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2010 BEIJING CONVENTION – NEW AVIATION SECURITY INSTRUMENT

Sorana Alina Catinca POP*

Abstract

In the current context of globalization and in particular of the effects that an event from one side of the world produces on the other side, the unification of thoughts, wills and ideas is advisable in order to identify a common denominator, and develop possible solutions to the existing problems in civil aviation with regard to security. The transport industry, that industry that connects the world and help us in the process of building and developing an international society whose common denominator is the air, has been affected my many events, 9/11 being by far the one event that made the air legislators reconsider the provisions of existing conventions. After modernizing the Rome Convention on compensation for damage caused by aircraft to third parties on the ground, the International Civil Aviation Organization (ICAO)[1] turned its attention towards the existing security provisions which were not updated. It was vital that stringent measures were taken to counter acts of unlawful interference with civil aviation. In this context, two conventions related to aviation security were reanalyzed, namely the Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague Convention)[2] and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (The Montreal Convention)[3].

Keywords: *civil aviation, aviation security, The Hague Convention, The Montreal Convention, ICAO, diplomatic conference, unlawful interference, aircraft seizure, suppression.*

Introduction

During its 33rd Session, the ICAO Assembly adopted Resolution A33-1 that directs the Council of ICAO and the Secretary General to act urgently to address the new and emerging threats to civil aviation. It was requested that the attention to be drawn towards the existing ICAO aviation security conventions. Pursuant to this Resolution and recommendations of the High-level, Ministerial Conference on Aviation Security held in February 2001, the Council, in June 2002, approved an ICAO Aviation Security Plan of Action, which contains Project 12 – Legal Aspects. Project 12 mandates a review of existing legal instruments in aviation security so as to identify gaps and

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[1] The International Civil Aviation Organization, a specialized agency of the United Nations, was established by Article 44 of the Convention on International Civil Aviation (Chicago Convention), signed at Chicago on 7 December 1944. The main objectives of ICAO are to develop the principles and techniques of international air navigation and to foster the planning and development of air transport. ICAO has 190 Contracting States. ICAO's Mission and Vision Statement is "to achieve its mission of safe, secure and sustainable development of civil aviation through cooperation amongst its member States."

[2] Signed at Hague on December 16, 1970, the instrument incorporated for the first time the principle *aut dedere, aut judicare.*

[3] Signed at Montreal, on September 23, 1971.

inadequacies as to their coverage in relation to new and emerging threats. The study focuses on the panel aspects of unlawful interference against civil aviation.[4]

The study drew a preliminary conclusion, that while the existing five aviation security conventions have been widely accepted by States as useful legal instruments for combating unlawful interference against civil aviation, they should be updated in several instances to respond to new and emerging threats. Certain threats, such as the use of aircraft as weapons, suicide attacks, electronic and computer-based attacks, chemical, biological and radioactive attacks, are not adequately covered. It was also underlined that the current provisions covered the persons actually committing the punishable acts without specific provisions addressing the issue of persons organizing and directing the commission of such acts.[5]

In this context, the ICAO Council agreed to prepare one or more draft instruments to address the new and emerging threats to civil aviation.

1. Development of new instruments and their context

A Study Group was created to analyze the existing security conventions and propose a new way of addressing new and emerging threats. The work of the Group consisted in identifying both acts which were not covered by existing instruments which should be criminalized under international law as well as criminalization of contributory offences. Among these acts, the following were considered:

a) use of civil aircraft as a weapon;

b) use of civil aircraft to unlawfully spread biological, chemical and nuclear substances

c) attacks against civil aviation using biological, chemical and nuclear substances.

The term "air navigation facilities" needed to be clarified as well in light of the advances in technology to ensure that the existing offence in the Montreal Convention adequately captures interference with signals, data and other non-tangible systems used for air navigation.

It became apparent to the Study Group that additional provisions found in the United Nations counter-terrorism instruments could be usefully incorporated including the political offence exception, fair treatment and non-discrimination provisions and explicit confirmation that the Convention do not govern armed forces activities during an armed conflict.

1.1. The context of relevant aviation security instruments

1.1.1. Tokyo Convention 1963

The Tokyo Convention took the first steps towards suppression of unlawful acts on board aircraft[6], and prescribes the means to determine the penal law applicable when an offence has been committed above territories not belonging to any particular State, or in cases in which the place where an offence has been committed cannot be precisely located. The Tokyo Convention required that the State of registration of an aircraft must establish jurisdiction in respect of the offences

[4] A35-WP/88, "ICAO Aviation Security Plan of Action, Project 12:Legal".

[5] Report on the Survey Concerning the Need to Amend Existing International Air Law Instruments on Aviation Security, 4 November 2005, C-WP/12531, paragraph 1.1.

[6] Matte, N.M. *Treaties on Air-Aeronautical Law* (1981) ICASL, p.353.

committed on board the aircraft and recognized the competence of the State of registration to exercise jurisdiction in the case of offences affecting the safety, good order and discipline on board the aircraft[7]. Further, a State Party which is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction except in certain circumstances[8].

It is interesting to notice that the Convention does not provide a requirement for the State to prosecute or extradite the person who committed the offence. In the event the Convention that prosecution or extradition proceedings are not instituted, the Convention provides an obligation to assist in communicating with the State of which that person is a national, releasing that person from custody and ensuring that person is at liberty to continue his journey to his choice of destination[9].

The absence of an obligation for States to actually deal with the offence committed was regarded as a serious deficiency of the Tokyo Convention, particularly in relation to the offence of hijacking[10].

The Tokyo Convention does not provide an adequate framework to deal with the acts identified by the Study Group, which means that it is not a proper instrument that could provide appropriate mechanisms to address the issues raised by the Group.

1.1.2. The Hague Convention 1970

There was a large number of hijackings in the 1960s that led to the need to define the act of hijacking recognizing it as an international offence[11] and provide an appropriate legal framework to deal with the offence. The contribution of the Hague Convention is quite important. First of all, the Convention covers both international and domestic flights[12]. Furthermore, the Convention defines hijacking and aircraft as well as the inclusion of the threat to undertake such act as an offence although this is limited to a threat made on board the aircraft in flight[13].

Another important development of the Hague Convention is the system under which State establish jurisdiction. A system of multiple and concurrent jurisdiction is set out in Article 4(1) of the Convention. One of the most important features of the Convention is the provision effectively establishing universal jurisdiction, that is, if the State Party does not extradite, it must take measures to establish jurisdiction over an offender present in its territory[14].

Although the Hague Convention included several key concepts addressing some of the deficiencies of the Tokyo Convention, its scope is limited to the specific offence of unlawful seizure of aircraft and acts of violence connected with the offence. The scope of the Convention needs to be broadened.

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[7] Article 2, Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963 (Tokyo Convention).

[8] Article 4, Tokyo Convention 1963.

[9] Article 13 (2), (3) and article 15 of the Tokyo Convention 1963.

[10] Horlick, GN "The Developing Law of Air Hijacking" 12 Harvard International Law Journal (1971).

[11] Diedericks-Verschoor, I.H. *An Introduction to Air Law* (1991) Kluwer, p.199. See also Bantekas, I. and Nash, C. *International Criminal Law* (2003) Cavendish Publishing Ltd., p.23.

[12] Article 3(3) of the Hague Convention 1970.

[13] Article 1, Hague Convention 1970.

[14] Article 4(2), Hague Convention 1970.

1.1.3. The Montreal Convention 1971 and Airports Protocol 1988

Prior to the conclusion of the Hague Convention, the need for the Montreal Convention was needed as the number of acts of violence committed on board aircraft as well as on airport ground facilities[15] was increasing. The Convention introduces the principle that acts must be committed intentionally. Moreover there was great debate with regard to the interpretation of "safety of air navigation". The debate resulted in the definition of "aircraft in service" a term used in the offence concerning the placement of a device or substance on an aircraft in service which is likely to destroy the aircraft[16].

Even with the new definitions and offences regime, the Montreal Convention is limited to offences which affect the safety of the aircraft "in service" or "in flight'. The limitation was addressed to some extent in the Airports Protocol of 1988[17]. Another limitation of the Montreal Convention is that it does not make it an offence to threaten to commit the offences in the Convention. States at that time focused on offences specifically directed against the safety of the aircraft either "in flight" or "in service". The result is that the Convention needs to be amended.

1.1.4. UN counter-terrorism instruments

Several United Nations instruments deal with various unlawful acts including acts of violence in specific contexts which have been criminalized under international law. These conventions seek to suppress international terrorism by establishing a framework for international cooperation among States in a way that principles such as "prosecute or extradite", exchange of information and mutual legal assistance are reiterated in every instrument[18]. In the Montreal and Hague Conventions there is no specific provision stating that the offences in the Conventions are not "political offences" as we can find in the terrorism conventions.

A common provision of the counter terrorism conventions is that exempting the activities of armed forces during an armed conflict and official State military activities[19].

The counter terrorism instruments put in place a jurisdictional system so that there is no "safe heaven".

1.2. The 2010 Beijing Convention

The Convention for the suppression of unlawful acts relating to international civil aviation (the Beijing Convention 2010) recognizes that the State Parties are deeply concerned that unlawful acts against civil aviation jeopardize the safety and security of persons and property: seriously affect the operation of air services, airports and air navigation; and undermine the confidence of the peoples of the world in the safe and orderly conduct of civil aviation for all States. Recognizing that new types of threats against civil aviation require new concerted efforts and policies of cooperation on the

[15] See Matte, NM. *Treaties on Air-Aeronautical Law* (1981) ICASL, p. 367. See also Dempsey, PS. "Aviation Security: The Role of Law in the War against Terrorism", 41 *Columbia Journal of Transnational Law* 2003 at p.669.

[16] Article 1(1)(c), Montreal Convention 1971.

[17] Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation 1988.

[18] Bantekas, I. and Nash, S. *International Criminal Law* (2003) Cavendish Publishing Ltd., p. 35.

[19] This provision is found in the in the following Conventions: Article 19, Terrorist Bombings Convention 1997, Article 4, Nuclear Terrorism Convention 2005, Article 2bis, 2005 SUA Convention.

part of States, the Parties admit there is an urgent need to strengthen the legal framework for international cooperation in preventing and suppressing unlawful acts against civil aviation.

The Convention responds to the new and emerging threats by enlarging the sphere of application to new offences.

Cyber-terrorism is one type of offence that has the advantage of anonymity, which enables the hacker to obviate checkpoints or any physical evidence being traceable to him or her. The leakage of dangerous pathogens[20] from laboratories also presents an "ominous analogy to the aviation sector in that the same could well occur in the carriage of such dangerous goods by air"[21].

The Convention covers a series of offences, from which the first one refers to an act of violence committed by a person unlawfully and intentionally against any person on board and aircraft in flight if that act is likely to endanger the safety of that aircraft[22]. This offence has three defining elements: the offence has to be committed by a person "on board"[23] an aircraft; the aircraft has to be "in flight"[24]; and the act should endanger the safety of the aircraft.

The second offence is committed when a person destroys an aircraft in service or causes damage to such an aircraft in service[25] which renders it incapable of flight or which is likely to endanger the safety in flight[26].

The third offence relates to a person who places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight[27].

The Convention brings in as a new offence something that has never been incorporate in a treaty on unlawful interference in civil aviation before. That is an offence is committed when a person destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of the aircraft in flight[28]. This refers *inter-alia* to cyber terrorism.

Cyber terrorism is the type of act that could affect international peace and security, which is one of the main purposes of the United Nations:

"To maintain international peace and security, and to that end: take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of

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[20] Pathogens are microorganisms (including bacteria, viruses, rickettsia, parasites, fungi) or recombinant microorganisms (hybrid or mutant) that are known or are reasonably expected to cause infectious disease in humans or animals.

[21] Abeyratne, R. "The Beijing Convention of 2010 on the suppression of unlawful acts relating to international civil aviation – an interpretative study", Springer Science Business Media LLC 2011.

[22] Article (1) (a) of the Beijing Convention 2010.

[23] The offender has to be physically inside the aircraft. The Convention does not define "on board" however, it must be noted that the term "on board" has been judicially defined in absolute terms in that as long as a person os physically in the aircraft , it matters not whether the flight had been terminated or not.

[24] An aircraft is considered to be "in flight" at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation.

[25] An aircraft is considered to be in service from the beginning of the pre-flight preparation of the aircraft by the ground personnel or by the crew for a specific flight until 24h after any landing.

[26] Article (1) (b) Beijing Convention 2010.

[27] Article (2) (b) Beijing Convention 2010.

[28] Article (1) (d) Beijing Convention 2010.

aggression or other breaches of peace, and to bring about peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace"[29].

In this light, we appreciate that cyber-terrorism would not only affect the security of air transport, but a threat to international peace and security from the point of view of the effects it can produce. The particularity of cyber-terrorism is that the threat is enhanced by globalization and the ubiquity of the internet[30]. It is a global problem.

The fifth offence identified by the Convention covers an instance where a person communicates information which that person knows to be false, thereby endangering the safety of an aircraft in flight[31].

9/11 is the basis for the sixth offence covered by the Convention which provides that any person who uses an aircraft in service for the purpose of causing death, serious bodily injury, or serious damage to property and environment commits an offence[32]. The interesting feature of this provision is that it included environmental damage that could be caused by such an act.

The next provision [33]makes it an offence to release or discharge from an aircraft in service any BCN (biological weapons) weapon or explosive, radioactive or similar substances in manner that causes or is likely to cause death, serious bodily injury or serious damage to property or the environment.

Another provision that is worth mentioning is related to an act of violence that is considered to be an offence under the Convention when it is committed against a person at an airport serving international civil aviation which causes or is likely to cause serious injury or death.

The Convention covers also threats to commit such offences.

One of the controversies of the Convention is in relation to the so called military exclusion clause which states that the Convention shall not be applicable to military armed forces for acts committed during an armed conflict or by military forces of a Sate in the exercise of their official duties. It has been shown that there were many undeclared armed conflicts over the last 70 years, including those based upon the right of self-defense recognized by the UN Charter and legal military interventions sanctioned by the Security Council resolutions. It has also been shown that it is not necessary to include such a clause in this Convention, simply because it is contained in most of the counter-terrorism instruments. Terrorism should be dealt with in those conventions and not in a civil aviation security convention. This was one of the main reasons for which, for the first time in the history of ICAO, the text was not adopted by consensus, but by voting.

The Conventions sets a multi jurisdiction system which envisages to cover as many situations as possible.

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[29] Charter of the United Nations and Statute of the International Court of Justice, Department of Public Information, United Nations, New York

[30] Abeyratne, R. "The Beijing Convention of 2010 on the suppression of unlawful acts relating to international civil aviation – an interpretative study", Springer Science Business Media LLC 2011.

[31] Article (1) (e) Beijing Convention 2010.

[32] Article (1) (f) Beijing Convention 2010.

[33] Article (1) (g) Beijing Convention 2010.

With regard to extradition of offenders, the Convention obligates the State Party in which the alleged offender is found if it does not extradite that person, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities in the same manner as in the case of any ordinary offence of a serious nature under the law of that State[34].

Conclusions

There is no doubt that the 2010 Beijing Convention is a landmark and represents a valuable contribution to the international civil aviation security. It is true that it is an instrument designed to serve aviation security, even though the word "security" never appears in the context of the Convention. It is mainly concerned with safety of aircraft in flight and in service.

The Convention does not cover "all instances of air rage through all such acts are unlawful acts relating to international civil aviation"[35]. We must also underline the fact that narrowing down the safety to aircraft in flight and the narrow definition of in flight may not cover all the instances of air transport operated by a carrier.

The treaty promotes cooperation between States while emphasizing the human rights and fair treatment of terrorist suspects[36].

Even though it is a "timely proactive initiative"[37] of ICAO, the Convention leaves a lot of room for interpretation and because of the controversies it gave birth to, it is not the vision of the cooperation among States. The Convention is not in force yet and it will definitely be interesting to watch the evolution of this aviation instrument inspired by the existing similar provisions in maritime law. It looks like the general view of the legislature is that as long as we discuss about transport, we can have general applicable and adjustable rules. The question is – will it work?

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COMBATING COUNTERFEIT MEDICINES TRADE IN ROMANIA. A NEW CHALLENGE FOR ROMANIAN AUTHORITIES

Alexandru Lucian ARJOCA[*]

Abstract
The study contain a new matter which are confronted both the Romanian authorities with prerogatives for combating fake medicines trade and the medicines producers and distributors in Romania. In what follows we try to define counterfeit of medicine in Romanian legislation, to present the principals EU and international settlements for combating the counterfeiting of medicine, to examine the offence settled by article 834 from Law no.95/2006 on Healthcare reform Title XVII – Medicine, to present methods to perpetrate the counterfeit of medicinal products in Romania, to present some evidence means for demonstration the perpetration of counterfeiting medicine products offence or illegal traffic of medicine products offence, national jurisprudence cases, social risk of fake medicines, the development of fake medicines trade in the last decade and the connection with organized crime, the improving of public-private partnership for combating this phenomenon and the necessity for arising consumer's awareness regarding fake medicines.

Keywords*: combating, medicinal product, social risk, counterfeit, awareness*

1. Introduction

The paper covers aspects regarding Intellectual Property Law (trademarks, patents), Penal Law, Penal Procedure Law, Civil Law, Unfair Competition Law and Civil Procedure Law.

The importance of study is given by:

- the newness in intellectual property doctrine;
- the experience of Romanian authorities for combating the trade of fake medicines;
- jurisprudence of Romanian penal courts in this domain;
- the development of this phenomenon in Romania in the last five years;
- the endorsement by EU Parliament of a new project of Directive for combating the counterfeit of medicines;
- the necessity of improving the public – private partnership for combating the counterfeit of medicine products;
- Arising consumers awareness regarding fake medicines.

For answering to these problems I will try to share my experience in combating the traffic of fake medicines (I am chief prosecutor of Bureau for combating IPR crimes – General Prosecutor Office attached to High Court of Cassation and Justice), to analyze the legal framework regarding the fake medicines trade, to share with the public new aspects regarding combating the fake medicines trade.

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2. Counterfeit of medicine definition

In usual language, **counterfeit** meaning to replicate a document, object, original preparation for illegitimate purpose, considering being authentic, the forgery of these[1].

The issue of counterfeit is an apparently authentic good or product. This meaning is given by the word "counterfeit" when is sanctioned like penal infringements (e.g. is replication, without authorization or putting in circulation, without authorization, of a trademark, patent object, industrial design object, variety plant patent object, semiconductor product which incorporate an integrate topography).

Counterfeit also meaning the infringement of patrimonial rights of industrial property rights (e.g. the infringement of exclusive right of exploitation and of forbidden the use of industrial property rights by others, without authorization or consent of the right holder).

The doctrine said that **the counterfeit** is applied also to protect the copyright and related rights, opinion motivated by rules of article 15 alignament 1 from Berne Convention for the Protection of Literary and Artistic Works, Berne Act of September 9, 1886, amended, and settlements from other countries with a long tradition in this domain (e.g. France)[2].

The concepts **counterfeit**, **counterfeited product, counterfeited good** appear in more legal settlements such as:

- Counterfeit of trademark and putting in circulation of counterfeited goods, settled by art. 90 align. 1 and 3 from Law no.84/1998 on Trademarks and Geographical Indications, republished;
- Putting in circulation of counterfeited goods, settled by article 300 from Penal Code;
- Counterfeit of patent, settled by art. 59 align.1 related to art. 32 align.2 from Law no.64/1991 on Patents, republished;
- Counterfeit of patent object, settled by art. 299 from Penal Code;
- Counterfeit of models and industrial designs, settled by art.52 align.1 and 2 related to art.30 from Law no.129/1992 on Models and Industrial Designs, republished;
- Counterfeit of variety plant patent, settled by art.44 align.1 related to art.31 align.1 from Law no.255/1998 on the Protection of New Variety Plant;
- Putting in circulation of counterfeited products, settled by art.5 align.1 letter b from Law no.11/1991 on the Repression Unfair Competition, modified and completed by Emergency Ordinance no.123/2003;
- Counterfeit of medicines, settled by art.834 from Law no.95/2006, Title XVII – Medicinal product, on the Health Reform, modified and completed;
- The concepts of "counterfeited communities" and "communities who infringe an intellectual property right", as are settled in art.3 align.1 point 11 and 13 and art.3 align.2 from Law no.344/2005, on the Customs Action Against Goods suspected of infringing certain intellectual property rights;
- The forbidden of production, importation and commercialization of fake or counterfeited goods, settled by art.4 from Government Ordinance no.21/1992, on the Consumer Protection, republished.

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[1] Academia Română – Institutul de Linvistică „Iorgu Iordan", *DEX – Dicţionar explicativ al limbii române, Ediţia a II-a* (*Romanian Language Explanatory Dictionary* - Second Edition), Univers Enciclopedic Publishing House, Bucharest, 1998, p. 219

[2] Viorel Roş, Dragoş Bogdan, Octavia Spineanu – Matei, *Dreptul de autor şi drepturile conexe, Tratat* (Copyright and Related Rights, Treatise), All Beck Publishing House, 2005, p. 513-520

From indicated settlements results that Romanian legislator reserved **counterfeit concept,** generally, for the fixing of facts and acts who infringe industrial property rights, and, in particular, in special domains (e.g. medicinal product legislation, consumer protection legislation, custom operations legislation, unfair competition legislation).

Romanian medicine legislation incriminates the counterfeit of medicines or illegal trade of medicines.

We appreciated that counterfeit concept in medicine legislation means unauthorized replication of a medicinal product (included unauthorized replication of immediate and outer packaging of medicinal product), that appears the same as the authentic medicinal product.

Also, we appreciated that in this domain is applicable ***properly counterfeit theory*** from trademark domain[3] under witch properly counterfeit is an identical replication or quasi- identical replication of protected trademark.

In conclusion we support that the counterfeit of a medicinal product is an identical replication or quasi-identical replication of a medicinal product that has been granted an initial marketing authorization, replication or quasi-identical replication of immediate packaging or outer packaging and replication or quasi-identical replication of package leaflet.

The similitude between counterfeit of trademark and counterfeit of medicinal product results from the fact that counterfeit of medicinal product exist independent of use or fake medicine trade.

We consider that in this domain are enforced more international settlements:

- Paris Convention for the Protection of Industrial Property of March 20, 1883, joined by Romania in 1920, and Decree no.1177/1968 which ratified the revised version by the Stockholm Act from 1967;
- Geneva Treaty for Trademark Law of October 27, 1994, which Romania adhere by Law no.4/1998;
- Washington Patent Cooperation Treaty of June 19, 1970, which Romania adhere by Decree no.81/1979;
- Munich European Patent Convention of October 5, 1973, which Romania adhere by Law no.611/2002;
- Council Regulation(CE) No40/94 of 20 December 1993 on the Community trade mark;
- Council Regulation(CE) No 2868/95 of 13 December 1995 implementing Council Regulation(CE) No 40/94 on the Community trade mark;
- TRIPS Agreement;
- Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights;
- Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights;
- Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency;

[3] Vorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei, *Dreptul proprietăţii intelectuale. Dreptul proprietăţii industriale. Mărcile şi indicaţiile geografice (Intellectual Property Law. Industrial Property Law. Trademarks and Geographical Indications*) , All Beck Publishing House, Bucharest, 2003, p. 468

- Directive 2001/83/EU of the European Parliament and of the Council of 6 November 2001 on the Community code relating to Medicinal products for human use;
- European Parliament position adopted on first lecture on 16 February 2011 on the proposal for a directive on the European parliament and of the Council amending Directive 2001/83/EU as regards the prevention on the entry into the legal supply chain of medicinal product which are falsified in relation to their identity, history or source.

3. Methods to perpetrate the counterfeit of medicinal products in Romania

The most important medicinal product characteristics are substance (active ingredient), packaging, labelling, medicinal prescription, marketing authorization, legal trade of medicinal product, production, import, distribution.

From our experience the medicinal products counterfeiting facts in Romanian jurisprudence are:

- direct selling of counterfeited medicinal products for human use who can be commercialize only by pharmacy with medicinal prescription;
- illegal importation of counterfeited medicinal products for human use;
- bringing immediate packaging who contain counterfeited medicinal products for human use by unauthorized person or bringing illegal replication of medicinal prescription in counterfeited outer packaging;
- applying of counterfeited security holograms on outer packaging;
- creating of illegal Romanian websites who's names contain most known medicinal product trademark;
- illegal advertising of counterfeited medicinal products for human use on websites;
- selling of counterfeited medicinal products for human use by postal order;
- illegal advertising of counterfeited medicinal products for human use on press;
- illegal manufacturing of Romanian counterfeited medicinal products for human use in Bulgaria and exporting of these, by postal package, on United Kingdom and Germany;
- Illegal placing on the Romania market of unauthorized medicinal products.

3. The examination of offence settled by art.834 from Law no.95/2006 on Healthcare reform, modified and completed. Proposals for legal classifications of fake medicines trade

The provisions of Article 834 from Law no.95/2006 on Healthcare reform Title XVII - Medicinal product, modified and completed are:

(1) Counterfeiting or placing on the market of medicinal products in violation of provisions of this Title constitutes infraction and 3 months to 3 years imprisonment shall be applied.

(2) If the medicinal products referred to in paragraph (1) are hazardous to health, 1 to 8 years imprisonment shall be applied.

(3)If the deed referred to in paragraphs (1) and (2) has resulted in disease or worsening thereof, 2 to 8 years imprisonment shall be applied; if it has resulted in death, 5 to 15 years imprisonment shall be applied.

3.1. Pre – existing circumstances

Juridical general object. The juridical general object of counterfeiting or placing on the market of medicinal products in violation of provision of Title XVII from Law no.95/2006 on Healthcare reform, is constituted by those social relations related to public health for securing the authenticity and legal wholesale distribution of medicinal products.

The manufacturing of a new medicinal product requires a long period of time, considerable expenses for patented invention of new substance, creation and marketing of a new trademark. So, we appreciated that counterfeiting of medicinal product offence has also a ***juridical special object,*** constituted by those social relations which formation, existence and development cannot be conceived without the defense of trademark and patent owner' s rights.

Premise situation. The premise situation for existence of offence settled by article 834 from Law no.95/2006 on Healthcare reform Title XVII - Medicine, is given by achievement of two conditions: the counterfeited medicinal product must be for human use and must have marketing authorization, given by National Medicine Agency (art.696 align.1 related to art.700 align.1 from Law no.95/2006).

Material object. In account of the normative modality of committing of the specific contravention, material object is constituted by medicinal product (shape, content), immediate packaging and outer packaging.

Active subject. Active subject of contravention can be any person that has the capacity to face legal charges "the law imposing no other condition".

Regarding placing on the market of medicinal products in violation of provision of Title XVII from Law no.95/2006, the active subject is determinate and can be doctor, chemist, authorized medicine importer, exporter, distributor, sex-shops, medical clinic, surgery, ethno botanical products distributor.

The participation is possible in all forms (co-author, instigation or complicity).

Passive subject. The passive subject can be the patient, state, patent or trademark owner contented by counterfeited medicine.

3.2. Constitutive content

A. Objective side. a) Material element. In the modality foreseen in the art.834 paragraph.1, the material element of the objective side can be realized alternatively by counterfeiting of medicinal product or placing on the market of medicinal products in violation of provision of Title XVII from Law no.95/2006.

The special settlement does not define the counterfeiting of medicine product, so we appreciate that this can be realize in the following possibilities:

- Adulteration of medicine by using of other active substance, by using different quantity of active substance or by absence of active substance;
- Forgery of outer packaging;
- Forgery of labeling by inscribing false bar codes, false country lots and false availability terms;
- Forgery of security holograms or unauthorized application of security holograms on outer packaging;
- Forgery of immediate packaging by packing different number of medicine;

- Forgery of medicinal prescription by unauthorized replication, by oversight of specific terms or by distribution of medicinal prescription in foreign languages;
- Illegal marketing of counterfeited medicines.

Regarding placing on the market of medicinal products in violation of legal provisions, the material element can be realize by marketing authentic medicines by physical or juridical persons, authorized or unauthorized in violation of provision of Title XVII from Law no.95/2006(provision of Chapter 3 – Marketing authorization (art.700 – art.747), Chapter 4 – Manufacture and Importation (art.748 – art.762), Chapter 5 – Labeling and Package Leaflet (art.762 – art.779), Chapter 6 – Classification of Medicinal Products (art.780 – art.786), Chapter 7 – Wholesale Distribution of Medicinal Products (art.787 – art.796), Chapter 8 – Advertising (art.797 – art.799), Chapter 9 – Information and Advertising (art.800 – art.811), Chapter 10 – Pharmacovigilance (art.812 – art.820).

The Romanian enforcement authorities finding when counterfeiting of medicinal product offence committed, also placing on the market of medicinal products in violation of legal provisions offence and counterfeiting of trademark offence committed.

b) Immediate consequence is a social dangerous for the public healthcare.

B. Subjective side. Under the aspect of the subjective element, the contravention of counterfeiting of medicinal product or placing on the market of medicinal products in violation of legal provisions can be committed only with intention, guilt form of the culpa being excluded.

3.3. Aggravated modalities

The aggravated modality stipulated by paragraph 2 of art.834 is realized when counterfeiting or placing on the market of medicinal products in violation of legal provisions are hazardous to health.

The aggravated modality stipulated by paragraph 3 of art.834 is realized when counterfeiting or placing on the market of medicinal products in violation of legal provisions resulted in disease, in worsening thereof, or in death.

3.4. Procedure aspects and punishment regime

The penal action is ex officio. The investigation is made by judiciary police under direct supervision of prosecutor, and the competence for judge the offences settled by art.834 paragraph 1 is detained by ordinary court (art.25 Penal Procedure Code). If aggravated modality stipulated by paragraph 3 of art.834 is realized, the competence of judge is detained by tribunal (art.27 point 1 letter b Penal Procedure Code).

The main punishment for the contravention stipulated by art.834 paragraph 1 is imprisonment from 3 months to 3 years, for paragraph 2 is imprisonment from 1 to 8 years and for paragraph 3 is imprisonment from 5 to 15 years.

4. Evidence means for demonstration the perpetration of counterfeiting medicinal products offence or illegal traffic of medicine products offence

To investigate the offences settled by art.834 paragraph 1 is quite difficult because:
- assume long and often difficult investigation;
- Infringers generally operating through the internet and the parcels are sent by email;
- Cases are often joined, leading to a common work;

- Evidence is based on material proofs and investigators;
- The role and the statute of private investigators in proving the cases is not very certain yet;
- The National Medicine Agency has supported the evidence given in various cases through its own expertises[4].

So, for solving counterfeit medicines trade case, the enforcement Romanian authorities try to produce proofs for identify the infringers, the counterfeited medicines sources, the distribution methods of counterfeit medicines, the profits resulted from counterfeit medicines trade, the number of commercialised counterfeit medicines, the areas of counterfeit medicines trade, the persons who have built websites who sold counterfeit medicines.

Evidence means in this matter are official flagrant reports, statement of facts, writings, corporal and residence warrants, rising of writings and objects, statement of infringer, statement of right owner, scientific expertises, rogatory committee, confrontation.

Jurisprudence demonstrated the importance role of medicines producer's private investigators and experts.

The National Medicine Agency has an important role by given relevant information regarding classification of medicinal products, the content of medicines, the existence or inexistence of marketing authorization and the harmful of a specific fake medicine to health.

An accessible instrument for existing evidence of perpetrate of counterfeiting medicinal product is to access the public site of Health Ministry – Pharmaceutical General Direction (www msf-dgf ro). This website contains National Catalogue of Prices for Medicinal Product for Human Use, Marketing Authorized, and permits to compare official prices with prices of medicines commercialized via internet.

Also, it is remarkable the change of penal Romanian jurisprudence regarding counterfeiting of trademark in one fake medicinal products trade case, solved by Bucharest Tribunal, where instance admitted the hearing of pharmaceutical company expert for demonstrate the counterfeiting of a specific medicine[5].

5. Romanian jurisprudence in counterfeited medicines domain

The most important action of enforcement bodies with prerogatives in this domain has constituted the annihilation of fake medicines trade network.

The counterfeited medicinal products were used for dysfunctional erectile treatment (VIAGRA and CIALIS), and were sold directly, or by postal order on the entire Romanian territory.

The counterfeited medicines were produced and immediate packaged in Syria and imported by a Syrian citizen who had pharmaceutical university degree. This citizen had an authorized chemist s shop in Syria, imported the medicines in marble container (he had also a marble company in Romania) and sold the counterfeited medicines to his distributors, students between 19 – 23 years old.

The counterfeited medicines were sold in plastics bags, separable immediate packaging, separable outer packaging and separable forgery holograms.

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[4] Gabriel Turcu, *Counterfeiting Medicines in Romania,* presentation as part of Regional Conference on Fighting Counterfeit Medicines, Bucharest, October 2010.

[5] Case no.2041/2009, Bucharest Tribunal – Penal First Section

Some ones of the counterfeited medicines had marketing authorization others hadn't, were promoted on press and via internet and announces contained information regarding the pills, prices and mobile phone numbers.

The chemical analyses of counterfeited pills revealed that contained different active substances, unknown substances or the percentage of active substance was different from authentic pills.

Regarding outer packaging these were inscribed with false code bar, false availability terms, and wasn't marketing authorized for Romania, and the immediate packaging contained more pills that marketing authorization.

The distributors replicated, by photocopying, Romanian medicinal prescription, after they bought an authentic medicine from chemist's shop, introduced immediate packaging into outer packaging and applied false holograms.

One case is finalized with the punishment of two infringers at conditional suspension of imprisonment and payment damages to trademark owners of counterfeited medicines[6].

The Syrian citizen was convicted to conditional suspension of imprisonment, prohibition to fallow chemist profession in Romania and payment damages to trademark owners of counterfeited medicines[7].

Three others distributors were convicted by Bucharest Tribunal to conditional suspension of imprisonment and payment damages to trademark owners of counterfeited medicines.

In one particular counterfeit medicines case counterfeit VIAGRA and CIALIS were sold by two websites whose names contained the name of medicine or name of medicine manufacture (www.viagra.ro and www.pfizer.ro). The creator of the websites and the distributors were convicted to conditional suspension of imprisonment and payment damages to one trademark owner of counterfeited medicines[8].

The analysis of the Romanian jurisprudence reveals:

- Neither instance from Romania doesn't apply execution imprisonment for counterfeiting of medicines or counterfeit medicines trade;
- The judges gives more importance to counterfeiting of the trademark of the medicines and ignore the settlements of art.834 align.1 from Law no.95/2006;
- Within 2006 - 2010 only 9 penal cases regarding counterfeiting of medicinal products was registered by Public Ministry;
- Within 2006 - 2010 the enforcement bodies with legal prerogatives for combating fake medicines trade didn't discovered any manufacture of counterfeit medicines,
- The Romanian fake medicines market it is evaluate by the right holders at approximately 100.000.000 Euro;
- Within 2007 - 2010 the National Customs Authority retained and confiscated 206.802 counterfeit medicine pills[9];
- No counterfeit medicines were found in the Romanian pharmacies.

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[6] Case no.5647/86/2008, Suceava Tribunal – Penal Section, Penal Sentence no.103/6.04.2009, definitive, unpublished.

[7] Case no.5262/99/2008, Iasi Court of Appeal – Penal Section, Penal Decision no. 43/18.03.2010, appealed.

[8] Case no. 42529.01/3/2007, Bucharest Tribunal – Penal Section, Penal Sentence no.224/24.03.2010, definitive, unpublished.

[9] Georgeta Mitroi – *Efforts of National Customs Authority for combating piracy and counterfeiting*, presentation as part of Regional Conference on Fighting Counterfeit Medicines, Bucharest, October 2010.

6. Social risk of fake medicines. The development of fake medicines trade in the last decade and the connection with organized crime

As we revealed at the last paragraph the Romanian courts didn't realized the social risk of fake medicines trade. The judge decisions been argued by the small quantity of medicines, the absent of penal convictions of infringers and the more importance given to trademark infringement.

The counterfeit medicines are a serious threat to patients, doctors and pharmaceutical companies from all over the world.

The World Health Organization (OMS) estimates that, globally the counterfeited medicine market reaches $75 billion every year[10]. More than 50% of medicines sold on Internet are counterfeited. It is also estimated that Europe generates a EUR 10, 5 billion medicines sale volume of counterfeited medicine. Thus, almost 77 million Europeans put their lives in danger by buying medicines without prescription. Globally the phenomenon is increasing, and the internet represents a distribution channel much more difficult to control. This happens especially due the fact that the medical world is one of the most regulated domains.

Within 2004 – 2010 Pfizer discovered approximately 63 million counterfeited pills, along with active substance that could have put on the market 64 million units[11]. In Egypt, the substances used to counterfeit Viagra were mixed in an industrial mixer while the medicine was painted with blue ink. The substance used for fake medicines were metals, arsenic, boric acid, dyes, floor polish. The same company identified its own counterfeit medicines in 92 countries from all over the world and in 45 countries counterfeited medicines was identified in legal whole distribution channel (e.g. United States, United Kingdom and Canada).

When Turkish police arrested seven members of a firearms smuggling operation in June 2007, they sized 5660 counterfeit Viagra tablets in addition to three assault rifles and hundreds of rounds of ammunition. "Canadian" Medicine case was finished with a major seizure at London Heatrow included 13.500 counterfeit Lipitor tablets. Investigation showed the complex route of entry into the UK together with likely onward route to US consumers[12].

In 2009, on EU level, enforcement agencies discovered, in two months, 34 million counterfeit medicine pills[13].

An estimated that 1% of medicinal products currently sold to the European public through the legal supply chain are falsified and the share are growing. In other parts of the world, up to 30% of the medicines on sale may be fake. In particular, more and more innovative and life-saving drugs are counterfeit.

Horror stories involving counterfeit medicine are legion. In 1995 a spurious meningitis vaccine killed thousands people in Niger. The next year, eighty-nine children in Haiti died after

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[10] Alexandra Manaila, *75 de miliarde de dolari din medicamente false* ($75 billion from counterfeited medicines), published article on www.paginamedicala ro – October 21, 2010.

[11] Steve Allen, *Counterfeited Medicines. Threat to Patient Health and Safety*, presentation as part of Regional Conference on Fighting Counterfeit Medicines, Bucharest, October 2010.

[12] Steve Allen, quated work.

[13] *34 de milioane de tablete contrafacute in doua luni* (34 millions counterfeit pills in two months), published article on www.paginamedicala ro , December 12, 2009.

ingesting cough syrup adulterated with antifreeze. The government-owned Shenzhen Evening News estimated that 192000 people died in China in 2001 because of fake drugs, between the toxins contained in some counterfeits and the absence of curative effect from fakes devoid of their active ingredient[14].

The counterfeit drug trade is well organized, with a supply chain that is truly global, comparable to those of the largest and most sophisticated multinational enterprises. India and China, the two largest suppliers of active ingredients to the legitimate industry, are the primary source for counterfeiters as well. Other countries such Mexico specialize in formulating and packaging the drugs. In the Haiti case, the trail of so-called cough syrup implicated Haitian, Chinese, German, and Dutch companies[15].

7. The improving of public-private partnership for combating this phenomenon

After enforcement bodies actions for combating counterfeit medicines trade (2006 – 2008), the big medicines manufactures begun to realize the necessity of improving of public-private partnership for combating this phenomenon.

In June 2010, Poiana Brasov, was organized a training seminar for combating counterfeit medicines trade, 43 attendees (prosecutors, police officers, custom officers, foreign experts).

In October 2010, Bucharest, Pfizer Company organized Regional Conference on Fighting Counterfeit Medicines, 129 attendees (prosecutors, police officers, custom officers, foreign experts, chemists, private detectives, lawyers) from 6 countries (Romania, Ukraine, Hungary, Czech Republic, Poland, Slovakia).

The role of these meetings were to improve the legislations regarding medical products, a better knowledge of the phenomenon, identification of new routes of counterfeit medicines, establishment of contact points on regional level.

Conclusions

The counterfeit medicines are a serious threat to patients, doctors and pharmaceutical companies from all over the world.

It is important to convince judges about the social risk of consuming counterfeit medicines.

From our experience, it is necessary to take the fallowing measures:

- The improving of public-private partnership for combating this phenomenon;
- The necessity for arising consumer's awareness regarding fake medicines by organizations of public opinion polls, mass – media announcements or counterfeit medicines public campaigns (e.g. share Hungarians experience in this domain[16]);

[14] Moises Naim, *Illicit. How smugglers, traffickers and copycats are hijacking the global economy*, Doubleday, a division of Random House Inc., Washington, 2005, p.123.

[15] Moises Naim, quated work, p.124.

[16] More information can be found at www mszh hu., www hamisitasellen hu., and www hamisgyogvszer hu.)

- The change of Romanian legislation in this domain by giving more power to enforcement agencies to combat counterfeit medicines trade. Recently, a new law to prevent fake medicines from entering the legal supply chain was approved by European Parliament on 16 February. Internet sales will be covered by the law, which also introduces new safety and traceability measures, as well as sanctions against counterfeiters. This law still needs to be formally approved by the Council of Ministers[17] and modified Directive 2001/83/EU of the European Parliament and of the Council of 6 November 2001 on the Community code relating to Medicinal products for human use;

- Creation of international and national cooperation and coordination bodies to combating counterfeit medicines trade.

[17] http:/www.europarl.europa.eu/sides/get.Doc

CONSIDERATIONS ON LIABILITY IN ADMINISTRATIVE LAW

Elena Emilia ŞTEFAN[*]

Abstract
The analysis of the responsibility of human action roused the interest of many theoreticians of law since the oldest times. As long as the individual lives in an organized environment, in society, he interrelates with the other individuals. Therefore, the individual must observe the social values established by the regulatory system of the society he lives in. At any moment, this individual's failure to observe the social rules and values causes a social reaction materialized into a whole system of restraining measures that are meant to restore social order. Due to the globalization phenomenon, we now witness new forms of legal liability, therefore we can now speak of legal liability not only of the person but also of the State, of its bodies, of public servants.

Keywords: *responsibility, administrative liability, miscarriage of justice, ill will, grave negligence*

1. Introduction

Just like any other social phenomenon, the legal liability has a strong socio-economic impact. Thus, the theory of legal liability discussed herein starts from the sociological aspect of liability. In this context, our subject matter will deal with the aspects characterizing the liability of a person who could, at some point in time, be suspected for having broken the law, thus determining the analysis of various cases of liability in the administrative law.

Right from the beginning, the law-[1] understood as a rule of conduct- had a very clear social function: to set in order certain social relationships existing in society. Hence, the social deed was first, the action of people, and then the law appeared in order to justify and legalize their activity. The separation[2], with a certain lifestyle, with certain rules of conduct, determined the emergence of the sense of justice in the human conscience; this sense determines people to look for a justification of their action, to legitimate their deeds and to classify it according to the rules of law.

The existence[3] of man is connected to the society he lives in. This is also the reason why man instinctively subjects himself to certain rigours such as the obligation of complying with a certain set of legal rules established and defended by the State.

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[1] Cristian Ionescu, *Treatise of Contemporary Constitutional Law*, 2nd edition, (Bucharest, C.H. Beck Publishing House, 2008), p.5

[2] P. Negulescu, G. Alexianu, *Treatise of Public Law,* vol. I, (Casa Şcoalelor Publishing House, Bucharest, 1942), p. 3-4, quoted by Cristian Ionescu in *Treatise of Contemporary Constitutional Law*, 2nd edition, (Bucharest, C.H. Beck Publishing House, 2008), p.5

[3] Cristian Ionescu, *op.cit*., p.13.

In a democratic regime[4], the respect for the fundamental rights and freedoms is an essential condition for the normal functioning of democracy.

The need of authority generated a control power that evolved into an "instrument for organizing and ruling society[5]", which requires a "distinct entity of temporary governors".[6]

However, the sustenance of the legal framework[7] is also ensured by the administrative, civil, criminal punishments for any infringement of the legal provisions, aiming by that to repair the damage caused by such infringement, to reinstate the victim in its rights, and to punish the author.

It is well-known that, wherever we may be in the world, all the states have a fundamental law, written or not, called Constitution. The emergence of the constitution[8] in the world was on a background of efforts, ideas and theories among which the separation of powers, the rule of law, the representativeness, and the natural rights of man were of particular relevance. The Constitution[9] sets forth the civic rights and obligations, the guarantees against tyranny and misuse of power. The emergence of the constitution involved its supremacy. Today, the supremacy of the constitution is a universal truth recognized not only by the modern constitutional law[10] but by many more.

2. Considerations on legal liability in general

2.1. Connection between responsibility and liability

We begin this section by outlining a conceptual delimitation between two terms we are going to use herein, namely: *"responsibility"* and *"liability"*.

Thus, there is an opinion according to which the notion of liability[11] is specific to the law, seen as a legal obligation emerging from a piece of legislation.

The term of *"responsibility"* refers to the fact that, by virtue of a law, someone can be held responsible for a deed they committed or for an action they did, assuming that their mental capacities were normal.

The concept of *"responsibility"* has a much wider scope than the concept of *"liability"*, that it includes, but without boiling down to an extrapolation of that.

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[4] Ioan Muraru, Nasty Marian Vlădoiu, Andrei Muraru, Silviu-Gabriel Barbu, *Constitutional Disputes*, (Bucharest, Hamangiu Publishing House, 2009), p. 28-29

[5] Ioan Muraru, Elena Simina Tănăsescu, *Constitutional Law and Political Institutions*, vol. 1, 12th edition. (All Beck Publishing House, Bucharest, 2005), p.3, quoted by Daniela Valea in *The Control System of Constitutionality of Laws,* (Universul Juridic Publishing House, Bucharest, 2010), p.9.

[6] Tudor Drăganu, *Constitutional Law and Political Institutions – Elementary Treatise,* vol.1, (Lumina Lex Publishing House, Bucharest, 2000), p.117, quoted by Daniela Valea in *op.cit,* p.9

[7] Cristian Ionescu, *op.cit*., p.159

[8] Ioan Muraru, Nasty Marian Vlădoiu, Andrei Muraru, Silviu-Gabriel Barbu, *op.cit,* p.2

[9] Cristian Ionescu, *Constitutional Disputes*, (Bucharest, Universul Juridic Publishing House, 2010), p.29

[10] Sorin Popescu, Elena Simina Tănăsescu, *Constitution of Romania – comments by articles*, coordinators Ioan Muraru, Elena Simina Tănăsescu and other authors, p.1475, quoted by Daniela Valea in *op.cit*, p.13

[11] Mihai Bădescu, *Theory of Legal Liability and Punishment*, (Bucharest, Lumina Lex Publishing House, 2001), p.114 et seq.

For full details on responsibility and liability, the author dedicates an entire chapter – the third – to this subject matter, p.113 et seq.

Whereas the concept of *"liability"* involves the fulfilment of certain obligations or the observance of certain restrictions, having in mind different behaviours, particularly by imposing special rules, imposing to social agents only the strict observance of these rules, the concept of *"responsibility"* has a much wider and elevated content as it refers to the activity carried out by the social agent, on its own initiative, based on the free choice of the aims, from among several possible aims, and of the ways of reaching them.

Although distinct in nature and content, the *"liability"* and the *"responsibility"* are interconnected. Both phenomena refer to the relationship between the individual and the collectivity, as they are forms of integration of the individual in society.

From the sociological point of view[12], *"responsibility"*, as part of the social life, evolved together with society. Thus, in time, there was a passage from collective responsibility to individual responsibility.

Responsibility[13] refers to man in his most natural and common stance: that of an agent of the current social action. Understood as such, *responsibility*[14] acquires a new status, becoming the main mechanism in defining the meaning of man's social integration.

Although, traditionally speaking[15], the concept of responsibility was associated exclusively to morale, the recent research has highlighted the need to define this concept in terms of law, as well. By its deed, a person who infringes the legal provisions impinges on the rule of law, disturbs the proper and normal progress of social relationships, affects legitimate rights and interests of its fellows, endangers the coexistence of freedoms and the social balance. Therefore, it must be held responsible.

Professor Nicolae Popa defines legal *responsibility* as a conscious and deliberate attitude of concern towards the implementation of the rules of law, towards the integrity of legal order, as well as towards the actions carried out by individuals in order to ensure a climate of legality.

Legal liability is a phenomenon in continuous evolution. The development of society as well as the social evolution of the legislation due to the globalization phenomenon have conferred a new dimension to legal liability, to its principles, to its conditions and functions.

3. Particularities of liability in the administrative law

In this section, we are going to analyze the types of administrative-patrimonial liability in terms of how we relate to the two sides: the subjective side and the objective side.

Also, at the same time, we are going to mark out several coordinates with regard to the impact of article 52 par. (3) from the Constitution of Romania on liability in the administrative law, and by that we mean particularly the analysis of the bond between the State, which can bear patrimonial liability in certain situations, and the magistrates.

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[12] Irineu Ion Popa, *Moral Substance of Law)*, (Bucharest, Universul Juridic Publishing House, 2009), p.356 et seq.

[13] Mihai Bădescu, *op.cit.* p.113.

[14] Mihai Florea, *Responsibility for Social Action*, (Bucharest, Ştiinţifică şi Enciclopedică Publishing House, 1976), p.6 quoted by Mihai Bădescu, *op cit*, p.113

[15] Nicolae Popa, *General Theory of Law,* 3rd edition, (Bucharest, C.H. Beck Publishing House, 2008), p. 234

3.1. Objective liability or subjective liability?

This study does not aim at dealing thoroughly with the types of liability in the administrative law, but at outlining only a few aspects, which we will actually do in the following.

At the European level, we refer to the European Court of Human Rights which, by virtue of article 6 "Right to a fair trial", holds the State responsible for the dysfunction of the judicial system, if it caused any prejudice to individuals.

Our constitutional law[16], just like the administrative law, establishes the personal pecuniary responsibility of the public servant in certain conditions, at the same time as the pecuniary responsibility of the State for abuses.

The public administration[17] must decide depending on the applicable laws and on the interpretative criteria established by the courts of justice, without taking any other aspect into account. This jurisprudential principle is adopted by the European Code of Good Administrative Conduct of 2001, which in its article 4 "Lawfulness" sets forth that *"The official shall act according to law and apply the rules and procedures laid down in Community legislation. The official shall in particular take care that decisions which affect the rights or interests of individuals have a basis in law and that their content complies with the law"*.

If[18], in terms of administrative law, we deal only with public services and nothing else, then the authors have rightfully concluded that persons charged with the management of such services have not only rights but also obligations.

Thus, in terms of significance of the subjective aspect, the administrative patrimonial liability can be of two types:

- objective liability, which intervenes regardless of whether the public authority that is held responsible is in default or not;
- subjective liability, which is based on the culpability of the liable public authority.

As regards responsibility[19] and culpability, both morally and legally, there is an indissoluble connection between them.

The administrative disputes law provides enough elements to give an idea about the procedural framework, the meaning of the notions of public authority, of public authority regime, of public interest, etc.

According to the provisions of article 1 par. (1) of Law no. 554/2004, an organic law, "Any person that deems him/herself aggrieved in a legitimate right or interest by a public authority, through administrative action, or as a consequence of such authority's failure to resolve such person's petition within the timeframe provided by law may approach the jurisdictional Administrative Litigations Court with a request for the rescission of the contested action, or the recognition of the claimed right or of the legitimate interest, and for the reparation of the damage suffered as a consequence thereof. The legitimate interest may be both private and public", and according to par. (2) of the same article "This Law also recognizes the right to approach the jurisdictional

[16] M. Djuvara, *General Theory of Law (Legal Encyclopaedia). Rational Law, Sources and Positive Law)*, (Bucharest, All Beck Publishing House, 1999), p.102

[17] Ioan Alexandru, *European Administrative Law*, (Bucharest, Universul Juridic Publishing House, 2008), p.243

[18] M Djuvara, *op.cit*. p.103,

[19] Irineu Ion Popa, *op.cit.* p.360.

Administrative Litigations Court of third parties aggrieved in their rights or legitimate interests through an administrative action of an individual nature and regarding another subject of law".

Also, according to the provisions of article 2 par.(1) point b) of Law no. 554/2004, the notion of public authority means "any government agency or local administrative authority acting as a public power for the satisfaction of a public interest; for the purposes hereof, private law entities recognized by law as being of public utility or authorized to provide a public service with the status of a public power shall be also deemed a public authority".

Likewise, according to article 2 par. (1) point k) of Law no. 554/2004, the notion of public service is defined as an activity organized or authorized by a public authority for the purpose of satisfying a legitimate public interest.

According to article 2 par. (1) point e) of Law no. 554/2004, the public interest is defined as the interest related to the rule of law and the constitutional democracy, the guaranteeing of the citizens' fundamental rights, liberties and duties, the satisfaction of the requirements of a community, the establishing of the jurisdiction of public authorities, and the private legitimate interest, according to article 2 par.(1) point a) of the same law points out the possibility to require a certain conduct, in view of securing a subjective future and predictable right.

An example of *objective administrative-disciplinary liability* can be found, for instance, with the members of the Government. This form of liability has acquired constitutional consecration. Concretely, it provides the possibility of rescinding[20] an administrative act issued by a minister or even of establishing indemnities for pecuniary or non-pecuniary damages, payable by a minister as a result of the decision of an administrative litigations court.

As regards the patrimonial liability of a member of the Government, it derives from the general principles of law, either as a result of the civil action making the object of a criminal procedure or as a result of a procedure carried out before the administrative litigations court. Thus, any member of the Government can bear patrimonial liability, according to the administrative disputes procedure, if he has caused some damage by an illegal administrative act or by an unreasonable refusal of resolving a petition.

In conclusion, the members of the Government shall be liable for damages that are not the result of a criminal deed, in the form of the administrative-patrimonial liability, when the damage was caused by an administrative act or by failing to resolve a petition within the legal timeframe, and in the form of the civil liability in the other damage causing situations.

3.2. Several aspects regarding the incidence of article 52 par. (3) of the Constitution on liability in the administrative law

In the beginning[21], the State was not held responsible for its deeds, it could take any measure it thought fit, without considering the interests of individuals. The administration acts through its public servants who are agents of the public authority. Therefore, the prejudice can only be caused by

[20] According to the provisions of article 52 of the Constitution and of Law no. 90/2001 on the organization and operation of the Romanian Government and its Ministries, published in the Official Gazette no. 164/2001, updated (last amended by O.U.G. no. 2/2010 on certain measures regarding the organization and operation of the Government' working apparatus and amending certain pieces of legislation)

[21] Ion Corbeanu, *Administrative Law*, 2nd edition, revised and supplemented, (Bucharest, Lumina Lex Publishing House, 2010), p.189 et seq.

the agents of the administration. The question that has been raised refers to who is the subject of responsibility, the administration or its servants.

Article 52 of the Constitution "Right of a person aggrieved by a public authority" provides the following in its paragraph (3):

"The State shall bear patrimony liability for any prejudice caused as a result of judicial errors. The State liability shall be assessed according to the law and shall not eliminate the liability of the magistrates having exercised their mandate in ill will or grave negligence."

Therefore, article 52 par. (3) of the Constitution of Romania provides for the State's patrimonial liability for prejudice caused as a result of judicial errors, regardless of the manner it was caused. We believe that the text quoted above does not refer exclusively to prejudice caused by judicial errors committed in criminal procedures, to which it expressly refers.

This form of liability is engaged not by acts but by judicial errors, i.e. by prejudice deriving from court decisions by which judicial errors were committed. Naturally, there are two such court decisions:

- a decision by which a dispute is resolved finally and irrevocably;
- another decision by which it is acknowledged that the previous decision contains an error.

The intervention of this form of liability involves, besides the requisite existence of the above two court decisions, also that the eligible party formulates its claims for having the suffered material or moral prejudice repaired. In this case, we deal with an objective liability.

Please note that, in the Romanian law, there is a special law on the statute of magistrates which is meant to help us outline the conditions under which magistrates may respond, which must be read in conjunction with the constitutional text quoted above. We are talking about Law no. 303 / 28 June 2004[22] on the statute of magistrates, which states the principle of civil liability and establishes a primary patrimonial liability devolving upon the State for the prejudice "caused by judicial errors", and a subsidiary liability devolving upon the judges.

The State may bring a recourse action against the judge or the prosecutor who committed the judicial error *"in ill will or grave negligence"*.

Although, in theory, the situations in which the State may bring a recourse action are clearly specified, in practice, in concrete cases, the two notions: "ill will or grave negligence" are extremely difficulty to prove, and are only broadly defined by the current legislation.

Also, we mention the provisions of Law no. 47/1992[23] according to which article 61 establishes that "judges[24] cannot bear legal liability for the opinions and votes expressed/cast upon adopting their solutions". This legal provision valorises the constitutional principle of the

[22] Law no. 303 / 28 June 2004 on the statute of magistrates, published in the Official Gazette no. 576/2004, with its last amendment by O.U.G. no. 59/2009 amending Law no. 303/2004 on the statute of judges and prosecutors and amending and supplementing Law no. 317/2004 on the Superior Council of Magistracy

[23] Law no. 47/1992 on the organization and operation of the Constitutional Court, published in the Official Gazette no. 101/1992, amended by Law no. 177/2010 amending and supplementing Law no. 47/1992 on the organization and operation of the Constitutional Court, of the Civil Procedure Code and of the Criminal Procedure Code of Romania, published in the Official Gazette no. 672 / 04 October 2010.

[24] For details about the Statute of the constitutional judge see Ioan Deleanu, *Justiţia Constituţională (Constitutional Justice)*, (Bucharest, Lumina Lex Publishing House), p.196 et seq., and *Contencios Constituţional (Constitutional Disputes)*, Ioan Muraru, Nasty Vladoiu, Silviu Barbu, Andrei Muraru**, (**Bucharest, Hamangiu Publishing House, 2009), p. 46 et seq.

independence of the judge, since it is beyond all doubt that a judge who would conduct his activity under the permanent pressure a possible liability would not be independent anymore.

Therefore, to clarify the content of the two notions, i.e. *"ill will or grave negligence"*, the ill will and the grave negligence must be defined in concrete terms.

For example, lately there have been several attempts to amend[25] Law no. 340/2004, through various projects that remain unfinished. Thus, in one of these projects, published on official websites, it has been tried to define the notions of "ill will or grave negligence" as well as "judicial error", in several variants:[26]

"For the purpose of this law, *ill will* shall have the following meaning:

Variant I: the wilful manipulation of the legal instruments of substantive and procedural law with the purpose of prejudicing the aggrieved party.

Variant II: the fraudulent intention while applying the law, having as consequence a prejudice of the aggrieved party.

Variant III: the wilful manipulation by a magistrate of the legal provisions and of the general principles if, by doing that, a prejudice was caused to the aggrieved party."

As regards the grave negligence, it has been shown that the event causing damages or the dangerous event, which is the result of an action or of an omission, is premeditated and deliberated by its author, as a consequence of his own action or omission. The damnable negligence must be inexplicable, without any connection to those particularities of the situation that could make the judge's error understandable but without justifying it.

"For the purpose of this law, *grave negligence* shall have the following meaning:

Variant I: the gross and inexcusable disregard of the judicial reasoning and of the legal rules, beyond an objective diligence if, by doing that, a prejudice was caused to the aggrieved party.

Variant II: the judge's gross and inexcusable ignorance of the rules defining his activity that prejudices the aggrieved party"

- Under article 96^3, after par. (1), the insertion of a new paragraph (paragraph (2)) has been thought fit in order to define the *judicial error* in agreement with the principle of legality, as outlined by the practice of the ECHR, a principle that the lawmaker must observe when establishing the law.

Also, in the same project, the following definitions have been suggested:

a. "The issue of a decision by disregarding the substantive and procedural rules of law that are sufficiently accessible, precise and predictable is a judicial error, capable of engaging the judge's or the prosecutor's liability, if the other prerequisites established by the law have also been met."

b. "Only an error that was acknowledged:

- by an irrevocable court decision issued after rejudging the affair as a result of using an extraordinary remedy;
- by a final court decision condemning the Romanian State, issued by an international court;
- established unequivocally in the situations and conditions set forth under article 504 par. (3) of the Criminal Procedure Code and which was capable of causing a prejudice to a party by injuring

[25] For details, please refer to the website of the Superior Council of Magistracy http://www.csm1909 ro/ csm/index.php?cmd=0704, http://www.csm1909 ro/csm/index.php?cmd=caut&doc=1423&lk=6

[26] The document can be accessed from the website of the Superior Council of Magistracy, the aforementioned definitions are on pages 10-12 of the document. http://www.csm1909 ro/csm/index.php?cmd=caut&doc=1423&lk=6

its fundamental rights and/or liberties, is a judicial error entitling to indemnities / a judicial error causing prejudices."

Considering the above, currently no compromise has been reached in defining these notions, therefore, in practice, it is extremely difficult to prove them in order to accurately determine someone's guilt. That is why a rigorous analysis is necessary, based on concrete cases, by also using theoretical arguments.

In conclusion, the administrative-patrimonial liability is a form of liability that is specific to administrative law because the activity of the administration, just like any human activity, is susceptible to cause prejudice to individuals.

However, one must not run to the other extreme and believe that whenever the administration or one of its employees causes a prejudice to the individual we can speak of engagement of administrative liability. This is because the administration does not always act in its capacity as a legal entity vested with public authority but it sometimes acts as a regular individual.

Conclusions

Nowadays, as a result of the massive dismissal of employees from the public administration, with dramatic direct consequences not only on public servants but also on the personnel hired on the labour market, i.e. increasing the size of work while decreasing the wages, in the following period we shall witness more and more trials on the docket of the administrative litigations courts dealing with the administrative-disciplinary liability of public servants.

Liability[27] is the natural consequence of any commitment. It a state of law, nobody is exempt from liability as regards the manner they fulfil their duties or complete the mandate they accepted. When somebody accepts a public function, they accept it with all its accessories: rights, obligations, liability.

On the other hand, it is possible that the number of affairs involving the State's patrimonial liability, based on article 52 of the Constitution, increases as a result of the judicial errors that are likely to be committed by magistrates due to the enormous volume of work devolving on each judge, because the judge, no matter how diligent he is, cannot avoid the natural risks of his profession. At the same time, we are pessimistic about a possible relief of the courts of law from the multitude of files as a result of the insecurity of legal relationships due to lack of legislative coherence, despite the "optimism" created by the law on the small reform[28] of justice, which has only recently become effective in Romania.

In the end of this study we quote the author Ioan Alexandru[29] who asserted that "liability is an instrument showing whether principles like compliance with the law, transparency, fairness and equality before the law are observed. Also, liability is essential for the consolidation of values such as efficiency, confidence or predictability in the public administration".

[27] Ioan Muraru, Nasty Vladoiu, Silviu Barbu, Andrei Muraru*, op.cit*, p.45-46.
[28] Law no. 202/2010 on the Small reform of Justice, published in the Official Gazette no 714 / 26 October 2010
[29] Ioan Alexandru, *op.cit*, p.260

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THE LEASE CONTRACT

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Abstract
Lease represents, due to its use and implementation on a large scale, one of the trade institutions that have contributed to the economic development of many countries, fact that can be considered valid also for Romania, with the exception of the last year when the world economic crisis had an important word to say in the given field. Although this agreement is very usual, there are still unclear points, both theoretical and especially practical that we try to clarify through the approached subject. Thus, the present work will include information necessary for all the professionals, both theorists and practitioners, as well as any person even without any legal education who has ever used or will use a leasing agreement, given the fact that we will outline its main characteristic, that of an atypical agreement which places it among the rental, purchase and loan agreements, but in no case this agreement must not be regarded as a combination of these. We will analyze the characteristics of this sui generis agreement, its functions classifying it juridically, in order to conclude after that with reference to its component elements. At the same time, we will try to pursue the way of transposing the Community law, especially the Services Directives, fact which represents an important step forward in the attempt to guarantee that both the services executors and their beneficiaries may enjoy more freely their fundamental rights guaranteed by articles 43 and 49 in the founding treaty of the European Community, respectively the right of settlement and the right of executing services, so that the trust between the executors and the consumers should be mutual.

Keywords: *scope of the duty, jurisprudence CJUC, right to be informed, lease contract negotiation impossible, consumer law, the abusive clauses*

I. Introduction

1. General terms

Analysts of the international trade have underlined the fact that **lease** constitutes an expression of modern contracting techniques in this field. The insistence on this type of contract is explained by many authors through their pragmatism and efficiency.

The lease appeared for the first time in the United States of America, and afterwards, gradually, it spread to other countries, especially in Europe.

In U.S.A., the lease was regulated through *The United States Uniform Consumer Credit Code* and through *The Uniform Commercial Code.* In the United Kingdom, France and Belgium there have been elaborated regulations that define the contractual relations on the basis of lease and specify the operations they include.

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The lease was determined in its appearance by objective causes. Thus, in the U.S.A., the United Kingdom and other countries, there were many difficulties in financing affairs, due to the rigidity of the existing forms and proceedings. Business men needed to equip their trading companies with modern outfits, under the conditions that the equipments they possessed were becoming antiquated, especially due to their obsolescence. The formula of buying goods from the buyer for the purpose of renting them to those clients who needed them came as a saving and efficient formula.

Professor Tudor R. Popescu noticed, within the scope of this operation, that *"the lessee has the initiative of the business, the seller allows it, the creditor facilitates it and all together, acting in their own interests, act at the same time to others' benefit".* In his turn, professor Ioan Macovei details the way that the leasing operations *"present advantages for all the interested parties".*

According to the new fundamental legislation adopted in Romania after 1989, the market economy was instituted both through declarative dispositions and concrete measures with a view to achieving this objective.

The necessity of reconstructing the market economy was and is urgent and, for this purpose, efforts have been made in order to increase the investments with Romanian and foreign capital and to stimulate the economic agents. In addition, it has been taken into consideration also Romania's prior aim to associate itself with the organizations of the European economic communities, fact that requires an efficient economy capable to diminish the shock of entering the Common Market where the quality indicators are on a high level.

Leasing is a step forward in financing the enterprises that wish to acquire outfits and equipments, but do not have financial possibilities.

This financing technique that involves a high risk comes to satisfy the economic agents that cannot obtain credit from banks or do not want to charge their real and personal estates by applying a mortgage or pledge, tasks which affect the progress specific to the commercial field.

The practical interest of the lease is to provide complete financing through lent funds of an investment without the beneficiary constituting insuring measures, through this the leasing distinguishes itself from the traditional credit of investments where the beneficiary company pays a part of the investment value.

For that reason leasing – as a financing technique – has in view first of all companies that aim at expanding the activity and improving the performances, and on a more general level ensures technical progress.

2. Definition.

The definition of the lease can be given from the economic as well as juridical point of view.

From the economic point of view, the lease represents a financing operation in which the financier ensures the necessary funds for the entire investment.

From the juridical point of view, the lease represents a complex contract that allows a person to obtain and use a thing without immediately paying the price.

The main characteristic of the lease contract consists in ***its atypical character*** through the fact it is placed somewhere among the rental, purchase and loan agreements, but in no case it must not be regarded as a combination of these. Under these conditions the lease contract is classified in the specialty literature as a contract of a "sui-generis" type. When formulating the "sui-generis" character of the lease contract we rely on several *characteristics* generally affirmed by the followers of this theory such as:

a) Lease is a way of special financing for the cession of using the leasing object;

b) The lease contract, in general, is not the type of contract especially regulated through the Code of Civil Law;

c) Through the lease contract, specific triangular relations are constituted among the leasing supplier – the leasing lessor – the leasing user;

d) Regarding the delimitation of the risks of the leasing affairs between the leasing lessor and the leasing user, there are some specific clauses for this kind of contracts.

The followers of the „sui-generis" theory of the lease contracts have created even a bifunctional theory for this type of contracts that argues this character. This theory relies on the existence of two *functions* of the leasing operation, equal as importance:

a) The function of usufruct, which is to benefit from using the good taken over on lease;

b) The function of financing the beneficiary's activity achieved through lease.

From the point of view of the legal classification, the lease contract presents the following characteristics:

a) it is a *bilateral legal act* which is concluded between the leasing company, in capacity of financier (lessor) and user, in capacity of beneficiary;

b) it is a *synalagmatic act* because both the parties are mutually obliged; this gives rise to correlative and independent obligations, fact which permits the application of general principles related to the execution or non-execution of synalagmatic contracts (example: cancellation);

c) it has *onerous title and patrimonial content,* namely the transmission of the right to use is made for a charge and all the three subjects involved pursue patrimonial interests and namely the realization of a profit appraisable in money;

d) it is *a non-translative property* deed, that is it transmits the right to use, but not also the ownership;

e) it has *consensual* character, that is the mere manifestation of will of the parties is sufficient for achieving the agreement in a valid way;

f) it has a *complex character* realizing an entire range of operations;

g) it is a *commercial contract* as it regulates multiple juridical relations among the business partners;

h) it has *intuitu personae* character, that is the user has to prove further exploitation of the good without having the right to alienate his rights or to cede the contract without the lessor's agreement;

i) it is a *contract with successive execution* as its effects are produced throughout the carrying on of the contract;

j) it presents some stipulations in respect to the *irrevocable character* of the contract. As regards this characteristic, the leasing companies divide the technical life of the machines (that is the period of time in which a machine, outfit etc. can be kept in good working condition) into two periods:

- primary period equal to the economic life of the machine (period of time in which the machine does not risk to suffer obsolescence), period in which the contract *cannot be cancelled*;
- secondary period equivalent with the period of time that lasts from the termination of the economic life to the end of the technical life of the machine, period in which the contract *may be cancelled* at all times with a notice according to the provisions in the contract;

Speciality literature mentions the fact that, as a rule, in the case of the **finance lease**, there is not the possibility to cancel the contract on the user's part. So the user is obliged to pay all the dues irrespective of the circumstances.

The operating lease contract has nevertheless the main characteristic that it may be cancelled at any time, but only after the expiry of the basic period. "Cancellation clause gives the right to interrupt the lease contract on the user's part before the expiry of the lease term. The value of the interruption clause depends on the possibility that the circumstances, future technological and economic conditions to lead to the situation in which the value of the good for the user to be smaller than the future leasing installments."

"The computer market, which it is very hard to estimate how fast these goods become obsolete, makes the object, as a rule, of rentals on operational lease. The presence of the interruption/cancellation clause is concretized for the lessee in the payment of larger leasing instalments which often leads to labelling the lease with such a clause (in this case, an operational lease – a n.) as being very expensive."

In many countries it is stipulated by law the term after which the operating lease contract can be cancelled. For example, in Germany, this term corresponds to a period of 40% from the normal use duration stipulated in the economic normatives.

As regards the lease contract cancellation, the **international norm IAS 17** "Lease Accounting" issued in 1994 specified that "normally a location-financing contract (finance lease) is not liable to cancellation". Also concerning the issue of the lease contract cancellation, IAS 17 "Lease" revised in 1997, (paragraph 9) stipulates that:

"The irrevocable lease represents the leasing operation which is revocable only: a) when an event that could not have been foreseen takes place; b) with the lessor's permission; c) in case that the lessee contracts with the same lessor a new lease regarding the same good or an equivalent one; or d) in the moment of payment by the lessee of a supplementary sum, so that at the beginning of the lease its continuation should be sure enough."

From the aspects presented it can be drawn the conclusion that the international norm IAS 17 "Lease" stipulates that, in principle, a finance lease contract cannot be cancelled, but, if this fact occurs, the penalties incurred by the lessee are very heavy.

Romanian legal norms concerning the irrevocable character of the lease contract specify: "in case that the user refuses to receive the good on the term stipulated in the contract or if he is in a state of juridical reorganization and/or bankruptcy, the leasing company is entitled to cancel the contract (…). Also in case that the user does not execute the financial liabilities of the leasing instalment for two consecutive months, the financier is entitled to cancel the contract (…)." As it can be noticed, Romanian legal regulations with respect to lease have in view only the cancellation right that the leasing company has while for the user such a right is not stipulated.

3. Component elements of the lease contract

According to the general dispositions of the Commercial Civil Code as well as the **speciality literature**, in the lease contract at least the following **minimal elements** must be included:

a) *Name and technical description* of the good that makes the object of the contract;

b) *Date and place* where the delivery (receipt) of the good is made by the supplier to the user as well as the exploitation instructions;

c) *Delivery and installation conditions* of the good that will result after there have been respected from the documents prepared on delivery and installation, with the specification of the terms of incurring the expenses and risks for the tenant and supplier;

d) *Usage conditions*, maintenance and control over the leased good with the detailing of the tenant's obligations;

e) *Guarantee of the good* with the implications and mode of exercising one's ownership;

f) *The tenant's liability* and the variant of insurance;

g) *Contract cancellation* for different cases and implications for the tenant and company;

h) *Contract expiry* (according to the simple option of the tenant);

i) *Condition of the good* returned;

j) *Period of using* the good by the user;

k) *The estimated price of the good* and in some cases also the price for which the respective good may be bought after the lease contract expiry;

l) *The value of the due and the date* when the user can pay it to the lessor;

m) *Force majeure* and other situations exonerating from liability;

n) *Manner of settling* the possible litigations.

II. Lease contract

1. Term. Subjects, mechanism, advantages.

The lease contract is a bilateral juridical act, unnamed, with onerous title, having patrimonial content, with successive execution, institu-personae and consensual.

The legal basis consists in the provisions of the Government Ordinance no. 5/1997, with further amendments and completions.

In the leasing mechanism, as a commercial operation structured in several distinctive juridical relations, the following persons intervene:

- the lessor of the good or the financier of the operation who is a specialized legal entity, Romanian or foreign artificial person; in relation to the kind of leasing operation which constitutes their object of activity, the leasing companies are general leasing companies, integrated leasing companies or real estate leasing companies for trade and industry that must have sufficient registered share capital.
- the user, the tenant or the beneficiary of the good.
- Third parties or the supplier, that can be the constructor, the producer or the manufacturer of the thing or the intermediary.

Leasing is regarded as a modern credit technique of the trade. Through the leasing operations goods and services are temporarily leased, in this case real estates and movables of a long-term use, found in the civil circuit. Usually, the goods given for tenancy are cars, equipments and outfits for commercial use.

The defining elements and stages of the lease are the following:

- demand directed to the financier by the client, future user, regarding the conclusion of the lease contract for a certain good;
- delivery by the financier to the user, of a mandate concerning the selection of the supplier, the good and the negotiation of the purchase contract of the good by the financier;

▪ negotiation by the user and supplier of a purchase contract of the good, on the basis of a mandate received from the lessor according to his necessities;

▪ use of the goods by the user only for professional purposes, according to the object of activity.

The lease has appeared due to the rigidity of the procedures in financing trade and due to the necessity of equipping the enterprises with modern machines and outfits.

The usage of the leasing operations as a form of merchandise traffic presents advantages for all the parties:

▪ The supplier has the possibility to assure a commodity market for his products and to consolidate his position against the competition.

▪ The user obtains the necessary machines and outfits without immediate expenses for investments and avoiding the due risks.

▪ The financier effects a profitable investment of his financial resources and can obtain, through the leasing instalments, important benefits.

2. Lease forms

a) According to the object of the leasing operations, several forms can be distinguished:
- lease of the industrial equipment;
- real estate lease with a commercial or locative destination;
- movable lease of goods with long term usage;
- goodwill lease

b) According to the contracting parties, lease is divided into:
- direct lease;
- indirect lease.

c)In relation to the fiscal effects, the leasing operations are of two kinds:
- finance lease;
- operating lease.

d) According to the duration of the ending, lease can be:
- short-term lease;
- long-term lease.

e) Considering the features of the achievement technique, lease presents the following variants:
- experimental lease;
- time-sharing lease;
- lease – back;

3. Juridical kind and characters

The lease can be characterized as a form of financing with a term. At the same time, the lease resembles the rental and instalment sale contracts.

The lease is a complex and original contractual mechanism that is achieved through the following juridical means:
- a contract of mandate, leased among the lessor/financier and user;
- a purchase contract concluded between the suppliers and the lessor;

- a location contract concluded between the lessor and the user;
- an accessory contract.

The lease is still a particular financing contract, the result of a fusion of juridical techniques and means. The lease contract is synalagmatic, onerous, commutative and it has an institu – personae character as far as it regards the user's person; the financier will be able to alienate, without restrictions, the ownership of the good to another financier.

4. Effects of the lease contract

In the leasing operation, **the third party supplier assumes a series of obligations**:
- delivery of the good in good working condition;
- participation in the training of staff assigned for the exploitation of the good;
- repair of the defects that do not result from the user's culpability;
- ensuring the spare parts necessary for the repair or payment of their equivalent value.

The financier/lessor has the following obligations:
- to observe the user's right to choose the supplier according to the necessities;
- to conclude a purchase contract with the supplier appointed by the user, under the conditions negotiated by this one;
- to conclude a lease contract with the user;
- to insure the goods offered on lease;

The user must:
- Pay the leasing instalments;
- To observe the ownership of the leasing company, returning the good by the termination of the contract;
- Not to charge the good with tasks;
- To effect the taking delivery and to receive the good;
- To exploit the good according to the technical instructions;
- Not to make amendments in the construction of the good;
- To assume the risks in case of destruction of the used good.

5. Liability of the contracting parties

The user's liability. In case that he refuses to receive the good by the agreed term, the financier will unilaterally cancel the contract, with damages.

If he does not pay the leasing instalments two months consecutively, the financier will cancel the contract.

Also, the user is liable for the prejudices of the good caused by him.

The financier's liability. If he does not observe the user's right to option, he owes damages.

6. Termination of the contract

It can be terminated:
- on the expiry of the term;
- by cancellation;
- through the agreement of the parties.

7. Advantages of the lease contract

Lease has imposed itself too in our country, the same way it did all over the world (perhaps less in the economy of the third world countries) first of all through its simplicity. Under the conditions that the competitive environment in our country becomes increasingly harsh, the reaction speed of the companies at the changes in the external environment is vital. Lease, through its efficiency, satisfies in a short period of time the need of funds for the investments of the economic agents. Also, by lease, the economic agents avoid the complicated procedures of contracting bank credit, procedures that suppose locking up some elements from the patrimony of the company or the private one for the creation of guarantees.

Lease assumes the existence of three third parties: the supplier, the financing company (the leasing company) and the user (beneficiary of the financing). The leasing company buys from the supplier the good demanded by the user and cedes it to the latter one on a certain period of time against a monthly due. This represents in essence the financing operation through lease. For the user, this operation will bring other advantages too such as:

1.It permits the achievement of investments the moment when he does not have the necessary liquidity. And as the investments contribute most of the times to the increase of the turnover, the income surplus obtained can cover the monthly dues.

2.It permits to use the funds for the increase of the working capital (current assets), the ones that bring money.

3.It permits to keep up with the new technology by the fact that at the end of the lease contract he may return the good to the financing company and to rent another one whose improved technical characteristics can provide a higher efficiency in exploitation.

4.It permits to benefit from the postponement of paying the customs duties to the end of the contract for the imported goods. The payment of the customs duties will be made only for 20% from the value of the good.

5.It permits to benefit from the fiscal facilities. The entire value of the lease instalment is fiscally deductible for SME.

Economic impact of lease

From the lessor's point of view, it is essential that the lease contract should protect his ownership and thus he can act directly on the good in case that the user does not settle the contractual obligations. Also, as the financing object is directly related to the contract and is personalized, there is the possibility to notice the business in its privacy and it is much easier to make a decision in case of temporary insolvency of the user.

The most important effects from the economic point of view are found at the user. This one can pay the right to use and, eventually, to acquire an investment good while he produces. The instalments can have this way the dimension and rhythm so that they should permit the payment of the instalments and even obtain a profit without the user's incurring heavy tasks. For example, for seasonal activities – as the sugar industry – the instalments can be orientated towards the end of the production period, when the incomes deriving from the sale of products will permit the settlement of the pay obligations. In these situations, the instalments are most of the times annual or semi-annual; on the contrary, for the activities in which the receipts are rhythmic and spread throughout the year – such as bread manufacture, milk industry – the instalments can be monthly.

The lease contract is concluded for at least a period of one year. There is no express requirement that the contract should be concluded in written form, but the Ordinance no. 51/1997 regulates the compulsory clauses in a lease contract, so that the written form should be implied.

The lease contract constitutes writ of execution (namely it can be executed against the user without having to follow a judicial procedure) if the user refuses to return the good, in the following situations:

- at the end of the leasing period;
- in case of contract cancellation due to the user's exclusive fault.

If the beneficiary does not pay the instalments on the terms and under the conditions stipulated in the contract, the leasing company is entitled to cancel the contract by full right and the client has the obligation: to return the equipment; to incur the due expenses; to pay the remaining instalments of the tenancy. Moreover, the beneficiary is liable to pay a lump allowance for cancellation which represents the future remaining instalments. All these aspects emphasize the existence of *severe conditions imposed by the beneficiary's financing institution*. All these measures have a penalizing character, to sanction the user.

The financier receives the good back, having the possibility to rent it again to another person or to sell it, while he receives the entire payment of all the instalments, calculated in relation to the economic life of the respective equipment.

Despite the severity of these measures concerning the beneficiary, the courts of arbitration have constantly pronounced in the creditor's favour, the alleged argument being that this way the user, the first person interested in concluding a lease contract, must observe scrupulously all the clauses of the contract because, only acting like this, all the involved parties will have a gain and the business may carry on successfully.

III. Conclusions

The lease has been outlined much more clearly as an economic reality than as a juridical entity. If for the economic agents the lease can be considered as a means of deconcentration through the diminuation of risks, for those called to decipher its juridical essence it seems to be an unsolvable issue.

The special economic success of this new operation has imposed the lease to everybody's attention. At the moment the lease is on international level one of the most common means to achieve financing.

However it is especially important to underline the fact that more and more frequently the trial courts this time, and not the courts of arbitration to which we have referred earlier, are notified with requests formulated by users, in capacity of consumers, regarding the abusive clauses included in the lease contracts.

Most often it is alleged the consumers' impossibility to negotiate effectively the contractual clauses; as a rule the contracts have already been drawn up on standard forms, using terms that are not easy for the user to understand most of the times, but especially the fact that these contracts include abusive clauses with respect to EAIR, effective cost paid by the user and the exact quantum of damages owed by the financier in case of contract cancellation.

Thus, from the practice recently outlined by the national trial courts, rallied also to the practice at the Courts of Justice of the European Communities (CJEC-cause C-70/10 Krajsky sud v Presove- Regional Court in Presov, Slovakia) we keep in mind several conclusions particularly important.

- In general, the consumer finds himself in a situation of inferiority to a seller or a supplier as to both his power of negotiation and the level of information, situation that directs him to adhere to the conditions previously drawn up by the seller and the supplier.

- The abusive clauses do not create obligations for the consumer; this represents an imperative disposition, a norm equivalent to the national norms that have, within the domestic juridical order, the rank of public order norms.

- The national court is obliged to assess ex officio the abusive character of a contractual clause, including the hypotheses in which the consumer abstains himself from alleging the abusive character of this clause, either because he does not know his rights, or because he is discouraged to allege them due to the expenses implied by this request.

- At the conclusion of the contract, the debtor of the obligation must possess all the elements that can have an effect on the duration of his obligations.

- Informing the consumer about the global cost of the leasing has an essential importance.

- The specification's lack of all the elements for effective identification of the costs may have as consequence the fact that the contract is exempted from those abusive interests and costs.

Regulations in force regarding the leasing operations:

- Ordinance no. 51/28.08.1997 regarding the leasing operations and the leasing companies;
- Law no. 90/28.04.1998 for the approval of GO no. 51/1997 regarding the leasing operations and the leasing companies;
- Amendment and completion of the Government Emergency Ordinance no. 51/1997 regarding the leasing operations and the leasing companies;
- Norms regarding recording the leasing operations in the accounting;
- Ordinance proposal of amending the Law no. 99/1999 regarding the leasing activities and leasing companies;
- Ordinance no. 51/1997 republished regarding the leasing operations and the leasing companies;
- Law no. 414/26.06.2002 regarding the profit tax (O.G. 456/27.06.2002);
- GR no. 859/16.08.2002 for the approval of the instructions regarding the methodology of calculating the profit tax (O.G. 640/29.08.2002);
- OMFP 1784/2002 for the approval of the specifications regarding some measures related to the termination of the financial exercise for the year 2002 for the artificial persons who, according to the provisions of the Accountancy Law no. 82/1991, republished, have the obligation to prepare annual financial reports (O.G. 21/16.01.2003);
- GR 22/16.01.2003 regarding some amendments and completions of the accounting and fiscal methodologies (O.G. 44/24.01.2003);
- GO 36/30.01.2003 regarding the correlation of some dispositions from the financial – fiscal legislation (O.G. 68/02.02.2003).

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THE CLASSIFIED CONTRACT

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Abstract
The aim of this study is to analyze the concept, formation and development of the classified contract. As we know, a contract is a legally enforceable agreement between two or more parties with mutual obligations. The terms and conditions that set the rights and obligations of the contracting parties are established when a contract is awarded. These include 'general conditions' which are common to all types of contracts, as well as 'special conditions' which are peculiar to a specific contract (such as, contract change conditions, payment conditions, price variation clauses, penalties or other conditions). Classified contract means any contract that requires, or will require, access to classified information (Confidential, Secret, or Top Secret) by the contractor or its employees in the performance of the contract. A contract may be a classified contract even though the contract document is not classified.

Keywords*: classified contract, public purchase, pacta sunt servanda, contractual freedom*

1. Introduction. Definition of the Concept

According to the provisions of Article 3 of the Government Decision no. 585/2002, the Annex regarding national standards for protecting classified information in Romania[1], a classified contract is any contract which is lawfully concluded between the contracting parties that signed it and within which classified[2] information is included and used. The analysis of this definition might suggest that we refer to the necessity to meet special conditions for the contract to be validly concluded and executed and to the requirements which are specific to the protection of classified information in a supposedly classified contract (a classified contract is an agreement between two or more persons that accept to create or cancel a juridical relation between them). However, in practice, this notion has a wider connotation and it is possible for the contract to have certain annexes that comprise classified information, whereas the contract does not contain classified information at all. When a contract is executed, information from different sources and of different levels of security is used, so that the contract will be classified according to the highest level of information comprised in

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[1] Government Decision no. 585/2002 regarding national standards for protecting classified information in Romania was published in the Official Gazette of Romania, no. 486, on the 5th of July 2002.

[2] According to Article 15 of the Law no. 182/2002 on protection of clasified information (the Official Gazette of Romania, no. 248, published on the 12th of April 2002), classified information is represented by information, data and national security documents which must be protected due to their importance and the consequences that might appear in case of unauthorised disclosing or dissemination of such information. Information is classified into two categories according to their importance: state secrets and confidential information. State secrets include: information concerning national security, whose disclosure could affect national security and state defence, whereas confidential information includes information whose disclosure might aggrieve a public or private legal person.

it and protection measures will be adopted accordingly; in practice the phrase ”classified contract” is also used for those situations in which the contract does not contain classified information except for its annexes (e.g. the tender book); consequently, the observance of the classified information protection norms are mandatory both for the conclusion and the execution of the contract because the annexes cannot be separated from the contract.

In the present paper, we are going to briefly analyse the special conditions that must be met for such a contract to be legally concluded, the mandatory conditions that are required for its execution, as well as a series of difficulties that might be encountered when this procedure is applied.

2. The Regulation of the Classified Contract

As we know, in conformity with the provisions of Article 969 § 1 of the Civil Code, “Legal agreements have the force of law for the contracting parties” and the conclusion of any contract is free, according to the principle of contractual freedom. However, contractual freedom is not absolute, but relative and, according to the law, it is limited mainly for matters such as preserving public order and moral standards (see Article 5 in the Romanian Civil Code and Article 6 of the French Civil Code). Thus, there is a contractual public order that implies certain limits on the possibility to conclude certain contracts with the purpose of protecting social values (the protection of public order).

At the same time, we have to distinguish between the contractual freedom of the public legal person and the contractual freedom of the private person; in this respect, we point out the fact that all contracting[3] authorities - as they are defined in Article 8 of the Government Emergency Ordinance no. 34/2006 on public purchase contracts, public work concession contracts and public service concession contracts, alongside with its subsequent amendments - have the obligation to apply the provisions of the previously mentioned ordinance in the their contracting activity. The lawmaker has set forth two exceptions from this Ordinance, which are provided in Article 12 of the Government Emergency Ordinance no. 34/2006, i.e. the situation in which the contract was classified as comprising secret information by the empowered authorities and in conformity with the legal provisions in force, as well as the situation in which the execution of the contract requires special security measures to be adopted so that the national interest is protected according to the legal

[3] According to Article 8 of the Emergency Ordinance no. 34/2006 on public purchase contracts, public work concession contracts and public service concession contracts: ”A contracting authority, as the present Emergency Odinance sets forts is: a) any state body – public authority or institution – which performs activities at central, local or regional level; b) any public body, other than the ones previously provided in letter a), which is a legal entity and was set up in order to satisfy general needs except for commercial or industrial needs and which: - is mainly financed by a contracting authority, defined as above at letter a), or by another public body; - is subject or accountable to a contracting authority, as defined above at letter a) or to another public body; - has more than a half of the board of directors/control or supervision board made up of persons appointed by a contracting authority, as defined above at letter a) or by another public body; c) any association made up of one or more contracting authorities, as provided above at letters a) or b); d) any public enterprise which performs one or more of the activities provided in Chapter VIII § 1 and which concludes public purchase contracts or concludes frame-agreements in order to perform these activities; e) any law subject, other than the ones provided at letters a) – d), which performs one or more of the activities provided in Chapter VIII § 1, according to a special or exclusive right - as defined at Article 3) letter t) - granted by a competent authority, when this authority concludes public purchase contracts or concludes frame-agreements in order to perform these activities.

provisions in force. Consequently, in case a classified contract is concluded and executed, the contracting authorities are not required to observe the legal provisions that regulate public purchases.

The difficult problem we have to deal with is identifying the legal norms that govern the conclusion and execution of these contracts; as we are going to see the difficulty of this task is due to the fact that there are no clear norms in this field.

Thus, in conformity with the existing legislation on the protection of classified information, contractual activities that require access to classified information are regulated in the Governmental Decision no. 585/2002, the section regarding "Industrial Security"; "industrial security" refers to the system of norms and measures adopted for regulating the protection of classified information in contractual activities. This section defines the parties that participate in the negotiation[4], conclusion and execution of a classified contract and sets forth a series of special conditions that must be met for the conclusion and execution of contracts to be valid.

Besides the Government Decision no. 585/2002, there are several national normative acts that are issued by authorities empowered to protect classified information and that aim to adopt measures for ensuring the protection of classified information. However, we have not identified legal dispositions that regulate the way in which law is applied for public purchase in connection to the norms for protecting classified information, i.e. the common norms adopted in the execution of contracts (e.g. situations in which participation in negotiations and the conclusion of the contract is accomplished in conformity with the legislation of public purchase, the contract being considered classified after its conclusion).

3. The Persons who take part in negotiating, concluding and executing a classified contract. Contracting parties in this case are: the contractor – an industrial, commercial, execution or research body – which designs or supplies services and the contracting party – the beneficiary of the works or services supplied by the contractor.

In concluding and executing a classified contract, an important role is played by the authorities that are empowered to protect classified information, such as: the National Registry Office for Classified Information (ORNISS) and the Designated Security Authorities (DSA)[5]; these authorities have approval, authorization, certification or control powers, as the case may be.

4. Special conditions for participating in negotiating and concluding a classified contract. Besides the conditions that are essential for validating a contract (capacity, consent, object and cause), classified contracts require a series of special conditions to be met:

4.1. Only authorized representatives of industrial objectives can participate in the negotiation and conclusion of a classified contract on condition they possess industrial[6] security authorization

[4] Article 3 of the Government Decision no. 585/2002 provides that "negotiations are activities referring to the awarding of a contract or sub-contract, from the notification of intention to call for bids at the end of the bid."

[5] According to Article 3 of the Government Decision no. 585/2002, Designated Security Authority – DSA – is "an organization which is legally authorized to establish, for its field of activity and responsibility, its own structures and measures for the co-ordination and control of the activities related to the protection of information classified as state secret. According to the law, the Designated Security Authorities are: Ministry of National Defense, Ministry of Interior, Ministry of Justice, Romanian Intelligence Service, Foreign Intelligence Service, Guard and Protection Service, Special Telecommunications Service".

[6] According to Article 3 of the Government Decision no. 585/2002, an industrial objective is a "document issued by the National Registry Office for Classified Information - ORNISS - for an industrial facility, certifying that the respective industrial facility is empowered to participate in the negotiation procedure of a classified contract".

issued by ORNISS. The industrial security authorization is a document issued by ORNISS to an industrial objective that is empowered to participate in the negotiation procedure required by a classified contract. We also mention the fact that the industrial security authorization must not be mistaken for the classified information authorization which is a document issued with the consent of special authorities by the leader of the juridical organization which has access to such information and by which it is confirmed that in exercising professional attributions, the person in charge may have access to such secret information depending on the security level thereof and according to the need-to-know principle.

At the same time, the industrial security authorization should not be mistaken for industrial security approval (a document issued by the DSA, which certifies that the industrial objective set forth by the contract has implemented all the security measures that are necessary for the classified information to be protected during the execution of the contract); this approval is obtained by the ORNISS from DSA so that the industrial security authorization could be issued. We also mention that, for example, in case a legal person wishes to take part in the negotiation of a classified contract with the Ministry of Administration and Interior, this legal person will have to address ORNISS in order to obtain an industrial security authorization, but before ORNISS issues this authorization, the law requires that an industrial security approval should be issued by the Ministry of Administration and Interior – which is the designated security authority, i.e. the institution which has competence to impose its own measures for coordinating and controlling classified information activities.

4.2. The industrial security authorization is issued for each classified contract. Consequently, although the industrial objectives (as they are defined in the provisions of the Government Decision no. 585/2002) are empowered to currently issue and use classified information and have personnel authorized to access classified information with a view to participate in classified negotiations, still the industrial objectives must have industrial security authorization for each contract they conclude.

However, for industrial objectives to be empowered to participate in such negotiations, taking into consideration the impossibility to obtain such an authorization immediately, the lawmaker has set forth – by Article 206 § 3 of the Government Decision no. 585/2002 – the possibility to participate in the negotiating procedure on condition the authorization procedure is initiated.

4.3. Invitations to negotiating procedures must contain clauses by which the potential contractor is required not to disclose the information he had access to and to return all the classified documents that were provided to him, in case he does not submit a bid or he does not win the bid, within no more than 15 days after notification. These conditions are obviously meant to ensure the protection of all the classified information that was used in initiating that procedure.

4.4. At the same time, the participants in the negotiation and conclusion of the classified contracts shall be subject to security vetting[7] which is accomplished by the competent and empowered authorities; the measures of security adopted will not be presented in detail because they do not represent the object of this article.

4.5. The contract to be concluded must include a Security Aspects Letter – this document is mandatory for the contract to be concluded and it must comprise clauses and protection procedures; the Security Aspects Letter will be drawn up by the contracting party that holds the classified information.

[7] For more details, see Article 211 the Government Decision no. 585/2002.

5. Special conditions for executing a classified contract. Although the contracting party obtained the industrial security approval and the industrial security authorization for participating in the negotiating procedure, these authorization documents are not enough for the contract to be executed. Thus, the lawmaker especially provided that, after the conclusion of the classified contract, the contract will not be executed until:

5.1. The contracting party will not have obtained the facility security clearance [8].

For a classified contract to be executed it is not enough to have an industrial security authorization, the lawmaker requiring another authorization document which is issued by the ORNISS, according to the provisions of Article 213 of the Government Decision no. 585/2002.

5.2. certain legal obligations on classified information protection are met (the authorization of the personnel who is involved in the execution of the contract, the training of the personnel etc.).

At the same time, in case the contracting party entrusts part of a contract to a sub-contractor, the former shall make sure that the subcontracting party holds an authorization or industrial security/facility security clearance and shall inform the contractor. At the conclusion of the sub-contract, the sub-contracting party shall include protection clauses and procedures, according to the provisions of these standards.

We would also like to add that during the execution of the contract, the parties shall be subject to the security vetting process that depends on the classification level of the contract; vetting may influence the execution of the contract and may lead to its cancellation.

6. Special problems regarding the classified contract. The hypothesis according to which the need for classification appears after concluding the contract:

A contracting authority may conclude a public purchasing contract and observe all the provisions stipulated by the Emergency Ordinance no. 34/2006; yet, subsequently, when the contract is executed, it might be necessary to classify this contract. A classified contract is not only the contract/document that comprises clauses which were wilfully agreed upon, but also all the documents issued and managed during the conclusion and execution of the contract; such an approach is necessary due to the obligation to observe the measures for protecting classified information according to the maximum level of classification that is assigned to the documents as required by the procedure (if a single annex has a classified character, the whole documentation will be considered as such, even if that annex is a single document and even if the other documents do not contain classified information and will not be numbered or marked for security reasons).

Thus, for example, it is possible for a contract whose object is the modernization of a communication network to require the access of the contracting party to a series of classified documents; this requires that a Security Aspects Letter should be drawn up.

Legislation does not provide what solution to be chosen in this situation. Actually, we have identified a single legal norm that might be applied in such a case; this norm does not, however, cover all the classes of secrecy and it is also subject to criticism. We refer to Article 2 § 3 of Order no. 74/2010 issued by the Ministry of Administration and Interior on approving the Norms for

[8] According to Article 3 of the Government Decision no. 585/2002, an facility security clearance is - a document issued to the person who is empowered to protect classified information, namely the security officer or employee within the security structure who certifies the vetting and accreditation of the right to hold, access and work with classified information that attain a certain level of the secrecy.

protecting classified information and confidential information regarding contract activities performed within the Ministry of Administration and Interior; according to this Order, the structures or institutions within the Ministry of Administration and Interior, which are empowered to purchase goods and services, shall be obliged – when drawing up the assignment documentation and later, when concluding the contract – to set forth the following cancellation clauses: the withdrawal of the security approval, the non-issue of the industrial security authority, if the obligation to classify certain contract components was mandatory during the execution of the contract.

This legal norm does not cover all the classes of secrecy, as it is proved by the legal subjects it refers to and the fact that it takes into consideration only those contracts within which classified information (confidential information) is used; thus, these norms could not be applied for contracts in which state secrets are included.

The measure taken by issuing the above mentioned normative act is, in our opinion a rigid one, as far as the contracting party is concerned; the legal text does not allow for a part of a contract (which must be classified) to be subcontracted to a subcontractor that might comply with the legal norms necessary for the protection of classified information; on the contrary, this measure requires that a cancellation clause be provided, no matter what possible practical particularities might exist. Thus, in practice, although the contract might be divided and the subcontract be accomplished for the party that subsequently needs the information to be classified, the potential endangers are thus limited for the economic entity which concluded the contract but which did not obtain the necessary authorisations; according to the above mentioned legal norm, such a solution would be impossible.

In the same context, a second problem is represented by the conclusion of a subcontract, according to the law, if the object of the contract allows for such a division to be made. We refer to the situation in which public purchase procedure is initiated, according to the provisions of the Emergency Ordinance no. 34/2006, and the documentation stipulates the interdiction to initiate subcontracting activities during the execution of the contract. In this situation we consider that the adopted solution will be the one imposed by the contracting authority. On the one hand, the contracting authority might cancel the contract, on the grounds that it cannot be executed by the contracting party (considering that the contracting party cannot obtain an industrial security authorization) and the subcontracting is not possible, according to provision of the Emergency Ordinance no. 34/2006. On the other hand, the contracting authority might invoke the provisions of Article 12 of the Ordinance and not take into consideration the provisions stipulated in the assignment documentation regarding the interdiction to subcontract, considering that the provisions of the Emergency Ordinance no. 34/2006 do not apply for classified contracts. In any of these cases, we notice that if the contractor is the person who conducts the vetting procedures, then such a situation would be a breach of the *pacta sunt servanda* principle; in this case, the effects of the juridical act would not be performed, which is in contradiction with the provisions that the parties agreed upon when concluding the contract. This exception could be included in the category of situations in which the law allows one of the parties to the civil juridical act to modify that act, in the absence of the other party's agreement and even if the other party does not agree[9].

Another important problem is represented by establishing the damages that the contracting party might claim if, after the contract is concluded, the information used in it should be classified and the documents necessary for authorization cannot be obtained. In this respect, it is important to

[9] See Gabriel Boroi*, Drept civil. Partea generală. Persoanele*, Hamangiu Publishing House, Bucharest, 2010, pag. 225.

mention that, as to the protection of classified information, the decision not to issue approvals or authorizations is normally not motivated and cannot be appealed against in any way. Thus, according to Article 229 of the Decision of the Government no. 585/2002,"ORNISS is not compelled to state the reason for denial"; consequently, the contracting party could not oppose such a measure and, implicitly, could not prove the fact that it did not accomplish its contractual obligations on grounds outside its competence; in this case, establishing the damages that the contracting parties might owe to each other could be a difficult attempt to accomplish. Obviously, as to the contracting activities performed by the Minister of Administration and Interior, within which confidential information is used, according to the previously mentioned cancellation clause, a presumption of guilt appears regarding the non-execution of the contractual obligations by the contracting party.

7. Conclusions

According to the above mentioned aspects, we can draw the conclusion that, basically, the classified contract requires, besides the essential and generally valid conditions that are necessary to be met for concluding contracts, meeting special conditions such as obtaining different authorization documents by adopting a certain conduct and by taking certain measures for concluding and executing this contract.

Thus, the way in which the lawmaker regulated the classified contract is, in our opinion, a clear proof of "contractual dirigism", to use the phrase of Louis Josserand; however, in this case, the necessity to protect security interests requires methods of "contractual dirigism" to be adopted: see the security aspects letter, which must be comprised in the contract, the obligation of the parties to observe legal norms on protecting classified information and the impossibility to avoid such legal dispositions. Although we agree that the state is bound to intervene in this respect, in order to protect classified information, public order and national security, *de lege ferenda*, we consider that unitary, unambiguous legal norms must be set forth for all the contracting parties to be protected when concluding and executing such a contract.

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COMPARATIVE ASPECTS OF SOME CRIMES THAT PREVENT THE COURSE OF JUSTICE CRIMINAL CODE AND THE NEW REGULATIONS IN THE NEW CRIMINAL CODE

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Abstract
The importance of this work lies in the substantial changes in the law of crime, changes justified by the new realities of a democratic society in which justice is elevated to the rank of supreme value and aims to ensure the legality, independence, impartiality and power in the process of making criminal justice by punishing the facts likely to affect seriously, ignore or undermine the authority of justice.
This paper is given by the need to address the theoretical level of crime changes in this category by the New Criminal Code, given that currently were not created many works on this subject. This paper addresses both law practitioners and litigants alike.

Keywords: *crimes against justice, changes in the new Criminal Code, the lack of denunciation, misleading the judicial bodies, influencing statements;*

Introduction

With the entry into force of new Penal Code, crimes against justice will have a separate heading in its special part, which is provided in Title IV, unlike current regulations, where they are presented in Chapter II of Title IV , entitled "Offences affecting public activities or other activities regulated by law."

The legislature has made this change just to give particular attention to these crimes, which are designed to protect justice, not simply a public interest activity, but is the third power in the state.

In terms of marginal name of the title, the legislature has made such changes, changing its name from "Offences that prevent justice" to "Crimes against justice. " Which was the basic reason was that these crimes are not always effectively prevent justice, they often produce only a state of danger for its implementation.

In the following we present some of the most important changes of offenses in this title.

1. The lack of denunciation (266 N.C.pen article.)

The indictment actually took mainly the existing legislation in the current penal code, namely the crime of crimes nedenunţare provided by art. Penal Code 262.

First of all, under the aspect of terminology, the name was changed from marginal "the lack of denunciation of some crimes" in „the lack of denunciation" offense because it covers offenses under

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the law the lack of denunciation a criminal offense under the criminal law is merely a feature of the offense. This should not actually take the form of a crime. That legislation includes a much broader scope of action on misconduct, unlike that previously existing.

But the most important reason behind this change was that the existence lack of denunciation crime only interesting to the authorities kept silent about the preparation or commission of a dangerous acts prohibited by criminal law against a people, no matter that the intention to commit the act was not yet put into execution, or that enforcement provisions are in the phase preceding acts, or even an attempt unpunished. It is also irrelevant if we were in the presence of non punishment causes such as irresponsibility, reported, of course, the act not denunced.

With this amendment, the legislature has made it clear that withdrawal is not only required when the act to which it relates takes form of criminality themselves, such as murder, but when it enters as a constituent in content of complex crimes, such as attack threatening the national security.

With respect to offenses subject of the lack of denunciation can be observed that the legislature intended to remove from this framework crimes against property, such as robbery, piracy, destruction and destruction aggravated qualified just because punishment for such criminal of the lack of denunciation no longer necessary now, while the offense has been committed. In most European countries, such an indictment is merely because the person who, while being aware about the preparation of an offense, referral to legal authorities omitted which could prevent its commission.

Thus, the new Penal Code will be punished only the lack of denunciation under the criminal law an act against life or death resulted in the victim. Thus, fall into this category, in addition to intentional acts, and other facts, such as those caused by negligence or intentionally exceeded (involuntary manslaughter, hit or injuries causing death, which resulted in the rape victim's death, robbery or piracy followed by the death of the victim).

The second cause of punishment for the crime committed by a family member. Unlike the old regulation that protects them from criminal sanction only the husband and close relatives or persons became such relatives by adoption, the new regulation has a wider scope. Thus, the meaning of art. 177 paragraph 1 letter c) of the new Criminal Code, "family members in addition to the above, I still understand and people who have established similar to those between spouses or between parents and children where they live.

It has also been maintained due to the punishment laid down in the third paragraph, but with some modifications. Thus, the legislature intended to broaden the scope of the causes of impunity, the idea of encouraging more people to denounce crimes in order to ensure as safe an environment company.

In this sense, unlike the current regulation, the cause of the punishment laid down in the 3rd paragraph only reflects on those people who tell to authorities about the crime committed before the trial so far been willing to prosecution for that offense or even after that time or after the perpetrators were discovered, facilitates their arrest, the new Criminal Code that reflects the persons concerned tell to competent authorities that act before the criminal proceedings shall be initiated against the guilty person, or even after this time, but under the condition of criminal responsibility to facilitate the Autotim or participants.

This change was needed, given that, on the one hand, the moment of the criminal action is following that of the prosecution and thus let people know about such things have more time available to think and positive action, on the other hand now, in light of the European Convention on Human Rights is a preventive arrest quite exceptional, and cases where it may have respecting the

provisions of Article 5 of the Convention, are considerably less than previously existing. Also, in light of new legislation, criminal liability can be achieved by means other than through the imposition of a sentence, so that the existing provision in the 3rd paragraph, last sentence should not be out of date (see cancellation institutions postpone the punishment or penalty).

In terms of the system of enforcement, the legislature has made such changes. While current regulations applicable punishment for this crime is from 3 months to 3 years in the new Criminal Code is from 6 months to 2 years, so that narrows this range. It also is an alternative punishment, so it introduces an alternative prison sentence, the fine.

2. Misleading the judicial bodies (Article 268 NCpen.)

Misleading is an indictment of the judicial bodies to us, which is based on offense but slanderous denunciation.

Rationale behind the introduction of this new accusation is that the crime of slanderous denunciation in its basic form, provided by art. 259 of the current Penal Code, which requires following the damage to reputation of a person who is accused in an unreal, an offense, although regulated as a crime against justice, not simply represent a special form of the crime of libel.

Given that the crime of libel is no longer found in the criminal provisions of new regulations and in consideration of implementation issues encountered in legal practice, is absolutely necessary to redefine the crime of withdrawal libelous content and changing the name marginal.

Making a comparison between the standard of criminality, according to art. 268 of the new Criminal Code and Art. 259 of the Criminal Code in force, aimed at denouncing the crime of allegations, we find that the legislature has made substantive changes.

Thus, first, as I mentioned, a first amendment is to change the name completely marginal crime of "slanderous denunciation" to "mislead the judicial organs. "

Another change concerns the legal content of the standard version, form the base of the new rules. Analyzing the criminality rule, we find that there are two distinct ways normative.

Thus, the notification referred to in art.268 NCpen. object may be committing a criminal act (without indicating the author), be committing a criminal act by a person.

Thus, the crime of misleading the governing legal authorities so untrue on a referral by the criminal law tort and unfair allocation of committing an innocent person the real facts.

In fact, many of the facts brought before judicial bodies are non-existent facts, and such judicial bodies are determined to make certain investigations or to perform certain procedures to verify their veracity, which implies a waste of time, energy, personnel and resources the handling of cases will be expected to have no purpose.

If the criminal law in force, the crime is referred to the allegations denouncing a crime, the new indictment, that the misleading of judicial bodies, the aim of any action under criminal law, the text of art. N.C.pen 268. expressly providing that the criminal complaint, accusation or complaint made by, the existence of an offense under criminal law or in connection with the commission of such acts by an individual.

The argument for such changes lies in the fact that,in terms of of the new criminal legislation (art. 15NCpen .) actby the criminal law is the first of four key features of crime and criminal referral at the time, madethe accusation or complaint , the existence of a criminal prosecution under the law, it is clear of any action, because without this there can be no finding of infringement.

Regarding treated version provided by art. 268 par. No. 2 N.C.pen. it should be noted that it was maintained on the production or worsening ticluirea false evidence, but unlike current regulations, the goal is to prove the existence of a deed under false criminal law or unfair allocation of a person committing an innocent facts.

Another change to the text of the case indictments include replacing the sentence reduction provided for in art. 259 paragraph 3 of the Penal Code. effect of a case of punishment in order to encourage people who commit this crime to notify legal authorities if the denunciation, complaint or produced false evidence, but respect the limits, ie before the detention, arrest or put in motion criminal action against the person against whom there was denunciation, complaint or evidence were produced.

By comparing the two criminality, we find that the point system of enforcement, how the basic form-type differences exist in the sense that the enforcement regime set out by the new indictment is an alternate, while the option is treated as unique and identical to that of Previous incrimination.

3. The influence of statements (art.272 N.C.pen.)

Influence of statements is an indictment new offense built on the skeleton test to determine false testimony being as close and slanderous denunciation of the crime, if we consider the sentence to start a new accusation that refers to "an attempt to cause or determine a person's "determination that is nothing but a good attempt, so a slanderous denunciation.

We also believe that the offense was included offense under the Penal Code art.261¹. "Preventing participation in the process" as causing a person to not notice the judiciary, not to present evidence or to not give equivalent statements to prevent it from effectively participating in the process.

Rationale behind the introduction of the new criminality lies in ensuring access to justice by protecting the freedom of any person to address not only justice but also to be convinced that, through the use of it, i will do justice, regardless of any form of pressure exerted by a third person, either on him or on a family member.

Incorporation of content, we find that the offending material element of the new crime consists of two alternative actions, to try to determine the action of a person or action may cause a person to give false statements only (which corresponds to the material element of the crime prev. the art.261 of the current Criminal Code, namely trying to determine perjury), but does not refer to the prosecution, not to give statements to withdraw their statements or not to present evidence in a criminal case, civil or in any judicial proceeding.

Regarding the modalities of the material element according to the new text of incrimination, attempting to cause or determine a person must take place through corruption, coercion, or otherwise act intimidating effect. It is also necessary that these actions take place against a person or a family member on it.

By comparing the two criminal provisions, we note that the crime of influencing statements, as well as crimes under Art. 261 and 261¹ of the Penal Code in force, has the premise that a situation component, which involves a civil, criminal, but what is significant is that the area was extended to other cases'proceedings, thereby realizing any case before the judicial organs to be taken statements and evidence given.

As regards the subjective side, since influencing statements are made in order not to find an offense under the criminal law or of preventing finding out the truth in a criminal case, civil or any other procedure, we consider that the form of guilt is the direct intent, intent on the purpose of qualifying active subject.

The legislature has expressly provided that if the act of intimidation or corruption is crime itself, the rules on competition infringements, which means that this crime is not absorbed in the formation of crime to influence the content of statements.

Also, the legislature also provided a reason for punishment. According to art. 272 par. 2 N.C.pen. understanding of the asset is not a crime perpetrator and the person injured, occurred when the offenses for which criminal proceedings shall be initiated prior complaint or intervening reconciliation.

The importance and the need to criminalize such acts are fully justified by the current phenomenon of crime and the pressures on those who can contribute to justice, the laws of the German, Spanish, Italian, French and Finnish recently introducing such legislation.

In terms of enforcement regime, the new regulation tightens the penalties applicable to such facts. Thus, while the existing Criminal Code punishes perjury trying to determine a sentence ranging from 3 months to 2 years imprisonment, alternating with the fine, the new Criminal Code penalizes the crime with a punishment of between one year and five years jail, this time not the fine alternative.

4. Pressures on the judiciary (art. 276 N.C.pen.)

This indictment is novelty in the criminal law, its appearance is determined by ensuring impartiality and freedom and protecting judges and the prosecution in the exercise of the powers conferred by law to attempt to intimidate or influence them.

By analyzing the incriminating note, we can see that the material element of the crime is the action of making statements on committing a crime or serious disciplinary misconduct by the judge or by the prosecution, which includes criminal investigation body.

However, it is essential that these public statements to be false. Also, a second essential requirement is that the offense or serious disciplinary misconduct in relation to handling that case.

We believe that in assessing the severity of the disciplinary violation must rapotăm us to the Code of Ethics for judges and prosecutors and to the provisions of Law no. 303/2004 on the status of judges and prosecutors.

Since the action of making false public statements relating to the commission by the judge or prosecution of a crime or a serious disciplinary cases related to the investigation that urmăreşte a qualified purpose, namely to influence or intimidate them appreciate that the act can not be committed with direct intention only.

The criminalization of these acts is based on the realities of legal practice, but especially the frequency, intensity and the expression of these facts in recent years, consisting of attempts to influence or intimidation coming from the parties or their representatives in the manner shown during initiate a process, thereby achieving an atmosphere of seriously endangering the impartiality of judges or prosecutors.

In the system of enforcement, the legislature has provided a punishment of imprisonment up to one year, alternating with fine criminal punishment.

5. Violation of hearing solemnity (art.278 NCpen.)

Violations solemnity indictment hearing is not a new in the current Penal Code as provided in Art. Marginal offense in 2721 under the name "Contempt of judicial organs."

However between the two regulations is not identity, the purpose of Article 278 N.C.pen. incrimination. Solemnity is the protection and proper conduct of litigation in court and do not necessarily honor or reputation of judicial authority representatives.

Another difference between the two criminality concerns that the offense of contempt of the judicial bodies designed a procedure that takes place either before a court or before the criminal prosecution body, while the new indictment covers only the procedure to be conducted before the court.

Regarding the material element of the crime, it should be noted that this action is to use offensive or obscene words or gestures.

Action offender shall be liable to disrupt court business. In other words, not every irreverent attitude to the court, not every judicial misconduct can be punished according to art. 198 par. 4 points. h of the current Criminal Procedure Code is the offense of violation of the solemnity of the meeting, but the action of the perpetrator must have the ability to disrupt court business.

The active subject is not qualified, it can be any person subject to participate or assist in a procedure that takes place before the court.

Of course, the active subject of the crime can not be judge presiding at the hearing or participate in this event and could put the question of abusive conduct offenses.

Regarding the penalty, the legislature reduced the sentence limits, ie one month imprisonment for three months or a fine, against the current governing bodies of the crime of contempt of court, which provides for imprisonment from three months to one year or a fine.

Conclusions

The new regulations in relation to crimes against the administration of justice have been made because of new social realities. How they will respond to social needs, can be easily predicted, but cannot be accurately known before the entry into force of new Penal Code and its implementation.

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THE SALE OF ANOTHER PERSON'S PROPERTY AS VIEWED BY THE NEW CIVIL CODE LAWMAKER

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Abstract
This paper is an attempt to present the new regulations of the New Civil Code via the express introduction of the possibility to contract assets that, on the date of contract execution, are owned by third parties. For this purpose and given the New Civil Code has not become effective yet as its content is to be amended via the draft law on its implementation, our intention is to first present the current situation by an analysis of the Romanian and foreign doctrine and jurisprudence, in particular the French ones, followed by an analysis of the said new regulations.

Keywords*: sell, another person's property, New Civil Code, property, third party*

1. Introduction

This paper covers the discipline of civil law, and contracts respectively, with implications in the field of real estate rights and obligations.

The novelty of the present paper resides in that it attempts to analyze the sale of another person's property from a double perspective, i.e. a comparison between the current doctrine and jurisprudence and its new regulations.

The significance of this study is highlighted by the effects the new regulations on the sale selling another person's property will have on the security of the civil circuit, the changes of the jurisprudence over the latest years, and re-orientation of doctrine in terms of an analysis of the sale-purchase contract.

The need to amend and adapt the contract-related legal regulations to the social and economic reality has stringently manifested over the last years when forced interpretation of the effective laws was resorted to quite often in order to define the law governing the legal relation between the contracting parties.

Besides this shortcoming, the lawmaker's intervention was also necessary in areas and concerning issues that were not covered by previous regulations, and one of these areas is that of selling another person's property.

Although the topic has been extensively debated in the doctrine over time, with generally converging solutions, the judicial practice had its fair share of confusion, erroneous interpretations and diverging solutions, which resulting in a need for a legal standard.

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As the New Civil Code[1] has not become effective yet and its content is being subject to amendment via the draft law on its applicability, our intention is to first present the current situation, and later analyze the new regulations.

2. Selling another person's property as it is currently regulated

Art. 1294 of the Civil Code defines sale as a convention through which one of the parties transfers the property right over an asset he owns to the other party in exchange for a given price. As the doctrine sets forth that the transfer of property is solely related to the nature of the sale-purchase contract, not to its essence, it has been shown that sale is the "pattern of the translative ownership contract and the primary instrument for asset circulation"[2].

The sale-purchase transaction is, in principle, a translative property contract and, as a rule, at the time of the valid execution of the convention, it rightfully implements the transfer of the property right.

As a consequence, one of the requirements that the sold property has to fulfill is that the seller should be the owner of the sold property, and in this respect the issue of selling another person's property has come up (questions concern the disposal of a certain individual asset as, in the case of *res genera* or *res futura*, property is not transferred at the time of contract execution).

Selling another person's asset was possible under the Romanian law[3]. By entering into the contract, the seller undertook to transfer the buyer the quiet possession of the asset – *vacua possessio* – and, if he failed to do so, he/she had to pay damages.

The French Civil Code has a very strict position about it, stipulating in art. 1599 that the sale of another person's property is null and void. A person cannot sell an asset that he/she does not own[4]. The authors of the code considered that the sale of another person's property mismatched the new principle of spontaneous transfer of property[5].

The French doctrine estimated that, in order to speak about the sale of another person's property, two requirements should be fulfilled simultaneously: the seller is not the owner, and the contract should immediately operate the property transfer, giving the actual owner the possibility to initiate action for the recovery of possession.

As concerns the first requirement, it is believed that it leads to three difficult aspects in three distinctly analyzed situations.

In the case of successive sales, the winner is he who bought first, and the document chronological anteriority is applicable[6]. However, the solution is contrary to business security, and

[1] The New Civil Code was passed by Law No. 287/2009 on the Civil Code, published in the Romanian Official Journal, Part 1, No. 511 of 24.07.2009

[2] Liviu Stănciulescu, *Drept Civil. Contracte şi succesiuni*, the 4th edition, revised and updated, (Hamangiu, 2008), p. 25-26, also concerning J. Huet, *Traite de droit civil. Les principaux contrats speciaux*, (L.G.D.J., Paris, 2001), p. 179

[3] Camelia Toader, *Evicţiunea în Contractele Civile,* Ed. All, Bucureşti, 1997, p. 48-49

[4] P. Guiho, *Les actes de disposition sur la chose d autrui ,* RTD civ., p.1954.1 and the following

[5] Philippe Malaurie, Laurent Aynes, Pierre-Yves Gautier, *Contractele Speciale*, Ed. Wolters Kluwer Romania, Defrenois, 2009, p.124 and the following

[6] J. Boulanger, *Conflits entre droits non soumis a la publicite*, RTD civ., 1935, p.435.

quite often is dismissed by taking into account the anteriority of real estate publicity in the case of real estate or the anteriority of possession in the case of a tangible movable property.

Selling indivisible property is distinctly analyzed based on the nature of indivisibility and the specificity of the given sale:

- the sale of part of an indivisible property is a valid patrimony assignment;

- The sale of part of an indivisible asset is a valid sale, however, it is considered to be random, and its fate will depend on the result of the separation of jointly owned assets. If the asset is given to the seller, the contract is fully valid, and, if it belongs to another joint owner of indivisible property, the sale is void;

- when a joint owner of indivisible property sells said indivisible property without the other owners' consent and with no authorization of justice, irregularity is obvious, and as long as no division takes place, the sale is not opposable to the other joint owners of indivisible property, and the solution also depends on the result of the separation of the jointly owned assets[7].

If the seller is an apparent owner, it was decided[8] that the sale is valid if two requirements are fulfilled: the buyer acted in good faith and there was a joint error as concerns the seller's proprietorship over the relevant asset (*error communis facit jus*).

As to the immediate transfer of property, the French authors believe that this rule allows practice to render the legal interdiction more flexible, being sufficient to enter into contracts that do not involve the immediate transfer of property, as it is the case of the conditional sale (where seller assigns a right in a conditional manner though, in practice, it has been estimated that the sale of property over which a seller has solely a conditional right is not a sale of another person's property, but merely subject to the same condition as the seller's right[9]), the case of term sale (where property transfer is postponed until the seller acquires the property right, a kind transactions that is frequent in the commercial practice of sale of *res genera* and stock-exchange transactions; when a certain asset (*res certa*) is concerned, term sale is null if, on term maturity, the seller is not the owner of the asset at issue) and the case of the promissory contract (where the parties' convention is interpreted in that the seller undertakes to acquire the property over an asset belonging to another person in order to further transfer it to the buyer).

Art. 1599 of the French Civil Code stipulates the sanction of nullity as to the sale of another person's property, and jurisprudence states it is a relative nullity, in contrast to the 19th century opinion that nullity should be absolute as the sale lacks one core element – the property.

Based on the relative nature of nullity that could represent some interference, it has been estimated that it may be invoked by claim (*actio*) or peremptory exception (*exceptio*) solely by the buyer, not the seller (who is the holder of the obligation of guarantee and, consequently, cannot lose property) or the actual owner (who is a third party as to the contract, but who can build his defense by action for the recovery of possession)[10].

The action for annulment becomes ineffective after the lapse of a five-year term by confirmation of sale or its consolidation.

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[7] P. Jourdain, *Les actes de disposition sur la chose indivise,* RTD civ., 1987, p.498

[8] A. Danis-Fatome, *Apparence et contrats, thesis defended at Paris I,* LGDJ, 2004, 1897.I.313

[9] Cass. Civ. 3e, 20 June 1973, *Bull. Civ. III*, p. 433

[10] Cass. Civ. 3e, 9 March 2005, *Bull. Civ. II*, nr. 63, Cass. Civ. 3e, 8 December 1999, D. 2001, Jur. 269, n. C. Albiges

Said confirmation comes from the buyer who accepts the change of the translative property sale into a simple obligation-generating sale.

Consolidation concerns the removal of the vice that was affecting the sale[11] and may be the owner's renunciation to his claim or the owner's act that subsequently acquires the property before the request for nullity[12].

However, the French specialized literature constantly shows that the interdiction laid down in art. 1599[13] is at present more of a nuisance than something of use, and jurisprudence is trying to limit it both in terms of applicability, and sanctions.

If the French Civil Code, via art. 1599, declares any sale of another person's property null and void, our Civil Code contains no such express provision.

Starting from this idea[14], but under the influence of the French legislation, Dimitrie Alexandrescu was of opinion that, for lack of a provision similar to art. 1599, the sale of another person's property is null and void for lack of cause: "As the buyer aims to acquire the property right over the purchased asset, property cannot be transferred given that the seller is not the owner of the sold property. *Nemo dat quod non habet*." The theory reflected in the practice of the courts of law of the time, and equally rather recently in a case decision that motivates that "a sale-purchase contract is also absolutely null that was entered into … by former owners, acting as sellers this time, and a buyer, as concerns the same apartment, for lack of cause (art. 966 Civil Code) as the sold apartment was another person's property"[15].

There have been isolated cases where it was stated that the sale of another person's property would be null for lack of object. "One may get to acknowledge the radical nullity of the sale of another person's property based on the fact that its object is some property that the seller does not have at his disposal, that he cannot sell or that is not in his patrimony"[16].

Opinions incurred various changes after the Italian Commercial Code was issued in 1882 when the validity of such sale was accepted if it was a purely commercial sale. The solution was subsequently borrowed by the Italian Civil Code in 1942.

Matei B. Cantacuzino states that we can solve "the issue in light of the general principles. If the parties contracted the transaction in a fully informed manner, the transaction will be a contract binding the seller to a "*facere*" consisting of procuring the buyer the property of promised property in exchange for a money equivalent, an obligation that will be resolved via damages if its fulfillment fails. It is clear that the sale of another person's property remains for the third party owner *res inter alios acta*"[17].

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[11] Chr. Dupeyron, *La regularisation des actes nuls*, thesis in Toulouse, LGDJ, 1973, p. 66 and p. 76-96

[12] Cass. Com.., 2 July 1979, *Bull. Civ. IV*, p. 224

[13] Philippe Malaurie, Laurent Aynes, Pierre-Yves Gautier, *op. cit*, p. 124

[14] Dimitrie Alexandrescu, *Explicaţiunea teoretică şi practică a dreptului civil român*, Tipografia Naţională, Iaşi, 1898, VIII, p. 571, quoted by Dan Velicu, *Reglementarea Contractului de Vânzare în Noul Cod Civil (II)*, *Revista de drept comercial*, Issue 3/2010, p. 53

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[17] Matei B. Cantacuzino, *Elementele Dreptului Civil*, Ed. All Educaţional, Bucureşti, 1988, p. 620

The theory is preferred by other reputed authors[18] of the time who underline the following distinction: when the parties agree that the property right over the asset will be forthwith transferred to the buyer, the sale will be null as the seller should have been the proprietor of the property at the time of the sale. However, as property cannot be transferred, it may be presumed that the parties committed a substantial error as concerns the object of the agreement, which error, as per art. 954 para. 1 of the Civil Code, leads to the nullity of the sale. Should parties agree upon knowing the true situation, their agreement should be interpreted in that the seller undertook to procure the asset for the buyer in exchange for the agreed price, and the obligation is one of "doing".

In the modern doctrine, the solution is different as well depending on whether the contracting parties were in error or aware of the seller's proprietorship[19].

If the parties or at least the buyer were not aware that the seller was not the owner of the sold property, the sale is affected by relative nullity for error of the seller's essential capacity. It is only the seller who can invoke this relative nullity by claim if the price was paid or by peremptory exception if the price payment is pending. The former Supreme Court states in a case decision that the buyer himself could request the annulment of the sale only if the seller had not transferred him the quite use and possession of the asset, hence he had not fulfilled his contractual obligation; if the asset transfer did take place, the buyer may request a guarantee, under the law, against a possible eviction the victim of which he might become[20]. There were also contrary decisions in that the buyer would have this right "even when he was not disturbed and even when the seller acts in good faith, thus having a possibility to ask for the reimbursement of his price if he paid it or to refuse to pay it if he has not paid it yet"[21].

The action for annulment results in restoring the parties in their previous situations, hence price reimbursement if said price was already paid.

If the buyer loses the property in favour of the actual owner, the buyer having not requested the annulment of the document or before requesting said annulment, the seller finds himself under the obligation to present a guarantee, thus the requirements of liability in case of property loss in favour of another person being fulfilled: the disturbance comes from a third party, the eviction has a cause prior to sale, the buyer acts in good faith, not knowing the risk of losing the asset. There are authors who disagree with this decision, believing that the obligation to present a guarantee cannot be generated by a (even relatively) null contract as this assumption is that, after nullity is declared, it is believed to have never existed[22]. However, these authors overlook the assumption of the theory stating the seller's obligation to provide guarantee: the buyer lost the property in favour of another person before requesting the document annulment.

The seller will not be able to invoke nullity even if he acted in good faith, believing he is the actual owner, as the interpretation of art. 954 para. 2 of the Civil Code leads to the conclusion that it

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[18] C.Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de Drept Civil Român*, Ed.All, Bucureşti, 1997, vol. II, p. 555

[19] For this purpose, see Liviu Stănciulescu, *op. cit*, p. 53 and the following, Prof. Dr. Francisc Deak, *Tratat de Drept Civil, Contracte Speciale* Ed. Actami, Bucureşti, 1998, p. 42 and the following, R. Sanilevici, I. Macovei, *Consecinţele vânzării lucrului altuia în lumina soluţiilor practicii judiciare*, in R.R.D. issue 2/1975, p. 33 and the following, D. Cosma, *Teoria generală a actului juridic civil,* Editura Ştiinţifică, Bucureşti, 1969, p. 217

[20] Supreme Court, Civil Division, Decision No. 1816/1975, *Repertoriu de practică judiciară în materie civilă pe anii 1975-1980*, p. 87

[21] C. Hamangiu, N. Georgean, *Codul civil adnotat*, Bucureşti, 1925, vol. III, case No. 10, p. 380

[22] R. Codrea, *op. cit.*, p. 34

is the other contracting party the one who should be held responsible for the error as mistakes about a person's identity (*error de persona*) are not allowed.

The actual owner may protect and valorize his rights via an action for the recovery of possession, and he may not request the annulment of the contract as he is not a party thereof[23]. Such action for the recovery of possession could be lost by the owner if the buyer defends in a justified manner by invoking *usucapio* (a contract entered into with the apparent owner being a legal right for the 10-20 year *usucapio*) or the exception deriving from art. 1909 – 1910 of the Civil Code.

If the actual owner ratified the sale or the apparent seller has become the owner of the asset, the buyer cannot invoke the nullity of the agreement either.

This theory was opposed by that stipulating the sale is not a *intuitu personae* contract where the seller's identity and characteristics are important, and, on the other hand, an asset belonging to a certain person does not concern the substance of the asset, but the abstraction that the property legal relation is[24]; the mere fact of having entered into a property translative convention on real estate that does not belong to the seller cannot automatically and unequivocally result in the conclusion that buyer's consent was subject to vice by error, and this has to be supported by evidence on a case-by-case basis.[25]. It is proposed[26] to uphold the sale as validly executed and the possibility of its termination unless the seller fulfills his obligation to transfer the property right.

In support of this opinion, another author highlights that the buyer's right to *bona fide* request the annulment of the sale is undeniable if said buyer could prove that he had been misled by the seller in ill faith. If the error shadowing the seller's proprietorship or the substance of the asset cannot lead to nullity as per art. 954 of the Civil Code, the deceitful deeds used to determine the execution of a contract with a non-owner will decisively lead to this effect[27], deceit (*dol*) being considered a vice more serious and more dangerous than error (also taking into account deceit by purposeful non-communication of essential information, even when it is merely the consequence of the breach of the information obligation required by pre-contractual good will principle and loyalty).

When both parties enter into the contract knowing that the seller is not the owner of the property being sold, contrary to the theories expressed in the early 20th century doctrine as detailed above, at present, such a sale is considered[28] to be null pursuant to art. 948 of the Civil Code, as it is a speculative action and, hence, it has an illicit cause (except for commercial sales).

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[23] Bucharest Tribunal, IV Civil Section, Decision No. 385/21.02.1997 in *Culegere de practică judiciară a Tribunalului Bucureşti 1993-1997*, Ed.All Beck, Bucureşti, 1998, p. 58-59; Supreme Court of Justice, Civil Division No. 132/1994 in *Buletinul Jurisprudenţei, culegere de decizii pe anul 1994,* Ed.Continent XXI & Universul Bucureşti, 1994), p. 37-41

[24] D. Chirică, *Drept civil. Contracte speciale*, Ed.Lumina Lex, Bucuresti, 1997, p. 63

[25] D. Chirică, *Regimul juridic al circulaţiei imobilelor proprietate particulară (teză de doctorat)*, (1992), p. 51

[26] Camelia Toader, *op. cit.,* p. 57-58

[27] R. Codrea, *op. cit.,* p. 31

[28] F. Deak, *op. cit., p.* 43-44, M. Georgescu, Al. Oproiu, note to the Civil Decision No. 190/1979 of the Olt County Tribunal, in *Revista română de drept*, Issue 6/1980, p. 52-54 ; Dr. Eugeniu Safta-Romano, *Contracte Civile,* Ed. Graphix, Iaşi, 1993, p. 51 ; Bucharest Court of Appeal, III Civil Divison, Decision No. 1490/1999 in *Culegere de practică judiciară în materie civilă 1999*, Ed. Rosetti, Bucuresti, 2001, p. 76-78 ; Bucharest Court of Appeal, III Civil Divison, Decision No. 1236/2000 and IV Civil Division, Decision No. 2353/2000 in *Culegere de practică judiciară în materie civilă 2000*, Ed. Rosetti, Bucureşti, 2002), p. 89-91, p. 104-107

This time, nullity may be invoked by any concerned party, including the seller[29] and the actual owner (that has a right to choose between submitting an action for absolute nullity or an action for the recovery of possession).

If the asset disposed of is part of the public domain of the State or administrative territorial units, the contract is absolutely null in any situation and such assets cannot be disposed of (art. 135 of the Constitution).

In practice, an opinion was expressed according to which the sale of another person's property is absolutely null for lack of the actual owner's consent pursuant to art. 948 and the following of the Civil Code, the buyer's good or ill will being irrelevant[30].

A particular situation is that where a joint owner of indivisible property sells the indivisible property in itself, without the other co-owners' consent, (it is worth mentioning that any co-owner may freely decide on his share that is an ideal share of the relevant right, the buyer being subrogated to the seller's rights and subsequently participating in the division in his capacity of co-owner of indivisible owner[31]). The doctrine and jurisprudence predominantly[32] stated that in this case the rules of sale of another person's property are not applicable, but the rules typical of the indivisible state, whereas the fate of the sale-purchase contract is dependant on the result of the division[33].

If the property is part of the lot[34] of the seller that is a co-owner, given that the division has a declarative effect, he is retroactively considered an exclusive owner, and the sale is fully valid.

If the asset is assigned to another co-owner, then it is retroactively estimated that the seller is not the owner of the sold asset, and the rules on the sale of another person's property become applicable, i.e. such a convention is null[35].

As one may notice, if the indivisible property is sold by one of the co-owners, the other co-owners can only defend their rights by separation of the jointly owned assets, and cannot request the nullity or annulment of the sale contract while the asset is indivisible, not can they submit an action for the recovery of possession[36].

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[29] Bucharest Court of Appeal, IV Civil Divison, Decision No. 3184/2000 in *Culegere de practică judiciară în materie civilă 2000*, p. 102-104

[30] Bucharest Court of Appeal, III Civil Divison, Decision No. 1492/1999 in *Culegere de practică judiciară în materie civilă 1999*, p. 78-80

[31] Decision No. 1306/1995 of the Supreme Court of Justice, Civil Divison, in *Dreptul* Issue 2/1996, p. 109

[32] There is also a less shared opinion stating that such a contract may be partially annulled depending on the extent of the property share of the co-owners who did not agree to the property disposal, and the sale is maintained valid within the limits of the seller's share whereas the buyer is to participate to the asset separation as joint owner of indivisible property; in this respect, the Bucharest Tribunal, IV Civil Division, Decision No. 3617/1998, with a note in *Culegere de practică judiciară civilă 1998*, Ed. All Beck, Bucureşti, 2000, p. 34-39

[33] Prof. Dr. Francisc Deak, *op. cit.*, p. 44; R. Sanilevici, I. Macovei, *op. cit.*, p. 38; Supreme Court of Justice, Civil Division, Decision No. 1336/1992 in *Probleme de drept din deciziile Curţii Supreme de Justiţie (1990-1992)*, Ed. Orizonturi, Bucureşti, 1993, p. 53-56

[34] Supreme Court of Justice, Civil Division, Decision No. 2603/1993 în *Buletinul Jurisprudenţei, culegere de decizii pe anul 1993*, p. 39-41

[35] C-tin. Stătescu, C. Bîrsan, *Drept civil. Drepturile reale*, Ed. Universităţii Bucureşti, 1988, p. 179-180. According to another decision, sale is subject to a termination condition if the asset is distributed to the share of another co-owner (R. Sanilevici, I Macovei, *op. cit.*, p. 38)

[36] Prof. Dr. Francisc Deak, *op. cit.,* p. 46. For the same purpose, Decision No. 2603/1993 of the Supreme Court of Justice, Civil Division, in *Jurisprudenţa C.S.J., 1993*, p. 39 and the following

In the case of spouses' joint assets, the Family Code consecrates the rule of the tacit mandate between spouses, i.e. the spouses jointly administer, use and decide on the joint assets; should either of them exert these rights on his/hr own, he/she is presumed to have obtained the other spouse's consent. The rule does not govern cases of disposal or saddling of a real estate when both spouses' express consent is required (art. 35 of the Family Code). A contract executed upon breach of this requirement was considered[37] cancelable at the husband's request as he had not given his consent, which would be contrary to the principle of contract effect relativity.

The problematic of the sale of another person's property has also been debated by the European Court of Human Rights in cases concerning real estate abusively appropriated by the State on which said Court was notified. The decisions of the national courts in the field have been contradictory and controversial due to the incoherence and inconsequence of the special legislation.

Before Law No. 10/2001 was passed, jurisprudence has determined that, in cases of sale of another person's property, the action for the recovery of possession submitted by the actual owner against the third party who is a good-will secondary acquirer is acceptable, and a comparison of the concurrent property titles over the litigated asset is done. Appearance in the legal field is interpreted and subordinated not only to the buyer's good will, but also to the existence of a joint and invincible error.

After the effectiveness of Law No. 10/2001, the Supreme Court practice was that of denying actions for the recovery of possession, retaining either the buyers' good will only, or believing that the lawmaker had taken into account the buyer's good will under Law No. 10/2001, or estimating the largely interpreted appearance in the legal field as applicable, with no clear distinction between common and invincible error and good faith. In other cases, the Supreme Court of Justice did not resort to comparing property titles, on the grounds that a legal confirmation of the validity of the sale of another person's property (and there are quite a few situations where sale contracts entered into with former tenants were validated based on their good faith at the time of the contract execution) consolidated *ipso jure* the transmittal of the property right over the asset to the buyer's patrimony, which effect could not be annulled by property title comparison[38].

The Court constantly retained the breach of art. 1 of Protocol No. 1 to the Convention, and former owners were deprived of any reasonable possibility of re-gaining possession over real estates that were abusively appropriated by the State (cases Păduraru v. Romania, Străin v. Romania, Penescu v. Romania, Porteanu v. Romania).

3. The content of the new regulations

In order to analyze the provisions of the New Civil Code on the sale of another person's property, let us start from the new definition of the sale-purchase contract.

Art. 1650 of the New Civil Code stipulates that "the sale is the contract via which the seller transmits or, as the case may be, binds himself to transmit the buyer the property right over an asset in exchange for a price that the buyer binds himself to pay".

[37] I. Filipescu, *Tratat de dreptul familiei*, Ed. All, Bucureşti, 1993, p. 135; Supreme Tribunal, Guidance Decision No. 18/1963, in *JN* Issue 7/1963, p. 119

[38] Decision of the European Court of Human Rights as of 1 December 2005, final as of 1 March 2006, in case Păduraru v. Romania, published in the Official Journal, Part I, No. 514 as of 14.06.2006

Para. 2, providing that "a separated property right or any other right may also be transmitted by sale", gives legal power to the unanimous opinion of the doctrine in that the transmittal of property resides in the nature of the sale-purchase contract, and not its essence.

In principle, however, sale is a translative property contract. Pursuant to art. 1674 of the New Civil Code, "except for cases laid down by law or if the parties' will does not state the contrary, property is rightfully transmitted to the buyer at the time of the contract execution even if the asset has not been delivered yet or the price has not been paid yet". Even though the rule of the rightful transmittal of property is expressly consecrated at the very time of convention execution, art. 1650 defines sale as the contract by which the seller transmits or, as the case may be, he binds himself to transmit the buyer the property right over an asset (which is remindful of the sale-purchase preliminary contract), and art. 1672 and 1673 distinctly regulate among the seller's obligations that of transmittal of the property right over the sold asset.

Under these circumstances, the question already posed by the doctrine appears to be legitimate: how does the seller have the obligation to transfer the property or how could he execute such an obligation as long as a new manifestation of will, i.e. transfer of will, is no longer necessary[39]? The exception is the sale of real estate when the translative effect operates on the recording of the right in the real estate records.

Starting from the new obligation of the seller to transmit the property right over the sold asset, art. 1683 was added according to which "if, at the time a contract is executed for a defined individual asset, it is owned by a third party, the contract is valid, and the seller has to ensure the transmittal of the property right from its holder to the buyer.

The seller's obligation is considered to have been fulfilled either by the seller having acquired the asset, or the owner ratifying the sale, or by any other means, directly or indirectly, that procures the buyer the property over the asset".

One can notice that the seller has to ensure the transmittal of the property right and not transmit property, which rightfully translates to the buyer starting the time of the asset acquisition by the seller or the ratification of the contract by the owner if the law or the parties' will does not stipulate otherwise (art. 1683 para. 3). In other words, the right shall be transferred to the buyer's patrimony by virtue of the consent expressed at the time of contract execution, with no other transfer documents required[40].

If the seller fails to execute the obligation and does not ensure the transmittal of the property right to the buyer, the latter may request contract termination, reimbursement of the price and payment of damages if applicable.

As doctrine has traditionally analyzed, in relation to this topic, the sale of the asset that is joint property by one of the co-owners as a distinct matter, the New Civil Code lawmaker has consecrated special provisions on this situation.

Similarly to the former law stipulation, the co-owner is the exclusive holder of a share of the property right and may freely disposed of the same for lack of a contrary legal provision (art. 634 para. 1 of the New Civil Code). If he decides to dispose of his share, that is an ideal share of the asset, the buyer replaces the seller and becomes co-owner of the asset alongside with the other co-owners.

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[39] Florin Moțiu, *Contractele Speciale – în Noul Cod Civil*, Ed.Wolters Kluwer România, Bucureşti, 2010, p. 62
[40] Dan Velicu, *op. cit.*, p. 55

However, as far as the asset in itself is concerned, art. 641 para. 4 shows that any legal documents resulting in asset disposal or saddling, documents on use free of charge, assignments of real estate income and leases executed for a term that is longer than 3 years, as well as the documents that are exclusively intended to embellish the asset can be entered into only upon all co-owners' consent.

Any breach of the aforementioned rules leads to the inopposability of the document as to the co-owner who has not expressly or tacitly consented to the execution thereof (art. 642 para. 1).

Co-owners in such a situation may ratify the document, so, in the case of a sale-purchase contract entered into by any of the co-owners, the buyer acquires the exclusive property right over the entire asset.

This is the possible outcome of a separation of jointly owned assets if the asset is given to the seller co-owner in kind.

However, if the co-owner who sold the asset that represents joint property fails to subsequently the transmittal of the property over the entire asset to the buyer, the latter may request, besides damages, at his own discretion, either a reduction of the price proportional to the share he had not acquired, or contract termination unless he proves he would not have bought the asset had he known he would not obtain the property right over the entire asset.

As concerns the first alternative option, the reduction of the price pro rata the share the buyer did not acquire, the wording (art. 1683 paragraph 5 of the New Civil Code) shows that he will stay the owner within the limit of the acquired share of property, hence he is a co-owner of the asset, which means that the object of the sale is no longer the defined individual asset, but a share of the property right over the asset.

The buyer's second option is to request contract termination; however, the lawmaker considered the enforcement of a sanction only if the buyer had not bought the asset had he known he would not acquire the property right over the entire asset. If the buyer acted in an informed manner, buying even though he knew he would not get the property right over the entire asset, this means he accepted such risk and cannot request contract termination, but merely for damages and a pro rata reduction of the price.

The extent of the damages is appropriately determined as per art. 1702 and 1703, except that the buyer who was aware of the fact that, on contract execution, the asset did not fully belong to the seller cannot request the reimbursement of the expenses related to independent or benevolent works.

Another particular issue is the sale of spouses' jointly owned assets.

Art. 342 of the New Civil Code shows that each spouse may freely use, administer and dispose of his/her own assets under the law.

For jointly owned assets, art. 346 paragraph 1 stipulates that documents concerning the real asset disposal or saddling can be executed only upon both spouses' consent, and the sanction for failure to do so is relative nullity as per art. 347 paragraph 1. An exception are legal documents resulting in disposal of assets against payment for jointly owned movables whose disposal is not subject, under the law, to certain publicity formalities, that may be executed by either spouse on his or her own. If the non-consenting spouse rights are harmed, he/she may only request damages from the other spouse, and the rights acquired by third parties in good faith will not be affected.

This rule also applies to the documents art. 346 paragraph 1 concern when the third party has submitted the required formalities in order to inform of the nature of the asset and he is protected against the effects of nullity (art. 347 paragraph 2).

4. Conclusions

Under the current legislation, in consideration of the fact that none of the aforementioned theories is free from all criticism, our opinion is in favour of the nullity of the sale of another person's property as a general rule, be it relative or absolute, depending on the given distinct circumstances, appreciating that the theory of the termination condition starts from the idea of a seller's obligation to transfer property, that at present is inexistent, as transfer property is generally done by the contract execution itself.

As one may easily notice, the New Civil Code consecrates the theory of the terminable nature of the sale of another person's property, a solution supported by a series of Romanian authors, accepted by various bodies of law (Spanish, German, Portuguese, Italian) and preferred by the French doctrine that considers it in line with the current requirements of the civil circuit[41]. The theory of the validity of such sale was consecrated by the United Nations' Convention on Contracts for the International Sale of Goods, passed in Vienna in 1980 and ratified by Romania by Law No. 24/1991.

The Romanian legislation thus aligns to certain requirements of the national and international doctrine and jurisprudence and the viability of the new regulations has only to pass the test of time.

In order to respond to the requirements of our dynamic present and the ever changing realities, the authors of the New Civil Code have promoted original solutions, upheld internationally acknowledged principles that have never been implemented in Romania, the validity of the sale of another person's property being a reformatory element among the obligations regulated by the Civil Code.

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[41] C. Toader, *op. cit.*, p. 58

THE LEGAL CONCEPT OF TRADING COMPANIES, ACCORDING TO THE NEW CIVIL CODE. THE NOTION OF *PROFESSIONALS*

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Abstract

The unification of private law according to the monist theory which is the fundament of the new civil code adopted by Law 287/2009, refers to the legal concept of trading companies, having as starting point the provisions of article 3, where the legislator defines a new legal concept – the professionals. According to the above mentioned article, as envisaged to be amended by the draft laws for implementing the new civil code, one of the important categories of professionals are the trading companies.

In the spirit of unifying the private law and producing a new civil code to represent the common law applicable to trading companies, the legislator, in art. 1888, presents the forms of trading companies, the five (5) forms of trading companies regulated in art. 2 of Law no. 31/1990 on trading companies as republished and amended. Besides the five forms of trading companies (general partnership, limited partnership, joint stock company, limited partnership by shares, limited liability company), the new civil code regulates as forms of company, the simple company and the participation company, the cooperative companies and, in a very general wording, "other type of company especially regulated by law".

Therefore, the new civil code represents only the common law for all professionals, including the trading companies, the latter being regulated by a special legislation, primarily by Law 31/1990 on trading companies as republished and amended.

Keywords: *new civil code; trading companies; professionals; monist theory; unification of private law.*

1. Introduction

The unification of private law according to the monist theory which is the fundament of the new civil code adopted by Law 287/2009, refers to the legal concept of trading companies, having as starting point the provisions of article 3, where the legislator defines a new legal concept – the professionals.

According to the above mentioned article, as envisaged to be amended by the draft law for implementing the new civil code, one of the important categories of professionals is the trading companies. In the spirit of unifying the private law and producing a new civil code to represent the common law applicable to trading companies, the legislator, in art. 1888, presents the forms of trading companies, the five (5) forms of trading companies regulated in art. 2 of Law no. 31/1990 on trading companies as republished and amended. Besides the five forms of trading companies (general partnership, limited partnership, joint stock company, limited partnership by shares, limited liability company), the new civil code regulates as forms of company, the simple company and the

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participation company, the cooperative companies and, in a very general wording, "other type of company especially regulated by law".

Therefore, the new civil code represents only the common law for all professionals, including the trading companies, the latter being regulated by a special legislation, primarily by Law 31/1990 on trading companies as republished and amended.

2. The legal concept of *professionals*

One of the newest provisions comprised by the new civil code is the introduction of the concept of *professionals*. The scope of the provisions of the new civil code concerns both the *professionals* and other subjects of civil law. Therefore, the first conclusion is that the *professionals* are one of the categories of civil law subjects that are involved in civil law relations (*stricto sensu*), as well as in relations of commercial law, administrative law, criminal law, financial law, etc.

The legislator defines the concept of professionals by using the concept of undertaking. Thus, according to article 3 paragraph 2, *the professionals are those who develop an undertaking*. The undertaking is defined by the legislator in article 3 paragraph 3, as being *the systematic exercise by one or several persons of an organized activity which consists in producing, managing or selling goods or in service delivery, no matter if the goal is obtaining profit.* This definition is amended by the legislator in article 6 paragraph 1 of the implementation draft law, where the concept of *professionals* includes the concepts of trader, undertaker, economic operator, as well as other persons authorized to carry out an activity with or without economic character. These legal texts show the concepts of *professionals*, undertakings, undertakers, traders, economic operators, very important for configuring the legal concept of trading companies.

Among all these concepts, only the concept of *professionals* appears for the first time in the national regulations, being *genus proximus* as compared to the concepts of undertaker, economic operator etc. *Differentia specifica* is determined by the particularities of each category which, generally come under the concept of *professionals*.

As far as the trader- natural person is concerned – the legal framework is represented by GEO no. 44/2008 on carrying out economic activities by authorized natural persons, individual and family undertakings[1] and, naturally, by article 7 and the following of the Commercial Code. By repealing the Commercial Code, the only normative act which regulates the activity of the trader- natural person is GEO no. 44/2008, but this piece of legislation does not define the trader.

According to the provisions of the new civil code, of the implementing draft law, of article 6 paragraph 2, the wording which once represented the substance of defining the trader, respectively *trading acts* or *trading deeds* is replaced by the wording *production, trading or service delivery activities.* By abandoning the concepts of *trading acts* and *trading deeds,* the objective criteria of defining the trader disappears, no matter if it concerns a natural person or a legal person – trading companies[2].

[1] Published in Official Gazette no 328/25.04.2008

[2] Smaranda Angheni, Dreptul comercial – între tradiţionalism şi modernism, Revista Curierul Judiciar nr. 9/2010, p. 484-485; Gheorghe Buta, Noul cod civil şi unitatea dreptului privat. Noul Cod civil. Comentarii, Editura Universul Juridic 2010, p. 15-40

At the same time, the content of this draft disposes that article 1 of law no. 26/1990 on the trading registry, as further amended and republished[3], is to be amended. This article defines the traders as being *the natural persons authorized to carry out economic activities, the undertakings, the individual or family undertakings, the national companies and enterprises, the autonomous companies, the economic interest groups, the European economic interest groups and the cooperative organizations.* Therefore, these legal entities may be included in the concept of *professionals.*

As far as the commercial undertaking is concerned, the specialized literature[4] identified its particularities. Therefore, the economic activity deployed by a commercial undertaking is carried out by one or several persons as *professionals*, these *professionals* having the quality of a trader. At the same time, there were points of view in the direction that the object of the economic activity is represented by the production and movement of goods, works and service delivery and the goal of the activity is obtaining a profit.

In the context of unifying the private law, the commercial undertaking may represent a criterion for establishing the commercial law matter, as well as the trader quality[5].

3. The legal concept of trading companies

As it results from the above mentioned provisions, the trading companies are included in the *professionals'* category because they develop an undertaking in the sense of art. 3 paragraphs 2 and 3 of the new civil code. At the same time, taking into consideration article 8 paragraph 1 of the implementing draft law, which proposes that article 1 of Law 31/1990 on the trading companies is amended, in order to carry out production, trade or service delivery activities, the natural persons and the legal persons may assemble and establish trading companies.

Therefore, the trading companies are characterized by: they represent a category of ***professionals***, they develop an **undertaking** which carry out production, trade or service delivery activities; they are **traders**; they are regulated mainly by special law (Law 31/1990 on the trading companies, as republished and amended), provisions which complete themselves with those of the civil code.

In our opinion, the **legal concept** of the trading companies can only be that of a professional – trader that carry out the activities provided by the law in order to make a profit.

4. Aspects on trading companies according to the new civil code.

4.1. Forms of companies. In the context of unifying the private law and producing a new civil code to represent the common law applicable to trading companies, the legislator, in art. 1888, presents the forms of trading companies, the five (5) forms of trading companies regulated in art. 2 of Law no. 31/1990 on trading companies as republished and amended. Besides the five forms of trading companies (general partnership, limited partnership, joint stock company, limited partnership

[3] Republished in Official Gazette no. 49/4.02.1998

[4] Stanciu D. Cărpenaru – Dreptul comercial în condițiile noului cod civil – Revista Curierul Judiciar nr. 10/2010 p. 545-546

[5] op. cit. p. 545.

by shares, limited liability company), the new civil code regulates as forms of company, the **simple company** and the **participation company**, the **cooperative companies** and, in a very general wording, "other **type** of company especially regulated by law".

Having in mind the wording of the legislator, it is easy to see the inconsistency of the terminology used in the text. So, even if in art. 1888 the title refers to the **forms of companies**, at the end of the text, the legislator abandons the wording "forms of companies" and refers to "other **type** of company", using, probably with the same meaning, the concept of "**type".** Or, in our opinion, the content of the word "type" is larger than that of "form". In fact, in the specialised literature[6], there are two types of trading companies, at least in respect of their form: **partnerships and business corporations.** There is an intermediary form of company, the limited liability company, which borrows features from the two already stated above.

At the same time, each form of company may comprise different types of companies, like in the case of cooperative companies which are craftsmanship cooperative companies, consumption cooperative companies, housing cooperative companies, transportation cooperative companies, etc.

4.2. Trading companies. Contractual conception. The contractual conception, determined by the development of the theory of contracts the last century, explains the existence of trading companies starting from the validity conditions necessary for any contract and from the contractual techniques which determine the legal relationships in the framework of the company. The disadvantages of this theory are determined by the specific aspects of a trading company, aspects impossible to be explained only from the point of view of contractual mechanisms. Also, such a concept cannot explain the existence of single persons' companies because in this case, the agreement, essential for any contract, is missing.

That's why, the theories tried to define the trading company from the institutional point of view, starting from the fact that the legal institution is an ensemble of rules that organizes, in a mandatory and long-lasting manner, a group of persons having a well established goal.

4.3. Legal framework. At present, the new civil code defines "the company" using the contractual theory applicable to trading companies, except for the"de facto" limitations of single person companies.

Therefore, according to art. 1881 of the new civil code, "through the company contract, two or more persons are binding each other to cooperate in order to carry on an activity and to contribute to this activity in cash, goods, in specific knowledge or prestations, with the aim of sharing the benefits or to use the economy that may result form this activity".

The definition is compatible with the specificities of trading companies, even if the special legislation provides, taking into consideration the form of the trading company, the sorts of the contributions to the social capital or to the company's assets.

The element which differentiates the trading company in all its forms from the "simple company" or from the "participation company" is its **institutional dimension – of legal person,** meaning that in all cases, the trading companies have legal personality while, in the other cases, this is possible only if the partners have decided this way.

[6] S. Angheni, M. Volonciu, C. Stoica, Drept Comercial, Ed. CH Beck 2008; St. D. Cărpenaru, Tratat de drept comercial, Ed. Universul Juridic 2009, p. 189 şi urm.

"If, according to the partners' will, the company is to acquire legal personality, no matter of the object of activity, it may be set up only in the forms and conditions described by the special law which gives it legal personality" (art. 1889 para. 2).

Therefore, the first observation in relation to trading companies, in the context of the new provisions of the civil code, is that the special provisions that obviously add-on to those of the civil code, continue to exist.

The meaning of "contract" of the trading company is important, especially **in respect of the conditions of validity.**

4.4. Legal status of the contributions in common assets. The newest provision applicable to trading companies refers to the **legal capacity of the spouse to become or not partner in a trading company,** if there are common assets to be contributed to the company. So, according to art. 1882 second paragraph, "a spouse cannot become partner by contributing with common assets without the consent of the other spouse", the provisions of art. 349 being applicable accordingly. From this point of view, the regulation in the new civil code regarding the legal status of the contribution in company of common assets is salutary.

So, according to art. 348 "The common assets may be subject to contribution in companies, associations and foundations, according to the law, the provisions of art. 346 and 347 being applicable accordingly". Therefore, these provisions have to be corroborated with those in art. 1882 second paragraph, which establishes the necessity of the agreement of the other spouse.

Thus, under the sanction of a voidable contract provided for in art. 347, none of the spouses can, without the consent of the other, dispose of the common assets as contribution to a company (including a trading company) or acquire participating shares or, shares, according to the case (art. 349 first paragraph).

According to art. 349 second paragraph, "In the cases of trading companies whose shares are admitted to trading on a regulated market, the spouse who consented to using the common assets can only ask for damages from the other spouse, without affecting the rights of third parties".

The participation shares or shares are common assets but the spouse who became partner is the one exercising the rights determined by this quality on his own.

Another important provision representing **common law** for trading companies, even for the companies enjoying legal personality, relates to the liability of partners for social debts.

The contractual theory regulating companies in general determines the partners' liability as well, which usually is **unlimited and jointly, with a subsidiary character,** which means that the third party creditors of the company will follow first the liable company for their debts and only in subsidiary, the partners who, according to art. 1889 para 1, are liable jointly and unlimitedly. This provision has exceptions provided expressly by the special legislation, in this case, the law of trading companies.

4.5. The simple company. According to art. 1892 para 1, the simple company doesn't enjoy legal personality. Even so, if the partners wish that the company acquires legal personality, in the modification act of the company contract, they shall expressly indicate the legal form, adapting the content of the company contract according to the provisions in the special legislation which regulates that particular form of company.

Acquiring legal personality is carried out by transforming the simple company in another form of company, a trading company for example. In this case, the provisions of art. 1892 para 3

second paragraph are applicable. According to this article, the partners and the **newly formed company** are jointly and indivisibly liable for all debts of the company set up before the acquisition of legal personality.

4.6. The *de facto* company. The previous legislation, the Civil code, the Commercial code, Law no. 31/1990 – the law of trading companies, didn't regulate the *de facto* company. The only situation regulated by the law was and still is the "irregularly set up company". The specialized literature analyzed the Italian law and concluded that the Romanian-Italian law provides only for regularly set up companies and for illegally or irregularly set up companies[7].

For the first time in the new civil code, the legislator introduces the *de facto* companies, providing in art. 1893 that "the companies which have to undergo the procedure of registration according to the law and which remain unregistered, as well as the *de facto* companies, are assimilated to simple companies".

The importance of this provision for trading companies is obvious, as long as these companies are subject to registration in order to acquire legal personality. Studying the wording of the text, we conclude that unregistered trading companies aren't *de facto* companies as these ones are, according to the legislator, separate from the unregistered companies, which means that the opinion of the specialized literature is confirmed[8]. According to the specialized literature, „the Romanian law provides only for irregularly set up companies and not for *de facto* companies".

Both companies subject to registration according to the law that remain unregistered and the *de facto* companies are assimilated to simple companies.

4.7. The legal of the contributions of partners. The provisions of the new civil code are **common law** for the contributions of partners in companies, in general. Because they are common law, there are, obviously, rules and principles. Therefore, art. 1883 provides for the regime of the contributions, the legislator separating the companies enjoying legal personality from the companies without legal personality. For the first ones, the contributions² made to the company's assets and in the second, they become **joint ownership of partner**s, except for the case when the partners have expressly decided that the contributions become **common use.**

Formally, the legislator pointed out that, if among the assets contributed to the company there is real estate; the company's contract shall be authenticated, for the transfer of property to the company as well as in the case of other real rights. The transfer is subject to **publicity formalities required by the law.**

As far as the sorts of contributions are concerned, the legislator provides in the new civil code all sorts of contributions: contribution in cash, contribution in intangible assets and contributions in prestations or in specific knowledge. It is very important that, according to the legislator, the sum of these contributions generates the social capital. **The general text** is art. 1894 entitled "Formation of the social capital". Here, the legislator, in paragraph 1, provides that "The partners contribute to the formation of the social capital of the company with contributions in cash or in assets, according to the case". Therefore, the legislator takes into account only liquidities and other assets in order to form the

[7] I.L. Georgescu, Drept comercial român, vol II, Ed. All Beck – colecţia Restitutio, 2002, p. 102 şi literatura citată acolo.

[8] Idem.

social capital. Paragraph 3 of the same article mentions that "the partners may contribute with prestations or specific knowledge, as contributions in company.

Thus, even if all sorts of contributions are provided in the title "**Formation of the social capital**", in paragraph 3 of art. 1894, the legislator does no longer speak about contribution to the capital but about company contribution, which is correct because, at least for trading companies, the contributions in prestations or specific knowledge cannot be brought in the social capital but, only in some cases, in the company's assets.

In our opinion, it would have been more appropriate that the legislator differentiates between "**company assets**" and "**social capital**". It is true that the social capital is part of the company's assets, but not all assets may represent contribution to capital, but on the other hand, it is possible that, according to the law, they represent contribution to company's assets, as correctly is provided by the legislator, as "company contribution".

For the **contribution in cash**, the provision in art. 1892 partially resembles to the rule provided in art. 62 para 2 of Law on trading companies no. 31/1990 as amended. The common point of the two provisions is the liability of the partner who is late in fulfilling the obligation to deliver the registered contribution to the social capital. According to the two texts, the partner is held liable towards the company for the subscribed sum of money and for the legal interest at the moment of deadline and for any other **damages** brought to the company. The only difference is that the new civil code refers to the **non-execution** of the obligation by the partner - debtor. On the other hand, in art. 65 para 2 of Law 31/1990, the legislator takes into account the simple "**delay"** in fulfilling the obligation. In the two situations, the debtor is *de jure* noticed just by reaching the deadline, only, in the case of trading companies, the rule „*dies inerpellat pro homine*" provided by art. 43 of the Commercial code is applied.

Taking into consideration that the new civil code unifies the private law, the general rule set out in art. 1898 regarding the *de jure* notice of the debtor-partner is also applicable to trading companies. Comparing the two texts of the new civil code and of the law on trading companies, we may see another difference. The liability for the damages brought to the company operates for the delay in execution of the contribution no matter of its nature.

In the new civil code, the liability for the "damages" brought to the company for delay in contribution is regulated separately for each category (sort) of contribution (art. 1897, art. 1899).

Each partner who is liable towards the company and towards the other partner has the obligation of contribution; the rights resulting from the partnership shares are suspended until the contribution to the social capital is made (art. 1895). As far as the trading companies are concerned, only for joint stock companies the law provides in an imperative manner the suspension of the respective rights; for the other forms of companies, this "measure" doesn't exist unless it was expressly provided in the constitutive act. It is interesting to see if, in the future, the law on trading companies will be "amended" in order to match some of the provisions of the new civil code, provisions regarding companies in general.

Another provision regards the **contributions in prestations and in specific knowledge.**

The obligations of the partner who employs himself to provide certain prestations or to bring certain specific knowledge to the company, as social contribution, are to provide the prestations or the specific knowledge in a continuous manner for the entire existence of the partner's quality and to bring in the company the income from the activities which are object of contribution.

The contributions in prestations or in specific knowledge are made by the partner who obliged himself to carry on certain actual activities and by providing to the companies certain pieces of

information in order to fulfill its objective. The sanctions applicable to the partner who doesn't fulfill this obligation are the exclusion and, according to the case, payment of damages.

For the contribution in **tangible assets**, the legislator expressly regulates three categories of such assets: debts, shares or partnership shares or credit titles, the last having the legal status of the contributions in debts as far as the liability of partner is concerned. Thus, for the contribution in debts, the partner is liable for their **existence** at the moment of the contribution, as well as for cashing it at deadline. If the company doesn't cash in the debt, the partner who brought in the debt (as contribution) shall be liable for paying the respective amount, the legal interest and any other amount, as damages.

The opinion of the legislator regarding the shares and the partnership shares issued by other trading company is interesting, as they aren't considered **debts** but intangible assets in the general meaning. The contribution in shares or partnership shares is considered contribution in intangible assets, respectively ownership acts, as, according to art. 1897 para 2, "the partner who contributes in shares or partnership shares issued by other company is liable for the contribution just like a seller is liable towards the buyer".

The legal status of the contribution in **tangible** assets is different according to the nature of the right transferred to the company by contribution of that respective asset (art. 1896). Thus, if the ownership or other real right is contributed to the company, the partners is liable for the contribution just like the seller is liable towards the buyer (the company) and if the right of use is contributed in the company, the obligations of the partners resemble to the obligations of a lessor toward a lessee (company)."

If a fungible asset is contributed to the company, the company takes ownership over it, even if this isn't expressly provided in the contract.

In our opinion, the **legal concept** of the trading companies can only be that of a professional – trader that carry out the activities provided by the law in order to make a profit.

5. Conclusions

The new civil code represents only the common law for all professionals, including the trading companies, the latter being regulated by a special legislation, primarily by Law 31/1990 on trading companies as republished and amended. Thus, the provisions of the new civil code shall be the common law for trading companies, regulated by special laws which, in some cases, need to be "amended".

The *professionals* are one of the categories of civil law subjects that are involved in civil law relations (*stricto sensu*), as well as in relations of commercial law, administrative law, criminal law, financial law, etc.

As far as the commercial undertaking is concerned, the specialized literature identified its particularities. Therefore, the economic activity deployed by a commercial undertaking is carried out by one or several persons as *professionals*, these *professionals* having the quality of a trader. At the same time, there were points of view in the direction that the object of the economic activity is represented by the production and movement of goods, works and service delivery and the goal of the activity is obtaining a profit.

The trading companies are a category of *professionals*, they develop an undertaking which carry out production, trade or service delivery activities; they are traders; they are regulated mainly by special law (Law 31/1990 on the trading companies, as republished and amended), provisions which complete themselves with those of the civil code.

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TEORETICAL AND PRACTICAL ASPECTS OF ERROR AND INTERPRETATION OF THE CONTRACT. ERROR IN STATEMENT

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Abstract
In civil law the error is a consecrated institution. In this research degree, our propose is to analyze the error and the interpretation of the contract; the error in declaration, in all its aspects that can pose, a comparative manner, both in the light of the new Civil Code as in the light of civil regulation in force. In the context of new procedures on the Civil Code, we can appreciate that a new succinct analysis of the error institution and interpretation of the contract is necessary to diminish the everlasting doctrine questions marks. In order to complete a comprehensive analysis of this institution we will study the basic characteristics of the notion of error, its types (Taking into account the particular error, the interpretation of the contract and declaration error), sanction and its applications field in the new Civil Code .

Keywords: *will, consent, the error in the declaration, contract*

Introduction

The purpose of this study is, as the title shows, error interpreting and notification of the contract, along with error in statement, a field which requires a special attention for this error category. The study also dwells on reasons invoked to obtain the cancellation of the contract.

The interpreting and notification substance of the contract has been subjected to endless controversy and difficulties of applying and interpreting rules that govern it.

The applicability of the legal error, the notion of the object's substantial quality, are just some of the aspects, out of the many aspects brought forward in the paper, which enhance the idea that, in relation with social and contractual dynamism, re-analysing the notion of a legal act is interesting and useful both theoretically and in practice,

The paper's main aim lies in studying doctrinarian concepts regarding error interpretation and notification of the contract, as well as the error in statement, under the new Civil Code, within specialised law practise and comparative criminal procedure.

The paper contents

As regards vices of consent, the novelties that the new regulation provides are significant. Thus, pursuing the model of modern legislation and of the Unidriot Principles, the essential error

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only will open the way of an action in cancelling the contract. As compared to current regulation, error regarding the nature or the object of the contract is treated as a relative invalidity cause.

Moreover, legal error and deceit are regulated, and the damage acquires a general vocation to protect the unfavourised party in a contractual relation and a relation that amends serious contractual imbalances through the unfair behaviour of the other party.

In order for the legal act to produce normal effects and be fully valid, there beiing a will that create does not suffice. The will must not be vitiated. The will is vitiated when it is not free and unaltered in its manifestation. The will is altered when there intervenes an error cause, which, while not serious enough to destroy it, is serious enough to alter it.

When the error case is due to a random event, rather than the will of a person, the alteration bears the name of error as such. When, the error cause is due to a person's fraudulent manoeuvres, the error is called deceit.

Vices of will do not hinder the formation of the legal civil act. This distinguishes them from the absence of will.

Either internal, or produced by another party's fraudulent manoeuvres, represents a vice of will without the distinction between a case where it refers to a state of affairs and a case where it refers to a legal precept. The principle ''nemo jus ignorare censetur" does not apply to cases where the law defends individual will against its own errors. Cases can emerge where the error or one or both persons between which a legal relation emerges, give way to a disagreement between the parties regarding a modality of the relation.

In such cases, the error is more than a vice of consent, because the disagreement it produces between parties prevents the relation from transforming.

The error (be it a legal or a fact error, the law does not distinguish between such types) can be more than a vice; it can be a cause of disagreement and in that case, the contract was not able to be formed, because the agreement lacks.

Besides these cases, the error only leads to the alteration of the contract when it concerns the substance of the object.

As it is known, the notion of substantial qualities of the object of the legal act has been interpreted in two ways.

According to the objective conception, the error regarding the substance of the object, as the contract's interpretation shows, boils down to the error regarding the substance the commodity is made of, its specific qualities and properties and those that distinguish it from objects of another type.

For example, there exists an error regarding the substance when the person, wanting to buy a genuine painting, mistakenly buys a copy, or buys an object which it believes to be golden, but the object is made of brass, it is obvious that the person would not have bought the copy or the brass object, had it known the genuine qualities of the purchased objects.

According to subjective conception, unanimous in modern doctrine, the notion of substance of the legal act object has a much wider significance, as its contents includes any trait that has been determined upon the completion of the legal act. The substance designates the substantial quality, that is the quality of the object that the parties focused on.

The main idea is to know whether a certain quality is substantial or not. This is assessed on a-case-to-case basis, according to the circumstances of the completion of the respective legal act.

For example, it is possible for the material that the object is made of, which usually represents a substantial quality, not to be of interest when an object purchased, taking into account its age.

It remains to establish the substantial qualities on a case-to-case basis. The subjective interpretation, once established as a rule, can lends itself to two modalities, and one can analyse: what is the quality that has determined the individual, the commissioner who made the error, or what is the quality considered as determinant in general view.

Opting between *in concreto* and *in abstracto* reasoning remains to be done.

The rift between the two criteria does not render them contradictory. It only underlines the fact that the in concreto reasoning is not in itself wider or smaller than the in abstracto one. It all depends on the liberalism or the toughness of judges to consider themselves convinced that the error they noticed was determinant for the person who committed it.

There can only be one conclusion. It is recommendable to use both criteria, of which the consideration of the act completion, the in concreto reasoning, can never be omitted.

Under the new Civil Code, the errors in essential in the following cases:

1.When it refers to the nature or the object of the contract.

2.When it refers to the identity of the object or its quality or any other circumstance considered essential by the parties in the absence of which the contract would not have been signed.

3.When it refers to the identity of the person or one of its qualities, in the absence of which the contract would not have been signed.

In the situation of the assumed error, that is if circumstances of the completion of the acts showed the party the probability of a false representation, but accepting the risk, agrees to the completion of the act, we cannot invalidate the act because the potential occurrence of the error was represented partially in the formation of the will, and thus assumed.

The novelty regarding the assumed error (art. 1209 the new Civil Code) lies in the banning of the objective criterion regarding error predictability.

We mention that a psychic event that does not correspond to a knowledge defect, but to an error of positive assessment cannot be judged as an errors regarding the legal act's substantial qualities.

Error regarding the substance with reference to the object of the counterservice is also mentioned.

Error can also reconcern the object of the service itself. In this case, for the reason identity, the production of the same effects should be acknowledged, for example if the salesperson sells a painting believing it is a copy, but the painting is actually the original.

The conclusion here is that, in principle, the error relating to one's own service can be invoked as a reason to cancel the legal act.

After analysing some aspects referring to the evolution of error regulation and various types of error, we will try to focus on error interpreting and notification of the contract, along with error in statement.

We can thus say that interpreting contracts presupposes the determination and the qualification of its content, of its clauses, in order to set the parties' rights and obligations.

If the parties' will is clearly voiced, interpreting is ruled out. This is necessary only if there exists a discrepancy between the real will and the declared will of the parties, when clauses are equivocal, confused or contradictory or the contract is incomplete.

Interpreting a contract is a logico-legal process whereby its unclear or confuse clauses are determined. .[1]

[1] Gheorghe Beleiu, Roman civil law. Introduction to civil law. Subjects of civil law. "Sansa SRL", ppublishing and press house Bucharest,1992.

If the norm is ambiguous, imprecise or unclear, one can resort to interpreting criteria, including equity[2], to remove potential contradictions between the contract's clauses and the clarification of the meaning that must be assigned to equivocal terms.

The positive right limits itself to giving some advice regarding contract interpreting, without drawing a hierarchy of methods.

The judge required to solve the case calling for a clause interpretation is not bound to apply these rules in a certain order. They are combined, being applied in a complementary way.

Although the interpretation of the contract and the error dispute are displayed on different terrains, an inevitable conformity is established between the two.

Both the contract and the statement of will of the party in error (be it with intention or tacit) are an object of interpretation.

We can talk about the existence of error only after the correct achievement of the interpretation both of the contract and of the statement. The issue is laid out in concrete terms, because the received statement, once it makes the recipient believe it voices the will of the party making the statement, can, however, have several meanings.

The contract's objective interpretation in line with good will can allow that, amid various interpretations, the one closest to the nature and object of the contract prevail, taking into account the potential acknowledgement of error that could derive from admitting a different interpretative solution.

One can get to rule out the claiming nature of the contract, due to error, if the significance of the contract is made to coincide with that of the will unaffected by error. Civil law acknowledges contractual freedom in interpreting legal acts, with the internal will of contract makers prevailing. Will autonomy is fundamental.

In commercial law, the declared will prevails and documents and specific contracts are being used. There can also exist error when the contract's interpretation does not rule out a rift between the signification of the contract and the signification that the party had given to its statement.

Given that the will of the contractual party is voiced in the statement, we infer that the former should also be interpreted. This gives way to a potential combination of interpretation and dispute of the act for error.

.As a conclusion, we can say that interpretation operates both with respect to the contract and to the statement; interpretation will be done first regarding the contract and then regarding the statement.

Interpreting the contract relates to the nature and cause of the operation, and interpreting the statement is linked to the relation between the party that declares and the social language rules system.

The fact that language and communication represent psychical mechanisms that are the most accessible for the individual to regulate their own behaviour, as well as the behaviour of other people, is much too obvious to insist on it.

Communication understood as a transaction act, inevitable in situations of action, becomes essential, both for the person's life and for the individual's social life. In interpreting the statement, we must also take into account the issue of formal error in expressing consent, and that of expressing error in statement or in conveying will, respectively.

[2] Gabriela Chivu, Contribution of trial practice in the development of Roman civil law principles, vol. II, Academy Publishing House Bucharest, 1978.

Error can occur not only wen consent necessary for the civil legal act is formed, but also when expressing the latter, as well as when transmission and interpretation take place. Error in expressing or conveying consent does not affect the validity of the civil legal act and the guilty party is to bear consequences.

The validity of the legal act is usually not affected when the unclearly expressed consent is misinterpreted, by error.

The will, once formed, must be conveyed to recipients via signs such as language and tools such as printing, telephone, fax, internet, in order to provide the data to third parties.

This is the framework within which error in statement acquires importance, the will is correctly formed, but was not accurately declared. In this case, errors refers to making the will external, thus presupposing that the latter formed without vices.

Error can regard the person of the statement maker that gives their own statement a signification different than the one objectively has or which addresses a written statement to a person, different than the one whom it intends to actually address.

Error can regard the delegate assigned the conveyance of the statement: the telegraphic service or even the nuncis in culpa or in deceit.

Can we discuss the application of rules from the error material in this case? It is true that not all statement vices can be fixed by interpretation, so that the actual will can be re-established as against the will exteriosed in the document.

Let's consider a hypothesis where payment is stated in Swiss Francs, instead of French Francs. In all these cases, the will formed awaringly, in a non-vitiated way, but does not correspond to its communication. So the wills of the parties did not meet, they failed to be in line.

I believe orders regarding error must be applied, the hypothesis being similar to the obstacle error one, when the completed act is only in line with the will of one of the parties and the will of the other party heads to another direction.

The only difference (besides the element that error relates to) is that here the only thing concerned is the statement of will of the party that invokes the error.

But, to move on, hypothetically, this statement has theoretically led to the completion of the act (otherwise, discussions would no longer take place) and then the difference fades away.

As I have pointed out, manifestations of will of the parties meet only formally. Each party consents to something else, at least partially.

The conflict between the party's will and its statement can be much graver, and it can relate to the menaing of the manifestation of the will, the acceptance or refusal of the act (''I accept'' instead of ''I don't accept'')

It remains to study the issue of accountability for error and its consequences.

The new Civil Code[3] provides in article 1211 regarding communication or conveyance error, that orders regarding error will be applicable and when error relates to statement of will, or when the statement was inaccurately conveyed via another person or by distance communication means.

As regards *accountability for error making*, I would show that error draws cancellation irrespective of the parties' fault.

Many authors believe that, if error is due to the fault of its victim and the other party has good will, then the party that was in error and obtained the cancellation of the contract, can be obliged to

[3] The new Civil Code – Law no. 287/2009, published in the Romanian Official Journal, no. 511/July 24 2009.

pay damages to the other party, under article 999 of the Civil Code, for the damage that cancelling the contract produces to the latter.

In practise, the issue of error victim accountability has not been raised and this has a simple justification: errors hard to demonstrate, and in cases where its occurrence can be blamed on the party that has become its victim, evidence is almost impossible to obtain (simple presumptions whose use is pursued in proving error, will not work in these situations in favour of the error's victims, but quite on the contrary, could work against it.).

Courts have not been faced with the situation of ruling on error victims, and the solution was brought about by the impossibility to demonstrate error.

Conclusion

Error notification of the contract does not only require ignorance or a wrong knowledge of the contents of legal norms, but also their inconsistent interpretation. The topic is current, taking into account that the legal abundance and flaws in designing laws pose problems including to law experts.

Moreover, provisions of the new Civil Code, besides setting the admission nature of legal error, in order to determine conditions this can be invoked within contract interpretation, as well as upon statement making or conveyance, provides a new opportunity for controversy to analyse.

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THE PROTECTION OF TRADE NAMES IN INTERNATIONAL LAW

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Abstract
The paper aims to identify the sources of international law conferring protection to trade names. Although their inclusion in the framework of intellectual property rights is debated trade names are essential to all commercial activity and are used irrespective of a potential cumulus of protection within a trademark. With the advent of globalization and regional integration, but even more with the development of the Internet, trade names are more widely used and disseminated in the global marketplace. As such the protection of trade names at an international level should be given more attention since as primary identifiers of commercial activity trade names can and do have important effects on both the economic and social dimensions of human activity. Equally important for preserving the goodwill of the entrepreneur and for insuring the protection a consumer requires, thereby affecting economic and social activity at both the micro and macro level, trade names are to be regarded as prime candidates for better regulatory scrutiny, with efforts for harmonization needing to be in place from the international level downwards towards the national level of legislation. The present paper seeks to identify the possible sources for such harmonization and point out the instruments that have already implemented such norms for the protection of trade names.

Keywords*: trade names, intellectual property, international law, Paris Convention, bilateral treaties, TRIPS*

1. Introduction. Defining the notion.

Trade names are traditionally identified as being part of the domain of intellectual property law, Black's Law Dictionary indicating that the term belongs to the field of Intellectual Property and further defining the term as meaning "1. A name, style, or symbol used to distinguish a company, partnership, or business (as opposed to a product or service); the name under which a business operates. ● A trade name is a means of identifying a business – or its products or services – to establish goodwill. It symbolizes the business's reputation. 2. A trademark that was not originally susceptible to exclusive appropriation but has acquired a secondary meaning. – Also termed brand name; commercial name".[1]

Awkwardly enough a Dictionary of Business Terms[2] merely indicates that a trade name is a "business name that may or may not be trademarked", all while not defining what a 'business name' is.

The Gale Encyclopedia of American Law defines trade names as being "names or designations used by companies to identify themselves and distinguish their businesses from others in the same field"[3].

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[1] Bryan Garner (ed.), *Black's Law Dictionary*, 9th ed., West (St. Paul – 2009), p. 1633

[2] Jack Friedman (ed.), *Dictionary of Business Terms*, 3rd ed., Barron's (New York – 2000), p. 703

In Europe the Oxford Dictionary of Law defines a 'business name' as being "the name under which a sole trader, partnership, limited liability partnership, or company carries on business. The choice of a business name is restricted by the Business Names Act 1985 and by the common law of passing off. The true names and addresses of the individuals concerned must be disclosed in documents issuing from the business and upon business premises. Contravention of the Act may lead to a fine and to inability to enforce contracts"[4]. A 'company name' is defined by the same dictionary as being "the title of a registered company, as stated in its memorandum of association and in the companies register. The names with which companies can be registered are restricted. The name must appear clearly in full outside the registered office and other business premises, upon the company seal, and upon certain documents issuing from the company, including notepaper and invoices. Noncompliance is an offence and fines can be levied. Under the Insolvency Act 1986, it may be an offence for a director of a company that has gone into insolvent liquidation to re-use the company name"[5].

On the continent, the French authors make an important distinction between the trademark, the trade name ('*nom commercial*'), the emblem ('*enseigne*') and the company or business name ('*dénomination sociale*')[6]. While all the above signs are deemed 'distinctive signs used in commerce'[7], together with geographical indications and Internet domain names, there are differences between them arising primarily out of their purpose. While the trademark is used to distinguish between the identical or similar products of different businesses, the emblem is an exterior sign that individualizes the shop or business establishment of its owner. The trade name on the other hand is deemed to be the name under which a natural or moral person carries on its business, this being one of the components of the business' goodwill. The company or business name would then designate the name of the business as established in its articles of association and the companies register.

The following table graphically indicates some of the main differences between the notions mentioned above, as indicated by the French doctrine:

	Distinguishes between	**Formalities required**	**Territorial character**
Trademark	Products or Services	YES	National/Regional/International
Emblem	Shops or Business Establishments	NO/YES	Local
Trade name	Businesses	NO	Local/National/Regional/ International
Company/Business name	Businesses	YES	Local/ National

The British doctrine has itself sought to expand the limits of the notion of trade names, in the recent changes to a well-established treatise the authors indicating that the section initially entitled

[3] Donna Batten (project ed.), *Gale Encyclopedia of American Law*, 3rd ed., Gale (Farmington Hills – 2010), vol. 14, p. 221

[4] Elizabeth Martin, Jonathan Law, *A Dictionary of Law*, 6th ed., Oxford University Press (Oxford – 2006), p. 68

[5] Elizabeth Martin, Jonathan Law, *A Dictionary of Law*, 6th ed., Oxford University Press (Oxford – 2006), p. 109

[6] See Nicolas Binctin, *Droit de la propriété intellectuelle*, LGDJ (Paris – 2010), pp. 396-398

[7] Nicolas Binctin, *Droit de la propriété intellectuelle*, LGDJ (Paris – 2010), p. 396

'Business names' was changed to 'Trading names' since "because of the expansion of subject-matter [the name] has become slightly misleading"[8]. The authors have included in the scope of the section protection attached to "the name under which a business trades"[9], be it the real company name or another name under which that person has decided to trade or do business[10].

In the international context, with which the present article is more concerned, the issue of the notion to be used is one of substantial interest given that the backbone of international protection for trade names, the Paris Convention for the Protection of Industrial Property[11], indicates in Article 8 just that "A trade name shall be protected in all the countries of the Union, without the obligation of filing or registration, whether or not it forms part of a trademark", without further defining what a trade name actually is. The "Guide to the Application of the Paris Convention for the protection of industrial property, as revised at Stockholm in 1967"[12] indicates however that "the trade name is a notion interpreted in differing ways in existing legislations. It can generally, however, be defined as meaning the name or designation identifying the enterprise of a natural or legal person."

When the rights and obligations of the parties to the Paris Convention were integrated within the framework of protection by the TRIPS Agreement in 1994, under article 2, there was no mention of the actual meaning that member states were to give to the notion of trade names.

The necessity to correctly identify the trade name's limits becomes even more apparent when taking into account the vast network of bilateral investment protection treaties entered into by the member states of the Paris Union and/or TRIPS.

Romania, for example, being a member state of the Paris Union since 6 October 1920 and of TRIPS since 1 January 1995, has concluded 57 Bilateral Investment Protection Treaties (BITs) in which trade names are mentioned. However, even if in all these international treaties trade names are mentioned alongside the industrial and intellectual rights to be considered investments and, implicitly, falling within the ambit of protection provided by the respective treaty, the terms used to designate 'trade names' slightly vary. Thus, if the preferred term is 'nume comerciale', in some of the treaties other terms are sued such as: 'nume de comerț'[13], 'nume înregistrate'[14], 'denumiri de firme'[15].

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[8] David Kitchin, David Llewelyn, James Mellor, Richard Meade, Thomas Moody-Stewart, David Keeling, *Kerly's Law of Trade Marks and Trade Names*, 14th ed., Sweet & Maxwell (London – 2005), p. 494, note 41.

[9] David Kitchin, David Llewelyn, James Mellor, Richard Meade, Thomas Moody-Stewart, David Keeling, *Kerly's Law of Trade Marks and Trade Names*, 14th ed., Sweet & Maxwell (London – 2005), p. 494

[10] David Kitchin, David Llewelyn, James Mellor, Richard Meade, Thomas Moody-Stewart, David Keeling, *Kerly's Law of Trade Marks and Trade Names*, 14th ed., Sweet & Maxwell (London – 2005), pp. 499 - 500

[11] Paris Convention for the Protection of Industrial Property of 20 March 1883, last revised at Stockholm on 14 July 1967 and amended on 28 September 1979

[12] Georg Hendrik Christiaan Bodenhausen, United International Bureaux for the Protection of Intellectual Property, *Guide to the Application of the Paris Convention for the protection of industrial property, as revised at Stockholm in 1967*, World Intellectual Property Organization (2004), p. 23

[13] Law nr. 110/1992 concerning the ratification of the Bilateral Investment Protection Treaty between Romania and the United States of America

[14] Law nr. 88/1995 concerning the ratification of the Bilateral Investment Protection Treaty between Romania and France

[15] Law nr. 81/1994 concerning the ratification of the Bilateral Investment Protection Treaty between Romania and the Russian Federation

Moreover the term 'denumiri comerciale' used in one of the treaties was later modified to 'nume comerciale' by means of an amendment to the treaty[16], thus further emphasizing the importance of harmonizing the terms used in these international acts and the need for a clear understating of the notion's limits.

Mention should be made here of the fact that the Romanian legislator has not been as determined as when amending the treaty with the Republic of Korea in what the term designating trade names was concerned on other occasions such as when ratifying the 1954 New York Convention Relating to the Status of Stateless Persons (where the term 'nume de comerț' is used)[17] or when ratifying the 1951 Convention relating to the Status of Refugees and the 1967 Protocol to the Convention (on which occasion the Romanian legislator has opted for the term 'firme de comerț')[18].

We will conclude this section by indicating that while the Romanian legislator has indicated, albeit not conclusively, a preference for the term 'nume comercial', he has, in all international contexts, indicated that trade names are included in the scope of protection by intellectual property law, all references to the notion having been within enumerations of such subject matter covered by intellectual or industrial property rights.

The Romanian legislator has even manifested his clear intention to this effect in national law, the Romanian Government's Ordinance nr. 66/2002 concerning the organization and practice of industrial property counselors indicating that "the field of industrial property is concerned with […] trade names[19]".

It is therefore surprising that the same Romanian legislator makes no other mention of trade names as being protected by means of intellectual property law and its only act concerning the means of acquiring trade names, the law regulating the functioning of the Trade Registry[20], refers to the trade names as 'firme' and fails to indicate any link between them and other intellectual property rights or the field of intellectual property law altogether.

2. International Protection

Making intellectual property rights the object of international treaties has been the object of numerous efforts since two major obstacles were encountered.

First there was the idea that the protection of intangible property of a foreigner would not be protected outside the remit of national law since the creation of intangible property was thought to be dependent on the laws of the host state[21], since these rights would only vest in someone if recognized by local law.

[16] Law nr. 103/1994 concerning the ratification of the Bilateral Investment Protection Treaty between Romania and the Republic of Korea

[17] Law nr. 362/2005 concerning Romania's accession to the 1954 New York Convention Relating to the Status of Stateless Persons.

[18] Law nr. 46/1991 concerning Romania's accession to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol to the Convention

[19] Here referred to by the preferred term – 'nume comerciale'

[20] Law nr. 26/1990 concerning the Trade Registry

[21] M. Sornarajah, *The International Law of Foreign Investment*, 3rd ed., Cambridge University Press (Cambridge – 2010), pp. 190-191

Second there was the differing position of the types of parties involved. Capital-exporting countries, taking into account the fact that intellectual property becomes increasingly valuable within their economies have tended to push for greater protection of intellectual rights. Capital-importing countries on the other hand have always preferred a more lax protection on intellectual rights which they perceived as necessary for them to more rapidly develop[22]. The capital-exporting countries have sought to overcome this obstacle by adopting a three-pronged strategy[23]: the first prong consists of "taking unilateral measures against recalcitrant states"[24] (such as the United States' section 301 of the Omnibus Trade and Competitiveness Act mandating the United States Trade Representative with monitoring and listing of countries where violations of intellectual property rights take place, followed by specifying time limits for the elimination of the offending practices and, if the practices are not eliminated, the imposing of trade sanctions), the second consists of including intellectual property rights in the definition of investment in bilateral treaties together with, where possible, imposing a more robust standard of protection than the standards in multilateral treaties[25], while the third prong focused on the inclusion of intellectual property in the scope of the World Trade Organization. The latter prong was most importantly pursued by the creating of international minimum standards for protection by means of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), included as part of the WTO treaty within the GATT framework[26].

As we've mentioned above, the TRIPS Agreement has not, in what trade names are concerned, created a stronger or more detailed international protection standard – trade names not even expressly mentioned in the text of the agreement - but has, nonetheless, by means of its incorporation by reference of the relevant text of the Paris Convention, enlarged the territorial applicability of the provisions of the Paris Convention, including its article 8 concerning the protection of trade names. Thus non-members of the Paris Union such as Brunei, Cape Verde, Chinese Taipei, Fiji, Hong Kong, Kuwait, Macao, Maldives, Myanmar and the Solomon Islands are, following their membership to TRIPS, bound by articles 1 through 12 and 19 of the Paris Convention[27]. More countries could be added to the list such as Afghanistan, Ethiopia and Samoa, currently observer members of the WTO. Special mention needs to be made of the European Union which, though not member of the Paris Convention itself, is bound by articles 1 through 12 and 19 of the Paris Convention by means of its membership to the WTO, even though all of its members were already members of the Paris Union at the date of the EU's accession to the WTO.[28]

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[22] M. Sornarajah, *The International Law of Foreign Investment*, 3rd ed., Cambridge University Press (Cambridge – 2010), p. 44

[23] M. Sornarajah, *The International Law of Foreign Investment*, 3rd ed., Cambridge University Press (Cambridge – 2010), p. 44

[24] M. Sornarajah, *The International Law of Foreign Investment*, 3rd ed., Cambridge University Press (Cambridge – 2010), p. 44

[25] M. Sornarajah, *The International Law of Foreign Investment*, 3rd ed., Cambridge University Press (Cambridge – 2010), p. 45

[26] M. Sornarajah, *The International Law of Foreign Investment*, 3rd ed., Cambridge University Press (Cambridge – 2010), p. 45

[27] In order to compile this list the membership to WTO and the Paris Convention was checked on the websites of the WTO (www.wto.org) and WIPO (www.wipo.int) on 3 March 2011.

[28] There are however states not members to the WTO but signatories of the Paris Convention: North Korea, Monaco, San Marino and Turkmenistan. Greenland is neither a signatory party of the Paris Convention nor a member of the WTO.

a. Backbone of protection

The backbone of trade name protection in international law is, without doubt, the Paris Convention. As the sole international treaty focused on industrial property that both mentions trade names as a distinct category of intellectual property rights and establishes a minimum protection standard the Paris Convention is the golden thread to be followed in the investigation of trade name protection at the international level.

Article 8 of the Paris Convention provides that "A trade name shall be protected in all the countries of the Union, without the obligation of filing or registration, whether or not it forms part of a trademark".

The "Guide to the Application of the Paris Convention for the protection of industrial property, as revised at Stockholm in 1967" indicates that that this article was already included in the original text of the Convention, subsequent revisions having only modified the wording "in order to achieve more conformity with other provisions of the Convention"[29].

However the question as to whether a name is or is not a trade name is to be determined according to the norms of the country where protection is sought[30], thus national law of the jurisdiction where the name is sought to be protected applies in what concerns the determination of subject matter.

The fact that even when concerned with the backbone of international protection of trade names, the definition of what a trade name would still fall under the ambit of national law again emphasizes the importance of each state's ability to correctly and consistently define and use the term in its national legislation, as already mentioned in the first section of the present paper.

According to the provisions of the aforementioned article a trade name should be protected in all member states of the Union, but the provision leaves it to the member states to choose how said protection is to be given (such as by means of special legislation, by means of unfair competition laws or by other means[31].

Generally the protection sought is to be granted against "use of the same or a confusingly similar trade name or of a mark similar to the trade name, if such use is liable to cause confusion among the public. Countries are free to prescribe special measures in cases of use of homonymous surnames as trade names"[32].

Moreover the protection granted under article 8 of the Paris Convention is independent from the protection of the trade name as a trademark. Therefore even if the trademark were to lapse the protection for the trade name would still exist[33].

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[29] Georg Hendrik Christiaan Bodenhausen, United International Bureaux for the Protection of Intellectual Property, *Guide to the Application of the Paris Convention for the protection of industrial property, as revised at Stockholm in 1967*, World Intellectual Property Organization (2004), p. 133

[30] Georg Hendrik Christiaan Bodenhausen, United International Bureaux for the Protection of Intellectual Property, *Guide to the Application of the Paris Convention for the protection of industrial property, as revised at Stockholm in 1967*, World Intellectual Property Organization (2004), p. 133

[31] Georg Hendrik Christiaan Bodenhausen, United International Bureaux for the Protection of Intellectual Property, *Guide to the Application of the Paris Convention for the protection of industrial property, as revised at Stockholm in 1967*, World Intellectual Property Organization (2004), p. 133

[32] Georg Hendrik Christiaan Bodenhausen, United International Bureaux for the Protection of Intellectual Property, *Guide to the Application of the Paris Convention for the protection of industrial property, as revised at Stockholm in 1967*, World Intellectual Property Organization (2004), pp. 133-134

[33] Georg Hendrik Christiaan Bodenhausen, United International Bureaux for the Protection of Intellectual Property, *Guide to the Application of the Paris Convention for the protection of industrial property, as revised at Stockholm in 1967*, World Intellectual Property Organization (2004), p. 134

Article 2(1) of the Paris Convention provides that "nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with", thereby implementing the national treatment rule for foreigners who qualify for protection under the Paris Convention. Therefore, in what trade names are concerned, all persons who qualify for protection under the Paris Convention enjoy the same rights as the nationals of the state where protection is sought. Moreover, the second part of article 8 indicates that, in what trade names are concerned, the owners of foreign trade names cannot be subjected to requirements of filing or registration for said trade names, even if such procedures are required of the nationals of that particular state. Thus, in what regards these procedural requirements foreigners who qualify for protection under the Paris Convention might enjoy a wider right than nationals of the state where protection is sought.

Mention should be made of the fact that, pursuant to the provisions of articles 2(1), 2(2) and 3 of the Paris Convention in order to qualify for protection under the Paris Convention the party should be either a national of a member state (other than the state where protection is sought) – no requirement as to domicile or establishment in the country where protection is sought being admissible – or a national of a state not member of the Union but having a domicile or a real and effective industrial or commercial establishment in the territory of one of the member states of the Union.

In conclusion a foreigner qualifying for protection under the Paris Convention has, upon application of article 8 of the Convention, the advantage, in respect of nationals of that member state that he is unaffected by an eventual national requirement for registration or filing or any other administrative procedure required by national law for the protection of a trade name.

The foreigner qualifying for protection under the provisions of the Paris Convention would not, however, benefit from protection with no regard to national law. Thus, the protection granted to a foreigner under article 8 of the Paris Convention would still depend on:

1.The definition given to trade names by the laws of the state where protection is sought; and

2.The standard of protection of trade names in the state where protection is sought.

If the former dependence was addressed above, in what regards the latter we must point out that, where a likelihood of confusion is to be demonstrated in order for a trade name to be protected against uses of identical or similar trademarks or trade names, national law may require that the trade name for which protection is sought must have been used or known in the country where protection is sought, otherwise no likelihood of confusion being possible[34].

b. TRIPS

As mentioned above, TRIPS has expanded the territorial applicability of the substantial provisions of the Paris Convention but has added little else in respect of the protection of trade names. Thus, even if TRIPS added the most-favored nation rule in respect of foreigners qualifying

[34] Georg Hendrik Christiaan Bodenhausen, United International Bureaux for the Protection of Intellectual Property, *Guide to the Application of the Paris Convention for the protection of industrial property, as revised at Stockholm in 1967*, World Intellectual Property Organization (2004), p. 134

for protection, the including of said rule does little in what trade names are concerned since it does not address the two dependencies still under the scope of national law.

Nonetheless, in a dispute brought before the WTO, the European Communities brought to the attention of the WTO Dispute Settlement Body an issue pertaining, in part, to the protection that needs to be afforded, pursuant to the provisions of TRIPS, to trade names[35].

In this dispute the facts pertained to the adoption, by the United States, of section 211 of the Appropriations Act, which, the EC argued, contravened the obligation of the United States to confer national treatment to foreign nationals of WTO members in what concerns the protection afforded to, among others, trade names.

The dispute concerned the trade name and trademarks "Havana Club" which initially belonged to the Cuban family Arechabala. Following the revolution in Cuba all assets belonging to the family had been confiscated by the Cuban state and the family, although it had a US trademark, allowed it to lapse. Later the Cuban government registered in its own name a US trademark for "Havana Club" but was forbidden to market its product in the US by reason of legislative restrictions to trade with Cuba.

Even later the Cuban government entered into a joint venture with the French company Pernod-Ricard, envisaging the marketing of Havana Club rum all over the world. The US-based company of Bacardi later purchased all interests of the Arechabala family in the trademarks and associated rights and then successfully determined the US Congress to pass legislation that retroactively nullified the Cuban government's registration of the US trademark and its subsequent assignment to the joint-venture created with Pernod-Ricard. Moreover Congress has instructed US courts not to recognize any claims by the Cuban government in what regards the Havana Club mark. The joint venture unsuccessfully attempted before the US courts to reclaim its trademark and stop Bacardi from using the "Havana Club" name since Congress had instructed courts not to recognize any rights of the Cuban government in the mark and since lack of commercial activity – albeit due to legislative restrictions – precluded the plaintiff from succeeding on unfair competition grounds[36].

The EC requested consultations with the US on the matter on 8 July 1999 and a panel was established on 26 September 2000.

The panel's report indicated, in what trade names are concerned, that trade names are not protected by means of TRIPS, not falling within the subject matter delimited in article 1.2 of TRIPS and the fact that article 2.1 of TRIPS incorporates the provisions of articles 1 through 12 and 19 of the Paris Convention gives no effect to trade name protection since the provisions of the Paris Convention are incorporated by reference in what concerns the categories of subject matter protected by TRIPS – therefore with the exclusion of trade names – and therefore it refused to take into consideration any other argument referring to trade names.

The EC appealed the report of the panel on certain grounds amidst which also that it believed the panel had incorrectly appreciated that trade names did not fall within the ambit of TRIPS.

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[35] DS176

[36] See F.M. Abbott, T. Cottier, "Dispute Prevention and Dispute Settlement in the Field of Intellectual Property Rights and Electronic Commerce: US – Section 211 Omnibus Appropriations Act 1998 (Havana Club)" in Ernst Ulrich Petersmann, Mark Pollack (eds.), *Transatlantic Economic Disputes. The EU, the US, and the WTO*, Oxford University Press (Oxford – 2003), pp. 432-438

The Appellate Body agreed with the appellant and concluded that "WTO Members do have an obligation under the *TRIPS Agreement* to provide protection to trade names"[37]. The Appellate Body reached this conclusion by holding that the Vienna Convention requires that treaties be interpreted so as to give effect to all their provisions and not make a whole section or paragraph redundant or useless. Thus, it argued that if the framers had had the intention of excluding trade names from the scope of protection to be afforded by TRIPS they would not have included article 8 of the Paris Convention (which deals exclusively with trade names) from the list of texts incorporated by reference in article 2.1 of TRIPS. Moreover the Appellate Body has indicated that article 1.2 of TRIPS aims to insure protection for all intellectual property rights, including trade names, and not just for the rights mentioned in the headings of the respective parts or articles of the agreement.

c. Bilateral treaties

In spite of the adoption of TRIPS, which, as shown above, capital-exporting countries such as the US have expended no efforts in promoting, the bilateral activity of the US on intellectual property since the signing of TRIPS has not declined but has, to the contrary, increased[38]. The reason for this is thought by some to be a reflection of the importance attached to the subject for the US, importance that translates into the policy of adopting "a more 'pragmatic' […] approach […] of dealing with trading partners on a bilateral basis, and rewarding 'friends'"[39].

Thus, professor Drahos argues, section 301 of the US Trade Act, referred to above, creates an incentive for bilateralism since it provides a mechanism for the bilateral treaties to be concluded: the US monitors countries reported to have violated intellectual property rights, it includes said countries on a list and monitors their response; possible outcomes are either a bilateral treaty or trade sanctions (very rare).

'Targeted' countries are therefore motivated, in their desire not to be included in the list or to be at least moved to a lower list, to enact laws and regulations for the protection o intellectual property rights even above the minimal level established by TRIPS, thus creating what professor Drahos calls a "TRIPS-plus" effect.

There is therefore significant – and well-grounded – reliance on bilateral mechanisms for the protection of intellectual property rights.

Bilateral activism in the area of intellectual property rights is however subject to the same two dependencies identified above, therefore even within the bilateral treaties great emphasis is placed on the international minimum standards provided by the Paris Convention and TRIPS.

Moreover we believe significant deficiencies in the attaining of envisaged effects are to be recorded if the definition of trade names in such bilateral treaties is not given sufficient clarity and efficacy. (Times New Roman, 12, justify)

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[37] Par. 341 of the Appellate Body's Report

[38] Peter Drahos, "BITs and BIPs. Bilateralism in Intellectual Property" in *The Journal of World Intellectual Property*, vol. 4, issue 6, November 2001, pp. 791-808.

[39] J. Jackson, *The World Trading System*, The MIT Press (Cambridge, Mass. – 1997), p. 173 cit. in Peter Drahos, "BITs and BIPs. Bilateralism in Intellectual Property" in *The Journal of World Intellectual Property*, vol. 4, issue 6, November 2001, p. 792, note 2

3. Conclusions

International protection of trade names is at this moment achieved at the global level on two levels: multiparty treaties such as the Paris Convention and TRIPS which establish a minimal standard of protection and bilateral treaties, the conclusion of which has been on the rise, which rely on the former for giving substance to the protection conferred.

Harmonization is needed however since international protection still is dependent on local laws for defining the boundaries of the notion and the standard for enforcement of protection.

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INTELLECTUAL PROPERTY IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract

If the case-law on IP matters of the European Court of Justice and of the First Instance Court is relatively well-known and studied, the situation is different with regard to the jurisprudence of the other European Court, the European Court of Human Rights (ECtHR, the Court). The number of ECtHR cases on IP matters is not large, but one may note an increase in the last few years, including a Great Chamber judgment on a trademark issue. Given the supra-legislative status that the European Convention on Human Rights (the Convention) enjoys on the basis of the Romanian Constitution, the principles established in the case-law of the Court will influence domestic legislation and practice. This article provides a comprehensive analysis of the intellectual property case-law of the ECtHR. In the first part, I will make a short introduction regarding the ECtHR and the importance of its case-law for the Romanian Courts. In the second part I will provide an overview of the types of cases and problems which arose before the ECtHR with regard to IP matters. In the third part I will analyze the main institutions concerning the protection of the right to property, protected by the First Additional Protocol: the protection of "goods", the interference and the conditions of the interference and the way they are applied to IP rights.

Keywords: *intellectual property, European Court of Human Rights (ECtHR), protection of property*

Introduction

The present article is an overview of the IP issues in the case-law of the European Court of Human Rights (ECtHR, the Court).

If the case-law on IP matters of the European Court of Justice and of the First Instance Court is relatively well-known and studied, the situation is different with regard to the jurisprudence of the other European Court, the ECtHR. The IP - related issues are not properly analyzed in the literature regarding the case-law of the ECtHR; most of the authors only mention that IP rights are protected as property rights by article 1 of the First Additional Protocol[1]. Also, in the IP world there is no mention of the ECtHR case-law and principles[2].

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[1] C. Ovey, R.C.A. White, Jacobs & White, *The European Convention of Human Rights* (Oxford University Press, Fourth Edition, 2006), 584; P. van Dijk, et al., *Theory and Practice of the European Convention on Human Right*, Fourth Edition (Intersentia, Antwerpen-Oxford, 2006), 863 and the following; Jean- Frédéric Sudre, et al., *Les grands arrêts de la Cour Européenne des Droits de l'Homme* (5e édition Ed. PUF, 2009), 690 and the following; D.J.Harris, M.O'Boyle, C.Warbrick, *Law of the European Convention on Human Rights*, (Butterworths, London,

However, a thorough study of the ECtHR is of importance in IP matters because, in accordance with the Romanian Constitution, the case-law of the ECtHR is to be applied directly by the courts and it has a supra-legislative force. As a consequence, the principles established and applied by the ECtHR are mandatory for the Romanian Courts and must prevail over the national legislation.

After a short introduction regarding the ECtHR and the importance of its case-law for the Romanian Courts (II), I will provide a short overview of the types of cases and problems which arose before the ECtHR with regard to IP matters (III). After that I will analyze the main institutions concerning the protection of the right to property, protected by the First Additional Protocol: the protection of "goods", the interference and the conditions of the interference and the way they are applied to IP rights.

1. The European Convention on Human Rights and the ECtHR. Importance for Romanian courts

The European Convention on Human Rights (ECHR, the Convention) is the most effective international treaty that protects human rights and fundamental freedoms. It entered into force on 3 September 1953. The Council of Europe is the international organization under which the Convention was drafted, adopted and implemented. The efficacy of the Convention for protecting human rights is explained by the creation of the ECtHR, the first international mechanism providing a procedural tool for implementing an international treaty: for the first time, individuals are able to introduce complaints before the Court for violations of their rights by the member states.

Despite a common confusion for Romanian practitioners, the Council of Europe is an international organization different from the European Union (EU); although sharing, in part, the same geographical location (the 27 member states of the EU are included among the 47 member states of the Council of Europe), the two international organizations are different with regard to their goals, institutions membership, etc. After the Lisbon Treaty, the European Union itself will become part of the Council of Europe – the community law will have to observe the ECHR.

In accordance with Article 20 of the Romanian Constitution, *"(2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favorable provisions*."

Romania became part of the ECHR in June 1994. Since then, as a result of the aforementioned constitutional provision, the ECHR is directly applicable by the Romanian Courts: they are obliged to refrain from applying the national laws which contravene the Convention or the

Dublin, Edinburgh, 1995), 530 and the following; Karin Reid*, A Practicioner's Guide to the European Convention on Human Rights* (Oxford, 2008), 467 and the following; Jean-Francois Renucci, *Tratat de drept european al drepturilor omului*" (Hamangiu, 2009), 554 and the following.

[2] I will only refer to Romanian Authors: Viorel Roş, *Dreptul proprietăţii intelectuale* (Global lex, 2001); Viorel Roş, Octavia Matei Spineanu, Dragoş Bogdan, *Dreptul proprietăţii intelectuale, Mărcile şi indicaţiile geografice. Tratat*, (ALL Beck, 2003); Viorel Roş, Dragoş Bogdan, Octavia Spineanu Matei, *Dreptul de autor şi drepturile conexe. Tratat* (CH Beck, 2005); I. Macovei, *Tratat de drept al proprietăţii intelectuale* (C.H. Beck, 2010); Teodor Bodoaşcă, *Dreptul proprietăţii intelectuale* (CH Beck, 2007).

principles established in the Court's case-law. As the Court put it in a Romanian case[3], *"(...) a system based on the primacy of the Convention and its jurisprudence on national laws is able to ensure the best possible functioning of the safeguard mechanism introduced by the Convention and its protocols. It is not unimportant to recall in this connection that, in its Recommendation of 12 May 2004 (Rec. (2004) 6), the Committee of Ministers welcomed the fact that the Convention was an integral part of the internal legal order of all States Parties. This implies an obligation for national courts to secure the full effect of its norms by applying them with priority before every contrary national legislative provision, without waiting for the repeal of the latter by the legislature (mutatis mutandis, Vermeire c. Belgium, Judgment of 29 November 1991, Series A No. 214-C, p. 84, § 26)*."

An overview of the evolution of the judicial practice would go much beyond the subject matter of this paper; I will only mention that, after showing reluctance in the beginning[4], the Romanian Courts applied directly the Convention in important areas of practice – nationalized houses, arrests, contraventions, civil and criminal procedure, etc.

2. The IP Rights in the ECtHR Case-law

The number of ECtHR cases on IP matters is not large, but one may note an increase in the last few years, including a Great Chamber judgment on a trademark issue. Distinction can be made between procedural guarantees (article 6 of the Convention) and material guarantees.

Before going into details, I emphasize that the IP issues will only be analyzed from the perspective of the owners of such rights. The exercise of the rights might give birth to other issues from the perspective the infringers - for instance, an analysis of an Anton Piller ex parte ordinance in the United Kingdom from the point of view of article 8 (protection of home)[5] - but these issues will not be treated here.

(A) Procedural guarantees – article 6 under its civil head[6]

Most of the ECtHR cases concern procedural guarantees.

(1) Applicability to patrimonial rights

IP rights are "civil" rights in the autonomous meaning of this in the Court's case-law. With regard to the **patrimonial** rights, it is clear that they are considered "civil" rights and a constant case law applies article 6 to cases in which national procedures concerned the aforementioned IP rights

[3] Dumitru Popescu v. Romania (no 2), 71525/01, 26 April 2007, § 103; all the judgments and decisions of the Court and of the Commission referred to in the present paper can be found on the web site of the Court – www.echr.coe.int.

[4] See Dragoş Bogdan, Adriana Dăgăliţă, *Strasbourg Court jurisprudence and human rights in Romania: an overview of litigation, implementation and domestic reform, State of Art Report*, accessible at http://www.juristras.eliamep.gr/wp-content/uploads/2008/09/Romania.pdf, accessed February 28, 2011.

[5] Chappell v. the United Kingdom, 10461/83, 30 March 1989.

[6] Article 6: „**Right to a fair trial**: 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

(copyright[7], patents[8]). For instance with regard to copyright, "*The Court notes that the proceedings in issue concern a copyright. It is satisfied, and this was not contested by the parties, that the proceedings concern the determination of the applicants' "civil rights and obligations" within the meaning of Article 6 § 1. This provision is therefore applicable.*"[9] The same will apply, without any doubt, to designs, trademarks or other IP rights with patrimonial content.

(2) Applicability to moral rights

With regard to the **moral** rights – especially in copyright issues – there is no case-law yet; however, given the "private" nature of the right, the lack of any relation to the public powers of the state, one may presume that the Court will accept its "civil" nature. Therefore article 6 will apply under its civil head for both patrimonial and moral IP rights.

(3) Guarantees

Most of the case-law on article 6 concerns the lack of enforcement of judicial decisions awarding damages further to an infringement of an IP right or the length of such proceedings: copyright[10], patents[11], license of an invention[12], etc.

However, all the guarantees of article 6 will fully apply – access to a court, equality of arms, adversarial character of the procedure, right to a hearing, etc. For instance, in Dima vs Romania[13], the applicant complained about a breach of article 6 because one of his main arguments had not been analyzed by the Supreme Court: in his appeal in cassation he had complained, *inter alia*, about the fact that he had not been cited by the expert when drafting the expertize report. The ECtHR concluded that Romania had violated Dima's right to a fair hearing when the Romanian Supreme Court dismissed his appeal without addressing Dima's challenge to the expert's report and the Court awarded Dima 2,000 euro as damages.[14]

(B) Material guarantees

With regard to the material guarantees, one should draw a distinction between moral and patrimonial IP rights.

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[7] I.D. v. Romania, 3271/04), 23 Mars 2010 ;

[8] Smith Kline and French Laboratories LTD v the Netherlands (decision of the Commission), 12633/87, 4 October 1990; the T. Company Limited v the Netherlands (decision of the Commission), 19589/92, 15 October 1993.

[9] Nemec and others v. Slovakia, 48672/99, 15 November 2001 (copyright over software). Actually, the object of the proceedings was not copyright as such, but damages over a copyright breach.

[10] I.D. v. Romania, 3271/04), 23 Mars 2010 (both non enforcement and the length of proceedings – 15 years); Nemec and others v. Slovakia, 48672/99, 15 November 2001 (length of proceedings – 9 years, violation); Oguz Aral, Galip Tekin and Inci Aral c. Turkey, 24563/94, decision of the Commission of 14 January 1998 (length of proceedings – 4 years, no violation).

[11] Erdős v. Hungary, 38937/97, 9 April 2002 (length of proceedings, 15 years, violation); Nagy and others v. Hungary, 61530/00, 14 September 2004 (length of proceedings, 5 years, violation); Nowak and Zajączkowski v. Poland, 12174/02, 22 August 2006 (length of proceedings – 8 years, violation); Voishchev v. Ukraine, 21263/04, 19 February 2009 (6 years, violation); Vrábel and Ďurica v. the Czech Republic, 65291/01, 13 September 2005 (length of proceedings, 11 years, violation).

[12] Termobeton v. Ukraine, 22538/04, 18 June 2009 (length of proceedings, 6 years, violation).

[13] Dima v. Romania, 58472/00, 16 November 2006.

[14] For a similar issue, see Hiro Balani v. Spain, 18064/91, 9 December 1994.

(1) The moral rights

With regard to the **moral rights**, there is no clear-cut case-law. In the literature, an important Romanian author considers that the moral IP rights are protected by article 8 of the Convention[15] under the umbrella of "private-social" life[16]. I agree with the idea that moral rights cannot be protected by article 1 of Protocol 1 because they do not have a patrimonial value[17]. One can accept that some of the moral rights – the right to be recognized as the author of an invention[18], for instance – may by analyzed as private-social rights protected by the large scope of article 8.

However, in my opinion, if those rights concern questions related to freedom of expression – most, if not all, of the copyright issues do – then the article to be applied would be article 10 of the Convention[19]. The right to be recognized as author of a work protected by copyright, to decide if that work should be divulged to the public, to oppose any modification of the work (in certain conditions), to retract it, are strictly related to the work itself; however, the work is an expression, the expression of the artist's personality. Therefore, all these moral rights should be analyzed under article 10 rather than under article 8 of the Convention.

The question of the protection of the moral rights under article 10 of the Convention appeared in an inadmissibility decision[20] where the applicant, a collective copyright management society, invoking Article 10 of the Convention, complained that artists affiliated with it had found their work affected because it could then be distributed by anyone without restrictions. However, the Court rejected the complaint without deciding whether article 10 applied to the broadcasting of the work because the complaint did not fulfill the *ratione personae* condition (the applicant was not the owner of the moral right).

In another decision[21], the applicants were the creators of some cartoon characters; they were dismissed from the magazine where they first created and published those characters but continued to publish them in another magazine. The court decided that the characters created by the applicants could be used by them in other magazines or newspapers but with other subjects and stories. Before the Court, the applicants also complained that the result of their trial constituted a violation of their

[15] Article 8: "**Right to respect for private and family life:** 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[16] Corneliu Bîrsan, "Conventioa europeană a drepturilor omului. Comentariu pe articole", second edition, C.H.Beck, 2010, p.1656.

[17] idem.

[18] Viorel Roş, *Dreptul proprietăţii intelectuale* (Global lex, 2001), 373.

[19] Article 10: "**Freedom of expression**: 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[20] AEPI S.A. (Societe Hellenique Pour La Protection Du Droit D'auteur) v. Greece, 48679/99, 31 May 2001.

[21] Oguz Aral, Galip Tekin and Inci Aral c. Turkey, 24563/94, decision of the Commission of 14 January 1998.

right to freedom of thought and freedom of expression, invoking article 9 of the Convention. The Commission considered that the applicants' complaint was to be considered under article 10 and noted that this complaint concerned a commercial dispute over "artistic materials" designed by the applicants and that the interference could reasonably be considered necessary in a democratic society for the protection of the rights of others, in particular one of the parties to a contract.

Even in the absence of an express ruling of the Court, certain situations regarding the public presentation of a work are analyzed under article 10. For instance, the confiscation of three paintings depicting in a crude manner sexual relations, particularly between men and animals and criminal conviction of the painter were accepted as interferences, necessary in a democratic society for the protection of morals[22]; although after some years the paintings were returned to their author, as the competent court considered that "(…) there is no reason to believe that he will use the three paintings in future to offend other people's moral sensibilities." These interferences concerned not only patrimonial aspects of copyright (the paintings were created only for a special exhibition), but mostly the moral right of the author to divulge the work to the public. There are also other cases which analyze interferences with (moral aspects of) copyright under the freedom of expression: the confiscation of a book[23], the seizure and subsequent forfeiture of a film[24], etc.

(2) The patrimonial rights

As the commission decided in the early case-law, "A patent is a possession for the purposes of Article 1 of Protocol No. 1 (see no. 12633/87, dec. 4.10.90, D.R. 66, p. 79)."[25] The **patrimonial** aspects of copyright, trademarks, patents, designs are protected as property rights under the First Additional Protocol of the Convention. Copyright over cartoon characters[26], copyright over a photograph ('Soroca Castle')[27] or a patent over a cigarette[28] are just a few examples. These aspects will be developed below, in the fourth section (IV).

3. Protection of ip rights as property rights

With regard to the patrimonial IP rights (the exclusive right to exploit the work, the invention, the trademark, the design, etc.), article 1 of the First Protocol is the main basis for protection[29].

A) IP rights as possessions in the autonomous meaning of article 1 Protocol 1

The concept of "possessions" referred to in the first part of Article 1 of Protocol No. 1 has an *autonomous meaning* which is not limited to ownership of physical goods and is independent from

[22] Müller and others v. Switzerland, 10737/84, 24 May 1988.
[23] Handyside v. the United Kingdom, 5493/72, 7 December 1976.
[24] Otto-Preminger-Institut v. Austria, 13470/87, 20 September 1994.
[25] Lenzing AG v. the United Kingdom (decision of the Commission), 38817/97, 9 September 1998.
[26] Oguz Aral, Galip Tekin and Inci Aral c. Turkey, 24563/94, decision of the Commission of 14 January 1998.
[27] Balan v. Moldova, 19247/03, 29 January 2008.
[28] British-American Tobacco Company Ltd v. the Netherlands, 20 November 1995.
[29] Article 1 Protocol 1: "**Protection of property**: Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

the formal classification in domestic law: certain other rights and interests constituting assets may also be regarded as "property rights", and thus as "possessions" for the purposes of this provision. The issue that needs to be examined in each case is whether the circumstances of the case, considered as a whole, confer on the applicant title to a *substantive interest* protected by Article 1 of Protocol No. 1[30]. The first major issue is therefore whether the applicant has a substantive interest in the meaning of the aforementioned article.

There are two different issues – the "object" to which the interest is attached and the recognition of the state of the said interest for the applicant.

(1) Article 1 of Protocol No. 1 applies to intellectual property as such

With regard to the first issue, as mentioned above, the substantive interest may relate to physical goods: house, personal car[31], computer[32], fur[33], diesel[34], wheat[35], etc. It can also regard a non-physical object: social parts in a company[36], shares[37], goodwill[38], clientele[39], economic interests connected with the running a restaurant[40] etc.

With regard to the IP rights, a comprehensive overview of the case-law is provided in the Great Chamber case Anheuser-Busch INC. v. Portugal[41]. The Great Chamber reiterated previous findings of the Commission concerning the protection of a patent[42] and a more recent decision of the Court applying art. 1 of Protocol no. 1 to copyright[43] before concluding: "In the light of the aforementioned decisions, the Grand Chamber agrees with the Chamber's conclusion that Article 1 of Protocol No. 1 is applicable to intellectual property as such."[44]

It is therefore established that IP, by its nature, is protected as a property right under the Convention. Several judgments and decision apply article 1 of Protocol no. 1 to IP rights - copyright[45], trademark[46], domain name[47], patents, etc. Moreover, not only the main right - to

[30] Iatridis v. Greece, [GC], 31107/96, 25 March 1999; Beyeler v. Italy [GC], no. 33202/96, § 100, ECHR 2000-I; Broniowski v. Poland [GC], no. 31443/96, § 129, ECHR 2004-V; and Anheuser-Busch Inc. v. Portugal [GC], no. 73049/01, § 63, ECHR 2007 ...).

[31] Viktor Konovalov v. Russia, 43626/02, 24 May 2007.

[32] Smirnov v. Russia, 71362/01, 7 June 2007.

[33] Jucys v. Lithuania, 5457/03, 8 January 2008.

[34] Novikov v. Russia, 35989/02, 18 June 2009.

[35] Plakhteyev and Plakhteyeva v. Ukraine

[36] X. v United Kingdom, decision of the Commission, 27 mai 1967.

[37] Marini v. Albania, 3738/02, 18 December 2007.

[38] Buzescu v. Romania, 61302/00, 24 May 2005.

[39] Iatridis v. Greece, [GC], 31107/96, 25 March 1999,

[40] Tre Traktörer Aktiebolag v. Sweden, 10873/84, 7 July 1989.

[41] Anheuser-Busch INC. V. Portugal (GC), 73049/01, 11 January 2007.

[42] For instance, Smith Kline and French Laboratories Ltd v. the Netherlands, no. 12633/87, decision of 4 October 1990, Decisions and Reports (DR) 66, p. 70 - "The Commission notes that under Dutch law the holder of a patent is referred to as the proprietor of a patent and that patents are deemed, subject to the provisions of the Patent Act, to be personal property which is transferable and assignable. The Commission finds that a patent accordingly falls within the scope of the term 'possessions' in Article 1 of Protocol No. 1."

[43] Melnychuk v. Ukraine (dec.), no. 28743/03, ECHR 2005 IX.

[44] Anheuser-Busch INC. v. Portugal (GC), 73049/01, 11 January 2007, § 72.

[45] Dima v. Romania (decision of the Court), 58472/00, 26 May 2005; Bălan v. Moldova, 19247/03, 29 January 2008.

[46] Anheuser-Busch INC. v. Portugal (GC), 73049/01, 11 January 2007.

[47] Paeffgen GMBH v. Germany (decision of the Court), 25379/04, 21688/05, 21722/05 and 21770/05, 18 September 2007.

exclusive exploitation - is protected, but also rights dependent on the former – the right to priority, for instance[48].

(B) The substantive interest must be recognised by the state

With regard to the second question, the substantive interest must be recognised by the state. It can be recognised as a positive right - ownership[49], habitation[50], specially protected tenancy[51], lease[52] - or just as simple interests which enjoy some form of protection even though they are not considered (positive) "rights" in that member state: the goodwill (clientele) is protected through unfair competition actions (in certain circumstances in most member states); economic activities[53], the simple possession[54] etc.

Furthermore, the applicant must be recognised by the state as having such an interest. Besides the *express and official recognition* (the inscription of the right in the Publicity Register[55]) there are also *unofficial recognitions* when the state acts as though the applicant has some form of interest in relation to that good (it addresses letters to the applicant as owner[56], accepts certain juridical acts – sale, succession[57] - or accepts the payments of taxes in relation to that good[58]), or, even, *implicit recognitions* – when the state fails to act in accordance with the law in order to destroy the good because it takes into account the interest of the applicant[59].

Separately, in my opinion, the substantive interest must be "actual", or, on the basis of the factual situation combined with the applicable law, the applicant must have at least a "legitimate expectation" of obtaining effective enjoyment of a possession[60]. I will not further analyse in this paper the problem of the "legitimate expectation", because so far, it has not played an important role in IP cases.

With regard to IP issues, there is no problem in accepting that a **registered** trademark, patent or design are protected. Problems occur with respect to the copyright, the applications for registration of a protected right. Separately, an interesting problem is whether the simple use of a sign as a trademark (without its registration) can be protected by article 1 Protocol 1.

i) Copyright

With regard to copyright, the most interesting decision is that taken in a Romanian case – Dima vs Romania[61] which concerned an artist who created the design for a new national emblem; he

[48] Anheuser-Busch INC. v. Portugal (GC), 73049/01, 11 January 2007.
[49] Brumărescu v. Romania [GC], no. 28342/95, ECHR 1999-VII.
[50] Minasyan and Semerjyan v. Armenia, 27651/05, 23 June 2009.
[51] Blečić v. Croatia, 59532/00, 29 July 2004.
[52] Bruncrona v. Finland, 41673/98, 16 November 2004.
[53] Dogan and others v. Turkey, 8803-8811/02, 8813/02 and 8815-8819/02, 29 June 2004.
[54] Bozcaada Kimisis Teodoku Rum Ortodoks Kilisesi Vakfı v. Turkey, nos. 37639/03, 37655/03, 26736/04 and 42670/04, § 50, 3 March 2009.
[55] Brumărescu v. Romania [GC], no. 28342/95, ECHR 1999-VII.
[56] Beyeler v. Italy [GC], no. 33202/96, ECHR 2000-I.
[57] Hamer v. Belgium (no. 21861/03, § 78, ECHR 2007-... (extracts)).
[58] Brumărescu v. Romania [GC], no. 28342/95, ECHR 1999-VII.
[59] Öneryıldız v. Turkey [GC], no. 48939/99, § 95-96, ECHR 2004-XII.
[60] Kopecký v. Slovakia [GC], no. 44912/98, §§ 35 and 48 to 52, ECHR 2004-IX.
[61] Dima v. Romania (decision of the Court), 58472/00, 26 May 2005.

was mentioned as the "graphic designer" of the emblem in a statute. Because he was never paid for his work, he filed three copyright infringement actions at the Romanian courts against persons who had minted coins or produced the national flag on which the national emblem was printed. All three suits were dismissed, the national courts holding that Dima did not own a copyright in the design of the state emblem: although the courts acknowledged that applicant had personally created the design of the emblem, they held that the Parliament, which had commissioned the revision of the design, was the "author" of the works. On the other hand, the courts considered that "symbols of the State could not be the subject of copyright," neither under the 1956 copyright statute in effect at the time Dima created the design (which did not expressly mention state symbols as excluded from copyright protection) nor under the new, 1996 statute entered into force after the events, which expressly excluded such symbols from copyright protection.

The Court dismissed Dima's complaint on the violation of article 1 of Protocol 1 as incompatible *ratione materiae* because the applicant had not proved to be the owner of a copyright: *"(...), the Supreme Court of Justice, acting as a court of last instance of the internal order, dismissed the Applicant's actions on the basis of a reasoning based on Decree No. 321/1956. (...), the Supreme Court of Justice ruled on the merits that the applicant, maker of the models in dispute, had made only proposals to Parliament and that, given the collective process of realization of the models and the role played by Parliament, the models in question were not a work of intellectual creation, within the meaning of Articles 1 (1) and 2 of Decree No. 321/1956. (...) Concerning the existence of a "legitimate expectation" in this case, claimed by the applicant under Decree No. 321/1956 because of its mention as an author in the statute, the Court recalls having decided that there can be no "legitimate expectation" when there is controversy over how the law should be interpreted and applied and that the arguments advanced by the claimant in this regard have been ultimately rejected by the national courts (see, mutatis mutandis, Kopecky v. Slovakia supra, § 50). Given the information available to it and considering it can deal only to a limited measure with errors of fact or law allegedly committed by the national courts (...), the Court saw no appearance of arbitrariness in how the Supreme Court of Justice ruled on the request of the applicant."*[62]

In the disputed facts of the case, especially concerning the real contribution of the applicant to the creation of the emblem, and because the national courts considered – without any appearance of arbitrariness – that the applicant could not invoke a copyright, the Court itself could not consider that the applicant had a "possession" within the autonomous meaning of article 1 Protocol 1. The simple fact that copyright is obtained in Europe without any formalities may raise issues related to the creation of the work, the contribution of the creators and the ownership. In such cases, following Dima, in the absence of any arbitrariness, the Court is likely to follow the decisions of the internal courts.

ii) Application for the registration of an IP right

With regard to the status of the application for the registration of an IP right, one has to follow the approach of the Great Chamber in the aforementioned Anheuser-Busch case[63]. In that case, the application for the registration of a trademark was refused in unclear circumstances, possibly with a retroactive application of an international agreement. The Chamber of the Court decided that an application for registration was not protected by article 1 of Protocol 1: "...while it is clear that a trade

[62] The decision is available only in French, the text is my unofficial translation in English.
[63] Anheuser-Busch INC. v. Portugal (GC), 73049/01, 11 January 2007.

mark constitutes a 'possession' within the meaning of Article 1 of Protocol No. 1, this is only so after final registration of the mark, in accordance with the rules in force in the State concerned. Prior to such registration, the applicant does, of course, have a hope of acquiring such a 'possession', but not a legally-protected legitimate expectation."[64]

The Great Chamber changed the approach: "(…) the Court takes due note of the bundle of financial rights and interests that arise upon an application for the registration of a trade mark. It agrees with the Chamber that such applications may give rise to a variety of legal transactions, such as a sale or licence agreement for consideration, and possess – or are capable of possessing – a substantial financial value. (…) These elements taken as a whole suggest that the applicant company's legal position as an applicant for the registration of a trade mark came within Article 1 of Protocol No. 1, as it gave rise to interests of a proprietary nature. It is true that the registration of the mark – and the greater protection it afforded – would only become final if the mark did not infringe legitimate third-party rights, so that, in that sense, the rights attached to an application for registration were conditional. Nevertheless (…) the applicant company owned a set of proprietary rights – linked to its application for the registration of a trade mark – that were recognised under Portuguese law, even though they could be revoked under certain conditions. This suffices to make Article 1 of Protocol No. 1 applicable in the instant case (…)".

In other words, the Chamber linked the application for registration to the trademark itself: the application becomes a "possession" only after registration, until then it is only a conditional right. The Great Chamber took into account the rights attached to the application for registration itself by the Portuguese system: such application may give rise to a variety of legal transactions, such as a sale or licence agreement, and as a consequence may possess (as was the case) a substantial financial value. These rights exist and can be exercised separately (and, in most cases, if not all) until the decision to register or not to register is taken; they exist and deserve protection until such decision is made.

Therefore, in this case, the application itself was a possession and the rights born with it were affected by what happened in the case. Therefore, the national regular filing constitutes a possession within the meaning of article 1 Protocol 1 if the national system attaches some rights to the said deposit (and most of the national systems do attach financial consequences).

iii) The use of a sign which is not registered as a trademark

Can the use of a sign which is not registered as a trademark be considered a possession? The response cannot be absolute; it must depend on the circumstances of the case. What is sure, is that at least in some situations, the use of a sign not (yet) registered as a trademark may be considered a possession in the meaning of article 1 Protocol 1. The good faith in the use of the sign, the duration of use and, most importantly, the existence of a clientele or of goodwill are, among others, factors to be taken into account.

(C) Interference of the state and litigation between private individuals

(1) Litigation between private individuals and the role of the Court

In accordance with a constant case-law, when a court decides a dispute between private individuals with regard to property rights, by evaluating the evidence and applying the law, this fact

[64] Anheuser-Busch INC. v. Portugal (GC), 73049/01, 11 October 2005, the judgment of the third Chamber, § 52.

does not, in itself, attract the responsibility of the State on the basis of article 1 Protocol 1, unless the decision is arbitrary.[65]

As the Court decided in Anheuser Busch, "(…) even in cases involving litigation between individuals and companies, (…) the State is under an obligation to afford the parties to the dispute judicial procedures which offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly in the light of the applicable law. However, the Court reiterates that its jurisdiction to verify that domestic law has been correctly interpreted and applied is limited and that it is not its function to take the place of the national courts, its role being rather to ensure that the decisions of those courts are not flawed by arbitrariness or otherwise manifestly unreasonable." Therefore, even though it has only limited power to review compliance with domestic law, the Court may draw appropriate conclusions under the Convention where it observes that the domestic courts have applied the law in a particular case manifestly erroneously or so as to reach arbitrary conclusions[66].

In other words, when there is no involvement of the state in creating the dispute[67], unless the decision of the courts is not manifestly unfounded or arbitrary, there will be no interference of the state in the property rights of the applicant.

With regard to IP cases, in *Melnychuk v. Ukraine*, which concerned an alleged violation of the applicant's copyright, the Court observed that the fact that the State, through its judicial system, had provided a forum for the determination of the applicant's rights and obligations did not automatically engage its responsibility under that provision, even if, in exceptional circumstances, the State might be held responsible for losses caused by arbitrary determinations. The Court noted that this was not the position in the case before it, as the national courts had acted in accordance with domestic law, giving full reasons for their decisions. Thus, their assessment was not flawed by arbitrariness or manifest unreasonableness contrary to Article 1 of Protocol No. 1 of the Convention.[68]

(2) Interference of the state

Any action of the state with consequences on the situation of the applicant is an interference with its possessions: the refusal to register a car[69], the forced sale of a car[70], the refusal to grant a final construction permit[71], the retroactive termination of a valid license[72], the exclusion of a lawyer from

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[65] Josephides v. Cyprus (dec.), 2647/02, 24 September 2002; Pado c. Pologne (dec.), 75108/01, 14 January 2003; Vasil Ivanov Vasilev v. Bulgaria (dec.), 47063/99, 10 March 2005); Gabriela-Hortenzia Radulescu and Aurica Radulescu v. Romania (dec.), 66988/01, 30 March 2004, etc.

[66] Kuznetsov and Others v. Russia, no. 184/02, §§ 70-74 and 84, 11 January 2007, Păduraru v. Romania, no. 63252/00, § 98, ECHR 2005, (extracts), Sovtransavto Holding v. Ukraine, no. 48553/99, §§ 79, 97 and 98, ECHR 2002 VII, Beyeler v. Italy [GC], no. 33202/96, § 108, ECHR 2000-I and, mutatis mutandis, Tsirlis and Kouloumpas v. Greece, judgment of 29 May 1997, Reports of Judgments and Decisions 1997 III, §§ 59-63).

[67] For instance, by selling a "possession" claimed by the applicant to a third party.

[68] Another example is Anheuser-Busch itself – for a discussion with regard to the solution of the court, the see the opinions of the dissenting judges Caflisch and Cabral Barreto: "*In our view, the Court's reasoning is both debatable and contradictory. The case opposes an individual applicant against a State; the applicant company's grievance is that it has been deprived of a "possession" or "legitimate expectation" by the Portuguese courts. Accordingly, the case does not pertain to a "private" conflict between private companies*."

[69] Sildedzis v. Poland, 45214/99, 24 May 2005.

[70] Viktor Konovalov v. Russia, 43626/02, 24 May 2007.

[71] Skibińscy v. Poland, 52589/99, 14 November 2006.

[72] Megadat.com SRL v. Moldova, 21151/04, 8 April 2008.

the Bar association[73], the quashing of a final and irrevocable judicial decision[74], the destruction of the property by the security forces[75], the delayed payment of the applicants' pensions[76], the delayed enforcement of a judicial decision[77], the annulment of a contract.[78]

Article 1 contains three different rules: "the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognizes that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest (…)"[79].

As a consequence, there are three types of interferences: deprivation of property (second rule), control of the use (third rule) and interference in the general rule (the first one). The distinction between the three types of interference is very important because, among other things, the payment of compensation is mandatory only in the case of a deprivation of property.

Deprivation of property has an autonomous meaning because not every loss of property will be considered a deprivation of property; there are cases where the property is lost but the Court will analyze the interference as a control of the use of the property because the loss forms a constituent element of the procedure by which the authorities control the use. For instance, the confiscation of the murder weapon is a form of control of the use because even though the confiscation entails the loss of the property, that loss is only the consequence of the breach of rules concerning the use of the weapon. On a practical level, it would be awkward for the state to pay compensation for confiscating the gun.

With regard to IP rights, some examples of interference could be: the annulment of a registered right, a compulsory license of a patent[80], the interdiction to use a trademark or a domain name[81], the interdiction to use a non-registered sign as a trademark (if the use of the sign is protected), the use by the state of a photograph as background for identity cards[82] etc.

Most of the interferences with IP rights have been analyzed as "controls of use"; there is no case qualifying the interference in an IP right as a deprivation of property.

Some of these classifications can be easily accepted: for instance, with regard to the compulsory license of a patent, the Commission reasoned that "a patent initially confers on its owner the sole right of exploitation. The subsequent grant of rights to others under the patent is not an inevitable or automatic consequence. (…) the decisions of the Patent Office, conferring (…) a right of compulsory license in respect of the applicant's patent, constituted a control of the use of

[73] Buzescu v. Romania, 61302/00, 24 May 2005.
[74] Ponomaryov v. Ukraine, 3236/03, 3 April 2008.
[75] Hasan Ilhan v. Turkey, 22494/93, 9 November 2004.
[76] Solodyuk v. Russia, 67099/01, 12 July 2005.
[77] Bazhenov v. Russia, 37930/02, 20 October 2005; Kanayev v. Russia, 43726/02, 27 July 2006.
[78] Dacia S.R.L. v. Moldova, 3052/04, 18 March 2008.
[79] James and Others v. the United Kingdom, 21 February 1986, Series A no. 98, pp. 29-30, § 37; Sporrong and Lönnroth v. Sweden, 23 September 1982; Series A no. 52, p. 24, § 61; Beyeler v. Italy [GC], no. 33202/96, ECHR 2000-I, § 98.
[80] Smith Kline & French Lab. Ltd. v. Netherlands (decision of the Commission), 12633/87, 4 October 1990.
[81] Paeffgen GMBH v. Germany (decision of the Court), 25379/04, 21688/05, 21722/05 and 21770/05, 18 September 2007.
[82] Bălan v. Moldova, 19247/03, 29 January 2008.

property."[83] The applicant company retained an exclusive right of exploitation, its legal position remained almost unaltered; the applicant company could still exploit, sell, license, etc. its patent; the mere fact that it had to allow a third party to use its patent can hardly be conceived as a deprivation of property.

In Bălan v. Moldova[84] the state had used a photograph taken by the applicant as background for identity cards, without paying any compensation and despite the applicant's opposition. The Court did not expressly qualify the interference and therefore the question remains whether the general rule applies or not (if the Court does not specify that another "special rule applies", usually the general rule must be considered to apply). In my opinion, in this specific case, where the state used the "possession" of the applicant without its consent, the interference in question is a form of control of use – even if the use by the state of the work was unlawful.

However, even stronger interferences, entailing the loss of the possibility to use the right, are qualified as controls of use and not as deprivations of property. For instance, in Paeffgen vs Germany, the applicant company had been prohibited by the competent court to use and dispose of a domain name and ordered, by the same court, to apply with the registration authority for a cancellation of the domains. The Court finds that the first two measures (the prohibition on using or disposing of the domains), "clearly served to control the use of its property within the meaning of the second paragraph of Article 1 of Protocol No. 1." as they did not entail a transfer of the applicant's rights under the domain contracts. The third measure (obligation to apply for cancellation) entailed a loss of the company's legal position under the domain contracts but was still a control of use of the domain name because "The possessions at issue in the present case were not tangible, physical assets (…) but a contractual right to the exclusive use of domain names. The contract in question expressly stated the domain holder was responsible for verifying whether the registration and use of the domain infringed the rights of others, and the applicant company – regardless of its intentions in registering the domain – must be taken to have been aware of the risk that its domains could conflict with pre-existing intellectual property rights of third parties."[85] The third measure was aimed at preventing the further disposal of items the use of which had been found to be unlawful and enforced the prohibition in question and therefore represented a control of use.

There is no case-law on this issue, but I wonder whether the annulment of a trademark or other registered right will also be considered a "control of use" as a result of the same arguments; from a practical perspective, if the annulment is considered a deprivation of property, then the question of compensation will arise and it is easy to understand why no compensation should usually be paid when a trademark (for instance) is annulled.

(D) Justification of the interference in IP cases

(1) Lawfulness

The first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful. The requirement of lawfulness, within the meaning of the Convention, means not only compliance with

[83] Smith Kline & French Lab. Ltd. v. Netherlands (decision of the Commission), 12633/87, 4 October 1990.

[84] Bălan v. Moldova, 19247/03, 29 January 2008.

[85] Paeffgen GMBH v. Germany (decision of the Court), 25379/04, 21688/05, 21722/05 and 21770/05, 18 September 2007.

the relevant provisions of domestic law, but also compatibility with the rule of law.[86]. It thus presupposes that the rules of domestic law must be sufficiently precise and foreseeable[87].

"Law" has an autonomous meaning and means not only the statute, but the objective (positive) law applicable in a certain situation, as a result of the interpretation by the courts of the statutory provisions; therefore, the case-law of the courts is "law".[88] Therefore, the divergences in the case-law may affect the foreseeable character of the law – as shown in a recent judgment, "The Court reiterates that where such manifestly conflicting rulings stem from the same jurisdiction, and no reasonable explanation is given for the divergence, such rulings smack of arbitrariness[89] ."[90]

The case-law concerning the non-respect of the condition of the legality of the interference is quite rich: the non-enforcement of a judicial decision[91]; the quashing of a judicial decision[92]; the non-respect of the *res judicata* of a judicial decision[93]; retroactive application of a law[94], lack of clarity and foreseeability of the law (as interpreted by the courts)[95] etc.

In Anheuser-Busch the main issue was the possible retroactive application of an International treaty; in this context, the Court reaffirmed that *"(...) the retrospective application of legislation whose effect is to deprive someone of a pre-existing "asset" that was part of his or her "possessions" may constitute interference that is liable to upset the fair balance that has to be maintained between the demands of the general interest on the one hand and the protection of the right to peaceful enjoyment of possessions on the other (see, among other authorities, Maurice v. France [GC], no. 11810/03, §§ 90 and 93, ECHR 2005-IX). This also applies to cases in which the dispute is between private individuals and the State is not itself a party to the proceedings (Lecarpentier and Another v. France, no. 67847/01, §§ 48, 51 and 52, 14 February 2006; see also, in connection with Article 6 of the Convention, Cabourdin v. France, no. 60796/00, §§ 28-30, 11 April 2006).*". In that case, the retroactive application of the law was contested by the parties and the Court, having regard to the conclusion of the national courts, refrained from concluding that the law had actually been applied retroactively.

However, this solution draws attention to the situations of conflict of laws, especially when an application for the registration of a right is pending and a new law enters into force. In Romania, such a situation happened in 1998 when the (new) law on trademarks, 84/1998, replaced the old law, no. 28/1967. Article 94 of the new law provided that "Applications for the registration of marks on which no decision has been taken prior to the date of entry into force of this Law shall be subject to the provisions of this Law." The new law introduced a new motive for the invalidation of a

[86] Iatridis v. Greece [GC], no. 31107/96, § 58, ECHR 1999-II.

[87] Hentrich v. France, judgment of 22 September 1994, Series A no. 296 A, pp. 19 20, § 42; and Beyeler v. Italy [GC], no. 33202/96, § 109, ECHR 2000 I.

[88] Even in the continental systems - Bock and Palade v. Romania, 21740/02, 15 February 2007.

[89] The Court makes reference to Beian v. Romania (no. 1), no. 30658/05, §§ 37-40, ECHR 2007-XIII (extracts); Vinčić and Others v. Serbia, nos. 44698/06, 44700/06, etc., § 56, 1 December 2009; Tudor Tudor v. Romania, no. 21911/03, § 29, 24 March 2009

[90] Saghinadze and others v. Georgia, 18768/05, 27 May 2010.

[91] Pietro and others v. Romania, 8402/03, 20 July 2006.

[92] Brumărescu v. Romania [GC], no. 28342/95, ECHR 1999-VII..

[93] Kehaya and others v. Bulgaria, 47797/99 and 68698/01, 12 January 2006.

[94] Silviu Marin v. Romania, 35482/06, 2 June 2009.

[95] Bock and Palade v. Romania, 21740/02, 15 February 2007; Scordino v. Italy (No 3) 43662/98, 17 May 2005; La Rosa et Alba v. Italy (no 6), 63240/00, 15 July 2005; Binotti v. Italy (No 2), 71603/01, 13 October 2005; Fiore v. Italy, 3864/00, 13 October 2005, etc.

trademark – namely if the trademark had been registered with bad faith. Therefore, the question arose whether the new motive should be applied to trademarks applied for registration under the old law but for which the procedure for registration finished after the entry in force of the new law.

One point of view expressed in the literature was that the new law should be applied because there was no final decision and the pending applications were to be considered as *facta pendentia*; in other words, in this opinion, the "decision" mentioned in article 94 is interpreted as referring to the final decisions on the applications for registration.[96] In my opinion, the new motives for invalidation of a trademark cannot be applied to applications for which the decision to set up the national regular filing was taken before the entry in force of the new law; as shown above, the national regular filing constitutes a "possession" protected by article 1 of the First Protocol. Applying new invalidation motives to rights acquired prior to the entry into force of the new law means applying the law retroactively, which is not permitted by the Romanian Constitution[97] and, as shown above, is permitted only in drastic conditions by the Court (conditions which do not appear to be fulfilled in the present case).

(2) Legitimate aim

The second condition is the weakest one because, as the Court points out, "the notion of "public interest" is necessarily extensive"[98]. Under the system of protection established by the Convention, it is for the national authorities to make the initial assessment of the existence of a problem of public concern warranting measures which may interfere with property rights[99]. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation[100]. Therefore, where the legislature has made a choice by enacting laws which it considers to be in the general interest, the possible existence of alternative solutions does not in itself nullify the justification behind the contested legislation. Accordingly, States enjoy a certain margin of appreciation in this sphere[101]. It is not for the Court to say whether the choice of the national authorities represented the best solution, provided that the authorities remain within the bounds of that margin.[102]

With regard to IP rights, the Court accepted that "issuing identity cards to the population serves an undoubtedly important public interest"[103]. Also, "the grant of the compulsory licence was lawful and pursued a legitimate aim of encouraging technological and economic development."[104] Finally, the interdiction to use a domain name "served to further the legitimate general interest of maintaining a functioning system of protection for trademarks and /or names by effectively

[96] Octavia Spineanu Matei "Proprietate intelectuală 3. Practica judiciara 2007-2008." Editura Hamangiu 2009, pag. 30.

[97] Save for the more favorable criminal law.

[98] Bäck v. Finland, 37598/97, 20 July 2004.

[99] Bečvář and Bečvářová v. the Czech Republic, 58358/00, 14 December 2004.

[100] Former King of Greece and Others v. Greece [GC], no. 25701/94, § 87, ECHR 2000-XII, and James and Others v. the United Kingdom, judgment of 21 February 1986, Series A no. 98, pp. 31-32, §§ 45-46.

[101] Malama v. Greece, no. 43622/98, § 46, ECHR 2001-II.

[102] Bäck v. Finland, 37598/97, 20 July 2004.

[103] Bălan v. Moldova, 19247/03, 29 January 2008.

[104] Smith Kline & French Lab. Ltd. v. Netherlands (decision of the Commission), 12633/87, 4 October 1990.

preventing unauthorised third parties (in this case, the applicant company) from unduly taking advantage of the distinctiveness and esteem of protected marks or names to the detriment of their holders."[105]

(3) Proportionality

In order to assess the proportionality of the interference, the Court has to examine the degree of protection from arbitrariness that is afforded by the proceedings in the case[106]: "a complaint has better chances of success where the applicant can show that the control of use of his property suffered from procedural irregularities such as non-implementation of domestic court judgments, or (otherwise) from a lack of application of domestic law".[107]

Another factor which will prove to be important in IP cases, is the existence of other possible measures to attain the legitimate aim[108]: "Apart from the lawfulness in national law of the measures of control, the state must show that the fair balance is satisfied i.e. that in the light of the public good underlying the control, the burden which falls on the individual is not excessive and that the measures are not disproportionate, that is to say, that the public end cannot be satisfied other than by imposing this cost on the applicant".

Other factors usually taken into account by the Court are: the conduct of the parties[109], the temporary or permanent character of the interference[110], the existence of pertinent reasons to justify the measure[111], the length of time during which the applicant had to support the measure[112], the uncertainty created by the interference[113] etc. In case of a deprivation of property, a sine qua non condition – unless there are exceptional circumstances[114] – is the payment of compensation proportional to the market value of the possession.[115]

In one of the IP rights cases, the Court had regard to the fact that the interference was not necessary in the circumstances of the case and therefore, there were no compelling reasons for breaching the right of the applicant[116]. However, this is the only example where the proportionality was breached.

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[105] Paeffgen GMBH v. Germany (decision of the Court), 25379/04, 21688/05, 21722/05 and 21770/05, 18 September 2007.

[106] Islamic Republic of Iran Shipping Lines v. Turkey, 40998/98, 13 December 2007.

[107] P. van Dijk, G.J.H. van Hoof, „Theory and Practice of the European Convention on Human Rights", Kluwer Law International, The Hague, London, Boston, 1998, pag. 639.

[108] D.J.Harris, M.O'Boyle, C.Warbrick, "*Law of the European Convention on Human Rights*", Butterworths, London, Dublin, Edinburgh, 1995, pag. 535: However, see BÄCK v. FINLAND, 37598/97, 20 July 2004: " The possible existence of alternative solutions does not in itself render the contested legislation unjustified. Provided that the legislature remains within the bounds of its margin of appreciation, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way ".

[109] Broniowski v. Poland [GC], 1443/96, § 129.

[110] Wiesinger v. Austria, 11796/85, 30 October 1991, § 73.

[111] Gashi v. Croatia, 32457/05, 13 December 2007.

[112] Luordo v. Italy, 32190/96, 17 July 2003.

[113] Paduraru v. Romania, no. 63252/00, § 65, ECHR 2005 ... (extracts).

[114] Jahn and Others v. Germany [GC], 46720/99, 72203/01 and 72552/01, ECHR 2005 VI.

[115] Tuncay v. Turkey, 1250/02, 2 December 2006

[116] Bălan v. Moldova, 19247/03, 29 January 2008

In other two cases where the Court examined the proportionality, it reached the conclusion that article 1 had been respected.

In one case[117], the interdiction of using the domain name and its cancellation were the only measures which met the demands of the general interest in protection of trademarks and/or (business) names. The Court accepted that, in the circumstances of the case other, less restrictive measures such as allowing the applicant to continue using the registered domains while clarifying possible confusions with others on the respective websites were not considered sufficient. It also took into account the fact that the applicant company had hardly used the domains in question. Having regard to the State's wide margin of appreciation in this field the Court found that article 1 of Protocol 1 was not breached.

The compulsory licence of a patent to the holder of a dependent patent was also accepted by the Commission because the license was necessary, limited to what was required for the working of the dependent patent and entitled the owner of the dominant patent to royalties. In view of the importance of the aim followed - to prevent the abuse of monopoly situations and encourage development – the Commission accepted that the method of pursuing that aim falls within the margin of appreciation accorded to the Contracting State[118].

Conclusions

As almost any other branch of law, national IP law is affected not only by the community law, but also by the case-law of the ECtHR; both – different – sources of law enjoy primacy over the national law as a result of special provisions in the Romanian Constitution. In both cases, if there is a conflict with the national IP law, the national judges are obliged to refrain from applying the national laws which contravene the principles established in the Court's case-law or the Community law.

IP rights are protected by the Convention. As civil rights, both patrimonial and moral rights enjoy the *procedural guarantees* offered by article 6; there are numerous cases in which the Court considered that the length of national proceedings regarding IP rights violated article 6; also, the non-enforcement of judicial decisions led to several convictions. All the other guarantees – access to justice, equality of arms, adversarial character of the procedure, the right to a hearing, etc. – apply to IP rights, but the case-law concerns, until now, only the motivation of the judicial decisions.

With regard to the *material guarantees*, the moral IP rights may be protected under article 8 of the Convention (as social-private rights) or, when they concern an expression (as is the case with most copyright protected works), under article 10 of the Convention. There are several cases in which the Court applied article 10 to interferences which concerned not only patrimonial, but also moral aspects of copyright. A deeper analysis of the application of article 10 in relation to works protected by copyright would go far beyond the scope of this paper; however, a thorough scrutiny of this case-law would be important in determining the limits of copyright when in conflict with the rights of others or an important public interest.

Finally, the patrimonial IP rights (the exclusive exploitation rights) are protected by article 1 of Protocol 1: there is clear case-law, including a Great Chamber judgment, which leaves very little

[117] Paeffgen GMBH v. Germany (decision of the Court), 25379/04, 21688/05, 21722/05 and 21770/05, 18 September 2007.

[118] Smith Kline & French Lab. Ltd. v. Netherlands (decision of the Commission), 12633/87, 4 October 1990.

doubt that, *by their nature, IP rights may be protected*. The second condition for protection – the *recognition by the state* – is fulfilled when the IP right is registered; however, it can lead to problems in the case of copyright, in the case of an application for registration or in the case of use of a sign which is not registered as a trademark.

In the case of copyright, the facts of the case can be disputed by the parties and, usually, the Court will not adopt a different solution than the national courts. The application for registration, in most systems, creates certain rights (priority, sale, license, etc.) which are themselves "possessions"; however, the mere application does not create a "legitimate expectation" for registration, it serves merely to assure that the rules of the game will remain unchanged until the application receives an answer. The simple use of a sign may, in certain circumstances, create a clientele or a goodwill which means that it can be protected as a possession. Other situations of this kind can be envisaged, but they have not appeared in the case-law yet.

Any interference with an IP right which enjoys the protection of article 1 Protocol 1 must be lawful, have a legitimate aim and respect a reasonable relation of proportionality with that aim.

The *clarity of the law*, the foreseeability of its application, the divergences in the case law and the retroactive application of a new law have been causing or could easily cause problems in the field of IP rights. The complex situation created by the existence of national law, Community regulations and directives, national practice and European case-law, cumulated with the traditional difficulty in this field of law may give rise in the future to problems related to the lawfulness of interference.

If the Court accepts rather easily that *most interferences have a legitimate aim*, the *proportionality of the interferences is the most important condition*; however, the case-law is not very rich when it comes to applying this condition to IP rights. Because none of the interferences analyzed by the Court has been considered to be a deprivation of property, in none of the cases could the lack of compensation play an important role; the remuneration was mentioned as one of the factors taken into account in a compulsory license case. It seems that the Court looks at the necessary character of the measure (if there were other measures which could have been taken by the state to achieve the legitimate aim); this element led to a violation in one case and to the contrary solution in another. There is no case-law yet on the revocation of a trademark, patent or other IP registered right; although the revocation implies the loss of the right, it is not certain that such a loss will be considered, in every case, as a deprivation of property. That question deserves a thorough analysis which, however, goes beyond the scope of this paper.

IP rights are human rights; they are protected by the Convention and a general theory concerning their existence, limitations and revocations cannot be created without resorting to the case-law of the ECtHR and principles established therein. In a complex IP world, with interrelated sources of regulation, the ECtHR establishes minimum standards that have to be directly applied by the national courts in order to respect basic human rights.

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USE OF FORCE AND INSTRUMENTS OF RESTRAINT - AN OUTLINE OF THE ROMANIAN LEGISLATION IN THE EUROPEAN CONTEXT

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Abstract

Establishing restrictions in employing force and restraint devices against prisoners has to be regarded as an essential part in terms of respecting human rights. This article aims at analyzing the conformity of the Romanian legislation with the provisions of the European Convention of Human Rights, with the CPT Standards and the Council of Europe Rec(2006)2 on the European Prison Rules. The paper will focus on the study of the ECtHR judgements regarding the principles of using force on prisoners and the use of instruments of restraint (handcuffs, restraint jackets etc.). To close with, the study will attempt to go through the recent developments in the Romanian legislation, including the Order no. 1676/2010 of the Ministry of Justice for approving the Regulation regarding the safety of the places of detention placed under the authority of the National Administration of Penitentiaries.

Keywords*: Prisoners; Use of force and instruments of restraint; ECHR; European Prison Rules; Romanian legislation.*

Introduction

Human rights protection is of paramount importance in the present days. In this respect, special attention needs to be given to the protection of the persons deprived of their liberty as they are in a fragile position and it is the duty of the state to ensure the full respect of their fundamental rights. The European system established by the Council of Europe constitutes a bulwark in protecting the fundamental rights and freedoms of the persons deprived of their liberty and is formed, *inter alia*, by the European Convention for the Protection of Human Rights and Fundamental Freedoms[1] (ECHR) completed by the European Court of Human Rights (ECtHR) case-law, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[2] together with the standards of the European Committee for the Prevention of Torture and Inhuman or Degrading

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

[2] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, adopted in Strasbourg on November 26, 1987, as well as Protocols no. 1 and 2 to the Convention were ratified by Romania through Law no. 80/1994, published in the *Official Journal of Romania*, Part I, no. 285 of October 7, 1994.

Treatment or Punishment (CPT) and by the Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules[3].

Although only the European Convention of Human Rights ensures an effective protection of an individual as a result of a violation of his or her fundamental rights, the importance of the other European instruments (European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and European Prison Rules) ought not be undermined, as the European Court of Human Rights regularly referes to CPT Recommendations and European Prison Rules in its judgements.

CPT focuses on future prevention by means of *a priori* control, giving recommendations to the visited state (with no binding force) and the European Prison Rules reflect the latest developments in best prison practice with the commitment to treat prisoners justly and fairly by creating a united framewok in the member states, taking into account the requirements of safety, security and discipline, while ensuring prison conditions which do not infringe human dignity and prepare the prisoners for their reintegration into society.

As a general remark, in the specialist literature it was stressed out that developments such as the reporting mechanisms of the European Convention for the Prevention of Torture provide a useful non-judicial system of review which supplements the provisions of article 3 and reports under that Convention regime are increasingly providing evidence upon which the Court relies in its determination of applications complaining of torture, or inhuman or degrading treatement. Though it is partly accounted for by the expansion matters which fall within the scope of article 3, it nevertheless remains disappointing that so many cases raise substantial complaints of treatement in breach of article 3.[4]

The recent evolution of the Romanian legislation since the entering into force of Law no. 275/2006 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings[5], continuing with the adoption of the Government Decision no. 1897/2006 for the approval of the Regulation of application of the Law No. 275/2006[6], emphasise the special attention given by the Romanian legislator in drafting and adopting legislation within the framework of international and European treaties and recommendations.

This study will try to assess the conformity of the Romanian legislation with the European principles and recommandations regarding the use of force and instruments of restraint against persons deprived of their liberty by executing a prison penalty, bearing in mind the prohibition, in absolute terms, of torture or inhuman or degrading treatment or punishment.

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[3] Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules was adopted by the Committee of Ministers on January 11, 2006 at the 952nd meeting of the Ministers' Deputies. Accessed March 7, 2011. https://wcd.coe.int/wcd/ViewDoc.jsp?id=955747.

[4] Jacobs & White, editors, *The European Convention on Human Rights*, 4th edition, Oxford University Press Publishing House, Oxford, 2006, p. 109.

[5] Law no. 275/2006 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings was published in the *Official Journal of Romania*, Part I, no. 627 of July 20, 2006 and was amended by Law no. 83/2010, published in the *Official Journal of Romania*, Part I, no. 329 of May 19, 2010.

[6] Government Decision no. 1897/2006 for the approval of the Regulation of application of the Law No. 275/2006 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings and other minister orders regarding the execution of prison penalties was published in the *Official Journal of Romania*, Part I, no. 24 of January 16, 2007 and was amended by Government Decision no. 1113/2010, published in the *Official Journal of Romania*, Part I, no. 838 of December 4, 2010.

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

Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) enshrines one of the basic values of the democratic societies whose core purpose is to protect a person's dignity and physical integrity – prohibition, in absolute and unqualified terms, of torture or inhuman or degrading treatment or punishment[7], thus protecting, *inter alia*, the persons deprived of their liberty against the excessive use of force or of instruments of restraint. Persons deprived of their physical liberty shall mean, in accordance with the ECtHR case-law, persons who are deprived of their liberty in accordance with a procedure prescribed by law by arrest or detention. So, in this sense, all the principles set out by the Strasbourg Court regarding the use of force and instruments of restraint against persons deprived of their liberty will apply in all the cases mentioned in article 5 paragraph 1 of the Convention[8].

Given the exposed position of the persons deprived of their liberty, member states need to give special attention upon fulfilling their obligation to taking all necessary measures in order to ensure the protection of those persons against torture or inhuman or degrading treatment or punishment. At this stage, mention should be made that a large proportion of the cases before the Commission and Court have been introduced by prisoners, who are perhaps in a particularly vulnerable position, almost, if not all, aspects of their lives being subject to regulation by authorithy. The potential for interference and restriction in fundamental rights and freedoms is considerable.[9]

The unconditional terms of article 3 also mean that there can never, under the Convention or under international law, be a justification for acts which breach the article. In other words, there can be no factors which are treated by a domestic legal system as justification for resort to prohibited behaviour – not the behaviour of the victim, the pressure on the perpetrator to further an investigation or prevent a crime, any external circumstances or any other factor.[10] Among the positive obligations of the member states there is the obligation to protect the person's dignity and physical integrity,

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

[8] Article 5, Right to liberty and security *1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*

[9] Karen Reid, *A practitioner's guide to the European Convention on Human Rights*, 3rd edition, Thomson Sweet & Maxwell Publishing House, London, 2008, p. 464.

[10] Aisling Reidy, *The prohibition of torture. A guide to the implementation of Article 3 of the European Convention on Human Rights.* Human rights handbooks, No. 6, Directorate General of Human Rights, Council of Europe, 2002, p. 19. Accessed March 7, 2011.
http://echr.coe.int/NR/rdonlyres/0B190136-F756-4679-93EC-42EEBEAD50C3/0/DG2ENHRHAND062003.pdf.

especially of those deprived of their liberty (for example detained persons, persons serving a prison penalty). This obligation implies the responsability of the state (through the penitentiary authorithies) even when the breaches of the physical and mental state of a prisoner had been committed by other inmates. Prison staff must take all the apropriate measures in order to prevent ill-treatment from the part of other inmates and to ensure the safety of this person against such violences.[11] In securing the necessary protection underlined in article 3, member states have a positive obligation to train its law enforcement officials (*e.g.* policemen, prison staff), thus ensuring a high level of competence in their professional conduct, the goal being the protection of persons deprived of their liberty against torture or inhuman or degrading treatment or punishment.

In assessing some cases of use of force or instruments of restraint, the European Court of Human Rights defined the conditions in which the policemen or prison officers may use these means. On the one hand, it is obvious that the use of a certain amount of force in case of resistance to arrest, an attempt to flee or an assault on a prison officer or fellow prisoner may be inevitable. On the other hand, the form, as well as the intensity of the force used should be proportionate to the nature and the seriousness of the resistance or threat.[12] The suffering and humiliation involved must in any case go beyond that inevitable element of suffering or humiliation connected with the execution of a prison penalty. In accordance with article 3 of the Convention the state must ensure that the conditions of executing a prison penalty are compatible with the respect for human dignity and that the manner and method of the execution of the measure do not subject the person to distress or hardship exceeding the unavoidable level of suffering inherent in detention.

In its jurisprudence the ECtHR stressed out repeatedly that persons deprived of their liberty are vulnerable and it is the duty of the national authorities to protect their physical well-being, whereas the use of physical force or other means of restraint have to be strictly necessary and have to be required by the prisoner's own conduct. In other words, in respect of a person deprived of his or her liberty any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in article 3 of the Convention.[13]

Practices and policies, such as handcuffing prisoners or use of other modes of restraint or other disciplinary measures, such as deprivation of outdoor exercise or visitation rights, must be subject to review and scrutiny to ensure that the manner in which they are not imposed is not abusive, nor give rise to degrading treatment.[14] In respect of persons deprived of their liberty, the starting point for assessing whether any ill-treatment has taken place is a determination of whether or not physical force has been used at all against the detainee in the first instance.[15] The Court, in assessing evidence, adopts the standard of proof "*beyond reasonable doubt*", either from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact, so

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[11] Mihai Udroiu, Ovidiu Predescu, *Protecţia europeană a drepturilor omului şi procesul penal român (European protection of human rights and Romanian criminal trial)*, C.H.Beck Publishing House, Bucharest, 2008, p. 113-114.

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

[13] ECtHR judgement from December 4, 1995, final, in the case of Ribitsch v. Austria (1), para.38. All the ECtHR judgements mentioned in this study are available on the website of the ECtHR http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/ and were accesed in March 4, 2011.

[14] Aisling Reidy, *op. cit.*, p. 27.

[15] *Ibidem*, p. 22.

if the applicant did not advanced to the Court any elements supporting the reality of his or her complaint in order to prove the reality of the alleged ill-treatment[16], if the evidence presented (including medical certificates) atests the low severity of the injuries and the methods used were not inadequate, nor disproportionate to the aim of the police mission, which was to bring the applicant before a judicial authority[17], if it is impossible to establish, on the basis of the evidence before it, whether or not the applicant had suffered at the hands of authorities treatment contrary to article 3 of the Convention as he alleged[18], the Court can not held that there has been a violation of article 3 under its substantive limb.

Strasbourg Court did not find any violation of article 3 of the Convention in *Boris Popov v. Russia*[19], as the decision of the national authorities to apply handcuffs to the applicant after he had swallowed a safety pin and uttered threats of further self-mutilation was not incompatible with respect for human dignity, therefore he was not subject to degrading treatment. The Court reiterated in that connection that the authorities are under a duty to protect persons in custody and that it is incumbent on the State to account for any injuries suffered during such periods.

Ill-treatment must attain a minimum level of severity if it is to fall within the scope of article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.[20]

The use of means of restraint in other circumstances than those provided by the Convention or by the Strasbourg case-law diminishes human dignity and is, in principle, an infringement of the right set forth in article 3 of the Convention. In this sense, Romania was condemned in some cases before European Court, as the use of force or other instruments of restraint was not legal and proportionate to the nature and the seriousness of the resistance or threat. In *Bursuc v. Romania*[21], the Strasbourg Court considered that given the intensity of the hits inflicted on the applicant, causing him multiple bruises to the head, including a severe head injury with diffuse cerebral edema, has to be considered torture within the meaning of article 3 of the Convention, also taking into consideration the duration of the abuse inflicted on the applicant for several hours by the police officers, from his apprehension at the bar in the evening, during his drive in the police car and, finally, at the police station, before he was taken to hospital in serious condition.

The ECtHR found a violation of article 3 of the ECHR regarding the unlawful and unnecessary use of force, amounting in inhuman and degrading treatment, in the following judgements against Romania:

- in *Barbu Anghelescu v. Romania*[22], the applicant suffered injuries caused by the police officers with the occasion of a routine traffic control, namely several bruises and injuries in the neck, on the forehead and another in the clavicular region of the thorax;

[16] ECtHR judgement from November 9, 2006, final, in the case of *Melinte v. Romania*, para.35-36.
[17] ECtHR judgement from April 26, 2007, final, in the case of *Dumitru Popescu (no.1) v. Romania*, para.68-69.
[18] ECtHR judgement from November 24, 2009, final, in the case of *Bolovan v. Romania*, para.45 and 47.
[19] ECtHR judgement from October 28, 2010, final, in the case of *Boris Popov v. Russia,* para.53-56.
[20] ECtHR judgement from October 26, 2000, in the case of Kudla *v. Poland*, para.91.
[21] ECtHR judgement from October 12, 2004, final, in the case of *Bursuc v. Romania*, para.91-92.
[22] ECtHR judgement from July 26, 2007, final, in the case of *Barbu Anghelescu v. Romania*, para.50 and 60-61.

- in *Cobzaru v. Romania*[23], the applicant suffered injuries caused by the treatment inflicted on him while he was under police control at the police station after being hit with painful and hard objects, his state of health consisting in severe headaches and stomachaches, difficulty in walking, bruises around both eyes, on his fingers, on the back of his right hand, on his chest, on his right thigh and calf, and a haematoma on his head;

- in *Georgescu v. Romania*[24], the applicant suffered injuries from being hit with hard objects, treatment inflicted by the authorities or with their consent or by the inadequacy of the prison conditions, in particular bearing in mind the authorities' failure to prevent the ill-treatment at least from the date when it became foreseeable.

- in *Niţă v. Romania*[25], the applicant was handcuffed at the foot of the table where he was asked to give declarations, despite the fact that the behaviour of the applicant did not justifiy the necessity of such actions taken by the police forces.

The ECtHR found that article 3 of the Convention was repeatedly infringed in *Rupa v. Romania (no.1)*[26] due, *inter alia*, of the excessive and unproportionate use of force and instruments of restraint by police officers:

- during a police operation, the applicant was hit on the head and in the stomach. After immobilising him on the ground, the officers sprayed tear gas at him, handcuffed him, then forcibly placed him in the boot of a police car, in which he was taken to the police station, were he was beaten again and, eventually, placed in a police cell, containing only a few metal benches, until the next morning. The Court, although it accepted that police forces can use force, tear gas or handcuffes, given the circoumstances of the case, in this particular situation it considered that the use of force during the arrest of the applicant was not indispensable, especially since the police forces did not take any special measures in order to avoid the risks inherent in the arrest of a person known to have behavioural disorders;

- the applicant was subject to inhuman treatment because during a subsequent police operation, the police officers had repeatedly kicked him before taking him to the police station and the police forces did not take any special measures in order to avoid the risks inherent in the arrest of a person known to suffer from personality disorder, these state of affairs being also sustained by the Romanian Supreme Court of Justice which had found that the police officers' actions on both occasions when the applicant had been arrested had amounted to an abuse of authority, thus confirming that the security forces' intervention had been disproportionate to the resistance offered by the applicant;

- regarding the aplicant's detention, he was again subject to inhuman treatment, being placed in solitary confinement as a sanction and immobilised with handcuffs and chains on his feet for a period exceeding the 25 days which he was ordered to spend in solitary confinement and, in view of the applicant's behavioural disorders, the authorities had been under an obligation to have him examined by a psychiatrist as soon as possible in order to determine whether his psychological condition was compatible with detention and what therapeutic measures should be taken. The Court

[23] ECtHR judgement from July 26, 2007, final, in the case of *Cobzaru v. Romania*, para.63 and 74.
[24] ECtHR judgement from May 13, 2008, final, in the case of *Georgescu v. Romania*, para.32 and 84.
[25] ECtHR judgement from November 4, 2008, final, in the case of *Niţă v. Romania*, para.38-39.
[26] ECtHR judgement from December 16, 2008, final, in the case of *Rupa v. Romania (no.1)*, para.115-121, 152-153 and 172-176.

considered that the Government had not shown that the measures of restraint applied to the applicant during his detention at the police station had been necessary.

In analisying the ECtHR case-law, there can be extracted the principles regarding the use of force and instruments of restraint against prisoners. Although the Court accepted in *Dedovskiy and others v. Russia*[27] that the behavoiur of the applicants could request the use of physical force, given the potential for violence that exists in penitentiary institutions and the fact that disobedience by detainees may quickly degenerate into a riot which would require intervention of the security forces, it found a violation of article 3 of the Convention regarding the unlawful or unnecessary use of force case, as the applicants were beaten by the officers of the special-purpose squad, both with and without the use of a rubber truncheon, because they refused to leave the cell which was to be searched and, respectively, refused to spread the arms and legs wide apart for a body search. The Court considered that the actions of the state agents can be considered as torture, especially bearing in mind that the gratuitous violence, to which the officers deliberately resorted, was intended to arouse in the applicants feelings of fear and humiliation and to break their physical or moral resistance. The purpose of that treatment was to debase the applicants and drive them into submission.

The Court sanctioned in *Davydov and others v. Ukraine*[28] the excessive use of force against the prisoners by the prison staff without any justification or lawful grounds, during some training exercises. Also excessive force and humiliation was used against some prisoners as they were considered "*malicious violators*" of the detention regime. The Court pointed out that, among the excessive force used, the prison staff participating in the training exercises used helmets and masks, therefore concealing their identity, making any further complaints practically impossible. These elements concluded that there was a violation of article 3 of the ECHR, but given the level of severity and of the physical and mental pain suffered by the detainees, the violation did not amount in torture, but rather in inhuman and degrading treatement.

A violation of article 3 was also found in *Artyomov v. Russia*[29], on account that a group of officers of the special purpose unit wearing balaclava masks and carrying rubber truncheons initiated certain operations in the correctional colony where the applicant was detained, that had been accompanied by repeated and severe beatings as a consequence of which a number of inmates, including the applicant, sustained multiple injuries. The Court did not discern any circumstance which might have necessitated the use of violence against the applicant. Since the applicant fully complied with the orders of the officers, the use of force was intentional, retaliatory in nature and aimed at debasing the applicant and forcing him into submission. In another incident in the same case, a rubber truncheon had been used against the applicant in response to the unruly conduct of detainees; the Court found that use of rubber truncheons against the applicant was grossly disproportionate to the applicant's conduct, *i.e.* his refusal to leave his cell, and retaliatory in nature, thus subjecting the applicant to inhuman treatment in breach of article 3 of the ECHR.

[27] ECtHR judgement from May 15, 2008, final, in the case of *Dedovskiy and others v. Russia*, para.80-81, 83 and 85.

[28] ECtHR judgement from July 1, 2010, final, in the case of *Davydov and others v. Ukraine*, para.266-267, 269 and 271-272.

[29] ECtHR judgement from May 27, 2010, in the case of *Artyomov v. Russia*, para.132, 140-141, 169 and 172-173.

In *Kucheruk v. Ukraine*[30], the ECtHR stated that if a person was injured when the prison guards attempted to put an end to his agitated behaviour by beating him with rubber truncheons, without proving that the applicant did attempt to attack the officers or fellow inmates or that his erratic movements, classified by the guards as "*outrage*", constituted any danger to their health or to the applicant's cellmates, than the use of truncheons was unjustified and amounted to inhuman treatment contrary to article 3 of the Convention and the fact that the applicant, suffering from chronic schizophrenia, was around the clock handcuffed for seven days in a disciplinary cell, this measure being based only on the opinion of a paramedic and a doctor unqualified in psychiatry, constitutes inhuman and degrading treatment contrary to article 3 of the Convention, taking into consideration that nothing was done to prevent the applicant from acquiring the injuries and the applicant was not afforded any medical care for his injuries.

In *Ciorap v. Moldova*[31], Strasbourg Court held that there is a violation of article 3 of the ECHR, as repeated force-feeding of the applicant performed in a manner which unnecessarily exposed him to great physical pain and humiliation, was considered torture. As it can be observed from the judgement, the Court held a violation of article 3 not only because of the force-feeding, but also because of an intervention of several factors, especially the unnecessary use of force, namely handcuffing and the fact that the forced-feeding was not supported by valid medical reasons.

From the procedural point, where an individual raises an arguable claim that he has been seriously ill-treated in breach of article 3 of the Convention, the member state has an obligation to initiate a thorough, prompt, independent and effective investigation, which should be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible. This means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia,* eyewitness testimony, forensic evidence etc. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or to identity the persons responsible will risk falling foul of this standard. For an effective investigation into alleged ill-treatment by state agents, such investigation should be independent. Thus, the investigation lacked independence where members of the same division or detachment as those implicated in the alleged ill-treatment were undertaking the investigation. The independence of the investigation implies not only the absence of a hierarchical or institutional connection, but also independence in practical terms.[32] In considering all these aspects, the Court found a violation of article 3 of the Convention under its procedural head in several cases against Romania, as the national authorities failed to fulfilll their obligation to conduct a proper official investigation into the applicant's allegations of ill-treatment, capable of leading to the identification and punishment of those responsible.[33]

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[30] ECtHR judgement from September 6, 2007, final, in the case of *Kucheruk v. Ukraine*, para.148, 156-157 and 144-146.

[31] ECtHR judgement from June 19, 2007, final, in the case of Ciorap v. Moldova, para.84-85 and 88-89. The Court was struck by the manner of the force-feeding, including the unchallenged facts of his mandatory handcuffing regardless of any resistance, the causing of severe pain in order to force him to open his mouth and the pulling of his tongue outside of his mouth with metal tongs.

[32] ECtHR judgement from January 26, 2006, final, in the case of Mikhenyev v. Russia, para.107-108 and 110.

[33] *Bursuc v. Romania*, *ibidem*, para.110; *Dumitru Popescu (no.1) v. Romania*, *ibidem,* para.78-79; *Cobzaru v. Romania*, *ibidem,* para.75; *Barbu Anghelescu v. Romania*, *ibidem,* para.70; *Georgescu v. Romania*, *ibidem,* para.85;

II. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

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

It needs to be said that CPT does not have any judicial function, its task being a purely preventive one, namely an *a priori* control, and the recommendations issued on the basis of information obtained during the fact-finding visits by the Comitee will not be binding for the visited state. As a consequence of this role, CPT does not seek to interfere in the interpretation and application of article 3 of the ECHR, which provides the prohibition, in absolute terms, of torture or inhuman or degrading treatment or punishment, but rather it will focus on future prevention, bearing in mind the case-law of the Court and Commission of Human Rights.

Although CPT does not give binding acts for the visited member states, CPT Standards are considered an adecvate instrument which member states can use in order to adjust their legislation to the European principles and standards. These guidelines drawn up by the CPT are substantive issues contained in their General Reports, by which the Committee hopes to give a clear advance indication to national authorities of its views regarding the manner in which persons deprived of their liberty ought to be treated and, more generally, to stimulate discussion on such matters.[34]

Regarding the use of force and instruments of restraint, CPT set out the standards in the 2nd General Report[35]: prison staff will on occasion have to use force to control violent prisoners and, exceptionally, may even need to resort to instruments of physical restraint. These are clearly high risk situations insofar as the possible ill-treatment of prisoners is concerned, and as such call for specific safeguards. A prisoner against whom any means of force have been used should have the right to be immediately examined and, if necessary, treated by a medical doctor. This examination should be conducted out of the hearing and preferably out of the sight of non-medical staff and the results of the examination (including any relevant statements by the prisoner and the doctor's conclusions) should be formally recorded and made available to the prisoner. In those rare cases when resort to instruments of physical restraint is required, the prisoner concerned should be kept under constant and adequate supervision. Furthermore, instruments of restraint should be removed at the earliest possible opportunity; they should never be applied, or their application prolonged, as a punishment. Finally, a record should be kept of every instance of the use of force against prisoners.

Special attention should be given to mentally disturbed and violent patients in the prison health care system. According to the 3rd General Report[36], resort to instruments of physical restraint

Niţă v. Romania, *ibidem,* para.50-51; *Rupa v. Romania*, *ibidem,* para.154-155 and 178-179; *Alexandru Marius Radu v. Romania*, ECtHR judgement from July 21, 2009, final, para.47 and 52; *Bolovan v. Romania*, *ibidem,* para.53-54; *Boroancă v. Romania*, ECtHR judgement from June 22, 2010, final, para.50-51.

[34] CPT Standards, About the CPT, p. 5. Accessed March 5, 2011. http://www.cpt.coe.int/en/docsstandards htm.

[35] CPT 2nd General Report on the activities covering the period 1 January to 31 December 1991 was published on April 13, 1992, para.53. Accessed March 5, 2011. http://www.cpt.coe.int/en/annual/rep-02 htm.

[36] CPT 3rd General Report on the activities covering the period 1 January to 31 December 1992 was published on June 4, 1993, para.44. Accessed March 5, 2011. http://www.cpt.coe.int/en/annual/rep-03 htm.

in the case of mentally disturbed and violent patients shall only very rarely be justified and must always be either expressly ordered by a medical doctor or immediately brought to the attention of such a doctor with a view to seeking his approval. Instruments of physical restraint should be removed at the earliest possible opportunity. In the event of using instruments of physical restraint, an entry should be made in both the patient's file and an appropriate register, with an indication of the times at which the measure began and ended, as well as of the circumstances of the case and the reasons for resorting to such means.

About the use of force and instruments of restraint in the Romanian prisons, some remarques are present in the Report following the CPT visit in Romania in 2006.[37]

Regarding ill-treatement applied by the members of specialized intervention groups in prison, the CPT stresses out that any form of abuse against prisoners (including verbal provocations and insults) is unacceptable and will be severely punished. Also, the use of force (in this particular case, the use of punches, foot kicks and rubber truncheons to control violent and/or uncooperative inmates should be limited to the minimum necessary, and, in any case, after a person is contained, there is no justification in continuing the use of force.

It is forbidden to all members of specialized intervention groups to wear masks in exercising their duties in prison, whatever the circumstances, as this aspect combined with the fact that members of those groups had tasks in surveillance, escort and search the dangerous prisoners dehumanizes the relationship between prison staff and inmates and introduces a powerful element of intimidation. In addition, wearing a mask obstructs the identification of potential suspects if and when allegations of ill-treatement are made.

In respect to security measures in a prison, CPT notes that it is unacceptable to resort systematically to means of restraint (handcuffing and chains), without an individualized assessment of risk in the case of prisoners sentenced to life imprisonment and classified as dangerous everytime they were removed from their cells, during their daily walk outdoors or during visits in order to secure areas of the prison. In the same manner, handcuffing dangerous prisoners during medical examinations and the permanent presence of prison staff (even masked members of specialized intervention groups) in all visited establishments cannot be tolerated, as this practice undermines the dignity of prisoners and prevents the establishment of a normal relationship between doctor and patient.

In addition to that, CPT emphasied to the Romanian authorities several principles regarding the use of instruments of physical restraint, recognizing that prison staff can, in certain conditions, use force to control inmates agitated and/or violent and may even, exceptionally, need to resort to instruments of physical restraint:

- instruments of restraint should not be used to imobilise an inmate as a response to his or her psychiatric problems, instead such a person must be transferred to an appropriate medical unit;
- any use of such means of restraint must be immediately brought to the attention of a doctor;
- instruments of restraint must be specifically designed to limit the adverse effects, discomfort and pain during their application, which is not the case with conventional handcuffs;

[37] Report to the Romanian Government on the visit to Romania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 8 to 19 June 2006, published on December 11, 2008, paraghaphs 73, 74, 102-104, 139 and 141. Accessed March 8, 2011. at http://www.cpt. coe.int/documents/rom/2008-41-inf-fra htm,

- the duration of periods of restraint should be as short as possible (usually within minutes or at most a few hours). Any extension must be justified by a new medical examination by a doctor. Imobilization for several consecutive days can have no justification and can be considered ill-treatment;

- the restrained persons should normally be out of sight of anyone outside the staff, except in cases of benefit to the individual;

- restrained persons must be monitored directly and permanently by qualified staff members regarding their mental and physical condition, ensuring immediate contact with outside persons interested in the state of the restrained person.

- the use of instruments of restraint must be recorded in a specific register established for this purpose, in the personal file of the restrained person and in the surveillance register. The entry should include the time when the measure started and when it ended, the equipment used, the circumstances under which the case occurred, the reasons that lead to the measure and a record with any injuries sustained by the person or staff;

- the management of each prison shall inform all staff involved about the use of instruments of physical restraint, through written guidelines, taking into account the above criteria and include information about the risks.

Finally, CPT emphasised that, in order to respect all these guidelines, there is a need to train the prison stuff involved in situations which require the use of force or instruments of physical restraint.

III. Recommendation Rec (2006) 2 of the Committee of Ministers to member states on the European Prison Rules

The European Prison Rules set out some principles regarding the use of force (rules 64 - 67) and instruments of restraint (rule 68) principles based on which the national legislation of the member states must be elaborated.

Regarding the use of force, it has to be used as a last resort by the prison staff, only in self-defence or in cases of attempted escape or active or passive physical resistance to a lawful order, always as a last resort and only for the shortest necessary period of time.

The use of force needs to be detailed in the national legislation, including, at least, provisions regarding: various types of force that may be used, circumstances in which each type of force may be used, members of staff who are entitled to use different types of force, level of authority required before any force is used and reports that must be completed once force has been used.

Instruments of restraint such as handcuffs, restraint jackets and other body restraints shall be used only if necessary, as a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority, unless that authority decides otherwise or by order of the director, if other methods of control fail, in order to protect a prisoner from self-injury, injury to others or to prevent serious damage to property, provided that in such instances the director shall immediately inform the medical practitioner and report to the higher prison authority. The use of these instruments must, in any case, be proportionate with the reasons that generated the situation and shall not be applied for any longer time than is strictly necessary. The use of chains and irons shall be prohibited.

In understanding these principles special attention should be given to the Commentary to Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European

Prison Rules[38], as they reflect the latest development in best prison practice. Use of force must be a last resort and should be at the minimum level necessary to restore order, within clearly defined limits and in response to a specific threat to security or good order. Best practices in these areas include good professional relationships between staff and prisoners in order to prevent incidents and to minimalize potential incidents, also through dialogue and negotiation, rather than permit the appearance of such situations which necesitate the use of force or instruments of restraint.

Because the use of force must always attain the minimum level necesary, prison staff has to be trained in techniques that enable the minimal use of force in the restraint of prisoners who are aggressive in such a way that all staff are competent in the basic skills and that sufficient staff are trained in advanced techniques.

If the situation requires, it is possible to intervine with members of other law enforcement agencies (such as the police) inside a prison; in this respect, it is recommended that prison authorities should conclude protocols with national agencies that may be called to help resolve a violent incident, in order to prevent excessive use of force by the members of these agencies inside a prison, bearing in mind that the prison staff will have to cooperate with the inmates after the crises has ceased.

Regarding the instruments of restraint, their use must be strictly controlled and avoided wherever possible. They should be used in order to prevent physical injury to the prisoners concerned or to staff, escape or unacceptable damage. In any case, the use of intruments of restraint must be an exceptional measure and cannot be a routine (e.g. escorting all the prisoners using handcuffs) and also, must be regulated in the national law and not not depend on the discretion of the prison administration.

IV. National legislation regarding the use of force and instruments of restraint

In assessing the national legislation one can find an obvious influence of the international and European treaties, standards and recommendations, as can be observed subsequentely.

Right to physical and mental integrity of persons is guaranteed by article 22 of the Romanian Constitution[39], which also provides that no one may be subject to torture or to any kind of inhuman or degrading punishment or treatment. Death penalty is prohibited.

Use of force and instruments of restraint against prisoners is strictly regulated in the national legislation, the interdiction of torture, inhuman or degrading treatments or other ill-treatments being a fundamental principle provided in article 4 of the Law no. 275/2006 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings. This principle is applicable not only to persons executing a prison penalty, but also, according to article 81 para.1 of the Law 275/2006, to the persons placed in centres for arrest and remand in custody, organised and functioning under the subordination of the Ministry of Administration and Interior and to persons placed in remand in custody during the trial, in special sections of the penitentiaries or in centres for remand in custody next to the penitentiaries, organised and functioning under the subordination of the National Administration of Penitentiaries. In this respect, it should be mentioned that the crime of

[38] Commentary to Recommendation Rec(2006)2 on the European Prison Rules, p.3-4, 28-30. Accessed March 7, 2011. http://www.coe.int/t/dghl/standardsetting/cdpc/E%20commentary%20to%20the%20EPR.pdf,

[39] The Romanian Constitution was published in the *Official Journal of Romania*, Part I, no. 767 of October 31, 2003.

inhuman or degrading treatments and the crime of torture are incriminated in articles 267 and 267[1] of the Romanian Criminal Code.

Legal provisions regarding the use of force and instruments of restraint against persons deprived of their liberty can be found in the following legislative acts:

- Criminal Code;
- Law no. 275/2006 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings;
- Government Decision no. 1897/2006 for the approval of the Regulation of application of the Law No. 275/2006;
- Minister of justice and minister of public health joint order no. 1361/C-1016/2007 regarding the right to medical assistance of the persons deprived of their liberty in the custody of the National Administration of Penitentiaries[40];
- Minister of justice order no. 1676/C/2010 on aproving the Regulation regarding the safety of places of detention placed under the authority of National Administration of Penitentiaries[41].

Persons deprived of their liberty shall be informed by the prison administration about the situations in which there can be use of force or other instruments of restraint and about the disciplinary sanctions.

According to those legal provisions mentioned above, immobilisation of the persons deprived of their liberty can be ordered on a temporary basis with an advance authorisation by the warden, in order to prevent a real and concrete danger, namely escape or violent acts of the prisoners or to interrupt the actions involving the body injury of another person or of their own or the destruction of property. Regulation of application of the Law no. 275/2006 provides for the possibility to use instruments of restraint, in justified situations, as a measure taken in order to ensure the safe escorting to the judicial bodies, hospitals, as well as the transfer to another place of detention, with the possibility to remove these instruments if ordered by the judicial or administrative organ. Means of restraint can be used in order to facilitate the movement of the persons deprived of their liberty, if decided by the warden, except for the cases where there is an emergency situation that does not allow it, situation which shall be notified forthwith to the warden. Upon the entry and exit from and in the arrest rooms, the persons deprived of their liberty shall be subject, mandatorily, to body searches. Exiting the rooms shall only be performed in the presence of a sufficient number of employees properly equipped, and when the situation calls for it, the persons deprived of their liberty shall be applied means of immobilisation. Furthermore, means of restraint, other than handcuffs, can be applied to persons deprived of their liberty taken in penitentiaries-hospitals and infirmaries or suffering of serious mental disorders admitted in dedicated sections of the medical units, only with the authorisation of the doctor, without hindering the carrying out of therapeutic programmes, in order to avoid self-injury, hurting other persons and damaging goods. The person deprived of liberty

[40] Minister of justice and minister of public health joint order no. 1361/C-1016/2007 regarding the right to medical assistance of the persons deprived of their liberty in the custody of the National Administration of Penitentiaries was published in the *Official Journal of Romania*, Part I, no. 459 of July 6, 2007.

[41] Minister of justice order no. 1676/C/2010 on aproving the Regulation regarding the safety of penitentiaries placed under the authority of the National Administration of Penitentiaries was published in the *Official Journal of Romania*, Part I, no. 523 of July 27, 2010.

that is subject to immobilisation shall be put under permanent observation. The means of immobilisation shall be removed when the state that required such measure no longer exists.[42]

In order to fulfill the legal conditions the use of means of immobilisation must be proportional to the state of danger, must be applied only for the necessary period and only when there is no other modality to remove the danger and must not have the character of a sanction. The use of means of intervention shall be carried out gradually, without exceeding the real needs of immobilisation of the trouble-making or violent persons or for neutralisation of illegal actions and shall cease as soon as the purpose of intervention has been achieved. The use and cessation of use of any means of constraint shall be communicated forthwith to the delegated judge on the execution of prison penalties, by indicating in detail all facts that determined such measures.[43]

It shall be prohibited to immobilise in chains the convicted persons and the immobilisation with handcuffs, straitjackets or other forms of immobilisation of the body shall be allowed only in exceptional situations. Physical punishments, use of force or other means of restraint and, for that matter, any means degrading or humiliating can not be used as disciplinary sanctions. The physical force may only be used in cases of self-defence, breaking out and active or passive physical resistance if provided so by legal provisions.

In ensuring the complete legality and predictability of the use of instruments of restraint, article 12 of the Minister of justice order no. 1676/C/2010 on aproving the Regulation regarding the safety of places of detention placed under the authority of the National Administration of Penitentiaries provides for those instruments and their description: handcuffs, immobilisation belts, instruments of immobilisation during transport or movement, leather, plastic or textile immobilisation belts, tear gas, tompha, rubber truncheon, water jets, rubber bullet cartridges or other non-lethal ammunition, service dogs, acoustic and light devices, smoke, physical force, accomodation in protection rooms and any other means of restraint provided by the laws in force. Use of force can be used in order to immobilise persons deprived of their liberty in a situation of active or pasive resistance to the lawful orders of the prison staff.

Standard procedures of intervention and immobilisation are provided in articles 290-302 of the Minister of justice order no. 1676/C/2010. Such procedures are utilised in order to solve incidents in the prison and must be used only for the necessary period, only if they are proportionate with the factual situation and only when there is no other modality to remove the danger and must not have the character of a sanction. There can be operational incidents (reaction to medical emergencies, fires, escaping disorder and violences of the inmates and dangerous events) or critical incidents (rebellion and taking hostages).

The necessity of the use of intervention procedures and instruments of restraint must take into account the harm that a staff member is trying to prevent (protecting his life or the life of the others, physical integrity or health, security of the goods, public order) and the consequences of the inmates' actions, who is not respecting the lawful orderes of the prison staff.

In analizing the proportionality of the use of force and instruments of restraint, certain elements must be taken into consideration: physical dimensions, age and gender of the prisoners, opposite to the prison staff involved in the use of force or other means of restraint, the presense of the firearms where the incident takes place, time and place of the incident. The use of such instruments is

[42] Law 275/2006, art.101, 138, 139 and 159.
[43] Law no. 275/2006, art.37 and Government Decision no. 1897/2006, art.198.

considered to be proportionate if the use of other less harmful alternative means could not restore the order and security of the prison.

In the specialist literature, several means of avoiding ill-treatement and of preventing the use of force are presented, such as:

- access in the prison of the persons from outside the prison at any time, so that the inmates may be able to complain for any ill-treatment or to solve problems that for them are sluggish and important;

- establishing clear rules of conduct for any time and place for both prison staff and inmates, thus excluding any ill-treatment;

- making a clear commitment from the prison administration as to the ethical behavior involving life in prison, excluding in this manner the permanent coercion of the inprisonment.[44]

In any case, the use of force and instruments of restraint must be preceded by certain actions of the prison staff, in which in which they try, as case may be, to convince the person deprived of liberty to terminate the incident peacefully, to alarm the associated structure for special security measures, constraint and control, to ask about any pertinent medical information and to ensure the presence at the scene of a doctor or nurse in order to observe the intervention, to use a camcorder to record intervention, to move the inmate in another cell and to present the associated structure for special security measures, coercion and control the operational situation and the route on which the inmate will be moved.

Intervention and use of instruments of restraint is realised by the associated structures for special security measures, coercion and control, specialised in such interventions, except of an emergency situation, when the emergency requires the use of these means by a single person from the prison staff. Where necessary, under special circumstances, the warden can require assistance to the competent authorities, informing permanently the government bodies and local authority.

To prevent similar situations in the future, requiring the use of instruments of restraint, but also to ensure full transparency of these procedures, legal provisions set out the duty of a prison officer to discuss with the person who was the subject of a measure of restraint, explaining to him why there was such an intervention in resolving the incident, a written note being made about this discussion.

In order to apply the means of restraint in the above conditions, places of detention are fitted with means of restraint. Places of detention personnel can be equipped with means for restraint, warning, and intervention. In accordance with article 197 of the Regulation of application of the Law no. 275/2006, prison staff can use, in order to intervene and to restore order, truncheons, tomphe batons, devices with tear gas, water jets, rubber bullet weapons, handcuffs, duty dogs, acoustic and light devices, as well as other means of protection and immobilisation in their endowment. The duty dogs shall be used as auxiliary means of safeguard and escort in the activities outside the place of arrest, at judicial organs, transfer activities of persons deprived of their liberty, for the security of the perimeters and for discovering mobile phones, explosives, toxic substances or narcotics and tracking fugitives. Any intervention shall be carried out in compliance with the principle of proportionality of the cause having generated the need and necessity of the intervention, without making undue use of violence.

[44] Ioan Chis, *Drept Execuţional Penal. Istoria închisorilor. Executarea pedepselor carcerale (Execution of Criminal Penalties Law. History of prisons. Execution of Custodial punishments)*, Wolters Kluwer Publishing House, Bucharest, 2009, p. 349-350.

In the event that force or other instruments of restraint were used by the agents of the state, medical personnel is legally obliged to notify the public prosecutor if it finds that the convicted person has been subject to torture, inhuman or degrading treatment or other ill treatment and is required to record in the medical record the findings and statements of the prisoner in connection with those findings or in connection with any other agression declared by the prisoner.

Within the doctrine it has been considered that, for the force to be applied only to the extent needed, prison personnel must be trained in due time, in respect to theory and through theoretical and practical exercises, and subsequently to prepare reports describing the potential incident, how to deal with the case and the actions that should be taken in order to resolve the potential incident in other ways than those involving use of force,[45] ensuring in this manner the necessity of training of prison staff, thus protecting prisoners against torture or inhuman or degrading treatment or punishment.

The new legal framework envisages a modern development of the Romanian prison system, thus aligning the penitentiary practices to European standards: the fundamental principles governing the execution of penalties are clearily provided for in the new regulations (*e.g.* lawfulness of enforcement of penalties[46], respect for human dignity, interdiction of torture, inhuman or degrading treatments or other ill-treatments, interdiction of discrimination in enforcement of punishments), a delegated judge on the execution of prison penalties was introduced, as the execution of these penalties shall be carried out under the surveillance, control and authority of the delegated judge, thus ensuring the lawfulness of the execution of such penalities.

In assesing national legislation regarding the use of force and instruments of restraint from the point of view of the conformity with the principle setforth in article 3 of the Convention, one must also bare in mind the European Union Council Regulation no. 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment[47], as it is has binding legal force throughout every member state, on a par with national laws and aims, indirectly, at preventing acts of torture and other cruel, inhuman or degrading treatment or punishment. Through this Regulation it was considered necessary to prohibit exports and imports of equipment which had no practical use other than for the purpose of capital punishment or for the purpose of torture and other cruel, inhuman or degrading treatment or punishment. Also, it was deemed necessary to impose controls on exports of certain goods which could be used not only for the purpose of torture and other cruel, inhuman or degrading treatment or punishment, but also for legitimate purposes.

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[45] Ioan Chis, *op. cit.*, p. 349.

[46] According to article 23 of the Romanian Constitution, penalties shall be established or applied only in accordance with and on the grounds of the law. The sanction of deprivation of freedom can only be based on criminal grounds.

[47] European Union Council Regulation (EC) no. 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, published in the *Official Journal of the European Union*, L 200, on July 30, 2005, p. 1–19. The Regulation entered into force, according to article 19, on July 30, 2006. These rules should ensure that Community economic operators do not derive any benefits from trade which either promotes or otherwise facilitates the implementation of policies on capital punishment or on torture and other cruel, inhuman or degrading treatment or punishment, which are not compatible with the relevant EU Guidelines, the Charter of Fundamental Rights of the European Union and international conventions and treaties.

V. Analysis of the conformity of national framework with European principles and standards.

Firtsly, it should be highlighted that the ECtHR judgements against Romania and the reccomendations made by CPT following their visit in 2006 must be evaluated bearing in mind that all these situations involve the use of force or instruments of restraint that amounted in torture or inhuman or degrading treatment or punishment as a result of the actions of members of the police forces or prison staff, actions that were conducted grounded on the former legislation which lacked fundamental safeguards in ensuring the conformity with the provisions of article 3 of the Convention.

The conformity of the national framework with the European principles and standards must be assessed bearing in mind, *inter alia*, that the European Prison Rules refer to the measures that should be implemented in "*national law*" rather than to "*national legislation*", as they recognise that law-making may take different forms in the member states of the Council of Europe. The term "*national law*" is designed to include not only primary legislation passed by national parliament but also binding regulations and orders, as well as the law that is made by courts and tribunals in as far as these forms of creating law are recognised by national legal systems.[48]

The changes made in the national law were observed by the CPT in the Report drafted following its visit in Romania in 2006, as the Committee welcomed a number of safeguards included in the Law no. 275/2006, which was adopted during that time: the duration of application of measures of restraint must be limited to what is necessary and these measures should be used as a last resort and never as punishment. In addition, the use of any means of restraint whatsoever must be authorized in advance by the warden (or communicated immediately to the appropriate) and notified immediately to the delegated judge on the execution of prison penalties.[49]

In the *National Report on Romania from 2008, submitted in accordance with paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1 elaborated by the* UN Human Rights Council it is underlined the fact that Law no. 275/2006 undertook a radical reform of the system of execution of penalties and custodial measures ordered by the judicial authorities during criminal proceedings. Thus, penalties are executed according to the laws, respect for human dignity is guaranteed and any form of discrimination is prohibited. The instances of ill treatment reported by persons deprived of freedom are dealt with by judicial authorities. Also, persons deprived of freedom have an unlimited right to file complaints, including through non-governmental organisations or to human rights organisations. Where the administration of a place of detention finds any violations of the rights of persons who are deprived of freedom, it takes measures to punish those responsible, and, where necessary, notifies the bodies of criminal prosecution. The doctors and other medical personnel are under obligation to notify the prosecutor about signs of torture or mistreatment ascertained on the body of the detainees. The personnel of the detention centers receive regular training and are under permanent scrutiny with regard to the behavior towards detainees. [50]

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[48] Commentary to Recommendation Rec(2006)2, Introduction, p.3-4. Accessed March 7, 2011. http://www.coe.int/t/dghl/standardsetting/prisons/E%20commentary%20to%20the%20EPR.pdf

[49] Report to the Romanian Government on the visit to Romania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 8 to 19 June 2006, published on December 11, 2008, *op. cit.*, para.139.

[50] UN Human Rights Council, *National Report submitted in accordance with paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1 - Romania*, 2 May 2008, A/HRC/WG.6/2/ROM/1, para.40. Accessed March 8, 2011. http://www.unhcr.org/refworld/docid/485906b1d html.

In analizing the present legal framework, it can be observed, as mentioned above, that the national law offers sufficient safeguards regarding the lawful use of force and instruments of restraint, as to the conditions in which these measures can be taken, the enumeration of the means of restraint, the duty of the medical personnel to report to the prosecutor if it finds that the convicted person has been subject to torture, inhuman or degrading treatment or other ill treatment and the criminal sanctions that can be applied to the state agents responsible for breaching the provisions of article 3 of the ECHR, amounting in torture or to inhuman or degrading treatment or punishment. As a general rule, when the intervention of a law enforcement official results in a temporary limitation of freedoms and rights, the duration of this limitation must be reduced to the minimum needed to reach the legitimate objective that justified the adoption of such measures. Furthermore, it is widely recognized by the European Court, the CPT and through the European Prison Rules that prison staff sometimes does not have any alternative than the use of force to control inmates agitated and/or violent and may even, exceptionally, need to resort to instruments of physical restraint. Such situations obviously require special safeguards, similar to those provided for by the national law.

Unfortunately, disregarding these legal safeguards in protecting persons deprived of their liberty against any form of ill-treatement, some reports were made, provided in the national report mentioned above, about the unlawful behavoiur of the states' agents, taking into consideration that between 2003 and August 2007, 570 complaints containing allegations of abuses and ill-treatments perpetrated by policemen (8 officers and 64 agents) were filed with the General Inspectorate of the Police. 41 cases were dismissed, in 7 cases disciplinary measures were applied, criminal charges were brought against 4 persons (1 convicted, 1 discharged, 2 acquittals). 17 complaints are still under investigation.[51]

Of course severe cases of use of force and instruments of restraint can lead, at least apparently, to the death of persons deprived of their liberty. A recent case that took place in 2010 in the Galați penitentiary involving the death of an inmate was analysed by several non-guvernamental organisations which elaborated a report[52] stating that prison staff applied an inhuman and degrading treatement on the detainee, had not respected the legal provisions regarding the use of force and instruments of restraint and the acts of violence against the prisoner may have caused his death. As it is said in the report, the prisoner being handcuffed (with the authorisation of the deputy warden) run in the lobby of the detention block, an agent tripped him up and then he was immobilised with leg cuffs, punched and kicked repeatedly with both fists and feet. Another agent, in the presence of a senior prison officer (the shift leader), dragged the inmate by his feet along the lobby of the detention block up to his detention room were he was immobilized by the bed with his legs and hands tied to the bed frame; apparently the inmate was kept immobile for 15 hours without access to food, water and utilities and subsequently, at a later time, suffered a cardio-respiratory arrest. The intervention for restraining the inmate was not filmed with the camcorder, but there some are images from the lobby recorded by a fixed camera mounted in the hall in the integrated security system. After the

[51] Ibidem, para.37.

[52] The report was presented in "*Accidental deaths" in public systems - Ill-treatement at Galați penitentiary* conference organized by the Romanian Group for the Defense of Human Rights (GRADO) and its partners - Penal Reform Foundation, Prison Fellowship Romania, The Magistrates Association of Romania and Transcena Association in the framework of the *Promoting the Respect for Human Rights in Executing the Criminal Penalties* project, at the House of the Romanian Parliament on October 19, 2010, http://asociatia-magistratilor ro/evenimente/101-morti-qaccidentaleq-in-sistemele-publice-tratament-inuman-si-degradant-in-penitenciarul-galati

immobilisation, the deputy warden informed the warden and the delegated judge on the execution of prison penalties about the use of force and instruments of restraint.

Among the conclusions of the report mentioned, there are some which are related to the use of force and instruments of restraint regarding, *inter alia*, the fact that the intervention and immobilization was not video-recorded although the internal procedures did provide for such an obligation and the fact that the prisoner suffered ill-treatement. It must be stressed out that the public prosecutor office was informed and the criminal investigation is pending.

Conclusions

We consider that the new framework of the Romanian legislation regarding the use of force and instruments of restraint ensures the conformity with the European principles and recommendations in this field. One can notice that numerous safeguards are provided in the national legislation regarding the use of force and instruments of restraint, in order to protect a person's dignity and physical integrity, namely to protect persons deprived of their liberty against torture or inhuman or degrading treatment or punishment.

It should, no doubt, be pointed out that, given the vulnerable position of the persons deprived of their liberty, national authorities must give special attention in establishing best practices, taking into consideration the necessity of training its law enforcement prison staff and other national law enforcement agencies who can intervene, in certain situations, inside a prison, focusing on learning the legal provisions, as the use of force and instruments of restraint should be the last alternative in solving a conflict in prison, the use of camcorders when using force and other means of restraint, thus ensuring a high level of competence in their professional conduct, protecting prisoners against torture or inhuman or degrading treatment or punishment.

In the future, a trilateral analyse should be carried out, assessing, in the first place, the Romanian legal framework as to the conformity to the permanently evolving European legislation and standards, secondly, the enforcement of the national legislation regarding the use of force and instruments of restraint, both on its substantial part, namely protecting the persons deprived of their liberty against the excessive use of force or of instruments of restraint, thus protecting those persons against torture or inhuman or degrading treatment or punishment and on its procedural part, regarding the obligation of the authorities to conduct a proper official investigation into allegations of ill-treatment, capable of leading to the identification and punishment of those responsible and, finally, the training of the law enforcement personnel, emphasing the lawful use of force and instruments of restraint and learning the legal provisions.

References

1. Legislation

A. National Legislation

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SOCIAL PROTECTION MEASURES FOR YOUTH CRIME AND JUVENILE DELINQUENCY PREVENTION

Dana DINU[*]

Abstract
This paper describes social protection measures designed especially for the purpose of protecting juveniles and preventing delinquency. EU Member States have noted that the phenomenon of juvenile delinquency has increased alarmingly in the last two decades, currently reaching mass proportions, and therefore it is necessary to reform and harmonize the national penal policies, to combat delinquency among minors by adopting an integrated strategy at national and European level, which will include three principles: prevention, judicial and extrajudicial measures, and social integration juvenile offenders. The whole society must be involved in shaping the personality of minors by the adoption of a consistent behavior with current social and legal norms. This paper discusses how the prevention of juvenile delinquency is an essential part of crime prevention in society and how the prevention and rehabilitation measures must involve protecting and promoting all rights for children, including the right to health, welfare and social services, recreation and leisure, as well as protection from violence and harm. In particular, the paper relates about technical and scientific co-operation on practical and policy-related matters, in training and demonstration projects. It is interesting to examine how collaboration can be encouraged in undertaking scientific research with respect to effective modalities for youth crime and juvenile delinquency prevention. The findings of such research should be widely evaluated and achieve a common European strategy to interest every member of the European Union, through collective investigation and dissemination of results of national policies. This paper describes how national authorities, civil society as a whole, and each person must be involved in designing strategies to combat juvenile delinquency, how family and education must contribute to the transmission to minors of the social and civic values necessary for their formation in the spirit of compliance with laws, rules of conduct and generally accepted social life.

Keywords: *juvenile delinquency, youth crime prevention, crime prevention policies, early intervention, prevention programs*

Introduction

This study investigates the role of an early educational intervention and child, family, peer, school-level predictors on juvenile delinquency, in response to the treatment-oriented policies of juvenile crime control. The research on delinquent and criminal behaviour among young people, as they make the transition from childhood to adulthood in an increasingly confusing world, and primary prevention programs are the alternative approach to reducing negative developmental outcomes and preventing future problems. Effective approaches for preventing juvenile delinquency and the adoption of measures to target youth at risk are detailed to try to remedy and prevent youth

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crime before it happens manifest, with particular attention given to the development of educational, professional development and community programs, improvements in parenting skills, to the value of restorative justice for both parts.

The problem of juvenile delinquency has increased considerably. Apart from drugs and alcohol abuse, cases of homicide, rape, burglary, assault, vandalism, prostitution, are some of the charges against young children and teenagers. This is a phenomenon to be treated in emergency because juvenile offenders currently inflict irreversible harm to their victims. In addition, they will be the tomorrow criminals and prospective parents. An assessment of the public's support for various responses to juvenile offending is important because policy makers often justify expenditures for punitive juvenile justice reforms on the basis of popular demand for tougher policies. It is recognized the concern of the impact of youth crime in the world, including crimes involving interpersonal aggression and costs associated therewith but there is little evidence that more punitive policies are more effective in deterring future criminal activity, and overly punitive responses actually may increase juvenile offending and the problems of adaptation will be accentuated by the lack of tolerance. As juvenile delinquency has become such a big problem all around the world, it is important for people to know about it and to take proper precautionary measures against it, systematic action, task-oriented and effective social work with both, offenders and victims, real or potential.

Delinquent and criminal behavior among young people and social protection measures are the issues that this paper examines. Some basic assumptions relating to delinquent behavior are presented, followed by a description of the effective measures for preventing juvenile delinquency, with particular attention given to the development of educational, professional development and community programs, improvements in family relations and parenting skills, the role of school and policies. The paper discusses current research findings, prevention strategies, special education programs for at-risk delinquents and the value of the restorative justice. It offers a vision of how community, educators and juvenile justice officials can work together to develop cooperative delinquency prevention programs and concludes with a summary and recommendations for future action.

The majority of studies and programs dealing with juvenile delinquency focus on youth as offenders and are limited in identifying the contribution of intervention to delinquency prediction. While the exact mechanisms and likely strength of the relationships between the conditions and juvenile crime remain ambiguous, the press to find adequate intervention methods for juvenile delinquents will only increase.

1. The strategy to combat delinquency among minors

The increasingly violent nature, the enormous proportions of contemporary juvenile delinquency and the escalating number of young people involved at much earlier ages with the juvenile justice system have challenged established beliefs guiding policy and practice with the juvenile offenders. Youth offending rates rise or fall depending on the effectiveness of prevailing juvenile justice policy in preventing and controlling delinquency.

Work to prevent and combat juvenile delinquency has been a constant preoccupation of modern states penal policy in general and EU Member States in particular. Having reviewed the "Report on juvenile delinquency: the role of women, families, and society", European Parliament

adopted on 21 June 2007 "Resolution on juvenile delinquency: the role of women, families, and society (no. 2007 / 2011 (INI)).

The European Parliament considers that the only way to effectively combate this phenomenon consists of an integrated strategy at national and European level. It is recommended that the Member States, in collaboration with the Commission, establish and adopt a series of minimum standards and common guidelines for the measures to prevent juvenile delinquency, focusing on preventive, judicial and extrajudicial measures, rehabilitation, social integration and reintegration, governed by the guiding principles set by the Beijing Rules and Riyadh Principles, the UN Convention on the Rights of the Child and by other treaties and international conventions in this field.

The desire is to achieve a common European strategy, through collective investigation and dissemination of results of national policies, organization of conferences with the participation of national experts, and promote communication and information between competent authorities and EU bodies. Therefore, the Commission and the Member States should collect national statistics, provide information from all regional and local authorities, associations, non-government organizations, other civil society organizations, usable in the process of developing measures at European level, in order to exchange the best practices and plan new programs inter-regional, European and international. The Commission was invited also to propose a framework program at Community level and preventive actions, to support the initiatives of intergovernmental organizations and inter-state cooperation, with the possibility of financing local and regional pilot projects. This program must contribute to the promotion of the best practices at European scale and provide social and educational infrastructure.

The Commission and the Member States have resources and programs in which integrate actions to prevent and combat juvenile delinquency, protect victims, as well as reinsert into society juvenile offenders: the specialized program "Preventing and combating crime" (2007-2013), the specialized program "Criminal Justice" (2007-2013), "DAPHNE III Program" on combating violence against children and youth, the Program "Youth in Action" (2007-2013), European Social Fund and the actions of the "Equal" to strengthen social integration, combating discrimination and facilitating access to the labor market of the less favored, the program initiative "Urbact", which aims to exchange best practice between European cities in order to ensure a safer environment and social integration for young people less favored, transnational initiative programs such as "Safety Net for Children and Youth at Risk", programs at which can participate as partners several Member States and European telephone hotline for missing children.

Community concerns in the fight against juvenile delinquency found their application in Romania too and an important step in combating youth crime was made by the Law no. 272/2004 on the protection and promotion of child rights bill, which is the legal framework for respecting, promoting and guaranteeing the rights of the child. It is very important that all society, the state, the central, regional and local authorities, community leaders, school, family, non-government organizations, young people, civil society as a whole and each person, to be directly involved in designing and implementing an integrated national strategy to combat juvenile delinquency. An effective fight against juvenile delinquency requires the implementation of integrated policy that contributes to the transmission to minors of social and civic values necessary for their formation in the spirit of compliance with laws, rules of conduct and generally accepted social life. It is also necessary to define a policy focused on a better economic and social cohesion, combating social exclusion and poverty, relating to housing and food for families facing social and economic

problems, guaranteed access to basic education, health care for all family members, vocational training, equitable access for family members to the labor market, leisure and interaction between young people. Because the family has a significant role in every stage of the fight against juvenile delinquency, all the states should create adequate support structures for parents that will help ensure a fair and healthy family development and early childhood socialization. Each state shall provide within the integrated approach to juvenile delinquency, special budget allocation of credits, loans consolidation programs, social and professional insertion of youth, resources for rehabilitation, modernization of juvenile delinquents structures, continuous training of the specialists and liability factors involved.

The United Nations for more than half a century has held congresses aimed at strengthening international cooperation against expanding crime. The quinquennial congresses have impacted criminal justice policies, as well as national procedures and professional practices throughout the world. As the globalization of many contemporary problems, including crime, has made international collaboration an urgent priority, the United Nations increased the efforts to set international guidelines for criminal justice. The Kyoto Congress was the first to adopt a declaration calling on governments to take effective steps to coordinate and intensify their crime prevention efforts in the context of economic and social development. Governments should include prevention as a permanent part of their programs to combat crime, including: establishing centers with expertise and resources; establishing a crime prevention plan with clear objectives and priorities; establishing coordination among relevant agencies or departments of government; fostering partnerships with non-government organizations, businesses, private and professional sectors and the community; seeking the active participation of people in crime prevention by informing it of the needs and means of action and its function. Also, governments should support the development of knowledge and skills in crime prevention: providing professional development for officials of relevant agencies; encouraging educational institutions to provide basic and advanced courses in collaboration with practitioners; working with the educational and professional sectors to develop certificated and professional qualifications.

2. The attitude towards juvenile delinquency

Juvenile justice is a human justice, respectful of the needs of children and their rights, which does not establish on simple punishment. When laws are promulgated and when the magistrates apply the laws, must comply with the known rules and procedures: with the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules, 1985), with the United Nations Convention on the Rights of the Child (1989), with United Nations Guidelines for the Administration of Juvenile Delinquency (Riyadh Rules, 1990) and with the UN Rules for the protection of Juveniles deprived of their Liberty (Havana Rules, 1990). Juvenile delinquency prevention requires a strong attitude towards negative events against the moral conduct and rules of law. On the legislative side, against persons who cause youths to commit crimes and lead them to consumption of alcohol, the sanctions applied must be tighten and parents who do not fulfill their parental duties must be sanctioned with the forfeiture of the parental rights.

The emphasis must be on preventing the perpetration of crimes by minors through appropriate policies and to involve the whole society in shaping their personality in adopting of a behavior in accord with the current social and legal norms. The various forms of delinquency are increasingly perceived, analyzed and managed as social risks by deviant behavior among youth, against which we

must protect through the basic techniques of personal protection and insurance, protect the victims and repair the damages. In consequence, negative reinforcement supports negative behavior while positive reinforcement stops delinquencies because children who grow up in violence learn to solve their problems through violence. Behavioral theory was studied by J. Watson, I. Pavlov and B.F. Skinner. It describes the outcomes of the consequences of a certain behavior on occurrence of such behavior in the future. "Operant conditioning" developed by B.F. Skinner is the learning methods according to which the likelihood of a behavior is increased or decreased by the use of reinforcement or punishment. In case of positive reinforcement a certain behavior becomes stronger by the effect of experiencing positive conditions. Preventive programs based on the social learning theory require placing an individual in a favorable environment where he would be less tempted to imitate violent behavior. Therefore, a change of community behavior can stop the members from negatively influencing the youth in engaging in delinquencies. Community planning and organizations represent a great possibility of controlling delinquency and developing delinquency-deterrence measures.

The justice system cannot meet the full needs of young people and community by only focusing on punishment, must also help young people overcome the obstacles promoting a strategy for preventing juvenile crime that will ensure public safety and offer young people a chance, not just a cell, avoiding the influence of an environment that can reinforce delinquent behavior. Harsh policies such as imprisoning more young offenders actually make our communities less safe by increasing recidivism: nearly half of the youths who are released from the juvenile detention facilities are readmitted within a year[1]. The Committee on the rights of the child, strongly affirmed that the deprivation of liberty should be only the last resort, neither the first, nor the single response of justice towards the offences of young people.

The priority objective of a common European approach in the fight against juvenile delinquency should be the development of models of intervention that manage juvenile delinquency and measures to provide alternatives to imprisonment, with pedagogical education: work for the benefit of society, rehabilitation and reconciliation with the victims and mediation training courses, depending on the severity of the offense, the offender's age and personality, and the maturity of the child; while custodial measures and criminal sanctions would be the last choice and should be applied only when is deemed absolutely necessary. In setting out the measures to be taken and their performance in a subsequent phase, should be take into account the child's best interest principle allowing the young offender to become a full member of society and not a marginal, rejected or revolted human being.

3. Community-based preventive programs

Community-based preventive programs aimed at providing a comprehensive and caring environment for adolescents are more effective in reducing recidivism among juvenile offenders than imprisonment[2]. While in some circumstances secure incarceration of violent or repeat offenders may be required for preventing young offenders from committing additional crimes and to ensure the

[1] Correctional Association of New York, "Before it's too late: a new strategy for preventing juvenile crime", American Journal of Preventive Medicine

[2] Lipsey M., "Juvenile delinquency treatment: A meta-analytic inquiry into the variability of effects", NY: Russell Sage Foundation, New York (1992)

[4] Justice Policy Institute, "The Costs of Confinement: Why Good Juvenile Justice Policies Make Good Fiscal Sense", Washington DC (2009)

safety of the community, policies that incarcerate more youth do not necessarily improve public safety. In cases where the risk to the community is so great that custody is necessary, individualized psychological treatment, social skills training and the use of smaller residential units rather than large institutions containing hundreds of juvenile offenders are more likely to reduce the likelihood reoffending. On the other hand, firmness must increase against young people who commit serious crimes of violence or who repeatedly violated the criminal law and will be available to non-custodial sentence or parole only when there are sufficient guarantees that their social recovery can be achieved outside a closed system.

Because „Welfare model" for juvenile justice applied in Europe constitutes an adaptation towards the educational needs to make the offender aware of the consequences of his behavior, prevention of recurrent crime can be also achieved through "restorative justice". Youthful offenders ordered to pay restitution to their victims or perform service to the community have lower recidivism rates than those for whom restitution or service is not ordered. The offender, through mediation with the victim, understand the seriousness of the incident and together with the victim and social workers develop a series of steps towards reconciliation, arranging reparations for damages and providing remedial assistance the victim might require. If successful resolution occurs, the juvenile is not placed in a correctional facility or labeled as a delinquent, the goal of this benefit being the rehabilitation in society through work in the general interest. Sentencing juveniles to appropriate correctional programs, based in the community whenever possible, restitution is much more cost-effective than confinement. The protection and support of victims and witnesses is recognized as an important basic element of overall crime prevention and crime control strategies. A proactive approach to the development and implementation of prevention and rehabilitation programs is needed, to apply the lessons learned through direct experience.

Greater attention must be given to the role and responsibility of local communities in dealing with juvenile delinquency. It is important to locally develop and implement coordinated action plans, state-level support and technical assistance to facilitate local efforts. The programs for groups and individual representatives of local communities are designed: to yield near-term reductions in youth violence through an appropriate combination of rehabilitation, deterrence and varying degrees of incapacitation; to yield lasting reductions in the numbers of violence-prone youth through an appropriate combination of prevention, early intervention, diversion, and rehabilitation that will prevent early onset of delinquency among the youth most at risk for lifelong violence, focus intensive efforts on youth who are retrospectively identified as early-onset delinquents, and intervene early with adolescents who begin to show signs of late-onset delinquency; repair harm to victims and build community capacity to maintain safety for its citizens through the institutions of social control; employ "best practices" programs and strategies in reducing youth violence.

In terms of the increasing preventive role of specialized state bodies, post-release or aftercare programs are necessary components of an effective juvenile justice system as they assist juvenile offenders who have been placed in custody to reintegrate into the community after being released: intervention programs aimed at changing the delinquent behaviors of young offenders, provide therapeutic treatments and other community supports such as employment and education assistance and community restraint programs which exercise surveillance and control.

The eradication of poverty programs is a way the community can economically empower the whole society, preventing juveniles from engaging in delinquent behaviors, through some important measures: diversification of support for families in difficulty; development of specialized social services to prevent and combat violence within the family; strengthening local governments to

implement projects in partnership to prevent and combat domestic violence; promoting public dialogue and awareness of the media about the negative consequences of domestic violence; educating the community to develop social solidarity for the victims of domestic violence; creating high quality educational services for children, psychological assistance and legal services; creating conditions for promoting a partnership with local authorities, central and civil society. The development of public and private partnerships to support juvenile programs on preventing children from becoming involved in crime, that will lead to safer schools and safer communities, is best done at the community level. After School Programs and Mentoring relies heavily on volunteers and private organizations to augment the work of public agencies. A promising development in efforts to prevent juvenile delinquency and crime is the involvement of national organizations and volunteers in social work (students and pensioners, along with well-known and authority figures such as sportsmen, actors, politicians) and the support for collaborative approaches to promote a positive learning environment in schools.

Also, youth can and must be a part of civic problem-solving, work in community partnership development with adults to improve crime prevention through programs youth-led and in organized group activities, submit ideas and support community efforts through structured volunteering. The integration and participation of young people in constructive activities, in all matters and decisions concerning them, are indispensable conditions for defining common solutions. This can be achieved through social service agencies or organizations and community centers. Multispectral prevention initiatives designed and implemented by entire communities are the most effective, in particular those that build on the strengths and interests of youth rather than focusing only on their problems or deficits.

The workplace can establish family-friendly policies such as flexible working hours, the ability to work from home and job sharing, which will allow parents to spend more time with their children, invite speakers and organizations to talk through information sessions to parents about child development and the transition to adolescence.

The Government can fund the development, evaluation and dissemination of best practice interventions to prevent juvenile delinquency and has to ensure equal distribution of resources which will give the youth the opportunity for employment. The eventual development of a wide automated juvenile records system will allow complete, accurate, and up-to-date juvenile information to be readily available to all authorized criminal justice agencies and officials. Access to this data will allow better to informally control youth and take more informed decisions, through the eventual implementation of a central juvenile case management information system.

Prevention programs should reinforce and strengthen existing community institutions that help kids stay out of trouble, through the following initiatives: after school programs; parent training programs; programs available to at-risk children, Mentoring programs, graduation incentives programs, junior police academies; community policing programs; alternative education programs for juveniles suspended or expelled from regular schools. Also, programs that promote structured recreational activities, vocational and life skills, entrepreneurship and education during non-school time have the potential to lower alcohol and substance abuse, teen pregnancy, school drop-out and youth violence.

Tailored strategies for culturally diverse groups and consistency are essential factors in achieving prevention at all levels. Increasing minority contact with the juvenile justice system can only be reduced through work to prevent and combat this phenomenon and tailored strategies which address the unique risk-factors associated with each minority group and social environments of the

children. To be effective, prevention work must take into account not only individual motivation, but also the cultural dynamic of the group. In some countries juvenile delinquent groups may have close ties with adult organized crime and connections with local community members, which must also be considered in the development of prevention programs.

The diversification of forms and means of publicity and knowledge of the laws in social environments destined for cooperation in designing and developing juvenile delinquency prevention activities is becoming increasingly important. In order to prevent juvenile delinquency is necessary also to take measures concerning the mass media. The regulatory authorities must ensure absolute compliance with EU legislation and national report on the content of publications, television broadcasts and other programs that may contain extremely violent scenes or immoral character and must take administrative measures against those who edit or offer them for sale. The media has a formative role in teaching the young generation and can play a significant role in preventing juvenile delinquency by taking initiatives to provide public awareness information, through dissemination of high quality programs and publication of normative models which make a positive contribution to the youth education. Research and practical experience show that fostering healthy social development in all community members is an effective approach to address the issue of juvenile delinquency.

4. Evidence-based policy formulation

Research and evaluation are important elements which must be integrated into all prevention efforts. The thoughtless expenditure of money, time or effort for poorly developed measures will do little to solve the problem of juvenile delinquency[3]. Agencies rarely invest in developing data systems that permit to monitor which programs are working and which not and many policymakers are often unaware of research evidence on programs and policies that are effective in reducing juvenile delinquency and also cost-effective.

Policy makers need to take into account the evidence concerning what works and what does not work. Effective juvenile justice systems are those which ensure that policy is guided by scientific research and cost-benefit analyses. Evidence on their effectiveness in meeting their stated aims is necessary for each program, using the following criteria: the direct and indirect costs of implementing the program, including future costs on the justice system; the ease with which the program can be implemented and the availability of the program.

The state needs first to complete an audit of existing programming to see if there are any gaps in the service or quality. A service gap indicates a lack of suitable treatment options for a particular type of youth and a quality gap indicates a lack of sufficient evidence-based programming. Then, the state must select the proven programs models to implement that best fit, hire appropriate staff that will provide the services and arrange for his training. If is necessary the improvement of the effectiveness of the existing programs, it needs to identify the programs to be assessed, compare them with the "best practice" standards, determine how effective the programs are using established social measurements, add needed elements to transform them into evidence-based programs, compare the effectiveness of alternative programs in treating similar youth, develop a way to assign youth to the most appropriate program taking into account all the relative costs and monitor the programs once they have been implemented to ensure that follow the program model as intended.

[3] United Nations Organization, "Juvenile Delinquency World Youth Report" (2003)

5. Avoidance of juvenile offenders incarcerations

A hard-headed look at the evidence reveals that tougher law enforcement and stricter sanctions are unlikely, in the absence of effective crime prevention, to reduce crime significantly and the majority of incarcerated juvenile offenders could be treated safely and more effectively outside of custody. Therefore, the youth justice system should set guidelines to reduce the population of juveniles in custody, avoid repressive approaches, focus on education and reintegration and emphasize community-based programs rather than incarceration. Depriving children of their liberty should only be used as a last resort and, as possible, interventions should be carried out in the child's home environment. The 'Welfare model' for juvenile justice, which is common in areas of Europe including Germany, France, Belgium, as well as East Europe, is based on informality of proceedings and interventions are developed based on the best interests of the young person. Other prevention approaches have proved ineffective in repeated tests. Evidence over more than thirty years through studies conducted in Europe, the USA, Australia and New Zealand shows that tougher methods of reducing juvenile crime, such as severe programs, boot camps, trying juveniles in adult courts and incarceration are strategies that have been proven ineffective because do not reduce criminality and increase the risks of future delinquency. Studies show the reinforcement of offenders' criminal behavior resulting from the collective detention, incarceration or remand of young offenders and the failure to provide a healthy family and environment or positive role model. In addressing these factors, such methods emphasize the need to divert young offenders from entering the juvenile justice system so that the offender can receive the necessary services or treatment and remain in an environment which is conducive to behavioral reform. They are also amongst the most costly means of dealing with juvenile crime due to: high immediate costs associated with incarceration or remand of young offenders and ongoing long-term costs associated with continued contact with the criminal justice system by offenders.

In contrast, there is ample evidence in support of certain other methods of dealing with juvenile crime. To save taxpayers money being spent on building prisons we need to create a system that decreases the number of youth becoming delinquent and prevents those youth who do stray from becoming adult criminals. A cost-effective approach to crime requires more than punishment because to help youth grow into constructive adults must be supported, educated, supervised, encouraged, cared for and given positive opportunities for recreation, education and personal growth. The most effective methods are those that prevent youth from engaging in delinquent behaviors in the first place, tend to focus on addressing the underlying factors behind the offending behavior of juveniles, such as family dysfunction, a delinquent peer group, truancy or alcohol abuse; and divert first-time offenders from further encounters with the justice system, and emphasize family interactions, adding or strengthening the 'protective factors' such as good parenting, having a positive role model or part-time employment[4]. But the majority of crimes are committed by a relative handful of repeat offenders who typically display serious behavior problems in early childhood. For them, more intensive, individualized treatment will likely to be required, institutional programs and post-release programs and services, especially when the safety of the community or the young offender is at risk.

Prevention programs are also extremely cost-effective in terms of their ability to deliver substantial long-term savings to taxpayers, mainly as a result of reducing the number of juvenile

[4] Peter Greenwood, Prevention and Intervention Programs for Juvenile Offenders, "The Future of Children", volume "Juvenile Justice"

crime outcomes and the demand for construction of youth detention centers and adult prisons. Prevention programs can deliver further significant benefits to the community by avoiding the incurrence of costs by victims of crimes.

6. Comprehensive and complementary programming

Primary prevention programs which aim to prevent crime before it occurs, including efforts to prevent smoking, alcohol and drug use, teen pregnancy, targeting the general population of youth and providing parenting training and support for low-income family, young mothers, or otherwise disadvantaged households, have been found to be among the most effective of prevention programs.

Secondary prevention programs target youth considered to be at elevated risk of involvement in crime, such as delinquency or violence and include elements of primary prevention. Many studies have demonstrated that previous occurrences of anti-social, delinquent or other problem behaviours by a young person can in itself be a significant risk factor behind subsequent offending and, in consequence, prevention programs which address the factors behind criminal behaviour before it occurs are among the most effective methods in reducing juvenile crime. Research documents that violent chronic offenders are most active during their teen years and while most children who exhibit behavioral problems right themselves rather than embark on a life of crime, those who do become chronic offenders typically follow well-worn pathways toward increasingly criminality. It is necessary to identify earlier kids who are likely to get in trouble and work with them in a family and community setting and expand intervention programs that target and serve those most at risk of becoming delinquent. Because most of the factors that predict youth offending are environmental, effective responses to youth crime include programs which are delivered in family, school or community-based therapies and services. Examples of secondary prevention include: programs which focus on family dynamics and parenting skills and broad family-oriented services to help ensure that values learnt in the education system are reinforced at home; support for pregnant young women and single young women with children; measures to help ensure that youth have access to education and do not drop out of school early; therapy for children who signs of violent or anti-social behaviour; programs or targeted policing of 'high risk' individuals or areas. Every delinquent child should be evaluated with a common scientifically validated risk instrument and if they need treatment services should receive those services in addition to whatever punishment the court deems to be appropriate. Advances in scientific research provides a strong foundation for identifying risk factors early in life, which enables us to address the underlying conditions that propel some youth to crime.

Tertiary prevention programs are targeted at youth who have already become involved in crime. Where custody is required, appropriate institutional and post-release therapy must also be provided in order to effectively reduce recidivism. Examples of tertiary programs include: probation, intensive supervision programs, restorative justice, detention, promotion and development of community programs for the resocialization of young offenders returning from detention, adequate measures for the social reintegration and recovery of young offenders in the justice system, prevention of repeated offence by creating jobs and employment of young people.

This categorization of juvenile justice programs incorporates elements of categories used by US Department of Juvenile Justice, Office of Juvenile Justice and Delinquency Prevention: Early-Age Programs; School-based Programs; Community/ Family-based Programs; Mentor Programs; Institution-based Programs; Policing Programs; Non-therapeutic Tertiary Programs and Post-Release Programs.

7. All interested factors's collaboration

Raising awareness of the public regarding the phenomenon of juvenile delinquency must be made by providing information on the juvenile delinquency issue and involving all the interested factors, governmental and non-governmental organizations. Integration of the juvenile justice, welfare and human services systems with police, courts, education and health authorities is very important. Measures should be taken to strengthen multi-agency collaboration in all areas, including policy formulation, information sharing and personnel training. Recommendation (2003)20 calls for: a multi-agency approach to deal with young offenders; a continued search for alternatives to custody; the recognition of victim's interests; the use of evidence-based interventions; the desire to involve parents and the need to produce race impact statements alongside policy plans.

Juvenile justice in Europe needs a common public vision and purpose for a more strategic approach, constructed around three principles that reflect the best interests of young offenders, their victims and the public: prevention of offending; reintegration of the offender; protective and retributive measures for society.

Juvenile crime cannot be effectively dealt by the juvenile justice system and its practitioners alone. Using the law as the only tool for tackling crime, limits society's capacity to control and prevent criminal behavior. Studies on the causes of crime confirm families, schools, local neighborhoods and peer groups as key influences on delinquent behavior. They all have important roles to play in its prevention.

An Expert Committee from 22 member states and from 3 observing parties (Canada, the International Association of Youth and Family Judges and Magistrates and the Permanent European Conference on Probation and Aftercare) was invited to address the juvenile crime prevention problems and to bring forward a new recommendation. The Committee upheld a number of key principles in Recommendation (87) 20: the response to youth offending should be swift, early and consistent; the responsibility for offending behavior be widened to include the young offender's parent(s); as far as possible and where appropriate, interventions with young offenders should include reparation to victims and to their communities and interventions should directly address offending behavior and should be informed, as far as possible, by scientific evidence on effectiveness.

Effective youth justice system is only part of the overall response to youth crime and address risk-factors of young people delinquency through involvement of all the relevant social elements and collaboration with a range of community agents, including schools, minority communities and non-government organizations. Government effort is required to encourage community participation in program design and delivery, in the promotion and development of more community programs focused on children's needs, and training of human resources from different domains, jurists, social assistants, doctors, psychologists and pedagogues, in juvenile justice issues. The integrated approach programs involve the participation of several partners: health and social services, education, justice, police, mental health professionals, substance abuse treatment. These programs primarily aim to break family isolation by combining a wide range of services and support networks for the family and youth, emphasize collaborative planning and problem solving among teachers, parents, students, community members, administrators; involvement in rule setting and enforcement because the risk factors come from all areas.

Conclusion

The suite of primary, secondary and tertiary risk-based programs address delinquency across the entire developmental lifecycle. Emphasis should be placed on early age intervention programs, school, family and community-based prevention programs. As the evidence that punitive measures to youth crime do not effectively increase public safety mounts, lawmakers and law enforcement should support implementation of evidence-based practices to treat young people who are in conflict with the law, which are more cost effective and produce more benefits.

The emphasis should be on involving directly the whole society family, school, non-government organizations, associations, national authorities, civil society as a whole and each person, in defining and implementing national strategies to combat juvenile delinquency, that will contribute to the transmission to minors of the social and civic values necessary for their formation in the spirit of compliance with laws, rules of conduct and generally accepted social life. Actions and interventions assess positive the results of experiments undertaken in the Member States as regards the cooperation between police authorities, educational institutions, local authorities and youth organizations and local social services.

The positive effect on juvenile delinquency prevention can be appreciable and works when family, school and communities come together to offer youth programs and services, provide them with the opportunity for supportive relationships and the chance to assume constructive roles in the community. The community can provide support and training for family on how to prevent the development of antisocial behavior through parenting programs, communication methods, counseling on parenting skills, best practice with their children and ways to reduce conflict at home, intervention with families in distress, parent-school partnerships and public awareness campaigns, sponsor programs to prevent domestic violence and provide assistance to parents living in situations of domestic violence.

The workplace can establish family-friendly policies such as flexible working hours, the ability to work from home and job sharing, which will allow parents to spend more time with their children, invite speakers and organizations to talk to parents about child development and the transition to adolescence through information sessions.

The Governments can fund the development, evaluation and dissemination of best practice interventions to prevent juvenile delinquency, integrated actions, appropriate training through a network of national experts to develop an integrated framework program to combat juvenile delinquency.

Juvenile delinquency is a complex problem and the available evidence suggests that one of the important elements to prevent and combat it is to develop a communication policy that allows public awareness of these problems.

There is a need for research on the effects of different types of juvenile delinquency preventive programs in order to achieve an optimal balance between effective treatment, accountability and community protection. The phenomenon of juvenile delinquency it could be completed with significant results in terms of psychological and legal research. Prevention's potential remains untapped because nowhere has been fully realized the impact of well-defined, youth-oriented crime prevention programs and nowhere all of these pieces were been pulled together in one community, although are trying to do so.

In conclusion, application of one single preventive program will not significantly reduce juvenile delinquency. There is a need to establish the sub cultural specifics of particular groups of

juvenile delinquents for programs development and to clearly define the target group at which preventive measures will be directed, in order to improve the responsiveness of young offenders in reforming their offending behavior. Culturally relevant programs can benefit young offenders through the encouragement of participation in juvenile justice and human service initiatives by providing them with a value system and sense of group identity which they are more likely to embrace and influence their behavior. Therefore, juvenile delinquency preventive programs should be based upon several theoretical and practical approaches, developed for every particular case of juvenile delinquency.

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PROLEGOMENA TO A STUDY UPON GENDER EQUALITY IN EUROPEAN UNION LAW

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Abstract
Equality between women and men can be regarded as a fundamental right, a common value of the European Union (as it have been stated by the European Court of Justice in its case-law), and a necessary condition for the achievement of the EU objectives of growth, employment and social cohesion. Although inequalities still exist, the EU has made significant progress over the last decades in ensuring equal opportunities and equal treatment for both men and women. This is mainly due to the specific legislation, to the gender mainstreaming and to the specialized policies for reducing the gender gaps in sectors such as labour, study, social security, etc. The present paper is going to offer a brief overview of the most important and historical legal landmarks in pursuing gender equality at European Union level.

Keywords*: European, gender, sex, equality, discrimination, legislation, case-law*

1. Introduction

The history of EU gender equality legislation goes back to the 1957 Treaty of Rome, which provided the principle of equal pay for men and women (Article 119 amended by Treaty of Amsterdam and renumbered as Article 141 EC). Later, the principles of gender equality was anchored in the EC Treaty and amending Treaties, as well as in the most recent Lisbon Treaty and further strengthened with the adoption of binding EC secondary legislation (i.e. the directives), and with the 'soft' law measures (for example strategies and recommendations), not to ignore the relevance of the case law of the European Court of Justice (ECJ). Despite the actions taken at European level to eliminate gender discrimination much remains to be done, as stated in European Commission's *Strategy for equality between men and women, 2010-2015*, or in *Europe 2020 Strategy*. This situation is due to a series of reasons, the principal one being that even though equality between women and men is protected by law, the substantive equality hasn't been fully achieved yet.

Beginning with an exercise of conceptualization, this essay identifies and explores the main characteristics of EU gender equality policy and legislation, the most defining stages in creating the legal frame for rendering equality between men and women, as well as the most relevant case-law of ECJ in fighting against gender discrimination or against unequal opportunities and unequal treatment affecting both men and women. A chapter is dedicated to a brief analyze of the modalities in which the Romanian state tries to achieve the so-called *acquis* in the field of gender equality, focusing on the legal frame and on the strategies the Romanian bodies adopted in order to confer equal

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opportunities and chances for both men and women, and to create the background for equal treatment.

In doing so the paper seeks to illustrate the major steps taken at European Union level and at national level (the case of Romania) in order to contribute to the *elimination of existing inequalities and promote equality between women and men* (in compliance with the legal provisions); in participation rates, in the distribution of resources, benefits, tasks and responsibilities in private and public life, in the value and attention accorded to male and female, to masculine and feminine characteristics, behaviour and priorities.

2. Development of gender equality in European Union

2.1. Conceptual delimitations

Equality is an abstract and complex concept, currently in development at European Union level, and, as well, a relative concept in the sense that any equality judgment implies a comparison between two predetermined elements. From the legal point of view, the concept of equality presents multiple dimensions, thus it can denote *formal equality* or equality of treatment; *substantive equality*, which circumscribes equality of opportunity and equality of results; and *pluralism*[1]. The idea of *formal equality*, also called "equality in front of law", is intrinsically linked to the interdiction of discrimination and it is resumed in the Aristotelian maxim: "the equal should be treated equal and the unequal in an unequal way". Despite the apparent simplicity of this aphorism, complications arise when trying to determine in each particular case what situations are equal or unequal to others. The examination of the similarity of two situations implies a judgment establishing which differences are relevant and which are not, hence the elaborated legislation at EU level on equality of treatment. *Substantive equality* is a conception of equality that is concerned with the ensuring ability of persons to compete on an equal basis, having regard to various obstacles (including discrimination) that may impede this equality of opportunity. In particular, claims of substantive equality seek to highlight significant social obstacles (particularly discrimination based on social characteristics) to equal access to such goods as education, employment, goods and services. For instance, an unequal distribution of childcare responsibilities between women and men may make it more difficult for women with children to undertake jobs with long working hours without additional support or accommodation. Accordingly, merely eliminating sex discrimination on the *hiring* stage may not be enough to ensure that female workers have the same employment opportunities as male workers. It suggests that it may be necessary to take further steps to accommodate or assist female workers with children so that they may compete on equal terms with their male counterparts. The connection between equality and pluralism was outlined by Michael Walzer, whose theory[2] aims at what he calls *complex equality*. According to Walzer, "In formal terms, complex equality means that no citizen's standing in one sphere or with regard to one social good can be undercut by his standing in some other sphere, with regard to some other good. Thus, citizen X may be chosen over citizen Y for political office, and then the two of them will be unequal in the sphere of politics. But they will not

[1] Howard, E., 'The European Year of Equal Opportunities for All- 2007: Is theEU Moving Away From a Formal Idea of Equality?', *European Law Journal* 14(2), 2008, pp. 168-185.

[2] Walzser, M., *Spheres of Justice. A Defence of Pluralism and Equality*, New York, London: Basic Books, 1983

be unequal generally so long as X's office gives him no advantage over Y in any other sphere – superior medical care, access to better schools for his children, entrepreneurial opportunities, and so on"[3]. Walzer states that this system of complex equality will lead to a more egalitarian distribution of social goods. Maybe in each sphere distinct inequalities will persist, but given the plurality of spheres, eventually every person will acquire goods in one sphere or another.

With regard to *gender equality* (or *sex equality*, as it is often referred) and having in sight the different acceptations of the term *equality*, we can conclude that it is rather difficult to theorize such a concept, especially due to its complexity. This concept cannot be resumed only to a scale of equalities, because there are different standards and goals[4] A good argument in sustaining this idea is the vast European primary (i.e. all the relevant Treaty provisions), as well as, secondary and biding (i.e. the directives in relation to this subject) legislation or the case law of the European Court of Justice (ECJ), all these covering the concept of gender or sex equality from general to more specific aspects. It is our duty to outline the fact that the concepts gender equality and sex equality are not perfect synonyms, thus, the former concept comprises social differences between women and men, such as certain ideas about their respective roles within the family and in society, while the term sex refers primarily to the biological condition of women and men. Both concepts are equally referred to in the EU legislation, as well in the ECJ jurisprudence, without making a relevant distinction between them. Still, if we are binding to offer a concise explanation of the concept, we shall observe that gender equality ensures that all human beings be free to develop their personal abilities and make choices without the limitations set by strict gender roles; that the different behaviour, aspirations and needs of women and men are equally valued and favoured.

Another important issue is the interchange made between gender/sex equality and the correlative non-discrimination principle. In our opinion, there were giant steps made by EU authorities in fighting against discrimination in this particular area, still there are plenty of things to do in offering equal opportunities for men and women, therefore to reach the so-called substantive gender/sex equality, as we are going to emphasize in the following chapters. European Commission, for example, is aware of the fact that real gender equality is hard to achieve, due to the considerable gaps in employment relationships.

Anyhow, in studying the different aspects incumbent to the gender/sex equality, we can notice that the EU bodies, and previously the EC bodies, settled the following relevant issues connected to the concepts: equal pay for men and women, equal treatment of men and women in employment, equal treatment of men and women in statutory social security schemes, equal treatment of men and women in occupational social security schemes, equal treatment of men and women engaged in an activity, including agriculture, in a self-employed capacity, the pregnant workers, the parental leave, equal treatment of men and women in the access to and the supply of goods and services.

It is not the purpose of this present paper to offer an exhaustive study upon all these relevant aspects regarding the gender equality. As already mentioned before, at this point we are trying only to offer some guidelines connected to this extremely generous subject, an approach focusing on the milestones reached at European Union level on the road of achieving ultimate gender equality.

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[3] Idem, *op.cit.,* p.19

[4] Scott, J., "Deconstructing Equality versus Difference: Or the Uses of Post-structuralism Theory for Feminism", *Feminist Studies,* 14(1):33-49, 1998

2.2. The EU and Gender Equality

Gender equality occupies an important place in the EU which has served as an invaluable platform for the pursuit of gender equality and the fight against discrimination in this particular area.

There is a wide range of views about the extend to which the development of EU has been associated with the reduction of gender inequalities, varying from very considerable[5], to very limited[6]. Still, the promotion and strengthening of gender equality has been established as an priority policy of the Community agenda and has been held on numerous occasions by the ECJ to be a fundamental right and a general law principle under Community legal order[7].

The importance of gender equality was given new impetus by the insertion of Article 13 EC into the EC Treaty, which gives the Community further competence to adopt anti-discrimination legislation. In particular, the Council has the power to adopt legislation aimed at fighting discrimination on grounds of sex, racial or ethnic origin, religion or belief, age, disability and sexual orientation. In addition and significantly, Article 13 EC has brought the concept of gender equality beyond the area of employment providing the legal basis for broadening the scope of the principle of equality.

At the same time, parallel changes in the typology of tools and techniques have been introduced in EU policy, with the aim of complementing the legislative measures. In particular, the main soft law tool to reduce discrimination based on gender has been gender mainstreaming, which has been defined as: "the systematic consideration of the differences between the conditions, situations and needs of women and men in all European Union policies, at the point of planning, implementing and evaluation"[8]. A gender mainstreaming requires the EU bodies to seek to eliminate inequality and promote equality between women and men in all activities. Meanwhile, Commission equality policy is extended to issues such as domestic violence and healthcare, previously the exclusive domain of Member States[9].

Furthermore, the developments that have taken place in recent years such as the setting-up of a Community Framework Strategy on Gender Equality[10], which combines traditional forms of legislation with the so-called reactive measures; the creation of an *ad hoc* and independent body, called European Institute for Gender Equality[11] entrusted *inter alia* with the tasks of gathering and disseminating information and best practices, promoting dialogue and partnerships and raising awareness are evidences of the EU's ongoing commitment to gender equality.

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[5] Wobbe, T., "From Protecting to Promoting: Evolving EU Sex Equality Norms in an Organizational Field", *European Law Journal*, 9(1):88-108

[6] Elman, A., *Sexual Politics and European Union*, Oxford Berghahn Books, 1996; Rossilli, M., *Gender Politics in European Union*, New York, Peter Lang, 2000

[7] See, as examples, ECJ Case 149/77, Defrenne v. Socie´te´ Anonyme Belge de Navigation Ae´rienne Sabena (III) [1978] ECR1378; Case C-13/94, P v. S and Cornwall County Council [1996] ECR I-02143.

[8] European Commission (1996), Annual Report form the Commission Equal Opportunities for Women and Men in the European Union 1996, COM (96)650.

[9] European Commission (2006), *Roadmap for Equality between Women and Men for the Period 2006-2010* COM (2006) 92 final of 1 March 2006.

[10] European Commission (2000), Communication, *Towards A Community FrameworkStrategy on Gender Equality (2001-2005)* COM (2000) 335 final.

[11] Regulation (EC) No 1922/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a European Institute for Gender Equality, OJ 2006 L403/9.

Although from a legal point of view, neither women nor men suffer from discrimination within the European Union, in reality equality has yet to be achieved. There are gender gaps in employment: women are under-represented in several fields, such as sciences and decision making. In addition, they are generally paid lower wages than men. Women also do more "unpaid" jobs: domestic chores as well as caring for the elderly and children. Conversely, men are also exposed to discrimination in a variety of activities or positions, where their aptitude is not taken for granted – raising children is an example. The gender equality policy also tries to find solutions for discrimination against men as well.

Due to this aspects underlined above, in March 2010, in order to mark the 15th anniversary of the declaration and platform for action adopted at the Beijing UN World Conference on Women and the 30th anniversary of the UN Convention on the Elimination of All Forms of Discrimination against Women, the European Commission adopted the Women's Charter[12], in which the Commission renewed its commitment to gender equality and to strengthening the gender perspective in all its policies. The Commission also identifies five principles to be followed in achieving one's goals related to the topic, namely: equal economic independence, equal pay for equal work and work of equal value, equality in decision-making, dignity, integrity and an end to gender-based violence, and finally, gender equality beyond the Union, the last principle being a transcript of the Commission's ambition to incorporate gender equality into EU external policies.

In the same year, on the ground of two important documents, namely, *Roadmap for equality between women and men 2006-2010*[13] and the *European Pact for Gender Equality*, the European Commission adopted the *Strategy for equality between men and women, 2010-2015*[14]; the strategy spells out actions under five priority areas defined in the Women's Charter, and one area addressing cross-cutting issues. For each priority area, key actions to stimulate change and achieve progress are described and more detailed proposals are to be found in the accompanying staff working paper. The actions proposed follow the dual approach of gender mainstreaming (meaning the integration of the gender dimension in all policy areas) and specific measures. The Strategy represents the work programme of the European Commission on gender equality, aiming additionally to stimulate developments at national level and to provide the basis for cooperation with the other European institutions and with stakeholders.

The *Europe 2020 Strategy*[15] proposed by the Commission in March 2010 presents a vision for the EU in 10 years time: a smart, sustainable and inclusive economy that delivers high employment, productivity and social cohesion. One of the issues underlined in this strategy is the current gap between male and female employment rates, which shows clearly the need to foster women's greater involvement. Indeed, the overall employment rate of women in Europe is at 62.5 % and some specific groups of women are particularly far from the *Europe 2020* targets. The rates for women

[12] European Commission (2010), Communication from the Commission, *A Strengthened Commitment to Equality between Women and Men. A Women's Charter*, Brussels COM (2010) final

[13] European Commission (2010), Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - *A Roadmap for equality between women and men 2006-2010* , COM(2006) 92 final

[14] European Commission (2010), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Strategy for equality between women and men 2010-2015*, Brussels, 21.09.2010, COM (2010) 491 final

[15] European Commission (2010), *Europe 2020,* A European strategy for smart, sustainable and inclusive growth, Brussels, 3.3.2010, COM (2010) 2020final

from non-EU countries, for instance, are below 50 %, while Roma women are four times more often unemployed than the general female population.

As we can see, the gender equality regime is a relatively complex one, due to the combined use of the traditional legal measures (presented in the following) and of the political instruments, all playing an important role in shaping the overall picture. In addition, the development of a gender mainstreaming strategy has provided an over arching framework within the EU to address the deeper problems and causes of gender inequality.

2.3. Retrospective overview on EU legislation

EU law has proved an ideal vehicle for upholding the principle of gender equality, in part at least because of the EU's undoubted potential for growth.

Since the inception of the European Community, EC gender equality law has made a positive and important contribution to combating discrimination and has developed into a principle of constitutional dimensions[16]. When the European Coal and Steel Community (ECSC) Treaty was concluded in 1951 and the Treaties establishing the European Economic Community (EEC) and European Atomic Energy Community (Euratom) were concluded in 1957, their inspirers intended their immediate goal to be the economic welfare, while political integration amongst the States of Europe to be a long-term goal. The architects of the three communities had personally witnessed the destructive force of nationalism; many have seen their countries overwhelmed and occupied during the World War II, therefore, their ultimate plan was to build a United Europe through concrete achievements, which first create a *de facto* solidarity.

Due to this context, in the Treaty establishing the European Economic Community (EEC) adopted in 1957, only one single provision (Article 119 EEC Treaty, now Article 141 EC Treaty) was included to combat gender discrimination, namely the principle of equal pay between men and women for equal work. The background to this provision was purely economic; the Member States, in particular France, wanted to eliminate distortions in competition between undertakings established in different Member States. France had adopted provisions on equal pay for men and women much earlier and it feared that cheap female labour in other Member States would put French undertakings and the economy at a disadvantage. However, in 1976 the European Court of Justice (ECJ) ruled that Article 119 EEC not only had an economic, but also a social aim. As such, it contributed to social progress and the improvement of living and working conditions[17]. Later on, the ECJ stated that the economic aim is secondary to the social aim, as a consequence, in Court's opinion, the principle of equal pay is an expression of a fundamental human right[18]. The ECJ has played a very important role in the field of equal treatment between men and women, in ensuring that individuals can effectively invoke and enforce their right to gender equality. Similarly, it has delivered important judgments interpreting EU equality legislation and relevant Treaty Articles, not to mention its important contribution to the future regulation of the gender equality.

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[16] More, G. 'The Principle of Equal Treatment: From Market Unifier toFundamental Right?' in Craig, P. and De Bùrca, G. (eds) *The Evolution of EULaw* (Oxford: Oxford University Press), 1999, pp. 517–553.

[17] ECJ 8 April 1976, Case 43/75 Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena [1976] ECR 455 (Defrenne II), at paras 10-12.

[18] ECJ 10 February 2000, Case C-50/96 Deutsche Telekom AG, formerly Deutsche Bundespost Telekom v Lilli Schröder [2000] ECR I-743 (Schröder), at para 57

While in the late 1950s there was only this Article on equal pay, since then a whole plethora of directives – a specific form of biding EU legislation - , which prohibit discrimination on the grounds of sex in particular, have been adopted[19], i.e: the Directive on equal pay for men and women (75/117), the Directive on equal treatment of men and women in employment (76/207, amended by Directive 2002/73), the Directive on equal treatment of men and women in statutory scheme of social security (79/7), the Directive on equal treatment of men and women in occupational social security scheme (87/378, amended by Directive 96/97), the Directive on equal treatment of men and women engaged in an activity, including agriculture, in a self-employment capacity (86/613), the Pregnant Workers' Directive (92/85), the Parental Leave Directive (96/34 amended by Directive 2010/18), the Directive on equal treatment of men and women in the access to and the supply of goods and services (2004/113), and, finally, the so-called Recast Directive (2006/54).

Article 119 should have been implemented before 1 January 1962, but the Member States were unable or unwilling to implement it. Even after recommendations by the European Commission and the adoption of a new timetable, this article was not transposed into national law. The implementation of the principle of equal pay became one of the priorities of the social programme agreed upon in 1974 and the Member States decided to adopt a new directive on equal pay between men and women[20].

Starting with 1975, there were cases brought to the ECJ in which the Court decided that individuals may rely on Article 119 EEC (now article 141 EC) before the national courts in order to receive equal pay for equal work or work of equal value, without discrimination on grounds of sex. While the ECJ case law enabled individuals to bring cases before national courts, it also made it clear that it is difficult to isolate pay from other aspects of working conditions.

With the entry into force of the Treaty of Amsterdam in 1999, the promotion of equality between men and women throughout the European Community has become one of the essential tasks of the Community (Article 2 EC). Furthermore, according to Article 3 paragraph (2) of EC Treaty, the Community shall aim to eliminate inequalities, and to promote equality, between men and women in all the activities listed in Article 3 EC. This obligation of gender mainstreaming means that both the Community and the Member States shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities.

Furthermore, since 1999 the Community has had the competence to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, and age or sexual orientation (Article 13 paragraph (1) EC). This article has provided a legal basis for two non-gender related anti-discrimination directives: the Directive on the principle of equal treatment between persons irrespective of racial or ethnic origin (2000/43/EC)[21], the Framework Directive on equal treatment in employment and occupation (2000/78/EC)[22] and, as far as gender is concerned, the

[19] Prechal, S. and Burri,S., *EU Rules on Gender Equality: How are they transposed into national law*, Publication Office of the European Union, 2009, p.3

[20] Council Resolution of 21 January 1974 concerning a social action programme, OJ 1974, C 13/1

[21] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000, L 180/22.

[22] Council Directive 2000/78/EC of 27 November 2000 establishing a legal framework for equal treatment in employment and occupation, OJ 2000, L 303/16.

Directive on the principle of equal treatment between men and women in access to and the supply of goods and services (2000/113/EC).

The next important moment in the development of EU gender equality law was the adoption of the Charter of Fundamental Rights of the European Union. This Charter, *inter alia*, prohibits discrimination on any ground, including sex (Article 21); it recognizes the right to gender equality in all areas, thus not only in employment, and the necessity of positive action for its promotion (Article 23). Furthermore, it also defines rights related to family protection and gender equality. The reconciliation of family/private life with work is an important aspect of the Charter; the Charter guarantees the right to paid maternity leave and to parental leave (Article 33). With the entry into force of the Lisbon Treaty, the Charter became a binding catalogue of EU fundamental rights (see Article 6(1) TEU, as amended by the Lisbon Treaty). The Lisbon Treaty also confirms the position taken earlier by the EU in the EC Treaty. Articles 13 and 141, for instance, were adopted without changes, as well as it states the importance of gender equality in the European Union. The promotion of equality between women and men is also listed among the tasks of the Union (Article 3 paragraph (3) TEU), together with the obligation to eliminate inequalities and to promote equality between men and women in all the Union's activities (Article 8 TFEU). Here, the Lisbon Treaty clearly reiterates the obligation of gender mainstreaming for both the Union and the Member States. The Lisbon Treaty is important for the further development of EU gender equality law, because it serves as a basis for the adoption of future legislation and other EU gender equality measures.

2.4. Primarily Source of EU Gender Equality Legislation

Any discussion of EU gender equality legislation cannot avoid starting with a brief discussion of a crucial Treaty Article, namely Article 141 EC (former Article 119 EEC), providing for equal pay between male and female workers. The original text of the former Article 119 EEC Treaty, adopted in 1957, provided that: "(1) Each Member State shall (…) ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work." Article 119 was renumbered and amended with the entry into force of the Treaty of Amsterdam on 1st of May 1999. The first two paragraphs remained nearly the same; however, the provision in Article 141(1) now explicitly states that: "Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value", the amendment being a solid contribution of ECJ case-law. Further, two new paragraphs have been added. According to Article 141(3) the Council can adopt measures to ensure the application of the principle of equal opportunities and the equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value. The new inserted paragraph (4) allows positive action. It stipulates that: "With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or prevent or compensate for disadvantages in professional careers."

Article 141 EC not only prohibits direct discrimination based on sex in the field of pay, but also indirect discrimination. Direct sex discrimination occurs when a person is treated less favourably on grounds of his or her sex. Indirect discrimination refers to discrimination which is the result of the application of a sex-neutral criterion, which disadvantages, in particular, persons belonging to one sex compared with persons of the other sex.

An important question in equal pay cases is always whether the work performed by a female worker is 'equal' to the work performed by a male worker. In this respect, the ECJ has decided that Article 141 EC also extends to "work of equal value" and also has underlined the need for genuine transparency in this area. This goal is only achieved if the principle of equal pay is observed in respect of each of the elements of remuneration granted to men and women. Comprehensive or global comparisons of all the considerations granted to men and women are not allowed[23]. This implies that often a comparison should be made between the work performed and the salary received by male and female workers. We should also mention that the prohibition provided by Article 141 EC applies not only to sex discrimination arising out of individual contracts, but also collective agreements and legislation[24].

As we have already mentioned, in the Lisbon Treaty, Art.141 EC was adopted without changes in the Art. 157 TFEU. With regard to the provision of Article 157 TFEU we have to mention that it hasn't only been interpreted to ensure equal treatment for men and women in matters of employment and pay, but even in contracts or relationships governed by private law, a giant step forward towards the desired future codification of the European private law.

2.5. The Case-law of European Court of Justice on Gender Equality

The case-law of ECJ, as already mentioned above, played an extremely important role in EU gender equality legislation or policies. Therefore, this chapter is dedicated to the analysis of the ECJ case law considered to be relevant in the field of gender equality, since it was for this institution to outline the fact that gender equality is a *fundamental right* and a *general law principle* under Community legal order[25].

We have already mentioned that the ECJ opinion according to each the principle of equal pay is an expression of a fundamental human right[26], was subject to the legislative amendments. In the following, we are going to emphasize the role of ECJ in developing another operable concepts regarding gender equality, such as *positive action measures*.

We shall start with the controversial ruling of the ECJ in the *Kalanke*[27] case, afterwards clarified in the *Marschall*[28] case. In both cases, the Luxemburg Court had to decide if some positive action measures adopted with the aim of improving women professional situation were compatible with the principle of gender equality. Former Article 2(4) of Council Directive 76/207/EEC provided that the directive was to be without prejudice to measures that promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities. In the *Kalanke* case, the ECJ established that in so far this provision constituted an exception to the

[23] ECJ 17 May 1990, Case C-262/88 *Douglas Harvey Barber* v *Guardian Royal Exchange Assurance Group* [1990] ECR I-1889 (*Barber*), at parag 33-34

[24] ECJ 8 April 1976, Case 43/75 Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena [1976] ECR 455 (Defrenne II), at paras 21-22

[25] ECJ 8 April 1976, Case 43/75 Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena [1976] ECR 455 (Defrenne II), at paras 10-12

[26] ECJ 10 February 2000, Case C-50/96 Deutsche Telekom AG, formerly Deutsche Bundespost Telekom v Lilli Schröder [2000] ECR I-743 (Schröder), at para 57

[27] ECJ, Case C-450/93, *Eckhard Kalanke v Freie Hansestadt Bremen,* [1995] European Court reports (ECR) p. I-03051

[28] ECJ, Case C-409/95, *Hellmut Marschall v Land Nordrhein-Westfalen,* [1997] ECR p. I-06363

principle of equality it had to be interpreted strictly and was specifically and exclusively designed to allow measures which, although apparently giving rise to discrimination on grounds of sex, were in fact intended to eliminate or reduce actual instances of inequality between men and women which could exist in the reality of social life. It thus permitted national measures relating to access to employment, including promotion, which gave a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men. However, in *Kalanke* the ECJ ruled that Council Directive 76/207/EEC precluded national rules that gave automatic priority on a promotion to women, in sectors where there were fewer women than men at the level of the relevant post. The Court considered that a national rule which guaranteed women absolute and unconditional priority for appointment or promotion was not a measure allowed by Community law, since it went beyond promoting equal opportunities and substituted for it the result "equality of representation" which was only to be arrived at by providing such equality. After the uncertainty about the legitimacy of quota systems and other positive action measures in favour of women in employment created by the *Kalanke* ruling, the European Commission approved a Communication[29] that intended to soften the effect of that judgment, proposing an amendment to Directive 76/207/EEC to reflect the legal situation after *Kalanke* and clarify precisely that despite rigid quotas other positive action measures were authorized by Community law.

Later on, the position of the ECJ regarding positive action measures was softened in *Marschall* case[30] In this case the Court notes that, even where candidates are equally qualified for a job, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life, so that the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances. In the light of these considerations, the Court holds, in *Marschall* case, that, unlike the rules at issue in *Kalanke*, a national rule which contains a saving clause does not exceed the limits of the exception in Article 2(4) of the Directive if, in each individual case, it provides for male candidates who are as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilt the balance in favour of a male candidate. Finally, in terms of criteria tilting the balance in favour of a male candidate, the Court observes that such criteria should "not be such as to discriminate against female candidates." The ECJ has pointed out that the use of several criteria like civil state, *«breadwinner status»*, or seniority in the company (when it is not relevant to perform the tasks of the post) constitutes indirect discrimination on grounds of sex.

In *Badeck* case[31], the Court reiterates the necessity for positive action measures to include a flexibility clause in order to prevent an intolerable discriminatory treatment of male workers. In addition, the requirement of an objective assessment of the candidatures that takes into account the

[29] Communication from the Commission to the European Parliament and the Council on the interpretation of the judgment of the Court of Justice on 17 October 1995 in Case C-450/93, *Kalanke v Freie Hansestadt Bremen*, COM/96/0088 FINAL

[30] See the comments on this case in: Brems, E., "Case C-409/95, *Hellmut Marschall v. Land Nordrhein-Westfalen*", *Columbia Journal of European Law,* Vol. 4, (1998), pp. 668-674; Cabral, P., "A step closer to substantive equality", *European Law Review,* 23, (1998), pp. 481-487;

[31] Case C-158/97*, Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen*

specific personal situations of all candidates persists. However, advancements are introduced in relationship with a measure that establishes a preferential access of women to training positions in the public sector. According to *Badeck*, the principle of equal treatment between men and women set up in Directive 76/207/EEC does not preclude a national rule for the public service which, in trained occupations in which women are under-represented and for which the State does not have a monopoly of training, allocates at least half the training places to women. The Court considers that this rule is intended to eliminate the causes of women's reduced opportunities of access to employment and careers, and moreover consists of measures regarding vocational orientation and training authorised by Directive 76/207/EEC.

In relation with the entry into force of the new substantive equality provision contained in the Treaty of Amsterdam (Article 141 ECT), it is important to mention the case *Abrahamsson*[32]. In this decision the ECJ rules that Directive 76/207/EEC and Article 141(4) ECT preclude national legislation under which a candidate for a post who belongs to the under-represented sex and possesses sufficient qualifications for that post must be chosen in preference to a candidate of the opposite sex who would otherwise have been appointed, even when the different between the respective merits of the candidates is not so great to lead to a breach of the requirement of objectivity in making appointments. The opinion of the Court is that such a method of selection is not permitted by Community law since the selection of a candidate from among those who are sufficiently qualified is ultimately based on the mere fact of belonging to the under-represented sex, and this is so even if the merits of the candidate so selected are inferior to those of a candidate of the opposite sex. Further on, it is considered that even though Article 141(4) ECT allows the Member States to maintain or adopt measures providing for special advantages intended to prevent or compensate for disadvantages in professional careers in order to ensure full equality between men and women in professional life, it cannot be inferred from this that it allows a selection method which appears to be disproportionate to the aim pursued. According to the ECJ's opinion, the disproportionate nature of a positive action measure of this kind persists even when it is intended to apply only to a restricted number of high-level posts. The importance of this case is that it is the first time the ECJ has to deal with interpreting the scope and meaning of paragraph 4 of Article 141 ECT. What is more, it is also the first time the Court of Justice makes explicit reference to the regard due to the proportionality principle in relationship with positive action measures.

Another case about the interpretation of the derogation to the right of equal treatment between men and women established in Article 141(1) ECT and Directive 76/207/EEC, referred in preliminary ruling to the ECJ, is *Lommers*[33]. Here, the ECJ dealt with subsidised nursery places made available by the Dutch Ministry of agriculture to its staff. The Ministry, aiming to tackle extensive under-representation of women within it and in a context characterised by a proven insufficiency of proper, affordable care facilities, reserved places in subside nurseries only for children of female officials, whilst male officials had access to them only in cases of emergency, to be determined by the employer. The Court noted that the Dutch Ministry measure could *a priory* help to perpetuate a traditional division of roles between men and women, arguing that, the promotion of equality of opportunity between men and women pursued by the introduction of a measure benefiting working mothers could also be achieved if its scope would be extended to include working fathers.

[32] Case C-407/98, *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*
[33] Case C-476/99, *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij*

The ECJ ruling in *Lommers* introduces a new trend in relationship with the ECJ's interpretation of the equality principle, namely, a more moderate approach to the concept of positive action strongly based on the compliance with the principle of proportionality. This decision implies also a shift in the case law of the European Court of Justice about social measures adopted by the Member States in order to improve the situation of women in the labour market. In *Lommers,* the ECJ overruled his previous settled case law in *Hofmann*[34]. In this last case, the ECJ ruled that Directive 76/207/EEC left discretion to Member States concerning the social measures they adopt in order to offset the disadvantages, which women, by comparison with men, suffer with regard to the retention of employment. Such measures were considered closely linked to the general system of social protection in the various Member States. Therefore, Member States were supposed to enjoy a reasonable margin of discretion as regards both the nature of the protective measures and the detailed arrangements for their implementation. That margin has been reduced by the ECJ's decision in *Lommers.* From now onwards, taking into account that the argument that women interrupt their careers more often that men to take care of children is not so strong any longer from the ECJ's point of view, this kind of measures needs to be conformed with the principle of proportionality.

Another case where the ECJ has confronted the interpretation of the Community provisions regarding positive action measures in favour of female workers is the case *Briheche*[35]. In this case, the ECJ has dealt with a preliminary question raised by a French Court concerning the compatibility with Community law of a national provision that reserves the exemption from the age limit for obtaining access to public-sector employment to widows who have not remarried, excluding widowers who have not remarried. The ECJ states that this national provision formally contravenes the prohibition of discrimination on grounds of sex under Community law. Nevertheless, the Court of Justice assesses if such a provision might be in accordance with the Community rules that allow exceptions to the equal treatment rule for men and women to measures aimed to achieve substantive equality by reducing de facto inequalities which may arise in society and, thus, to prevent or compensate for disadvantages in the professional career of women. In its reasoning, the ECJ comes back to its previous settled case law and considers that a provision as the one at issue could be covered by that exception. The ECJ concludes that the provision at issue automatically and unconditionally gives priority to the candidatures of certain categories of women, reserving to them the benefit of the exemption from the age limit for obtaining access to public-sector employment and excluding men in the same situation. From that assessment, it follows that such a provision is not allowed under Directive 76/207/EEC and Article 141(4) ECT. In *Briheche*, the ECJ seems to advocate for the inclusion of a "saving clause" that allows that cases like the one of Mr. Briheche would be included in the scope of the exemption to the age limit for obtaining access to public sector employment instead than imposing an elimination of the measure aimed to privilege widows.

2.6. Gender equality and Romania

Gender equality still represents a sensitive issue for Romanian political environment. Even if legally, some aspects regarding the specific problematic of this subject were achieved, especially by means of Law no.202/2002, the frame law in gender equality, there are still lots of things to do,

[34] Case 184/83, *Ulrich Hofmann v Barmer Ersatzkasse,* [1984] ECR p. I-03047.

[35] Case C-319/03, *Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice,* [2004] ECR p. I-8807

especially in awareness of gender gaps, and in the procedures for discrimination complaints. Law no.202/2002, amended subsequently, transposed the following European directives or provisions of some defining directives for gender equality: Directive 76/207/EEC with the amendments brought by Directive 2002/73/EC; art. 1, 2, 4, 5, 6 and 7 from Directive 75/117/EEC; art. 10 and 12 din Directive 92/85/EEC; Directive no. 97/80/EC; Clause 2, point 5 and 6 from Directive no. 96/34/EC; Directive no. 86/613/EEC.

The Law no.202/2002 provides a comprehensive definition of the notion of equality of opportunity between women and men, highlighting the need to take into account the different capabilities, needs and aspirations of males and, respectively, women and their equal treatment for developing effective coherent policies and to determine the achievement of *de facto* equality between women and men in all spheres of social life. The same law provides for the establishment of the National Agency for Equal Opportunities, as a specialized body of central public administration under the authority of the Ministry of Labour, Family and Social Protection, which aims to promote policies of equality of opportunity between women and men at all levels of social, political, economic and cultural life, but also to introduce a gender perspective into all policies and programs.

An important policy step has recently been registered with regard to enhancing the gender equality strategy in Romania. On 15 April 2010 two important documents were approved: the 2010-2012 National Strategy on equal opportunities for women and men and the General actions plan for implementing the National Strategy on equal opportunities for women and men[36]. Both documents emanated from the National Agency for Equal Opportunities that had the support of an inter-ministerial working group. The Strategy is structured alongside two main gaps identified with regard to gender equality implementation in Romania: the low awareness on gender equality in mass media and public administration structures; and the lack of consistent legal framework provisions with regard to addressing gender-based discrimination complaints. Such a reality is caused by the fact that there are two public bodies addressing gender-based discrimination complaints: the National Council for Combating Discrimination and the Agency. In addition to the above-mentioned gaps, the Agency also identified several threats jeopardizing the adequate implementation of gender equality policies in Romania: the economic crisis; the labour market dynamics; insufficient promotion of the social campaigns in mass media; and communication deficiencies between public institutions on the one hand, and civil society and social partners on the other hand.

In order to address the identified gaps affecting the implementation of the gender equality policies, the Strategy is built on a central objective stated as 'the improvement of the implementation frame of all gender equality policies aimed at achieving *de facto* equality between women and men at all levels of economic, social, cultural and political life'. This general objective is paralleled by eight specific objectives: introducing the gender perspective at all education levels; combating the gender stereotypes in the education system; reducing the gender pay gap; encouraging the reconciliation between private and professional life; promoting the gender perspective in social life; encouraging women's balanced participation in decision making; mass-media awareness with regard to gender equality between women and men; and monitoring the implementation of the indicators included in the Beijing Action Platform.

[36] Government Decision No. 237 of 24 March 2010 on the approval of the National Strategy on equal opportunities for women and men for 2010 – 2012 and on the approval of the General actions plan for implementing the National Strategy on equal opportunities for women and men for 2010 – 2012, published in the Official Gazette No. 242 of 15 April 2010

Overall, while articulating a national strategic paper on addressing gender equality policies and specific implementation is extremely important to take coherent and consistent action aimed at reducing gender inequality in Romania, the effort of strategizing should be accompanied by investments in redressing measures that are proportional to the size of the issues

3. Conclusions

The brief overview presented above illustrates that a great deal of progress has been made in the area of EU gender equality law since 1957. Both the EU legislator and the ECJ have greatly contributed, often in a delicate interplay, to this process. Tribute should also be paid to individuals who have brought cases before their national courts, cases that ended up in the ECJ in Luxembourg. This has enabled the ECJ to deliver its judgments. As we have seen, the case law of the ECJ has, from time to time, been the driving force for EU gender equality standards, in particular in the area of introducing new concepts or other revolutionary novelties, especially in the enforcement of EU equality law, and especially the effective enforcement of gender equality standards in the Member States, as we have seen the Romanian case.

It is beyond any doubt that the European Union's achievements in fostering equality between women and men have helped to change the lives of many European citizens for the better and provide the foundation on which we now have to build a genuinely gender-equal society.

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MORAL HEALTH TO WOMEN SENTENCED - IMPORTANT VECTOR OF IDENTIFICATION IN ITS CRIMINAL PERSONALITY

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Abstract

Becomes very important that every woman be considered owned specific human universe, with its own individuality and personality, manifesting and living differently, depending on his own temperamental bias, will and character. Therefore, it is important for the evolution of women held the degree of biological and psychological safety that they perceive in the new living environment. Women's behavior is influenced both held the length of the sentence, as the main stressor, books and psychosocial phenomenon, manifested by a "prison crisis". Prisoner's attitudes have a wide range of forms of expression, anxiety, suicide threats and self-harm behaviors, from total neglect and emotional indifference. So, the situation itself, each inmate is a unique behavior, full of contradictions, frustrations and failures. It comes in prison following a flagrant antisocial behavior, the commission of crimes, some very serious, some are poorly suited, refracting or unable to integrate the rules of social coexistence. Since the prison system can irreparably degrade human dignity must be borne in mind that the rules being applied to particular inmates came to women sentenced in anxious and undergo the rigors of space law. Therefore, it requires a sound legal system designed to protect as much as possible, the concept of human dignity under lawful limitations. To understand the psyche of detainees and to establish procedures for treatment and rehabilitation for women-owned, it is very important to study the negative effects of physical isolation, psychological and social. It is also necessary to know the reasons which have led to such mental imbalances, because we must avoid turning them into attitudes of character. Reeducation convict becomes a complex and difficult this process is closely linked to the principle of individualization of the sentence correct.

Keywords*: criminal law, woman sentenced psychology, criminal personality, woman deviance, prison reform.*

1. Introduction

The social organization tends to place women in passive situations, social rules and its own constitution compels women to suppress passive instincts.

The trend of males of female attitudes can foster the emergence of deviant behavior, antisocial. It was found from research a possible link between female criminality and masculinity that emerged in the behavior of women. While many personality traits are common to both sexes, defining individual psychology, there are different ways of behaviors - their attitudes based on gender.

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The image of women, compared with that of man, the place and role in the family system and social activity, was generally devalued, men, especially married ones, with full rights, including the imposition of sanctions based on physical aggression.

She had to endure over time several variations of humiliation, neglect and even abuse, all because of social norms accepted and promoted by groups and macro groups membership. Forms of victimization that she was subject ranged from one culture to another, from one historical stage to another, from aggressive forms easier to physically violent and psychologically traumatic.

J. Léauté in his work, says that "less participation of women in crime is even more remarkable, since in the general population, the percentage of women is equal or even greater than men, as is the case of Romania.

Lower percentage of female participation in crime is variable, so the extent to which women increasingly participate in economic, social, political, in the same measure provides more opportunities to commit crimes, leading to greater participation in crime. It is known that women commit a smaller circle of crime and there are a number of crimes specific to women, such as infanticide and prostitution.

But women and committing crimes against public property or personal crimes of forgery, crimes against the norms of social and crimes against the person, including murder and (especially for battered women, victims of domestic violence).

Viewed from a historical perspective, the causes of crimes committed by women have been treated over time with indifference, and the penalties imposed on them, were numerous and varied, but often different from those applied to men. Intellectual tradition maintains respect for the autonomy of man, his intelligence and force of character, while for women despise their weakness and passivity.

The late nineteenth century, Cesare Lombroso and the founder of scientific criminology G. Ferrero in the paper entitled "Women and criminal prostitution" (1900) argue that there is a typical female criminality. Theory first formulated by Lombroso in 1895, leaving the idea of "atavistic regression" of one who commits crimes. Therefore, the killer is a biological being that differ considerably from being normal, because of anatomic and physiologic tracers and stigmas acquired by hereditary. Criminal woman was perceived to have innate qualities of man's crime, plus the worst characteristics of women. It is believed that when women display criminal behavior, they are worse than men because of lack of moral sense.

According to the authors, these features include lying, deceit, hostility, were not evident in men. If the crime was considered a male trait of their character common in women murder was against morality.

Women deviant social or criminal not to act in accordance with accepted social norms and values when they were diagnosed as pathological and requiring treatment to be cured. This theory has helped to perpetuate the notion of "fallen woman. " It is obviously a false vision that reflects the authors' conception biologist, as the vision of socio-economic inferiority of women.

Other scholars are concerned in the crime as something pathological socially induced rather than biologically inherited. It supports the idea that women feel left out of different situations, which increases their desire for new experiences, to security and recognition. These desires may be related to deviant behavior in women.

D. Pollack American criminologist examined the specific problem with modern women deviance, he argues that it is not necessarily a smaller proportion of women in the crime, but the fact that many criminal act sare not known to the authority. Criminals source typical female is sought in

female education, which requires that it be carefully conceal aggressive tendencies, menstrual sufferings, and her sexual activity, which leads to the formation of a behavioral deficit. Pollack considers murder a learned behavior from a very early age and was of the opinion that, in a society dominated by men, women have always been regarded as strange and even dangerous.

Theory of control exercised by parents - suggests that within the family, boys unlike girls, are encouraged to undertake more risky behavior, so it is more likely to engage in criminal activity. For girls, parental control is more severe, conditioner them to be more passive and thus will make less risky activities than boys.

Freda Adler masculinity thesis developed seeking to explain female criminality. It has experienced major changes after the 60 years when there was a rapid increase in female crime, women are becoming more "masculine" more aggressive. This sentence states that, with the growing status of equality with men , women increasingly assume more masculine social roles, they tend to assert themselves in ways typical male, so that they become more practical, more energetic and aggressive. There were changes in family and in particular the transition of women from public space at home. Good girls are those who retain allegiance to traditional social roles, while bad girls are acting like men. Increased crime is regarded as masculine.

E. Sutherland and D. Cressey criminology emphasized that women's participation in criminal activity varies from state to state, in a country as women gain more freedom, the participation in criminal activity increases, approaching male . There is a vigorous males of women manifested in dress, language and everyday behavior. This trend manifested in sexual promiscuity, legalization of legale mancipation legal aspect, brings about changes in the structure of crimes committed by women's shoulders, registering an increase of participation in terrorist acts and great cruelty, the violent killings.

Feminist Studies show that the main cause is the marginalization of female crime, poverty, lack of education, women are often imprisoned for not adhering to strict moral codes or social roles they were assigned.

By the early twentieth century, women were perceived primarily as sexual objects, subject to male-dominated ideologies. Post-modern feminism - shows that social reality is constructed by men and aconsequence of institutional mechanisms exist to perpetuate male domination.

In conclusion, the number of theories developed in female crime is great, each trying to provide the best explanation and individually responsible predominant factors involved in producing this type of crime. It's a proven fact that women and men differ biologically and interms of social influences. Women are also many possibilities that had not before. However, we can not say that one theory could explain female criminality. This theory must be understood as a complex phenomenon, influenced by interactions between the psychological, social, developmental, environmental, economic, biological, even evolutionary.

2. Personality of women prisoners - the prisoners' moral health.

The impact of imprisonment on women convicted personality components is often dramatic, resulting in different manifestations of the conduct and civil society.

It is very important to consider that every woman owned is unique, with its own individuality and personality, their own feelings and psychological experiences, manifesting and living every moment of life differently, depending on his own subjectivity. All they have multiple causes and

determinations related to the temperamental traits, will and character, education or training received and level, the environment in which to form and lived until coming to prison. We consider as very important for the evolution of women held is the degree of biological and psychological safety that we will charge the new living environment.

The prison is a severe punishment by inserting an isolation from family, society, breaking the profession and work reintegration of prisoners is difficult. When the length of the sentence is longer than it is a moral distress and duration that can lead to alienation an estrangement of people. And behavior in prison subculture "who" the vices and aggressive attitudes are reshaping another personality - a "personality missed. "

Thus, on arrival in prison, held face unusual situations and conflict, which distort and causing her physical and mental isolation. Lonelinessis a feeling of overwhelming and kept separate from others and thus will experience a lack of communication, will miss the affective-emotional support, identifying the group by the lack of a sense of ownership.

Dramatic conviction to imprisonment becomes evident gradual disintegration of personality, all components are affected: affectivity, motivation, will, temperament, skills and character.

At present, humanism principle broadens its scope more and not aimed at the destruction and elimination of convict, but the correction, the rehabilitation of them.

As the core of personality, affectivity "bearing the brunt" of deprivation of liberty imposed frustrations, developing a sense of victimization, inmates feel strong emotional level, lack of personal privacy, which leads to "blunting sensitivity" and the frequent expression malice and hatred, at one time considered normal. "Hooray, the mixture hostility, intolerance and aggression is directed at individuals or groups that make the individual to feel in a position of inferiority."

These interpersonal interactions based on intimidation, aggression, hatred, leading inevitably to the emergence of human alienation and fear. Inmates fear for their life, they fear they will contract the incurable or shameful, they are afraid they will fall prey to despair. This fear and obedience to the "oppressors" lead to an emotionally dependent -those on affective, developing "culture of silence". Women prisoners are no longer able to clearly express what I feel, what they want. Confusion maintained at both the social and psychological, social and cultural patterns imposed to prevent them formulate their own needs and make themselves understood by others. With no alternative culture, even in relations between prisoners, they communicate in the form simposed from outside, their awareness level remained at a level unable to decipher the essence of events they face. In these circumstances, the actions are directed towards prisoners form of adaptation, by finding ways to solve their need within a "strictly biological, non-human. "Thus, in this phase, inmates lose one of the essential qualities of life, namely, mental and spiritual freedom, they lose their existential significance, becoming mere objects. In this environment frustrating, to avoid reaching the stage noted above, inmates resort to psychological defense mechanisms, enabling them to withstand indefinitely the universe in which they live.

These methods of protection can be of several types: immature (with somatization, introspection, projection, passive-aggressive behavior, regression), neurotic (displacement, dissociation, inhibition, isolation, repression, intellectualization, sexualization), narcissistic (denial, distortion) or mature (anticipation, humor, sublimation, altruism). Prisoners and constructed as "niche strength in an environment where there is no possibility of escape and fight."

Psychological degradation, loneliness feeling, pain, longing for freedom and the loved ones who remained outside the prison, are more pronounced in mothers who carry custodial sentences. These mothers suffer a pain in the separation of children. Often they are the sole supporters of their

children, the main source of financial and emotional support. As when a man enters prison, his wife or concubine, or continue to assume their responsibilities for raising children.

The reverse is not true. Often, women who do not have to return permanently in danger of losing custody of children. For all those incarcerated mothers, separation from children is the greatest punishment that causes despair, feelings of guilt and anxiety about the welfare of children.

The effect is felt not only on the incarceration of women prisoners, but also on their children. Research has shown that they have a greater tendency to face many problems which generally relate to parental absence, or low self-esteem and poor relationships with peers. In addition, these children struggle with feelings of anxiety, shame, sadness, isolation or guilt.

One can easily see that during the execution of punishment, the woman held emotions, focus on issues related to her children. Whether in the wild was a good or less good mother, now realized that the only emotional investment that can be done in these circumstances, is on leave children outside in the different situations. Felt responsibility towards the fate of children is directly proportional to their age, many of the causes of disciplinary violations are caused by lack of information or finding some bad news about their children.

It seems that in many cases, the woman as a wife betrayed, deprived of the professional assessment as a result of the offense penalized for social morality, his mother found the attribute needed for rehabilitation support in her own eyes. More over, whether conceptual or feels instinctively realized the quality of parent is one who can not take in any situation, and raises serious prisoners in this respect.

It is worth noting that when maternal feelings are genuine, the woman held the possibility of moral recovery is taking shape with more hope of a positive completion. It depends very much on how to maintain and support, instead of ownership, the development of this sentiment, are absolutely necessary, some educational programs in this respect.

Also, a very important role in the moral reconstruction and rehabilitation of women prisoners they have personality counseling, psychological therapy and the relationship is created between teacher, psychologist respectively, who are responsible for guiding and supporting a prisoner, and this, who needs help. Between psychology and women should be held to develop a relationship nondirective, open, honest, offering the possibility of developing a sense of confidence and a willingness to change. The two people to communicate and learn together to discover the sources humanization, integrity and individual autonomy.

The purpose of psychotherapy is to restore and maintain mental and moral health of women-owned, the environment adaptive skills development life prison reassure the confidence in yourself and that rehabilitation is possible and that relationships with loved ones can be restored and kept out prison.

2.1. Adapting to life in prison environment and ways of relating to prisoners

Coming in prison troubles already strained balance human personality contact with judicial authorities during the criminal trial, marking its existence in terms of living space, personal time and the suspension of future social behavior by developing a sense of abandonment and isolation and mental social. Thus, deprivation of freedom for the convicted raise problems adapting to the new framework of rules and values of life issues but also further development of his personality.

"Social norms contain rules applicable to individuals, describing and detailing the ways in which embodied the values must be legitimate and acceptable behaviors in society. "The rules

eliminate the conflicts in the common human groups may have "binding" (legal rule) or "moral restraint" (moral norm).

In prison, social norms and values have certain specific elements, determined by the characteristics of the prison lifestyle. Thus "the dignity, health, employment, equality, human rights, protection, love, etc.. are assessed in terms of prisoner status and ranked according to the pressure of needs unmet in the prison environment."

The prison does both organizational rules, relating to the functioning of institutions and mechanisms for enforcement, and relational and actionable rules, which relate in ways considered effective relationships between prisoners, the detainees - a group of prisoners, but inmates - staff prison.

Upon entry into prison, women prisoners will be felt in a greater or lesser extent, depending on the age, its psychological structure, degree of social maturity and level of culture, the effects of deprivation of liberty and will respond in a specifically to this new situation. So the information relating to a prisoner are provided by its conduct in prison at the time of submission, as determined by the norms and values which it will be appreciated that according to the circumstances in which they are.

Along with the official rules, which refers to rights and obligations of prisoners, there are informal rules established in the interests of prisoners with long sentences or repeaters to which we must adapt to the inmates so that they learn the system of norms and values to be to feel protected and secure.

In terms of internalization of these norms and values, revealed that detainees to be adapted to the new statute and rules and values that they consider appropriate situation in prison. Also joining them is the role of defense mechanism of the prisoners, to help them to exculpate, not to have remorse. Inmates with low education, the bewildered, with a weak personality structures, and those psychological reversal in the first period of detention, are more responsive, more quickly assimilating this system of informal norms and values. Inmate behavior is influenced both by the length of the sentence, which is the main factor of stress and psychosocial factors, manifesting the so-called "crisis of detention." As mentioned earlier, the impact of imprisonment on women is felt dramatically by limiting the area of organizational life and movement, the "restriction of personal relationships, lack of information and strict authoritarian regime, closed environment and monotonous activities. All these features are perceived by prison environment held as an infringement of its integrity as a human being.

The event most frequently seen in prisoners is anxiety-tears, screams, threats of suicide, self harm behaviors, the contradiction in the rules of internal order of the prison. Sometimes, desperate events start after a few days or just about crying, which I can not explain, while somatic states may appear different: poor, have insomnia, are disoriented in time. Deposit shock is felt by women in prison held directly proportional to the emotional disturbances that come in this environment. The most important issue is determined to avoid such events in the transformation of character attitudes. It is necessary to know the reasons which led to such a psychological imbalance, staff members with the task of convincing held that every problem can be remedied.

Another category of deposit held in prison show a total disregard and indifference, as a result of the realization that the solution chosen was totally wrong condemned, and those for which he risked his freedom does not show consideration, but one or even neglects a leave.

Jealousy as a desperate fight for the defense of affection, is often encountered among the prisoners. After a period of "affectively begging, you can install a cold and hardships of family

separation. Sometimes, in this uninterested, can hide dangerous intentions, used to hide under the guise impassibility, trying to win the goodwill of staff, simulating other diseases or held close to their own interests subjugated.

With all of these behavioral reactions, each inmate is a specific human universe, full of contradictions, frustrations and failures. It comes in prison following a flagrant antisocial behavior, the commission of crimes, sometimes very serious, are poorly suited, refracting or unable to integrate social norms of the prison.

To understand the psyche of a prisoner is very important to study effects of physical isolation, psychological and social characteristic of liberty.

Research has shown that in conditions of detention, a series of phenomena occurs, such as territoriality and extreme aggression in marriage, which are exacerbated in this environment. Adapting each held in the prison environment is an issue of the uniqueness convict determinate. In general, after a prolonged stay in prison, inmates understand the rules of that environment, recognize the centers of power in this world, I find the most appropriate ways to relate to colleagues and other staff.

Over time, the detainees are "spiritualize", gaining a broad vision of their own life and the relativity of the human condition.

2.2. Integration in the group owned and networking between them

On arrival in prison, psychological trauma is the first step to determine the convicted person to join the informal group of prisoners, to develop desirable behaviors in this group and to submit unconditionally to the group leader.

Phenomenon occurs as captivity, prisoners social culture, a process by which it reaches to adopt and share their views on persons convicted of the prison world and society in general.

Initially adopted a hostile attitude towards inmates by prison staff, to the "outside world" and develop loyalty to other owned, supporting each other when needed. Adopt such rules of imprisonment are generating the need for "belonging to the group. "Captivity phenomenon is the result of social pressure exerted by the group is informal and held acounter-force education, educational effort to specialized treatment from prison staff.

In prison it creates a special type of interpersonal relations, containing a unique dynamic and ways of structuring and expression, determined by two fundamental factors:

- particularly within the prison as an institution, rules of internal order, types of activities;
- distinguished from prison detainees who have mental and moral particularities generally unfavorable to the establishment of psychosocial relationships.

To survive the dark environment, the inmates are integrated into a particular group, trying to interact, to reveal his feelings, to exchange information, ideas, to show their disagreement with certain procedures, to the conflict. Over time, the inmates begin to have different roles in groups, to participate in problem solving and decision making, eventually becoming members of that group.

In this framework can not talk about balance, or morality, normality, because the atmosphere of understanding is, in fact, a succession of fragile moments and the normality and morality are mainly subordinated interests and biological materials. Personal relationships are based on the likes and dislikes, personal necessity subordinate satisfaction. The structure of statuses and roles is very important for the functionality owned group - many have held a weak ego, a bad self-image, need increased dependence, blurred and dark picture of the future.

To exercise its function well, the leader needs certain essential qualities: it must be a civilized person, with a vocabulary adequate to above average intelligence group to command respect, be a good knowledge of human character, to assist prisoners who need and respect the existing rules. The leader shows such as "a production of the group, " a person who allows the group time to develop their dominant need or needs. There are no natural leaders. There are only individuals who know how to capture the group's needs and to present themselves as those best able to solve them.

The psycho-social perspective, the population held in a penal institution, is a human group with defining characteristics. We can thus say that individuals do not lead the group, but group leads individuals to behave in the group, totally different than individual manifests.

The structure of the group held power represents an important problem for the administration of places of detention.

Communication is the lever by which the individual is humane and develop their personality in relationships. Lack of communication can lead to the isolation of prisoners, disabled social interaction and community reintegration. The information is circulated interpersonal communication, emotional behavior, needs, aspirations, for drivers in action, it triggers or fade resistance activities manifesting efforts.

All human behavior takes place in a social field in which a person proposing a new people and knowledge becomes an interlocutor and partner interaction. It creates such a psychological circle in which all sensible people involved change their attitude, behavior and mood became group mentality.

2.3. Ways of relating to prisoners by prison staff

Prison environment result from prisoners exceptional events with a high degree of frustration and depression. Support to be granted in those moments is very important so, approval, acceptance, encouragement, smile or tone are important prerequisites to creating a harmonious relationship based on trust between detainees and staff. Prisoner shall be oriented to analyze their own work and behavior, which have caused her to arrive at the prison.

Prisoners must be confident that they will be treated fairly and humanism by staff, is also protected from attacks and intimidation of other inmates. In case of disturbance or threat of prison policy, that staff be able to intervene to restore it. Personnel must have a high qualification and training, should be addressing the prisoners, their needs for proper functioning of the prison security and safety.

Interested staff is to encourage better communication and understanding between steady-state owned because silence means inmates and staff. If prison conditions fail to provide satisfactory comfort, where inmates are not properly appreciate the work of staff to provide them under the law which affect the relations between prisoners and staff, often leading to tensions and conflicts.

Also, to prevent and remove that category held aggressive, manipulative, or conceal the true feelings under the mask of indifference, it is necessary to take into account the concordance between words and deeds, to know and appreciate the detainees, but not as apparent as actions and their behavior. That requires constant surveillance in case they should be combined with carrying out their daily activities in which they are assigned to tasks controlled, lower or higher.

There are occasions when staff members encounter resistance to engaging in inmates due to a fatalistic attitude, expressed regularly or occasionally, by giving to "exist". These are cases that departed of effort to change something in their behavior, making them unreceptive to positive

influences. In this situation, work with the inmates must focus on the destruction of this "sense." Learned to swear and offend her around, held it will be very surprised to observe that he speaks beautiful, civilized and that is treated with confidence. Convinced that it is not able to do something good, it extaziated he can carry out various tasks which were entrusted. Empowering detainees by every act committed, will lead to encourage detainees to impose their will in accomplishing the tasks performed, breaking bad habits reactions. Positively oriented, the prisoner may act as a stimulating factor for change in lifestyle and behavior, the model of others, or other staff members held. Rehabilitation of prisoners' labor efficiency depends largely on the type of means that are used, the ability to select and apply them in each case, the ones that prove most suitable. All this requires special skills of prison staff for a better knowledge of each inmate.

Through communication and interpersonal relationships made strictly regular formal, informal relationships develop and prison staff, based on affinity, common interest and sympathy. These types of informal relations should not be neglected, for a better communication and understanding between staff members contribute fundamentally to the functioning of the prison system.

In daily professional activities, prison staff fail to know each other under the influence of mutual appreciation, externalized or intuited, the team is formed inside a network of interpersonal relationships based on attraction, rejection or indifference. Particularly stressful work supervisory staff is manifested by a continuous contact with inmates and their activities.

2.4. Principles of rehabilitation of inmates in prison

Current realities of society at the beginning of the millennium has led researchers and experts in the field, to focus attention on sentenced to prison in general and in particular due to increasing their international and failure of governments to deliver the reforms and changes in management women owned. U.S. research prison population demographics were analyzed, concluding that women are prison population segment that has the fastest growing. They attributed this increase rapidly increased use of imprisonment as punishment for crimes related to particular drugs.

In recent years we tried to find adequate solutions to the problems of women prisoners, emphasizing rehabilitation, with significant impact in reducing recidivism. Studies have shown that rehabilitation and treatment needs of important groups of prisoners are neglected, especially those of women.

To determine how treatment and rehabilitation for women-owned, it is necessary to identify and assess their needs, both criminality and non criminogene. This identification must be made both in the population and the individual prisoner.

Carlene Pat argued that "a coherent and effective policy for women within the criminal justice and penal system will be developed only when it is accepted that the offenses committed by women are committed in circumstances other than those committed by men, violating the law by women is, overall, qualitatively different from men and that in response to violations of law must be gender specific. "Therefore, it recognizes the need for a needs-based management and rehabilitation of a system specifically for women-owned.

In recent years, is internationally noted an increase in interest in education in prison, because prison was only one school for a long time "by recycling and processing of crime" and less a place where convicted criminals are able to learn and to prepare for true social integration within normal parameters. Yet society as a whole is co-participants to achieve this process of change, so these tests

do not give the expected results, although in recent years have produced a series of positive things about preparing prisoners for reintegration into society.

For that purpose to be achieved, education in prison - considered the most important task of resocialization, so should not only have academic education, but must be conceived as social education. Therefore, training programs are developed to help you decide the detainees prior lifestyle changes and adaptation to current life.

Yet, some participate in educational programs held non educational reasons to leave the cell to meet with friends or even to avoid work.

Also, prison work is closely related to preparing prisoners for life in the communitarian. Work is an essential element in the Company all institutional, as an indispensable tool for carrying out the functions of punishment.

Often, inmates are socially inadequate and are not useful for regular work, so it is important that the detainees to perform work habit and appreciate the quality of work, the rewards that come in the form of wages and strengthening their self-esteem and status.

The effects work for women are held is substantial preserve physical and mental shape, it encourages the struggle of life, raises awareness and of the value power is a means of discipline , accustomed to a rational use of time, order, punctuality, reliability , diligence, boredom and provide a profit to improve its existence.

We conclude that inmates rehabilitation is a complex and difficult process and this process is closely linked to the principle of individualization of administrative punishment. Being the active side of the prison system, the system being applied to their particular inmates came in anxious and undergo the rigors of space law. Thus, the prison system is a result of the shared life of inmates to prison and the center vectors of force in serving their sentences.

2.5. Prison treatment of women prisoners

Prison is meant to re-socialize and play the society those individuals who at one point broke the law. Resocialization is a way to convert back, refocusing and reshaping of the personality of the person convicted to a criminal sanction against the norms and values of society.

This can be achieved by restructuring their profound character of the detainees, the gradual disintegration of the old moral code and legal and socially acceptable substitution by one, by preventing and deterring criminal acts against the most serious, the prisoner's gradual reintegration into normal social life.

Penitentiary institution becomes a formative institution in which the emphasis is on character building and positive modeling, prison treatment is a complex of educational, psychological, sociological, productive, and occupational health of detainees held for the purpose of recovery and social reintegration .

The need for rehabilitation through an appropriate treatment is in the interest of the Company in general and prisoners in particular. There is often a tendency to confuse the prison term treatment with the prison system, using the wrong term prison treatment, except for medical or psychiatric care.

Therefore, the Council of Europe has set the period of treatment should be interest in a broad sense, including all measures necessary to maintain or regain physical or mental health of detainees in the same measure with the full range of activities that encourage and promote rehabilitation and social to offer them the opportunity to acquire competency for a normal life, socially responsible. All treatment strategies must be viewed in the context of preparing prisoners for their release.

The aim of prison treatment is well-defined set of minimum rules concerning the treatment of prisoners in art. 65 shows that: "treatment of individuals sentenced to a punishment or deprivation of liberty shall have the purpose, as long as the length of the sentence, creating in them the will and skills to enable them, to live after release respecting the law and meeting their needs. This treatment must be such as to spare them respect for themselves and develop their sense of responsibility. "

Resocialization of inmates during the execution of punishment, so treatment requires specialized institutions, from the educational, sociological, psychological, professional, religious, medical and physical, which will follow the rules change priority values, individual beliefs, and treatment in an open environment, after serving their sentences, when seeking post reinsertion of juvenile criminal, framing them in a social activity, acquiring a new status in life and reduce social stigma.

To achieve the goal of treatment in prison should be taken into account that the individualization of treatment should begin right from the jail inmate, after his first meeting with the teacher or psychologist by personalizing treatment to the characteristics of attitude and conduct of each held in conjunction with personal factors, educational and their family.

The case of psychotherapy in prison is determined by forming an accurate image of himself, the adaptation of prisoners to their own personality and its acceptance as objective reality, in order to transform her personality, learning the first signs of "correction of character" in relations of trust and reintegration reciprocity with others, establishing a positive relationship with himself and the world around us.

2.6. Self-esteem - vector of personality convict

From the psychological perspective, personality is part of being human, that meets certain notes or defining characteristics, is what is actually a person, regardless of how others perceive its qualities. Renowned personality defines the personality as G.W Allport, "dynamic organization within the individual of those psychophysical systems that determine his characteristic behavior and thought. "

After Sillamy N. (1996), personality is essentially stable element of the conduct of a person, his usual mode of being, which distinguishes it from others. Everyone is at the same time, similar to other individuals in their cultural group and different from her character's unique lived experiences, the singularity of his most original portion of his ego is the essence of his personality. "

In design Romanian psychologist P. P. Neveanu (1978), the human subject's personality is considered as a unit of bio-psycho-social functions as the bearer of epistemic, pragmatic and axiological or a micro invariants of informational and operational conduct that is consistently expressed and or features are the defining issue. "

A main problem of the human being is self-identification and self-awareness development. Developing self-awareness are highlighted during puberty and adolescence due to personality changes that can move with its structures and substructures, and when there is increased self-perception

Everyone perceives itself as a unique and distinct person in itself and for itself, but in equal measure and to others inter-human relations.

Confidence depends more on our ability to do certain things, it is not innate and not depend only on the education I received in childhood.

Choosing the theme of this paper is motivated precisely by the fact that self-esteem has a great significance on our lives in general, affect the way we live and consequently the primary direction that prison staff must act involved in rehabilitation activities and resocialization of prisoners, the study determined externally owned and personality of each sequential processing components such personalities, for the prisoner's awareness of self identity, personal values and positive goals in life post-enforceable.

Acceptance by a person's own values and capabilities is based on beliefs and assumptions about abilities, limitations, appearance, emotional resources, each place in the world, perception and sense of importance of each potential.

2.7. Components of self-esteem

Self-esteem is based on three components: self-confidence, self-concept for the love of self, in connection interdependence. A good dose of each of these three components is essential to achieve a harmonious self-esteem.

The most important element is self-love, unconditional love of our performance, it was responsible from the period of the childhood for the restore detainee resin after failures. It does not forbid distress or doubt, but desperate defending. Love itself depends largely on who owned the love he received in childhood and the "emotional food, which has been given.

Self-concept, self-established or less well founded, the strengths and weaknesses of a prisoner, is the second pillar of self esteem. Subjectivity is a phenomenon which plays an essential role. This conception itself is due to projections of the family environment and in particular the parents did it for the future held.

The third component of self-esteem, self-confidence provisions apply specifically to the prisoner. Being confident means to believe that you are able to act in a manner appropriate to important situations (Lelord, C. Andre, 1999). Contrary to self-love, and above all, self-concept, self-confidence is not difficult to identify. Confidence comes mainly transmitted by way of education or school family.

A low self-esteem is affected when factors such as: to feel important and loved, to trust in you, to feel respected and accepted, to maintain your integrity, to control conflicts, to accept responsibilities and challenges, to act independent and interdependent, a good feeling of trust, to feel connected with others, to feel competent in making decisions, to feel safe, which leads to a self-image is influenced.

Self-image develops over the life of experiences and actions that we have with others. Experiences during childhood have a vital role in developing self-image. Attitudes of parents, teachers, colleagues, brothers, friends, helps create the child's self image.

Most people's emotional problems is based on feel bad about themselves, manifested by the constant need for approval of others, to validate all actions by others. The feeling of self-worth is the central unit of our existence which relate everything. A damaged self-esteem, distort communication. People with low levels of the personality variables were not feeling too well known, rather talk about them in a neutral, uncertain, ambiguous, have an opinion about yourself that depends on the circumstances and parties. Postpone decisions, are often troubled by the possible consequences of their choices are influenced by peer groups in decision making are sometimes hesitant and conventional decision-making. Such people react emotionally to failure, they feel rejected if challenged in areas where the search is deemed competent and negative information about them.

Self-esteem is support for a full mental health and personal value is the essence of emotional and mental health, absolutely necessary to make the change of life.

Undoubtedly, personal image has a power so great that its impact is overwhelming the destiny of the human beings, it can influence both success, and failure as being responsible for emphasizing the negative aspects of everyone's life, so that the image itself can be our friend or enemy, as it feeds on past failures to undermine us now, or whether it feeds on past successes to give us the courage to step forward.

For man to be versatile and effective it must be formed as such early and helped to maintain availability that is operating at high levels.

Self-image has the capacity to project himself into the future. But many come from poor people detained who have experienced frustration, prevented their hopes bold design. The existence of a limited perspective on tomorrow, reduces confidence in themselves to very modest rates.

Thus, recovery of prisoners for a balanced life is enforceable post-totally necessary coexistence with their secret being discovered, with a healthy personal and realistic picture, in respect of their own mistakes and forgiveness. Need to practice skills to be accepted as it is and not to become what is not a condition that leads to constant tension and obtaining short-term recovery and rehabilitation outcomes.

In principle, the individual knows the trials of life itself, through its acts of conduct, personal services, its relations with others both in normal circumstances and in extreme situations. Here is an extremely important issue concerns the socialization of a prisoner, as the largest and most complex process in which individuals are not only social beings, but human as such.

Confidence in personal success, mobilization to achieve certain objectives, refeeled more or less a failure, improving performance by building on previous experiences are the attitudes strictly self-esteem. In other words, self-esteem includes a provision that prepares the individual mind to react according to expectations of success, acceptance and personal determination.

Studies on motivation specialists suggest that the human will to reach a more elevated social status or social recognition from a strong desire to to maintain a positive self image . It also demonstrated that creative people have high self-esteem, the belief that they can impose its own model, self-esteem becomes a fundamental element of creativity, the freedom of expression and effective.

3. Conclusions

Consideration of the social conditions causing crime does not preclude a deep analysis of criminal women personality, the ways in which it filters the surrounding influences and choose one direction or another action. Therefore, the interest in studying the mechanism of criminal women personality that leads to the crime, is essential knowledge and understanding of complex causal processes. Low Schooling, contempt for work, an optical negative on how to meet the needs, excessive alcohol consumption, lack of culture, "cult" use physical aggression to solve conflicts, broken families, family climate are features that conflict is in close relationship with antisocial behavior and appear frequently in those who occupy a disadvantaged position in society.

Although the prison has proved to be generally the most effective means of punishment, its strong impact dissocialized can not be hidden or ignored, and fewer positive results, particularly the

increase recidivism compels the conclusion that this means punishment, as used in the current period, show the risk of heading slowly but surely to fail.

This is substantiated by the fact that despite all the specialized interventions such as psychological, social and educational programs and supported to try potentiating multidisciplinary educational function of punishment is steadily increasing number of repeat offenders.

The acute need for public reporting of prison life to community life and open to families of prisoners. This can be achieved by humanizing the prison environment accented by instrumentation methods and techniques, and kept focused on psychiatric and psychological problems they face and by using resources and deep involvement of civil society, families and Local authorities in the rehabilitation of persons in custodial status. Likewise, the current legal framework requires improvement, acquisition and application of case law of homologous structures of EU states and, last but not least, human rights and the provisions of regulations, guidelines and conventions with specific themes, issued by the European and international structures to which Romania is party.

Resocialization of inmates can not be achieved by simply applying the penalty of imprisonment and through activities and programs of rehabilitation and resocialization, but by the application of multidisciplinary and individualized programs based on psycho-behavioral skills of inmates, followed by affective-emotional needs and not only socio-educational status of these people in deprivation of liberty.

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BRIEF ANALYSIS OF REGULATIONS REGARDING WORK BY TEMPORARY EMPLOYMENT AGENT

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Abstract

The work by temporary employment agency represent an important form of employment in most of the European Union membre states.That's why, at the level of central institutions of European Union, stated the need "to reach a fair balance between the protection of temporary workers and strengthen the positive role that temporary agency work can play on the European labor market. " Although relatively new inserted in romanian legislation, by Law 53/2003 (Labor Code), the work by temporary employment agency has been the subject of some mismatches between the intern legislation and the union law, taking into account that Romania was preparing for the integration into European Union. The work by temporary employment agency is defined by the present Labor Code as the work provided by a temporary employee in favour of a user, of temporary employment agent's disposal. The present regulation isn't entirely in accordance with the dispositions of European Parliament and Council Directive 2008/104/CE. Therefore, for being in accordance with the regulations of union law, the New Labor Code will bring a series of important changes regarding this particular form of professional activity.

Keywords*: temporary employee, labor, employment agency, union law, Labor Code*

Introduction

The labor market plays an important role for the national economy. Flexibilization and adaptation of labor relations to the socio-economic realities was one of the priorities of the Romanian legislator in the matter of labor law .

By this study, we brought into attention a specific forme of professional activity held under an individual employment contract on a definit term, work by temporary employement agency.This institution of labour law was relatively late regulated for the first time in Romanian legislation by Law nr.53/2003 (Labor Code), although the work by temporary employement agency is an important form of labor employment at European level.

Since work by temporary employment agency plays an important role in the European labor market, the European Parliament and the Council, taking into account the proposal of the Commission, adopted a Directive to regulate the most important aspects of this institution.

Currently, the Romanian legislator amends the regulations from Labor Code concerning work by temporary employment agency, following the recommendations contained in the Directive 2008/104/CE.

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Based on current regulations, we tried to highlight differences between them and the European Directive rules, but also whether future regulations contained in the bill of Law for modifying and supplementing Labour Code respect the European Union recommendations.

Specialized literature gives a rich documentation material in the targeted matter, making also reference to European regulations.But, because of the recent appearance and also of the long debates on the amending rules of Labor Code, we consider that this study brings an element of novelty by analysing them in comparation with the current regulations and with the European Directive regulations.

1. The content of the paper

A part of the individual labor contract on a definite term, first related in Romanian legislation through Law no.53/2003 (The Labor Code), is the written work contract over the period of a mission, between a temporary employee and a temporary employment agent (a company).

Article 87 of Law 53/2003 shows that temporary work constitutes a specific form of professional activity, being performed by a temporary employee in favor of a user on the basis of the disposition given by a temporary employment agent to the employer of the temporary employee. Thus, in this specific form of labor are involved three parts: the employer (the temporary employment agent), its employee (temporary employee) and the user (the one who benefits from the work performed by the temporary employee).

The Bill of Law for modifying and supplementing Law 53/2003 changes the definition given to this form of work, showing that work through a temporary employment agent is the work of a temporary employee who has closed a temporary contract with a temporary employment agent and is brought at the disposal of the User in order to work temporarily under the supervision and direction of the latter[1].

In the content of Art.87 are defined by one at the time the notions of temporary employee, temporary employment agent and user. Concerning all these notions it can be noticed that the definitions given by the regulations of the Labor Code are different from the notions provided by the regulations of the European Directive 2008/104/CE.

Thus, paragraph 2 of Art.87 of the Labor Code uses the term “temporary employee”, while the European standard uses the term “temporary worker”.

There are differences between the two categories of terms since the notion of worker is wider than that of employee, including not only those who sign contracts to work, but also those in labor relations, that have a different source than such a contract. Indeed, the Luxembourg Justice Court stated that the notion of worker must be interpreted under Community Law in a broad way[2].

Also, paragraph 2 of Art.3 of the Directive shows that the directive does not affect the national legislation as regards to the definitions of remuneration, employment contract, labor relations or worker.

Analyzing the bill of modifying and supplementing Law 53/2003, it can be noticed that the legislator once again didn't use the notion given by the European Directive, but kept the notion “temporary employee”, showing that he is “the person who signed a temporary work contract with a

[1] Art.43 from the Law Project to modify and suplement Law 53/2003

[2] Alexandru Țiclea (coordinator) – The Labor Code – commented and annoted with legislation, doctrine and jurisprudence, edition II, revized and lenghtened, Vol.I (Bucharest; Pub.Juridic Universe, 2010), 476.

temporary work agent, in order to be at the disposal of a User to work temporarily under the supervision and direction of the latter[3].

In this new regulation is made clear that the temporary employee closes a work contract with the temporary work agent. From this regulation it is clear that between the two a work contract is made, showing that the employee is "hired" to the temporary work agent. In the definitions given by the Project to labor through the temporary work agent and also through the temporary employee it is stated that the User is the one who supervises and directs the activity of the temporary employee. The current legislation does not clearly specify this.

It is noticed that the purpose of providing a temporary employee is not expressly stated in paragraph 2 of Art.87 modified by the Project, the current regulation showing that the provision is made over the time needed to achieve certain precise tasks and with a temporary aspect. Perhaps, the Project's developers wanted no repetition in this respect, the purpose being stated by Art.88 of the Labor Code.

Also, the definition in question given by the Project is much clearer than the current one; the legislator leaving no place for interpretation regarding the contractual report between the employee and the temporary work agent and as regards to the supervision and management of employee's activities. However, the notion of temporary employee is not in compliance with the regulations of the European Directive.

According to Art.87, paragraph 3 of the current Labor Code, the temporary work agent is a company authorized by the Ministry of Labor, Family and Social Protection, which is established, operational and authorized under the conditions set by Government Decision no.938/2004. The analysis of this provisions shows that the temporary work agent is a legal person. European regulation from Art.3, paragraph 1, letter b, shows that the temporary work agent can be any physical or juridical person.

Although the European Directive includes the concept of temporary work agent to both individuals and legal persons (all legal persons not only companies), the Project to modify and supplement the Labor Code does not take into account this recommendation and further defines the temporary work agent as a company, and as such, as a legal person.

Also, European norms show that the temporary work agent closes labor contracts or work relations with temporary workers, the Project retaining only the closure of labor contracts, not accepting other work relations.

Article 87, paragraph 4 of the Labor Code regulates the notion of user as the employer whom the temporary work agent offers a temporary employee to carry out specific and temporary tasks. But, the European Directive uses the term "enterprise user" defining it as "any individual or legal person for whom and under the supervision and direction which it works as a temporary employee".

The Project to modify the Labor Code keeps the term "user" and defines it as being the employer, but takes the rest of the definition from the European standards. The current legislation as well as the Project to modify and supplement the Labor Code doesn't make distinctions in terms of user, resulting that this can be either an individual or a legal person.

In the case of Art.88 of the Labor Code there are differences between national rules and regulations of the European Directive 2008/104/CE. The recalled article defines the mission of temporary work as a specific and temporary task. The directive does not restrict the meaning of

[3] Art. 43 from the Bill for the amendment of Law 53/2003

temporary mission, but defines it as the period in which the temporary worker is made available to the company.

From the analysis of the dispositions of Art.43 of the Project to modify and supplement the Labor Code, it can be noticed that Art.87 of the Labor Code will have another paragraph, in which it is defined the mission of temporary work. The definition given by this new paragraph is taken from the European rules, however, is completed with the phrase "to perform a specific, temporary task". So, the legislator wants to keep the restriction of the meaning of temporary mission to enforce a temporary single specific task, although originally the term "period" is used in order to define that notion.

Also, it is considered that limiting the use of temporary work only in those three cases shown in Art.88, contravenes the dispositions of Art.4 paragraph 1 of the Directive which state that "the prohibitions and restrictions regarding the use of temporary work are justified only on grounds of general interest regarding, in particular, the protection of temporary workers, the requirements on safety and health at work or the need to ensure proper functioning of the labor market and to prevent abuses."[4]

In this respect, the Project modifies Art.88 showing that a user can resort to the temporary work agents in order to execute a temporary, precise task, excepting the case from Art.92. This last article is not subject to modification and shows that a user can not benefit from the services of the temporary employee if it seeks to replace one of his employees whose work contract is suspended as a consequence to the strike participation.

As regards to the dead line of the mission of the temporary work, the actual regulation shows in Art.89 that it is of 12 months, with the option of being prolonged only once, under the conditions foreseen by the temporary work contract or by the additional act, over a period which cannot be longer than 18 months.

Through the emergency ordinance of the Government no.65/2005 approved through Law no.371/2005, Art.82 of the Labor Code was modified, in the sense that the term over which an individual work contract with a definite period can be made is of maximally 24 months.

This alteration should also bring to the modification of Art.89 of the Labor Code, an article which remained active and without alterations to the present.

After approximately 6 years, the Project to modify and supplement the Labor Code, provides the modification of Art.89 in the sense that the present maximum period is of 24 months, with the possibility of being prolonged over successive periods, without passing the total period of 36 months. This 36 months term appears as a following to the modification of the same normative act and of Art.81, paragraph1.

Although the project modifies Art.89, it does not come in conformance with the regulations of the European Directive in matter.

The European regulation does not limit the period of the mission, respectively of the individual work contract. On the contrary, it is mentioned the undetermined period of this contract made with the temporary work agent (pct.15 of the Preamble and Art.5 paragraph 2).[5]

[4] Alexandru Ţiclea (coordinator) – The Labor Code – commented and annoted with legislation, doctrine and jurisprudence, edition II, revized and lenghtened, Vol.I (Bucharest; Pub.Juridic Universe, 2010), 477.

[5] Alexandru Ţiclea (coordonator) – The Labor Code – commented and annoted with legislation, doctrine and jurisprudence, edition II, revized and lenghtened, Vol.I (Bucharest; Pub.Juridic Universe, 2010), 479.

Article 90 of the Labor Code regulates the contract of provision closed between the temporary work agent and the user. Paragraph 1 of this article states that this contract is closed in written form.

As such it is considered that the contract of provision has no *ad probationem* and *ad validitatem* value. Also, Art.90 of the Labor Code does not give any sanctions if the written form of the provision contract is not respected.[6]

Paragraph 2 of the same article regulates the content of the provision contract. So, the first element which this contract must contain is the reason for which the use of a temporary employee is necessary. This actual regulation issues from the dispositions of Art.88 of the Labor Code, where the strict cases in which a temporary employee is used are stated.

Due to the modifications brought to Art.88 by the Project to modify and supplement the Labor Code also Art.90 has suffered modifications, as such disappearing from the provision contract the reason for which it is necessary the use of a temporary employee.

A second element refers to the term of the mission and, if it is the case, the possibility to modify the term of the mission. The term of the mission refers to the period over which the temporary employee is needed. That is why, the Project to modify and supplement the Labor Code has as first element of the provision contract the "period of the mission".

Other elements of the contract in question are: the specific job characteristics, especially the necessary qualifications, the mission location and work schedule, the concrete work conditions, individual protection and work equipments which the temporary employee must use, and any other services and facilities in favor of the temporary employee. These elements are maintained in the regulations of the Project to modify and supplement the Labor Code.

As regards to the elements concerning the "value of the contract which the temporary work agent benefits from, as well as the pay to which the employee is entitled"[7], it can be noticed that the developers of the Project to modify and supplement the Labor Code preferred to use the phrase "commission value" for the temporary work agent's payment. Stating the pay in the contract has the role of protecting the temporary employee, his income being guaranteed by both parties of the provision contract.

Through the Project to modify and supplement the Labor Code it is added a new letter to paragraph 2 of Art.90. So, an important element which the provision contract should contain refers to the conditions in which the user can refuse a temporary employee referred by a temporary work agent. As such the employee and the temporary work agent are protected by eventual unjustified refusals from the user.

The condition regarding the voidness of any clause through which it is forbidden the employment of the user of the temporary employee after completing the mission is held by the Project to modify and supplement the Labor Code. So, it is allowed for the user to employ the temporary employee after the completion of the term.

According to the dispositions of the European Directive provided in Art.5 paragraph1, regarding the equality in treatment, the regulations of Art.91 of the Labor Code state that temporary employees have access to all services and facilities given by the user, under the same conditions as any of its employees. Also, it is stated in Art.91, paragraph 2 of the Labor Code the obligation of the user to ensure the temporary employee with individual protection and work equipments.

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[6] Ion Traian Ştefănescu, Treaty on the Law of Labor, (Bucharest ;Pub. Wolters Kluwer, 2007), 416-417

[7] Art. 90 paragraph 2 letter G, of the Labor Code

Regarding these equipments the rule is that they are made available by the user, which is natural as long as the work is done by the employee at the headquarters or work stations of the user and in its use.[8] The same regulations also states the exception to the rule, meaning that through the provision contract the temporary work agent has to acquire for himself these equipments.

Article 92 of the present Labor Code provides a guarantee to the fundamental right to strike of the user's employees. So, the user cannot benefit from the services of the temporary employee if it seeks to replace in such a manner one of his employees whose work contract is suspended as a consequence to participating in a strike.

The solution provided by the law is fully explicable, because, if the replacement were admitted, practically, the effects sought by the strike as a form of protest of final rank in the case of a conflict of interests would be lost, by striking the employees seeking to force the owner to resolve their claims. As a consequence, the strike would reach this purpose only in the case in which the owner would see himself in the situation of remaining without his workers whom he so requires. If he were able to replace them with a temporary employee, he would never be interested in a real negotiation with the strikers concerning the ending of the conflict.[9]

The conditions of the temporary work contract are provided by Art.3 of the Labor Code, paragraph 1, and showing that it is closed in written form, normally over the duration of a mission. From the legal dispositions it is understood that this contract closed between the temporary work agent and the temporary employee can be closed over a much longer period than the duration of a single mission.

As shown by the dispositions of pct.15 of the Preamble and of Art.2, paragraph 2 of the Directive, the European legislator considers that the general form of the work relation is the individual work contract over an undetermined period. Not taking into account these European regulations, the Project modifies Art.93 paragraph 1 of the Labor Code, eliminating the phrase "as a rule". As such, the legislator limits the closing of temporary work contracts only for the duration of one mission. Also, the Project modifies paragraph 2 of the same article, in the sense that in the temporary work contract should also be stated the pay of the temporary employee.

As regards to closing the work contract for more missions, de dispositions of Art.94, paragraph 1are kept also in the Project, but, we consider them to be contrary to the modified Art.93, paragraph 1, where it is strictly stated that these type of contracts are closed over the period of one mission, renouncing the possibility left by the actual regulation.

Paragraph 2 of Art.94 shows that between the two missions the temporary employee is at the disposal of the temporary work agent and benefits of a wage paid by the agent, which cannot be lower than the minimum gross salary. This paragraph is altered through the project to modify and supplement the Labor Code, in the sense that the temporary employee no longer benefits from a paid wage by the agent between two missions.

Also, in the Project it is provided that for any new mission a temporary work contract is closed, as regards to the present regulation where it is stated that for a new mission an additional act to the temporary work contract is closed. And in this case we consider that the alterations brought to the Labor Code are ambiguous, because by keeping the disposition of paragraph 1 regarding the closing of a temporary work contract for more missions, it can no longer be regulated that for each mission a new temporary work contract is closed.

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[8] Alexandru Ţiclea (coordonator) – The Labor Code – commented and annoted with legislation, doctrine and jurisprudence, edition II, revized and lenghtened, Vol.I (Bucharest; Pub.Juridic Universe, 2010), 482.

[9] Magda Volonciu, în Alexandru Athanasiu, Magda Volonciu, Luminiţa Dima, Oana Cazan, The Labor Code. Commentary on articles, Von.I, Art.1-107, (Bucharest; Pub. C.H.Beck, 2007) 492.

The last paragraph of Art.94 is also altered through the Project to modify and supplement the Labor Code, showing that this type of contract ceases at the completion of the mission for which it was closed and not at the ending of the last mission for which it was closed, as in the actual regulation. Also, this paragraph provides a new situation to close the temporary work contract, respectively if the user renounces the services of the employee before the ending of the mission, under the conditions of the provision contract.

As regards to the wage the temporary employee receives, it is provided in Art.95 of the Labor Code, that he is paid by the temporary work agent, without being lower than the salary of the user's employee who has the same or a similar job. The same article states the fact that the temporary work agent retains and transfers all the contributions and taxes owed by the temporary employee to the state budget and those owed under the law.

As a safety measure for the employee, the current regulations state that if in 15 days from the date in which the previously shown obligations have become due and payable, and the temporary work agent does not execute them, the temporary employee can ask them from the user. The latter is obliged to take the place of the temporary work agent as regards to the rights of the temporary employee.

Significant changes are brought to Art.96 of the Labor Code. As such, the limits of the trial period depending on the temporary work contract are shown.

Three terms are stated in the actual regulation, while in the Project only five are stated. So, in order for the temporary work contract to be closed for a period smaller or equal to a month, the trial period is of 2 working days (held disposition); for the closure of the temporary work contract over a period between one and three months the trial period is of 5 working days; for the closure of a temporary work contract over a period between 3 and 6 months the trial period is of 15 working days; for the closure of a temporary work contract over a period over 6 months the trial period is of 20 days; for the closure of a temporary work contract over a period of over 6 months, in the case of employees in management positions, the trial period is of 30 working days.

In order to protect the temporary employee, Art.97 of the Labor Code states that it is the user's obligation to assure all conditions regarding the prevention of work related accidents or professional illness. The obligation provided by Art.26 from Law no.319/2006 is also used by paragraph 2 of the article in question, so the user has to inform the temporary work agent if such an event should occur, the latter being in the position of employer.

The text of Art.98, paragraph 1 of the Labor Code allows for the cease of the mission, as the temporary employee to end with the user an individual work contract, meaning that he becomes his employer. Of course, the ending of the mission also means the ending of the contract with the temporary work agent, the one in cause loosing the position of temporary employee; as a consequence he becomes free to engage in a new work relation; this can be stated over a determined or undetermined period, as is the case, through enforcing the general rules. [10]

It is to be noticed that the Project of modifying and supplementing the Labor Code, paragraph 3 of Art.98 is abolished. So, there is no longer the presumption that if the user continues to benefit from the temporary work of the employee without closing with him an individual work contract or without prolonging the provision contract, an individual work contract over an undetermined period intervened. We consider that by abolishing this paragraph, the employee is no longer protected in such a situation.

[10] Alexandru Țiclea (coordonator) – The Labor Code – commented and annoted with legislation, doctrine and jurisprudence, edition II, revized and lenghtened, Vol.I (Bucharest; Pub.Juridic Universe, 2010), 491.

Article 99 of the Labor Code protects the temporary employee and uses the principle of non-discrimination, in the situation in which the temporary work agent fires the temporary employee before the term stated in the temporary work contract, for other reasons than disciplinary. So, the temporary work agent has to keep in mind the legal regulations regarding the cease of the individual work contract for reasons not regarding the employee.

A consequence of the non-discrimination principle in regards to work is represented in Art.100 of the Labor Code. As such, the temporary employees are subject to the same legal and contract provisions as the employees of the user registered with an individual work contract over an undetermined period. In the new regulation it is introduced alongside the collective work contracts also the provisions of internal regulations, as dispositions applicable to temporary employees.

The Bill of Law for modifying and supplementing the Labor Code introduces a new article, Art.100 prime, which provides a measure of financial protection to the temporary employees, showing that the temporary work agents do not perceive a tax from the temporary employees in exchange for steps regarding their recruitment by the user or the closing of a temporary work contract.

Conclusions

A study made by European Foundation for Improvement of Living and Working Conditions shows that temporary agency work is a significant form of employment in most Member States of European Union and employs large numbers of workers, especially in Belgium, France, Germany, Italy, the Netherlands, Spain, and the UK. It is also an area experiencing rapid, and in some cases substantial, levels of growth, both in terms of number of employees and sector revenues.

On the supply side, factors helping to drive the growth in temporary agency work include its active use to facilitate the reengagement of long-term unemployed into work, and a growth in the labor force participation of people that need or prefer temporary work. On the demand side, temporary agency work enables user firms to make relatively easy labor adjustments and cost savings by outsourcing some responsibility for recruitment and administration. Agency work is also widely used in sectors affected by seasonal patterns of demand and to cover staff absences[11].

The results of this study once again highlights that temporary agency work is an important form of labor employment and as such should be properly regulated also by the Romanian legislation.

Although the European Directive 2008/104/CE provides some recommendations for Member States, the Romanian legislation on temporary agency work is not totally consistent with these recommendations. Thus, the changes proposed in the Bill of Law for modifying and supplementing the Labor Code are in many respects inconsistent with European standards.

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[11] www.eurofound.europa.eu

HUMANITARIAN CRISES AND THE USE OF FORCE

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Abstract

The use of force by states is controlled by both customary international law and by treaty law. Although some commentators interpret Article 2(4) of the UN Charter as banning only the use of force directed at the territorial integrity or political independence of a state, the more widely held opinion is that these are merely intensifiers, and that the article constitutes a general prohibition, subject only to the exceptions stated in the Charter. This principle is now considered to be a part of customary international law, and has the effect of banning the use of armed force except for two situations authorized by the UN Charter. Firstly, the Security Council may authorize collective action to maintain or enforce international peace and security. Secondly, Article 51 also states that: "Nothing in the present Charter shall impair the inherent right to individual or collective self-defense if an armed attack occurs against a state." There are also more controversial claims by some states of a right of humanitarian intervention, reprisals and the protection of nationals abroad. In recent years several countries have begun to argue for the existence of a right of humanitarian intervention without Security Council authorization. Many countries oppose such unauthorized humanitarian interventions on the formal ground that they are simply illegal, or on the practical ground that such a right would only be ever used against weaker states by stronger states. The main objective o f this study is to determine to what extent the international community of states agrees upon the existence of such a right to intervene with military force in order to protect the victims of human rights abuses, without a prior Security Council authorization.

Keywords: *force, intervention, authorization, victims, sovereignty*

Introduction

The present paper is meant to cover the sensitive domain of the use of force in international relations, especially those situations when the recurrence to military force cannot be legitimated by a resolution of the United Nations Security Council, organ which has the primary responsibility for maintenance of peace and international security, but merely by considerations of moral duty and humanity. The practical significance of the study consists in trying to find answers to the question whether we can envisage the existence or, at least, the emergence of a new exception to the general prohibition of the use of force or the threat of use of force in inter- state relations in cases of severe humanitarian crises. The reality is that in practice States have used military force without the assent of the United Nations Security Council, the problem of reconciliation between their conduct and the UN Charter remaining in the charge of the doctrine. The answer to this question has to be looked up in different approaches to this problem, approaches that lead to various ways to give legitimacy to unilateral use of force by States. Whether the legitimacy stands in the ex post facto or implicit

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authorization given by the Security Council, in customary law or in matters of human rights respect and prevention or termination of severe violations of these rights, what is undoubtful is that the unilateral use of force is a controversial matter. We try to discover if there is an evolution in the international rules governing the use of force so that they could allow a prompt reaction of States in humanitarian crises, especially at times when, due to specific interests of permanent Member States of the Security Council, this organ`s action is blocked. This paper is based on the international literature that deals with this subject as well as on factual cases when States have used military force prior to a Security Council authorization, trying to identify solutions or new ways of interpretation of the existing norms ruling the use of force in order to accommodate what is legal and legitimate with what sometimes appears as necessary in exceptional situations.

1. Use of force by States

The use of force by States is controlled by both customary international law and by treaty law. The UN Charter reads in article 2(4): "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." The value of this rule is that of a norm opposable *erga omnes;* it constitutes one of the fundamental rules of international law.

The final part of article 2 (4) has been interpreted by a part of the international law doctrine as containing an exception to the prohibition of the threat or use of military force as the force used with other finality than to occupy another State`s territory or aimed against the political independence of another State, or in any other manner inconsistent with the purposes of the UN does not constitute a violation of this principle. The result would be that article 2 (4) does not contain an absolute prohibition (apart from self-defence and Security Council authorizations), but only a limited one, the compatibility of this finality with the purposes of the UN Charter being incumbent to the State using force. The majority of authors and States reject however this interpretation, based firstly on the traveaux préparatoires which show, in their opinion, that this formula was inserted to strengthen the prohibition by giving examples of what an eventual violation would give raise to. A second argument comes from a practical point of view, that is if this permission were retained, it would reduce dramatically the prohibition of article 2 (4), each State being allowed to claim, based on a subjective interpretation, that the purposes stated in this rule were not achieved, thus their acts were not unlawful[1].

Although it is true that the main purpose of the United Nations is the maintenance of international peace and security and that we could argue that any use of force, regardless of the pretext used to justify it, is against this primary purpose of the organization, nonetheless we cannot ignore the fact that the way the Charter was written leaves room for speculation and various interpretations.

2. Exceptions to the prohibition of the use of force

The exceptions to the prohibition of the use of force expressly retained by the UN Charter are self-defence, stated in article 51 of the UN Charter, and the collective security system based on Chapter VII of the Charter.

[1] Robert Kolb, *An Introduction to the Law of the United Nations* (Oxford and Portland, Oregon: HART Publishing, 2010), 71; Tarcisio Gazzini, *The changing rules on the use of force in international law* (Manchester: Manchester University press, 2008), 125.

a. Self -defence

The traditional customary rules on self-defence derive from an early diplomatic incident between the United States and the United Kingdom over the killing on some US citizens engaged in an attack on Canada, then a British colony. The so-called *Caroline* case established that there had to exist "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation"[2] and furthermore that any action taken must be proportional, since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. These statements by the US Secretary of State to the British authorities are accepted as an accurate description of the customary right of self-defence.

Thus there is still a right of self-defence under customary international law, as the International Court of Justice (ICJ) affirmed in the *Nicaragua case*[3] on the use of force, some commentators believe that the effect of Article 51 is only to preserve this right when an armed attack occurs, and that other acts of self-defence are banned by article 2(4). The more widely held opinion is that article 51 acknowledges this general right, and proceeds to lay down procedures for the specific situation when an armed attack does occur. Under the latter interpretation, the legitimate use of self-defence in situations when an armed attack has not actually occurred is still permitted.

The use of force in self-defence is not questionable when a prior armed attack has occurred or at least when an armed attack has started since an irrevocable course of action has begun. The controversy appears when this attack is imminent (anticipatory self-defence) and even more so when there is no foreseeable armed attack, but there is a window of opportunity to strike first in order to avert future threats (preventive or preemptive self- defence)[4].

United States` President, George W. Bush, was clear in occasionally dramatic terms when he was prepared to resort to the use of force. What became known as the 'Bush doctrine' comprised two key elements. The first sought to expand the concept of 'imminence' with regard to the right of self-defence so as to enable the USA to exercise this right by acting 'pre-emptively'. The first indication of the pre-emptive self-defence element of the Bush doctrine came in the justification for Operation Enduring Freedom on 7 October 2001 as a response to the ongoing threat posed by al-Qaida and the Taliban[5]. The second element was an attempted shift in the rules on the responsibility of states for the attacks of non-state actors so that there was to be "no distinction between terrorists and those who knowingly harbor them". Though taking military action before an armed attack has emerged is incompatible with the provision of article 51 of the UN Charter, this could be considered lawful under customary law governing the use of force since, as stated before, treaty-based self-defence and customary self-defence not only coexist, but can also have different substantial contents or, even if they have identical beginnings, they can develop autonomously.[6]

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[2] http://en.wikipedia.org/wiki/Caroline_affair.

[3] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, I.C.J. Reports 1986.

[4] Robert Kolb, *An Introduction to the Law of the United Nations*,75.

[5] UN Doc S/2001/946 (7 October 2001), http://www hamamoto.law kyoto-u.ac.jp/kogi/2005kiko/s-2001-946e.pdf.

[6] Tarcicio Gazzini, *The changing rules on the use of force in international law,* 119; Christian Henderson, "The 2010 United States National Security Strategy and the Obama doctrine of 'Necessary Force'", Journal of Conflict & Security Law, Oxford University Press (2010),407.

b. Coercive measures under Chapter VII of the UN Charter

Chapter VII of the United Nations Charter sets out the Security Council`s powers to maintain peace. It allows the Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to take military and nonmilitary action to "restore international peace and security".

Article 42 represents the "heart of collective security"[7] and the military action that can be used against any State if targeted by the Security Council is the ultimate sanction of the Charter as the measures that this organ can take go gradually[8] from measures not involving the use of armed force to actions by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations[9].

c. Humanitarian intervention – e new exception to the rules banning the use of force?

A humanitarian crisis (or "humanitarian disaster") is an event or series of events which represents a critical threat to the health, safety, security or wellbeing of a community or other large group of people, usually over a wide area. Armed conflicts, epidemics, famine, natural disasters and other major emergencies may all involve or lead to a humanitarian crisis.

Recent humanitarian crises include the 2004 Indian Ocean earthquake (Asian tsunami), the 2005 Kashmir earthquake, Hurricane Katrina in August 2005, Rwanda genocide, Sri Lankan civil war, Israeli-Palestinian conflict, Afghan Civil War, Darfur Conflict, Iraq War, May 2008 Sichuan earthquake, Cyclone Nargis which made landfall in Myanmar and claimed the lives of at least 22,000 people, the 2010 Haiti earthquake and the present 2011 Libyan conflict.

The present study will deal only with such crises that derive from manmade situations.

Armed humanitarian intervention is the use of military force by a nation or nations to stop or prevent widespread, systematic human-rights abuses within the sovereign territory of another nation. This means that unilateral use of force used by a State or a coalition of States in order to end severe violations of fundamental human rights committed on another State`s territory usually occurs during an internal or international conflict[10]. In this context, military force refers to operations involving direct attacks against persons and places. It does not refer to other military operations, such as providing humanitarian aid, peacekeeping, or stability and support operations that might result in the need to use force after units peacefully arrive with the consent of the host nation or parties to a conflict[11].

A relatively recent matter raised the question whether international law permits the use of force by foreign States, individually or collectively, to stop violations of international human rights and humanitarian law committed within a single State. This was the intervention by the North Atlantic Treaty Organization (NATO) in Kosovo during the spring of 1999, intervention which

[7] Robert Kolb, *An Introduction to the Law of the United Nations*, 85.
[8] Raluca Miga-Beşteliu, *Drept internaţional public. Vol. II (*Bucureşti, C.H. Beck: 2008*),* 159.
[9] Article 42 of the UN Charter.
[10] Raluca Miga-Besteliu, *Drept internaţional public,* 166.
[11] Daniel Rice "*Armed humanitarian intervention and international law: a primer for military professionals".* Military Review. FindArticles.com. 07 Mar, 2011. http://findarticles.com/p/articles/mi_m0PBZ/is_6_87/ai_n24225701/.

aroused controversy at the time and still provokes questions about the legality of the action, its precedential effect, and procedures for developing new international law.

The Federal Republic of Yugoslavia (FRY) headed by Slobodan Milosevic committed grave international crimes against the ethnic Albanians in Kosovo. However, both the ethnic Albanians and the Serbs in Kosovo engaged in aggressive and brutal actions against each other and both were at fault, legally and morally. The Kosovo Liberation Army (KLA) has also committed terrorist and other brutal acts against the Yugoslav Serbs and the FRY forces.

The Security Council was involved in the Kosovo matter for some time. It adopted three resolutions under Chapter VII of the Charter prior to the NATO bombing campaign. These resolutions laid out a plan of action that authorized the Organization for Security and Co-operation in Europe (OSCE) to place an observer force, the Kosovo Verification Mission (KVM), in Kosovo to monitor the situation. The resolutions also called upon the FRY, the KLA, and all other States and organizations to stop using force and called for a halt to violations of human rights. The resolutions did not authorize the use of force by any outside entity. Rather, they reaffirmed the sovereignty and territorial integrity of the FRY. In this situation, outside entities had no authority to take forcible actions. The Security Council, though, by twelve votes to three, rejected a resolution condemning NATO`s use of force[12].To avoid a veto, the Council resolution adopted subsequent to the bombing did not retroactively legalize NATO's actions but only prospectively authorized foreign States to intervene in the FRY to maintain the peace.

As NATO`s intervention in Kosovo did not clearly frame in the exceptions expressly mentioned by the UN Charter, the problem for international law theoreticians is to find a way to legitimate unilateral use of force based on humanitarian grounds, that is if there is any legitimacy to the unilateral use of force.

First of all, using the term "intervention" clearly leads to the central idea of this concept, that is such actions, undertaken in humanitarian purposes, unfold without the consent, and even against the will of the State where they are localized[13] and the Kosovo experience indubitably demonstrates this.

The main concern when talking about humanitarian intervention is the way this concept interferes with the target-State`s sovereignty. The word "sovereignty" is not usually used alone in international relations but alongside with the word "equality". The authors of the UN Charter, when listed the principles on which the activities of the UN are based, decided upon the concept of "sovereign equality" in order to ensure that any acceptance of "absolute sovereignty" is ideologically repudiated[14]. We can think that as long as there no longer exists absolute sovereignty of States, there are matters which escape their exclusive competence. Another principle stated by the UN Charter comes to settle this issue. That is the principle of non-intervention in the internal affairs of another State, principle stated by article 2(7) of the Charter. This basic rule of international law is a consequence of the equality and sovereignty of States but it has been subject to a process of reinterpretation in the human rights field, so that States may no longer plead this rule as a bar to international concern and consideration of internal human rights situations[15]. The very essence of human rights protection systems consists in States` acceptance that human rights are not a matter left

[12] Malcolm N. Shaw, *International Law,* (Cambridge, University Press: 2010),1157.
[13] Raluca Miga-Besteliu, *Drept internațional public,* 166.
[14] Robert Kolb, *An Introduction to the Law of the United Nations,* 40.
[15] Malcolm N. Shaw, *International Law* ,273.

at the discretion of each State who can act freely in hard core sovereignty and that States have no longer absolute powers over the individuals in their jurisdiction. On the contrary, States sovereignty must be a basis for human rights observance and not for their violation[16].

Most States clearly would prefer to secure UN authorization before using force for humanitarian purposes, and would probably agree that the Security Council, acting under Chapter VII, can authorize military action in response to severe atrocities and other humanitarian emergencies that it concludes constitute a threat to peace and security. The understanding of what constitutes threats to international peace has been radically broadened since the 1990s to include such issues as mass displacement, and the UN Security Council has authorized use of force in situations that many States would have previously viewed as "internal" conflicts.

In several instances, however, groups of States have intervened with armed force, and without advance authorization from the Security Council, at least in part in response to extreme violations of basic human rights, trying to legitimate their actions on the existence of implicit Security Council authorizations.

The existence of an implicit authorization system of coercion presumes the existence of a system of authorizing the coercion[17]. According to the UN Charter, the Security Council has the exclusive power to decide coercive measures under Chapter VII, including the use of force, excepting the situations of self-defence stated in article 51 of the Charter. However, The UN has not been able to operate Chapter VII as originally envisaged[18] so other solutions had to be found in order for the organization to fulfill its primary role, namely the maintenance of international peace and security.

The Security Council has delegated its coercive powers to Member States, but it has never expressly mentioned what were the legal grounds for the right to act in such direction. Not even article 53 of the UN Charter, which clearly allows such a delegation of power to regional arrangements or agencies, was invoked in Security Council`s resolutions concerning the authorization of Member States to make use of military coercive powers. The explanation for its reluctance is that, every time the Security Council authorized Member States which were part of such regional arrangements, to take military enforcement measures, other UN Member States that were not formally part of those regional organisms wanted to take part of that particular collective action[19].

There can be found no formal reference in the Charter that grants the Security Council the right to delegate its primary responsibility but, regardless of such a situation, this practice is considered legitimate when searching the very economy of the Charter, its purposes and its goals.

As long as the collective security system, as it was meant to work according to the editors of the Charter, is not functional as such, there had to be found other ways to ensure that the universal

[16] Corneliu-Liviu Popescu, *Protecţia internaţională a drepturilor omului* (Bucuresti, ALL BECK:2000),9.

[17] Daniel Dormoy, *Reflexions a propos de l`autorisation implicite de recourir a la force,* Les Metamorphoses de la securite collective: pratique et enjeux strategiques: journee franco-tunisienne (les actes des journees d`etudes de Hammamet – Tunisie – organisees les 24 et 25 juin 2004) par l`Association Tunisienne de Sciences Politiques – Paris: 2005, 223.

[18] Malcolm N. Shaw, *International Law,* 1266.

[19] Philippe Lagrange, *Securite collective et exercice par le Conseil de Securite du systeme d`autorisation de la coercision,* Les Metamorphoses de la securite collective: pratique et enjeux strategiques: journee franco-tunisienne (les actes des journees d`etudes de Hammamet – Tunisie – organisees les 24 et 25 juin 2004) par l`Association Tunisienne de Sciences Politiques – Paris: 2005, 55.

organization fulfills its main function. The legitimacy of such actions is not extremely questioned because they have the Security Council`s endorsement.

The problem is not regarded with such ease when it comes to unilateral use of force by a State or a group of States acting, as we mentioned before, to stop severe and mass violations of human rights happening between the borders of another State. This problem occurs especially when the Security Council is silent, when it either decides not to take any action at all, or when its action is blocked by the veto of one or more of the permanent Members or even only by the perspective of a veto. Although, according to resolution 377 (V) of 1970, the UN General Assembly gained residual responsibilities as to the maintenance of international peace and security[20], such as the power of recommendation for a use of force in the absence of Council action, the Uniting for Peace resolution has only been used, given the debates around its legality, to recommend peaceful measures in situations of emergency[21].

The problem thus still remains in practice as to the possibility to take armed action in the event of serious humanitarian crisis, when both the Security Council and the General Assembly remain silent. Not to mention the necessity to maintain a balance between the Charter based principles of equal sovereignty and non-intervention in the internal affairs of another State and the equally fundamental one which is the respect of human rights. In this context, can the international community watch passively as fundamental rights are being massively violated within the borders of a State or is it compelled, at least on moral grounds, to intervene, even by using military force, to put an end to such situations?

Different approaches on the issue of legality and legitimacy of the use of force for humanitarian purposes place it either on the grounds of an implicit authorization of the UN Security Council, considering it part of a customary rule, already existing or at least emerging from the practice of States, or merely think it as an excusable breach based on moral considerations.

Several cases[22] in international practice reveal that in many occasions the use of force was not duly authorized by the Security Council or was authorized only with regard to post-conflict phase. What appears necessary is to explore whether those were cases of rule disregarding or they represent at least an incipient sign of an entire process of modification of the authorization rule or even of downgrading the authorization itself from legal requirement to a matter of political expediency. In the absence of a Security Council resolution, the argument that overwhelming humanitarian necessity could exceptionally amount to a circumstance permitting the use of unilateral force in spite of the general ban embodied in article 2 (4) of the UN Charter was advanced by the United Kingdom in particular with regard to the military intervention in Kosovo. It was only until later that this argument was followed by other States[23].

Until Kosovo, States have tried to rely on Security Council allegedly authorizing them to resort to military force but in the Kosovo crisis there can be found no consistent attempt by NATO to

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[20] If "the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of peace and international security….. the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security."

[21] Robert Kolb, *An Introduction to the Law of the United Nations,* 91.

[22] E.g. the military operations in and against Iraq in the aftermath of the Gulf Crisis; Liberia; Sierra Leone; Kosovo.

[23] Tarcisio Gazzini, *The changing rules on the use of force in international law,* 82.

try to base their action on Security Council resolution authorizing the use of force. But they did underline that the intervention was to be considered exceptional and that it did not bear any normative value nor raise any normative expectations.[24]

In this perspective, the Obama administration's first National Security Strategy published on 27 May 2010 by the White House[25] appears extremely relevant. The Obama doctrine regarding the use of force places the concept of "necessity" on a pedestal, which is not controversial when talking about self-defence, but becomes very much so when it speaks of using force, whenever it appears to be necessary to fight against evil in the world. It is not clear who is responsible with the qualification of a situation or a person as being "evil", nor which are the criteria used to make such a qualification. Not to mention that the concept of "necessity" itself leaves room for a lot of subjectivism. But an even more controversial problem is the one regarding humanitarian interventions and the concept of "just war". US President Obama stated very clearly that all responsible nations should embrace the role that militaries with a clear mandate can play to keep the peace and that the use of force can be justified on humanitarian grounds, not implying though that he would like to see a principle emerge permitting the unilateral use of force on humanitarian grounds[26].

Though President Obama is not ready to claim that there already exists a principle allowing military intervention to protect civilians within the borders of their country, he somewhat suggests or implies this idea by pretending that the use of force on humanitarian grounds already *can* be justified, in other words *the legitimacy* of such interventions, even if only in exceptional situation, s*hould not be questioned.* What appears to be clear is that these interventions are not based on legal grounds but on moral ones.

The Obama doctrine is quite dangerous as it leaves so much space for subjective interpretations. Equally dangerous is the mere reference that the 2010 US Security Strategy makes to the United Nations and even to NATO in stating that '[w]hen force is necessary . . . we will seek broad international support, working with such institutions as NATO and the U.N. Security Council'[27]. Working *with NATO* and only secondly *with* the United Nations sends a very ambiguous message. How are the United States going to work with these organizations? If they consider it to be necessary to intervene in other States to save civilians for instance, they will seek their support but if they won`t grant them this support, will they act regardless? The answer appears to be affirmative, the role assigned to these organizations being only accessory to the will and action of this super-power. One cannot ignore the fact that the United States of America are one of the permanent Members of The UN Security Council, nor their place inside NATO and that they are one of the most powerful States who set "trends" of action in international relations. So if they decide to take individual military action within the borders of another State, without any consent, not to mention authorization of the only international organ lawfully vested with this right, it could be expected that other States, according with their own interests, will follow and support the United States in their mission.

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[24] Tarcisio Gazzini, *The changing rules on the use of force in international law,* 84.

[25] The White House, 'The National Security Strategy of the United States of America' (27 May 2010) , http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

[26] Christian Henderson, *The 2010 United States National Security Strategy and the Obama Doctrine of 'Necessary Force*', Journal of Conflict & Security Law (Oxford: University Press: 2010) 431.

[27] 2010 NSS (n 10) 22 in Christian Henderson, *The 2010 United States National Security Strategy and the Obama Doctrine of 'Necessary Force*', 432.

This could be a first step towards the crystallization of a new customary exception to the general ban of the use of force. But when talking about an imperative international rule, a lot of prudence is required as it can only be modified by another imperative rule and at this stage the international community is far from it. Humanitarian interventions are rather scarce and a customary rule implies a general practice, if not universal when discussing about imperative rules, but most importantly it needs the *opinio iuris* that States act according to one specific practice because it is compulsory not because circumstantial motives impel them to. Maybe the only *opinio iuris* that exists in this matter is that humanitarian interventions should be regularized.

The international community is still reluctant to think that there already exists a right of intervention on humanitarian grounds because such a recognition could have extremely important consequences especially for less influential States. A right to intervene based on moral and humanitarian imperatives could open the door to arbitrary and abuse on the part of powerful States that might invoke it in order to satisfy their interests in other States. There are voices that draw attention to the historical imperialistic character of international law up until recently and to the idea of neocolonialism[28] that should no longer be considered a territorial enterprise but rather an economic one, all of the interventions allegedly undertaken to put an end to human suffering having been followed by the establishment of the necessary conditions to make foreign investments secure and profitable[29]. So there is a great risk that powerful States use this kind of interventions in order to satisfy their interests but at the same time we cannot ignore that there still are leaders with no commitment to human rights or peace and States governed by violence, disorder and chaos, States which either cannot or will not protect their citizens. In such circumstances, how can the international society just stand by as a simple spectator at a show that takes even hundreds of thousands of lives? The intervention is probably more than a right and mostly a duty of a neighboring State or a coalition of States in front of extreme violence and even massacres happening in other States and the multiplicity of motives is not relevant as long as the intervention serves humanitarian purposes as well and presumably was intended to do that too[30]. What should be proved though is that intervening States are driven primarily by humanitarian motives and not by imperialistic ambitions. Even so, humanitarian intervention without a UN mandate is technically illegal under the rules of the UN Charter. It may be morally and politically justified in certain exceptional cases, it may be and in most cases is considered an excusable breach because saving lives is mostly a moral impulse, not a legal doctrine[31]. Benefits of this approach include that it contemplates no new legal rules governing the use of force, but rather opens an "emergency exit" when there is a tension between the rules governing the use of force and the protection of fundamental human rights. Intervening states are unlikely to be condemned as law-breakers, although they take a risk of violating rules for a purportedly higher purpose. However, in practice, this could lead to questioning the legitimacy of the legal rules themselves if they are unable to justify actions the majority of the UN Security Council views as morally and politically justified. Nevertheless, for the time being, the decision to intervene militarily to put an end to humanitarian emergency belongs purely to politics and the philosophical concepts of

[28] Anne Orford, *Reading Humanitarian Intervention. Human Rights and the Use of Force in International Law (*Cambridge: University Press: 2004), 44-47.

[29] Anne Orford, *Reading Humanitarian Intervention,* 47.

[30] Michael Walzer, *The Argument about Humanitarian Intervention, http://them.polylog.org/5/awm-en.htm.*.

[31] *Michael C. Williams, Humanitarian Intervention and the Use of Force, www.cap.uni-muenchen.de/ transatlantic/.../williams.doc.*

justice and morality, intervening States hoping that their breach of international rules will be pardoned or at least tolerated by the rest of the international community[32].

Humanitarian intervention alone, however, does not and cannot eliminate the root causes of the problems it addresses and in fact it can add to the number of victims, any moral justification for armed intervention having to take into account both the intentional death and destruction and the potential for unintended damage that the use of armed force will cause[33]. Another aspect that has to be taken into consideration is the chance for success of an armed intervention. A successful intervention must not only stop the immediate suffering, but also prevent it from resuming once forces withdraw. If the intervention is not successful, the force the nation uses to intervene will appear to be, and perhaps in reality will have been, unwarranted. That is, it will have resulted in additional violence that increased rather than prevented the suffering it sought to remedy[34]. Therefore, in order to be considered an "excusable breach", armed intervention should indeed put an end to killings and destruction, otherwise being just another violation of a fundamental international principle, violation that cannot have any justification.

Conclusion

If we tried to reach a conclusion concerning the existence of a right to intervene with military force to safeguard human rights or, more precisely, if we can talk of another exception to the prohibition of the threat or use of force than the ones expressly mentioned by the UN Charter, we would have to say that the issue is far from being closed. Since the making of the UN Charter the international society has evolved and has shown more and more concern for what we can call "humanism" and its juridical expression - human rights. Nevertheless, the international community still relies on the Security Council to decide the most appropriate coercive measures in emergency humanitarian disasters, but it hasn`t stopped States to act unilaterally when facing the incapacity of this organ to react promptly.

The reality is that military force is being used without a prior authorization given by the Security Council whose justification and legitimacy is definitely not based on the provisions of the UN Charter but have to be searched in the creation of customary rules, in the theories of implicit Security Council authorizations or in the moral necessity to protect civilians against massive violations of their fundamental rights, when their national State either is the perpetrator or is just unable to offer them any kind of protection.

The issue of humanitarian intervention will once again be subject of debate if foreign forces (e.g. NATO) decide to intervene in the recent Libyan conflict in order to stop mass killings and bloodshed caused by the Libyan leader and its army fighting anti-government forces. The UN Security Council adopted resolution 1970 (2011) on 26 February 2011 which has not authorized the use of force by Member States nor has it empowered them to take all necessary measures to put an end to violence against civilians, but only imposed sanctions not involving the use of force. The only "open door" to a decision of a UN authorized military intervention in Libya is the last sentence of

[32] Tarcisio Gazzini, *The changing rules on the use of force in international law,* 178.

[33] Daniel Rice *"Armed humanitarian intervention and international law: a primer for military professionals*". Military Review. FindArticles.com. 07 Mar, 2011. http://findarticles.com/p/articles/mi_m0PBZ/is_6_87/ai_n24225701/.

[34] Daniel Rice, *Armed humanitarian intervention and international law: a primer for military professionals*.

this resolution keeping the Security Council actively seized of the matter.[35] As for NATO, so far it has no intention to intervene in Libya. However, the NATO Secretary General said, "*as a defence Alliance and a security organisation, it is our job to conduct prudent planning for any eventuality*." The Secretary General stressed that NATO is in close coordination and consultation with other international and regional organisations, including with the United Nations, the European Union, the Arab League and the African Union. "*This is a humanitarian crisis on our door-step that concerns us all. The civilian population in Libya is the target of systematic attacks by the regime. So we must remain vigilant ….the violation of human rights and international humanitarian law is outrageous*.[36]", he stressed.

The United Nations Secretary-General is also deeply concerned about the fighting in western Libya, which is claiming large numbers of lives and threatens even more carnage in the days ahead. He notes that civilians are bearing the brunt of the violence, and calls for an immediate halt to the Government's disproportionate use of force and indiscriminate attacks on civilian targets. He stresses that those who violate international humanitarian law or commit grave crimes must be held accountable.[37]

If the killings in Libya don't stop, and it appears each day more and more clear that they will not stop, it is only a matter of time to see if the Security Council will act according to Chapter VII of the UN Charter, or instead authorize Member States to take all necessary measures to set off the Libyan massacre, or maybe not act at all. In the occurrence of the last hypothesis, other concerned or interested entities (States or organizations) might take control of the situation and intervene militarily intending to end this humanitarian crisis. Once again the question of the legitimacy of such interventions will be raised.

The authority of the United Nations Organisation and of its Charter is questioned as well, as State practice show that in the event of Security Council "silence" other ways of action are found, drifting away from the boundaries set by this binding document. This could be a sign that international law should suffer modifications or new regulations should be adopted to cover all situations that were not initially thought of but are unmistakably part of the reality of current international relations. Humanitarian interventions represent a very spiny matter that definitely requires some settlement in order to reduce, if not fully eliminate, the risk of abuse and arbitrary, settlement which might include the resignation to the veto right in matters concerning human rights. Reality will probably show that permanent Members find more dear their veto right than the commitment to fundamental rights so other solutions have to be found so that massive violations of human rights are discouraged by strict provisions.

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[35] Resolution 1970 (2011) adopted by the Security Council at its 6491st meeting, on 26 February 2011, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/245/58/PDF/N1124558.pdf?OpenElement.

[36] http://www nato.int/cps/en/natolive/news_71277 htm.

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CONSIDERATIONS ON CONTRACTS BETWEEN PROFESSIONALS AND CONSUMERS

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Abstract
The study " Considerations on contracts between professionals and consumers" will analyze the definition of the consumer, the definition of the merchant and the consumer rights. The study will analyze also the abusive clauses, the clauses which were not negotiated directly with the consumer, clauses which creates a significant imbalance, in the detriment of consumer.

Keywords*: contract, merchant, consumer, abusive clause, consumer rights.*

1. Introduction

Definition of contract with consumers. The contract between a merchant, a service provider, or an authorized practitioner of a liberal profession and consumers, regardless of the form used for training/proving the Convention, including certificates of deposit, purchase orders, invoices, delivery dockets or receipts, tickets, vouchers containing stipulations or by reference to general conditions of contract default[1].

Contracts concluded with consumers will be under the provisions of specific legal provisions contained in the Law of consumption, while the rules of civil law, consumer being free to choose either a cure belonging to the Law of consumption, or for any of the positive civil law, though without the mixture of legal rules within the same proceedings (principle of purity of the legal regime of action).

Classification. Legislation. A new classification of contracts can be remarked since its own classification criterion is the *contractual quality*. Using this criterion, we can say that there are contracts from the consumers, between *consumers and professionals*, and *other contracts* that do not relate to such operations, such as those concluded between professionals or between consumers.[2]

It is noteworthy that in our country this process has been triggered since 1992 by adopting Ordinance no. 21 regarding *Consumer Protection*[3], republished in the Official Gazette. no. 75 of March 23rd 1994, as amended and supplemented. Other laws followed on the fields that contain rules such as those considered in the classification discussed, that during the period of Romania's EU accession to be published the Law no. 296 of June 28th 2004 on the Consumption Code, which

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[1] J. Goicovici, *Consumption Law Dictionary*, C.H. Beck Publishing house, Bucharest, 2010

[2] C. Stătescu, C. Bârsan, Civil Law, *General Theory of Obligations*, IXth Edition, Hamangiu Publishing house, 2008

[3] Emergency Ordinance published in the Official Gazette no. 212 on June 28th 1992

entered into force on January 1st 2007. This law establishes specific obligations for operators and service suppliers, as well as separate rights of the consumers regarding, in particular, to *informing* and *educating* them and to concluding *contracts*.

Definition of the merchant. Merchant - natural or legal person, in relation with customers, acting on behalf of his commercial activity, industrial or production, craft or profession, and the person who acts in such a purpose in the name and / or on behalf of another trader.[4]

By option of the Romanian legislature, practitioners of liberal professions are defined as "services merchants" in their relation with consumers, so that legal protection of consumers is extended to services in the liberal professions such as lawyers, real estate brokerage, home decoration, etc.., but not the activity of public notaries, whose public authority endowment does not allow an analogical application of legal norms belonging to the Law of consumption. Notary work exemption from the scope of incidence of legal regulations to protect consumers has sometimes been explicitly stated by the legislature, for example, according to art. 2. (3) of the Law, the provisions of Law no. 365/2002 on electronic commerce, modified, are inapplicable to notaries public work, "insofar as it involves a direct and specific exercise of public authority."

Definition of the consumer. The consumer is any natural person or group of natural persons constituted as associations within the terms of an agreement under the provisions of this law, and acts with purposes beyond the scope of commerce, industry, production, handicraft or liberal.[5] According to other definition, the consumer is a natural person, or group of natural persons constituted in associations, that buys, gets, uses or consumes products or services beyond the scope of their professional activity.[6] According to this definition, the following elements of the definition of consumer can be highlighted: a) the first element of the definition: the natural person or group of natural persons constituted in associations; b) the second element of the definition: persons who "buy, gain, use, or consume"; c) the third element of the definition: goods and services; d) the extraprofessional purpose of gaining the goods or the services.

2. Study contents

Consumer rights. The Law no. 296/2004 - Consumption Code provides the rights of the consumers.[7] These are:

- the right to be protected against the risk of acquiring a product or a service that could endanger their life, health or safety or to affect their legal rights and interests;
- the right to be informed fully, fairly and accurately regarding the essential characteristics of products and services so that the decision to be taken on them to better meet their needs and to be educated in their capacity as consumers;
- the right to have access to markets that provide a wide range of quality products and services;
- the right to be compensated effectively and appropriately for damage resulting from poor quality of products and services, using the means provided by law for that purpose;

[4] J. Goicovici, *Consumption Law Dictionary*, C.H. Beck Publishing house, Bucharest, 2010

[5] Art. 2 (1) of Law on abusive clauses in contracts between merchants and consumers. Official Gazette no. 305/April 18th 2008

[6] J. Goicovici, *Consumption Law*, Sfera juridica Publishing house, Cluj-Napoca, 2006

[7] Art. 27 of Law no. 296/2004

- the right to organize associations of consumers, in order to defend their rights and interests;
- the right to refuse the conclusion of contracts that include abusive clauses, according to legal provisions;
- the right not to be restricted by a trader to obtain a benefit specifically provided by for law.

The Abusive Clause. The Abusive Clause is the clause that was not negotiated directly with the consumer and which, by itself or with other contractual provisions, creates, to the detriment of consumers and contrary to the requirements of good faith, a significant imbalance between the rights and obligations of the parties.[8] A contractual provision will be deemed not negotiated directly with the consumer if it is determined not to give the consumer the opportunity to influence its nature, such as pre-formulated standard contracts and conditions of sale applied by traders

In the economy of Abusive Clause the lack of direct negotiation of the contractual stipulations in question is crucial, also the breach of good faith by the professional and the existence of a significant imbalance between the rights and obligations of the parties. The legislation has defined the Abusive Clause on the infrastructure of two basic aspects - a subjective and an objective one - proved simultaneously: (a) *the subjective conditions* of the occurrence of that abuse of economic power in bad faith practiced by the professional; (b) *the objective economic effects* of the clause, the significant disproportionately imbalance between the mutual providing of the parties and therefore an excessive advantage to professional to the detriment of the consumer.

Most times, an abusive clause can be proven abusive within the terms of a specific contract, not to be in another consumer contract in which the consumer has been proven with rights to compensate the contractual concessions he had done in the benefit of the professional.

The mark of abusive clause is where the consumer, if he had the real chance to choose, he wouldn't have accepted it, and that clause would not have been freely assumed by the consumer considering the option of negotiating; by definition, the abusive clauses are contractual dispositions marked by the *lack of negotiation* and their suppression is a counterweight to the "lack of freedom" of the consumer to choose the contractual text.

Sanctioning the abusive nature of the clauses of the consumption contracts within the terms proposed by Article 6 of Law no. 193/2000 on abusive clauses, modified, will be mainly done by partial cancellation of the contract, the clauses affected by abuse. Law stipulates the following text: "abusive clauses contained in the contract and found, either personally or through the bodies authorized by law, will not affect the consumer and the contract, which will be developed further, with the consent of the consumer only if, after its removal, the contract can be continued."

Domain of abusive clauses

Extension of the abusive clauses qualification as abusive mainly showed on specific branches of the Law, then on the Common Law of contracts. Thus, abusive clauses were found in the optional insurance contracts that are, in fact, under administrative control. In example, the clauses of the victim's complaint after the expiry of validity of the guarantee. Clause that the victim had to seek compensation within the period of validity of the policy has been regarded as an unwritten clause. The same fate had a similar clause providing constructors liability whereby the tenant is obliged to

[8] J. Goicovici, *Consumption Law Dictionary*, C.H. Beck Publishing house, Bucharest, 2010

pay in advance the contribution to the repair costs, according to owner's unilateral estimation; clauses that require tenants to contract some work for themselves only with counterparties designated by the owner.[9]

The following are examples declared abusive by Justice:

- The clause that exonerates from any liability the photo laboratory that looses a received film;
- The clause of the professional training contract that provides that the cost is totally owed by the holder without any possible reduction;
- The clauses of subscription to a sports club which exonerate the club from any liability in case of injury or theft committed in the locker room;
- The clauses of some dry cleaner shops that provide a fixed amount of money as penalty for material damage;
- The clause of opening a savings account which allows the bank to proceed with discretion and without preventing the account holder to transfer from deposit account to a creditor to the debtor's deposit account.

In the classification of abusive clauses in the general theory of contract, French Civil Code calls the provisions of Art. 1134, par. (3) [corresponding Article 970, par. (1) of Romanian Civil Code: "Agreements must be executed in good faith "], Art. 1152, par. (2) and Art. 1131, corresponding to Art. 966 of Romanian Civil Code ("The bond without cause or a case based on false or illicit can have no effect").

Classification of a clause as abusive, under the provisions of Art. 970, par. (1) of the Civil Code is in relation to clauses, not the contractor's person and behavior. The phenomenon of economic imbalances is the objective fundament and it is pointless to check whether the counterparty intended or not to harm the other party, or that he acted contrary to the principle of good faith. The European Directive in 1993 only good faith as an additional qualification criteria and this idea has not been anymore considered by French legislation.

Art. 4 of Law no. 193/2000 of abusive clauses in contracts between merchants and consumers provides that a clause never negotiated with the consumer will be considered abusive if by itself or in conjunction with other provisions of the contract provokes a significant counterbalance between the rights and obligations of the parties, in the detriment of the consumer. Thos Law also lists the clauses considered abusive.

Therefore, will be considered abusive the clauses which:

a) Entitle the merchant to unilaterally verify the contractual clauses without having a reason specified in the contract and agreed upon by consumer, by signing it;

b) Oblige the consumer to comply with contractual terms which he was unable to ascertain on the actual signing of the contract;

c) Oblige the consumer to comply with his contractual terms even if the merchant did not comply with his obligations;

d) Entitle the merchant to automatically extend a contract concluded on a determined period by tacit consent of the consumer, if the time limit to which he could express his choice was insufficient;

e) Entitle the merchant to unilaterally and without the consent of the consumer modify the clauses of products and services specifications that are due to be delivered, as well as the delivery term for a product, and the execution date for a service;

[9] I. Turcu, *Theoretical and Practical Treaty of Commercial Law,* vol. III, C.H. Beck Publishing house, 2009

f) Entitle the merchant to unilaterally ascertain the conformity of the delivered products to the contractual provisions;

g) Exclusively entitle the merchant to interpret the contractual clauses;

h) Restrain or cancel the right of the consumer to claim damage if the merchant does not comply with his contractual obligations;

i) Obliges the consumer to pay penalties if he does not comply to his own contractual obligations, penalties that are disproportionately superior to the damages suffered by the merchant;

j) Restrain or forbid the consumer's right to cancel the contract when:

- the merchant unilaterally modified the clauses of letter e);
- the merchant did not comply to his contractual obligations;

k) Exclude or limit the legal liability of the merchant for injury or death of the consumer as a result of an action or deficiency of the merchant regarding the proper use of the products and services;

l) Exclude the consumer's right to take legal action or exercise any other remedy, while asking the solving of particular disputes by arbitration;

m) Unjustified allow some restrictions in administration of the clear evidence the consumer possesses, or restricting the request of evidence that are subject to other parts of the contract, as stipulated by law;

n) Entitle the merchant to transfer the contractual obligations to a third-party (agent, attorney) without the consent of the consumer, if this transfer causes the reduction of warranties or of other liabilities towards the consumer;

o) Forbid the consumer to compensate a debt to merchant by a debt that the merchant has to consumer;

p) Allow the determination or raising of the delivery price compared with the one agreed upon by signing the contract, except when the consumer is provided for with the right of cancellation when he considers the pricing too high compared to the one first agreed upon;

r) Allow the merchant to obtain large amounts of money from the consumer in case of failure or failure to completion of the contract by the latter, without stipulating the same equivalent compensations in the benefit of the consumer, when the merchant fails to execute or complete his contractual obligations;

s) Allow the merchant to unilaterally cancel the contract without providing the same right to the consumer;

t) Allow the merchant to cancel the contract signed for an undetermined period without prior notification, except with a pertinent motivation accepted by the consumer by signing the contract.

Article 1152, par. (2) of French Civil Code, with no counterpart in the Romanian Civil Code, governs judicial review of penalty clause under the criterion of obvious disproportion between the actual injury suffered and the original amount. The review proposes to reduce or increase the compensation clause and not to suppress it.

Abusive clauses in concept of Art. 996 of Romanian Civil Code are perceptible as being without cause. The concept 'cause' is regarded as equivalent to the content that restores the balance to the committed party. Analysis is limited to verifying whether all the obligations of one part taken globally are a real issue, counter-part. The analysis of each clause is part of the requirement that each must have a counterpart to their own and then it is not about the balance of the contract, but about the imbalance in the clause. The jurisprudence of French Court of High Cassation upheld the text of Art. 1161 of French Civil Code (Art. 966 of Romanian Civil Code) justifies deleting the disputed

stipulations. This solution was adopted in the field of property insurance, in banking for the clause of value[10], in relation to rapid transportation - the clause limiting liability for delay.

This jurisprudence seems to have a tendency to go beyond the narrow relationship between professionals and consumers. When the law considers that a clause gives one party more benefits, the other can fight this abuse by the provisions of Art. 966 of Romanian Civil Code on absence of the case[11].

Researched analysis reveals the existence of the phenomenon of excessive contractual stipulations which may not be permitted and is explicitly prohibited by the legislature in some cases. To fight effectively against these clauses with scientific rigor is necessary beforehand to be determined with precision the criteria for being an abuse of these clauses. First, was the idea of equilibrium and was considered an abusive clause the one that creates a significant imbalance between the rights and obligations of the parties. The criteria of equilibrium being insufficient is necessary to use subordinated criteria. Significant imbalances can be viewed either as economic or moral issue. The criteria determining the imbalance is faced with the difficulty of comparison of objects and measure these objects. Therefore, subordinated criteria are:

a) Abusive clauses allowing unilateral and discretionary rule of contract development;

b) Rules that provide a benefit without counterpart;

c) Rules that distribute unevenly the economic risks;

d) Clause derogating provisions and suppleness of the common law even if those measures contribute to achieving the ideal balance.

Criteria for determining abuse of contractual stipulations

Source identification of criteria for determining abuse is found in Art. 4, par. 1 of Law no. 193/2000, amended, and in Art. 3, par. 1 of Directive 93/13/EEC, which stipulates that there will always be abusive "the contractual clauses not negotiated directly with the consumer whether by itself or together with other provisions of the contract, created at the expense of consumers and contrary to the requirement of good faith a significant imbalance between the rights and obligations of the parties." Thus, from the text of these provisions can be deducted that the main conditions that must be fulfilled in order to speak of the existence of abusive clauses: lack of direct negotiation (1), breach of good faith (2) and, create a significant imbalance between the rights and obligations of parties (3).[12]

a. The absence of direct negotiation

The fundamental principles governing contract law are the principle of contractual freedom and the principle of mutual consent, rules aimed at ensuring the free formation of contracts, in order to have their nature and contents accurately reflect the will of the contracting parties. The effect of these guarantees is annihilated by the existence of abusive clauses, the essence of which is the lack of direct negotiation, as defined in Art. 4, par. 2 of Law no. 193/2000, amended, given the inability of consumers to influence the nature of the contract.

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[10] I. Turcu, *Banking Contracts and operations. Banking Law Treaties*, V[th] Edition, Lumina Lex Publishing house, Bucharest, 2004, vol. II

[11] I. Turcu, *Theoretical and Practical Treaty of Commercial Law,* vol. III, C.H. Beck Publishing house, 2009

[12] P. Vasilescu - coordinator, *Contractual Consumption, Landmarks for a General Theory of Consumption Contracts,* "Universitaria" Collection, Sfera juridica Publishing house, Cluj Napoca, 2006

Lack of direct negotiations is materialized, as shown, in adhesion contracts or general conditions of sale which take effect on a presumption of abuse of economic power which may be rebutted by proof of the professional negotiation. The admissibility of such evidence is necessary to demonstrate the effectiveness of the negotiation, that there is possibility to change the content or nature of the contract, so it can be concluded that there would be negotiating only by virtue of simple discussions on the clauses. Negotiation of some contractual clauses that does not preclude, within the same contract, unfair clauses whereas, as revealed and art. 4, paragraph 1 of Law 193/2000, amended, negotiation does not result in partial removal of the possibility of rules on consumer protection against abusive clauses in respect of the entire contract.

The absence of direct negotiations also highlights the case of ambiguity, obscurity of contractual term, as evidenced by the provisions of Article 1, par. 2 of Law no. 193/2000, amended, that "in case of doubt on contractual clauses they will be interpreted in favor of consumers." This stipulation asserts, it seems, a less drastic sanction on removing the ambiguity of a clause that is given meaning by professionals and preferring an interpretation of that clause for the benefit of consumers. But to the extent that such ambiguous clause creates a significant imbalance between the rights and obligations of the parties it shall be deemed to meet the conditions of abusive clauses and, therefore, will be penalized more severely this time, reputed as being unwritten, sanction upheld by law.

Thus will be necessary to consider a clause that does not directly negotiate, or whenever it will be inserted into a pre-formulated standard contract or conditions of sale and to the extent that, even when it has been discussed, consent of the economically weaker part was not been an "active" one in the sense of active contribution to the contents of that clause, but a "passive" one, understood as a mere acceptance of the conditions imposed by the stronger contracting party.

b. Breach of good faith

Adding good faith criteria for determining the category of abusive terms confer to the good faith a new role, namely to "abusive terms control criteria", as can be inferred from Art. 4, par. 1 of Law no. 193/2000, amended. With the purpose of eliminating the abusive, the recourse to the criteria of good faith - also considered *abstract foundation for abusive clauses* - comes from the abuse from the part more powerful economically, abuse that draws the consequence of breaking the contractual balance, thus ignoring the good faith clause, which are incumbent to both parties, both upon signing the contract and on its duration.

The concept of good faith may be understood differently depending on the prevailing element in its content: the subjective and the objective. Thus, through the subjective element, involving a good faith means diligent conduct, cooperation to achieve the purpose of the contract and fidelity in terms of its execution, which results in an assessment of good faith in concreto. On the other hand, the objective element of good faith turns into a means of establishing the imbalance in this case it will determine in the abstract.

Directive 93/13/EEC, in the preamble, justifies the use of the general criterion of good faith in terms of the need for an *overall assessment* of the different interests of parties involved in the contract. It also stresses that the duty of good faith will be considered met if the professional will act fairly in respect to the consumer and its interests, focusing on the possibility of bargaining power and contractual partner the fact of knowing to what extent consumer consent was induced or if the services or goods were provided as a result of a consumer's explicit orders.[13]

[13] Id, pg. 130

c. Significant imbalance between the rights and obligations of parties

Art. 4, par. 1 of Law no. 193/2000, amended, require the condition that stipulate the necessity of a "clause, by itself or together with other provisions of the contract, to create a significant imbalance between the rights and obligations of the parties", but omit the definition of that term which, according to doctrine, it is understood as equivalent benefits in the sense of absence following the execution of contractual obligations by the parties whether this imbalance has actually occurred or exists only virtually. Regarding the *nature* of the imbalance, it is *dual*, even though the law stipulates an imbalance between "the rights and obligations of the parties", which would have the consequence of this qualification as a *legal* criteria, bear in mind the purpose of unfair terms protect consumers' economic interests, which is widening the imbalance area, including the *economic* nature.

The moment in relation to which the imbalance is determined is the signing of the contract, as reflected in Art. 4, par. 1 of Directive 93/13/EEC, as during the contract a potential lack of equivalence of benefits could be a consequence of the unexpected, or the element of *random*. The provisions of the Directive expressly set the elements for identification of the significant imbalance, stipulating that to determine its existence the *nature* of the contracted products and/or services must be considered, also *the circumstances that led to concluding the contract, all the contractual clauses, or other clauses* that show a close connection with the one in discussion, all these elements instituting the rule of *in concreto assessment* of a contractual imbalance, but as emphasized when on general sale conditions this assessment will be made *in abstracto*.[14]

3. Conclusions

Following the analytical approach of abusive clauses can be inferred that this institution is meant to annihilate any significant imbalance between rights and obligations of the parties, generated by the abuse of economic power exercised by a professional contracts with a consumer

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[14] Id, pg. 131

ASSIGNMENT OF CONTRACT

Diana-Nicoleta DASCĂLU[*]

Abstract

The New Civil Code introduces in art.1315-1320 a new institution called the assignment of contract, inspired by the Civil Code of Quebec. An assignment encompasses the transfer of rights held by one party—the assignor—to another party—the assignee. Assignment of rights under a contract is the complete transfer of the rights to receive the benefits accruing to one of the parties to that contract. The study presents different aspects of this institution, also from the perspective of comparative law, insisting on the notion of assignment of contract, the effects created between the assignor and the assignee, the assignor and the assigned contractor and also the effects created between the assignee and the assigned contractor. The study also analyses the similarities and differences between some important institutions of the Romanian Civil Code : assignment of contract, assignment of claims, novation and delegation. The hypothesis of successive assignments it is examined, meaning the situation when an unscrupulous assignor will assign exactly the same rights to multiple parties (usually for some consideration). In that case, the rights of the assignee depend on the revocability of the assignment, and on the timing of the assignments relative to certain other actions. The assignor has also the obligation to guarantee the validity of contract. When the assignor is bound by a contractual clause to ensure the execution of the contract he acquires the status of guarantor for the assigned contractor obligations.

Keywords*: assignment of contract, assignment of debt, novation, assignee, assignor, assigned contractor, novation, delegation*

1. Introductive notions concerning the institution of assignment of contract

Assignment of contract was a controversial institution in the matter of legal recognition, not only in the Romanian civil law, but in other European private law systems. The main line of approach which brought controversy to the assignment of contract was the idea of impossibility of translation of debt as part of the obligation. But, although, legally, this institution was not established in an express manner by the current law, doctrine and judiciary practice was a witness to the possibility of assigning a contract, not just a claim, possibility stipulated by the Romanian Civil Code from its early beginnings.

The new Civil Code no longer avoids this institution, which was already a fact of civil reality, and more of the commercial reality, and specifically embraces in the art. 1315-1320 the institution designated by the term contract assignment. So it came that legislation, jurisprudence and doctrine recognize without hypocrisy, the vitality of the assignment may it be of debt or contract.

Legal science, concurring to the economical and legal reality that perceived the assignment not simply as a tool to allow essential values circulation, was thus forced towards maturity, this way

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admitting that an obligation report should be looked upon as a transferable good, more specific that it would be possible to be assigned as any material good.

In a simplistic way of seeing things, the assignment of contract may be defined as the legal transaction whereby one party of a contract (the assignor) is replaced by a third party (transferee), as an effect of the agreement resulted during the execution of the contract, between the transferor and the transferee, with the actual consent of the contractual partner.

As stated by the specialized doctrine[1], the assignment of contract (also known by the name of "assignment of contractual position" – called so by part of the specialized doctrine and some foreign law codes) supposes the participation of three parties: the assignor (the party which yields their contractual position), the assignee (the third party, which, as an effect of the agreement settled with the assignor, replaces the latter in the legal contract) and the outward (the original contractor, which is also directly affected by the assignment of contract)

However, some of the classical specialized doctrine inclines to believe that the assignment of contract is inadmissible and choose to interpret its applications as simple assignments of debt.

2. History of the institution of contract assignment

Roman law, forefather of the European private law and in this case of the Romanian Civil Law didn't include the institution of contract assignment, this due to the specific conception developed by syndics upon the obligations institution, which was regarded in ancient Roman law and also in the classic as a personal link essentially uniting two persons clearly defined[2].

The consequence of this concept was the impossibility to call upon a mechanism through which one of the parties of the obligation report would disappear and thus be replaced by a third party, having the contract completed by two other parties, different from the original ones.

The above mentioned impossibility is also justified by the physical power to coerce of the creditor against the debtor through the optics of the Law of XII Tables : enforcement was directly upon the person of the malicious debtor, by cutting them into pieces or by sale as slaves beyond the Tiber. Under these circumstances, in the eventuality of an assignment, any debtor would be exposed to the use of force, from a creditor not of his choice.[3]

The economic needs brought a protest upon the idea that obligation was not transferable, reason for which, especially after the Punic wars, the net asset value of claims and the need to bring them into the legal circuit appear more and more worthy of interest. Thus, it gradually emerged the idea that a claim is an active element of the patrimony as property itself.

Thus, Roman law evolved, assuming the replacement of a creditor or of a debtor of a contractual report, through novation as through "substitution", by *cognition in rem suam*, and then by means of *procuration in rem suam* of a so called judicial mandate of self interest.[4]

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[1] Alexandra Irina Danila, *Cesiunea de contract*, Editura Hamangiu, Bucureşti, 2010

[2] Paul, Dig.44.7.3pr apud Mircea Dan Bob, *Repere istorice ale cesiunii de contract în dreptul privat*, in collective volume *Cesiunea de contract,* Publishing Sfera Juridică, Cluj-Napoca, 2007, p. 56

[3] Mircea Dan Bob, *Repere istorice ale cesiunii de contract în dreptul privat*, , in collective volume *Cesiunea de contract,* Publishing Sfera Juridică, Cluj-Napoca, 2007, p. 56-57

[4] *ibidem*

Subsequent transformations known by the Roman law pointed towards the transmission of the active element in the obligation report – the claim – with no specific interest in debt translation or contract assignment.

An early practical application of the contract assignment is documented to have occurred in the early XIVth century, however the doctrinal theories on this matter were late to appear, being noticed as late as the second half of the XIXth century, especially in Germany.

Debating for a first time this issue of assignment of contract, the initiator of this operation, Otto Bähr, presented it as an assignment of claim, coupled with an assumption of debt.[5]

As very well underlined by a member of the Romanian doctrine[6] regarding the historical origins of the assignment of contract, one that would seek to document upon a recent institution, as the conventional assignment of contract, would end by historically placing the decisive mutation – as through the private law perception – being represented by a so-called "reification" of the contract (meaning that it would be perceived as an assignable legal good) somewhere in the French specialized doctrine and judiciary practice of the 1950s. Thus, a product of an "impersonal" agreement, could be assigned to a third party, together with the assignee, as a result of contract assignment, the assignee being completely and fully liberated in what regards the specific convention.

3. Main thesis and theories of approach for the assignment of contract institution

The subjectivist thesis captures the essence of the contract in its capacity of being a "hope directed towards a third person, who's figure is not unimportant to us", impossible to be perceived as asset value, detached from the contractors person. According to the above, the conventional assignment of contract would only be possible as a tripartite operation, established on the consent of the three interested parties : the assignor, the assignee and the transferee.[7]

Although supporters of the proactive thesis define the contract as an instrument of "socialization", neither deny the transmissibility of the obligation, but only the transmissibility of the obligation source. In other words, when the obligation arises from a contract – not yet fulfilled or with a later date of execution – the replacement of a party with a third one is still possible, but it intervenes at the origin of the source (of the obligation) and is in a dependency relation with the consent of the assignee.[8]

The classicism of the assignment of contract brings forward two theories: the dualistic theory and the monistic theory.

Supporters of the dualistic theory define the assignment of contract as two distinct operations: an assignment of claim, followed by an assignment of debt.

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[5] Ph. Reymond, *La cession des contrats*, Centre du droit de l'entreprise de l'Université de Lausanne, Lausanne, 1989, p. 14.

[6] Juanita Goicovici, *Utilitarism juridic- contractul înţeles ca valoare patrimonială cesibilă*, in collective volume *Cesiunea de contract* , Sfera Juridică, Cluj-Napoca, 2007, p. 74

[7] Juanita Goicovici, *op.cit,* p. 76-78;J. Ghestin, Ch. Jamin, M.Billiau, *Traite de droit civil. Les effets du contrat*, 3e edition, LGDJ, Paris, 2001

[8] M. Billiau, *La transmission des creances et des dettes*, L.G.D.J., Paris, 2002

Assignment of contract is, as sustained by the supporters of this thesis, "that convention through which all legal relationships arising from a contract are being transferred to a third party contractor". Thus, the assignment has the role of "allocating, for the future, to a third party, with no relation to the contract, all rights and obligations arisen from the contract, and to alienate the assignee from the initial contract"[9].

According to the analyzed theory, the assignment of contract would assume the transfer of all rights and obligations within a contract, yet as a result of two distinct operations: a claim transfer and a debt transfer, the entire assignment of the contract thus depending on the admissibility of the two operations which it supposes.

This theory is supposed to have the following flaws: 1. It apparently does not propose a solution for the transfer of the potestative rights towards the transferee and 2. by the fact that, from this point of view, through an assignment of contract, made of an assignment of claim and an assignment of debt, the obligation is "duplicated", the assigned lender being thus able to require both the assignor and the assignee to be eligible for the initial claim/debt, furthermore this way the entire operation wouldn't produce any major effect, the assignor would so remain indebted towards the assigned lender and, thus, the contract wouldn't be assigned but the debt would be overtaken by the assignee, through a contract between the latter and the assignor.[10]

Discussions were held not so much on the assignment of claim, institution that was long ago accepted by French and Romanian syndic, but on the second mechanism of which would depend the assignment of contract, that of the assignment of debt, long-disputed by a part of the European doctrine, following the principle that he who would contract with the debtor is entitled to believe in the latter's solvency, without being placed in a situation where the debtor would be able to assign the debt to a new debtor, that does not present the same warranties as the original lender has trusted upon initially, when he contracted with the debtor.

However, there were several authors that did not see a legal obstacle in the path of achieving the assignment of debt, following the principle that the mere omission of the legislature to regulate the assignment of debt does not mean without a shadow of a doubt that this kind of transaction is prohibited by law or impossible to obtain, the passive side, in this case, would be translated in a conventional modality.[11]

The second theory on the mechanics of assignment of contract was the monistic theory. Its followers believe that the purpose of the assignment of contract is not the translation of rights and contractual debts but a chance for the initial contract to survive in the actual case in which one of the original contractors cannot withstand the contractual report, reason for which it substitutes itself for another party.

Seen from this point of view, the specialized doctrine[12] stated that the assignment would not operate on the obligation itself but on the source of the obligation – the contract itself. The promoter of this theory was the French syndic Laurent Aynes, whom considered that the assignment of contract mustn't be looked upon as a simple addition of two distinct legal operations, namely the

[9] Ch. Lapp, *Essai sur la cession de contrat synallagmatique à titre particulier*, thèse, Strasbourg, 1950, apud Ioan Popa, *Cesiunea contractului*, in R.R.D. nr. 10/2006, p. 126.

[10] Juanita Goicovici, *op. cit*., p. 79

[11] Ch. Lapp, *Essai sur la cession de contrat synallagmatique à titre particulier*, in Revue internationale de droit comparé, 1952, Vol. 4, Issue 2, p. 375-377.

[12] Juanita Goicovici, *op. cit.,* p. 80

assignment of debt and the assignment of claim, as elements of the agreement, but as a translation of the contract as a whole.

According to the monistic theory, as seen through Aynes' perspective, the assignment of contract does not contravene the principle of binding force of the contract, neither its relative effect. The assignee is a third party relative to the original contract, as an object of the translation, but as an effect of the assignment he becomes bound to the contract. Furthermore, in the case of the assignment of contract, it isn't even necessary to impose the formalities of the Civil Code in the issue of the opposability of the assignment of claim, nor to discuss the admissibility of the assignment of debt, the assignment of contract being possible even in the absence of the agreement of the assigned co-contractor.

The large majority of the French specialized doctrine, as the Romanian specialized doctrine, have adopted the monistic thesis, except that the assignment of contract cannot though work in the absence of agreement of the assignee

The reason of such operations is that, if the parties of a contract are not willing to cease the contract through rescission or dissolution and one party is willing and able to continue its' contractual obligations and a third party is willing to take over the place of the initial party of the contract that is no longer willing to participate, at that precise moment there may be a continuation of the contract with the third party through the so called "assignment of contract".

Why would one refer to the intervention of this specific institution and not appeal to novation by change of creditor or debtor, an institution much older and widely accepted by the specialized doctrine? The answer is a very simple on, if we consider that the effect of novation would be in such case. Novation is known as a way of extinguishing an old obligation and replacing it by a new one, which would necessarily include an *aliquid novi*, a new element. If the parties would refer to novation, as a solution in replacing one of the initial parties of the contract, the consequences would be disastrous considering the main effect of this institution – cessation of the initial obligation with all its' accessories and safeguards.

A legitimate question arises, however: is there possible to replace a party in an agreement of will (contract) with a third party? We consider this to be a pertinent question, as long as, a contract is defined as an agreement of will.

According to the provisions of the New civil code draft, Art. 1315 states : "a party may be substituted by a third party in relations arising from a contract only if the benefits were not fully completed, and the other party consents".

The above text raises a further question: does the consent of the assignor to be replaced in the existing contract constitute a parallel contract with the initial one and eventually with the contract that forms between the assignor and the third party that takes over?

If the assignment of contract involves three parallel contracts, the initial one, the contract between the assignor and the assignee and the contract between the assignor and the assigned, then, according to the classic definition of the contract, there are three agreements of will, which answers to the first question: there is no translation of an agreement of will, but a contractual relation at the level of its contents of rights and obligations, and the agreement of will, of the assigned is yet another agreement, a new contract through which transfer is accepted, the transfer of relations of the original contract.

The answer to this question, given by the specialized doctrine[13], is a nuanced one – there is no transfer of agreement of will, as the agreement of will must be reiterated, but a transfer of the *assignor's contractual position.*

[13] Juanita Goicovici, *op. cit.,* p.86

The denomination chosen by the French specialized doctrine, that of "contractual position" allows the analysis of such situations that, unlike an assignment of claim, an assignment of debt, a novation or a classic/traditional delegation that would transfer to the assignee the full rights and obligations, of the party that withdraws, taken as a whole and not as rights and isolated debts, together with safeguards, potestative recognized rights etc.[14]

4. A possible classification of the assignment of contract

Specialized doctrine that analyzed this institution, classified assignment of contract in *legal* and *conventional* based of its source, which may be an express provision of law, or the understanding of the parties. Current legislation only knows particular applications of this institution, which could be integrated into the legal concept of contract assignment, as is the case of art. 1441 of the Civil Code, related to housing, art. 169 of the Labor Code assignment of optional insurance contracts from the seller to the buyer. Besides these cases, expressly covered by law and integrated by doctrine in the notion of legal assignment of contract, doctrine and jurisprudence validated the legal regime of the conventional contract assignment, reason for which the New Civil Code had to regulate, in the general part of the obligations, this institution. (Section 8, art. 1315-1320).

A part of the French doctrine also underlines the *judicial assignment* of contract, the classic example being that of the assignment offered to certain contracts concluded by a company subject to insolvency proceedings.

There are authors, whom dispute the existence of legal assignment of contract, whereas, in this case, the Court's recognized power to decide the assignment of a contract is, under all, in a specific legal provision.

A provision similar to that existing in French insolvency lay, exists in our Law nr. 85/2006, regarding the insolvency procedure. However, the authority which is empowered in this field is not the judge of the judicial trustee in bankruptcy, but the administrator of the liquidator. Thus, in art. 92 it is stipulated that "the judicial administrator/liquidator may denounce a contract by which the debtor was obliged to perform certain specialized services or other of strictly personal/intimate nature , unless the creditor agrees to benefit from services by a party designated by the judicial administrator/liquidator". This legal provision has been interpreted by the Romanian doctrine as being an assignment of contract.[15] To be noticed that the Romanian law of insolvency, however, grants the contracting party the right to take the decision of the assignment of the contract.

5. Target area of this relatively new institution in Romanian law

As presented in the New civil code draft, the assignment of contract occurs only when "a party may be replaced by a third in relations born out of a contract only if the benefits were not yet fully implemented, and the other party consents".

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[14] S. Valory, *La potestativite dans les relations contractuelles*, Presses Universitaires D Aix Marseille, 1999, p. 347

[15] Ion Deleanu, *Părţile şi terţii. Relativitatea şi opozabilitatea efectelor juridice*, Ed. Rosetti, Bucureşti, 2002, p. 57

According to the above, assignment of contract applies mainly to *contracts with successive execution/completion*, those that are still unfolding and whose effects and benefits have not been totally consumed. It's only natural that this type of contracts, with successive completion, to take first place in the scope of the assignment, as appealing to a simple logical operation one can notive the impossibility to assign a fully executed contract and whose conditions have already been met.

Doctrine also included within the scope of the assignment contracts that are fulfilled *uno ictu whose main effects have not yet been exhausted.*

We find there is a keen interest in the question whether in what regards unilateral contracts there may exist assignment of contract, of claim or of debt, based on the position of the obligor. The practical difference is quite difficult to be made, considering that the New civil code provides both assignment of claim and assumption of debt. Considering the amplitude which assignment of contract implies, including the fact that it comprises the transfer of potestative rights, not only of claim rights, it has been considered that it is possible and preferable the assignment of unilateral contracts.

We consider that the law favors the freedom of assignment, so an assignment will generally be permitted unless there is an express prohibition against assignment in the contract.

An assignment cannot have any effect on the duties of the other party to the contract, nor can it reduce the possibility of the other party receiving full performance of the same quality. Certain kinds of performance, therefore, *cannot* be assigned, because they create a unique relationship between the parties to the contract.

6. Considerations regarding the refusal of the assignor to accept the assignee

New Civil Code provisions subjugate the entire operation of transfer of the contractual position of the assignor to the assignee to the agreement of the obligor.

The question arisen is whether the agreement of the obligor represents a potestative discretionary right, which may be exercised with no limits or external constraints, or is it an non-discretionary right.

We may begin to answer that question from admitting that the right of the obligor belongs indeed to the potestative rights category. Yet, this does not mean that it is by itself a discretionary right.

In French law, discretionary rights are subject to the requirement of good-faith and in what regards the area of censorship of potestative rights to dissolute a contract, the jurisprudence stated that any right might be susceptible of abusive use by its holder.

French specialized doctrine also concluded that the discretionary right is that right of whose application, even if founded on bad-faith, cannot be sanctioned, either because there is no appropriate penalty, or because the law or the judge would consider unnecessary the additional protection implied by censoring the given right.[16]

Following this principle, we notice that the refusal of the obligor to accept the assignee may be and must be, in need, censored by the court, when it implies malicious intent. But this would apply only in what regards contracts where the direct interest is for the monetary element and not for the parties involved.

[16] D. Roets, *Les droits discretionaires*.. apud Juanita Goicovici, *op. cit.,* p. 132

In what regards *intuitu personae* contracts, meaning those that are based upon special qualities of the contractual partner, or feelings of affinity between contractors, things go a different path and we consider that, in principle, there might be a discretionary consent implied, which cannot be censored by court.

But even so, there could be a situation when, we consider, discretionary agreement of consent is not permitted. That would be the situation in which the obligor is the same with the professional, the one party that by the skills it possesses made possible the very existence of the contract.

Doctrine made a distinction between *intuitus personae* subjective-case which is based on a person's emotion and *intuitus personae* objective-case which is based on a professional or technical objective quality of a person. Thus, a contract based on a subjective *intuitus personae* is *per se* incesibil, as the feelings, affinities or human qualities that bond the parties of the contract make impossible the reiteration between the obligor and the assignee.

In the case of a contract assignment, based on an objective *intuitus personae* contract, the right of the obligor to approve to the assignee, although potestative, is not discretionary. Assertion might be explained by the fact that reiteration of professional qualities presented by the assignor in the person of another specialist of same field of expertise is possible, but the assessment of competence of the latter is, in need, at Court's discretion.[17]

Legal value of the obligor consent

Concerning the nature of the given consent of the obligor, the French specialized doctrine asked if the consent would be constituent or effectual, translative or constitutive of the assignment of contract, issue that divided scholars opinions: some believed that replacing a party with a third would represent a translative operation of contractual relation, by maintaining the object and the cause of the initial contract[18], and, on a separate belief, the consent of the obligor would necessarily mean forming a new contract, stating that any new agreement of will is a *mutuus dissensus* in relation to the initial contract and that by creating a new convention/agreement similar to the initial one, a "clone" in terms of the object, but necessarily a different one, in relation to the initial contract.[19]

However we tend to rally to the first thesis underlined above, meaning that the assignment of contract represents an operation involving a translation of contract, especially since the notion of assignment of contract contains the idea of transfer, transfer of the contract, transfer of the contractual position in the supreme goal of survival of the original contract.

Regarding the second thesis, although at first sight one would be tempted to agree with the idea that, at least according to the classical definition of the contract as an agreement of will(s), the consent of the obligor would have the value of a new contract, the logical and teleological interpretation line is suddenly interrupted when appealing to the legal fiction which renders the new contract into a "clone" of the old one in what regards the object, but yet a new one, different from the original.

Yet, from this angle, the matters become unnecessarily complicated and can lead to erroneous interpretations; the above statement suggests the fact that the new contract, which has as base ground the agreement of the obligor, would "terminate", through the new consent which is followed by a

[17] Juanita Goicovici, *op. cit.,* p. 132

[18] Most prominent supporter of this theory is L. Aynes.

[19] French doctrines most prominent supporters of this theory were J. Ghestin, M. Billiau, Ch. Jamin, and in the Romanian doctrine Juanita Goicovici, *op. cit.,* p. 119

mutuus dissensus, hence an "annulment" more or less implied, would at the same time create a so-called "clone", a new contract, similar as object to the old one, but yet different as parties.

However we fail to understand the role of the institution of assignment of contract, since the fact that its main effect, represented by the transfer of the contract itself, is not accepted, or, in other words, the transfer of the contractual position of one of the initial party to a third party, which is thus brought inside the original contract; *id est* the original contract remains the same, with no alteration of any kind, but, by the obligor's agreement, one of the initial parties is being substituted by a third, which may exercise all the rights and be responsible of all obligations that arise from the contract.

However, regardless the virtual mechanism used to achieve the assignment of contract, which most probably will be an issue of the future too, the fact is that without the consent of the obligor, the assignment of contract cannot be completed. A normal thing otherwise, considering the scale and effects an assignment of contract presents to the party that still remains bound by the contract.

Yet things are not that clear here either, as the question arises: the obligor's consent represents an element of valididy or effectiveness?

If in a first phase, issues were shaped around the necessity to intervene or not of the obligor, and from May 6th 1997 when the Commercial Chamber of the French Court of Cassation validated the thesis of current expressed consent, or anticipated expressed consent of the obligor, discussion was given a new dimension: what are the links of this consent?

Subjectivist doctrine, starting from this jurisprudence, misleads the consent of the obligor based upon the validity of the assignment of contract, regardless if it is a contract concluded by party consideration or not. However, this required consent for the formation of the convention itself, will lack of translativ effect the assignment of contract, leading eventually to the creation of a new contract between the obligor and the assignee under the same conditions as the first contract. The offer of the assignee to contract with the obligor, expressed in the assignment of contract concluded with the obligor is followed or preceded by the acceptance of the obligor. Whereas the assignor, will be a party to the transaction, and not a *third* party, the formalities relating to inform the latter no longer find applicability.

Asserting autonomy of the assignment of conventional contract, Cristophe Lachièze supports a tripartite agreement of will, without however affecting the translativ character of the operation. In other words, the agreement of will of the obligor, assignee and assignor will cause the formation of a convention whose effect will be the transmission of an existing contract. If at the conclusion of the initial contract the assignee has stated its possible transfer/translation the operation will be valid by virtue of the agreement between the assignee and obligor. As for the liberation of the assignor, unless parties have referred expressly to the contrary, it will be liberated of the obligations resultant of the contract as a result of its overtake by the assignee.

Following the same case-critical line toward the subject, Christian Larroumet developed the theory of effectual consent, stating that while the obligor's consent is not necessary to bring on the assignor as a party in the assigned contractual report, it appears essential for the liberation of the assignee. Thus, depending on the option of the obligor we will distinguish imperfect assignment, when the assignor intervenes in the original contract without liberating the assignee and the perfect assignment which supposes liberation of the assignee by the assignor.

Systematic analysis of French doctrine and jurisprudence proves the absence of an uniform concept regarding the role of consent of the obligor, regarding the operation. The opinions expressed may be grouped into three broad categories.Thus the consent of the obligor regarding the operation has the value of a formative consent, of an authorization or of an effectual consent. We note,

however, that authors who argue the hypothesis of authorizing the assignment of contract dissociate the institution of liberation, which supposes in its turn the consent of the obligor.

7. Conventional assignment of contract as provided in the New Civil Code

The new Civil Code contains explicit provisions regarding the legal status of the assignment of contract, taking over a large part of the regulations of the Italian Civil Code (article 1406-1410 CCI).

Thus, article 1315 paragraph 1 of the new Civil Code defines the assignment of contract by reference to its effects stating that "(1) a party may be replaced by a third party in reports resulted from a contract only if the benefits have not yet been fully implemented, and the other party consents to it". In relation to the content of the above text, specialized doctrine has shown that the "so called assignment of contract is nothing more than the replacement of a party (initial or original) of the "assigned" contract, with another party" which represents a contractual technique and not a civil autonomous institution. Going even further on the same path, it has been questioned the translativ character of this operation.[20]

As designed, within the framework of the new code, the assignment of contract appears as a single operation, producing an indivisible effect. However, in order to achieve it, the consent of the obligor is a must. There is no direct clue, however, to what the valences of this consent are.

Starting from a similar wording, in the Italian doctrine we encounter the same controversy related to the role of the consent in the economy of the assignment of contract. Jurisprudence, and major part of the Italian authors tend to embrace the thesis according to which the consent of the obligor represents a constituent element of the assignment of the contract and, therefore, we are in the presence of a convention with multilateral translativ effect.[21]

Consent to the assignment will be possible to be expressed anticipated, but the effects of the operation towards the obligor will only occur when substitution is notified or, where appropriate, accepted. (Article 1317, paragraph 1 of the new Civil Code).

In what regards the form of the assignment of contract and acceptance, article 1316 of the new Civil Code refers to the form required by law for the validity of the assigned contract.

Regarding the effects towards the assignor, the principle established by the new Civil Code is that of his release from the terms of contract, yet, it validates as an exception as when the contractor expressly demands the opposite, the so-called imperfect assignment of contract. If the obligor consents freely to the assignment, the assignor is without doubt freed from his obligations towards the assigned co-contractor at the moment when the substitution produces effects towards the latter. By contrast, when the obligor co-contractor expressly states that he does not intend to free the assignor of contractual obligations, the latter is held as an alternative debtor for the eventuality of insolvency of the assignee. We recall that in this latter theory there isn't an actual assignment since there is no transfer/translation.

In case that the obligor contractor did not consent to the liberation of the assignor from contractual obligations, the first can hold the latter responsible when the assignor fails to accomplish

[20] Paul Vasilescu, *Cesiunea de contract - între nominalism şi realism juridic***,** in „Cesiunea de contract. Repere pentru o teorie a formării progresive a contractelor" - coord. P. Vasilescu, Ed. Sfera Juridică, Cluj-Napoca 2007, p.34

[21] C. M. Bianca, G. Patti, S. Patti, *Lessico di diritto civile***,** Ed. Giuffrè, Milano 1991, p. 116; *Codice civile spiegato articolo per articolo***,** Edizioni Giridiche Simone cit. de I. Popa, *op. cit***.,** p. 122;

the contractual obligations. In this case, article 1318 of the new Civil Code draft, states the obligation of the obligor contractor to notify the assignor the failure to comply with the obligations of the contract of the assignor, no longer then 15 days from the date of non-execution. The question that arises is whether this term is considered a prescription term or a revocation term, and if it's subject to suspension or interruption. We consider that the legal nature of this term should be that of a revocation term.

Just as the assignment of claim and debt overtaking, in the case of the assignment of contract, the obligor contractor will be able to confront the assignee all legal exceptions that would result from the contract. As an exception to that, vices of consent are excluded, as well as any defenses or exceptions arising in its relations with the assignee, subject to maintaining this right when agreeing to the assignment.

Finally, it is established a system of guarantees that the assignee is held to. Firstly there is a legal guarantee consisting of the assignee obligation to guarantee the validity of the contract. Then, the assignee may conventionally assume the guarantee of the contract execution, situation in which it will respond as a fideiusor for the obligations of the obligor contractor – Art.1320.

8. The effects of assignment of contract

The operation of assignment of contract represents an agreement to the formation of which participate the three free willed consents, from which emerges its tripartite nature: that of the assignor, of the assignee and of the obligor, the latter giving its "agreement" consent, as it was called by doctrine, regarding the assignor's party.

We also consider that the consent given by the obligor creates the assignment, not effectual, i.e. the validity of the contract of assignment is held by the agreement consent of the obligor, and not the effectiveness or performance of the contract.

As already said, the consent of the obligor can only be co-substantially to the transmission, not just a shutter of effects between the obligor and the assignee.

The assignment of contract implies three general effects : a. the legal transfer of the contractual relationship between the assignee and the assignor is realized – at which moment the so-called "substitution of contractual position" of the assignee intervenes; b. the assignee is definitively and completely freed from the initial contractual report, except for the case when the obligor does not consent to that; c. the assigned contract continues, with the assignor in the place of the assignee, with no substantial modification brought to the object and causes of the contract, and in principle, without having the effects of retroactivity.

As regards the **effects between the assignor and the assignee**, considering that the consent of the obligor is an imaginative condition of validity, we believe that in its absence, the mere substitution consent between the assignor and the assignee has no legal effect and the assignment of contract does not exist.

In the event that one of the parties, the assignor or the assignee binds itself to the other, through an express clause, to obtain the consent of the obligor, being bind, depending on the circumstances, to an obligation of means or an obligation of result, and it fails to do so, it will be bind to pay damages, on the provisions of common law.

If the consent of the obligor has been obtained, before or after the agreement between the assignor and the assignee, then the assignment of that specific contract is valid. It is the moment that

produces the most important legal effect of the assignment: operates the legal translation of the contractual report between the assignor and the assignee, performing the so-called "substitution of contractual position" of the assignor.

As regards the moment at which the assignment of contract is born, provisions of the new Civil Code delineate two situations: 1. If one party consented in advance that the other party may substitute itself by a third party in the contractual relation, the assignment will produce effects to that party from the moment the obligor is notified of its existence, or at the moment the latter consents to it; 2. In the case that there is an agreement only between the assignor and the assignee, the assignment is born only at the moment the obligor co-contractor consents to it.

Another effect that occurs between assignor and assignee is the legal obligation of guarantee to which the assignor is bind towards the assignee, regarding the validity of the contract. If the assignor expressly binds itself to guarantee not only validity, but also execution of the contract, the latter will also have the quality of a fidejussor for the obligations of the obligor co-contractor.

Between the assignee and the obligor, appear as a first effect of the assignment, the obligations and rights given by the substitution of the assignor in the initial contract. In other words, the assignee becomes a party in the assigned contract, having all rights and being bound to execute all obligations that are born of that contract.

In this sense, Article 1319 provides expressly that "the obligor contractor may oppose the assignee all exceptions that might be a result of the contract".

Even so, it was expressly stipulated the rule according to which the obligor cannot invoke towards the assignee vices of consent or other defenses or exceptions born from its reports with the assignee. An exception to this latter rule is the supposed express clause, previous to the assignment of the contract and which would condition its consent towards this right.

Regarding the effects between the assignor and the obligor, in principle, these end at the moment of the transfer of contractual position of the assignor towards the assignee. At this point the assignment of the contract is perfect.

Yet, the legal text, namely Article 1318, although institutes the rule according to which the assignor is released of its obligations towards the obligor contractor, starting with the moment at which the substitution produces its effects upon the latter, it also states the exception to this rule, situation that might be categorized as an imperfect assignment of contract.

Thus, if the obligor contractor stated that it does not want to free the assignor, means that it has expressly reserved the right to backfire the latter if/when the assignee fails to perform its obligations. The assignor, being thus bound to the contract, would be held responsible towards the obligor on the grounds of contractual liability. But to be able to hold the assignor responsible, the obligor has a legal term of 15 days from the date of the event to notify the assignor of the assignee's non-execution of contractual obligations.

The doctrine has raised the problem of retroactivity of the effects of the assignment of contract. The answer to that problem was no, arguing that the assignment does not operate, just as if the contract would have been originally made between the assignee and the obligor. The first receives the status of sudden party and replaces, as a rule, the assignor, only in obligations resultant after the assignment.[22]

[22] Juanita Goicovici, *op. cit.* , p. 142

9. The limits of the contract assignment to other institutions that resemble

9.1 Assignment of contract and assignment of debt

Most authors entered the assignment of contract into the category of translative operations with the assignment of debt. Thus, the assignment of contract, as well as the assignment of debt, allows a particular succession, and does not create new rights between assigned and the assignee.

However, unlike the assignment of debt, the assignment of contract not only conveys to the third party a right or obligation, but especially confers party status, with all rights attached to them. In other words, assignment of contract is not the aim both the right and duty to provide contractual agreement as to ensure continuity, transfer of operating a contractual position. Assignment of debt, as well as the assignment of contract, transfers to the assignee a pre-existing legal relationship.

Even if we were inclined to believe that between the two of them, they are only quantitative differences, meaning that the assignment of debt forward only the active side of the report obligation and the assignment of contract covers both active and passive side of it, unitary conception of the latter operation proves otherwise.

Assignment of contract is not only the transmission of rights and obligations arising therefrom, but the very quality side with all the powers conferred[23].

9.2 Assignment of contract and novation by changing the creditor

Novation by changing the creditor occurs when the debtor is released from his old lender and assumes a new obligation to another creditor shown at first.The doctrine would say that such an operation would evoke pretty easy the assignment of debt.

As the assignment of contract, the subjective novation is a tripartite agreement, the latter stressing appearance that the debtor's consent is essential to extinguish the original debt and especially to engage the new lender just as willingness to release the old debtor's creditors is essential.

Novation, unlike the assignment of contract those claims not operate transmission, but the extinction of the old one and creating a new one. Therefore, novation necessarily imply the disappearance of original obligation and not maintaining it with all the features that they are linked. From this aspect has been pointed that the assignment of the contract change the holder in a legal relationship which remains identical while novation made to create a new legal relationship for the benefit of a new owner.

9.3 A parallel concept to assignment is ***delegation*****,** which occurs when one party transfers his *duties or liabilities* under a contract to another. A delegation and an assignment can be accomplished at the same time, although a non-assignment clause also bars delegation.

10. The new Romanian Civil Code was not concerned about the possibility or impossibility of the **successive assignments** and did not consider what would be the solution for a problem that would arise in practice, maybe because the legislature has been more cautious and conditioned the assignment of contract by the obligor s agreement.

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[23] Laura Retegan, *Cesiunea de creanţă în raport de alte operaţiuni triunghiulare,* in Studia Universitatis Babeş-Bolyai, Cluj-Napoca

American law, however, has regulated the institution of assignment of contract as a free and valid one only by the consent the assignor and assignee, without seeking the approval of the obligor, as long as it is a contract for which assignment is permitted.

The common law favors the freedom of assignment, so an assignment will generally be permitted unless there is an express prohibition against assignment in the contract. Where assignment is thus permitted, the assignor need not consult the other party to the contract. An assignment cannot have any effect on the duties of the other party to the contract, nor can it reduce the possibility of the other party receiving full performance of the same quality. For assignment to be effective, it must occur in the present. No specific language is required to make such an assignment, but the assignor must make some clear statement of intent to assign clearly identified contractual rights to the assignee. A promise to assign in the future has no legal effect. Although this prevents a party from assigning the benefits of a contract that has not yet been made, a court of equity may enforce such an assignment where an established economic relationship between the assignor and the assignee raised an expectation that the assignee would indeed form the appropriate contract in the future.

A contract may contain a non-assignment clause, which prohibits the assignment of specific rights, or of the entire contract, to another. However, such a clause does not necessarily destroy the power of either party to make an assignment. Instead, it merely gives the other party the ability to sue for breach of contract if such an assignment is made. However, an assignment of a contract containing such a clause will be ineffective if the assignee *knows* of the non-assignment clause, or if the non-assignment clause specifies that "all assignments are void".

Two other techniques to prevent the assignment of contracts are rescission *clauses* or clauses creating a condition subsequent. The former would give the other party to the contract the power to rescind the contract if an assignment is made; the latter would rescind the contract automatically in such circumstances.

Also it took into consideration the solutions if there is a succession of transfers of contract made by the same assignor.

Occasionally, an unscrupulous assignor will assign exactly the same rights to multiple parties (usually for some consideration). In that case, the rights of the assignee depend on the revocability of the assignment, and on the timing of the assignments relative to certain other actions.

In a quirk left over from the common law, if the assignment was donative, the *last assignee* is the true owner of the rights. However, if the assignment was for consideration, the *first assignee* to actually *collect against the assigned contract* is the true owner of the rights. Under the modern *American rule*, now followed in most U.S. jurisdictions, the first assignor with equity (i.e. the first to have paid for the assignment) will have the strongest claim, while remaining assignees may have other remedies. In some countries, the rights of the respective assignees are determined by the old common law rule in Dearle v Hall.

Earlier donative assignees for whom the assignment was revocable (because it had not been made irrevocable by any of the means listed above) have no cause of action whatsoever.

Earlier donative assignees for whom the assignment was made irrevocable can bring an action for the tort of conversion, because the assignment was technically their property when it was given to a later assignee.

Later assignees for consideration have a cause of action for breaches of the implied warranty discussed above.

Conclusions

Assignment of contract was a controversial institution in the matter of legal recognition, not only in the Romanian civil law, but in other European private law systems.

The new Civil Code no longer avoids this institution, which was already a fact of civil reality, and more of the commercial reality, and specifically embraces in the art. 1315-1320 the institution designated by the term contract assignment. So it came that legislation, jurisprudence and doctrine recognize without hypocrisy, the vitality of the assignment may it be of debt or contract.

Specialized doctrine that analyzed this institution, classified assignment of contract in *legal* and *conventional* based of its source, which may be an express provision of law, or the understanding of the parties.

The operation of assignment of contract represents an agreement to the formation of which participate the three free willed consents, from which emerges its tripartite nature: that of the assignor, of the assignee and of the obligor, the latter giving its "agreement" consent, as it was called by doctrine, regarding the assignor's party.

We also consider that the consent given by the obligor creates the assignment, not effectual, i.e. the validity of the contract of assignment is held by the agreement consent of the obligor, and not the effectiveness or performance of the contract.

The assignment of the contract, new institution introduced by the Romanian Code, raises special analysis, since the solution that has elected legislature was to give the obligor that last word, linking to its approval, the validity of the entire process.

As noted, American law, where the assignment of contract is much older and is more commonly used, chose another option, that of seeing the transfer of contract as a matter strictly involving the obligee/assignor and the assignee, the obligor being able to resort to other means of defense if the new contractor, assignee, and will not meet its obligations. Ease with which this institution is treated, by the way the conditions of validity makes it handy to be contractors, but without harming the party remaining in the contract.

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COLECTIVE DOMINANCE: „GRAY AREA" OF ANTICOMPETITIVE PRACTICES

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Abstract

Anticompetitive behaviour may be more pronounced in the context of economic crisis. The desire to maintain itself on a particular market, at a higher level of profitability or at a reasonable level at least, can lead the undertakings, in economic crisis conditions, to adopt an anticompetitive behaviour more easily. This may result from the existence of anticompetitive agreements and concerted practices, as well as from the tendency to abuse its dominant position which the undertaking has on a certain market. Among these "classic" behaviours, certain behaviours "at risk" can be identified. We refer to collective dominance in a particular market. The analysis necessarily entails the conceptual delimitation of the collective dominance notion. For this purpose, the relevant legal provisions will be identified in the Romanian and EU law, as well as the decisions of the European Court of Justice in this matter. Clear differentiation should be made between anticompetitive agreements, on the one hand, and abuse of dominant position, on the other hand and the analysis of the position which collective dominance occupies in anticompetitive practices is required. In this context, particular regard will be on the fuel market in Romania: establishing the fuel price at the pump - possible collective dominance?

Keywords*: collective dominance, anticompetitive practices, anticompetitive agreements, abuse of dominant position, relevant market*

1. Introduction

The purpose of this paper is the analysis of collective dominance, as a special method of anticompetitive behaviour, which represents a real "gray area" between anticompetitive practices on the one hand, and abuse of dominant position, on the other hand.

The study of this anticompetitive behaviour is important for the following reasons: it is a concept that does not have a distinct legislative regulation in the area of anticompetitive behaviour, neither in the European Union legislation nor the Romanian legislation; collective dominance may result from an agreement of several undertakings specifically within anticompetitive practice, or a specific form of abuse of dominant position, exercised by several undertakings; last but not least, it must be determined whether the collective dominance is possible in oligopolistic markets; it is necessary for the distinction between the concepts of „anticompetitive agreement" and „abuse of dominant position" to be established, and to examine which of the forms can fall under the collective dominance; there are relatively few decisions in the jurisprudence of the Court of Justice of the European Union dealing with this problem; as a special regard, on the Romanian market for fuel is

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likely that the determination of the final price of fuel at the pump, to represent the result of a collective dominance.

In this regard, in order to determine whether collective dominance may or may not be an anticompetitive practice, it is necessary to delineate the conceptual notion, implying the following: identify the main legal provisions in this area, on national and European level; clear differentiation between anticompetitive agreements and abuse of dominant position; description of jurisprudence solutions of the European Court of Justice from which it results the criteria to be considered for identifying a position of collective dominance as anticompetitive behaviour.

In comparison with the already existent specialized literature existing on competition law, this study aims to explore the concept of "collective dominance" to determine whether it represents an anticompetitive agreement or an abuse of dominant position, in which the analyzed notion of conceptual evolution will be presented. Furthermore, the fuel market in Romania is analyzed, in which the setting of the final price at the pump may represent a possible collective dominance.

2. Content

Section I. General aspects

Competition policy has always been a particular concern throughout the European Union, with the purpose to establish a system ensuring that, in the single market, competition is not distorted. The same purpose is expressly stated by the Romanian legislature, through the provisions of art. 1 of Law no. 21/1996[1]: protection, maintain and stimulate competition and a normal competitive environment, in order to promote consumer interests.

To achieve the stated purpose, the concern was to establish means to combat anticompetitive practices, which, as reflected in the legislation in force, are presented in the following forms: anticompetitive agreements between undertakings, abuse of dominant position and prohibited economic concentration.

Anticompetitive practices may be more pronounced during the current economic crisis which is manifested globally. In this context, in the desire to maintain the undertaking on the market, the anticompetitive practices can embrace various forms, which make it difficult to classify the practice in classical patterns. Therefore, certain practices represent a real "gray area" between anticompetitive practices and abuse of dominant position: we take into consideration the collective dominance.

To delimit this notion conceptually, in essence, two "classical" anticompetitive practices are necessary to be presented: anticompetitive agreements between undertakings, abuse of dominant position of one or more undertakings.

Section II. Anticompetitive agreements.

Essential legal provisions regarding anticompetitive agreements are found in:

- article 101 of Treaty on the Functioning of the European Union (former article 81 TFE): "Are prohibited as incompatible with the common market, all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between

[1] Republished in the Official Gazette no. 742 of 16.08.2005, as amended by GEO no. 75/2010 published in the Official Gazette no. 459 of 06.07.2010

Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market".

- article 5 of Competition Law no. 21/1996: "Any agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition on the Romanian market or a part thereof, are prohibited."

It is easy to notice from the relevant legal text that the Romanian legislation is in line with EU legislation, defining the notion of anticompetitive agreement through the same concepts. To fully understand the concept of anticompetitive agreement we consider that the presentation of the main concepts which determines their meaning, is required, particularly in relation to decisions of the Court of Justice of the European Union[2].

In this purpose, we distinguish the following concepts:

a) *"Agreements / arrangements and concerted practices"*

An arrangement is an agreement between two or more undertakings by which they oblige to adopt a certain type of practice, through which the rules and free market competition effects, are circumvented. It is irrelevant whether the agreements are *horizontal* (between undertakings in the same stage of production, processing and marketing) or *vertical* (undertakings in different stages of production and marketing process, not competing with each other): both are prohibited. It is also irrelevant the *form* in which the arrangement is set: it can be not only written but also verbal. The Court state that unwritten agreements are prohibited, such as commitment to honour (gentlemen's' agreement)[3], as well as verbal agreements, without binding effect[4]. Consequently, the analysis is targeting the concept of any agreement of undertakings, concluded in writing or verbally, although it may or may not be executed according to the law and even if the expression of the will of the parties does not constitute a valid and binding agreement under national law[5].

Concerted practice is at a lower level compared to agreements and represents a process of coordination at the trade level strategies between different undertakings, but which is not materialize by the concluding of an agreement. A concerted practice is an anticompetitive parallel behaviour of some undertakings, which fall under prohibition when such practice is the result of "concertize" of shares of those undertakings. The difference between an agreement and concerted practice is important in terms of conditions for the existence of a prohibition and evidence of breach of competition rules. In case of anticompetitive agreement is sufficiently for a breach of competition rules to exists in order to consider that the provisions of the agreement shows the intention to distort competition; it is really irrelevant whether or not competition was distorted[6]. In case of concerted practice, concentration as such is not prohibited; market behaviour, the practice that follows the concentration, is the one that falls under the prohibition when it affects trade and distort competition.

b) *"Decisions by associations of undertakings"*

The decisions represents any decisions taken by undertakings, in a broad sense, including the articles of incorporation of a trade association and its internal rules, decisions taken in accordance

[2] *Brevitas causa*, in those that will follow it will be referred as ECJ or the Court

[3] Joined cases 41, 44 and 49/69*, ACC Chemiefarma vs. Commission, section 13.* This case, like the other to which we refer throughout this paperwork are published on the website of the European Union Court of Justice, *www.curia.eu.int*

[4] T – 7/89, *Hercules NV vs. Commission*

[5] Case C-277/87, *Sandoz Prodotti Farmaceutici SpA vs. Commission*

[6] Case 56/65, *Societe Technique Miniere vs. Maschinenbau Ulm*

with those rules, which are mandatory for association members, including recommendations, for example, setting "price target" by an association[7].

The term "association" is taken into consideration in a broad sense: not limited to any particular form of association, and includes all undertakings organizations, with or without legal personality, including non-profit associations.

c) *"Undertakings"*

By the meaning of law and jurisprudence in competition law, the term of undertaking has a broad scope and includes: company incorporated under civil or commercial law; legal entities, which carries economic activity; entities without legal personality, but with some kind of recognized legal status[8], so that they may carry out economic activities[9]; individuals, state undertakings and even the Member States, whenever economic and commercial activities are developed[10].

d) *"which have as object or effect"*

If the object of an agreement between undertakings is the restricting of competition, it is irrelevant if a distortion of competition has been indeed produced. In this case, what matters is the intention, as expressed in the agreement. Intention to distort can result from all or only some of the agreement clauses; only those clauses indicating that the agreement object is to prevent competition will be covered by the prohibition and will be cancelled, and not necessarily the entire agreement.

If from the content of the agreement does not obvious result the intention of the parties to distort competition, the effects of the application of the agreement must be taken into consideration. Evidence of breach of competition rules is resulting from factors demonstrating that competition was distorted in reality or, at least, a danger of distortion has existed[11].

e) *"prevention, limitation or distortion of competition"*

The competition exists when the undertakings in the market act independently one of each other and have freedom of choice. ECJ stated that an undistorted competition can be guaranteed only if equal opportunities for various undertakings are ensured[12].

The most typical form of competition existence is the one where the consumer has the possibility to choose freely. When this freedom is prevented or limited in any way, it distorts competition. The Court has developed and nuanced the meaning of "distortion of competition", indicating that in order to be prohibited, an agreement between undertakings must distort competition to an appreciable extent"[13].

Section III. Abuse of dominant position.

Essential legal rules on abuse of dominant position are found in:

- article 102 of the Treaty on the Functioning of the European Union (former article 82 TFE) "Any abuse by one or more undertakings of a dominant position within the common market or in a

[7] Case 8/72, *Cementenhandelaren vs. Commission*

[8] It will be the case, for example, of the "partnership".

[9] Case C-244/94*, Societe D'Assurence*: a non-profit organization that manages an old-age insurance scheme in accordance with the rules set by authorities is an undertaking within the meaning of the Treaty on the Functioning of the European Union.

[10] Case C-35/96, Commission vs. Italy

[11] Case 65/56, *Societe Technique Miniere*

[12] Case C-202/88, *France vs. Commission*

[13] Case 65/56, *Societe Technique Miniere*

substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States".

- article 6 of Law no. 21/1996: "The abuse by one or more undertakings of a dominant position on the Romanian market or in a substantial part of it, is prohibited"

When analyzing the concept of abuse of dominant position we distinguish between the following concepts: a) the market/ relevant market; b) dominant position; c) abuse of dominant position.

a) *"The market"* is a term with pronounced economic resonances; synthetic, the market is the place where supply meets demand. In the context of competition law, *"the market"* means *"relevant market"*.

EU Court of Justice stated in Continental Can case[14] that the analysis of the position of an undertaking first imply the delimitation of the relevant market and then assess the position (possibly dominant) that the undertaking has in that market.

The relevant market is the *market of product/service* in terms of demand and supply, and then superimposed over the *geographic market*.

Market of product/service, according to the definition given by the Competition Council[15] consists of all products/services which are considered as interchangeable or substitutable by reason of their characteristics, price and use of it. These products must be sufficiently similar so that consumers may take it into consideration when they decide to purchase. The Competition Council took over the definitions which the Court gave to the concept in case decisions.

Therefore, in Hoffmann-La Roche case[16], the Court stated that the concept of relevant market means that an effective competition between products part of it may exists and this implies the existence of a sufficient degree of substitutability between all products in the same market, as long as a certain type of use is pursued.

To determine the specific relevant market is also necessary to superimpose the geographic area in which the conditions are relatively constant. If in the case of market product the keyword was "substitutability", in case of *geographic market* the essential element is represented by the homogeneity. In this reason, the European Commission stated[17] that the relevant geographic market covers the area in which the targeted undertakings are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas by the fact that in this areas conditions of competition are appreciably different. The definition has been took over by the Commission from ECJ, who explained the concept in solving the United Brands case. Similarly, the Romanian Competition Council retain[18] that the relevant geographic market covers the area in which economic agents involved in the delivery of products included in the product market are localized, area in which the conditions of competition are sufficiently homogeneous and which can be differentiated in

[14] Case C- 6/72, solved at 21.02.1973

[15] Order no. 388 of August 5, 2010 for the implementation of Guidelines on relevant market definition, published in Official Gazette no. 553 of 05.08.2010.

[16] Case C-85/76, Decision of 13.02.1979

[17] In *The European Commission notice on relevant market definition for the application of Community Competition law*

[18] Order no. 388 of August 5, 2010 for the implementation of the Guidelines on relevant market definition, published in Official Gazette no. 553 of 05.08.2010

neighbouring geographical areas, due, in particular to substantially different conditions of competition. Similarly, the concept of geographic market refers also to services.

b) *Dominant position*

In the United Brands[19] case, ECJ stated that dominance position is a position of economic strength of an undertaking which enables it to prevent the maintenance of effective competition in the relevant market, giving them the opportunity to behave in an appreciable extent independently of its competitors, customers and ultimately to consumers. The definition was then taken over by the Court in Hoffman-Laroche[20] case.

From the definition developed by the Court results a keyword: dominant position is a position of *strength*, of *power*. A clarification appears as necessary: it is not required, in order to be considered in dominant position, for an undertaking to be in a situation of monopoly. The monopoly is a narrower concept, and the intention of competition law is to protect free competition from harmful actions of an undertaking located in a position of strength, regardless of whether on the relevant market a minimal competition exists or not. According to ECJ, in Hoffmann-La Roche case, "such a position does not preclude some competition, (as in case of monopoly or a quasimonopoly), but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it, so long as such behaviour does not operate to its detriment."

How do we determine whether an undertaking is in dominant position on the relevant market? As in the case of the process of delimitation of the relevant market, there is no single absolute criterion to lead us inevitably to the correct solution. However, the first element to be taken into consideration when analyzing an undertaking position on a market is the market share. In this respect, ECJ stated in Hoffmann-La Roche case that the existence of a dominant position can result from several factors which, regarded separately, are not necessarily decisive, but between these factors, the existence of a very large market share is very important.

Romanian law (article 6 of Law no. 21/1996) presumes, until proven otherwise, that one or more undertakings are not in dominant position, where the shares or cumulative share on the relevant market, recorded in the period under analysis, are not exceeding 40%. From the interpretation *per a contrario*, results that the undertaking has a dominant position on the relevant market if its market share is above 40%.

In addition to the undertaking market share, which in some cases can lead to one conclusion, there are other criteria taken into consideration in determining an undertaking position in the market.

We are talking about market share of competitors, their attitude, compared with the attitude of the investigated undertaking, attitude seen for a longer period of time so it can be determined if competitors are able to establish their behaviour in an autonomous manner; also, evidence can be provided by the existence of a strong distribution network of the investigated undertaking, its technological and financial strength, global dimension. Competition authority will investigate the barriers (in fact and in law) which would have to beat potential competitors to enter the relevant market.

Therefore, to conclude, we say that it is considered to be in a dominant position the undertaking which force it to act independently of the environment in which it manifests itself.

[19] Case C-27/76

[20] See above

c) Abuse of dominant position

The goal of every undertaking with economic character, since its foundation, is the developing and obtaining of profit, in order to have a significant market share on the acting market. Once reached this position, often tend to maximize profits by no fair means, but through abusive, abnormal anticompetitive practices. Such behaviour has the effect of distorting the normal conditions of competition, which is likely to cause injury to intermediate and final consumers.

For the protection of competition article 102 of TFEU and article 6 of Law no. 21/1996 pulled out of licit area the *abuse of dominant position*. The dominant position is not prohibited by itself, but only abuse of such position is prohibited and sanctioned.

The concept of abuse of dominant position has been defined by ECJ in a case solution (Hoffmann-La Roche[21]) as "objective concept, related to the behaviour of an undertaking in a dominant position is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which in condition of normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition".

Section IV. Collective dominance

As previously stated, if the abuse of dominant position is committed by a single undertaking, this behaviour can easily fall under the provisions of art. 6 of Law no. 21/1996 or, on the European Union level, in the provisions of art. 102 of TFEU.

The situation is not so easy if a collective dominance of several undertakings is observed. In this regard, it should be mentioned that both art. 102 TFEU and art. 6 of Law no. 21/1996 provide that abuse of dominant position is achieved by *one or more undertakings.*

The situation, in which the collective dominance of several undertakings is resulting from the existence of anticompetitive agreements between them, cannot be excluded.

In these circumstances, because the collective dominance is not expressly regulated as such, and in the jurisprudence of ECJ a few decisions on this matter are identified, the existence of some difficulties in determining and sanctioning of this anticompetitive behaviour, is observed:

a) Collective dominance can fall under the concept of anticompetitive agreement or represents an abuse of dominant position, jointly exercised by several undertakings? In other words, it is necessary to distinguish between anticompetitive practices, in order to determine the applicable legal provision: art. 101 TFEU (respectively art. 5 of Law no. 21/1996, the Romanian law), if we are referring to an anticompetitive agreement or art. 102 TFEU (respectively art. 6 of Law no. 21/1996, the Romanian law), if we refer to an abuse of dominant position.

The distinction is necessary because the main sanctions are different: anticompetitive agreements by nullity, while the abuse of dominant position is sanctioned by a fine. Moreover, in case of anticompetitive agreements, the legislation allows exceptions, which are not applicable in the case of abuse of dominant position.

Usually, as reflected in the relevant legal provisions and the decisions of ECJ, as will appear in the forthcoming, joint dominant position is the result of abuse of dominant position of several

[21] See above

undertakings. Collective dominance does not rule out the fact that it can be the result of anticompetitive agreements between several undertakings. This is because the agreement involves, by definition, a collective and convergent behaviour of the involved undertakings in that agreement, which may then be able to draw a collective dominance in a certain market. Furthermore, collective dominance may be the result of concerted practices (generally to establish the price in parallel manner) which is often the case in oligopoly markets. Establishing similar prices by the oligopolistic represents a common behaviour on a market like this: each undertaking sets the prices taking into account the possible price which will be set by its competitors, so that, ultimately, prices are substantially equal. There is no problem, if such determination of the prices occurs in an unconcerted manner. If the establish of the prices appears as a result of a concerted practice (which necessarily involves proof of connivance of between the undertakings), the prohibition provided in art. 101 TFEU, becomes incident. In these circumstances, if the existence of anticompetitive agreements or concerted practices is proven, as defined above, from which it results a collective dominance of such undertakings, collective dominance will be legally indicted and sanctioned according to art. 101 TFEU, in the Romanian law in accordance with the provisions of art. 5 of Law no. 21/1996.

b) Much more common are the cases in which collective dominance represents a form of abuse of dominant position of several undertakings. In this regard it is highlighted that both art. 102 TFEU and art. 6 of Law no. 21/1996 accept the possibility that the abuse of dominant position is committed by *several undertakings*. It is not specified if these undertakings are required to have certain connections between them or, on the contrary, they can be independent.

In these circumstances, there is a difficulty in determining whether collective dominance exists only if the dominant position is held by undertakings belonging to the same corporate group or collective dominance is possible in the case of independent undertakings, although acting in an oligopolistic market, jointly occupy a dominant position.

In a first stage of its jurisprudence, ECJ has limited the concept of collective dominance to situations where two or more undertakings hold together a dominant position in a market due to structural and economic links between them which makes them act as a single entity. Therefore, in Continental Can case[22], it has been explained that the position of collective dominance is held by undertakings belonging to the same corporate group.

We therefore conclude that, if structural and economic binds exists between undertakings engaged in collective dominance in a market, and the undertakings are linked strong enough in order to adopt the same behaviour on the market, collective dominance exercised by them appears as a particular form abuse of dominant position and will be sanctioned as such.

c) It is not so simple when we can speak about a collective dominance in the case of undertakings also, which, even if they act independently, occupies on a particular market, together, a dominant position. This is the case of oligopolistic market.

An oligopolistic market is characterized by a small number of competitors that have similar market shares, without a considerable differential force in relation to one another. In the conditions of such market, between the competitors behaviour exists a closely relation, the action of one of them being followed by an appropriate response from the others, every change of strategy being made by taking into consideration the likely response of competitors.

[22] Case C-6/72, *Continental Can*

The answer to the question whether the collective dominance in oligopolistic markets is possible, is affirmative, and it results from the interpretation of ECJ jurisprudence which showed some development in the area.

Moreover, in a first stage, ECJ seemed to reject this possibility, highlighting the need of differentiation between unilateral behaviour of a single undertaking with a dominant position and interactive behaviour of several independent businesses that form up an oligopoly[23].

Only in Italian Flat Glass[24] case the concept of collective dominance has been recognized. Even if it annulled the European Commission decision, the decision of Court of First Instance is important because it established the concept of collective dominance. In this case, it has been acknowledged that the abuse of dominant position can be committed not only by a single undertaking but also when the abuse is committed by two or more undertakings which hold together a dominant position in the relevant market. The Commission considered that the collective dominance exists because the undertakings were able to develop a trade policy independent from normal market conditions and had a market presence as a single entity. The Court noted that two or more independent economic entities can be united within a determined market by such economic links that, as a result of this, together hold a dominant position in relation to other undertakings in the same market. It can be observed that the decision mentions only the existence of economic links between undertakings, without explaining if economic links specific to oligopolistic market can be retained.

This assessment has been achieved in Almelo case[25], in which, in the analysis of collective dominance exerted by electricity suppliers in Holland, the Court stated that for a collective dominant position to exists, a link of such nature between the undertakings has to exist, which can allow them to have the same behaviour in the market, not to highlight, as shown in the previous case, that the connections have to be of economic nature.

The fact that two or more undertakings may abuse of their dominant position in a relevant market without economic links existing between them, was highlighted in the case of Compagnie Maritime Belge Transports SA[26]. The Court stated that is enough for the undertaking to be present or to act as a collective entity in the market in relation to competitors, partners and their consumers. Furthermore, the possibility for the collective dominance to exists on oligopolistic market, is revealed, the Court showing that for the determination of abuse of collective position, a series of correlation factors have to be analysed, including economic evaluation and analysis of market structure in question .

The same approach regarding the collective dominance is found in Gencor case[27], where CFI stated that collective dominance concerns oligopoly agreements also, and the existence of structural links between undertakings is not a necessary condition for collective dominance to be applied.

In conclusion, we assert that collective dominance concerns not only the behaviour of undertakings sufficiently linked together by corporate structure, legal arrangements and economic links, but interrelated behaviours of undertakings in oligopolistic markets, and if those undertakings abuse the common dominant position they commit an abuse of dominant position, within the meaning of art. 102 TFEU and in accordance with the Romanian law art. 6 of Law no. 21/1996.

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[23] Case C-85/76, *Hoffman – La Roche*
[24] Cases T-68, 77-78/89, *Societa Italiana Vetro vs. Comisia*
[25] Case C-393/92, *Almelo and others, vs. NV Energiebedrijft Ijsselmij*
[26] Case C-395-396/1996, *Compagnie Maritime Belge Transports SA*
[27] Case T-102/96, *Gencor Ltd vs. Commision*

Section V. Fuel market in Romania

In Romania, in the fuel market, a certain reality has become steady: the price at pump for fuel (gasoline, diesel) is increased by the major competitors in this market at the same time, in about the same percentage, the final price charged to the consumer being established substantially equally by all suppliers.

Latest price rises at the end of 2010 and beginning of 2011 seemed reasonless by objective factors (such as the increase of oil barrel price) and, on the ground of global economic crisis, caused strong dissatisfaction of consumers who have blocked gas stations for hours, buying, as protest, a low amount of fuel with small value coins.

Competition Council, the Romanian national authority in competition area has opened an investigation into the fuel market in Romania, since 2005, an investigation which was not completed even to this date.

According to the National Institute of Statistics of Romania, in January 2011, fuel prices increased by 2.2% compared to December 2010[28]. Compared with the maximum peak recorded in mid 2008 when a barrel of oil has reached a maximum "historic" level (over $ 140) in December 2010 the price at pump for gasoline in Romania was 18% higher, this percentage placing our country on the second place in Europe after Greece, while the EU average price decreased by 4% during the same period, as it results from a study behavioured by Eurostat. From the 32 European countries taken into consideration, in 8 countries in December 2010 the price was higher than in June 2008 and in 24 countries the price was lower (it has been taken into consideration the evolution of price in local currency, with all taxes included)[29]. Therefore, discontents are justified by the reality that on European level, except the Greeks, the Romanians suffered in the past two and a half years the biggest increases in fuel price.

On the Romanian market of fuel there are a few major competitors with the largest share of the relevant market: Petrom, Rompetrol, Lukoil, MOL and OMV. In the public statements of these companies it is consistently mentioned that the pump price is determined in a transparent manner. In essence, it is asserted that the price consists of about 50% state tax, 40% depends on the quotation of the oil barrel and the remaining 10% represents the cost of transportation and storage. None of the companies disclose the specific method of calculating the price of fuel at the pump.

Under existing conditions where the practical way of determining the price is not transparent, on the fuel market in Romania there are few competitors, acting on a specific oligopolistic market, and price growth is operated at the same time and about the same rate, the question which is rising is whether the determination of fuel price at the pump represents or not an anticompetitive behaviour.

Difficulties in analyzing this problem are resulting from the following: so far the existence of anticompetitive practices between competitors involved has not been proven; competitors are not part of the same corporate group, so it is difficult to establish an abuse of dominant position in the conventional sense of this concept; the competitors operate in a oligopolistic market - the concept of collective dominance applies in this case also?

a) Possible anticompetitive practice.

[28] National Institute of Statistics of Romania, *www.insse.ro*

[29] Eurostat is the official Institute of Statistics of the European Union. Information is taken from the official website, *epp.eurostat.ec.europa.eu*

Although the fuel market in Romania and the way in which the final price for fuel is determined at the pump has been the subject of an investigation opened by the Competition Council since 2005, so far no decision has been taken.

According to art. 5 letter a) of Law no. 21/1996, any agreement between undertakings and any concerted practice which have as their object or effect the prevention, restriction or distortion of competition on the Romanian market or a part thereof, in particular those which directly or indirectly establish the prices for purchase or selling or any other trading conditions, is prohibited.

Therefore, this would constitute a prohibited anticompetitive practice if the method of establishing fuel prices at the pump would be the result of agreements or concerted practices (in the sense defined above) between companies operating in the market. With such anticompetitive practice failed to be proven so far it cannot be concluded that a violation of art. 5 of Law no. 21/1996 exists.

b) Possible collective domination.

As described above, the concept of collective dominance has evolved over time, its scope includes not only the behaviour of the undertaking sufficiently linked together by corporate structure, legal arrangements or economic links, but interrelated behaviours of undertakings in oligopolistic markets .

Therefore, it is theoretically possible that in an oligopolistic market, such as the fuel market, in which the principal competitors act, an abuse of collective dominance to be committed.

To determine an abuse derived from a collective dominance, we have to examine the following aspects:

i. Determining the relevant market

The relevant market is represented by the product market, in terms of demand and supply, superimposed over the geographic market.

The product market, according to the definition given by the Competition Council[30] consists of all products / services which are regarded as interchangeable or substitutable by reason of their characteristics, price and use. These products must be similar enough so that consumers can take it into consideration when making a purchasing decision.

From the perspective of demand, substitutability is assessed by considering an abstract consumer – to what extend this abstract, generic consumer, can redirect to another product in order to achieve the same purpose, if the conditions causing him to prefer a particular product are changing? In Continental Can case, the Court took into consideration the criteria of reasonable substitutability without great difficulty, between products in order to achieve the same purpose. In the case of fuel one cannot retain a reasonable substitutability, because the fuel used in Romania is the „traditional" one (gasoline, diesel) „classic" vehicles being used. On the Romanian market we cannot talk about an authentic demand of alternative products, not being able to retain the existence on a market of electric and hybrid vehicles. In conclusion, it is clear that from the perspective of demand, i.e. from the consumer point of view, related to the tested product (fuel) there is no substitutability, not even reasonable, since the consumer cannot redirect himself to another product.

From perspective of supply, the substitutability results from the existence of products which companies can easily, and economically acceptable produce, by increasing their production capacity or by reconversion of production capacity, these products can become, in a reasonable period of time, substitute for products already included in the relevant product market. Substitutability is not at a

[30] Order no. 388 of August 5, 2010 for the implementation of the Guidelines on relevant market definition, published in Official Gazette no. 553 of 05.08.2010

reasonable level, from this point of view, because potential competitors of main fuel suppliers cannot, with relative ease, enter the existing market of fuel (because there are many barriers to enter the market, including in terms of financial resources, any sale of fuel at a competitive level assuming major investments) and much less to be able to provide alternative products (e.g. supply of electric vehicles with electricity). Substitutability in terms of supply determines how open the relevant market is: the more open the market, the fewer companies will be suspected of abuse.

The relevant geographic market contains the area in which the concerned undertakings are located in the delivery of products within the product market, area in which the conditions of competition are sufficiently homogeneous and which can be differentiated in neighbouring geographical areas, due, in particular to substantially different competition conditions.

In conclusion, it appears that the analysed relevant market is the fuel market (engine fuel) throughout Romania, which has many barriers to entry into the market and the market is closed.

ii. assessing the position that undertakings occupy on that market and whether the position is dominant.

The dominant position is a position of economic strength of an undertaking which enables it to prevent the maintenance of effective competition in the relevant market, giving it the opportunity to behave, in an appreciable extent, independently of its competitors, customers and, ultimately, to consumers.

One of the most important criterions that lead to the conclusion that the occupied position in the relevant market is dominant, is represented by the market share. Article 6 paragraph (3) of Law no. 21/1996 presumes, until proved otherwise, that one or more undertakings are not in dominant position, if cumulated share or shares on the relevant market, recorded in the period under review, are not exceeding 40%. Therefore, from the interpretation *per a contrario*, results that share higher than 40% determins the existence of a dominant position.

In Romania, the fuel market is dominated by Petrom, with a share of 30%, followed by Rompetrol and Lukoil, with shares of 20% each, the rest of the market being held by MOL, OMV, Agip and private gas stations.

With only the top three competitors having about 70% of market share, it can be concluded that we are in the presence of a dominant position on a market.

iii. If an abuse of dominant position has been committed

Dominant position is not prohibited by itself. Only the abuse of that position is prohibited.

Parallel price fixing in an oligopolistic market does not demonstrate, necessarily, an abuse of collective dominance position. A conclusion like that would condemn the oligopoly itself, while the interrelated behaviour of competitors is characteristic for an oligopolistic market (in this market, each undertaking envisages in the adopted business decisions, a possible response of competitors).

For the abuse of collective dominance to exists, it must be proved. As stated by ECJ in Compagnie Maritime Belge Transports SA case[31], the abuse clearly results from the desire to eliminate competitors from the market.

In the particular examined case, on the fuel market in Romania an abuse of collective dominance might be retained only if the fixing of price for the sale of fuel at the pump required by major competitors is proved, taking advantage of market dominance in an unrighteous manner (according to art. 6 letter a of Law no. 21/1996), for example by successive price increase unjustified by objective factors (such as barrel oil price or tax increase).

[31] See above

3. Conclusions

The collective dominance in a relevant market may result from an anticompetitive agreement of several undertakings, which, if proven, attract the provisions of art. 101 TFEU (art. 5 of Law no. 21/1996).

On the other hand, the collective dominance may be the result of behaviour of several companies which, because of economic, legal or structural links between them, act as a collective entity in relation to competitors and consumers in a relevant market. If this position of collective dominance is abusively exploited, it represents an abuse of a dominant position which falls within the provisions of art. 102 TFEU and in the Romanian law in the provisions of art. 6 of Law no. 21/1996.

Specific behaviours of interdependence between undertakings on oligopolistic market may represent a concerted practice sanctioned by art. 101 TFEU. In order to fall under the provision of art. 102 TFEU, it is necessary that collective dominance of oligopoly to include an unconcerted behaviour and to prove the existence of an abuse of dominant position.

The concept of "collective dominance" has evolved over time, its area including not only the behaviour of undertakings sufficiently linked together by corporate structure, legal arrangements and economic links, but interrelated behaviours of undertakings in oligopolistic markets.

Future research of collective dominance as a form of anticompetitive behaviour, would involve: identifying difficulties in establishing the collective dominance, especially in its substantiation; the analysis of ECJ decisions which have been pronounced on this matter, in order to determine haw the Court considers that this anticompetitive behaviour should be sanctioned, as wel as the steps that must be followed for proving an abuse of collective dominant position; a comparison of the ways in which national competition authorities from different member states regulate and sanction the collective dominance of the undertakings, especially on oligopolistic markets.

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A REFLECTION UPON THE INDEPENDENCE OF THE EUROPEAN CENTRAL BANK: THEORY AND PRACTICE

Monica TOMA ŞAGUNA[1]

Abstract
Looking back at the role played by the European Central Bank in the European Union and even in the whole world, from its creation and until now, we can say, without risking to fall into the demagogue area, that the European Central Bank has become the most important institutional creation in Europe since the institutionalization of the nation state in the seventeenth century. The European Central Bank is considered to be, formally and probably also in practice, the most independent central bank in the world. In this framework, the purpose of my paper is, by analyzing what central banking independence means, to reflect if, in this case, theory and practice joined in a congruent point. It is true that the issue of central bank independence has been the subject of important academic work. However, the literature has mainly focused on the theoretical and formal aspects of the concept. The experience of the past few years and especially the actual economic crisis has shown that the implementation of the rule of law is not without challenges, even inside the European Union. Therefore, the objective of my study are: an introspection in the central banking independence concept by comparing what it was meant to be and how is manifested in the present and a detailed analyze of the concept from theoretical and practical point of view.

Keywords: *independence, transparency, European Central Bank, theories, practice*

1. Introduction

My paper covers the essential concept on which this key institution of the European Union is built: **independence.** The concept of central banking independence was largely debated, criticized and doubted as the European Central Bank, within its prerogatives, plays an essential role in the European scheme. Many theories pro and against central bank independence were asserted, but despite that, the European Central Bank is regarded as the most independent central bank in the world.

The importance of the study lays in the fact that The European Union is certainly the most prominent scheme of international economic integration and the European Central Bank was created as one of its essential institutions.

On January 1, 1999, Europe entered a new era with the adoption a single currency – euro – by eleven of fifteen member states of the European Union. Greece joined afterwards the euro area, in 2001. The launch of euro has indeed created the world's second largest currency area in terms of economic size, after the dollar of the United States of America.

The European Central Bank plays the main role in this unique creation, as the monetary policy in the euro area has been delegated to it.

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To fully understand the concept of central banking independence and in order to create a complete view upon the subject, the paper will analyze what was meant to be when the European Central Bank was founded (1), second how was it legalized and (2), in the end, how it is manifested in practice (3).

The existent specialized literature has widely debated this subject, but this paper will present the concept of central bank independence including the practical aspects, meaning the way central banking independence is manifested.

2. Paper content

The creation of a single market and the continuing concentration and integration at the European level have created phenomena that can neither be governed by nationally based policies, nor left to the working of unregulated markets. The creation of a single European currency became an official objective of the European Economic Community in 1969. However, it was only with the advent of the Maastricht Treaty in 1993[2] that member states were legally bound to start the monetary union, but no later than 1 January 1999.

According to the European Court of Justice, one of the principal goals of the Maastricht Treaty was to create a single economic region, free from internal restrictions, in which an economic union may be progressively achieved. This requires, among other things, that the parities between the currencies of the various Member States remain fixed until all national currencies in the Economic and Monetary Union, have been replaced by the single currency, the Euro.

In this important aim, the European Central Bank is the core of the European Union monetary policy.

The strong point of the European Central Bank's meaningful position is its exclusive right to issue money and the responsibility over its value. According to article 106 from the Treaty on the functioning of the European Union, the European Central Bank shall have the exclusive right to authorize the issue of banknotes within the European Union.

The primary objective of the European Central Bank is to maintain price stability in the Euro area. The Treaty on the functioning of the European Union does not define the idea of „price stability", which gives the European Central Bank relatively free hands to both define and implement its objective. Not disregarding this objective, it shall also support the general economic policies and objectives of the European Union as laid down in Article 2 of the Stature of the European System of Central Banks and of the European Central Bank. On this line, article 2 above mentioned, establishes a clear hierarchy of objectives.

In pursuance of its objectives, the European Central Bank is bound by the same principles as the other European Union institutions, the principles of legitimacy and proportionality.

In this context, a fundamental aspect of the monetary order in the euro area is the independence of the European Central Bank and of the national central banks from political influence. This concept, on which European Central Bank has been built, has a „constitutional" status, as it is provided both in the Treaty on the Functioning of the European Union and in the Statue of the European System of Central Banks and of the European Central Bank.

[2] known as the Treaty on the European Union

Placing all central rules regulating the European Central Bank in the Treaty on the functioning of the European Union and in the Statute of the European System of Central Banks and of the European Central Bank, which constitute primary law with direct effect on and within Member States, it gives the European System of Central Banks a strong law-based status and strengthens its independence even further. Since the Treaty can only be changed if all Member States agree on and ratify amendments, the Statute of the European System of Central Banks and of the European Central Bank has a very high legal, constitutional status.

It is true that the Council can make minor technical amendments, but changes in European Central Bank's powers or objectives require the same procedure as changing the Treaty on Functioning of the European Union and the acceptance by all Member States of the European Union.

Art. 129 paragraph 4 from the Treaty on the Functioning of the European Union and art. 41 of the Statute of the European System of Central Banks and of the European Central Bank establish a **simplified amendment procedure**. According to these provisions, specific articles of the Statute can be amended by the Council, either on a proposal from the Commission and after consulting the European Parliament and the European Central Bank or on a recommendation from the European Central Bank and after consulting the European Parliament and the Commission. In either case, the consultation of the European Parliament is required.

In the literature, various definitions of central bank independence can be found. The bottom line of indicators for central bank independence is that they all try to measure how much influence institutions and government have on monetary policy making.

The European Central Bank independence is a demand for it to fulfil its primary objective of maintaining price stability and its exclusive competence for the monetary policy and related functions in the euro area. The European Central Bank has to be protected from all types of influence that might be adverse to the achievement of its objective. Also, there must be considered that in the perception of the public, an independent central bank is more credible than a central bank which is dependent of the government.

In this context, the independence of the European Central Bank is not therefore an end in itself but rather an indispensable element of a monetary order that gives priority to the objective of price stability.

In order to make the European Central Bank immune to political pressure, the process of monetary decision-making of the European Central Bank has deliberately been distanced from the conventional politically organized and democratically legitimated system of decision-making. By leaving the concept of price stability undefined, some flexibility has been achieved. At the same time, however, some theoreticians consider that it has become difficult to control the accountability of the European Central Bank and secure that it functions in a legitimate manner.

Therefore, a central question becomes whether it is possible to function in an independent and legitimate manner at the same time, fulfilling both the substantive and procedural requirements for legitimacy.[3]

Some theoreticians, whose point of view will be presented bellow, asked in various papers the following question: Is the European Central Bank too independent? Democracy based on representation assumes a symmetrical relationship between power and accountability – when public power is implemented someone must be able to be held accountable for it. Public power is used

[3] .H.H. Weiler, The European Central Bank and Legitimacy, Is the European Central Bank a Modification of or an Exception to the Principle of Democracy?, Harvard Law School, 2000

within the European Union and by European Central Bank without, if nothing else, the traditional forms of political accountability which otherwise should follow automatically.

To fully understand the concept of central banking independence we should start by analyzing what was meant to be when the European Central Bank was founded (1), second how was it legalized and (2), in the end, how it is manifested in practice (3).

1. The founding of the European Central Bank and the theories upon its independence

Looking back at the founding of the European Central Bank, the European Central Bank is the successor of the European Monetary Institute. In the negotiations leading to the conclusion of Maastricht Treaty, in 1993, the key debate over the institutional structure and policy-making powers of the future European Central Bank was over the issue of the degree of central bank independence from political influence. An important question was raised: **Would member states have any authority and influence in the policy decisions of the future European Central Bank?**

To this extent, were taken into consideration not only the possible influences of the member states, but also other possible influences, like: business and banking associations, labour unions etc.

In that event, the position of Europe Central Bank independence was strongly sustained by Germany and especially by the Bundesbank officials, given Germany's strong tradition of non-inflationary monetary policy and independent central bank. The opinions of Bundesbank officials were also shared by a number of leading architects of the Economical Monetary Union, primarily within the *Delors Committee.*

The opinions of the Germany and *Delors Committee* were based on the following arguments:

First, they showed that the most empirical studies demonstrated that countries with independent central banks achieve **substantially lower rates of inflation**, than countries in which central bank is controlled directly by the government.

More, an independent central bank can be **more responsive to short-term needs of the economy,** in order to avoid the inevitable delays in decision-making process, that exist in the normal political process.

Also, central bank independence and its corresponding **impact on policy credibility** have also been cited by many analysts, as an important reason for freeing the hand of a central bank. This is because independence has a strong impact on policy credibility and vice versa. A central bank with a strong reputation for credible anti-inflationary policies may be able to resist political pressures to reform the legal structures and statutes of the bank that might threaten price stability.[4]

While these arguments were strongly sustained and attested, they were not unquestioned.

On the over side, there were also theories that asserted against the independence of the European Central Bank, which will be presented hereinafter. **Perhaps the strongest argument against central bank independence is based on legal or democratic theory.**

The theory would contend that an independent central bank cannot be held democratically accountable for its politically sensitive actions. In other words, the delegation of powers to non-elected officials (i.e. the European Central Bank Governing Council) can only be acceptable in a democratic society, if the bank is accountable in some manner to democratically elected institutions. In order to sustain the idea, these theories asked who should be held responsible of the effects on employment created by the European Central Bank's monetary policy – the European Central Bank

[4] Delors Report, Report on economic and monetary union in the European Community, 1989

or the governments of the Euro-Zone? They showed that Central Banks remain free from the task of legitimating their power (via elections), unlike other representative institutions. Forward, it was asserted that this is of main concern to the European Central Bank and the institutions of the European Union, as they grapple with questions of democratic deficits, pressures of regionalism and issues of transparency. In this theory, general consensus exists that the European Union and, thereby, the European Central Bank should be transparent and largely accountable to its citizens in the future.[5]

But what does the transparency and accountability of the European Central Bank mean? And what is the relation with its independence?

For a long time, central banks have been associated with **secrecy**. In the literature, there are differences as to define **transparency**. Basically, two kinds of definitions can be distinguished. Sometimes transparency refers to the activities of the central bank in proving information. In other cases, transparency relates to the public's understanding of monetary policy. When a central bank is open about its policies, the general public can get a good understanding of the decisions taken by the monetary authorities and the reasoning behind. By providing the public with adequate information about its activities, the central bank can establish a mechanism for strengthening its credibility, by matching its actions to its public statements.

Accountability of a central bank refers at the obligation to give an explanation for its actions. Accountability refers not only to the question of whether a central bank has achieved its mandate, but also to what central bank has done in attempting to achieve its mandate.

It goes without saying that independence does not mean arbitrariness. Central bankers should never forget that they are ultimately accountable for their policies to the elected politicians and to the public at large (including future generations). In this respect, proper accountability cannot be seen as a "counterweight" to independence. Accountability can be seen rather as the "other side of the coin" of independence and the two concepts are mutually reinforcing, rather than antagonists, as is sometimes suggested.

In order to be independent, central banks must have a clear objective against which their performance can be measured. The European Central Bank's mandate of maintaining price stability is a good example of a clear objective, which fosters both independence and accountability. It is in fact easier for external parties to assess the performance of an independent institution, if the criterion against which the performance is evaluated is clear and transparent. A complex and obscure objective, by contrast, naturally leads to increased margins for discretion, by the independent authority and to a higher degree of opacity in its behaviour. Any weakening of the democratic control over an independent institution, may lead to excessive discretion and unclear objectives, which risks creating political backlashes against independence and may over time undermine independence itself.

Therefore, independence is sustainable in the long term only if accompanied by strong accountability and transparency, in the operations of the independent institution.

European Central Bank's former President Duisenberg's assertions – *that the European Central Bank's definition of price stability, as an annual increase in the Harmonized index of Consumer Prices for the euro area of below 2 per cent, acts as a yardstick, against which public can hold the European Central Bank accountable* – suggest this view on accountability. **This view sees accountability and independence as mutually dependent.** But Duisenberg's confidence in the European Central Bank's monetary indicators and objectives, do not necessarily assuage sceptics

[5] David Howarth and Peter Loedel, The European Central Bank, The New European Leviathan? Revised second edition, Palgrave Macmillan, 2005, 117-122

who see the European Central Bank as beyond the control and legitimacy of democratic processes and institutions. Arntenbrink[6] and Nicolas Jabko[7] in their studies considered that while it can be recognized that accountability and independence can be served quantifying monetary objectives and are interrelated, it cannot be accepted the notion that merely publishing monetary objectives meets the full standards of democratic accountability.

Specifically as Verdun[8] noted *"the lack of formal parliamentary control over the European Central Bank's decision-making process….has led to considerable concerns about democratic accountability: the aspect of secrecy, technocracy and lack of transparency…."* within the European Union. More bluntly, Buiter[9] warns that the "lack of openness, transparency and accountability…" threaten to "undermine the viability of whole enterprise".

In principle, the sceptics believe that the final decision and priorities, which are given to monetary policies, must lie with the European Parliament or some other nominally representative body – perhaps the Council of Finance Ministers. It follows that, if necessary, monetary policy should be subordinated to fiscal policy or other objectives laid out by popularly elected officials. This is because, as the presented opinions consider, only democratically elected officials of the government have the respective legitimacy and authority to proceed with the negotiations and reach an agreed upon solutions. In this vein, noted economist Peter Kenen[10] has suggested that the European Parliament be given greater authority over the European monetary policy-making process. Again, more bluntly, Buiter[11] suggests evolving a "European Parliament with teeth".

Clearly, the issue of transparency and accountability is framed politically in the context of a concern for the lack of democratic control over monetary-policy making and democratic legitimacy of the Economical Monetary Union project more broadly.

The output orientation of much of the debate about the benefits and the costs of the Economic Monetary Union signifies that the policy-makers regard its economic and social effects as the strongest, perhaps even as the only, possible legitimating aspect of the single currency.

The legitimacy problem has placed increased focus on the matters of accountability and transparency. Monetary policy decisions affect member states differently due to different structured economic cycles, despite some convergence and differently structured economies. The risk was seen in the fact that some member states may come to feel disadvantaged by the European Central Bank's monetary policy, the legitimacy of the bank will be called into question and the pressure will be increased on the governments to speak out.

Doubts on the European Central Bank's legitimacy increase the need for executive board members to give frequent interviews, press conferences and speeches about goals and instruments. National central bank governors need to do the same at the national level. In this light, the decision to hold two Governing Council meetings a year in other member states was design to improve the visibility of the European Central Bank.

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[6] F. Amtenbrink, The democratic accountability of Central Banks: a Comparative Study of the European Central Bank, Oxford, Hart Publishing, 1999

[7] Nicolas Jabko, Democracy in the age of euro, Journal of European Public Policy, vol. 10, no. 5, pp.710-39

[8] A. Verdun and T. Christiansen, Policies, institutions and the Euro: Dillemas and Legitimacy in C. Crouch, ed. Oxford, 2000

[9] W. Buiter, Alice in Euroland, in Journal of Common Market Studies, vol. 37, no. 2, pp. 181-209, 1999

[10] Peter Kenen, Economic and Monetary Union in Europe, Cambridge, 1995

[11] W. Buiter, Alice in Euroland, in Journal of Common Market Studies, vol. 37, no. 2, pp. 181-209, 1999

As presented above, theoreticians call for strengthened links between the European Central Bank and the European Parliament, as another move to improve the legitimacy of the European Central Bank. However, this is inherently problematic, as other theoreticians who counteracted this idea showed: the European Parliament, despite being directly elected, is neither well understood nor well liked by some Europeans.

These political theories remained at a debate level, as practice showed that the independence of the European Central Bank is a premise for the fulfilling of its objectives.

On the other hand, there are the theories advanced by the **economists**, which give a new perspective upon the idea of transparency. Many economists and market analysts define **transparency and accountability** in terms of monetary strategy, communicative effectiveness and coordination with other policy-makers. In particular, they focus on the two pillar strategy of the European Central Bank, the bank's ability to communicate its strategy to the public and to the markets, and the ability of the bank to coordinate the strategy with leading policy-makers – whether at the national level or through European Union institutions.

In this light, central Banks need to make the public aware of the benefits of the price stability, as memories of high-inflations are fading. Clear monetary goals can also help to guide inflationary expectations and thus influence the behaviour of firms and workers. But, perhaps, most important of all, central banks need to communicate clearly with the financial markets.[12]

The actual economic crises have showed indeed how important is the role of central banks and how important is price stability.

The Treaty on the functioning of the European Union supplements the considerable degree of institutional independence granted to the European Central Bank, by extensive provisions concerning transparency and accountability. Article 132 paragraph 2 from the Treaty on the functioning of the European Union notes that, while the European Central Bank is under no obligation to publish recommendations, opinions and decisions, it may choose to do so. As regards the National Central Banks of the Eurosystem, they currently produce full forecasts, at six-monthly intervals. Also, the European Central Bank begun to publish its Monthly Bulletin, that can be used to provide updates on policy developments, while the press conference that follow Governing Council meetings, can be used to announce policy changes, if the European Central Bank thinks that the European Central Bank's and national central bank's forecasts have become too out of date to be useful.

In addition, there must be taken into consideration the legislative powers of the European Central Bank.

The European Central Bank has the power to make regulations, take decisions, make recommendations and deliver opinions to the extent necessary to implement its tasks and carry out its responsibilities within its area of competence, monetary policy. The European Central Bank is also entitled to impose fines or periodic penalty payments on undertakings for failure to comply with obligations resulting from its regulations and decisions. The regulations and decisions enacted by the European Central Bank enjoy the status of European Union law and may be invoked by interested parties in national courts, assuming that the conditions for direct effect are met.

The difference between the legislative competence of the European Central Bank and that otherwise implemented within the European Union is that the **European Central Bank uses its powers independently from the other European Union organs and national parliaments.**

[12] David Howarth and Peter Loedel, The European Central Bank, The New European Leviathan? Revised second edition, Palgrave Macmillan, 2005, 122-127

The exposed theories of independence and accountability of the European Central Bank carry with them considerable merit. My position is that only an independent central bank can fulfil its objective and this assertion is demonstrated by practice. The independence of the European Central Bank is conducive to maintaining price stability. There is ample empirical evidence that central bank independence brings about lower inflation, which ensures a more stable environment for economic and employment growth. This is also supported by extensive theoretical analysis and empirical evidence on central bank independence. Also, central bank independence is a way to protect policy makers against the temptation of using monetary policy in a negative way. However, the temptation is not eliminated. This might be a reason why central bank independence appears to be strongly supported by the citizens.

But, given the arguments both in favour and against central bank independence, next an essential question have to be answered: **did the Treaty on European Union create an independent European Central Bank? Despite the theories up mentioned, the institution from its founding, enjoyed independence as provided in the Treaty on the functioning of the European Union and in the Statute of the European System of Central Banks and of the European Central Bank.**

2. The legislative framework

The concept of independence, as provided in the Statute of the European System of Central Banks and of the European Central Bank includes:

a. **Institutional independence;**
b. **Legal Independence;**
c. **Personal independence of the members of its decision-making bodies;**
d. **Functional and operational independence;**
e. **Financial and organisational independence;**

Before analyzing the legal framework, here must be noted that, given their specific role in the Eurosystem, **the concept of independence also extends to the national central banks and their decision-making bodies**. Also, the non-euro zone countries, which are members of the European Union under the derogation of adopting euro, must fully align to this demand before joining euro. In this context, it should be ensured that there is no discrepancy between the central bank's formal status in the legislation and the implementation of the legislation. It is of most importance that all present and future Member States respect this economic and institutional ground rule of the European framework.

a.Institutional independence

Article 130 of the Treaty is the key provision establishing the independence of the European Central Bank. Its first sentence provides clearly and explicitly that *„ When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the European System of Central Banks and of the European Central Bank, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks".*

In this respect, article 130 makes it **illegal to accept or seek instructions from any body, be it public or private, national or international.**

An important aspect is that, if the idea of **„instruction"** is forbidden, this does not exclude the idea of **cooperation. One of principles of functioning of the European Union institutions is the institutional cooperation. To this extent, seeking information or dialoguing does not affect the institutional independence.**

The prohibition on the acceptance of instructions is correlated by a commitment of the European Union institutions and bodies and of the governments of the Member States, in the second sentence, that, these bodies undertake to respect the principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the National Central Banks in the performance of their tasks. **Thus, they are obliged not to give instructions to the members of the decision making-bodies of the European Central Bank and the National Central Banks and to abstain from influencing them.**

b. Legal independence

As article 282, paragraph 3 of the Treaty on functioning of the European Union and article 9, paragraph 1 of the Statute of the European System of Central Banks and of the European Central Bank states, the European Central Bank and the National Central Banks enjoy their own legal personality. The European Central Bank, given its important role in the economic integration, is the single institution of the European Union which has legal personality. This is a premise for it to fulfil its objectives.

For the European Central Bank, legal independence includes the right to bring actions before the European Court of Justice, in order to protect its prerogatives, if they are impaired by a European Union institution or a Member State.

c. Personal independence

As the institutional independence is the principle aspect, the personal independence is the particular one. To substantiate the institutional independence, the Statute of the European System of Central Banks and of the European Central Bank protects the personal independence of the members of the European Central Bank's decision-making bodies.

Personal independence is a crucial determining factor of central bank autonomy. If the members of the European Central Bank are selected for political, ideological and/or national reasons, one would have to question the overarching independence of the European Central Bank to pursue its price stability mandate, unaffected by political or national constraints.

The European Central Bank's decision-makers will have to assume a transnational identity and act in the interests of Europe first, instead of national interest.

Institutionally and personally, the European Central Bank is a hybrid of transnationalism and intergovernmentalism. The two key bodies in the European Central Bank are the **Executive Board**, made up of a president, a vice-president and four additional members, each appointed to eight years, non-renewable terms; and a **Governing Council**, comprising the Executive Board and the central bank governors of the national central banks which have adopted the euro. The national central banks governors will also have, at a minimum, five-year contracts, so as to ensure some continuity on the Governing Council. The Executive Board is appointed by consensus of the political leaders of the European Union (the European Council), after consulting the European Parliament and national central bankers. The Executive board is clearly the transnational European part of the European

Central Bank and is seen as the leading articulators of the European Central Bank's policies. While undoubtedly interested in supporting the European Central Bank's price stability mandate, the national central bank governors will be also representing the concerns of their respective nations.

So, as noted above, one of the manifestations of the personal independence is the relatively long fixed terms of the office. For the national central banks governors, article 14, paragraph 2 of the Statute provides a minimum term of office of five years, which is renewable. For the members of the Executive Board article 11, paragraph 2 fixes a non-renewable term of office of eight year.

A member of the European Central Bank's decision-making bodies may not be dismissed in a discretionary manner on the grounds of past policy performance. Instead, members may only be removed from its office, if they become unable to fulfil the conditions required for the performance of their duties or if they are found guilty of serious misconduct. In such cases, as article 11 paragraph 4 of the Statue of the European System of Central Banks shows, the Governing Council or the Executive Board may apply to the European Court of Justice to have a member of the Executive Board compulsorily retired.

In the same circumstances, a national central bank governor may be relieved form its office by the competent national authority, if he no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct. However, the governor concerned or the Governing Council may refer the matter to the European Court of Justice, on grounds of infringement of the Treaties or any rule of law relating to their application. The European Court of Justice has jurisdiction in such cases, as article 14 paragraph 2 of the Statute of the European Central Bank provides.

The statues of the National Central Banks, as amended in line with article 131 of the Treaty on functioning of the European Union extend the protection against discretionary dismissals to the other member of the National Central Banks' decision-making bodies. However, the other members do not enjoy the right to refer the matter to the European Court of Justice.

Also, an important requirement for personal independence is the absence of any actual or potential conflict of interest between the duties related to the central bank decision-making bodies (and also in relation to the European Central Bank for national central bank Governors) and any other functions which they may have. Hence, as a matter of principle, the membership of a decision-making body involved in the performance of European System of Central Banks-related tasks is incompatible with the exercise of other functions that might create a conflict of interest.

Furthermore, to effectively ensure central bank independence, the appointed members of central bank decision-making bodies should be clearly perceived to possess **high professional capabilities.** The Statute of the European System of Central Banks and of the European Central Bank states that:

"The President, the Vice-President and the other members of the [European Central Bank] Executive Board shall be appointed from among persons of recognized standing and professional experience in monetary or banking matters".

Problems may arise if the members of the decision making bodies have a political affiliation or have played an active political role prior to their appointment, or (even more problematic) if they are expected to play a role afterwards. There are several examples showing that political affiliation can be used by other institutions or political parties as an excuse to put pressure on the central bank, especially after a change in government. The ability of the central bank to speak out, if needed, possibly in critical terms, with respect to economic and budgetary policies might also be impaired if

the Governor, or the other members of the board, are perceived to have a political affiliation, as this might be interpreted as political interference. In this respect, the European Central Bank has emphasised in its Convergence Reports that the assessment of legal convergence should not be limited to a formal assessment of the letter of national legislation, but may also consider whether the implementation of the relevant provisions complies with the spirit of the Treaty and the Statute. The European Central Bank was particularly concerned about pressures being put on the decision-making bodies of some Member States' national central banks, which were inconsistent with the spirit of the Treaty.

A final issue is related to collegiality. A collegial decision-making body, composed of several members is more likely to resist external pressures and partisan behaviour. The European Central Bank has made this clear in various legal opinions.

d. Functional and operational independence

Perhaps the pivotal concept in the study of central bank independence is its functional independence. **An independent central bank should be free to set its policy instrument with the aim of achieving its objective.** Functional independence thus requires that the primary objective of the national central bank of a member state of the European Union be set in a clear and legally certain way and be fully in line with the primary objective of price stability established by the Treaty.

Functional and operational independence is substantiated in several provisions of the Statute of European System of Central Banks and of the European Central Bank. To this end, the European Central Bank has been assigned all necessary competences and powers to achieve its primary objective of price stability.

For example, the European Central Bank has a monopoly on euro issuing. The Member States' right to mint coins is restricted and is subject to approval by the European Central Bank. No legal tender may, therefore be created against the European Central Bank's will, and gives the European Central Bank full control over the money base in the euro area.

The institutional arrangements in the field of exchange rate policy ensure consistency with the objective of price stability for both the single monetary policy and the exchange rate policy. Also, the official foreign reserve holdings are concentrated within the Eurosystem. European Central Bank controls the use of these holdings as well as Member States' residual balances in foreign currencies.

The Eurosystem may freely use a wide range of instruments for the implementation of its policies. This range of instruments includes regulatory powers and the right to impose enforceable sanctions, in case on non-compliance with the European Central Bank regulations and decisions

An important prohibition is stated in article 123 of the Treaty on functioning of the European Union. The National Central Banks of the European System of Central Banks are forbidden to lend the public sector. This prohibition entered into force at the start of the Stage Two of Economic and Monetary Union. It protects the European System of Central Banks against pressure from public sector to grant monetary financing using central bank money and includes the purchase by the European System of Central Banks of public debt on the primary market. The European Central Bank regularly monitors the market for possible circumventions of this prohibition involving purchases of public debt on the secondary market. Other method of surveillance is the obligation that any Member State of the European Union has, when adopting a normative act, which falls into the competences of the European Central Banks. In this case, the adoption of the act must be preceded by the consultation of the European Central Banks, which end with an opinion.

More generally, governments can undermine the independence of monetary policy by conducting an excessively profligate and hence unsustainable fiscal policy. Although there have been

many academic debates on this issue, it is beyond doubt that conducting an independent monetary policy, aimed at the achievement of low and stable inflation, is made significantly more difficult by the existence of large budget deficits. This is true for two related reasons. First, when deficits and public debt become unsustainable, the incentive for the government to force the central bank to monetise its deficit, thus eliminating public debt via inflation, increases substantially. Second, the larger the budget deficit and the accumulated debt, the more market participants become aware of the risk of monetisation. In addition, they may believe that the central bank will be forced to "bail out" the government by assuming its liabilities, even if Article 123 of the Treaty explicitly prohibits this. This may jeopardise the anchoring of inflation expectations and make the control of inflation more costly. In this case, fiscal policy may become dominant over monetary policy, thus undermining, de facto if not de jure, the functional independence of the central bank. This relationship is admittedly more complex and less direct in a supranational environment like the euro area, with decentralised fiscal policies and a centralised monetary policy, but the basic nexus is the same.

Therefore, sound public finances, which in any event represent a valid objective *per se*, are an important underpinning of central bank independence. The way to achieve budgetary discipline with a view to protecting central bank independence may vary across countries. In the European Union, explicit provisions on budgetary surveillance are foreseen in the Treaty and in the Stability and Growth Pact.

e. Financial and organisational independence

Another important aspect determining the level and degree of central bank independence is its financial independence.

A central bank cannot credibly operate in an independent way, without proper financial means; it would be under a "Damocles' sword" if it depends on the government for the financing of its operative expenses. **The concept of financial independence should therefore be assessed from the perspective of whether any third party is able to exercise either direct or indirect influence not only over central bank tasks, but also over its ability (understood both operationally, in terms of manpower, and financially, in terms of appropriate financial resources) to fulfil its mandate.**

Four aspects of financial independence – **the right to determine its own budget; the application of central bank-specific accounting rules; clear provisions on the distribution of profits; and clearly defined financial liability for supervisory authorities** – are particularly relevant in this respect. These are the features of financial independence where national central banks are most vulnerable to outside influence.

In the euro area and in the European Union, Member States should not put their national central banks in a position, where they have insufficient financial resources to carry out their European System of Central Bank - or Eurosystem - related tasks. Moreover, the principle of financial independence implies that a national central bank must have sufficient means not only to perform European System of Central Banks - related tasks, but also its own national tasks (e.g. financing its administration and own operations). This was stated by the European Central Bank in many recent opinions.

The European Central Bank has its own budget, independent from that of the European Union.

The European Central Bank and the National Central Banks have their own financial resources and income and enjoy organisational autonomy. Their financial and organisational autonomy enables the European System of Central Banks to perform its tasks as required.

The capital of the European Central Bank is subscribed and paid up by the National Central Banks. As a consequence, the European Central Bank has its own budget, independent from that of the European Union. Its Statute also allows the European Central Bank to adopt autonomously the conditions of employment for its staff and to organise its internal structure as it sees fit.

In addition, as a supranational organisation, the European Central Bank enjoys in the territories of the Member States the privileges and immunities that are necessary for the performance of its tasks. Chapter 1 of the Protocol on the privileges and immunities of the European Communities of 8 April 1965 guarantees, among other things, that the premises and archives of the European Central Bank are inviolable and that its property and assets are intangible. The Protocol states further that these must not be subject to any administrative or legal measure of constraint, without the authorisation of the Court of Justice of the European Union.[13]

3. How is central banking independence manifested into practice?

Having understood how central bank independence is provided in the Statute of the European System of Central Banks and of the European Central Bank, we have to see how this is manifested into practice.

A former Dutch president of the European Central Bank, from 1 July 1998 to 30 October 2003, Wim Duisenberg, said: „*It's normal from the political side to give suggestions or opinions, but it will be abnormal if these suggestions were listened to."* His words are, indeed, so very true.

The monetary policy of the European Central Bank was in many ways supposed to be different, than the policies pursued by national central banks. From the European Central Bank's first days, in June 1998, the European Central Bank's policies were extremely politicized, its independence questioned, and its credibility doubted. What it is clear from this point of view is that the institutional and policy dilemmas faced by the European Central Bank are quite similar to the dilemmas faced by other national central banks over the last 50 years. Exchange rate fluctuations or the internal political pressure from Euro-Zone governments, act as a direct constrain on the ability of the European Central Bank to pursue an independent monetary policy.

But despite this fact, as it was presented above, in the European Union, the principle of central bank independence has a quasi-constitutional basis. Article 130 of the Treaty on functioning of the European Union states very clearly that:

"When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the European System of Central Banks and of the European Central Bank, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks."

Article 7 of the Statute of the European System of Central Banks echoes this statement. The Treaty provisions on central bank independence apply to all European Union Member States, irrespective of euro area membership. Countries are thus expected to have completed the process of granting their central bank full institutional independence, by the time of accession to the European Union; in practice, however, this is not the case.

[13] Hanspeter K. Scheller, the European Central Bank – History, role and Functions, 2nd revised edition, 2006

This is a particular concern because it suggests that in several European Union member states there is not yet a full understanding, in particular by the political authorities and possibly also by society as a whole, of the reasons underlying central bank independence and of the commitments, that these countries have made to grant such independence, at the time of accession to the European Union. Central bank independence is instead often considered only as a pre-condition for adopting the euro. Failure to fully ensure central bank independence is, in fact, a breach of the Treaty which would justify bringing an action before the Court of Justice of the European Union. The European Commission, which has the power to take such an initiative according to the Treaty, should consider doing so when needed.

Often, central bank independence was questioned in relation to its financial independence. According the Stature of European System of Central Banks and of the European Central Bank, as we seen above, a central bank must be financially independent. This has not always been uncontroversial.

For example, the **Finnish** legislator proposed in 2003 to reduce Suomen Pankki's capital. The legislative proposal would have forced Suomen Pankki to sell part of its foreign reserve assets. The European Central Bank indicated in its opinion, of 15 October 2003, that reducing the equity of one national central bank and imposing restrictions on the management of its financial resources, could not be considered in isolation from the potential effect of such a reduction on the financial position, and therefore on the financial independence, of the Eurosystem as a whole. The European Central Bank noted that the obligation of Member States to ensure the independence of their central banks puts them in an exceptional position, since it obliges the Member States to keep the assessment of the level of financial resources and the management of the capital of the national central banks at arm's length. The national central bank should not be dependent for its finances on the government, the parliament or any other third party.

Another example of a similar kind can be taken from the discussion over the Central Bank and Financial Services Authority of **Ireland** Bill. The legislative proposal aimed to establish the regulatory authority as a constituent part of the central bank, with its management separated from that of the central bank. This structure could have posed risks for the national central bank's financial integrity, since there was potential for the national central bank to be exposed to liabilities resulting from funding and budgetary decisions for the regulatory authority. The European Central Bank therefore recommended in its opinion, of 5 June 2002, giving the organs of the central bank controlling powers with regard to funding, budgetary and staffing decisions.

Recently, in the context of the present economic crisis, the independence of the national central banks was questioned in the **Portugal case, in the Hungarian case and in the Romanian Case.**

In the **Portugal case**, on 25 October 2010, the European Central Bank received a request from the President of the Portuguese Parliament for an opinion on several provisions of the draft law containing the annual State budget proposed by the Government for 2011. Once approved, such provisions would apply to the whole public sector, including the Banco de Portugal.

In its opinion, adopted on 12 November 2010, the European Central Bank showed that, the 2011 draft budget law contains exceptional austerity measures, mostly focusing on tax increases and public spending cuts.

The planned measures were not only aimed at restoring the budgetary balance, but also Portugal's reputation in the international community, thereby ensuring the regular financing of the economy and the sustainability of social policies. The measures apply without exceptions and

supersede all currently applicable *lex specialis* regimes, collective bargaining agreements and individual employment contracts.

The European Central Bank showed that the draft law directly affect the Banco de Portugal from 1 January 2011 on different plans: a progressive reduction rate up to 10 % on the excess amount of gross total monthly remunerations above EUR 1 500 earned by staff and members of decision-making bodies is introduced; the same reduction rate is introduced to the amount paid to any person under a service provision contract. The conclusion or renewal of such contracts requires the prior authorisation of the Ministry of Finance. Failure to obtain authorisation could mean that such contracts are declared void; Banco de Portugal is prohibited from awarding its staff or managers any salary increases, performance-related bonuses or cash payments of a similar nature. In addition, the Banco de Portugal is prohibited from: (i) opening procedures for promotion to specific positions and it must suspend any such ongoing procedures, (ii) granting any seniority-based automatic career progression, and (iii) undertaking career restructuring or reclassifications, until 31 December 2011 at the earliest. Acts carried out in breach of the above will be void and will result in the persons responsible for such acts incurring civil, financial and disciplinary liability; also Banco de Portugal is prohibited from hiring or recruiting any new staff, regardless of the type and duration of the employment relationship, unless exceptionally justified by a significant public interest. In such case, Banco de Portugal must provide information on recruitment on a quarterly basis to the Minister for Finance. In addition, the 2011 draft budget law caps the amount of the meal allowance, prohibits the award of variable performance-related pay to managers and officers and imposes a tax surcharge of 10 % on any pension payments by the Banco de Portugal exceeding EUR 5 000 per month.

The European Central Bank considered that the draft budget law has implications for central bank independence, in particular financial and institutional independence, as well as the personal independence of the members of the Banco de Portugal decision-making bodies.

As regards financial independence, the European Central Bank showed that, in order to protect Banco de Portugal's autonomy in staff matters, the Portuguese authorities are under an obligation to ensure that the specific set of draft provisions on which the European Central Bank was consulted, are decided on by the competent Portuguese authorities, in close cooperation with Banco de Portugal. Such cooperation must ensure the ongoing ability of Banco de Portugal to perform independently the tasks conferred on it by the treaties. To this end, Banco de Portugal should be involved in drawing up the relevant parts of the draft legislative provisions, in an effective manner, so as to safeguard central bank independence.

In its opinion, the European Central Bank concluded that, the combination of salary reductions with the prohibitions set up on hiring and recruiting new staff and undertaking career restructuring, directly impairs the ability of Banco de Portugal to employ and even possibly retain qualified staff and may amount *de jure* to depriving its decision-making bodies from their powers of internal organization and control over staff, or at least to significantly limiting them.

As regards the institutional independence, the European Central Bank regarded that the measures go beyond what is considered necessary to give full effect to the objective of reducing public expenditure and it would be a breach of Banco de Portugal's institutional independence, if such requirement would lead to an authorization procedure whereby staff recruitment by the Banco de Portugal could be rejected by the Ministry of Finance.

In the **Hungarian case**, the European Central Bank adopted an opinion on 12 July of 2010, regarding a draft law of the Magyar Nemzeti Bank, that intended to introduce a reduction of the

salary of the Governor and of the members of the Monetary Council and of the Supervisory Board of the Magyar Nemzeti Bank, since their salary is based on the Governor's salary.

In its opinion, the European Central Bank raised serious concerns regarding the central bank independence. The European Central Bank concluded that, the Hungarian authorities have an obligation to ensure that any amendment to the legislative provisions on the remuneration of the Magyar Nemzeti Bank's staff is decided in cooperation with the bank, taking due account of the Magyar Nemzeti Bank's views, thus protecting the autonomy in staff matters, which is part of the financial independence of the central bank. **Also, any amendment to the salaries of the Governor and other members of the Magyar Nemzeti Bank's decision-making bodies, who are involved in the performance of European System of Central Banks-related tasks, should not affect the terms under which they have been appointed, thus protecting the personal independence of the members of the Magyar Nemzety Bank's decision-making bodies.**

In the **Romanian case**, the European Central Bank adopted an opinion, on 1 of July 2010, on a law on certain measures necessary for the restoration of budgetary balance. The law, among various decreases of the salaries of different categories of public employees, provided a decrease of 25% of the salaries of the staff of National Bank of Romania, and the transfer to the State budget of the amounts representing this decrease. The law indicated that the salary decreases set out in the law apply until 31 December 2010.

The European Central Bank concluded that this measure disregarded the Treaty provisions on central bank independence and the monetary financing prohibition. From an accounting perspective, a decrease of staff salaries will de facto decrease the operational costs of National Bank of Romania, hence increasing potentially its financial resources. However, if the related increase of National Bank of Romania financial resources is directly transferred to the State, such a situation would effectively mean increasing the funding of the Romanian State at the expense of the bank. **In this respect, any direct financial transfer of this nature from National Bank of Romania to the State budget can be assimilated to monetary financing which is clearly prohibited under Article 123 of the Treaty.**

The **personal independence** of the European System of Central Banks decision-making bodies was also doubted in other cases. As we seen, Article 14 paragraph 2 of the Statute of the European System of Central Banks and of the European Central Bank establishes that the central bank laws must provide for a minimum term of office of five years for the Governor and the same article protects against the arbitrary dismissal of Governors. Governors may be relieved of their duties only if they no longer fulfil the conditions required for the performance of their duties or if they have been guilty of serious misconduct.

One possibility to circumvent this provision can take place on the occasion of the adoption of new legislation aimed at reorganizing the term of office of the Governor. The change in the law could be used as an opportunity to dismiss the Governor. In order to protect the personal independence of central bank Governors, any reorganization of the term of office should foresee that the existing Governor can continue to perform his duties until the end of the term of office he has been appointed for.

This was made clear, for example, in a European Central Bank opinion, of 11 May 2004, on an **Italian** draft law changing the Governor's term of office to eight years. While the term of office was compatible with the Treaty and the Statute, the European Central Bank pointed out that the wording of the draft law amounted to an *ex lege* revocation of the appointment of the incumbent Governor. The law was adapted accordingly.

Another possibility to circumvent the requirement of personal independence is to adopt different rules for the other members of the decision-making bodies of the national central banks involved in the performance of European System of Central Banks-related tasks. Especially in collegiate decision making bodies, if the other members do not have the same degree of independence as the Governor, the personal independence of the central bank is at risk. The European Central Bank has made this point clear in a number of legal opinions over the past few years.

For instance, the European Central Bank has advised the **French**[14] **and Cypriot**[15] legislators to amend provisions in national law that enabled the appointment of board members for a term of less than five years.

As another example, a draft **Slovak** law[16] foresaw alternative grounds for dismissal for the board members other than the Governor that were incompatible with Article 14 paragraph 2 of the Statute. The European Central Bank was of the opinion that such a formulation stood in the way of legal clarity and, more importantly, could be used to circumvent the effective protection of personal independence. The European Central Bank therefore recommended referring only to Article 14 paragraph 2 of the Statute of the European System of Central Banks when stating the reasons for dismissal of a board member.

Conclusions

As a conclusion, by analyzing the concept of central banking independence and its implications upon the institutional relations and upon concluding the objectives of the European System of Central Banks, we saw the importance of its implementation into practice.

The paper analyzed central banking independence from three points of view: what was meant to be when the European Central Bank was founded (1), second how it was legalized and (2), in the end, how it is manifested in practice (3).

The presented pro and against theories, showed that, even if the independence of the European Central Bank is doubted, criticized, it is a main base for the well functioning of this impressing scheme, which is the European Union.

The analyzed cases, when central bank independence was questioned into practice revealed that pressures against a central bank will always exist, given the political and economical interests and the key position of this institution, but what it is important is the way of defending this principle at national and European level.

Failure to fully ensure central bank independence is, in fact, a breach of the treaties, which would justify bringing an action before the Court of Justice of the European Union. The European Commission, which has the power to take such an initiative according to the Treaty, should consider doing so when needed.

As a suggestion for future researches, I believe that an interesting paper would consist into analyzing the infringement cases of the principle of independence. The reactions at national and European level, the institutional ways used to rectify a breach of the treaties and the way the conflict was ended, would make a clear opinion upon functioning of central bank independence.

[14] European Central Bank Opinion of 22 June 2006
[15] European Central Bank Opinion of 15 March 2007
[16] European Central Bank Opinion of 4 August 2005

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TIME-SHARING OWNERSHIP A NEW METHOD OF TENURE OF AN ESTATE?

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Abstract
There have been reported cases in which a private property was owned simultaneously by several individuals, every single one enforcing utility upon the estate as a whole, but in a successive order for equal or uneven periods of time. Although at first it seemed just a theoretical possibility, this institution came into being as the estate development domain expanded with the desire of the population to own a holiday retreat. The imagination of investment companies created mechanisms of financing residence-type homes by exploiting some psychological resorts, therefore the population that hadn't enough resources to become solely owners of their dream estate were drawn in by the idea of benefiting from such an asset for a predetermined period each year, paying just a fraction of the asking price for the estate. In the last decades this field overcame every expectation, either by sticking to the legal settings that were of common knowledge or by establishing new ground rules, or by betaking the criminal path. This paper work aims to clarify the status of this legal institution by getting to the root of the ambiguity that revolves roundabout it, that's if the time-sharing contract ascertains a new kind of ownership, so in case of litigation the parts should refer to the provisions of property rights or should they expect to be protected only by the consumer's injunctions.

Key words: *juridical nature of the periodic property; ownership right perpetuity; time schedule exertion of the property prerogatives;Act 282/2004 regarding the acquirer's protection in respective to some aspects entailed by the contracts through which an utility right is attained over real estates on a limited time span; 94/47/CE Directive*

Introduction

Time-sharing ownership is a borrowed institution from the french legislation, that is virtually the corner stone of the romanian perspective on property law enforcement. The french lawgiver statuates in article 33 of Act 579/1971 that the associates of a civil corporation, encompassed in order to atribute fractioned real estates, are allowed to use succesively the same habitat. This juridical state described in the above mentioned article was designated as being a multi-hotel or multiproperty deed. The associates are not the holders of an ownership right, instead they are titulars of a receivable right, the corporation remaining the only owner of the whole real estate, meaning that the perpetuity characteristic of the property right is not inflicted upon. Furthemore, the law forbids the initiators of the association to use the term "property" in order to obtain the associate capacity, as for the utility acquisition deeds, they must make referrals to the attribute of associate and not that of the asset's

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owner. The utility right of the associates can't be mortgaged, but the social parts in which it resides may be pawned.

The main ideea of the regulations was extracted by the romanian legislator and transposed in our doctrine, thus giving birth to a sinuous debate on the matter of entraping the very esence of the time-sharing ownership right. Since 2001 until the present, the nature of the new juridical institution became the battlefield for many of our repectable theoreticians and practitioners which became the spokesmen for the recognition of a novel method of tenure of an estate or, on the contrary, toggled themselved on the other side of the barricade, by making a standing for the acknowledgement of a receivable right kind of nature for the new arrival in the nursery of property prerogatives avowed to an ownership holder. This study undertakes the task of making the essay to clarify whether a litigation founded on a time-sharing ownership infliction shall be resolved by applying civil law enforcement agents like resorting to the annulment of the noxious deed or by invoking the consumer's provisions that will bring a different outcome for the infringed right. The necessity for an analisys of the disputed subject is noticeable, therefore my goal is to underline the impact that "Act 282/2004 regarding the acquirer's protection in respective to some aspects entailed by the contracts through which an utility right is attained over real estates on a limited time span[1]" had over ascertaining the nature of the time-sharing ownership right. Oversteping the astonishing denomination, that brings to light the deficient translation of the 94/47/CE Directive, we can only ponder if this Act reflects the avowal of time-sharing ownership in the romanian civil law.

Time-sharing ownership – a new method of tenure of an estate?

The institution is shrouded in controversy starting with its very name and origins[2]. Neither the inland law, nor the international injunctions have settled the matter of attributing a sole denomination to the notion, so in accordance to the prescriptions of the european, continental or american law, the authors refer to time-sharing ownership, temps-partagé property, spacial-temporal ownership or multiproperty. The extensive use of the multiproperty concept was explained in the french doctrine by appealing to the genesis of the institution, that emerged as an up-scaling of the co-ownership[3]. Nevertheless, the inadequence of emplying the multiproperty or multiutility notions to designate the esence of the juridical construction lead to reconsidering the almost induced nature of the trade mark denominations[4]. The multiproperty concept was considered to be too vague and ambiguous, meanwhile the periodic ownership one is thought as not being able to capture the specificity of the right.

Time-sharing ownership could be defined by a large group of practitioners as a method of the property right, in virtue of which each ownership holder exerts his prerogatives in his own name and for himself solely for a predetermined time segment, that is constantly repeatind itself, on a succesive and countinuous basis, at regulate spells. The holders may be natural or legal persons (even the statal

[1] M. Of. 580/ 30 iunie 2004.

[2] B. C. Stoica, S. Stoica, Discuţii privind proprietatea în sistem time sharing. Investiţiile imobiliare în regim timeshare – între miraj şi posibilităţi de implementare, Pandectele Române 5/2004, page 222; I. Popa, Coproprietatea spaţio-temporală, Pandectele române 5/2004, page 227.

[3] Fr. Terré, Ph. Simler, Droit civil. Les biens, 5 ème édition, Dalloz, 1998, pages 386-387.

[4] J. Chappuis, La residence secondaire dans le droit immobilier, Aspects juridiques de la residence secondaire, ASERJ, Université de Savoie, 1991, page 41.

entity), but nevertheless, although this institution presents the property holders as owners of the same asset, they will not emerge as being bound between them by any juridical deed[5].

The concept of time-sharing evokes the temporary characteristic of the ownership right, which is a very important aspect to highlight because of the fundamental trait that is bestowed upon the right to detain a good, that of perenity. The opposition between its perpetuity and the periodical peculiarity is ment to raise many question marks. In fact, the time limitation that interceds doesn't affect the property right in itself, but the exertion of some of its prerogatives. The cease of the time-sharing ownership is not meant to lead the way towards the effective loss of the property right, the only tendency is for this special condition of the right to come to an end and for the ownership right to grow into a pure and simple right. Most of the times, time-sharing refers to real estates, houses or holiday flats over which the usage attribute is exerted on a determined period, in a successive manner by more than one owner.

In the french juridical literature, the multiproperty was dealt with as a mock exception from the exclusive character of the ownership right and it was analized alongside the co-ownership and the indivision state, that are real exceptions. Although there is a denomination resemblance between the co-ownership and the multipropriety, they shouldn't be confused. The multiproperty confered a temporary usage of the good, in the meantime the co-ownership being capable to invest the holder with an exclusive property right over the fraction that he detains. In order to insure the usage of the same asset, successively, in predetermined time shafts by several individuals, a company type kind of juridical organization was bread, so that the membership to such a group would implicitly mean the right to use the joint good. The initiators of this mechanism resorted to employing the concept of company starting from the ideea that every purchaser had a contribution and that all of them form a collectivity. This sort of company that attributed real estates on a temporal basis was financed with the aid of each acquisitor's contribution and became the only ownership holder of the joint asset. Taking all in all, the asset belonged solely to the colective juridical entity and was not sharable.

Thence, the french lawgiver edicted on the 6th of January 1986 the legal frame for the fiction work of the multiproperty[6], but the french legislator rejected the posiblity of identifing such a time overlap with the co-ownership and even prohibited the use of the term "owner" in add campains for this sort of engineerings .The purchaser is designated as the consumer and is the beneficiary of all the protective measures established for the overseeing of his rights that reside in the shareholder capaciy over the company which is the owner of the good. The law edicted in the 8th of July 1998[7], which transposed the 94/47/CE Directive[8], added to the initial regulations a set of consumer's right provisions that arose from the contracts signed between merchants and consumers[9].

Due to the metamorphosis that the exclusive character of the property suffered because of the appearance of new ownership methods in occidental law systems, the romanian doctrine became a visionary for the path that the juridical regime of the real estates would take after 1989. As far back as 22 years ago, voices have been raised to highlight that such an overlap of properties, that confers an alternative usage, is not congruent with the Civil Code provisions established for the co-

[5] T. Sâmbrian, Proprietatea în sistem time sharing – proprietatea periodică- , o nouă modalitate a dreptului de proprietate, Dreptul 5/1997, page 35 and the following.

[6] C. Athias, Droit civil. Les biens, 8e édition, Litec, Paris, 2005, pages 303-305.

[7] Code de la Consommation, Litec, Paris, 2003, page 68.

[8] JOCE no. L 280 since the 29th of October 1994, pages 83-87.

[9] G. Mémeteau, Droit des biens, Paradigme- Centre de Publications Universitaires, Orléans, 2003, page 143.

ownership. The juridic relations that are the efect of time-sharing ownership are born by the will of the parties and are conceived from the very beginning with the intention of perpetuity, which makes us presume the free disposition act of each of the owners over his respective right[10].

The special nature of the time-sharing ownership is unanimously acknowledged as derogatory from the common exclusive property and from all the other methods of the ownership right. Thence, arose the necessity of a new stipulation of this institution that would clarify its particularities. Some authors have even made de lege ferenda suggestions in the direction of considering the time-sharing ownership as a type of forced co-ownership or in that of adopting a special set of rules that deal exclusively with the periodical property of an estate that may be inhabited[11].

When it comes down to settling the juridical nature of the time-sharing ownership, some authors[12] incline to esteeme that it is a new method of the property right and even though it is alike the other ones, especially the joint quota ownership, it may easily be differentiated and considered a stand-alone institution. According to other points of view[13] in the case of the periodical ownership, the good pertains to a number of individuals which have shared the usage attribute with all the consequences that derive from this particular contract in respective to the acts that may be carried out by one of the right holders with regard to the entire asset. From their perspective, the time-sharing right holders are the actors of juridical raports specific for the co-ownership, the general notion being sufficient to also cover the concept of periodic property[14]. The right is born by dividing the time in periods for the total or partial use of the asset by each of he co-owners, the effects being similar to those generated by the usage sharing action[15].

The parentage of time-sharing in Romania resides in a lottery ticket prize issued by the National Lottery Company under the denomination of The Golden Mansion that confered the winners with the gain of owning a particular penthouse in one of the villas for a period of time that was inscribed on the ticket. The ownership right that they achieved was at their free will disposal, meaning that they could have sold it, rented it, assigned it or devolved it as inharitance, while the maintanance of the apartment was insured by contributing with an annual tax, in correspondance with each owner's period of property exertion. We should stress upon the fact that all of the disposition acts must relegate to the whole asset and must refer strictly to the timetable that each owner should stick to, any other exploitation of the good shall be sanctioned with its annulment. The preservation and the management deeds may be carried out unabashed by the property holders in regardance to the entire asset, but only in respective to the period for which the ownership is granted.

The romanian Civil Code, in contrast with the french counterpart, puts to regulation only the property share action, the usage share being left in the hands of the jurisprudence. This last institution is considered to be a provisory division that leans over the possession and usage of the conjoint good,

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[10] M. Uliescu, Proprietatea publică şi proprietatea privată – actualul cadru legislativ, in Studii de drept românesc 3/1992, page 226.

[11] V. Stoica, Proprietatea periodică, Pandectele Române 4/2005, pages 169 and the following.

[12] T. Sâmbrian, the quoted article, page 35; M. Uliescu, the cited study, page 226.

[13] C. Bîrsan, Drept civil. Drepturile reale principale, All Beck, Bucharest, 2001, page 197; L. Pop, L.-M. Harosa, Drept civil. Drepturi reale principale, Universul juridic, Bucharest, 2006, page 219.

[14] V. Stoica, Drept civil. Drepturi reale principale, vol II, Humanitas, Bucharest, 2004, pages 112-114.

[15] V. Stoica, the quoted piece of work, peges 43-44; For a more detailed approach of the direction in which the periodic property represents in fact the legal consacration of a variance of usage sharing in the case on of co-ownership, B.C. Stoica, S. Stoica, the cited article, page 222; L. Pop, L.-M. Harosa, the cited study, page 219.

without refering to the property right in itself. All the other attributes that form the juridical content of the property right are exerted concomitantly by all the co-owners in regard to the whole asset.

Even after the ediction of the Law 282/2004 regarding the protection of purchasers in aspects that are entailed in contracts respective to obtaining an usage right over real estate, recognized for a limitated duration, some voices have distinguished themselves from the crowd by statuating that the periodic property would still seem as a manner of expressing the common co-ownership right, while in the situations in which the provisions of the above mentioned law are not applicable, we would be in the presence of a forced co-ownership on a duration established in the parties' convention. In this last hyphosesis, the forced nature of the right derived from the imposibility to petition for the sharing action in that particular time shaft, prohibition that results from the juridical provisions, not from the will of the signing individuals[16]. In my opinion, no matter the conjecture, the periodic property preserves the permanent and compulsory character. From the moment that the parties have agreed to this form of ownership, the right holders are obliged to maintain it, with no facility to divide the good, so if the exertion of the right would become overburdening the right holder could opt either for disposing of the good or for abandoning it[17]. The periodic property right of each holder concerns the entire asset and every holder may exert the usage attribute in a predetermined time interval, on a succesive conveyor belt. This state, qualified by some as indivision[18], represents in fact the very esence of the time-sharing ownership and is to be mentained for the period established in the convention of the parties (which in the case of the contracts that are regulated by the Law 282/2004[19] can't go below 3 years) or for the whole spell of the good's existance[20]. I believe that, in the hypothesis in which the right refers to an individualy determined asset, the most likely when it comes down to time-sharing, we couldn't make talk about the indivision state because it always bears upon an ansamble of goods. Some authors considered that in the case of the periodic property more than the fact that the indivision institution is not appliable, not even the unanimity clause could be enforced, as long as the time-sharing right holders are not the subjects of the same juridical rapport[21]. This absolute separation is posible only on a theoretical scale, having in mind that, in practice, the lack of legal provisions converges towards the neccessity for the parties to sign agreements that establish the juridical regime of the rights which they hold. Aside the nature of the periodic property, its coexistence with other methods of the ownership right shouldn't be excluded de plano. Being a method of the property right, the time-sharing ownership operates with the same characters as the pure and simple right, meaning that it is governed by the erga omnes opposability, exclusiveness and perpetuity. As well as the exclusive ownership right, the periodic property perpetuates itself through transmission, standing for the fact that the right may have different holders over a time span.

Many authors have the conviction that Law 282/2004 represents the acknowledgement of the time-sharing ownership by the romanian legislator, but one particular respectable theoretician and

[16] V. Stoica, the quoted study, page 44.
[17] T. Sâmbrian, the cited writing, page 39.
[18] I. Popa, the quoted article, page 237.
[19] C. Toader, Contractul de time-sharing, acum reglementat şi în România, in Revista de drept comercial 9/2004, page 152 and the following; L. Stănciulescu, Particularităţile contractelor de locaţiune sezonieră, reglementate de Legea 282/2004 privind protecţia dobânditorilor cu privire la unele aspecte ale contractelor purtând asupra dobândirii unui drept de utilizare pe durată limitată a unor bunuri imobiliare, in Revista de drept comercial 9/2004, page 23 and the following.
[20] I. Popa, the cited piece of work, pages 234-235.
[21] T. Sâmbrian, the quoted study, page 40.

CEDO practitioner thinks otherwise[22]. He fundaments his belief on two of the normative deed's provisions which stipulate that the here in discusion law regulates the protection of the acquisitors of an usage prerogative over real estate, on a limited duration, through the mediation of contracts that have such an object (article 1) and that its rulings apply to contracts regarding the purchase of an usage right over immobile goods on a limited time span, that are signed on a minimum 3 years duration, with the payment of a global price. The contract gives birth directly or indirectly or transfers an absolute right or any other right that is respective to the usage attribute of one or more real estates for a determined or determinable period of the year, which can't be less than a week (article 3 letter b). By collating the two injunctions, alongside other authors[23], the above mentioned practitioner concluded that the Law 282/2004 refers strictly to transmiting the usage right over a real estate for a determined or determinable spell, so the nature of the time-sharing ownership would be that of a receivable right. He states that the law pursues the consumer's protection in certain areas of the merchandise activities and not the introduction of a new form of ownership. "It's obvious that a person which owns and uses an asset on a limited basis in a year for a few days only can't be named co-owner. The so called periodic property is nothing more than a receivable right against the company that owns the real estate[24]"[25]

On the other hand, the theoreticians that take sides with the absolute right nature of the time-sharing, in fact three quarters of all the authors, consider that the periodic property takes birth from the free will of the parties, which sign a contractual deed that must undergo the publicity formalities[26] which are requested for the immobile goods.

Conclusions

In present times, our legal system doesn't regulate the periodic property, but with the aid of Law 282/2004 a tranposition of the 94/47/2004 Directive was performed and thus the juridical regime of the contracts that enable the purchase of time-sharing ownership rights has been established, but nevertheless these injunctions are to be completed with common law provisions or with other special deeds that have applicability in this field. As I have already pointed out in the body of this article, the romanian legislator doesn't clarify the juridical nature of the right that makes the topic of our concerns, leaving the role of grand master for the baptizing cerenomy to the practitioners and to the doctine.

The applicational domain of the law is sufficiently broad for it to gather under the same roof absolute rights, as well as receivable rights that are susceptible of insuring the use on an asset for a

[22] C. Bîrsan, Drept civil. Drepturi reale principale, 3rd edition, Hamangiu, Bucharest, 2008, page 198.

[23] V. Pătulea, Legea 282/2004 privind protecţia dobânditorilor unui drept de utilizare limitată a unor bunuri imobile, in Dreptul 1/2005, page 7; L. Pop, L.-M. Harosa, the quoted article, page 223.

[24] Ch. Laroumet, Droit civil. Les biens Droits réels principaux, tome II, 5e édition, Economica, Paris, 2006, page 414 The extending of the divisioned usage in practice to other goods as airplanes, yachts or similar can't guide us to any other opinion. Mainly the periodic property bears over corporal, immobile and inhabiting destined assets, without excluding the posibility that the object could have another destination (camping, recreational parks), or even be a mobile good. The assets mustn't be consumable or, in the hypothesis that they are consumable, the owner is obliged that at the end of the period for which he was granted ownership to put to the next holder's disposition the same quantity, quality and of he same value consumable goods.

[25] C. Bîrsan, the cited study, page 198.

[26] V. Stoica, the quoted work, vol II, page 127.

determined period. The problems that raise their head in this contextual arrangement are by far more intricate and arduous as the Law 282/2004 contains a special provision regarding the immobile goods, so that the juridical regime of the born or transmited rights, that are fundamented in contracts that can't be enforced with the injunctions of the hereby deed, remains to be settled.

The article 6 paragraph 1, letter a) provisions of the above mentioned juridical act, acknowledge the right of the purchaser to desist the contract only by his free will alone, without the neccessity of invoking any reason for his decision in a 10 calendaristic day span from the moment in which the parties have signed the contract or a precontract. In this hypothesis, the acquisitor may only be obliged to defray the summs mentioned and agreed upon in the contract for the unileteral disolution of the deed and that correspond with the formalities that must be accomplished in the 10 day interval. The relinquishment of the unilateral right of the purchaser to waive the contract will be sanctioned with the annulment of his manifestation, at the same time the legislator prohibiting the stipulation of any contractual clauses that dismiss or abridge his right.

All the directives that were elaborated in the contractual domain participated to a general harmonization movement on the european contractual law scene, moreover, the juridical acts that were signed by the consumers as actual parties of the topic contracts are an integrated component of the revolving motion that encompasses the member states of the European Union. We should still observe that, in this field, the european legislator followed until the present a step by step intercession in the areal of harmonization. This manner of approaching the contractual relations between merchants and consumers colaborated with the unforeseeable development of the market may create incoherences in applying the community law.

Secondly, the use of abstract concepts by the community provisions may steer to a defective translative action of these directives onto the inland law systems, this being one of the motives for which the national lawgivers encounter difficulties in capturing the very esence of the community injunctions and make clumsy attempts to seize on the dispositions.

The 94/47/CE Directive is to be appreciated, because the input of a minimal standard protection for the purchasers of time-sharing rights exerted on the immoble assets all over the european landscape is critical in solving litigations that arise from the appliance of a fairly new institution. The directive's provisions bring their contribution to the satisfaction that the consumers feel and, more importantly, act in a pozitive way in the economical development of the market that's created in this innovatory real estate concreet floor. Furthemore, they bear a hand to reducing the deceitful contractual praxis and to increasing the consumer's confidence in this manner of perceiving the transgression from the conservatory implementation of the ownership right to a more lively institution.

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AN OVERVIEW ON THE ENERGY MARKET

Petruta-Elena ISPAS[1]

Abstract
Biofuels like wind and hydropower present the most lucrative and promising of the 5 areas considered renewable energy. Biofuel in Romania is currently at 43% in use, of its full potential and as such there is a large margin for growth and exploitation. The main drawback for bioenergy is that there is a lack of funding which is halting bioenergy from being able to fill the market the way it should.

Keywords: *biofuels, renewable energy, wind power, energy from renewable sources (E-RES).*

Introduction

Romania as a community member has one of the largest potentials to grow within the renewable energy sector stretching from hydropower to geothermal; there is a wealth of opportunity here in Romania. The proposed Green Certificate scheme will also boost the viability of the Renewable industry through providing another source of income for the producers of renewable energy.

Wind power has one of the largest growth potentials in Romania with a 23% increase in installed wind power developed for the year 2006 constituting an investment amount of 9 billion Euros. The major countries where development has been the greatest, Germany and Spain, have seen a slump in wind investment as the investors turn to less developed European markets.

Romania in 2006 constituted only 1.3MW within this industry[2] which has increased to 14.1MW at the end of 2009[3]. Yet this is not a problem as currently there is 636 MW of wind capacity under construction[4]. In terms of the future Iberdrola has won the right to install 1.5GW of wind energy in Dobrogea, this along with the recent announcement that Petrom is to invest 100 million Euros in a 45MW wind farm that it has recently bought the rights to develop it[5].

In a study conducted in 2004 it was stated that biomass could constitute 19% of Romania's total energy needs.[6] Biomass could in theory make up the majority of Romania's Quota for the 2009/28/EU directive. The current directive however sets down strict sustainability criteria that will

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[2] http://ec.europa.eu/energy/renewables/studies/doc/wind_energy/2007_statistics2006.pdf

[3] http://www.zf ro/companii/primele-70-de-turbine-eoliene-de-la-fantanele-sunt-ridicate-cez-e-aproape-gata-sa-aprinda-becul-in-120-000-de-case-5977451/

[4] http://ebrdrenewables.com/sites/renew/countries/romania/profile.aspx

[5] http://www.businessgreen.com/business-green/news/2261661/romania-underlines-wind-energy

[6] Environmental Engineering and Management Journal September/October 2008, Vol.7, No.5, 559-568 http://omicron.ch.tuiasi ro/EEMJ/

require constant re-evaluation to ensure that CO2 emissions savings are made according to the directive.

Hydropower is the final in the big three potential renewable energy sectors and is also the least aided by government schemes. This is due to the fact that after 10MW of power hydropower starts becoming profitable. There is a current installed capacity of 6,715 MW[7] which is almost a third of Romania's entire installed potential.

On top of this the Romanian government is in the midst of selling 200 small hydro-plants as part of their accession into the EU[8]. In terms of growth there is a potential of an extra 9GW of power that could still be tapped. Therefore there is still a lot of potential to be exploited in this already developed market.

The solar energy consumption in Romania is almost non-existent. While there was some development during before the 90's no serious headway has been made since. This leaves the solar market almost completely unopened. Under the proposed 220 law that would change and solar energy would be given priority over the other renewable energy sources. This could spell the beginning of a rejuvenation of the solar industry and the potential is there. Romania's solar energy potentials is around 1200GWh[9]

Work content

Renewable energy is assuming an increased importance across Europe (and indeed across the world) due to security of supply issues as well as environmental and dependency concerns. The European Union is often regarded as an international frontrunner concerning the development, promotion and implementation of renewable energy policy and technology.

Starting with 1 January 2007 Romania became an EU member. In the same year, the Energy Strategy in Romania for the period 2007-2020 was drafted and approved by the government by Government Decision 1069/2007.

Legislation on energy[10]

Primary legislation: Electricity Law 13/2007 as subsequently amended and supplemented; Law 325/2006 on the public heating supply service; Law 220/2008 establishing the promotion system of the energy production from renewable sources of energy as subsequently amended and supplemented; Government Emergency Ordinance 44 of 16 April 2008 (updated) on the carrying out of economic activities by self-employed persons, individual companies and family businesses as subsequently amended and completed**;** Government Decision 540/2004 approving the Regulation for granting licenses and authorisation in the electricity field, as subsequently amended and supplemented; Government Decision 90/2008 approving the Regulation on the connection of users to public interest electricity grids.

Secondary legislation: Technical norm on the demarcation of the protection and safety areas corresponding to energy capacities approved by ANRE(Romanian Energy Regulatory Authority)

[7] http://ebrdrenewables.com/sites/renew/countries/romania/profile.aspx

[8] Curierul National, "Hidroelectrica sells 19 micro power plants," May 2009

[9] Ukraine Biofuel Portal, 2007

[10] http://ec.europa.eu/energy/renewables/transparency_platform/doc/national_renewable_energy_action_plan_romania_en.pdf

Order 4/2007, as subsequently amended and supplemented; Technical norm "Technical conditions for the connection to public interest electricity grids for wind power plants" approved by ANRE Order 51/2009.

At the beginning of June 2010, the Romanian Parliament voted the law amending and supplementing Law 220/2008 establishing the energy production promotion system from RES (energy from renewable sources).

The new law stipulates the carrying out of improvements on the administrative procedures, regulations and codes, as well as completion deadlines for such improvements depending on its entry into force.

The regulations to be drawn up/revised are the following: calculation methodology of the purchase share of green certificates by providers depending on the purchase share of the dully established E-RES; calculation methodology of the final gross consumption of electricity from renewable sources of energy; qualification regulation for the producers of electricity from renewable energy sources for the application of the support scheme; methodology for the monitoring of the support scheme through green certificates for the promotion of electricity from RES; methodology for setting regulatory prices from E-RES produced in electricity plants with installed power under 1 MW, per type of technology; regulation on the takeover of the electricity excess produced from renewable energy sources by natural persons holding electricity production capacities under 1 MW per consumption site, and by the public authorities holding electricity production capacities realized, either in part or in full, from structural funds; methodology on the possibility of amending the notifications throughout the operation day by the producers of electricity from renewable sources; regulation for the issuance and monitoring of origin guarantees for electricity from renewable resources.

The general objective of the energy sector strategy is to provide the necessary energy both at present and on a medium and long term at the lowest price possible and adapted to a modern market economy and a civilized life standard, under appropriate quality and supply safety conditions and in compliance with sustainable development principles.

Strategic objectives contained in the Strategy are the following[11]:

Energy safety: increase of energy safety by providing the necessary energy resources and limiting the dependence of imported energy resources; diversification of imported resources, energy resources and their transport routes; increase of the adequacy level of electricity, natural gas and petroleum national transmission grids; protection of the critical infrastructure.

Sustainable development: promotion of energy production from renewable sources so that the share of electricity produced from such sources out of the total electricity gross consumption to be of 33% in 2010, 35% in 2015 and 38% in 2020. Out of the gross domestic energy consumption, 11% shall be supplied from renewable sources in 2010; stimulation of investments in improvement of energy efficiency throughout the entire resources-production-transmission-distribution-consumption chain; promotion of use of liquid biofuels, biogas and geothermal energy; support of research-development activities and dissemination of results of researches applicable to energy; reduction of the negative impact of the energy sector on the environment by using clean technologies; promotion of the production of electricity and thermal energy in high efficiency; rational and efficient use of primary energy resources.

[11] http://ec.europa.eu/energy/renewables/transparency_platform/doc/national_renewable_energy_action_plan_romania_en.pdf

Competitiveness: development of competitive markets of electricity, natural gas, petroleum, uranium, green certificates, greenhouse gas emission certificates and energy services; liberalization of energy transit and provision of permanent and nondiscriminatory access of market members to transmission, distribution and international interconnection grids; increase of electricity interconnection capacity from approximately 10%, at present, to 15-20% in the perspective of 2020; continuation of the restructuring process in the lignite sector in order to increase profitability and access on the capital market.

The use of RES has an important role in this strategy.

The strategy shows that, except for large hydro electrical facilities, the costs associated to the production of electricity within plants that use renewable sources are currently superior to those using fossil fuels. The stimulation for the use of such sources and the call for investments in energy facilities using renewable sources shall take place by applying support mechanisms in accordance with European practice.

It is necessary to draw up studies on the impact of wind turbines on birds migration in Dobrogea and to define a clear and single map of areas where the construction of wind and hydro energetic facilities is not appropriate on environmental grounds.

The use of renewable energy sources has a significant impact on the national power system, being necessary: the drafting of different scenario studies on the impact resulting from taking over the electricity produced using wind and micro hydro turbines and by cogeneration using biomass in the transmission and distribution electric grid (voltages of or exceeding 110 kV) within areas with a high potential; the development of the transmission and distribution grids in the *smart grid* concept*;* the construction of new electricity production facilities with high flexibility in terms of operation and development of capacity market in order to counter balance and/or reduce negative effects of uncontrolled variability of wind and micro hydro energy.

The Romanian national renewable energy policy was drafted and implemented in the difficult context of economic phenomena specific to transition from centralized economy to market economy, and during the recent years, post-transition.

The Directive 2009/28/EC on the promotion of the use of energy from renewable sources (RES) sets the overall target to reach 20% renewable energy in gross final energy consumption in 2020. This target is broken down into binding individual Member State targets. Reaching these targets will require a huge mobilization of investments in renewable energies in the coming decade[12].

In order to improve financing and coordination with a view to the achievement of the 20% target, Article 23 (7) of the Directive requires the Commission to present an analysis and action plan with a view to: the better use of structural funds and framework program; the better and increased use of funds from the European Investment Bank and other public finance institutions; better access to risk capital; the better coordination of Community and national funding and other forms of support; the better coordination in support of renewable energy initiatives whose success depends on action by actors in several Member States.

Romania was the first country specified in Annex 1 of United Nations Framework Convention on Climate Change (UNFCCC) which, by means of Law No 3/2001, that approved the

[12] DIRECTIVE 2009/28/EC of the European Parliament and the Council of 23 April 2009; on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC.

Kyoto Protocol, being obliged to reduce by 8% greenhouse gas emissions in comparison with the base year 1989, for the first engagement period 2008-2012.

During the following period, a number of statute/legal documents have been drafted aiming at the promotion of E-RES.

GD 443/2003 on the promotion of electricity production from renewable energy sources (amended by GD 958/2005) established a number of measures among which: Emission of guarantees of origin for the electricity obtained from RES based on a regulation drafted by ANRE (Romanian Energy Regulatory Authority); issuing by ANRE of a number of regulations on electricity market operation rules providing for the priority takeover and marketing of electricity obtained from RES; obligation of grid operators to guarantee the transmission and distribution of electricity obtained from RES without endangering the reliability and safety of grids; reduction of regulation barriers and other barriers to the increase of RES electricity production; simplification and acceleration of authorizing procedures. Directive 2001/77/EC was transposed in the Romanian legislation by this GD.

GD 1892/2004 (amended by GD 958/2005 and GD 1538/2008) introduced the obligatory quota system combined with green certificates trading as support mechanism for the promotion of RES electricity production. The document contains provisions on the application method for this system.

In order to accelerate the production of E-RES, the Romanian Parliament adopted Law 220/2008 on the establishment of the promotion system of the energy produced from RES.

At the beginning of June 2010, the Parliament approved a law amending Law 220/2008[13]. By this amendment, provisions of article 1 - 4, art. 6 - 10, article 12, article 15(1) and article 16(2) - (6) of Directive No 2009/28/EC of the European Parliament and Council of 23 April 2009 on promotion of use of energy from renewable sources are transposed.

In the context of the EU accession, the Romanian Government drafted the National Development Plan 2007-2013 (NDP). NDP presents the RES potential, the information contained in the use strategy previously presented being retreated. NDP represented the strategic planning document that guides and stipulates the social-economic development of Romania in accordance with EU development policies.

In order to achieve the global objectives and the ones specific to the period 2007-2013, the considered measures and activities are grouped in six national development priorities: increase of economic competitiveness and development based on knowledge; development and modernization of transmission infrastructure; protection and improvement of environment quality; development of human resources, promotion of employment and social inclusion and enforcement of administrative capacity; development of rural economy and increase of productivity in the agricultural sector; reduction of development discrepancies between different regions of the country. The use of RES is considered to be a sub-priority within the first priority.

Due to the fact that the energy produced from renewable energy sources is “clean” energy, the use of such sources offer an alternative to the energy produced from fossil fuels. At the same time, the use of renewable energy resources available shall contribute to the integration of certain isolated areas in the economic circuit. Romania shall intensify the actions related to the use of renewable resources and is concerned, particularly on medium and long term, with the use of renewable energy resources for the production of electrical and thermal energy thus contributing to the encouragement of innovative technologies development and the practical use of new technologies.

[13] Official Gazette no. 577/13.08.2010

According to the acquis on the European Union Cohesion Policy, Romania drafted the **National Strategic Reference Framework 2007-2013 (NSFR)**, as reference document for the planning of Structural and Cohesion Funds during the reference period. NSRF links the national development priorities, established in the National Development Plan 2007-2013 and priorities at European level. NSRF extracts and synthetizes the main elements included in the NDP Analysis and Strategy while they are reorganized depending on the 3 Priorities and the 11 Guidelines contained in the Community Strategic Guidelines, thus reflecting the classification of NSRF in the European principles of the Cohesion Policy.

Within the same period the drafting action was initiated for the National Strategy for sustainable development – Horizons 2013-2020-2030. The Strategy was approved by GD 1460/2008 and aims at the achievement of the following strategic short, medium and long term objectives: **Horizon 2013:** Organic incorporation of sustainable development principles and practices into the range of public program and policies rolled out by Romania, in its capacity as an EU member state; **Horizon 2020:** Reaching the current average level of European Union countries as regards the main indicators of sustainable development; **Horizon 2030:** Romania will come close to achieving the average level for that year of EU member countries from the point of view of sustainable development indicators.

The Strategy is a comprehensive document which analyses all areas of economic and social life. Strategic objectives and guidelines in relation to energy sector sustainable development.

Horizon 2013. National objective: provision on short and medium term of the necessary energy and the establishment of requirements for the country energy safety on a long term according to modern market economy, under safety and competitiveness conditions; fulfilment of obligations undertaken based on the Kyoto Protocol on the reduction with 8% of greenhouse gas emissions; promotion and application of adjustment measures to climate change effects and compliance with sustainable development principles.

The main strategic guidelines on energy policy that Romania must initiate as a priority, in accordance with objectives and policies agreed upon at the level of the European Union are energy security, sustainable development and competitiveness.

In terms of sustainable development should be considered: increase of energy share produced based on renewable resources to total consumption and electricity production; rational and efficient use of renewable primary resources and the gradual decrease of their share in the final consumption; promotion of electric and thermal energy production in high efficiency; support of research – development – innovation activities in the energy sector, insisting on the increase of energy and ambient efficiency level; reduction of the negative impact of the energy sector on environment and compliance with obligations undertaken in order to reduce greenhouse gas emissions and atmospheric pollutants emissions;

Overview on main findings and barriers. Barrier - Lack of a Certification body[14]

The first and strongest barrier reflects the absence of a national (or even European) appointed certification body. This barrier is considered to be the main problem regarding the issue of certification, and is therefore ranked the highest of all.

In some countries, a nationally recognized certification body or scheme is clearly missing. Examples concern Czech Republic, Greece and the Netherlands. Several Member States lacking such a body or scheme may experience problems regarding the quality of installations. From a supply side

[14] http://ec.europa.eu/energy/renewables/studies/doc/renewables/2010_non_cost_barriers.pdf

perspective, the companies that do invest in decent training for the installers are affected by companies that do not; both by avoided training costs as well as a bad general reputation of the market. What is more, due to the lack of national benchmarks there is no standard, creating further problems with installation and maintenance. From a demand side perspective, consumers are reluctant to have RES systems installed due to uncertainty of good installation.

These problems have been recognized within most of these Member States. National bodies representing one or several technologies within the countries are currently developing certification, training and examination schemes to circumvent this barrier and improving installation of RES systems and equipment.

Subsequently, in some Member States this phase has been implemented already, where a certification body for one or several technologies is in place. The main technologies in scope are PV panels, biomass systems such as boilers and stoves, and heat pumps. Often these bodies provide training of a few days, including wiring and other electrics, piping and plumbing, and chimney fitting. After this training, there is an examination, after which the companies and installers receive their certificate if the pass successfully. These schemes are frequently integrated with certification schemes of central heating boiler installers, plumbers and electricians. Examples can be found in Austria, Belgium and Germany.

Finally, in some Member States there are certification bodies including all the relevant technologies. In addition, for consumers to be eligible for support, the systems and equipment must be installed by a certified company or installer. Denmark, France and the United Kingdom are example of such countries.

Overall, this barrier is present in about half of the Member States, which means lacking a certifying body for one or several technologies. However, the severity of the problem is not too large, for it is in the long-term benefit of the installers themselves to install the systems and equipment decently.

As mentioned above, this barrier is practically limited to small-scale systems. It is anticipated that the construction of large power facilities is *de facto* contracted to verified and experienced contractors only, most often through tenders including quality standards.

This barrier focuses primarily on installing skills, but will not exclude the knowledge of public servants and policy makers, research, maintenance and operator personnel, etc. In addition, the lack of guidelines for planners, architects, etc. on optimizing the use of renewable energy will be discussed. However, from the country reports it became clear that this barrier plays a minor role with regard to the issue of certification.

In accordance with Article 4 of Directive 2003/30/EC on the promotion of the use of biofuels or other renewable fuels for transport, Member States report to the Commission every year prior to 1 July: the measures taken to promote the use of biofuels or other renewable fuels to replace diesel or petrol for transport purposes; the national resources allocated to the production of bio mass for energy uses other than transport; the total sales of transport fuel and the market share of biofuels, pure or blended, and of other renewable fuels placed on the market for the preceding year. Where appropriate, Member States must report on any exceptional conditions in the supply of crude oil or oil products that have affected the marketing of biofuels[15].

The use of biofuels and other renewable fuels for transport is being promoted with the aim of partially replacing petrol and diesel, contributing to achieving certain objectives such as: meeting

[15] http://ec.europa.eu/energy/renewables/biofuels/ms_reports_dir_2003_30_en htm

commitments for the reduction of greenhouse gases, ensuring fuel security in a manner compatible with the environment and increasing the level of energy independence, promoting the use of renewable energy sources.

In addition, promoting the use of biofuels could create new opportunities for sustainable rural development, with the potential to open up new markets for agricultural products.

Directive 2003/30/EC was transposed in full by Government Decision No. 1844/2005 on the promotion of the use of biofuels and other renewable fuels for transport, published in Official Gazette No 44 of 18 January 2006.

Fuel suppliers are introducing on the market only a blend of biofuels and conventional fuels - derived from mineral oils as follows: from 1 January 2011, diesel with a minimum 5% biofuel content by volume; from 1 January 2013, diesel with a minimum 7% biofuel content by volume; from 1 January 2011, petrol with a minimum 5% biofuel content by volume; from 1 January 2013, petrol with a minimum 7% biofuel content by volume; from 1 January 2017, petrol with a minimum 9% biofuel content by volume; from 1 January 2018, petrol with a minimum 10% biofuel content by volume[16].

Romania's potential to supply the raw material necessary for biodiesel, namely vegetable oil (sunflower, soya, oilseed rape) is approximately 500 - 550 thousand tones/year. Its potential to supply the raw material necessary for bioethanol, namely for corn seed is approximately 390 thousand tones/year and for wheat germ approximately 130 thousand tones/year.

At present Romania has a production capacity of about 400 thousand tones/year for biodiesel and about 120 thousand tones per year for bioethanol. The Ministry of Economy, Trade and the Business Environment is responsible for implementing the 'Qualitative and quantitative monitoring system for petrol and diesel' marketed in filling stations, as approved by Order No 742/2004 of the Minister for Economy and Trade[17], the annex to which was replaced by Order of No 58/2006 of the Minister for Economy and Trade[18].

In 2009, under the 'Qualitative and quantitative monitoring system for petrol and diesel', checks were carried out to determine the fatty acid methyl ester (FAME) content of approximately 200 diesel samples and to determine the content of biofuels in petrol in approximately 100 petrol samples. The checks were performed by bodies recognized by the Ministry of Economy, Trade and the Business Environment to carry out sampling of petrol and diesel, in accordance with Order No 907/2004 of the Minister for Economy and Trade approving the list of recognized bodies carrying out sampling activities, as amended.

In the following, we will present one of the authorities implied in the energy field, ANRE.

In the year 1999 has been established the National Agency for Regulation for Electricity (ANRE) and for Gas (ANRGN) in 2000, with the aim of **creating stable and transparent rules encouraging commercial activity and safeguarding public interests**, in accordance with the requirements of the EU Internal Electricity Market Directive 96/92/EC for the establishment of an independent regulatory body and of the Directive 98/30/CE of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market natural gas. ANRE is

[16] http://ec.europa.eu/research/energy/pdf/draft_vision_report_en.pdf.
[17] Official Gazette no. 1081 /19.11.2004
[18] Official Gazette no. 239/16.03.2006

functioning according to the Law no. 13/2007, Law no.351/2004, Government Ordinance no. 22/2008 on energy efficiency and promoting the use of the final consumers of renewable sources of energy.

In April 2007, ANRE took over the responsibilities, personnel and budget of ANRGN which was dissolved. Therefore, ANRE became the only regulatory authority in both domains energy and gas.

Also, in December 2009, Romanian Agency for Energy Conservation (ARCE) of the Ministry of Economy was abolished and was merged by absorption with ANRE. Reason for which, ANRE is now working under the direct coordination of the Deputy Prime Minister.

ANRE is organized and operates as an autonomous public institution of national interest. It has a legal personality and its own patrimony. ANRE is funded from the State budget through the budget of the General Secretariat of the Government, and the proceeds according to the law.

As ANRE it is a key institution for the implementation of the European Union's energy policy, which is why its independence and the quality of specialists are requested from the European Commission to all its member states and it does not make any compromises. Reason why, on 25th June 2010, the European Commission sent a letter to the Romanian Government, informing that the new restructuring of ANRE is infringing the statute of independence required through the European Treaty for such an authority. Romania should take these steps for the independence and autonomy of ANRE.

For now, the only measure taken by the Romanian authorities on this matter was only to meet and establish a debate on the letter received through the Romanian authorities from the European Commission.

Therefore, on the 12th of July 2010, the General Secretary of the Government, ANRE, the Ministry of Finance and the Ministry of Economy debated the letter received from the European Commission and established that indeed the Directives related to the independence and autonomy of the regulatory authorities were infringed.

Accordingly, it was established that the legislation shall be amended. As it was mentioned in the letter of the European Commission the autonomy of ANRE shall be reinforced as it will be again under the coordination of the Prime Minister and not of the General Secretary of the Government and the financing of the operating costs and capital shall be again insured through the own revenue.

In the exercise of its powers ANRE collaborates with public authorities and civil society organizations, economic operators in the electricity sector, heat and gas, with international organizations in the field, so that transparency and objectivity of the process to be insured.

ANRE is a member in many international authorities implied in the process of the functioning of the international cooperation in the energy field. ANRE is a member in **Energy Regulator Regional Association** (ERRA), having the rank of an associate member. ERRA is a voluntary organization comprised of independent energy regulatory bodies primarily from the Central European and Eurasian region, with Affiliates from Asia the Middle East and the USA.

ERRA began as a cooperative exchange among 12 energy regulatory bodies. The U.S. National Association of Regulatory Utility Commissioners (NARUC), through a Cooperative Agreement with the US Agency for International Development (USAID), has been providing technical forums, meetings and study tours for the energy regulators of the above region since 1999.

The Association's main objective is to increase exchange of information and experience among its members and to expand access to energy regulatory experience around the world.

The Founding Members identified the purpose of ERRA as follows: to improve national energy regulation in member countries, to foster development of stable energy regulators with autonomy and authority and to improve cooperation among energy regulators. in addition, the Association strives to increase communication and the exchange of information, research and experience among members and increase access to energy regulatory information and experience around the world and promote opportunities for training.

ANRE is leaded by **a President**, with the rank of Secretary of State. The President of ANRE is appointed and removed through the decision of the Prime Minister. The given mandate of the President is for a term of 5 years.

Subordinated to the President is the Office of the dignitary. The President is empowered to issue orders and decisions. The normative orders and decisions given by the President shall be published in the Official Gazette of Romania, Part I.

According to the law[19], the President **is assisted by three Vice-Presidents**, with the rank of Deputy Secretary of State. The Vice-Presidents are also appointed and removed by the decision of the Prime Minister. The mandate to the Vice-Presidents is having a term of 5 years.

The President and the three Vice-Presidents, together, shall provide the fulfilment and powers accruing to ANRE. Orders and decisions of regulatory action shall be published in the Official Gazette of Romania, part I.

The regulations which are elaborated by ANRE are approved by the **Regulatory Committee.** The Regulatory Committee consists of the President, the three Vice-Presidents and 7 regulators. The 7 regulators, as the President and the Vice-Presidents, are appointed and can be revoked through the Prime-Minister's decision. Their mandate is given for a period of 5 years.

Under the coordination of the President, the Regulatory Committee has to approve the rules, decisions and orders of ANRE with the majority, as a main attribution.

The **Advisory Committee** has the role to assist the Regulatory Committee in harmonizing the interests of the legal entities with the final consumers'.

The Advisory Committee is formed by 11 members, appointed and revoked through the Prime-Minister's decision, at the proposal of the President (of ANRE). The Advisory Committee's decisions have recommendation character for the President and for the Regulatory Committee.

The Departments of ANRE ensure the fulfilment of some of the main responsibilities assigned to them under the legal frame of the law[20].

ANRE's departments are the following: Department on electricity market, prices and tariffs - **DPTE**; Department on natural gas market, prices and tariffs - **DPTG**; Department for grid access, authorization in electricity - **DARAE**; Department for grid access, authorization in the domain of natural gas–**DARAG**; Department in the electricity efficiency domain - **DPEE**; Department in the natural gas efficiency domain – **DPGN;** Control and consumers protection Department - **DCPC**; Cooperation, program and communication Department - **DCC**.

Conclusions

The EU is a world leader in renewable energy and the sector is already of considerable economic importance. As renewable technologies have matured, production of renewable energy has risen steadily, and costs have come down. However, development has been uneven across the EU,

[19] G.D. no. 1428/2009.
[20] GD no. 1428/2009.

and renewable energies still represent only a small share of the EU's total energy mix. Because external costs of fossil fuels, such as environmental impact, are not fully considered, renewable energy is still not competitive.

Different renewable energy sources are at various stages of technological and commercial development. Under favorable conditions, wind, hydro, biomass and solar-thermal sources of energy are economically viable. Others like photovoltaic energy (which uses silicon panels to generate electricity from sunlight) require increased demand to improve economies of scale.

So, while renewables have begun to make their mark and provide more environmentally-friendly energy, the potential remains to increase their market share and establish them as cost-effective, widely used options.

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THE ILLEGAL PERFORMING OF THE ABORTION - PRESENT AND FUTURE REGULATIONS

Mihaela MOISE (ROTARU) *

Abstract
The impending coming into force of a new Criminal Code calls for a comparative analysis between the criminal provisions that are applicable today and the future ones in order to observe the evolution of the way to incriminate human behaviour that is against the law. We can find the crime of illegal performing of the abortion, described in the article 185 of the Criminal Code in force, in the provisions of the new Criminal Code also, but under a different name, and the legal text in which the crime is described contains some important changes. Those elements of differentiation will be analyzed in this study.

Keywords: *performing, abortion, pregnancy, illegal, crime.*

Introduction

1. The paper deals with issues relative to the offense of illegal performing of the abortion stipulated in article 185 of the Criminal Code in force, by reference to the provisions of the new Criminal Code about the crime of interruption of pregnancy, as described in article 201 of the New Criminal Code.

2. The issue is of particular importance because it refers to a part of social relations that are protected by criminal law, namely those that appear and develop about the protection of life, physical integrity and health of pregnant women, on the one hand , and the protection of the fetus, on the other hand.

3. The paper includes several sections in which there are further analyzed and compared to the current and future provisions of the Romanian Criminal Code relative to the crime of illegal performing of the abortion. The aim of this approach is to highlight the changes that occurred in the manner of description of the offense, starting with its change in the title dictated by the evolution of medical science and legal practice area. During this exposure we have also made different proposals for improving legislation. Moreover, a separate section is dedicated to the presentation of the elements of comparative law as the elaboration of new Criminal Code has been inspired by the penal codes of some countries with old democratic traditions such as: Spain, Norway, Portugal, Austria and so on.

4. The crime of illegal performing of the abortion has been analyzed over the years in many courses and treaties of criminal law but also in a series of articles and studies. This incrimination existed before the events of December 1989, after that it was abolished for a short period of time, and

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then it had been reintroduced in the Romanian Criminal Code by Law no. 140/1996. This paper does not have as a purpose to repeat what was previously written in the field, but to continue the discussion on this topic, having as a base the studies already existing in the speciality literature and taking into account the imminent entry into force of the new Romanian Criminal Code.

1. The crime of illegal performing of the abortion is stipulated in article 185 of the Criminal Code in force[1]. It is a part of the Chapter III, entitled „Abortion", of the Title II, "Crimes against the person". The Romanian Criminal Code of 1968 incriminated the following facts: the illegal performing of the abortion in the article 185, the abortion performed by the pregnant woman to herself in the article 186, the possession of abortifacient tools and materials in the article 187, and the elision to announce an abortion in the article 189. By the Decree-Law[2] no. 1/1989 on the repeal of laws, decrees and other normative acts the abortion was decriminalized. Subsequently, because of the large number of abortions performed by unauthorized persons or without specialized training in this field, the article 185 was reintroduced in the Romanian Criminal Code by Law no. 140/1996[3], having a new content, in order to protect life, physical integrity and health of women, respectively, the general interests of the society[4].

In the new Criminal Code, represented by the Law no. 286/2009[5] we find the crime of interruption of pregnancy in the article 201, a crime which is part of the fourth chapter, entitled „Attacks on the Fetus", of the first title , "Crimes against the person".

A first observation can be made relatively to the marginal name of the offense. Thus, in the Criminal Code in force, the legislator has provided for this offense the name of illegal performing of the abortion. If we interpret to the contrary, we can say that there are situations in which the abortion is lawful and not a criminal offense. The same reasoning we can also apply to the offense of illegal deprivation of liberty provided in article 189 C.C., this crime keeping the same marginal name in the new Criminal Code. The legislator has established the marginal name of this offense as the illegal deprivation of liberty because there are cases in which the deprivation of liberty of a person can be done legally. In the new Criminal Code the abortion is incriminated. Because of the fact that from its marginal name the term „illegal" is missing that means that any interruption of pregnancy is a crime. However, this hypothesis is refuted by the legal text of the article 201 paragraph (6) of the new Criminal Code[6] that provides the following: 'There is not an offense the interruption of pregnancy performed for therapeutic purposes by an obstetrics- gynecology specialist physician, if the pregnancy has no more than twenty-four weeks, or the subsequent interruption of pregnancy, made for therapeutic purposes, in the interest of the mother or of the fetus". For this reason, we believe that the marginal name of the crime stipulated in article 201 N.C.C. should be amended, in order to introduce the term „illegal" in reference to the abortion.

2. In the paragraph (1) of the article 185 C.C. it is provided that „the interruption of pregnancy, by whatever means, performed in any of the following circumstances: a) outside medical

[1] Next C.C.

[2] The Decree-Law no. 1 of the 26th of December 1989 on the repeal of laws, decrees and other normative acts was issued by the Council of National Salvation Front and was published in the Official Gazette no. 4 of the 27th of December 1989.

[3] Law to amend the Criminal Code, published in the Official Gazette no. 289 of the 14th of November 1996.

[4] Alexandru Ionaş, *Offences under the Romanian Penal Code*, second edition, revised and enlarged, University of Braşov, (Braşov: OmniaLex, 2009), 138.

[5] Published in the Official Gazette no. 510 of the 24th of July 2009.

[6] Next N.C.C.

institutions or medical offices authorized for that purpose; b) by a person who is not a specialist physician; c) if the pregnancy has exceeded fourteen weeks (...) " is the crime of illegal performing of the abortion.

In the paragraph (1) of the article 201 N.C.C. we do not find the collocation „by any means". We consider appropriate the elimination from the legal text of this phrase because it was superfluous, since it is a crime the interruption of pregnancy in any of the circumstances referred to in letters a), b) or c) of the paragraph (1) of the article 185 C.C., respectively of the article 201 N.C.C., whatever means are used to obtain the result.

The fact of interruption of pregnancy outside medical institutions or medical offices authorized for this purpose, provided in the article 185 paragraph (1) letter a) C.C., is found with the same form in the new Criminal Code, in the article 201 paragraph (1) letter a).

But substantial changes occur regarding the letter b), relative to the abortion performed by a person who is not a specialist physician. In the new Penal Code, in the article 201 paragraph (1) letter b) it is provided that it is a crime the abortion carried out by a person who is not an obstetrics-gynecology specialist physician and has not the right of free medical practice in this specialty. It is true that the current wording of the phrase „specialist physician" concerns an obstetrics-gynecology specialist physician because only he can make normal and lawful interruption of pregnancy. We believe, however, that the new wording of the letter b) meets better the needs of clarity and precision of the legal text.

Interpreting to the contrary the text of the article 201 paragraph (1) letter b) N.C.C. we can observe that if an obstetrics-gynecology specialist physician who has no right of free practice in this specialty makes an interruption of pregnancy in these circumstances, he becomes an active subject of the crime in question.

The specification related to the right of free medical practice is of the essence because in its absence it is simple to conclude that the fact of being a specialist physician is not sufficient to allow the concerned person to carry out the interruption of pregnancy in legal conditions. We say it taking into consideration the fact that being a specialist physician does not automatically imply that the person has the right to free practice in this specialty.

Thus, before the entry into force of the Law no. 95/2006[7] on healthcare reform, medical graduates acquired the right of free practice after making a one-year period of practical training, in accordance to the Ministry of Health Order no. 418/2001. Currently, the Government Ordinance no. 12/2008[8] concerning the organization and financing of residency states that residency is the specific form of postgraduate education for medical graduates providing training necessary to obtain one of the specialties included in the medical specialties classification.

In the article 17 of the Government Ordinance no. 12/2008 it is stated that, since the 2005 graduates of the Faculty of Medicine, the attainment of free practice right is done after the promotion of the specialist physician exam. Once granted the right to free practice[9], physicians who have obtained the certificate of membership of the College of Physicians in Romania may conduct training activities under their care. In order for the physicians to exercise their profession in complete legality,

[7] Published in the Official Gazette no. 372 of the 28th of April 2006 and most recently amended by the Law no. 286 of the 28th of December 2010 on the 2011 state budget.

[8] Published in the Official Gazette no. 81 of the 1st of February 2008.

[9] According to the article 379 and the following of the Law no. 95/2006.

the certificate of membership[10] of the College of Physicians in Romania must be certified annually based on valid professional indemnity insurance for each year[11].

The circumstance in the letter c) of paragraph (1) of the article 185 C.C. relative to the fact that it will be the offense of illegal performing of the abortion the interruption of pregnancy if exceeded fourteen weeks of pregnancy is provided in the same form in the article 201 paragraph (1) letter c) N.C.C.

Recent research in the field of embryology[12] requires the reconsideration of this term of fourteen weeks of pregnancy. At the end[13] of the 8th week of pregnancy, the specific tissues and organs of the fetus are formed, so we can identify the characteristic appearance of the body core. In this time of the conception the embryo changes its name into fetus. Fetal period, between the 9th week of pregnancy and birth, is characterized by rapid growth and maturation of organs of the body. The body acquires the characteristics of human aspect. At the aborted fetuses at the end of the third month of pregnancy reflex activity can be evoked, which indicates the presence of muscle activity[14]. At the end of the 12th week of pregnancy fetal upper limbs are very close to their final length, but the lower ones are not yet well developed. The fetus begins to move between the 9th and 12th week, but these movements are not yet felt by the mother[15]. Moreover, relative to the central nervous system, in the 12th week of pregnancy we can identify the vermis[16] and the cerebral hemispheres[17].

Given the foregoing we suggest the reducing of the age of pregnancy from fourteen to eight weeks, so abortion if pregnancy has exceeded eight weeks to be considered the crime provided in the article 185 C.C., respectively in the art. 201 N.C.C.

Relative to the penalty provided by law, in the article 185 paragraph (1) C.C. the punishment is the imprisonment from 6 months to 3 years, and in the article 201 paragraph (1) N.C.C. it is the imprisonment from 6 months to 3 years alternating with the fine and the prohibiting of the exercise of some rights. Thus, it is apparent that the sanctioning regime is more gentle in future legislation, so the new Criminal Code is the more favourable criminal law. The additional punishment expressly provided of prohibiting the exercise of some rights implies the mandatory character of its application. The additional punishment is about the prohibition of the exercise of the right to hold office, to exercise a profession or a craft activity or to perform the work that the convict used to commit the crime, punishment provided in the article 64 paragraph (1) letter c) C.C., respectively in the article 66 paragraph (1) letter g) N.C.C.

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[10] According to the article 384 of the Law no. 95/2006.

[11] Documentation made in Romanian using the site: www.pharma-business ro.

[12] Embryology is a part of biology that deals with the study of embryonic development in all phases, from fecundation to birth, according to the definition of the site: www.dexonline ro. Embryology is divided into embryogenesis, which covers the period of development from intrauterine embryonic fecundation and is extending up to the end of the 8th week, and organogenesis, which corresponds to the fetal period which lasts from the end of 8th week to birth. The embryo becomes a fetus during this period and bears that name until birth. Documentation made in Romanian using the site: www.wikipedia.org.

[13] Thomas W. Sadler, *Langman's Medical Embryology,* 10th edition, (Bucharest: Callisto Medical, 2007), 67.

[14] Sadler, *Langman's,* 89.

[15] Keith L. Moore, *Eléments d'Embryologie Humaine,* (Quebec: Vigot, 1989), 36.

[16] The vermis is the middle part of the cerebellum, located between its two hemispheres, according to the definition of the site: www.dexonline ro.

[17] Moore, *Eléments,* 164.

3. The paragraph (2) of the article 185 C.C. has the same form in the new Criminal Code in the article 201 paragraph (2), including the penalty prescribed by law.

Significant changes occur on paragraph (3), which includes in both the Criminal Code in force and the new Criminal Code two separate thesis. The first thesis, in the article 185 C.C., refers to causing serious personal injury to a pregnant woman by the facts set out in paragraphs (1) and (2), offense punishable by imprisonment from three years to 10 years and the interdiction of certain rights. The

„ serious personal injury" means the offense provided in the article 182 C.C.

In contrast, in paragraph (3) of the article 201 N.C.C. it is maintained the same sanction but for the purpose of punishing the fact of causing personal injuries to pregnant women . By 'personal injury' we understand the offense provided in the article 194 N.C.C. According to this article it is considered „personal injury", the fact provided in the article 193 (hitting or other violence) that caused any of the following: a) a disability, b) injuries or damage to a person's health, requiring, for healing, more than 90 days of medical care, c) severe and permanent injury to aesthetic prejudice, d) abortion; e) endangering a person's life .... ". Comparing this legal text with the one contained by the article 182 C.C. we can observe that the circumstances are nearly the same. Thus, we conclude that the changes are only formal. This is because the authors of the new Penal Code have not been speaking in the chapter on crimes against the physical integrity or health of a person about the following offenses: hitting or other violence, personal injury and serious personal injury like in the Criminal Code in force, but only about the first two, operating changes on the number of days of medical care.

Regarding the second thesis, about the death of a pregnant woman as a result of the described act, the immediate exceeded intended consequence is the same and what is different is only the sanction that can be applied. Thus, the Criminal Code in force stipulates for this offense the punishment of imprisonment from 5 to 15 years and the additional penalty of disqualification from duties and in the new Criminal Code we can observe that the minimum limit of the punishment has been increased from 5 to 6 years, but the maximum special limit has been reduced to 12 years. We believe that the reason for this change was dictated by considerations of criminal policy in order to encourage courts to sentence the condemned to prison even if the punishment is oriented towards its minimum special limit, but with the condition that this sentences to be served[18].

4. Between paragraph (4) of the article 185 C.C. relative to the perpetration by the physician, in which case the subject will be punished with imprisonment and with the ban on exercising his profession of doctor, and paragraph (4) of the article 201 N.C.C. there are not essential changes, but the new form of the paragraph shows that the future legislation is more concise.

In paragraph (5) of the article 185 C.C. it is provided that the attempt to commit the offense is punishable. In the article 201 paragraph (5) N.C.C. it is stated that the attempt to commit the offenses described in the paragraphs (1) and (2) shall be punished. We believe that the wording contained in paragraph (5) of the article 185 C.C. is deficient, and the authors of the new Criminal Code have improved this situation by stating that it is punishable to attempt to commit the offenses described in the first two paragraphs. Currently, the article 185 C.C. indirectly refers to the fact of punishing the attempt to commit the offense described in paragraph (3). We disagree with this because the offense

[18] Display of Reasons for the new Criminal Code, published on the website of the Chamber of Deputies - www.cdep ro.

referred to in paragraph (3) is committed with exceeded intent, and in this case the attempt is not even possible. Consequently, we can not talk about punishing an attempt that it is not even possible.

5. The paragraph (6) of the article 185 C.C. contains three cases in which the physician will be punished if he performs the abortion. In paragraph (6) of the article 201 N.C.C. there are two situations in which the facts are not a crime. This is a substantive change. The first situation concerns the therapeutic abortion performed by an obstetrics-gynecology specialist physician if the age of the pregnancy has not exceeded twenty-four weeks. In the second situation, it is not a crime the subsequent interruption of pregnancy, for therapeutic purposes in the interest of the mother or the fetus. It is interesting to see why the legislator took this age of the pregnancy as a landmark. We believe that it is provided in this way because after twenty-four weeks the fetus is capable of extra-uterine life. The fetus can be born if the pregnancy has reached twenty-two weeks, given that the new medical technologies ensures survival outside the womb at that age[19]. At twenty-four weeks of age, the fetus weighs about 780-1000 grams and measures about 28-30 cm. The fetus practice breathing by inhaling amniotic fluid in the lungs and adopts a rhythm of life with periods of waking up to eight hours, sleeping in the remaining time[20]. A further argument is found in the legal text and it is related to the provision of „the interest of the fetus".

The legal nature of these assumptions contained in the Criminal Code in force, on the one hand, and in the new Criminal Code, on the other hand, is different. Thus, the Criminal Code in force refers to cases in which the act will not be punished, which means that the act is and remains an offense, but the person who commits it is not punishable.

In the new Criminal Code the act is not considered to be an offense, understanding here the lack of one of the essential features of the crime. According to the article 15 paragraph (1) N.C.C. „the offense is an action under the criminal law, committed by guilt, unjustified and attributed to the person who committed it". The assumptions set out in the article 201 paragraph (6) N.C.C. imply that the facts are not an offense because they are justified by the mother's interest in the former case, and the interest of the mother and the fetus in the second. Although these hypotheses are not found listed in the chapter II of Title II of the general part of the Criminal Code, related to causes that justify the act, this is the situation described by the criminal law that can not be considered a criminal offense because it is excluded by the legitimate interests[21].

6. A new element in the future legislation is paragraph (7) of the article 201 N.C.C., which has no counterpart in the current regulation. In the article 201 paragraph (7) N.C.C. it is provided that „a pregnant woman is not punished if she interrupts her own pregnancy". The authors of the new Criminal Code took the article 245 of the Norwegian Criminal Code as a source of inspiration. In the preamble to the new Penal Code it is stated that the stipulation of the explicit impunity of the pregnant woman who interrupts her own pregnancy has the purpose of ending the discussions existing among the authors in the criminal law literature around this issue. The act committed by a pregnant woman is an offense, with all ensuing consequences in terms of criminal participation, but she is not punished.

As we said at the beginning of the study, until the repeal of the article 186 C.C. by the Decree-Law no. 1/1989, the interruption of her own pregnancy committed by a pregnant woman was

[19] Larisa Ciochină and Constantin Iftime, *A vision for life*, (Bucharest: Pro Vita Media, 2003), 21.
[20] Ciochină and Iftime, *Vision,* 21.
[21] Mihai Adrian Hotca, *The New Criminal Code and The Previous Criminal Code. Differential aspects and situations of transition*, (Bucharest: Hamangiu, 2009), 19.

considered to be an offense. But with the entry into force of the Law no. 140/1996, which stated only the reintroduction of the article 185 C.C. relative to abortion, it is no longer made any reference to the situation of pregnant women in the Criminal Code, so the question if we punish or not the pregnant woman in this situation was raised. This problem has finally found the solution in the new Criminal Code because any single woman is free to decide on their own body.

7. As one of the objectives of the creation of the new Criminal Code is the harmonization of our legislation with the legal systems of other Member States of the European Union[22], it is interesting to analyze the provisions of these countries' criminal codes applicable in the studied matter.

Thus, the **Norwegian Penal Code** provides in the article 245 that ,,any person who interrupts the pregnancy when the statutory conditions were not met or when the decision to act in this way was not taken by a person authorized to do so shall be found guilty of the crime of abortion and shall be imprisoned up to three years. In case of repeated commission of the crime by a person or if that person acts in order to get a win or in aggravating circumstances, the punishment is the imprisonment up to six years. If the person has acted without the consent of the pregnant woman, the punishment is imprisonment up to fifteen years, and if the act results in death of the pregnant woman, the imprisonment does not exceed twenty-one years. Statutory provision contained in the first paragraph of this article shall not apply to pregnant women causing the abortion to themselves".

Analyzing the legal text we see that the person who commits the offense does not have to meet a certain quality, so we can state that the offense can be committed by any person who meets the legal requirements of criminal liability. The Norwegian law also provides some aggravating circumstances just like in our legislation, its most serious being that the abortion resulted in death of the pregnant woman. It is interesting to note that the Norwegian Criminal Code does not refer to situations where the act is not considered to be an offense as provided in the Romanian Criminal Code, and provides a single situation in which the act is not punished, namely that of the pregnant woman who causes on herself the disruption of pregnancy. In fact, this issue of the fact of not punishing the pregnant woman who commits the abortion on herself was borrowed in the Romanian Criminal Code, as indicated in the preamble of the new law.

It is also interesting that in describing the crime of abortion in the Norwegian Criminal Code, there is no situation in reference to the age of the pregnancy. So we can conclude that the act of interrupting the pregnancy will be considered the crime of abortion regardless the age of the pregnancy and that is a situation that is different from what is provided in our legislation. We can see that the punishment provided for the hypothesis that abortion takes place without the consent of the pregnant woman and for that in which the abortion has as a result the pregnant woman's death is more severe than the one provided in our legislation. In the first case, the Norwegian Criminal Code provides the imprisonment of up to fifteen years, while the Romanian Criminal Code provides the imprisonment of two to seven years. In the second case, the punishment laid down in the Norwegian Criminal Code is the imprisonment for up to twenty-one years, unlike the Romanian Criminal Code in force, which provides the imprisonment of five to fifteen years and unlike the new Romanian Criminal Code which provides the imprisonment from six to twelve years.

The **German Criminal Code** describes the abortion in the art. 218, which read as follows: "(1) If a person interrupts the pregnancy, that person receives a prison sentence of up to three years or

[22] Display of Reasons for the new Criminal Code, published on the website of the Chamber of Deputies - www.cdep ro.

a fine. In the present law, induced abortions before completion of implantation of the fertilized egg in the uterus are not considered interruptions of pregnancy. (2) In cases with extremely serious consequences, the court may impose imprisonment from six months to five years. In general, the cases with extremely serious consequences are when the offender: acts without the consent of the pregnant woman or puts the life or the health of a pregnant woman in serious danger. (3) If the offense is committed by a pregnant woman, it receives a prison sentence of up to one year or a fine. (4) The attempt shall be punished. A pregnant woman receives no punishment for the attempt".

The article 218a provides that: "(1) the abortion is not punishable under article 218 if: 1) a pregnant woman asked for the abortion after presenting to the physician a certificate ..., in order to prove that she has consulted a specialist on this issue at least three days prior to the medical intervention, 2) the interruption of the pregnancy is carried out by a doctor, 3) if the pregnancy has not exceeded twelve weeks. (2) The abortion performed by a physician, with the consent of the pregnant woman is not punished if the abortion is indicated, based on a medical finding - taking into account present and future living conditions of pregnant woman, in order to save the life and physical integrity and mental health of the pregnant woman from a serious danger that can not be removed otherwise. (3) It will be considered to have met the conditions set out in paragraph (2) in case the abortion is performed by a physician, with the consent of the pregnant woman because the woman was the victim of a crime provided in the articles 176-179[23] - and this is recorded in a medical finding - if there are reasonable grounds for believing that the pregnancy occurred as a result of that offense and if pregnancy has not exceeded twelve weeks. (4) A pregnant woman is protected from punishment, according to article 218, if the abortion was made after consulting with a doctor (article 219) and if pregnancy has not exceeded twenty-two weeks. The court may waive the delivery of a sentence under article 218 if the pregnant woman was in a special situation at the time of intervention".

Just like in the Romanian Criminal Code, regarding the person who interrupts a pregnancy, in the German Criminal Code it is provided the same punishment of imprisonment up to three years alternating with the fine. What is interesting to note in the German Criminal Code is that it is not considered termination of pregnancy the induced abortion before completion of implantation of the fertilized egg in the uterus. For the pregnant woman who causes an abortion to herself, unlike the Romanian Criminal Code, the German Criminal Code provides the punishment of imprisonment up to one year or a fine. If the act remained as an attempt, the pregnant woman is not punished.

Just as in our legislation, the German Criminal Code provides the punishment of the attempt to commit the crime of abortion. In the article 218a of the German Criminal Code there are provided specific causes of punishment of the crime of abortion, including the condition that abortion is not punishable if the age of the pregnancy has not exceeded twelve weeks. This is a difference compared to our legislation because the Romanian Criminal Code incriminates the act if the age of the pregnancy has exceeded fourteen weeks.

Another situation in which the offense is not punished and which has no counterpart in our legislation is that of the interruption of pregnancy if it turns out that this occurred due to the fact that the woman was the victim of an offense listed in the legal text, and if the pregnancy does not exceed twelve weeks.

[23] In the articles 176-179 of the German Criminal Code provides the following crimes: sexual abuse against a minor (article 176), aggravating sexual abuse against a minor (article 176a), sexual abuse against a minor which results in the victim's death (article 176b), sexual coercion and rape (article 177), sexual coercion and rape causing the death of the victim (article 178) and sexual abuse compared to persons unable to defend themselves.

In the article 218a of the German Criminal Code it is stated that abortion is not punishable if the pregnant woman asked for it after she has presented to the physician a certificate to prove that she has consulted a specialist on this issue at least three days prior to the medical intervention.

A differentiating factor from the Romanian Criminal Code is the presence of the article 219 of the German Criminal Code, which provides the fact that the pregnant women who are in an exceptional situation or conflict should be advised prior the medical intervention. According to this article, counseling serves the protection of the unborn life. Counseling should be an attempt to encourage pregnant women to keep the pregnancy. Counseling should help a pregnant woman to take a responsible decision knowingly. For this, a pregnant woman must be aware that the unborn person has the right to life at any stage of pregnancy and that therefore, under law, an abortion can be considered only in exceptional circumstances, when giving birth to a child would be a very unusual burden for the woman. Counseling should contribute, through advice and assistance, to control the conflict situation and it should be a remedy for the exceptional circumstances appeared after the occurrence of the pregnancy.... ". We consider as appropriate the future introduction of mandatory counseling of the pregnant woman in our legislation, as this would reduce the number of abortions and would more effectively protect the fetus against the aggression.

In the **Spanish Criminal Code** there are three articles dedicated to describe the crime of abortion. Thus in the article 144 it is provided that "the one who performs the abortion on a pregnant woman without her consent, shall be punished with imprisonment of four to eight years and shall be deprived of the exercise of any particular health profession or of any services in clinics, gynecology or medical establishments, public or private, for a period of three to ten years. The same penalties will be applied to the person performing the abortion with the consent of the pregnant woman obtained through violence, threat or deception.

In the article 145 it is provided that: "(a) the person that performs an abortion on a pregnant woman with her consent, unless permitted by the law, shall be punished with imprisonment of one to three years and shall be deprived of the exercise of any particular health profession or of any services in clinics, gynecology and medical establishments, public or private, for a period of one to six years. (2) The woman who consents to an abortion or determines another person to perform it, unless permitted by law, shall be punished with imprisonment from six months to one year or a fine".

In the article 146 it is provided that: „a person who, through gross negligence, performs an abortion, will be punished with imprisonment from three to five years or a fine. When the abortion was caused by professional negligence, the special penalty of declension of the exertion of the occupation, the profession or the service for a period of one to three years will also be applied. The pregnant woman will not be punished according to the content of this provision".

Similarly to the Romanian Criminal Code the abortion performed without the consent of the pregnant woman is punishable, but the punishment provided by the Spanish law is more severe than that provided by our criminal code as it is a sentence of imprisonment from four to eight years, unlike the imprisonment from two to seven years under the Romanian Criminal Code. In both legislations it is provided the additional penalty of prohibition of practice of a profession, but what differs is the time it is applied. In the Spanish Criminal Code the period provided is from three to ten years. In the Romanian Criminal Code in force the period of prohibition of certain rights shall be from one to ten years, and in the new Romanian Criminal Code that period is reduced to a maximum of five years.

Unlike the new Romanian Criminal Code, which expressly provides the fact of not punishing the pregnant woman who causes an abortion on herself, in the Spanish Criminal Code it is provided that the pregnant woman that acts in this way shall be punished with imprisonment from six months to one year or a fine.

The Spanish Penal Code provides a situation in which the pregnant woman in not punished, namely the one in which she interrupts alone her own pregnancy by gross negligence. We consider appropriate for the future the insertion in the text of the article 201 N.C.C. of this differentiation relative to the case of the pregnant woman who causes an abortion on herself. In particular, we propose for the future regulation that the pregnant woman to be punished if she knowingly causes the interruption of her own pregnancy, by applying, of course, a lower sentence than the one which would be applied for the case of the abortion performed by a doctor outside legal requirements, for instance. If the pregnant woman, causes the interruption of her own pregnancy by negligence we consider that the impunity should be maintained, following the model offered by the Spanish Criminal Code.

Conclusions

1. The comparative analysis of legal texts relating to abortion contained in the article 185 C.C., respectively the article 201 N.C.C., allows highlighting the similarities and, especially, the existing differences on this issue.

Thus, even the name of the offense has been changed. Regarding the penalty applicable we can observe that in certain paragraphs of the article 201 N.C.C. the punishment of imprisonment is provided alternately with the fine, and in others we observe that the minimum limit of the punishment has increased and the maximum limit has been reduced for the reasons that we have exposed above. Furthermore, by changing the legal text, the way the legislator expressed himself regarding the punishment of the attempt of committing the offense of abortion has been reviewed. Another modification of the essence is that regarding the change of the legal nature of the causes of impunity laid down in the article 185 paragraph (6) C.C. Thus, in the paragraph (6) of the article 201 N.C.C. there are provided certain situations in which the conduct is not an offense.

And last but not least, the express provision in the legal text of the article 201 paragraph (7) N.C.C. of the impunity of the pregnant woman who interrupts her own pregnancy puts an end to the existing discussions in the literature.

2. The highlighting in this study of the new issues that are found in the article 201 N.C.C. competes at better understanding the legal text and the offense itself, and the proposals to improve the legislation in this area can ensure the establishment of legal texts that will not leave room for interpretation and ambiguity.

3. The crime of interruption of pregnancy referred to in the article 201 N.C.C. should always be considered and analyzed in the context of the title „Crimes against the person" of which the offense is a part. It should be further investigated the assumption that the fetus should be considered as a person if that is in its interest.

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OBLIGATIONS OF THE PROFESSIONAL IN CONTRACTS WITH THE CONSUMER

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Abstract
The paper treats the merchant's obligations that he must respect when he has a contract with a consumer. The presentation of the obligations is structured by the different kind on them. The source of the paper is present legislation (Law no. 296/2004), but it also has references to new legislation that will soon be applicable (Law no. 287/2009).

Keywords*: contract, merchant, consumer, professional obligations, consumer protection.*

1. Introduction

Consumer protection represents an area of major interest and in a continuous change given the multitude of goods and services intended for the general public as well as the manners of procuring them.

The dangers generated by consumerist society were first exposed in the United States of America by philosophers like Marcuse (*One-Dimensional Man*), economists like Galbraith (*The Age of Opulence*) and Vance Packard (*Clandestine Persuasion*)[1] so that in 1962, in his message about the state of the nation, President Kennedy would "officially" state that the mass of consumers is, in economic terms, the most important group but at the same time the less "listened to". This was actually the occassion when, through the voice of the said Amnerican president the phrase " consumers' right to safety" was uttered for the first time, a notion which was to make a remarkable career later on [2].

After two decades, the consumerist movement also expands into Western Europe where there have appeared the first consumer protection bodies together with the first legal protection norms. In France, the first Consumer Code enters into force in 1993. Within the European Union, where improvement of the quality of the life of the EU citizens is sought and it is desired to avoid food and sanitary catastrophies of the past, there has been adopted a consumer protection programme through directives (such as EEC Directive 85/374 regarding liability for all defective products).

In Romania, the main normative acts regulating this field of consumption are: Law no. 296/2004 regarding the Consumption Code, Government Ordinance no. 21/1992 regarding consumers' protection, Government Ordinance no. 130/2000 regarding consumers' protection on the

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[1] J. Calais-Auloy, Fr. Steinmetz, *Droit de la consomnation,* 5e edition, Dallonz, Paris, 2000, p. 2.

[2] Juanita Goicovici, *Dreptul Consumatiei* (*The Law of Consummation)*, Sfera Juridica Publishing House, Cluj-Napoca, 2006, p. 7.

conclusion and implementation of distance contracts, Law no. 363/2007 on combating traders' unfair practices in their relationship with consumers and the regulations' harmonization with the European legislation on consumer protection, Law no. 193/200 regarding abusive clauses of contracts concluded between traders and consumers.

References to " professionals" (as traders) who provide services which thus enter in the field of consumer protection are contained in the New Civil Code (Law no. 287/2009) which is going to enter into force, their responsibility being aggravated towards those who are not traders.

In point of protection, in this area of major interest, in Romania, the state is responsible for the protection of citizens as consumers by providing the environment required for the unobstructed access to goods and services, for their information about the essential characteristics of these goods and services, for protecting and securing the legitimate rights of natural persons against abusive practices, their participation in the establishment of and in making the dicisons which interest them as consumers. Market control and supervision actions are carried out by the empowered staff of the central and territorial public authorities having responsibilities in the field of consumer protection, in all cases where they find non-compliance with the normative acts in the field of consumer protection, is empowered to apply main, complementary sanctions, order complementary measures and notify the prosecuting authorities in case that the deeds ascertained for may constitute crimes.

2. Study's content

The rights and obligations arising between the economic agents and consumers with respect to the procurement of goods and services, including financial services are regulated in detail under the Consumption Code (L 296/2004). This normative act applies to the trade of new, used or reconditioned products destined to consumers, contracts concluded with consumers and rules on advertising goods and services.

The two parties of the legal relationship (the economic agent and the consumer) as well as the meaning of the contract concluded with consumers are defined in the Annex to the Consumption Code. An *Economic Agent* is a certified natural or legal entity who, in its professional activity, manufactures, imports, stores, transports or trades goods or parts thereof or provides services. A *Consumer* is any natural person or group of natural persons constituted in associations, who act for purposes beyond its commercial, industrial or manufacturing, craftsman or liberal activity. *The extra-patrimonial purpose of acquiring/using the good or service* is an essential element in defining the consumer as well as the requirement that it be in all cases, a *natural person* (including a person represented by an association of consumers)[3]. *Contract concluded with consumers* – the contract cncluded between traders and consumers, including warranty certificates, order receipts, invoices, lists or delivery receipts, notes, tickets containing stipulations or references to the general pre-established conditions. The special legal provisions contained in the consumption law will be applied to this contract and in parallel, the rules of civil law, the consumer being free to choose either for a remedy pertaining to consumption law or for one offered by positive civil law, but without allowing for the mixing of legal norms within the same legal action (the principle of purity of the legal condition of the action).

[3] Juanita Goicovici, *Dictionar de Dreptul consumului* (*Consumption Law dictionary)*, Ed. C.H. Beck, Bucharest 2010, p. 159.

Returning now to the economic agent, its area covers the *trader*, namely the natural or legal entity authorized to perform the activity of commercializing the goods and services on the market (according to the Annex of the Consumption Code) and the *professional*, namely the person exploiting an enterprise (represents the exploitation of an enterprise, the systematic exercise by one or more persons of an organized activity consisting in the manaufacture, management or alienation of goods or provision of services regardless of whether it is purposed to make profit or not – according to art. 3 of Law no.287/2009 – the New Civil Code). The same conclusion may also be drawn from the doctrine where it is shown that a *professional* is the person who has abilities in the area which the derived purpose of the contract concluded with the consumers of the good/service belongs to[4].

Therefore, the *obligations of the economic agent* are the *obligations of tjhe professional* (I will refer to them hereinafter using the last phrase) and they are of two types: *legal* and *contractual.*

With respect to *the legal obligations of the professional*, they are enumerated in Chapter II – Obligations of the economic agents, under art. 8 – art .21, art. 26, art. 27 and in Chapter VI – Legal framework regarding the obligation to inform and educate consumers, art. 45 – art. 60 of the Consumption Code.

The safety obligation of the professional is a result obligation in principle and it consists in seeing to the safety of persons and goods. The professional is required "*to market only safe goods and services which meet the prescribed or stated features, act fairly in its relationships with consumers and not use abusive commercial practices."* (art. 8 of Law no. 296/2004).

Within the same obligation is is forbidden "*to import, manufacture, distribute as well as trade fake or counterfeited, dangerous products or products whose safety parameters are non-compliant, which may have an impact on the life, health or safety of consumers".* (art. 9 of Law 296/2004), "*to condition the sale of a product to the consumer by the purchase of an imposed quantity or by the simultaneous procurement of another product or service. [...] the provision of a service to the consumer conditioned by the provision of another service or by the purchase of a product"* (art. 11 of Law 296/2004) and "*any forced sale[...]. The dispatch of a product or the provision of a service to a person shall be carried out only on the grounds of a previous order thereof".* (art. 11 of Law 296/2004).

An "extension" of the safety obligation of the professional is the seller's (professional's) obligation to bear "*the expenses related to the replacement of defective products, to the remedy or refund of their cost"* (art. 12 of Law 296/2004).

The advisory obligation is an obligation of the professional trader/service provider to guide the consumer's choice, meant to set pertinent bench marks for the latter's choice by value judgements, especially with respect to the opportunity of contracting. This obligation is particularized by *its specific function* to guide the client's choice between the various types of offers formulated by the professional and, therefore, to calibrate the contractual body against the real, actual needs of the consumer. The advisory opration is much more complex than the one to inform, the latter entailing the delivery to the consumer of technical data with a neutral, objective content whilst the advisory obligation involves the issuance of *subjective benchmarks*, of value judgements or advice tailored to meet the particular needs of the consumers. Judicial practice (especially the French practice) has additionally retained in the advisory obligation, the existence of an obligation of the professional trader/service provider to *dissuade* the client, to discourage the conclusion (under certain terms) by

[4] Juanita Goicovici, *Dictionar de Dreptul consumului* (*Consumption Law dictionary)*, Ed. C.H. Beck, Bucharest 2010, p. 436.

the consumer of a legal act whose effects would jeopardize the life, health and physical integrity of a person[5].

The difference between the advisory obligation and the obligation to inform is also relevant from the point of view of the *object*, the former cannot be limited only to the illustration of the actual situation, but it has also got to point out the opportunity (in the technical and/or financial field) of contract conclusion. The fulfillment of the advisory obligation does not entail the technical presentation of the product to the buyer only, but also the assurance that the latter has purchased a good to meet his needs.

The advisory obligation is the match of the consumers' right " *to receive full, correct and accurate information about the essential characteristics of goods and services, including the financial services offered by economic agents in order that they would have the possibility to make a rational choice between the goods and services offered, according to their economical and other kind of interests and in order that they would be able to use them, according to their destination, safely and securely"* (art. 45 of the Consumption Code).

The obligation of pre-contractual information is the legal obligation of the professional to provide the consumer, at the pre-contractual stage, with objective, neutral data with a technical content for the purpose of the latter's delivering an informed consent[6]. The specific content of the obligation refers to (1) informing the consumer about the essential features of the goods and services (art. 27 of the Consumption Code), (2) the risk it presents for the consumer (art. 35 – art. 37 of the Consumption Code), (3) labeling rules of products: manner of use, ingredients, quantities, term (art. 46 – art. 52 of the Consumption Code), (4) informing the consumer about the price, documents accompanying sale and the obligation to use Romanian language (art. 54 of the Consumption Code).

The obligation of contractual/post-contractual information is the professional's obligation to provide the consumer, subsequent to forming the contract, certain objective, neutral data with a technical content. One of these obligations is the one provided for under art. 59 of the Consumption Code pursuant to which the professional has to prove to the consumer, upon purchase, the manner of operation and use of the products to be bought.

With respect to the *contractual obligations* of the professional, they are correlative to the consumer's rights and are provided for under Chapter IX – Rights of Consumers upon contract conclusion, under art. 75 – art. 84.

The *contracts* which professionals conclude with the consumers must contain *clear, unequivocal clauses for the understanding of which no specific knowledge be required* (art. 75 of the Consumption Code). One can see that the legislator has imposed that each contract stipulation (clause) which represents per se a willful agreement or "a miniature contract", should be clear, undoubtebale, the objective level of understanding for these clauses being the one of a normal, profane person.

"*The information regarding the pack of touristic services, their prices, consumption loan contracts and all the other conditions applicable to the contract, communicated by the organizer or by the retailer to the consumer must contain accurate and clear indications not allowing for their equivocal interpretation"* (art. 76 of the Consumption Code). One can see that the legislator has

[5] Juanita Goicovici, *Dictionar de Dreptul consumului* (*Consumption Law dictionary)*, Ed. C.H. Beck, Bucharest 2010, p. 364.

[6] Juanita Goicovici, *Dictionar de Dreptul consumului* (*Consumption Law dictionary)*, Ed. C.H. Beck, Bucharest 2010, p. 369.

imposed in the case of *providing information* about the conditions of contract application, the requirement that the former be *accurate and clear* so as not to allow for *ambiguous interpretations* and in this manner the consumer be protected against modifications of the conditions subject to which it first undertook to contract.

The Consumption Code also covers the situation in which the condition of ambiguity however appears in contracts and stipulates the solution under art. 77 of the Consumption Code, by precisley applying the law principle *"in dubio pro reo"(when in doubt, for the accused)* in an adapted manner. In this way, should the clause be susceptible of more interpretations *the one in favour of the consumer will be preferred.*

For ensuing a fair contractual framework, the legislator has expressly provided for *the professional's obligation not to insert abusive clauses in caontracts with consumers* (art. 78-81 of the Consumption Code). By *abusive clause* it is understood that contractual stipulation which has not been directly negotiated with the consumer and which per se or jointly with other contract provisions creates, to the consumers' detriment and contrary to the requirements of good faith, a significant disbalance between the rights and obligations of the parties (item 6, Annex to the Consumption Code).

Out of the definition arise the detemining conditions for the existence of an abusive clause: absence of direct negotiation of the contractual stipulation in question, breach of good faith by the professional and the existence of a significant disbalance between the rights and obligations of the parties. The legislator has considered two aspects when defining the abusive clause: a subjective and an objective one. The first one is represented by *subjective conditions* where the abuse of economic power intervenes, an abuse exercised in bad faith by the professional, and the second is represented by the *economical objective effects* of the clause (the disporportionate disbalance between the performance of the parties which create excessive advantage to the professional in the consumer's detriment).

With respect to the *criteria of estimating the exiostance of "a significant disbalance"* between the rights and obligations of the parties, to be noted that this is not to be understood as a "massive", "manifest", "obvious" disbalance, very seldom, does the abusive nature of the clauses drawn up by professionals borrow exorbitant, ostensible aspects. On the contrary, abusive clauses have this nature only in the economy of the contract (from the perspective of all the commitments which the parties undertake), the same clause being capable of being abusive in a concrete contract but not being abusive in a consumption contract, based on which the consumer has been acknowledged rights to compensate the contract concessions made to the professional. By definition, abusive clauses are contract provisions marked by the absence of negotiation and their suppression is constituted as a counter-balance to this " lack of freedom" of the consumer to choose the contract text.

The legislator establishes a *relative assumption* within art. 80 of the Consumption Code stipulating that *" a contract clause shall be considered as not having been directly negotiated unless this clause has been established without giving the possibility to the consumer to influence its nature"*. The situation referred to in the article is the one very often encountered with "adhesion" contracts (pre-formulated) and that of the general conditions practised by traders on the market of that particular good/service, which practically obligate the consumer to sign the agreement only under the terms stipulated by the professional (in Romania this is very often encountered in case of utility suppliers which are also monopole companies).

On the other hand, the Consumption Code etsbalishes under art. 81 that *it is not enough* that *"only certain parts of the contract clauses or only one of the clauses should have been negotiated*

directly with the consumer" in order to consider that the remainder of the contract may be deemed legal, if at a general assessment it would arise that it has been pre-established by the professional. Moreover, the legislator, for protecting the consumer, imposes that the professional should bring evidence of the negotiation of a pre-formulated clause. This provision supports the rule according to which in the matter of contracts concluded between consumers and professionals the *assumption of the professional's bad faith* is incident, the obligation of exculpation devolving upon the latter by providing evidence in court.

Sanction of the abusive nature of consumption contract clauses, in the vaersion proposed by art. 6 of Law 193/2000 regarding abusive clauses, is done by *the cancellation* (in principle, partial cancellation of the abusive clause) of the contract or in other terms, by *deeming them as nugatory*; "abusive clauses [...] shall not take effects on the consumer'', as the legislator states in art. 6 of Law 193/2000 regarding abusive clauses. In the assumptions where abusive clauses may not be separated in the economy of the contract from the remainder, since they refer to essential obligations and rights, without which the contract cannot survive, (relative) nulity, the abusive clause contaminates the whole of the contract (total) nulity. In all cases, the court is the one to ascertain for the existence of an abusive clause in the contract, apply the sanction according to art. 15 of Law 193/2000 and awards, under the sanction of consequential damages, the alteration of the contract clauses by the trader, with or without consequential damages awarded to the consumer[7].

The proffesional is obligated to stipulate in the contract *the express clause about the right to unilateral termination of the contract* (art. 82 of the Consumption Code). The clause must be written in large print in the spot reserved for the consumer's signature, where there will also appear the name and address of the trader towards whom it will exercise this right. *The unilateral termination clause* is the contract stipulation which grants the (protestative) right to invoke the cancellation of the agreement with effects in the future to both parties. Usually unilateral termination clauses are used in covenants with successive implementation concluded for an indefinite period of time, and in consumption law, commercial practices attest the implicit existence of such right in any contracts for works concluded for an indefinite period of time or for a conventional term longer than one year[8] .

In order to be able to prove the content of the contract, the professional is obligated to *issue a copy of the contract to the consumer.* The professional is also obligated to *prove handing over the copy of the contract to the consumer* in case of an inspection (art. 83 of the Consumption Code). This obligation is meant to assure both proof of the conditions subject to which it has been contracted as well as the possibility of exercising an objective inspection targeted to the professional.

One last obligation of the professional provided for in the Consumption Code is the obligation *to grant fair indemnities* in case of unilateral termination of the contract between the professional and the consumer 9art. 84 of the Consumption Code). To support this obligation, the legislator points out the fact that *the consumer's right to unilaterally terminate cancel the agreement* may not be cancelled or restricted by any contract clause or understanding between the parties in the cases provided for by law, this clause being void de jure.Under these circumstances, the consumer is protected in case it unilaterally terminates or cancels the agreement, *without losing the possiblity to recover the due indemnities from the professional.*

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[7] Juanita Goicovici, *Dictionar de Dreptul consumului* (*Consumption Law dictionary)*, Ed. C.H. Beck, Bucharest 2010, p. 101.

[8] Juanita Goicovici, *Dictionar de Dreptul consumului* (*Consumption Law dictionary)*, Ed. C.H. Beck, Bucharest 2010, p. 115.

Conclusions

The regulating scope of the Consumption law is of major interest, extensive, given the object it refers to (goods and services), but also owing to the continuous diversification of both goods, services and technologies, for which fact it is required to update the regulations concerning it, including the provisions regarding the obligations of professionals precisely in order that legislative gaps be creted to the detrimet of the consumer.

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SOCIETAS EUROPAEA - PAST AND FUTURE

Andreea RADUCANU[*]

Abstract

In European Community Law is circulated the idea of a European-type society which requires the harmonization of national legislations to make them compatible. Debuting in 1958 with Sanders Project, the road to crystallization of a joint legal entity to borrow elements of national legislation and to be generally accepted by all Member States was long and difficult. European Law Society is the culmination of a lengthy effort to conceptually and procedurally. An old European objective was to discover an unique corporate template, not simply harmonizing national laws. It is interesting to discover the significance of the designation of European Society by its latin name – SOCIETAS EUROPAEA - and to observe the implementation and harmonization of national laws in relation to the stated purpose of Regulation (EC) no. No 2157/2001 on the European Company Statute (SE): the internal market and the improvements in economic and social situation of the Community means not only that barriers to trade msut be remove, but also an adaptation of production structures community dimension. For this purpose, it is essential that those companies whose activity is not limited to satisfying purely local needs should be able to plan and carry out their activities Community-wide reorganization. On the other hand is entertaining the analysis from a historical perspective of procedures on informing, consulting and other mechanisms to involve employees in the work of European Societies and Cooperative Societies of Europe, and future projection of these influences on the activity of European Society. It ultimately plans our project aims to preview the future face of European Company - as a multinational entity with legal personality, established directly under European Community Law - in the report and the obstacles to the creation of groups of companies from different Member States.

Keywords*: Societas Europaea, European Community, treaty, harmonization of legislation, Member State*

Introduction

The Statute for an European Company ("SE Regulation") was adopted on 8 October 2001 after more than 30 years of negotiations in the Council, and supplemented by the Council Directive with regard to the involvement of employees. It offered the possibility to create a new legal form called a European Company, also referred to as an SE after its Latin name *Societas Europaea*. The aim of these documents is to create a "European company" with its own legislative framework.

The objectives of the SE Regulation, according to its recitals, were to, *inter alia,* remove obstacles to the creation of groups of companies from different Member States, enterprises no longer need to create new legal entities since their establishment in another EU country.

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Two traditions are facing in the debate surrounding the European society: the Latins used to nordic and often conflicting social relationships that support a system in which employees are represented at all levels of government.

The studied matter is important because European Company is a manifestation of European cooperation in trade policy, having as basis the European unity and a quick look back over the history of the debates surrounding the SE is essential to understand the stakes of a formula offering such great potential to companies.

To cover this matter is important to look at the way companies, in a historical perspective - as part of EU history . Thus, the paper will trace the history and willingness of cooperation of European states, who built the world of European Treaties, its how it is today with influence on business scope, and implicitly on the European society.

Thus, the paper will trace the history of cooperation and willingness of European states, who built the world of European Treaties, as it is today with influence on trade, and consequently on the development of European society.

Regarding the future of Societas Europaea, as part of future trade policy, as any structure that is the result of a delicate compromise that was reached following lengthy negotiations, be noted that besides the positive aspects that will be set forth, it is a imperfect body that is going to evolve in next years, aspects evidenced by amendments to the Statute and the Directive.

The relation between the paper and the already existent specialized literature can materialize in the approach of the author to the analysis of European society from a historical perspective, as part of European cooperation mechanism, and analyzing steps in the direction of perfecting this useful body in the development of European trade.

1. European Unit

European unity is a concept frequently used today in all areas, but the idea of European unity is not something new, is not a creation of the European twentieth century, with roots deep in the history of the continent, it can be said from the time of Charlemagne.

In the beginning it was conceived as a solution in order to avoid conflicts between European states, so for a better life for the population. If the Holy Roman Empire but the goal was defending Christian space, not the economic cooperation.[1]

Until today, security and social welfare were the main driving forces of European integration

Steps towards the creation of a supranational European structures have been interpreted as the Treaty of Union between King of Bohemia and Georg von Podebrand High Council of Venice in 1462 and the Peace of Westphalia in 1648 which ended the war 30 years and was considered the beginning of a classic public international law *jus publicum europaeum.*[2]

In 1306, Dante Aligheri in his work " *De Monarchia* " was focused on the creation of a universal European monarchies as a Roman-German emperor, predicting such a federalist solution for Europe, a universal peace by making the European monarchs of the supreme leader, a unique and legitimate authority, and in 1307 the French lawyer Pierre Dubois in the work " *De recuperatione*

[1] Ioana Eleonora Rusu si Gilbert Gornig ,*EU Law , (*C.H.Beck , Bucharest , 2009) , 3 ; Fabian Gyula , *European Court of Justice* (Rosetti , Bucharest,2009), 7.

[2] Ioana Eleonora Rusu si Gilbert Gornig ,*EU Law,3.*

Terra Sancte " proposed the creation of a Europe united politically, as a condition for maintaining peace on the continent.[3]

Tomasso Campanella in 1605 related to his work "Monarchia Messiae" about the benefits of economic union, and during 1834-1867 it appears that there were patterns in the field of economic and trade, as was the Prussian customs union of which the great economist says Friedrich List " commercial and political union are twins, one can`t be born without the other not being followed.[4]

William Penn made a proposal to modern times in his work " *Essay on current and future peace of Europe*" (1693), bringing together representatives from Europe into a "Diet " and in 1712 Abbot of Saint-Pierre in his work "*Draft eternal peace "* , sketched image of an European Senate who would have legislative and even judicial powers.[5]

United Europe is doomed to what Montesquieu said "*a society of societies*"- building Europe united was the peoples desire to create a continent which wars, chaos and poverty to be banished once and for all, and the old continent restore the glow to be entitled.[6]

Important is the work of Immanuel Kant in 1795 " *About the eternal peace*" that point out the need to constitute a federation of European states, which have a Republican Order under the dome of a common constitution.[7]

One of the pioneers of international law, Emmerich Vattel wrote in his book "The Law of Nations or the Principles of Natural Law" (1758) that Europe is a political system , a body formed by a multitude of interests and relationships and all these make Member of the continent, a kind of republic of whose members, although they are independent, are united by common interest "to maintain order and freedom ".[8]

Nineteenth century is, par excellence, the century federalist proposals, as follows:

In 1821, Master Joseph, in his "*Soirées of St. Petersburg*" issue the idea of a League of Nations. In this period , Italian revolutionary Mazzini loose a federation of European by a crash of thrones and that could cause the young Europe appearance. In 1827, Pierre Leroux published in the Parisian newspaper Le Globe- astudy article "*About the EU*".[9]

Victor Hugo, in nineteenth century predicted " *that day will come when we live like two huge groups the United States of America and United States of Europe to shake hands over the ocean that separates them and, through industry and commerce will flourish* ", and JJ Rousseau see a European republic monarchy only if they will abandon their greedy and bellicose nature and people will step out and therefore will become more wise.[10]

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[3] Fabian Gyula , *European Court of Justice* ,7; http://files.libertyfund .org / files / 2196 /Dante_1477_ EBk_v5.pdf- Dante Alighieri, *De Monarchia* [1559] ;Dubois, Pierre, fl. 1300; Langlois, Charles Victor, 1863-1929 - *De recuperatione Terre Sancte* : traité de politique générale (1891).

[4] Eduard Dragomir – „ *European Constitution between ambition and reality*

http: //www.europeana ro/Constitutia%20Europeana.pdf. ; Fabian Gyula , *European Court of Justice* ,8.

[5] Eduard Dragomir – „ *European Constitution between ambition and reality* http: //www.europeana ro/ Constitutia%20Europeana.pdf.

[6] http://ro.wikipedia.org/wiki/Charles_de_Secondat,_baron_de_Montesquieu .

[7] Ioana Eleonora Rusu si Gilbert Gornig ,*EULaw ,5.*

[8] Emmerich de Vattel *The Law of Nations or the Principles of Natural Law* (1758) 2003, 2005 Lonang Institute,

[9] http://www.europeana ro/comunitar/istoric/istoric ideea unitatii europene

[10] Fabian Gyula , *European Court of Justice,8* ;Eduard Dragomir – „ *European Constitution between ambition and reality* http: //www.europeana ro/Constitutia%20Europeana.pdf.

European idea has materialized in the twentieth century, during the so-called postwar detaching Pan movement - in 1923.

The founder, Austrian Count Richard Coudenhove-Kalergi in his work "Paneuropa" suggested a unification of Europe, the final form as United States of Europe, the U.S. model, treating the general problem of customs union, joint bodies and the economy united. Pan-European Union aim was to join the 26 existing democracies in a federation as Pan American Union, to offset the great powers - Russia, Great Britain, USA and Japan. In 1926, he gathers in Vienna constituent congress of Pan-European Union, attended by 2,000 people.[11]

Less well known, danish Heerfordt published in 1924 an essay entitled "Europe communis" which contains a detailed analysis of what could be a Europe communis institutions, the future European federal state, and in 1928, Gaston Riou expected a continental confederation in his "My homeland Europe" as one condition to preserve the role of hegemon in the world against the presence in the planetary jurisdiction of the United States of America, Britain and the Soviet Union.[12]

In 1929, Count Sforza published the book "United States of Europe", Bertrand de Jouvenel in 1930 published ";Towards the United States of Europe", and Edouard Herriot book "Europe " , the European Union under the project a League of Nations .

In 1926, various economists and business people have created "Economic and European Customs Union " and they have declared it as the beginning of European unification action.[13]

Starting from the idea of Pan-European union, the most trenchant and dramatic initiative was a French foreign minister Aristide Briand - at that time president of the League and owner of Noble Peace Prize in 1926 for the Locarono Treaties - in 1930 developed a project for a European federation that European countries did not abandon the attributes of their sovereignty.

On 7 September 1929, he made this proposal to the General Assembly of the League of Nationsand he was tasked to present a memorandum on "organizing a system of European federal union ". Government responses to the document presented on 1 May 1930 was conservative, and in some cases even negative.[14]

Created in order to ensure a lasting peace, the European construction has materialized after the Second World War.

The plan for Europe reconstruction developed in 1947 by Foreign Minister George C. Marshall European forced the states to decide together how to divide up the funds, which led the first European attempts at cooperation elevation.[15]

On May 9, 1950, French Foreign Minister Robert Schuman proposed, based on ideas of Jean Monnet, the joint of coal and steel resources of France and Germany in an organization open to other European countries.

The Declaration of 9 May 1950 he said about *placing all the Franco-German production of coal and steel under a common High Authority, an organization open to other countries of Europe. The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and will change the*

[11] Ioana Eleonora Rusu si Gilbert Gornig ,*UE Law* ,4;Fabian Gyula , *European Court of Justice* ,8.
[12] http://www.europeana ro/comunitar/istoric/istoric ideea unitatii europene
[13] http://www.europeana ro/comunitar/istoric/istoric ideea unitatii europene
[14] Ioana Eleonora Rusu si Gilbert Gornig ,*UE Law,*4; Fabian Gyula , *European Court of Justice* ,8; Eduard Dragomir – „ *European Constitution between ambition and reality".*
[15] Ioana Eleonora Rusu si Gilbert Gornig ,*EU Law,*10.

destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims.[16]

To the call responded four states , the Treaty of the European Coal and Steel Community (ECSC) was signed in Paris on 18 April 1951 by France, Germany, Belgium, Italy, Luxembourg and the Netherlands. The Treaty came into force on 23 July 1952 (expired in 2002). On 25 March 1957, the six member states signed in Rome, the Treaties of the European Economic Community (EEC) and European Atomic Energy Community (Euratom), known as "the Treaties of Rome".

The three communities joined in coming years nine countries: Denmark, Ireland and Britain in 1973, Greece in 1981, Spain and Portugal in 1986, Austria, Finland and Sweden in 1995. On 1 May 2004 ten countries joined the European Union: Cyprus, Estonia, Latvia, Lithuania, Malta, Poland, Czech Republic, Slovakia, Slovenia, Hungary.[17]

With the signing of the Treaty of Rome has been the foundation of the Community Commercial Law, which statued principles and directions of development.

By articles 2 and 3 it was stipulated for the EEC the promoting harmonious and consistent economic activities in the community, by establishing a common market and the progressive and unity harmonization and coordination of economic policies of member states, providing the abolition of restrictions between Member States, freedom of movement of persons, services and capital, and the progressive harmonization of the laws in the proper functioning of the common market.[18]

Single Market finisher was done by entry into force of the Single European Act (SEA) on 1 July 1987, regulating the free movement of goods, services, capital, payments and people across the Communities.[19]

The Maastricht Treaty on 7 February 1992 ,entered into force on 1 November 1993, creates the European Union , wich consists on three pillars:

1. European Communities, allows EU institutions to coordinate common policies in various areas (single market, transport, competition, single currency, employment, public health, consumer protection, research, environmental protection, agriculture), with the objective economic and social cohesion;

2. Common Foreign and security policy, is joint actions of Member States of the European Union in this field.

3. Police and judicial cooperation in criminal matters, is the cooperation between the police and justice in the 15 Member States for strengthening national security.[20]

The Amsterdam Treaty signed on 2 October 1997 and entered into force on 1 May 1999, contained provisions in the following areas: citizen rights (notably the protection of fundamental rights), security adns justice cooperation (integrating the Schengen acquis in the competence of the

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[16] Ioana Eleonora Rusu si Gilbert Gornig ,*EU Law,10*;Fabian Gyula , *European Court of Justice ,9* ; Eduard Dragomir – "*European Constitution between ambition and reality* „ http: /www.europeana ro/Constitutia% 20Europeana.pdf.

[17] Ioana Eleonora Rusu si Gilbert Gornig ,*EU Law,10;* Gheorghe Piperea, *Companies, market capital.Acquis Community (*All Beck,Bucuresti,2005),1; Prof.univ.dr.Augustin Fuerea, *European Business Law (*UJ, Bucuresti, 2006), 10-14 .

[18] Prof. univ. dr Dan Drosu Saguna si Mihail Romeo Nicolescu, *European companies (*Oscar Print, Bucuresti, 1996), 22

[19] Augustin Fuerea, *European Business Law ,*14.

[20] Augustin Fuerea, *European Business Law* ,15;. Gheorghe Piperea, *Companies, market capital.Acquis Community ,*4 *;* Ioana Eleonora Rusu si Gilbert Gornig , *EU Law ,*19.

European Union), common foreign and security policy (choice of a High Representative for CFSP) and consolidation of the democracy. Treaty of Amsterdam extended the consumer protection policy, set the objective of sustainable development environment, has given the European Union a new competence in matters of employment and work, enhanced social protection and equality of opportunity fight against exclusion.[21]

The Nice Treaty was signed on 26 February 2001 and entered into force on 1 February 2003, after being ratified by each Member State, either by voting in the national parliament or by referendum . Treaty of Nice, essential for future enlargement, contains provisions to ensure good institutional activity at the time when the Union will have nearly 30 member states, so enrolling in the vision of institutional reforms whose three main axes are: the composition and functioning of European institutions, the decision procedure of the Council of Ministers and the strengthening cooperation between institutions.

At the end of the Treaty, the Nice *Declaration on the future of the European Union*, was established to convene a conference in 2004 to discuss other important issues, establishing and maintaining a more precise delimitation of powers between the EU and its Member States, reflecting the principle subsidiarity, the status of the EU Charter of Fundamental Rights, proclaimed in Nice, in agreement with the Koln European Council conclusions, simplification of the Treaties with the intention of making them clearer and easier to understand, the role of national parliaments in the European architecture.[22]

Draft Treaty establishing a Constitution for Europe was developed by the Convention on the Future of Europe at the Thessaloniki European Council on 18 July 2003.

Following the Intergovernmental Conference, 17-18 June 2004, Heads of State or Government of Member States have reached agreement on the draft Constitution and was drawn up a provisional consolidated version.

On 29 October 2004, one of the most important events of the past decades was held in Rome, by signing the Treaty establishing a Constitution for Europe . EU heads of state put their signature on that document in a ceremony held in the same place where, half a century ago, had signed the famous Treaty of Rome establishing the European Economic Community (EEC) and the European Atomic Energy Community (Euratom).[23]

After lengthy negotiations, the Heads of State and Government reached a compromise on the shape of the future treaty, on 7 December 2007 signing of the Lisbon Treaty, aiming to provide the legal bases of the new European construction .The Treaty of Lisbon amends the EU's two core treaties, the Treaty on European Union and the Treaty establishing the European Community. The latter is renamed the Treaty on the Functioning of the European Union. The potential impact of the Lisbon Treaty on European Union External Trade Policy. The Treaty of Lisbon introduced a number of changes to European Union (EU) external trade policy decision making. These involve the scope of exclusive competence of the EU, the role of the European Parliament and the inclusion of trade in the common external action of the EU.[24]

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[21] Augustin Fuerea, *European Business Law* ,16; Ioana Eleonora Rusu si Gilbert Gornig , *EU Law* ,22.

[22] Ioana Eleonora Rusu si Gilbert Gornig ,*EU Law* ,22-23; http://ec.europa.eu/romania/documents/eu_romania.

[23] Ioana Eleonora Rusu si Gilbert Gornig ,*EU Law,*24 ; Eduard Dragomir – „ *European Constitution between ambition and reality"* http: /www . europeana . ro / Constitutia % 20 Europeana.pdf.

[24] Ioana Eleonora Rusu si Gilbert Gornig ,EU Law ,*25*; http://europa.eu/lisbon_treaty; Stephen Woolcock ,*The Treaty of Lisbon and theEuropean Union as an actor in international trade,*(ECIPE Working Pape r • No. 01/2010 www.ecipe.).

The European Union is distinguished from other international organizations through its model of integration that lie beyond the traditional cooperation between countries: EU member states have transferred part of their powers at EU level. In addition to the powers of national, regional and local, there is a European power, based on democratic and independent institutions mandated to intervene in areas where joint action is considered more effective than individual action of Member States (cf. principle of subsidiarity) : The single market for the movement of persons, goods, services and capital, agriculture, the single currency, economic and social cohesion, environmental protection, research.

The European Union is an organization that includes 25 countries on the European continent: Austria, Belgium, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, United Kingdom, Netherlands, Poland, Portugal, Czech Republic, Slovakia, Slovenia, Spain, Sweden and Hungary, forming an area of over 450 million.

The objectives of the European Union are : creation of European citizenship, strengthening an area of freedom, security and justice, promoting economic and social progress, asserting the role of Europe in the world.

2. Societas Europaea

The project of a multinational European companies is beginning in 1959 under the wand of a Dutch Professor Pieter Sanders and French Notary M. Thibierge, just two years after the signing of the Treaty of Rome establishing the Economic European Community(EEC)-25 March 1957.[25]

The first step were taken by the French Notaries Public who, at their 57th annual Congress, suggest that it might be desirable to adopt, by means of an international convention , a comprehensive company law.

Soon afterwards, a Dutch professor who was to play a decisive part in drawing up the first version of the SE statute – Pieter Sanders, Dean of the Rotterdam Law Faculty – made it the subject of his inaugural lecture to the city's Higher Institute of Economic Sciences.[26]

As Professor Pieter Sanders shows in his work "*The European Company*", idea took shape in 1959, when practising lawyer until thos moment, he was confronted with the questions from clients form outside the Common Market who wanted to know in which of the Member States (then only six) they should form their subsidiary.

Curiously, the initiative was taken by practitioners and scholars, not by the business community, as a result of low interest to such an innovation at that time.

This proposals received the support of the Commission, which invited the academics and professional organization to comment on such of idea.

In 1965 the French Government has notified the proposal to the Council of Ministers of the EEC, as it Europeenne societe anonyme, and in 1966 Professor P. Sanders was responsible for coordinating a group of experts to elaborate the future status of the European Societies - SE.

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[25] Dan Drosu Saguna si Mihail Romeo Nicolescu ,*European companies* ,263.

[26] Noëlle Lenoir , The *Societas Europaea or SE -The new European company* , (HEC Europe Institute, Paris,2007), 6 ; *Le Statut de l'étranger et le marché commun*, 57th Congress of the Notaries of France, Vol. I and Ii, Tours, 1959, edited by S. ed., 1959 and "Compte rendu des travaux", *Revue du marché commun*, 3, 1960, suppl. no 27, p. 80, J. Foyer.

Similar efforts have occurred in 1967-1967, partially completed on 30 June 1970, the EEC Commission to the Council of Europe draft statute of the SE end.

The Commission, in its preface to the report, saw it as the best way of achieving the objectives targeted by the reform, which is to say:

- to allow the mobility of companies by making it possible for them to transfer their registered office from one country to another;
- to facilitate mergers and the creation of subsidiaries by companies in different Member States; and
- to encourage the grouping together of production factors scattered all over the Common Market, joint initiatives and access to the European capital market.[27]

The idea has already been brought in vogue by the lecture given by Professor Pieter Sanders on the idea of a company that would sans national borders within Europe and would be a European Company rather than a UK Company, French Company or a German Company, for e.g.

After a long wait caused by numerous legal difficulties under which the special nature of the law was to be regulated - it is detached from nationality is different-as national rights.

The project initially of anonymous European company (SAE) fit directly in order to the community, being provided a European registry, operation of the company being subject to EU jurisdiction. SAE offering to the companies a uniform and adapted framework for the formation of larger companies, in turn formed the smaller companies - subsidiaries or joint holdings.[28]

The project of creating a European company was considering a transnational regulatory nationality in virtue of which the company was not influenced by the nationality of the State in which she fixed location, and status was one of the measures to be adopted by the Council before 1992, stipulated in the White Paper on completing the internal market approved by the European Council.

"White Paper on completing the internal market" was adopted in 1985 and contained a provision whose purpose was to eliminate 31.12.1992, of all internal trade barriers within the EU, and in 1995 "White Paper in preparation for the associated countries their integration in the EU internal market".[29]

In this respect the Nice Agreement was an attempt to resolve institutional difficulties caused by future EU enlargement, as an agreement on creating a European Company Statute.

Several times shown on the agenda of the Council of Europe devoted to social issues and jobs, these draft regulations or directives, there were never completed by a political agreement in the absence of unanimity.

Lost in 1993, the idea was reborn in 1997 with a new impetus at the Amsterdam European Council Heads of State and Government then undertook to complete the file " European Society Status " before January 1, 1999.

15 Heads of State and Government on 8 December 2000 were able to reach an agreement after talks on the status of the European society for 30 years. This agreement provides for a wider participation of workers at the enterprise life. Thus, on 20.12.2000, at the Nice summit, the European Union Council of Ministers adopted a dual regulatory proposal on the *European Company Statute*, and on *the involvement of workers in the European society.*

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[27] Noëlle Lenoir, The *Societas Europaea or SE -The new European company* , (HEC Europe Institute, Paris, 2007), 6.

[28] Augustin Fuerea, *European Business Law,*125.

[29] *About White paper*- http://www.sedlex md/nav3.php

After the compromise accepted 8.12.2000, countries that wish they had the right to refuse national transposition of certain provisions of the agreement on *the* involvement of workers, instead virtually any European company will be based in these countries.

We followed a unique status for European companies installed in several European Union countries to harmonize their functioning and social rules applied to its employees.

The other advantage brought by the statute is that enterprises will not have to create new legal entities in their time of implantation in another European country.

Two traditions are facing in the debate surrounding the European society : Latinos, who are used to social relationships often conflicting and Nordic nations that support a system in which employees are represented at all levels of government.

The companies, pillars of a functioning market economy, is a key area in which legislation should be harmonized with the acquis communautaire. By art. 52 and 58 of the Treaty of Rome established the principle of freedom of establishment for companies of Member States of the Common Market. Free competition between the company requires an equal legal status, thus imposing the necessity of coordination laws.

At beginning, because the European institutions were not competent to impose a supranational regulator, the solution was agreed upon European-style companies, subject to unique rules integrated itself into the national law of Member States, a solution that involved the harmonization of laws on the path Directives .

Later, after the Council has got competent, it was the idea of a European Company (Societas Europea), supranational entity established directly under Community law. Similarly, the Council adopted Regulation No. 2137/85 of 25 July 1985 on European Economic Interest Grouping.[30]

In the efforts to remove existing barriers in trade, production and realization of cross-border mergers between companies from different EU Member States, the European Council issued Regulation EC nr.2157/2001 dated 8 October 2001 published in the Official Journal Community European 10.11.2001, by outlining the status of European society, and by the European Council Directive nr.2001/86/CE dated 8 October 2001 was completed SE Status purposes of workers involvement in the company`s activity.

This Regulation shall enter into force on 8 October 2004- about article 70 and this Regulation shall be binding in its entirety and directly applicable in all Member States, but considering the recital no.22, Community provisions may be applied in an EU Member State than the day on which that State has itself implemented in national law, the Directive and has taken all necessary steps for the formation and operation of SE , so that the Directive and the Regulation may be applied simultaneously.

According to Article 14 .1 - **COUNCIL DIRECTIVE 2001/86/EC ,** Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive no later than 8 October 2004, or shall ensure by that date at the latest that management and labour introduce the required provisions by way of agreement, the Member States being obliged to take all necessary steps enabling them at all being obliged to take times to guarantee the results imposed by this Directive.

[30] Piperea, *Companies, market capital.Acquis Community* ,10-11.

Romania has fulfilled this obligation by Ordinance 51/2008 which amended Law No. 31/1990 was being introduced Title VII ind.1 - art.270 2a -270 2e - on the establishment and functioning of European society.[31]

Françoise Blanquet,a judge, was responsible for the SE file at the Internal Market Directorate General and is the person who followed the debates to which the SE gave rise the most directly over the long term. His article " Enfin, la société européenne ", Revue du droit de l'Union eu-ropéenne, no 1, 2001, provides a good illustration of the different stages in the debates around this issue up to 2001.[32]

The regulation is directly applicable in all EU Member States, it has the obligation to establish legal mechanisms necessary for registration and operation in their territory, so that regulations and directives can be applied simultaneously.

Regulation 2157/2001 on the European Society, in force since 2004, aims to establish a legal framework to allow companies incorporated in different Member States to merge or form joint holdings and subsidiaries in more quickly, avoiding obstacles inherent in different national legal systems in the EU.

Thus, by creating the legal framework for the establishment, operation and liquidation of of a SE, the European Council followed meet the challenges encountered by companies in expanding their activities at European level because:

- limited applicability territorial of national laws;
- existence of strong differences between the laws applicable to partner companies.

Provisions of regulation are applicable to companies that intend to merge, creating a holding company, to establish a subsidiary or to transform into an SE and that:

-either have its registered office (registered office) and operational headquarters (head office) in a EU member state;

-or have head offices in an EU Member State, and operational headquarters in a non-EU member state, but whose activities are an effective and continuous link with the economy of EU membership.

It should also be noted that, although published in the OJEU (Official Journal of the European Community), registration, dissolution, liquidation remain subject to national law. In fiscal matters also apply where the rules state headquarters. In the future, would like the European level, change this situation - that is to be in direct taxation at European level and thus create a new resource budget.

On 11th September 2005, Allianz (a German insurance company, Europe's biggest insurer) became the first major company to adopt the status Societas Europaea (SE), announcing the move as part of a merger and business restructuring.[33]

In July 2007,The SCOR group was the first French listed company to have chosen the status of *Societas Europaea*, and thus the first to use the "SE" acronym on the financial markets. The Group's three companies (SCOR, SCOR Global P&C and SCOR Global Life) have also adopted this status.[34]

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[31]Vasile Muscalu, *Supplemeting the Law 31/1990 . European companies . Ordinance52/2008* -Rev.Dreptul nr.5/2009,11.

[32] *Revue du droit de l'Union européenne*, n 1, 2001. ; Noëlle Lenoir , The *Societas Europaea or SE -The new European company* ,5.

[33] https://www.allianz.com/en/press/news_dossiers/allianz_se/.

[34] http://www.scor.com/en/the-group/our-company/a-societas-europaea-company html.

Legal bases for SE status were implemented only in October 2004, with the passage of EU legislation, which, in theory, allow this new form to work perfectly in 28 countries in the European Economic Area (EU and the three neighboring countries). Economists explain that some big European companies might move its headquarters to places like Luxembourg, in order to pay less taxes (how American companies to choose their Delaware).

3. Harmonization of commercial law, part of trade policy - in the run statutes.

Under the free movement of persons, services and capital in the European Community, by Article 220 of the Treaty of Rome (as amended by the Single European Act) was stipulated the right of Member States to conclude bilateral treaties in the EEC in order to mutual recognition of firms and companies that operate in their territory for granting rights under article. 58, preserving the legal personality of companies that change their headquarters, the possibility of merger between companies incorporated and registered in different Member States and governed by different business laws.

As mentioned above, are also relevant Commission `s White Paper on completing the Internal Market issued by the European Commission on 28-29 June 1985 in Milan.

With these R*ules in white* were regulated aspects of establishing a framework favorable to cooperation companies of different Member States,as follows: tax reduction and improving the administrative; basis for a legislative framework; further efforts in order to substantiate and placing Societas Europaea ,Community company type, available and operational in all Member States; uniform commercial laws of the Member States regarding the regulation of limited companies and stock companies ; liberalization of national laws regarding the status of branches and subsidiaries of commercial firms in other Member States in the event that the parent company is registered in a Member State.[35]

In order to harmonize commercial law at the European level, have been developed as knew "Directive on the harmonization of commercial companies":

1.The Publicity Directive -18/151/EEC1968- the first Directive on the advertising companies;
2. The second Directive - 72/91/EEC/ 1976 - The Capital Directive;
3.The third Directive- 78/855 ECC/1978 – The Merger Directive;
4.The fourth Directive-78/660/EEC/1978- The Balance Sheet Directive ;
5. The fifth Directive -84/569/EEC/1984 - that amends the Fourth Directive ;
6.The sixth Directive -82/891/EEC81982- The Corporate Split-Up Directive;
7.The seventh Directive -83/349/EEC/1983- The Groups of Companies accounts Directive;
8.The eighth Directive - 84/258/EEC/1984- The Auditor Directive ;
9.The eleventh Directive -89/666/CEE/1989 - The Publicity of Branches Directive ;
10.The twelfth Directive -89/667/EEC/1989- about limited companies.[36]

4. Arguments

Two traditions are facing in the debate surrounding the European society : Latinos, who are used to social relationships often conflicting and Nordic nations that support a system in which employees are represented at all levels of government

[35] Dan Drosu Saguna si Mihail Romeo Nicolescu ,*European companies* ,26.

[36] Augustin Fuerea, *European Business Law* ,113-118; Dan Drosu Saguna si Mihail Romeo Nicolescu ,European companies ,26-28.

In recent years it has become obvious that the organization and functioning of the EU internal market and improve the social and economic environment , trade barriers should be reduced or completely eliminated .It was necessary that de means of production adapted to the size of the entire community to trade in the domestic market can grow and prosper.

As a consequence of this, the EU considers it essential that companies develop their own business which is not strictly limited to local level, but can develop easily outside the national borders .

The goal was initially to provide IT companies a complete set of EU rules on company law to facilitate their operations in the region. We can say that from a historical perspective, the EU has acted to reduce competition between countries.

Most Member States have adopted the real seat principle, which requires the laws of the country where a company bases its operations to govern all of its activities.This has deterred European companies from registering in countries with favorable legal regimes,and almost no charter market has developed in Europe.

A series of decisions by the European Court of Justice (ECJ), starting in 1999, however, began to shift the political landscape in which the debate over the SE and regulatory competition was taking place.

The ECJ clarified that a company incorporated in one Member State may open a branch in another Member State and use it to conduct the entirety of the company's business (the ECJ held that Denmark could not refuse to register a branch of a company incorporated in the UK, despite the fact that its Danish owners did not intend to conduct operations there and had incorporated in the UK in order to evade Denmark's minimum capital requirements- Case C-212/97[1999] ECR I459).[37]

It expanded the Freedom of Establishment to include rights to a more favorable company law and tax law.

Similary is the decision of the ECJ - Grand Chamber 12.09.2006, C-196/2004, Cadbury Schweppes plc. Cadbury Schweppes Ltd. et contre Overses commisioners of Ireland Revenue Court ruling on the meaning of the establishment of a subsidiary in another Member State and the collection from this branch of the profits made by another State shall not constitute an assumption general tax fraud and can not justify taking a national measure that would restrict the exercise of fundamental freedoms guaranteed by the EC Treaty making of such a measure is justified only in cases of abusive practices such as artificial easily montages that have no connection with any economic reality.[38]

The Court also rejected the rights of Member States to refuse to recognize the legal personality of companies that have moved their central administration into the State but remain registered elsewhere. (Case C-208/00 [2002] ECR I-9919).

More recently, the ECJ has appeared to reversecourse, denying a Hungarian company the right to remain subject to Hungarian law after moving its central headquarters to Italy. Cartesio is a Hungarian limited partnership whose application for registration of the transfer of its seat to Italy was

[37] Jodie A. Kirshner, *A THIRD WAY: REGIONAL RESTRUCTURING AND THE SOCIETAS EUROPAEA,(* Centre for Business Research, University of Cambridge, Centre for Business Research ,Judge Business School Building, Working Paper No. 385,June2009) 1-2 ; http: // www.worker-participation.eu/Company-Law-and-CG/ECJ-Case-Law/Centros

[38] Rev. Dreptul nr.11/2009,221-229.

rejected by the Hungarian Court of Registration. Cartesio intended only to transfer its de facto head office to Italy, while continuing to operate under Hungarian company law.

Because of the refusal to enter transferral of the de facto head office in the Hungarian Company Register the question was referred to the ECJ, to determine whether Articles 43 and 48 EC Treaty preclude a member state from imposing an outright ban on a company incorporated under its legislation transferring its de facto head office to another member state without having to be wound up in Hungary first, and to have the seat transfer entered in the Hungarian Company Register.

It should be underlined that the Cartesio case is to a considerable extent similar to the ECJ's Daily Mail Decision, since it also raises the question of the transfer abroad of the de facto head office.[39]

The final SE legislation, in force since October 8, 2004, explicitly enables companies to transfer their registered seats, provided that they also move their headquarters.

In the Report from the Commission to the European Parliament and the Council regard the application of Council Regulation 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) are highlighted the main arguments underlying the formation of an SE:

The European image of an SE is reported to be one of the most important positive drivers. It is particularly attractive for companies who seek to stress their European affiliation or want to benefit from a European legal form, which is better known than their national forms, to penetrate other Member States' markets without having to set up foreign subsidiaries.

The supra-national character of an SE is reported as a potential advantage in the process of conducting cross-border mergers or structural changes in a group (e.g. transforming national subsidiaries into branches of the parent company).

The possibility to transfer the registered office to another Member State is considered an essential driver and a real comparative advantage of the SE compared to national companies.In the absence of a directive on the cross-border transfer of the registered office of a company the SE remains the only company form that allows companies to transfer their registered office to any other Member State without liquidation. This possibility is particularly attractive for holding companies.

The possibility to use the SE form as a means to conduct a cross-border merger was considered an important driver until the entry into force of the Cross-border Merger Directive. In this sense one could hold that the provisions for employee participation are more flexible in the directive than in Status , although there are contrary views.

Important is the role of IT in terms of reorganization and simplification of the group structure.The transformation into an SE, including the conversion of subsidiaries into branches, is particularly attractive for companies in the finance and insurance industries. The advantages mentioned are only one supervisory authority (instead of a number of them in all Member States where a company has subsidiaries) and easier compliance with capital requirements.

The set-up costs, time-consuming and complex procedures, and legal uncertainty together with the lack of hindsight and practical experience of the advisors and competent

public authorities are reported as the most important negative drivers when *establishing an SE*. Well-known examples of the high cost of formation of an SE include Allianz SE and BASF SE, whose costs for reincorporation as an SE amounted to €95 million and €5 million respectively. Leaving these cases aside, the average set-up costs for the SEs interviewed in the external study were

[39] ://www.worker-participation.eu/Company-Law-and-CG/ECJ-Case-Law/Cartesio.

approximately €784,000 (including the tax and legal advisory costs, translation costs and registration costs). The overall set-up costs range from approximately €100,000 up to figures of between €2 and 4 million.

Sometimes considered that the rules on employee involvement as a negative driver as, in their view, they are complex and time-consuming, especially in Member States where the national legislation does not provide for a system of worker participation. Sometimes these rules are considered disproportionate, namely if very few employees are concerned by the involvement process.

We can say that the the formation of European society allows transfer of registered office from one EU member state to another- transfer which consists of a dissolution of the company or create a new legal person as needed if a national society that wants to make such an operation - and provide some uniformity of administrative rules, accounting and staff participation .

5. The future of European Company - The future of trade policy

Accompanying document to the Report from the Commission to the European Parliament and the Council on the application of Council Regulation 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) COM(2010) 676As of 25 June 2010, 595 SEs were registered in the EU/EEA Member States. The number of SEs increased in an exponential way from 2004 to 2008. In 2009 fewer new SEs were created than in 2008, but in 2010 the trend was again an increased number of new SEs created. The number of new SEs set up each year from 2004 to mid-2010 was 9 in 2004, 16 in 2005, 35 in 2006, 88 in 2007, 179 in 2008, 156 in 2009 and 112 in 2010 as at 25 June3. Reportedly 6 SEs have been liquidated4 and 1 SE converted to a national legal form (German GmbH).

The SE's facilitation of regional restructuring has attracted a large proportion of companies. The major changes proposed are basically taxation oriented (which is a key consideration in establishment and running of any business). As of now the position is that the SE are liable for taxation in the respective Member States where they operate. Thus, for illustration, an SE with its registered office in Paris would be liable to account for its profits in UK, Germany etc. there itself through its branches or subsidiaries.[40]

The Societas Europaea (SE) harmonized a minimum of company law and assigned employee representation to a supplementary negotiation process. Commentators predicted that it would introduce cross-border regulatory competition to the EU. Others suggested that companies would choose the SE over other national corporate forms, in order to moderate the requirements of mandatory employee representation. We can say that companies are utilizing the form in a third, more significant way: to facilitate within-group restructurings that make regulation by a single supervisor possible. Their actions generate pressure for the unification of additional areas of law and the development of new regional regulatory systems. Empowering the SE would therefore lead to increased integration of corporate oversight within Europe.[41]

In November 2010 the European Commission presented a draft EU trade policy to help revitalize the economy of Europe. In its discussion document *Trade, Growth and International Business,*, the Commission examined how trade acts as an engine of economic growth and create

[40] Jodie A. Kirshner, *A THIRD WAY: Regional restructuring and the SOCIETAS EUROPAEA,6* .
[41] Jodie A. Kirshner, *A THIRD WAY: Regional restructuring and the SOCIETAS EUROPAEA,2* .

jobs. The proposed strategy aims to *reduce trade barriers, openingof global markets and achieving a level playing field for European companies.*. The overall objective is to adopt a bolder approach to ensure that citizens enjoy the benefits of trade. Commission intends to use trade policy to contribute to overcoming the current crisis and create the appropriate environment for a stronger EU economy. The document *Trade, Growth and International Business* incorporates the European Commission vision on how trade should contribute to restarting and strengthening the European economy and strategy for the next five years in commercial matters.

The strategy aims at increased economic growth, more jobs and various alternative with reasonable prices for consumers, the main objective of ensuring *that European companies enjoy fair conditions and that rights are respected so that we can enjoy all the benefits of trade.*

Specifically, the Commission proposes:

1.completion of its ambitious agenda in the WTO negotiations and with major trading partners such as India and Mercosur. Completion of this agenda would lead to increased European GDP by over one point per year;

2.develop commercial relationships with other strategic partners such as the United States, China, Russia and Japan, focusing in particular on non-tariff trade barriers;

3.helping European companies to gain access to global markets by establishing a mechanism to restore the balance between open markets in the EU (government procurement) and more closed markets with trading partners;

4.opening of negotiations on the provision of overall investment with some of the major trading partners;

5.ensuring fair trade and a proper respect for the rights of the paper making promises tangible benefits.

These priorities reflect the concerns of citizens across the EU. A Eurobarometer survey on the international trade show that two thirds of EU citizens think that the EU has benefited from international trade. Most of them have confidence that the European products and services can compete successfully in global markets.

Following of this measures , the *European consumers* will have access to a wider variety of goods at lower prices,*European businesses* will gain from greater access to export markets and from lowering the costs of cross-border commerce,*Workers* – trade creates more jobs, both in Europe and outside our borders,*Developing countries* – access to EU markets on advantageous terms offers them a step up the economic ladder.

On the other hand, however, as a result of the Commission report in autumn 2010 the Commission is currently examining the possible change in the status of SE to make proposals in the 2012. If such changes are submitted, they must be done in parallel with the revision of the Council Directive 2001/86/EC , which will be subject to consultation with social partners in accordance with Article 154 of the Treaty.

In more general terms, the measures which the Commission will propose that this report will therefore be the subject to the principle of better regulation, including impact analysis.

EU must address these new realities while remaining fully aware of the primary trade purposes - to generate long term growth and employment in the European economy.

In this regard the Commission has launched an ambitious program aimed at *developing the single market in services*, keeping in mind that, at present, services account for two thirds of GDP and employment in the EU, but only about one-fifth of total intra- EU trade . Today, only about 8% of European SMEs doing business in other Member States. This lack of dynamism not only limits

choice for consumer choice, but do not allow small and innovative businesses to grow, to develop activities and become more competitive.

To unlock this potential of the Single Market for services by 2012, the European Commission has today adopted a set of targeted actions to tackle remaining problems. The Services Directive aims precisely at removing unnecessary and burdensome obstacles to trade in services in the Single Market. One year after the implementation deadline, the Commission and the Member States have completed an assessment of how the Directive has been implemented on the ground. The results of this so-called "mutual evaluation" exercise conclude that, while much has been achieved so far, the Single Market for services is not yet delivering its full potential.

In the present times of crisis, it needs to unlock the further potential for growth that exists in anintegrated Single Market for services. This will help businesses grow, innovate and create more jobs. This will also provide for better and more competitive services to EU consumers and businesses alike.

The Communication "*Towards a Single Market Act* – (IP/10/1390) for a highly competitive social market economy", adopted on 27 October 2010 stated that the gains from a better functioning Single Market for services are estimated at annual profits of €60 to €140 billion, a growth of GDP of between 0.6 and 1.5%. While services currently represent two-thirds of the EU's GDP and employment, they only account for around one-fifth of total intra-EU trade.

The proposed measures in the field to the Single Market works on the ground , in 2011 and 2012 the Commission will carry out a "performance check" of the Single Market for services from the user's perspective,the objective is to identify specific practical problems that hamper the internal market for services and how the interaction between different rules may have unintended effects.

It is also considering eliminating items that prevent cross-border services specifically because it found the existence of difficulties affecting cross-border provision of services for companies without a permanent establishment (it is service providers who have a permanent establishment in the country offer their services).

EU will never be able to meet the ambitious objectives of the Europe 2020 in terms of sustainable and inclusive growth unless priority is given to urgent structural reforms of the markets for services and products to improve the business environment.[42]

Conclusions

From those presented we can say that the initial objectives of the SE Status have been achieved to some extent, European Society allows to the European dimension companies to transfer their headquarters across the border, to organize better and to restructure and choose between different structures management, while maintaining the right employees to be involved and protecting the interests of minority shareholders and third parties.

The European image and the supra-national character of an SE are positive aspects of European society, but six years of experience with regard to Societas Europaea Status demonstrates that the application raises practical problems, because SE Statute does not provide a uniform structure of the SE European Union, but 27 different European companies, made several references

[42] http://ec.europa.eu/romania/news/270111_piata_unica_a_serviciilor_ro htm, *Commission launches an ambitious program aimed at developing the single market for services.*

to legislation national and uncertainty about the legal effect of directly applicable law and its interface with national legislation. Also , the uneven geographical distribution of the SE in The European Union shows that status is not adapted to the situation of all Member States. Any potential changes to the SE Status to address practical issues identified by various stakeholders will need to bear in mind that the SE status is the result of a delicate compromise that was reached following lengthy negotiations.

The present paper is a forey int the process of European society in the draft, the object of lengthy negotiations to achieve supra-state company, and its future based on cooperation of Member States, according to Commission proposals to transform itself into an attractive and useful to as many corporations.

Societas Europaea theme challenges us to a thorough investigation, future projects can be oriented to the forms of incorporation of the company in accordance with national and European legislation printspublicity in thes national and community level, functioning and dissolution , split-up of SE, practical way in which workers participate in SE activity, compared with European Cooperative Society and European interest Groups, and various ways of adapting the national level.

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NOTION AND LEGAL SIGNIFICANCE OF THE INSOLVENCY

Rares-Sebastian PUIU-NAN[1]

Abstract
The article examines the past and present regulations regarding the insolvency, in general, and the insolvency of two of the most important financial institutions: banking and insurance company, in particular. The most important regulations regarding this issue consist in: Law no. 85/2006, Law no. 53/2004 and Government Ordinance no. 10/2004. In present time, lots of companies are affected by the insolvency procedures. It is thus important to have a profound analysis of "insolvency", to clarify its meanings.My article will present the evolution of the reglementation of "insolvency" till present time and will analyse the notion and the characters of "the insolvency procedures". I'll be analysng afterwards the definition, the most important elements that compose the notion of "insolvency"and its forms.In the end of my paper work I will analyse the enforcement sphere regarding both banking and insurance company and I will make a simultaneously short analysis between the insolvency stated by the comercial law on one hand and the insolvancy of banking and insurance company on the other hand, followed by conclusions and recommendations.

Keywords: *insolvency, judicial reorganisation, bankruptcy, insurance company, banking company,*

Introduction

My paper work is about the insolvency, in general, and about the insolvency of two of the most important financial institutions: banking and insurance company, in particular. The companies have a very important role in the economy of a nation. They represent the force that sustains the economy, the bases for the future development and a source of stability.

Any masive decline of one the companies could produce a "chain reaction" and could compromise the national economy. For these reasons, based on legal previsions, it is extremely important to avoid the bankrupcy of such companies and its consequencies.

Thus, it s very important for each legal system to adopt a clear and eficient legislation in this matter. It is also important to create and maintain a mechanism to supervise and prevent the insolvency of the companies.

The purpose of this paper is to realise a detailed analysis of the laws in our legal system regarding the insolvency of the companies and of banking and insurance company, the relation between special laws and general laws, the common reglementations and the differences between these procedures.

A close analysis of this issue will help the persons involved in such procedures or which are about to be involved to have a concrete image of all the applicable laws.

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This issue, based on present regulation, was not analysed before in detail, so it is my duty to create a proper and a most accurate image of all the legal reglementation regarding the insolvency of banking and insurance company in our legal system.

1. The evolution of legal regulations on insolvency

The traders' businesses, as well as their legal relations, give rise to, change and cancel, by their property, rights and obligations. However, when the debtors cannot pay their business debts, their creditors have a special legal instrument to recover such debts, namely: the commercial insolvency procedure.

The insolvency procedure has its origins in the legal institution of bankruptcy, which, in its turn, originates in the ancient times, when, in the beginning, it was a special way of forced enforcement with the purpose of liquidating the debtor's property and paying for all his debts owed to the creditors. The etymology of the Romanian word *faliment (en> bankruptcy)* is Latin; the verb *fallo – fallere* means to make a mistake, to fail, but also to cheat. The bankruptcy was the condition of a debtor's property characterised by the inability of payment, created as fraud to the creditor.

This legal institution was regulated in different manners by the ancient peoples. The Jewish laws regulated the debtors' possibility to regularly clear themselves off debts, thus allowing the traders to set up a new business. Unlike the Jews, the Greeks, and later the Romans, did not allow such a remedy to the reckless, unable or oppressed debtors. They were held up to infamy and their trade stalls were publicly destroyed, which was in itself their disgrace[2]. This is how the Italian phrase „banca rotta" was formed, which later gave rise to the British word of „bankruptcy", meaning *bancruta* (rom.).

The Roman law regulated the first collective procedure favouring the creditors over bankrupt debtors, which allowed them to take possession of the debtors' property and sell it, and distribute the price among themselves in the account of their receivables.

This legal institution has evolved in two distinct ways, which are to be found within modern regulations, within two different law systems:

- *The Anglo-Saxon laws* took over and developed the Jewish concept according to which the remedies granted to the creditor combined with the debtors' protection, so that the latter's business could survive and the debtors could be cleared off debts and start a new business. The purpose of these regulations was: i) to allow for the debtors' rehabilitation, giving them the chance of a fresh start in business; ii) to regulate and order the debtors' property distribution among their creditors;
- *The Roman-Italian laws* regulated primarily the creditors' protection, by the recovery of the debts owed to them and by punishing the bankrupt debtors. The debtors' default of payment shall automatically entail non-property related consequences consisting of interdictions and loss of rights meant to prevent them from running a business.

Nevertheless, these regulations differentiated between the good-faith, honest, but unlucky debtors and the ill-meaning debtors. The legal regime for the good-faith debtors' liability is more mitigated than the ill-meaning debtors' liability, the first being granted a certain degree of debt clear off.

The starting point of the regulation of the bankruptcy legal institution in our law system (included in the commercial code of 1887) was the Italian commercial code, which took over the

[2] Ioan Schiau, *Drept comercial* (Bucharest: Hamangiu, 2009), 316

concept of Roman-Italian laws. According to this regulation, the bankruptcy was de facto a forced enforcement procedure on the debtors' property. The procedure had a unitary, collective, joint and egalitarian character and was aimed at meeting the legal interests of the debtors' creditors.

The unitary and collective nature of the procedure resulted from the fact that such procedure applied equally to every and all debts and represented a joint defence of the interests and rights of all the creditors of a trader. The joint nature means that all these debts concurred, the payment to the creditors being made, based on the egalitarian nature of the procedure, equally for each creditor, proportionally to the weight each debt had within the property liability, according to the order of priority required by law.

The major inconvenience of the bankruptcy procedure, as it was regulated by the provisions of the commercial code, were the following:

- the great emphasis on its punitive and discreditable function, which was aimed primarily at punishing the bankrupt debtor, at excluding him from the guild of traders and at applying, in some cases, punishments that deprived him of his freedom and/or some non-property related restrictions or interdictions;
- the subject of the procedure – the bankrupt debtor – was usually a natural person, the small trader, so that most of the provisions of the procedures were addressed to the latter; only few regulations of the commercial code were aimed at trade companies;
- The lack of preventative measures and the insufficient measures of debtor rehabilitation;

The evolution of human society, the development of the business environment, of its principles and demands, the increase in the number of trade companies have shown the disadvantages of this procedure, which led to a change in the law makers' perspective on this legal institution; thus, the procedure on judicial reorganization and bankruptcy (law no. 64/1995) came into being.

This law sets three different procedures:

- the procedure of judicial reorganisation, which is aimed at the debtor's rehabilitation and payment of liabilities by restructuring the debtor's company and business;
- the procedure of liquidation of some of the debtor's assets in an orderly manner, until the liability has been covered;
- the procedure of bankruptcy, which is aimed at liquidating the debtor's property and paying his debts, and which results in the lack of existence of the legal person as a consequence of its property liquidation.

The novelty elements of this law may be summarised as follows:

- the emphasis of the institution moves from the creditors' protection and defence (by organising the debtor's asset liquidation to redeem the liability) on the debtor's rehabilitation and business survival (by taking economic reorganisation and restructuring measures aimed at paying his debts);
- the condition of an adjudicative order is suppressed and replaced by an order for relief, also as a way of directing the procedure not towards the liquidation of the debtor's property – which is the last solution in redeeming a liability – but to the debtor's rehabilitation;
- the arrangement and standstill agreement are cancelled, their functions being taken over by the reorganisation procedure;
- the reorganisation or liquidation plan is regulated, as an instrument of debtor rehabilitation or debtor property liquidation in order to avoid bankruptcy;

- by closing the procedure, the debtor is discharged of his obligations prior to the opening of procedure, except for the cases provided by law;

- the non-property effects of the conventional insolvency, which gave the bankruptcy a punitive and discreditable nature, are removed;

- besides the traditional protagonists, the law also regulates the capacity of the trustee in bankruptcy and official receiver and grants a number of process duties and rights to the local chambers of commerce and industry[3].

The Ordinance no. 38/2002, which amended the law no. 64/1995, introduced the term „insolvency" for the first time, thus replacing the traditional phrase of „cease of payment". The term has been kept for the current regulation, represented by law no. 85/2006, which, in order to achieve progress in the improvement of the legal regulation, has replaced the title „the procedure on judicial reorganisation and bankruptcy" with „insolvency procedure"[4]

The evolution of the successive legal regulations dedicated to the insolvency procedure is characterised by the shift of emphasis from the trader's commercial obligations to any obligations of some categories of traders and non-traders. The broadening of the scope may be explained by the advantages offered by this procedure as compared to other forced enforcement for debts – the procedure regulated by the Code of Civil Procedure and the procedures applying to budgetary debts:

- favouring judicial reorganisation over liquidation due to insolvency;
- the positive effects generated by opening the insolvency procedure: holding-up lawsuits and extrajudicial actions in order to realise the debts against the debtor or his property, and stopping the calculation of any interests, increases or penalties or adding the expenses to the debts which were incurred prior to the opening of the procedure and which have not been guaranteed based on any real guarantee[5].

2. The notion and natures of the insolvency procedure

The insolvency procedure is *a series of legal norms aiming at obtaining monetary funds to pay the debts owed by the debtor undergoing insolvency to his creditors, under the conditions set for each debtor category, by means of a judicial reorganisation based on a reorganisation plan or by means of bankruptcy.*

The ways of achieving the insolvency procedure are the general procedure and the simplified procedure.

The general procedure is the procedure whereby a debtor meeting the conditions provided by art. 1 par. 1, without fulfilling at the same time the conditions of art. 1 par. 2 of Law no. 85/2006, undergoes successively, after completing the supervision period, the judicial reorganisation procedure and the bankruptcy procedure, or separately, either the judicial reorganisation procedure or the bankruptcy procedure (art. 3 point. 24 of Law no. 85/2006). [6]

The simplified procedure is the procedure whereby the debtor meeting the conditions provided by art. 1 par. 2 of Law no. 85/2006 undergoes directly the bankruptcy procedure, either on the opening of the insolvency procedure or after a supervision period of maximum 60 days, during

[3] Ioan Schiau, *Regimul juridic al insolventei comerciale* (Bucharest), 15
[4] St. D. Carpenaru, *Tratat de drept comercial* (Bucharest:Universul Juridic,2009), 708.
[5] Ion Turcu, *Tratat de insolventa* (Bucharest:C.H. Beck, 2006),252-253
[6] St. D. Carpenaru, *Tratat de drept comercial* (Bucharest:Universul Juridic, 2009), 696

which the elements shown in art. 1 par. 2 letters c) and d) of the law (art. 3 point. 25 of Law no. 85/2006) are analysed.[7]

The ways of achieving the insolvency procedure are the procedure of judicial reorganisation and the bankruptcy procedure.

The procedure of the judicial reorganisation is the procedure applied to a legal entity debtor, in view of paying the debtor's debts according to the debt payment schedule. It requires the development, approval, implementation and observance of a reorganisation plan whose object is either the operational and/or financial restructuring of the debtor's business or the liquidation of some assets of the debtor's property (art. 3 point 20 of Law no. 85/2006). The enforcement of the judicial reorganisation procedure requires that the debtor continues its business with the purpose of obtaining the necessary amounts to pay the debts to its creditors.[8]

The bankruptcy procedure is the concurrent, collective and egalitarian procedure applying to a debtor in view of liquidating its assets in order to cover its liabilities (art. 3 point 23 of Law no. 85/2006). The application of the bankruptcy procedure leads to the debtor ceasing its business, followed by the debtor's deletion from the registry where it was registered.[9]

The natures of the insolvency procedure are:

- *the judicial nature,* as, according to the law, all the deeds and operations required by the insolvency procedure are regulated by the law and are carried out under judicial control by the bodies charged with the enforcement of the procedure (legal courts, bankruptcy judges, trustee in bankruptcy and official receiver)*;*
- *the personal nature,* as, based on the category of entities it belongs to, either the general procedure or the simplified procedure shall be applied to the debtor undergoing insolvency*;*
- *the collective (concurrent) nature*, as this procedure tries to cater for the settlement of all debts of all recognised creditors of the debtor undergoing insolvency*;*
- *the remedy or forced enforcement nature,* as it is aimed at covering the liabilities of the debtor undergoing insolvency, which is achieved either by judicial reorganisation (which is a remedy for the debtor's business), or by the bankruptcy procedure (which is an instrument of forced enforcement on the debtor's assets).[10]

3. Definition, defining elements and forms of insolvency

According to the common law literature, represented by Law no. 85/2006, the insolvency is '*such condition of the debtor's patrimony that is characterised by the insufficiency of liquid assets available for paying the certain, liquid and contingent liabilities*' (art. 3 point 1 of the act).

This legal definition of insolvency includes the two defining elements of insolvency:

a) the insufficiency of available liquid assets;
b) the non-payment of due debts.

a) The insufficiency of available liquid assets

According to law no. 85/2006, a situation of insolvency involves first and foremost the existence of the payment incapacity on the part of the debtor. The debtor's assets are such that they

[7] St. D. Carpenaru, *Tratat de drept comercial* (Bucharest:Universul Juridic, 2009), 696
[8] St. D. Carpenaru, *Tratat de drept comercial* (Bucharest:Universul Juridic, 2009), 696
[9] St. D. Carpenaru, *Tratat de drept comercial* (Bucharest:Universul Juridic, 2009), 696
[10] St. D. Carpenaru, *Tratat de drept comercial* (Bucharest:Universul Juridic, 2009), 697-698

cannot cover, with the available liquid assets, the payment of all contingent liabilities. Liquid assets mean both the account balance, and the securities with maturity at sight, etc.

Under the terms of law, the debtor is in insolvency when his assets either lack liquidities, or such liquidities are insufficient. Per a contrario, the insolvency procedure shall not be used when the debtor, even if he has liquidities, does not pay the due debts. In this case, the creditors shall be able to obtain their debts by means of common law, using the forced execution procedure, as regulated under the civil procedure law.

As a consequence, taking into account this essential element of insolvency, in order to apply the procedure of insolvency, the court should in all cases analyse the reasons that have determined the debtor not to pay to his creditor/creditors the contingent liabilities. Only under this circumstance, pursuant to analysing such reasons, the court identifies as the source of non-payment any lack or insufficiency of liquid assets, should the court make use of the insolvency procedure.

In theory, but also in practice, it has been questioned whether the courts of law are able or not to assess the source and the quality of liquid assets by means of which a tradesman supplies their due debts.

The opinions have been different. A minority opinion has claimed that the courts of law do not have such right. Another opinion, a majority one, adopted in the court use, has claimed that the courts of law have this right.

b) The non-payment of due debts

According to the law, the insolvency includes, apart from the insufficiency of liquid assets, the non-payment of contingent liabilities the debtor has. Even if the law does not says this specifically, only the debtor's liquid debts have to be taken into account. Should the debtor fail to observe other kind of liabilities, the common law regulations, and not the insolvency procedure, shall be used. The law does not make a legal distinction of the debtor: trading, civil, budget, etc., so that the debtor is in insolvency in case of non-payment of any of such liabilities.

Under the terms of the current regulations, insolvency has <u>two forms:</u>

a) *presumably indemonstrable insolvency* – when the debtor, within 90 days from the due date, has not settled the payment to the creditor; the presumption is relative (art. 3 point 1 letter a of law no. 85/1996);

b) *imminent insolvency* – when it is proved that the debtor shall not be able to pay when they fall due the engaged contingent liabilities, by using his available liquid assets when due (art. 3 point 1 letter b of law no. 85/1996) ;

Non-payment of the debt within 90 days from the due date regards the debt of the creditor that requires opening the procedure, respectively the debts of the creditor that submits the file petition. As such, the debtor is in insolvency, if such has not settled the debts with such creditor within 90 days from the due date, even if during such period the debtor has settled other payments to other creditors.

4. Delimiting technical insolvency from the notion of debtor's de facto insolvency

In the Romanian law, the notion of 'technical insolvency' is different from 'de facto insolvency': <u>*the de facto insolvency*</u> is a situation of financial imbalance of the debtor, in which the amount of liabilities is bigger than the amount of assets, whereas the <u>*technical insolvency*</u> is the situation of the debtor's assets in which the debtor is unable to pay the debts as they fall due because

of lack of liquidities[11]. This payment inability or the situation when payments are no longer settled is taken into account under the insolvency procedure, regardless of the ratio between the debtor's assets and liabilities.

In the French law, the terminology makes no difference between such terms as 'technical insolvency' and 'de facto insolvency', using for both situations the term 'insolvency', which is defined differently, as the case may be. The French law no. 85-98 of 25 January 1985 (with subsequent amendments) broadens the scope of the insolvency procedure to the entities that, disobeying a legal or statutory interdiction, carry out commercial activities regularly and on their own (notaries, court enforcement officers, civil servants etc.) and to some private law entities (economic interest groups, sports associations etc.).

In the American case law, as well as in the American doctrine, the term used is that of *insolvency*, there being a difference between insolvency and default of payment. The American legislation (USC Title 11, Bankruptcy Code) allows the consumers to declare *bankruptcy,* placing their assets under the control of a Federal Court in order to be cleared of their debts. Chapter 13 allows an employee to propose a plan, which is subject to the federal court approval, in order to pay partially or in full his debts to his creditors over a longer period of time. The records concerning these lawsuits are preserved for 10 years in the *Credit reports.* Even after the lapse of such time the people in question will have great difficulties in obtaining a credit in the form of payment deferral or a money loan. By means of this procedure, debts such as taxes, wife or underage children alimonies, study loans etc. cannot be redeemed.

The debtor's solvency or insolvency condition is not however totally meaningless under the insolvency procedure, since the debtor's financial recovery possibility by using a reorganisation plan is assessed according to such debtor's solvency. The debtor's insolvency may be an insurmountable obstacle in carrying on his activity[12] and the debtor's recovery perspectives are more reduced when the insolvency started being determined by the assets insufficiency.

The insolvency as a characterising condition of the debtor's assets determines his creditors' impossibility to obtain by means of a forced execution the recovery of all certain, liquid and contingent liabilities from the debtor.

The notion of 'de facto insolvency' has different meanings and effects in common law and business law. *Under the terms of the civil law*, the de facto insolvency of a debtor that is not a tradesman is also called *deconfitura* [insolvency]. The insolvency situation creates the following more important effects:

- the insolvent debtor can no longer claim the benefit of the term, all his terms falling due on the date of insolvency occurrence (art. 1025 Civil Law);
- in case of delegation, the creditor that has discharged the delegating debtor no longer has appeal against him, in case the delegated debtor has become bankrupt or insolvent after the delegation date (art. 1133 of Civil law);
- the tradesman shall not be bound to make the delivery if, during the period from selling to the maturity of delivery term, the buyer has become bankrupt or insolvent (art. 1323 of Civil law);
- the civil society stops by the insolvency of one of the partners (art. 1523 point 4 of Civil law);

[11] St. D. Carpenaru, ,Tratat de drept comercial", pag. 711
[12] Ioan Schiau, " Drept comercial", pag.318

- the mandate terminated by the insolvency and bankruptcy either of the principal or of the agent (art. 1552 point 3 of Civil law);

- the fidejussor, even without paying, may claim recovery of damages to the bankrupt or insolvent debtor (art. 1673 point 2 of Civil law)[13]

`As noticed above, in the common law, the de facto insolvency has consequences with equity effects: it incapacitates the debtor of certain rights and determines the termination of the legal relation arisen between the debtor and various legal and natural entities.

In business law, the de facto insolvency does not have the same effects as in common law, because in business, the patrimonial asset can benefit of the financial liquidities obtained by crediting; thus, even if a salesman no longer has in his patrimony enough assets to settle his debts, he will be able to get over this situation by concluding loan contracts. Of course, an important role in accessing or not such credits, and also in the price of such contracts is the tradesman's credibility. Without credibility, the possibility to contract loans is much diminished, almost non-existing.

Creditors are interested less if their debtor's patrimony is solvent or not. The fact that the patrimonial liabilities are bigger than the assets does not affect creditors, as long as the debtor pays his debts. Thus, as long as the tradesman shall contract loans, making thus the proof that he is also a good pay, his solvency or insolvency shall have neither any effects nor any other legal consequences. When the debtor tradesman no longer benefits from a loan, then he will no longer be able to fulfil the undertaken responsibilities, which will lead to his creditor's/creditors' enacting the forced execution or insolvency procedure, as the case may be.

5. Definition of the insolvency of insurance companies and credit institutions

The term "insolvency" acquires a different meaning when used for either insurance companies or credit institutions.

For the insurance companies, the condition of insolvency is "*that insurance company condition characterised by one of the following situations:*

1. obvious inability of paying due debts using monetary means;

2. the decrease of the available solvency margin to less than half of the minimum limit required by the legal regulations in force for the security fund;

3. the impossibility of restoring the insurance company's financial status during the financial rehabilitation procedure;"(art. 3 letter j of Law no. 503/2004)

For the credit institutions, the insolvency is defined by law as "*that condition of the credit institution in one of the following situations:*

1. obvious inability of paying due debts using monetary means;

2. the decrease to less than 2% of the solvency indicator of the credit institution;" (art. 2 letter h of the Government Order no. 10/2004)

Thus, we can notice some similarities as well as differences between the insolvency situations of the insurance companies, respectively of the credit institution. What is common to both types of companies is the situation of "*being obviously unable to pay due debts using monetary means".*

There are also specific situations for each of the two types of companies when insolvency may occur:

[13] Ioan Schiau, " Regimul juridic al insolventei comerciale", pag. 4

a.) For the insurance companies, either the decrease of the available solvency margin to less than half of the minimum limit required by the legal regulations in force for the security fund (point 2), or the impossibility of restoring the insurance company's financial status during the financial rehabilitation procedure (point 3).

b.) For the credit institutions, the decrease to less than 2% of the solvency indicator of the credit institution.

In terms of the scope of the legal norms applying to the insolvency of insurance companies or to the insolvency of credit institutions, each of them is governed both by special norms and by general norms.

For the insolvency of insurance companies, the special law is Law no. 503/2004, while for the insolvency of the credit institutions, the special law (*lato sensu*) is the Government Order no. 10/2004.

The common law on the insolvency of insurance companies / credit institutions is Law no. 85/2006. On this matter, the provisions of Law no. 32/2000 on the insurance business and insurance supervision, as well as the emergency Government Order no. 99/2006 on credit institution and capital suitability are also considered norms of a general nature.

Taking into consideration the lawful principle *"specialia generalibus derogant"* , whenever the special norms contain provisions that exempt from the provisions of Law no. 85/2006, the special norms shall apply. When the special norms "are silent", the general norms shall apply, as they apply whenever a matter or aspect of a matter is not regulated by special laws.

Consequently, there shall prevail the dispositions on the insolvency procedure stipulated by law no. 503/2004, respectively by the Government Order no. 10/2004, which shall be supplemented by the provisions of law no. 85/2006, respectively of law no. 32/200 and of the Government Order 99/2006.

Conclusions

We believe that the new regulations on insolvency should greatly emphasize the efficiency of this procedure, mainly conditioned by the quick performance of the process stages. The repeated legislative reforms have shown care for speed, for shorter solution periods, but, at least so far, they have not proven efficient enough, as the proceedings are carried out over long period of times – years.

The efficiency of the procedure may also be given by the advantages, but especially by the disadvantages it generates to the debtors and creditors (for creditors – the possibility of a compulsory payment of a legal security, stopping of the calculation of any interests, increases and penalties, the possibility of maintaining some ongoing contracts, contrary to the creditors' interests, the debtor's discharge of debts, and for the debtors – the interdiction of a repeated reorganisation application, removal of debtor's right to administer his assets, possibility of forcing the debtor to submit a legal security for provision of services).

The soundness, transparency and efficiency of these regulations will ensure the stability and dynamics necessary to the business environment, will encourage trade in good faith and will deter the ill-meaning traders, will allow for a safe circulation of capital and will prevent financial blockages.

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- *Law no. 85/2006* on the insolvency procedure.

PAYMENT ORDINANCE IN THE NEW CIVIL CODE – AN OPTIMAL AND FAST WAY OF RECOVERING COMMERCIAL RECEIVABLES

Mădălina CONSTANTIN*

Abstract
The payment ordinance procedure from the perspective of the new civil proceeding code is a summary of the two procedures currently regulated by Government Ordinance no. 5/2001[1] regarding the payment notice procedure and Government Emergency Ordinance no. 119/2007[2] regarding the measure for preventing delays in the execution of the payment obligations resulted from the commercial contracts.
By uniting the two procedures, a single mechanism of recovering the certain, liquid and due receivables, which represent obligations to pay amounts of money, both in civil and commercial matter (art. 999 paragraph 1 of the new Civil Procedure Code).

Keywords: *payment ordinance procedure, contract, receivables, creditor, debtor*

1. Introduction

The amounts of money which represents certain, liquid and due receivables, should result from a contract (civil or commercial, the lawmaker not making any difference in this regard), ascertained by a written document or generated (considering the receivables) by bylaws, regulation, document acknowledged by the parties by signature (or by other means admitted by the law). Also, this contract can be concluded between individuals and legal entities or only between legal entities, being admissible also the contracts concluded between a commercial company and a contracting authority.

The new regulation provides for a prior and mandatory phase, which the creditor has to undergo before filing for a payment ordinance with a court of law (art. 1000 NCPC):

- the creditor communicates to the debtor a payment notice with which the creditor requires the payment of the amount due within 15 days of receipt of the notice;

- the notice shall be sent by a court executor or by registered mail with declared contents and confirmation of receipt;

In the event where the debtor fails to pay within the term stated in art. 1000 paragraph 1 of the new civil procedure code (the 15-day term), the creditor can file with the court a request for issuing the payment ordinance.

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[1] Published in the Official Gazette of Romania, Part I no. 422 of 30/07/2001

[2] Published in the Official Gazette of Romania, Part I, no. 738 of 31/10/2007

As an element of legislative novelty, we mention that sending the notice, in compliance with the formalities required by art. 1000 paragraph 1 NCPC, triggers the suspension of the extinctive prescription with regard to the receivable to be recovered under this special procedure.

In our opinion, the procedure of issuing this notice, which requires that the debtor should pay the receivable, is actually a prior mandatory procedure which needs to be undergone before the plaintiff files a complaint with the court and initiates the legal procedure. This mandatory character also results without doubts from the phrasing of art. 1001 NCPC which states that if "the debtor fails to pay within the term stated by art. 1000 paragraph 1 , then "only the creditor can file the request for payment ordinance".

2.Paper Content

Relevant Court. Contents of the request

With regard to the relevant court, art. 1001 NCPC states that the request for payment ordinance shall be filed to the relevant court for judging the substance of the case in first instance, therefore in accordance with the provisions of the common law.

As the new procedure of the payment ordinance refers to the certain, liquid and due receivables, both in civil matter and in commercial matter, the contents of the request have been adapted to the new legislative reality, in this regard being necessary the identification data of the creditor and debtor, individual or legal entity, as the case may be. Also, being a legal action, it shall include aspects regarding the purpose of the action, the motivation in fact and in law, signature, as per art. 1002 paragraph 1 NCPC.

Given the new regulation has introduced a prior mandatory procedure, the request for issuing the payment ordinance shall have attached also the evidence of having sent the notice (art. 1002 paragraph 2 of the new civil procedure code). The request for payment ordinance and the attached documents shall be submitted in several copies, one copy for each party and one for the court.

Given that the text of the request for issuing a payment ordinance can include also a heading regarding the payment of the interest pertaining to the main obligation, the lawmaker has stated in art. 1003 of the new civil procedure code the way of calculating the interest, in the sense of an amount and time as of which the interest is calculated, a way mostly adopted from the former payment ordinance procedure, but improved and adapted to the specificity of the new procedure. Thus, if the parties have failed to establish the level of the interest for the late payment, thus giving priority to the conventional interest, there shall be applied the reference interest rate set by the National Bank of Romania.

Besides the main debt and the related interests, in accordance with the provisions of art. 1003 paragraph 3 NCPC, the creditor can also claim supplementary damages determined by the costs pertaining to the recovery of the outstanding debt, which the debtor has failed to willingly pay (stamp tax, legal stamp, lawyer fees or court executor fees, etc.)

Judging procedure

The new regulation has preserved the rule according to which the solving of the request for payment ordinance is made including the subpoenaing of the parties, according to the provisions regarding the urgent cases (art. 1004 of the new civil procedure code). As an element of legislative

novelty, we can mention that the subpoena shall be handed over to the party 10 days before the hearing date, the subpoena having attached a copy of the request for payment ordinance and the documents proving the plaintiff's claims.

The letter of defence in this matter has remained mandatory and the debtor is to submit it at least 3 days ahead of the hearing date. Given that this special procedure is complete with the common law, the failure to submit the letter of defence triggers the defendant's losing the right to submit evidence and to claim exceptions, apart from those of public order (art. 203 paragraph 2 NCPC). Also, especially in this matter, the failure to submit the letter of defence can be considered by the court as an admittance of the creditor's claims (art. 1004 paragraph 3 of the new civil procedure code). Also, it is stated that the letter of defence is not to be communicated to the plaintiff (the plaintiff is to become acquainted with it on the first hearing term).

The judge shall try to settle the trial in an amiable manner, under the forms stated in art. 1004 paragraph 1 NCPC : the parties are subpoenaed in order to "insist on the debtor's making the payment" and to try to reach an agreement of the parties on the payment conditions.

With regard to settling the litigation by paying the outstanding amount or by the parties' agreement, given the new system of the civil trial:

The court shall pronounce a final decision, if the creditor represents that they have received the payment of the amount due (art. 1005 paragraph 1 of the new civil procedure code).

The court shall pronounce an expedient decision, if the parties reach an agreement, decision which is final in this context, being a writ of execution, without investing an execution formula, as this is no longer necessary (art. 1005 paragraph 2 of the new civil procedure code).

Challenging the receivable. Term of the procedure

To the procedure of challenging the receivable by the debtor, the lawmaker added two hypotheses of overruling the payment ordinance, if the following minimum conditions required by art. 1006 paragraphs 1 and 2 of the new civil procedure code have been met:

If the debtor challenges the receivable and the documents submitted to the case file, the explanations and clarifications of the parties show that this challenge is grounded, the court shall overrule the creditor's request by a decision which can be appealed by the latter by means of a request for cancellation, as per art. 1009 paragraph 2 NCPC.

If the defences on the substance of the case, regarding the challenging of the receivable, require the necessity of administering other evidence than that stated in art. 1006 paragraph 1 of the NCPC (documents in the file, explanations, clarifications of the parties), the court shall overrule the creditor's request by a decision that can be appealed by the latter by means of a request for cancellation, as per art. 1009 paragraph 2 NCPC. Also, this other evidence than that stated in art. 1006 paragraph 1 of the NCPC, needs to be admissible in the procedure of common law.

In both cases of overruling stated by art. 1006 paragraphs 1 and 2, the creditor can sue according to common law.

For the purpose of obtaining an accelerated judgement, the maximum time span of this procedure has been kept to 90 days, similarly to the older regulation, however, there has been expressly stated the penalty for not observing this deadline: the court orders, even ex officio (this also means at the request of the interested party), the closure of the file by a final decision (art. 1008 of NCPC), the creditor having the option to sue according to the common law.

With regard to issuing the payment ordinance (we refer to the case of allowing the request for legal action), NCPC considers two cases: allowing in full the request for payment ordinance, or allowing a part of it. Thus, in order to allow in full the request for payment ordinance, the court shall verify whether the creditor's claims are grounded by reference to: the request for legal action, the documents submitted, the statements by the parties (their explanations and clarifications). Correlatively, if the plaintiff's claims are partly grounded, the court shall issue a partial payment ordinance, and for the difference, the creditor can sue according to common law (art. 1007 paragraph 2 NCPC).

The payment ordinance allowed shall indicate the amount and the payment term. With regard to the payment term, the following rules are instated:

The term shall not be shorter than 10 days and shall not exceed 30 days of the date of communicating the ordinance (art. 1007 paragraph 3 NCPC). The legal text is of private matter, as the parties can mutually agree to derogate from this rule.

This term (of 10 to 30 days) is no longer mandatory for the judge, if the parties agree on another term. Also, such agreement should exist until the time of closing the debates, in order to give another term than the one of common law.

At the debtor's request and for well grounded reasons regarding the actual payment possibility, the court can order a longer payment term (longer than 30 days) or rescheduling the payment if the receivable contemplated by the trial represents payment obligations of the quota of the common expenses to the landlords' associations, as well as maintenance expenses chargeable to the individuals, corresponding to the areas that they use as dwellings.

The ordinance shall be communicated to the present party or shall be immediately communicated to the parties, according to the rules of common law. As the lawmaker has not expressly stated this, there can be raised the question whether the overruling decision pronounced under the conditions of art. 1006 paragraphs 1 and 2 NCPC should be handed over to the parties present or communicated according to the rules of common law? On the other hand, establishing this rule is important in order to calculate the elapsing of the term for a possible request for cancellation. As also in the case of a cancellation decision, there can be made a request for cancellation (art. 1009 paragraph 2 NCPC), and in the case of the payment ordinance given according to art. 1007 paragraphs 1 and 2 NCPC the term for the cancellation request shall be calculated as of the date of handing it over or communicating it, the only resulting solution being that the overruling decisions shall be communicated to the litigant parties according to the common law (in our opinion, this cannot be handed over as there is no express derogatory provision in this regard the provisions of common law are to be applied).

Cancellation request

The cancellation request can be made within 10 days of handing over or communicating the ordinance (art. 1009 paragraph 1 NCPC). With regard to motivating the cancellation request, such reasons are limited by art. 1009 paragraph 3 NCPC to : the disregarding or the conditions for issuing the payment ordinance (the certain, liquid and due character, the source of the receivable, the performance of the prior procedure, etc) as well as the necessity of administering other evidence than that admissible further to challenging the substance of the receivable (art. 1006 NCPC).

The regulation of the cancellation request by the payment ordinance procedure, brings forth the following elements of novelty:

The cancellation request can be introduced both by the debtor (against the ordinance under which the latter has been obligated to pay the receivable in full or in part) and by the creditor, that can resort to the cancellation request against the decisions to overrule the request for payment ordinance (decisions pronounced under the conditions of art. 1006 paragraph 1 and paragraph 2 of the NCPC) and under the conditions of art. 1007 paragraph 2 NCPC, in case of allowing the ordinance in part.

The cancellation request falls under the competence of the court that has pronounced the payment ordinance, but such case shall be judged by a panel of two judges (art. 1009 paragraph 4 of NCPC)

The decision which resolves the cancellation request is final irrespective of whether it allows or overrules the request

Given the final character of such a decision, it is without doubt that it cannot be appealed.

Conclusions

So, the payment ordinance procedure does not apply to the receivables listed on the creditors list in case of an insolvency procedure and, also, in case of the receivables arisen from contracts concluded between commercial companies and consumers. Of course, in such cases, the procedure regulated for such special matters is to be applied for the recovery of such receivables.

However, given the character of special procedure of the payment ordinance, this shall be applied as a priority to the requests that fall under the scope of this regulation and shall not be completed with another special procedure.

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THE LEASE CONTRACT, GENERAL CONSIDERATIONS FOR THEORETICAL AND PRACTICAL PROCEDURE

PhD. Bogdan SPASICI[*]

Abstract

The farming lease represents the contract in which the possessor gives farming produce to the farmer for a fix term utilization in exchange for a price (lease).

The lease goods can be lands with agriculture destination among which: productive farming lands (plough-land, vineyards, winegrowing, orchard nursery, hop gardens, mulberry nursery), woody pasture-ground etc..

The farming lease in common law is stipulated in law no. 16/1994, with modifications and addendums. According to article 6, the lease farming contract is always written, registered in a special record under the supervision of the local county council secretary. Therefore, it is a solemn contract registered within the local county council.

The contract must always contain: the contractual parties, business headquarters, the object of the contract accurately and in full terms (description of all goods, inventory and the map of the land); the contractual agreements (rights and obligations), the duration, the payment system and terms, other clauses agreed by parts within law[1].

In practice, the lack of a contractual framework was known due to the high number of lawsuits which were reflected in the un-utilization of approximate 1 million hectare. This was the main reason for the addendum of the law 16/1994 trough another law no. 223/2006. The new law introduced a certain framework of the contract for lease.

In this context, the present study aims to analyze the legal nature of the contractual frame and the theoretical and practical utility of its introduction in a legalized form.

Keywords: *lease, goods, risk, deadline, form.*

1. Introduction

Formulation and execution of the lease contract.

Lease contract is concluded between the lessor, on one hand, and the tenant (lessee), on the other hand.

The lessor must be the owner, usufructuary or other legal holder of the goods forming the subject of the contract (art. 21).

Lessees may be individuals or legal entities.

Lessees individuals must be Romanian citizens, residing at home or abroad.

Lessees must have agricultural speciality training, agricultural practice or a certificate of agricultural knowledge and the guarantees required by the lessors.

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[1] See Fr. Deak, *Civil Law Treaty. Special contracts*, Actami Publishing, Bucharest, 1999, p. 300 et seq.

Corporate tenants may be Romanian legal entities established in Romania, including partially or fully foreign owned.

The legal person must have been engaged in operating the farm property and must present the guarantees required by the lessor (art. 3 last)[2].

The natural or legal lessee can not sublease agricultural goods (Art. 22 para. (a)]. As an exception "the lessee may assign the lease contract, but only to his/her wife/husband co-participants in the operation of agricultural goods or their descendants who have reached age of majority" with the written consent of the lessor[3].

The lease contract has two components: agricultural goods leased and lease (the price of the lease).

Goods that are subject to lease may be both movable and immovable property and must meet the following conditions[4]: to exist (at the beginning of the contract), to be determined, to be lawful and possible to be owned by the lessor and be in the civil circuit.

Rent represents the lease price and it is paid in goods or money.

Establishing the lease amount for each category of land use can be based on: area, potential of production, etc.. (art. 14).

The lease contract is a solemn contract. Thus, the lease shall be in writing, a copy for each party and a copy for s the local council in whose jurisdiction the property is leased, within 15 days from the date of termination.

The contract shall be entered in a special register kept by the secretary of the local council[5]. Consequently, writing and recording the contract are requirements for its validity and enforceability [art. 6. (4)], their failure attracting absolute nullity of the contract [Art. 24 para. (a)].

According to art. 5, the lease must include: the contracting parties and the address or location, the subject to contract, completely and accurately determined (the contract must include a detailed description of all agricultural property rented, their inventory of land and site plan), the obligations of both parties, expressly and fully specified, during of the lease, arrangements and payment of the rent, the responsibilities of both parties, other clauses agreed by the parties, permitted by the law.

Lease transfers the right to use agricultural goods from the lessor to the lessee (a variant of the tenancy).

Consequently, the special rules of the agricultural lease contract must be applied with priority and completing the rent contact (which is the common law).

Since the lease is a bilateral contract (sinalagmatic), it creates obligations for both lessor and lessee.

According to art. 8. (a) "the lessor is obliged to surrender the leased property and, within the prescribed time, to guarantee the tenant of total or partial eviction and perform all other obligations assumed by contract. "

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[2] See G. Boroi, L. Stănciulescu, *Civil Law. Selective Course. Tests grid*, Hamangiu Publishing, Bucharest, 2010, p. 425.

[3] See I. Dogaru, *Civil Law. Special Contracts*, Publishing All Beck, Bucharest, 2004, p. 695 et seq.

[4] See L. Lefterache C.M. Craciunescu, *Law No lease. 16/1994. Commented and annotated*, Ed All Beck, Bucharest, 2000, p. 5-6.

[5] See D. Chirica, *Special Civil Contracts*, Lex Light House, Bucharest, 1997, p. 200-201.

The lessor has an obligation to guarantee the peaceful use and useful aims leased property. Thus, the lessor must ensure the tenant not only for the peaceful use of his work, against hidden defects[6].

The lessor has the obligation to give back the agricultural goods in the state farms, and to make appropriate repairs to maintain the proper usage, throughout the contract.

The lessor has the obligation to pay taxes due to the leased agricultural goods (art. 10 of law).

The lessee has the obligation to pay the price of the main lease, on the dates, places and conditions in the agreement.

Lease payment is made by the common law rule at home tenant (as Cher).

The lessee has the obligation to use the leased property as a good owner.

The obligation to cultivate land requires care and diligence which would have made himself owner of the farm. Thus, the tenant is assessed in the abstract fault (*culpa levis in abstracto*)[7].

The lessee may not change the category of leased land except with the prior written approval of the owner (art. 20).

At termination, the lessee must return the goods leased in the state in which they have been received according to the inventory.

Lessee shall bear the cost of terminating the contract, drafting and registration fees that it [art. 6. (3)].

The lessee must also provide the lessor leased agricultural goods, as well as documentation for the lessor to exercise the right of control over how to manage the leased goods [Art. Article 8 (3)].

The lessee has the right of retaining the agricultural goods, which may be recognized by court decision on "its demage with the other party, arising from the contract [Art. Article 8.(4)].

The lease terminates at the normal deadline[8] or during the conduct of "any Contracting Party may request termination of the lease in court for cases of default by the other party, under the law" (Art. 24 para. 2).

According to Law no. 16/1994, there are special cases of termination of the lease: the death of a party, the expiration and alienation inter vivos of agricultural property rented.

2. Supporting the lease risk

The contracting parties may determine the limits of carrying cases and the damage caused by natural disasters[9] (art. 21 par. 1 and 2).

Supporting the risk lease combines two aspects: the risk of destruction and the risk of contract work.

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[6] If the actual handing over of agricultural goods is found that the land lease has an area less than or greater than that provided in contract, it may require decrease or increase the price (rent).

[7] See C. Toader, *Civil Law. Special Contracts,* Publishing All Beck, Bucharest, 2005, p. 193 et seq.

[8] Since the lease has successive execution, and its duration is of the essence, such termination will occur at expiration, see L. Stănciulescu, *op. cit.*, p. 197.

[9] Also, the agreement may provide for the assumption of total or partial loss of the leased property as a result of fortuitous circumstances or force majeure.

Fortuitous destruction, in whole or in part, of the leased agricultural goods is the responsability of the lessor, as owner, according to general rules (res perit domino). But the lessee shall be held to prove that the destruction occurred without his fault (art. 1431, 1434 Civil Code)[10].

If the lost of the leased goods was partial, the lessee will be able to claim a proportionate price decreasing with the deterioration of work or contract termination.

If the farm good was totally lost, the lease will terminate in that moment[11].

In case of the fortuitous destruction of leased property, the risk of the contract will be in the responsability of the lessor (as the debtor of the obligation which can not be executed)[12].

According to art. 1467 - 1469 Civil Code, if the rent was established on part of their production quotas, its loss will be in the proportional responsability of the lessor and lessee[13].

The lessee will not bear the risk of their destruction after harvest (if the rent will be payed in to the equivalent in Romanian New Currency - RON), because at that moment he will not be the owner of the agricultural products[14].

3. Lease in 2009 the Civil Code provisions

New Civil Code provisions are considering some changes in the domain of the lease.

Since the Civil Code Act 2009 also amended the last provision, we present only the significant ones.

According. 1836 par. 1 and 2 Civil Code 2009 may be leased agricultural goods, such as agricultural land, land occupied by construction and installation agrozootechnical, fisheries and land reclamation facilities etc.. as well as animals, buildings, machinery, equipment and similar goods for agricultural use.

If the term is not fixed, rent is considered to be made for the entire period required harvesting fruit that will produce agricultural goods in the agricultural year ending contract (art. 1837 Civil Code 2009).

Lease agreement should be concluded in writing and filed in one copy at the local council in whose jurisdiction the property is rented farm (art. 1838 Civil Code 2009)[15].

Lessee may change the category of leased land only with prior consent given in writing by the owner and compliance with legal provisions (art. 1839 Civil Code 2009).

Lessee is obliged to provide goods for foreign agricultural crop loss or destruction of animals due to natural disasters (art. 1840 Civil Code 2009).

If during the lease, the entire harvest of the year or at least half of it was lost chance, the lessee may require proportionate reduction of rent if it is determined in a fixed quantity of agricultural products, in an amount of money. If the lease is done over several years, the reduction

[10] If the tenant has been late but even if the distruction of the work was fortuitous, however, the risk will be borne by him as a debtor of the obligation to teach agricultural goods [art. 1074 par. (2) Civil Code].

[11] See G. Boroi, L. Stănciulescu, *op. cit.*, p. 427, C. Toader, op. cit., p. 195.

[12] As an exception when contract was signed for a year and the harvest was lost completely or at least half the lessee has the right to demand a proportional reduction of the lease (art. 1458 Civil Code) .

[13] For details on the lease interest in the destruction, see D. Macon, IE Cadariu, *op. cit.*, p. 189.

[14] See I. Dogaru, *op. cit.*, p. 707 et seq, L. Stănciulescu, *op. cit.*, p. 196 et seq

[15] When leased property is located within the jurisdiction of several local councils, a copy of the contract shall be submitted to each local council in whose jurisdiction the leased assets are located.

will not be set until the end of the lease (art. 1841 par. 1 and 2 Civil Code 2009). As an exception, the lessee can not obtain a rent reduction if the destruction took place after the harvest was reaped.

According to art. 1843 par. A Civil Code in 2009, when rent is set at a rate of fruit or a monetary amount depending on the amount of such allowances, the fortuitous destruction, in whole or in part, is borne fruit divided proportionately.

But if the destruction occurred after gathering fruit and a guilty party delays in delivery or reception of their due share of the fruit to reduce its losses, and share other party shall be considered as if no loss had occurred, unless the fruit would have died even if the delivery and reception of fruit were made on time.

When rent is paid in fruits, as Lessee is in default for collection on their teaching and as a lessor is receiving notice of the date on which it was notified in writing by the tenant (art. 1844 C. Civil Code 2009).

Lease contracts concluded in authentic form (sn[16]) and the local council is registered, enforceable time limits for payment of rent and the contractual arrangements. (art. 1845 Civil Code 2009).

With the written consent of the lessor, the lessee may assign the lease spouse involved in operating the leased property or its progeny adults. Sublease all or part is prohibited under penalty of nullity (art. 1847 and 1846 Civil Code and 2009).

Lease agreement is renewable automatically for the same duration, unless either party has notified the parties thereto, in writing, its denial at least six months before expiry, and for agricultural land, with at least one year (art. 1848 par. a Civil Code 2009)[17].

According to art. 1849 "The lessee has a right of first refusal on leased agricultural property".

4. Framework of a lease contract. Theoretical and practical utility

The Law no. 223/2006 "for the amendment of Law no lease. 16/1994"[18], art. 3. 1 has been reformulated in the sense that "Leasing is done through written contract, the model is provided in the annex ..." (sn).

As well as writing and recording at the local council, the law adds a certain "model" contract, not to mention that "the lease contract" is also a condition of validity (in addition)[19].

In what follows, we try to analyze the provisions governing "rental contract framework" through the theoretical usefulness, especially practical.

According to art. 1 and 2 Annex of the law (the model contract), lease "ends and the lease executed on the basis of Law no. 16/1994, as amended and supplemented "between lessor and lessee (natural or legal persons).

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[16] We recall that for the validity of contract. 1838 Civil Code 2009 states in written form and submit a copy to the local council. The written form is the first document under private (not necessarily true).

[17] If the term of the lease is one year or shorter periods of non-renewal under par. (1) is reduced by half (art. 1848 par. 2 Civil Code 2009).

[18] Published in M.O. no. 497 of 8 June 2006.

[19] According to art. 1176 (1) Civil Code 2009 "Framework Agreement is the agreement whereby the parties agree to negotiate, enter into contractual relationships or to retain the essential elements of which are determined by it".

Lessees individuals must be Romanian citizens, whether residing at home or abroad should be a trained agricultural specialist, agricultural practice or a certificate of agricultural knowledge and the guarantees required by the lessors.

Corporate tenants must be Romanian legal entities established in Romania, including partially or fully foreign owned. They must be engaged in operating the farm property and the guarantees required by the lessor (art. 3. last lease of Law).

Can not act as lessees (being unable to take on lease any agricultural goods) public officials and employees responsible for the management of autonomous administrative management of the agriculture, institutes and stations that have the wealth or land management State Farm property (art. 18, amended by Law no. 350/2003).

Under the sanction of nullity, the lessee can not sublease [all or any part art. 22 par. (a)].

According to art. 3 model in Annex 3 of "The contract is to lease the land area .... "[20].

According to art. 4 of the model contract "land leased by the lessee will be used solely for agricultural use". Thus, in a lease, lessor shall undertake to teach the use of work in order to obtain money or goods, and the tenant is obliged to pay rent for the exploitation of property and obtaining financial benefits.

We mention that although, apparently, achieve the proposed completion time is after an act, in fact, cause precedes effect, as foreshadowing mental and the goal is achieved before the conclusion of the legal act[21].

According to art. 5 par. 1 and 2 of the model lease "ends .... for a period of years" and "may be renewed by written agreement of the parties".

Conclusions

We concur that the doctrinal opinion, having regard to the supremacy of the lease provisions of Law no. 16/1994 on the model contract clauses, lease may be terminated for a period longer than one year[22].

In art. 7 and 8 in the Annex are listed the rights and obligations and that the lessor, lessee (no line in them).

Law ferenda seems to me to alter the text in that: the main obligations of the lessor are required to guarantee the delivery of agricultural goods duty and obligation to pay taxes due and the tenant's main duties are: the obligation to pay the lease obligation to use the leased property as a good owner, the obligation to return the goods and the obligation to pay lease costs[23].

We mention that while art. 8, gives the tenant a right of first refusal for the sale of land alienation, the clause may be interpreted as "absolute zero"[24].

According to art. 10 (1) of the model lease "shall automatically be terminated upon expiry".

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[20] In theory, the formulation art. 3 of the law has been criticized because it is widely held that the lease has two aims: agricultural goods and rent, see L. Stănciulescu, *Considerations on "lease contract framework" established by Law no. 223/2006*, in R.D.C. no. 9 / 2006, p. 52 et seq.

[21] See G. Boroi, *Civil Law. General Part*, Hamangiu Publishing, Bucharest, 2008, p. 240.

[22] See L. Stănciulescu, *op. cit.*, p. 54.

[23] See L. Lefterache C.M. Craciunescu, *op. cit.*, p. 47.

[24] Since the foregoing provisions of art. 9 para. 1 of Law no. 16/1994 and art. 5 of Law no. 54/1998 have been expressly repealed by Law no. 247/2005, see L. Stănciulescu, *op. cit.*, p. 55.

"At the time of termination, it may be renewed by mutual agreement with the Law no. 16/1994"(art.10par.4).

Although the purpose stated in the explanatory memorandum to the Law no. 223/2006 was decrease in the number of legal proceedings and sustained exploitation of agricultural land, the new provisions (however good intention were) failed to produce effects than expected[25].

We appreciate that the only corroboration of the new arrangements with other measures, including economic and administrative nature, will succeed in overcoming the crisis situation where we are.

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[25] In support of new regulations has been argued that "the lack of a lease contract framework ... has led the preparation of incomplete contracts ... and therefore have not been paid for lease rights, causing tens of thousands of actions in the courts"; See L. Stănciulescu, *op. cit.*, (9 / 2006), p. 52 et seq.

HARMONIZED RULES OF INTERNATIONAL INSOLVENCIES - EVOLUTION AND SIGNIFICANT CONCEPTS

Gabriela MOLNAR (FIERBINȚEANU)[*]

Abstract

Governments have become, in time, concerned about the effectiveness of bancruptcy laws and despite that the usage of legal procedures vary around the world there must be observed a tendence in organising high performing insolvency regimes, market – oriented and of judicial efficency. This orientation involves also the need to establish new directions of cooperation in the field of cross- border cases, offering in this way protection and greater legal certainty for investment. UNCITRAL MODEL LAW ,Council Regulation(EC) No.1346/2000 and the common rules and concepts in usage introduced are, above the evolution of national insolvency regimes, two of the most effective exercises providing support in cases of insolvency with cross-border implications. Having in mind that national legal sistems contain rules on various types of proceedings the purpose of all the initiatives regarding the international aspects of insolvency law was to create a base of cooperation between states, constructing also new legal conditions to be applied.This comparative paper intendes to reflect the work that has been done in international field regarding cross-border insolvency starting from question raised in national legislations in the process of establishing the area where different substantive laws can act together with support of an international regulation.

Keywords*: evolution of national regimes, need of cooperation, Uncitral Model Law, Council Regulation(EC) No.1346/2000, concepts covered in international regulations*

1. Introduction

Over the past forty years there was a lot of work done in the field of international law reform because of the change in commercial practices due to the globalization and economic developments.Also new developments have taken place in the international insolvency sector creating a strong framework for the operation of the regulations issued in this area and solving effectively cross border insolvency cases.

In the mechanism of understanding the need for flexibile, protective and company-friendly insolvency law regime it will be interesting and usefull to observe the questions raised over the years and the struggle to achieve such a goal especially when there were so many differences of opinion and why not of state policy among the participants at this project.

The purpose of this article is to offer an image of the done efforts in harmonisation and modernisation of national legislations and in producing guiding lines in cross-border insolvency

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cases because until results as UNCITRAL Model Law[1] or Council Regulation (EC)No.1346/2000[2] were obtained, a lot of effort was alocated in this process.

Organizing a brief encounter with problems raised from the countries and members of the working groups participating in this process and also explaining the good points and why not the needs arising after the apearence of the two acts will be a point in starting a complete research in this domain.

In the paper will be also presented key concepts as territoriality, universality, center of main interests, forum shopping, main and secondary proceedings and establishment, which are important instruments in the process of relating the cross-border reglementation to national law .

2. Evolution in national and international insolvency regimes

In time, paralell on the ongoing expansion in economic activity there was sensed the need to develop mechanisms for governing the conflicts beetween national laws in the event of the cross border context. The objectives in national legislations included protecting the rights of creditors, debtors and employees, facilitating the rehabilitation of businesses worth to be preserved and maximazing the value of the assets available to pay the claims of the creditors in liquidation procedure.

But in national insolvency laws the theories were different regarding universality or territoriality principles, various type of proceedings, reorganization proceedings, liquidation process, priority rules in distribution of assets, recognision of the foreign court orders.

Realizing that flexible frameworks are needed to deal with cases of cross-border insolvencies some countries were preocupied during the national law reform to insert, along the specific objectives, also elements of cooperation in this cases.At the begining the relief was provided by multilateral treaties[3] but there were also non-Governmental initiatives trying to put together uniform concepts that can be adapted in domestic legislations like Model International Insolvency Co-operation ACT (MIICA)[4]or the result of the research deveeloped by the American Law Institute among member countries of NAFTA[5] .

[1] United Nation Commission on International Trade Law,Uncitral Model Law on cross – border insolvency with Guide to Enactment, available online at http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf

[2] The Council of the European Union adopted the regulation on insolvency proceedings ("the insolvency regulation") on 29 May 2000. In accordance with Article 47, it entered intoforce on 31 May 2002

[3] Montevideo Treaty on commercial international law 1889 ratified by Argentina, Bolivia, Colombia, Paraguay, Peru and Uruguay; the Nordic Bankruptcy Convention in 1933 (the convention includes Denmark, Finland, Iceland, Norway, and Sweden). The convention was intended to facilitate the handling of insolvency proceedings that involved two or more of the neighboring Nordic countries, and the essential principles stated that bankruptcy proceedings initiated in one member country exposes all assets possessed by the debtor in every other Nordic country as well, the guiding legislation for such proceedings is that of the country in which the action is initiated, the appointed bankruptcy administrator has the authority to dispose of the bankrupt's assets in any and all of the member countries in which they may be found.

[4] Committee J of the International Bar Association formed a group to analyze the present state of international insolvency cooperation and The Model International Insolvency Cooperation Act (MIICA) created and drafted by members of Committee J, was a proposalfor domestic legislation for adoption by individual countries, available online at http://www.auilr.org/pdf/6/6-4-7.pdf

[5] The North American Free Trade Agreement has stimulated a large increase in economic activity that crosses the Canadian, Mexican, and United States borders. An increase in the number of bankruptcies in which creditors and assets are located in more than one of the NAFTA countries was a visible result The American Law Institute's (ALI's) Transnational Insolvency: Cooperation Among the NAFTA Countries tried to offer a new cooperation perspective.

3. UNCITRAL Model Law on cross-border insolvency and Council Regulation (EC)No.1346/2000

3.1. UNCITRAL Model Law on cross-border insolvency

The United Nation resolution creating UNCITRAL spoke in terms of the "progressive harmonization and unification" of the law of international trade but in this days UNCITRAL defines its mission as the "modernization and harmonization" of trade law.[6]

Between the task of harmonizing and unifying existing bodies of national law on the one hand, and the modernization of national laws on the other hand there are some differences [7].

Harmonization represents the effort to identify common aproaches among existing domesting laws. Reports to the General Assembly and the Commission in the late 1960s mark that international actors understood the "progressive harmonization and unification" of trade law as involving the reconciliation of divergent practices and an articulation of emerging international norms.[8]

Making a statement regarding efforts in achieving the "modernization and harmonization" of trade law, UNCITRAL becomes a more pro-active participant in the reform of global commercial law.The different position can be seen looking at the two UNCITRAL Secretariat reports issued at the beggining of the project that would lead to UNCITRAL Model Law regarding cross-border insolvency and in 2000 when work begun on the Legislative Guide on Insolvency Law

In the note of the UNCITRAL Secretariat from 1993 was recognized the desirability of a workable system of cooperation between states but also been pointed that a principle of universality in insolvency proceedings was imposible to be imposed at any level so that the only possible action was to harmonize existing rules. In its 2000 report on Possible Future Work on Insolvency Law, the UNCITRAL Secretariat noted that an important justification for authorizing the Working Group on Insolvency Law to begin its work on the Legislative Guide on Insolvency Law "was to modernize insolvency practices and laws."

The Model Law completed with the input of thirty-six member and forty observer states of UNCITRAL, as well as thirteen international organizations. A final version was adopted in 1997, and a Guide to Enactment (Enactment Guide) was published in 1998 and has been proposed for adoption in numerous jurisdictions(Japan, Mexico, South Africa, the United Kingdom, the United States)

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[6] UNCITRAL describes its mission as follows:The core legal body of the United Nations system in the field of international trade law. A legal body withuniversal membership specializing in commercial law reform worldwide for over 40 years. UNCITRAL's business is the modernization and harmonization of rules on international business, available online at www.uncitral.org.

7 In its website, UNCITRAL defines the terms harmonization and unification in this way: "Harmonization" and "unification" of the law of international trade refers to the process through which the law facilitating international commerce is created and adopted. International commerce may be hindered by factors such as the lack of a predictable governing law or out-of-date laws unsuited to commercial practice. "Harmonization" may conceptually be thought of as the process through which domestic laws may be modified to enhance predictability in cross-border commercial transactions. "Unification" may be seen as the adoption by States of a common legal standard governing particular aspects of international business transactions. A model law or a legislative guide is an example of a text which is drafted to harmonize domestic law, while a convention is an international instrument which is adopted by States for the unification of the law at an international level - www.uncitral.org/uncitral/en/about/origin_faq html.

[8] Susan Block-Lieb Professor of Law, Fordham & Terence Halliday , Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law, available online at Social Science Research Network electronic library:http://ssrn.com/abstract=965710

Promulgation of anything, even if only a "model" rather than binding law, is a tremendous advancement in its own right given international bankruptcy's disappointing track record.[9]

The Model Law's provisions can be separated into two areas, administrative provisions and substantial provisions. Administrative provisions, might be divided further into two subsidiary categories: provisions related to international cooperation and communication, and antidiscrimination rules.The substantial area covers Chapter III of the Model Law, which is entitled "Recognition of a Foreign Proceeding and Relief."

The Model Law appears to be enjoying a warm reception from enacting states, a marked departure from the coolness offered most of its predecessors. One explanation of the Model Law's comparative success might be the use of the mechanism of a model law itself. A model law permits provision-by-provision treatment. A state may wish to deviate from the proposed majority text and adopt one of the alternative provisions for those areas where the Model Law's drafters provide variations.[10]

Adopted by UNCITRAL on 25 June 2004, the purpose of the Legislative Guide is to assist the establishment of an efficient and effective legal framework to address the financial difficulty of debtors. It is intended to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations.

The advice provided in the Legislative Guide aims at achieving a balance between the need to address the debtor's financial difficulty as quickly and efficiently as possible and the interests of the various parties directly concerned with that financial difficulty, principally creditors and other parties with a stake in the debtor's business, as well as public policy concerns.

The Legislative Guide addresses the issues central to an effective and efficient insolvency law and assists the reader to evaluate different approaches available and to choose the one most suitable in the national or local context.[11]

3.2 Council Regulation (EC)No.1346/2000

The origin of the project is the proposal to conclude a Convention among the Member States of the European Economic Community (EEC), to regulate the conduct of insolvency proceedings as between themselves according to the Foundation Treaty of the EEC[12].

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[9] John Pottow, A Model for International Bankruptcy, Virginia Journal of International Law, Vol. 45, No. 4, Summer 2005; Michigan Law and Economics Research Paper No. 05-001. Available at SSRN: http://ssrn.com/abstract=646962

[10] John Pottow, A Model for International Bankruptcy, Virginia Journal of International Law, Vol. 45, No. 4, Summer 2005; Michigan Law and Economics Research Paper No. 05-001. Available at SSRN: http://ssrn.com/abstract=646962

[11] Resolution adopted at 16.december 2004 by the General Assembly of the United Nations (on the report of the Sixth Committee (A/59/509)) contents the belief that that" the Legislative Guide, which includes the text of the Model Law on Cross-Border Insolvency and the Guide to Enactment recommended by the General Assembly in its resolution 52/158 of 15 December 1997, contributes significantly to the establishment of a harmonized legal framework for insolvency and will be useful both to States that do not have an effective and efficient insolvency regime and to States that are undertaking a process of review and modernization of their insolvency regimes".

[12] Treaty Establishing the European Economic Community, signed in Rome on 25 March 1957, commonly known as the (first) Treaty of Rome. Article 220(4) of that Treaty commits the Member States to negotiating a series of conventions, including one to secure the simplification of formalities governing the reciprocal recognition and enforcement of judg-ments of courts or tribunals and of arbitral awards'.

Over the period from 1960 to 1996 the Insolvency Convention project featured on the agenda of the institutions of the European Community. During those years, work advanced in various stages . The most intense periods of activity may be broadly divided into two principal phases.. The first phase occurred in the years prior to February 1970, when a group of experts drawn from the original six Member States produced a text published as the Preliminary Draft Convention.

The Draft Convention submitted to the Council in April 1980 for further study and potential adoption was not a succesffull one and the sustained resistance on the part of several Member States resulted in the discreet abandonment of further attempts to promote the adoption of it.

The new initiative in the project was taken by the Council of Ministers which, in May 1989 with the Community's membership already enlarged to 12, established a new working party on the Bankruptcy Convention.That phase was characterized by a publicity and exposure to informed comment, in marked contrast to the prevailing taste for secrecy which attended the developments during the prior phase.

At a meeting of the EU Council of Ministers on 25 September 1995, the finalized text of the Convention was tabled for approval and, if possible, immediate adoption.[13] The more cautious—and in an EU context somewhat novel—course was taken of an 'initialling' of the text by all 15 Member States, thereby precluding any further negotiation or textual amendment. As required by Article 220 of the Treaty of Rome it was agreed that after a brief interval to allow governments to study this final version the Convention would be opened for signature for a limited period of six months, within which it would have to be signed by all the 15 states. When the deadline for completion of signatures passed on 23 May, the signature of the United Kingdom remained outstanding for reasons which only subsequently became fully apparent.[14]

In 1999, the project was revived in the form of a Regulation, the substantive provisions of the Convention's text were incorporated with only a handful of alterations, other than essential drafting adjustments.The committee of experts were drawing together the more satisfactory elements from the model issued in the first phase and Istanbul Convention and combined these with fresh elements of its own devising. It also appears to have been guided by a strong instinct to provide a workable set of rules that respond to issues actually encountered in practice, rather than to pursue some impossible and almost abstract theory about the way in which to legislate for the problems of international insolvency. The finished textproduced by the Balz committee is one which, while by no means devoid of imperfections, has many positive virtues which under normal circumstances would have ensured its implementation by all members of the European Union.[15]

The text of the Convention contained 55 Articles, together with three Annexes. The most important requirement in the context of the EU internal market was to determine in which states insolvency proceedings are capable of being commenced, and the rules are to be applied. Also

[13] Although the Istanbul Convention produced under the auspices of the Council of Europe, and opened for signature on 5 June 1990 was a new innovating text to follow the working groups insisted on the terms drafted in the first phase.

[14] Although the pretext for non-signature by the UK in May 1996 was the disagreement between the UK and its EC partners over the agricultural crisis caused by the BSE epidemic, it transpired that the UK Government had concluded that the Convention's failure to make clear and unambiguous provision for its application to the colony of Gibraltar was an obstacle to UK acceptance of the text.

[15] Gabriel Moss Ian F. Fletcher, Stuart Isaacs ,The EC Regulation ON Insolvency Proceedings a Commentary and Annotated Guide, Oxford University Press.

important is that Chapter III (enable secondary proceedings to be opened, with effects restricted to the territory of a single contracting state), offered for certain types of creditors some advantages. In Chapter V provision was made for the European Court of Justice to have jurisdiction to deliver interpretative rulings concerning the Convention having in mind the need of an uniform interpretation.

In the transformation from Convention to Regulation, Chapters I to IV inclusive, comprising Articles 1 to 42, were directly transposed.Also being an EC legislative act, the Regulation did not need to contain any express provisions relating to its interpretation by the European Court of Justice, and therefore the Chapter Vof the Convention was discarded.

Assistance in its interpretation by national courts, and by the European Court of Justice was further provided by the series of numbered 'Recitals' (numbering 33 in all) which are placed at the beginning of the text of the Regulation.

On 31 May 2002 Regulation (EC) No.1346/2000 of 29 May 2000 on insolvency proceedings entered into force. The regulation applied entirely and directly to the Member States, which joined the EU as of 1 May 2004, and as of 1 January 2007. The regulation does not apply to Denmark, as it opted out in accordance with the Treaty of Amsterdam. The regulation acknowledges the fact that as a result of widely differing substantive laws in the Member States "it is not practical to introduce insolvency proceedings with universal scope in the entire Community".[16] The differences mainly lie in the widely differing laws on security interests to be found in the Community and the very different preferential rights enjoyed by some creditors in the insolvency proceedings.

The goals of the regulation are to enable cross-border insolvency proceedings to operate efficiently and effectively, to provide for coordination of the measures to be taken with regard to the debtor's assets and to avoid forum shopping.[17]The regulation, therefore, provides rules for the international jurisdiction of courts in a Member State for the opening of insolvency proceedings, the (automatic) recognition of these proceedings in other Member States and the powers of the 'liquidator' in the other Member States. The regulation also deals with important provisions for choice of law which contain special rules on applicable law in the case of particularly significant rights and legal relationships. On the other hand, national proceedings covering only assets situated in another Member State than the state of opening are allowed alongside main insolvency proceedings, which have in principle a universal scope. The law of the state of opening spreads its effects all over Europe. [18]

[16] Recital 11 at the begining of the REGULATION - This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community. The application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties. This Regulation should take account of this in two different ways. On the one hand, provision should be made for special rules on applicable law in the case of particularly significant rights and legal relationships (e.g. rights in rem and contracts of employment). On the other hand, national proceedings covering only assets situated in the State of opening should also be allowed alongside main insolvency proceedings with universal scope.

[17] Recital 4 at the begining of the REGULATION - It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping).

[18] Bob Wessels - Cross-Border Insolvency Law in Europe: present status and future prospects, available online at http://www.ajol.info/index.php/pelj/article/viewFile/42224/9343

The EU Insolvency Regulation only applies to intra-Community relations; in cross-border insolvency cases relating to non-EU states, the rules of general private international law or specific legislation of a country (domestic or contained in a treaty) apply in this field [19].

Insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings holding funds or securities for third parties and collective investment undertakings are excluded from the scope of the Regulation.

4. Position of the new concepts in cross – border reglementation

There is clear statement that there are significant differences in substantive bancruptcy law and in the way that each country approaches the situations when the debtors or his assets are located beyond borders. In those cases it is important to identify the level of cooperation between countries and also the acces level that the country allows to foreign creditors when a multinational debtor files domestically

Five broad types of regimes of international bankruptcy are generally discussed in the literature today: territoriality, universality, contractualism, international organization, and secondary bankruptcy[20]

In the universality model insolvency proceedings are seen as a unique proceeding reflecting the unity of the estate of the debtor. The proceeding should contain all of the debtor's assets, wherever in the world these assets are located and the whole estate will be administered and reorganised or liquidated based on the rules of the law of the country where the debtor has his domicile (or registered office or a similar reference location) and in which country the proceedings have been opened. The applicable law for the proceedings and its legal and procedural consequences is the law of the state in which the insolvency measure has been issued, known as lex concursus, lex forum concursus.

A daring universalist proposal is advanced by Rasmussen.[21] Under his proposal, each debtor would have the ability to choose its bankruptcy country to which its bankruptcy would be subject. The country would then function as the "home country", and will administer the proceeding in accordance with the principles of universality. The debtor's choice would be made at incorporation, changeable only with the consent of the creditors and publicly available to any prospective creditor ex ante.

The territoriality model on the other hand takes as a basic idea that the respective insolvency measure only will have legal effects within the jurisdiction of the state within the territory of which a court has opened the insolvency proceedings. The legal effects of these proceedings therefore will stop at this state's borders.

The Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets. To protect the diversity of interests, the Regulation

[19] Recital 4 at the begining of the REGULATION - This Regulation applies only to proceedings where the centre of the debtor's main interests is located in the Community.

[20] Alexander M. Kipnis, July 3, 2006, Beyond UNCITRAL: Alternatives to Universality in Transnational Insolvency,available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=913844

[21] Robert K. Rasmussen, A New Approach to Transnational Insolvencies, 19 Michigan Journal of International Law 1, 32-35

permits secondary proceedings to be opened to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community.

The rules of jurisdiction set out in this Regulation establish only international jurisdiction, that is to say, they designate the Member State the courts of which may open insolvency proceedings. Territorial jurisdiction within that Member State must be established by the national law of the Member State concerned.

Legal problems in cross-border insolvencies emerge when assets of a company are situated in several countries with different legal systems belonging to more than one legal entity. Different national insolvency laws have different creditor priorities. The questions arising are which country can claim the international jurisdiction for the proceedings and which substantive insolvency law has to be applied.

The Regulation provides for the opening of 'main proceedings' in the State in which the 'centre of a debtor's main interests' is situated. In the case of companies there is a rebuttable presumption that this is the State where it has its registered office. This reflects the position under English law and deviates from German law, where the 'centre of independent economic interest' is to be determined independently from its place of registration. The Regulation, however, permits the opening of 'secondary proceedings' in States, other than that of the main proceedings, where the debtor has an 'establishment'. The effects of 'secondary proceedings' are restricted to the assets of the debtor situated in the territory of that State. The law applicable is that of the Member State where the secondary proceedings are opened. Therefore, this law decides who is entitled to request the opening of such proceedings.

Where secondary proceedings are opened before main proceedings, they are defined as 'territorial proceedings'. Territorial proceedings are only permitted if main proceedings cannot be opened because of the conditions laid down by the law of the Member State where the centre of the debtor's main interests is situated, or if the proceedings are requested by a creditor who has its domicile, habitual residence or registered office in the Member State where the establishment is situated. The reasoning behind this is to avoid parallel local proceedings from taking place without the co-ordination umbrella of the main proceedings. Territorial proceedings can be either liquidation or rehabilitation measures.

Once main proceedings are opened, territorial proceedings become 'secondary proceedings' and rehabilitation proceedings may, at the instance of the liquidator in the main proceedings, be converted to liquidation proceedings. Any kind of closure of the secondary proceedings will not become final without the consent of the liquidator in the main proceedings. For this purpose the liquidator is entitled to demand a stay of liquidation of secondary proceedings. The concept of 'secondary proceedings' is equally found under English (so-called ancillary proceedings) and German law, whereby the existence of assets in both countries is sufficient in contrast to the requirement of an 'establishment' under the Regulation.[22]

The introduction of COMI - center of a debtor main interests – and of the primary and secondary proceedings created series of debates in solving the problems arised in applicable law and in establishing of the real cases of forum shopping.

[22] Michael Butter, Cross – Border Insolvency under English and German Law, Oxford University Comparative Law Forum, available online at http://ouclf.iuscomp.org/articles/buetter.shtml.

When the centre of main interest of a debtor cannot be located in the territory of a Member State, the Regulation does not provide a base for international jurisdiction of courts in a Member State to open main insolvency proceedings.

Art. 3(1) Reg presupposes that this centre is within the EC Community. Recital 13, 'This Regulation applies only to proceedings where the centre of the debtor's main interests is located in the Community.'is also clear. In a case like this, it is up to the national law (including its private international law) to determine the international jurisdiction of its own domestic courts[23].

In addition to the main insolvency proceedings, art. 3(2) InsReg gives the courts of another Member State, in which the debtor possesses an 'establishment', jurisdiction to open insolvency proceedings in relation to that debtor. A secondary proceeding, opened based on art. 3(2), does not have a universal effect, as the effects are restricted to the assets of the debtor situated in the territory of that Member State.

There is no limit on the number of secondary proceedings which may be opened. If a debtor has a number of establishments in different Member States then a corresponding number of secondary insolvency proceedings can be opened in each of those States. Both fact-intensive concepts ('centre of main interests' and 'establishment') have to be present at a certain moment in time.

The 'centre' should exist at the moment the court decides to open the main proceedings. In case the court has determined its international jurisdiction application of the lex concursus elsewhere can not be influenced by a decision of the debtor to close down all activities and to 'transfer' the centre to another Member State or a country outside of the EU and/or to limit 'centre' activities to a level that would qualify as a place of operations ('establishment').[24]

The Community law takes a firm stand within the debate of forum shopping: 'It is necessary for the proper functioning of the internal market to avoid [...] forum shopping.', defining forum shopping as the situation in which the debtors 'transfers assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position'.

The motivations behind a pre-insolvency migration are not always as dishonest as common belief suggests. The discussion of the economic motives behind forum shopping has revealed that in most cases, it will entail beneficial effects for creditors, in particular in those cases where the migration has been supported or even initiated by the creditors. An analysis of the problem in the context of (primary) EC law leads to the result that the current COMI approach, the combination of Articles 3 and 4 of the Regulation, violates the fundamental freedoms of the Treaty. The application of the insolvency law of the Member State of registration could be a solution de lege ferenda that would provide for a better solution, both in respect to the parameters set by the Treaty but also with regard to an easier and more predictable insolvency law regime in Europe[25].

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[23] In the Netherlands for example a company or legal person with registered office outside the Member States is subjected to an insolvency opening in this country when in the Netherlands there is a commercial activity or the debtor keeps offices

[24] Also an 'establishment' must be able to be determined on the day the court is opening secondary proceedings. Art.2 h from InsReg defines "establishment" as any place of operations where the debtor carries out a non-transitory economic activity with human means and goods so that only a few assets do not make up an establishment.

[25] Wolf-Georg Ringe, University of Oxford, Faculty of Law Institute of European and Comparative Law, Forum shopping under the EU Insolvency Regulation, available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1209822

5. Conclusions

The efforts made for successful transnational bankruptcy regime are quite remarcable and involved during a long period of time a lot of attention especially having in mind that the whole process took place in a continuos economic and political transformation.The UNCITRAL Model Law on cross-border insolvency that has been enacted (or its model substantially followed) in so many countries outlines several crucial mechanisms for international cooperation so that Council Regulation (EC)No.1346/2000 came into force on a solid ground . Giant steps has been made in providing a recognisable framework for cross-border insolvency, regarding international jurisdiction, recognition of judgments, choice of law provisions, position of creditors and powers of office holders. Cross-border insolvencies in the EU have become much more predictable and a step in the right direction has been made by the moderate choice for a model of coordinated universality.

It can be seen, even if this presentation is rather historical, the need for improvment [26] , and it will be interesting to study the dificulties in the ruling mechanism according to Council Regulation (EC)No.1346/2000 and also observe the evaluation process pursuant to article 46 InsReg that specifyies that no later than 1 June 2012, and every five years thereafter, the commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of the regulation, which shall be accompanied if need be by a proposal for adaptation of the regulation.

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[26] Bob Wessels, Twenty Suggestions for a makeover of the EU INSOLVENCY REGULATION, International Caselaw Alert, No. 12 – V/2006, October 31, 2006, pp. 68-73, available online at www.bobwessels nl weblog under 2006-09-doc4.

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COMPARED LEGAL ASPECTS REGARDING THE ENFORCEMENT OF THE CRIMINAL JUDGMENTS WITHIN THE DOMESTIC JUDICIAL SYSTEMS OF THE MEMBER STATES OF THE EUROPEAN UNION

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Abstract
The Enforcement of the Criminal Judgments, regulated by the domestic judicial systems of the Member States of the European Union, either as object of criminal procedure law or as object of executional criminal law or prison law, represents the accomplishment of the criminal justice act by achieving those decided by the criminal judgments. The paper analyses the similarities and differences existing between the internal legislations that regulate the domain of interest, identifying solutions for improving the internal legislative framework of the Member States of the European Union and for harmonizing and unifying the European legal framework.

Keywords: *execution; criminal judgment; Code of Criminal Procedure/ Crimnal procedure law; judicial systems of the Member States of the European Union*

Introduction

The Institution of the Enforcement of the Criminal Judgments plays the first fiddle within the domestic judicial systems of the Member States of the European Union, because through this institution there is achieved the purpose of the criminal justice, consisting of detecting and calling the perpetrator of a criminal offence to penal responsibility. According to the Romanian Code of Criminal Procedure the aim of the criminal trial is to acknowledge in due time and completely the deeds that represent offences, so that any person who has perpetrated an offence is punished according to his/her guilt, and no innocent person is held criminally responsible. The criminal trial must contribute to the defence of the rule of law, to the defence of the person's rights and liberties, to the prevention of offences as well as to the citizens' education in the spirit of law[1]. The provisions of article 2 paragraph 1 of the Polish Code of Criminal Procedure also stipulate that the purpose of this Code is to establish rules which will secure that: (1) the perpetrator of a criminal offence shall be detected and called to penal responsibility, and that no innocent person shall be so called, (2) by a correct application of measures provided for by criminal law, and by the disclosure of the circumstances which favored the commission of the offence, the tasks of criminal procedure shall be fulfilled not only in combating the offences, but also in preventing them as well as in consolidating the rule of law and the principles of community life, (3) legally protected interests of the injured

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[1] The Romanian Code of Criminal Procedure and Five Current Laws, the 12th Edition, Hamangiu Publishing House, 2010.

party shall be secured, and (4) determination of the case shall be achieved within a reasonable time[2]. Some other criminal procedure codes of the Member States of the European Union emphasize the aim of the Criminal Procedure Law to determine the order of criminal procedure that ensures the effective application of the norms of the Criminal Law and the fair regulation of criminal legal relations without unjustified intervention in the life of a person, as it is laid down expressly in the Latvian Code of Criminal Procedure[3].

As results from the national judicial systems of the Member States of the European Union, the Institution of the Enforcement of the Criminal Judgments represents the binding between the criminal procedure law and the criminal executional law or prison law. So the legislator tried to underline that the criminal executional law is ensuring the continuity of the specific acts of the Institution of the Enforcement of the Criminal Judgments. In this respect, the domestic judicial systems of the Member States of the European Union regulates this two specific objects of the enforcement of the criminal judgments and the effective execution of the criminal decisions in their national criminal codes and special laws. The specialized literature in this field shows that the phase of the enforcement of the criminal judgments mainly includes: the issuance of the execution warrant, the responsibilities regarding the execution of the competent authorities, the contest of the execution, the removal or modification of the sentence.

The Institution of the Enforcement of the Criminal Judgments refers to the criminal decisions that are executory. The Bulgarian Code of Criminal procedure stipulates in article 412 that: the sentences, decisions, definitions and dispositions shall be executed after they become effective[4] and the Estonian Criminal Procedure Code provides that a court judgment or ruling enters into force when it can no longer be contested in any other manner except by review procedure. A court judgment enters into force upon expiry of the term for appeal or appeal in cassation. If an appeal in cassation is filed, the court judgment enters into force as of the date on which acceptance of the appeal in cassation is refused or the conclusion of the judgment of the Supreme Court is pronounced. A court judgment made by way of summary proceedings enters into force upon expiry of the term for submission of requests for court hearing of the judgment by way of the general procedure. A court ruling enters into force upon expiry of the term for appeal against the ruling. If an appeal is filed against a ruling, the ruling enters into force after it has been heard by the court which made the ruling or by a higher court. An arrest warrant or a court ruling which is not subject to appeal enters into force as of the issue of the warrant or the making of the ruling[5].

The criminal judgment is invested with the authority of the principle *ne bis in idem*, that means nobody shall be liable to be tried or punished again in criminal proceedings under the

[2] The Polish Code of Criminal Procedure, Act of 6 June 1997.

[3] The Latvian Code of Criminal Procedure - Text consolidated by Tulkošanas un terminoloģijas centrs with amending laws of: 28 September 2005; 19 January 2006; 21 December 2006; 17 May 2007; 22 November 2007; 19 June 2008; 29 June 2008; 12 March 2009; 11 June 2009; 16 June 2009; 14 January 2010.

[4] The Bulgarian Code of Criminal Procedure, in force from 29.04.2006, with amending laws of 12 June 2007, 20 December 2007, 5 August 2008, 23 December 2008, 13 February 2009, 10 April 2009, 28 April 2009, 30 April 2009, 23 April 2010.

[5] The Estonian Code of Criminal Procedure**,** Passed 12 February 2003, (RT[1] I 2003, 27, 166; consolidated text RT I 2004, 65, 456), entered into force 1 July 2004, amended by the following Acts: 28.06.2004 entered into force 01.03.2005 - RT I 2004, 56, 403; 28.06.2004 entered into force 01.07.2004 - RT I 2004, 54, 387; 19.05.2004 entered into force 01.07.2004 - RT I 2004, 46, 329; 17.12.2003 entered into force 01.07.2004 - RT I 2003, 83, 558; 17.12.2003 entered into force 01.01.2004 - RT I 2003, 88, 590.

jurisdiction of the same State for an offence for which he or she has already been finally acquitted or convicted in accordance with the law of that State. This follows from Article 4 paragraph 1 of Protocol No. 7 to the European Convention on Human Rights and an almost similar provision is contained in Article 14 paragraph 7 of the International Covenant on Civil and Political Rights. Under the national legislation of the Member States of the European Union the principle *ne bis in idem* is recognized under the terms "*ne bis in idem,*" "double jeopardy," and "prohibition of double punishment", for instance the Austrian law[6] uses all these terms.

When the final judgment becomes effective, the competent Authority executes the sentence - as it is defined by the final judgment - in due time. Any prior detention or other deprivation of liberty shall be deducted from the (final) prison time to be served if not defined otherwise in the final judgment. The convicted imprisoned person shall be treated with humanity and respect for his/her inherent dignity according to international standards.

The national criminal procedure laws of the Member States of the European Union distinguish between the main punishments (such as imprisonment) and collateral punishments (such as special interdiction). For instance, section 38 of the Hungarian Criminal Code provides as principal punishments: the imprisonment, the labor in the public interest, and the fine and as supplementary punishments: the prohibition from public affairs, the prohibition from profession, the prohibition from driving vehicles, the banishment and the expulsion[7].

The national legislations on criminal procedure of the Member States of the European Union are compatible in a major percent, but there are some important non-operating national criminal procedures that could be reflected especially in the cases that form into the jurisprudence of the European Court of Human Rights and that could serve as starting point for identifying solutions for improving the internal legislative framework of the Member States of the European Union and harmonizing the European legal framework.

The European Convention for the Protection of Human Rights and Fundamental Freedoms could be considered one of the most important instruments that contribute to increasing the efficiency of the protection afforded to the rights guaranteed. This protection is on the one hand due to the judicial mechanism of monitoring the compliance with these rights by Member States and on the other hand to the possibility of the judicial body, namely the European Court of Human Rights to impose penalties for infringement the Convention regulations. In this respect, there are eloquent the cases that regard the individual and general measures imposed by the European Convention for the Protection of Human Rights and Fundamental Freedoms that were not taken by adopting specific acts or improving the national criminal procedure legislation. The individual measures are those that must be taken by the Member State regarding the person whose rights granted by the Convention were not respected and the general measures are those that the Member State must adopt in order to avoid other similar cases.

For instance, the case Aliykov v Bulgaria (judgment of 03/12/2009, final on 03/03/2010), concerns a violation of the applicant's right to fair trial due to the unjustified refusal in 2003 by the Supreme Court of Cassation to reopen the criminal proceedings which had resulted in his conviction *in absentia* in 2002 (violation of Article 6 paragraph 1). The European Court noted that there was no evidence that the domestic authorities had fulfilled their obligation to attempt to inform the applicant

[6] The Austrian Code of Criminal Procedure, published in Gazette No. 631/1975, as last amended by Federal Law Gazette I No. 111/2010, repealed and considered by Federal Law Gazette I, No. 1 / 2011.

[7] The Hungarian Criminal Code, Act IV of 1978.

of the proceedings in question (although the applicant was aware of an initial set of proceedings) and in the circumstances there was nothing to authorise the conclusion that the applicant had unequivocally waived his right to appear with respect to the proceedings in question. The applicant did not attempt to hide his address from the authorities. The European Court held that the applicant should have had the possibility of obtaining a re-trial at which he could be present.

The applicant, who was arrested in November 2002, served his sentence and was released in 2003. The European Court considered that where, such as in this case, an individual is convicted despite a violation of his right to participate in the proceedings, a retrial or the reopening of proceedings represent in principle an appropriate way of redressing the violation found of Article 6 [8].

Other significant situations are the 2182 cases of length of judicial proceedings concern the excessive length of judicial proceedings in Italy (1.571 civil cases, 364 cases before industrial tribunals, 7 sets of enforcement proceedings; 122 criminal cases and 118 cases before administrative tribunals). About 180 cases have resulted in friendly settlements.

The first findings of violation of Article 6§1 by Italy, due to excessively lengthy court proceedings, date from the 1980s. Following a number of general measures, the Committee put an end to its supervision of such judgments in 1992 for criminal cases and in 1995 for civil cases (Resolutions DH(92)26 and (95)82). Unfortunately there was no reduction in the number of such violations found by the Court and the Committee decided in 1997 (Resolution DH(97)336) «to resume the examination of the reforms required in order to solve the problem posed by the length of civil proceedings in Italy and, consequently, to maintain the cases relating to this problem on its agenda until the implementation of these reforms». The Committee of Ministers subsequently adopted several further interim resolutions, some setting out the measures taken and others also pointing out the shortcomings of these measures (Resolutions DH(99)436, DH(99)437, DH(2000)135 and ResDH(2005)114). In 2000 the Committee decided «to continue the attentive examination of this problem until the reforms of the Italian judicial system become thoroughly effective and a reversal of the trend at domestic level is fully confirmed».

In the absence of any decisive progress, the Committee, first in Interim Resolution ResDH(2005)114, and then in Interim Resolution CM/ResDH(2007)2, called upon the Italian authorities to establish a new, effective strategy, co-ordinated at the highest level of government and based on an interdisciplinary approach involving all the main actors of the Italian judicial system. Individual measures: According to the information available, 707 sets of proceedings were not yet finished (531 civil proceedings, 109 proceedings before labor courts, 1 set of execution proceedings, 23 criminal proceedings and 43 proceedings before administrative courts). The Italian authorities had indicated that the findings had been signaled to the domestic courts with a view to accelerating the pending proceedings. General measures: *1) Legislative reform in the 1990s*: Over the past decade, Italy has enacted several reforms and taken a number of organizational measures which are reflected in the resolutions mentioned above (1992, 1995, 1997 and 1999). Important measures have been taken both: (a) in the criminal field, through an overall reform of the Code of Criminal Procedure,

[8] Preliminary information has been provided by the authorities on 14/10/2010. Bilateral contacts are under way in order to collect the additional information necessary for the presentation of an action plan/report to the Committee. The Deputies decided to resume consideration of this item at their 1108th meeting (March 2011) (DH), in the light of an action plan / action report to be provided by the authorities.

fixing time limits for investigations by the prosecution and simplifying a number of procedures; and (b) in the civil field, among other things by the institution of the new justices of the peace in order to help deal with the workload of the ordinary judges. *2) Supervision of execution*: *The 2005 Annual Report*: In 2004, in the face of the increase in the mean duration of proceedings, Italy had been invited to draw up an action plan to identify: (1) the problems at the origin of the slowness of proceedings, (2) a range of corrective measures and a timetable for their implementation and (3) the time-scale within which the measures could be expected to show the first results. In the action plan submitted in 2005 (CM/Inf/DH(2005)39) the Italian authorities identified the following causes at the origin of the structural problem: the principle of compulsory criminal action; an insufficient degree of decriminalization; the low cost of bringing an action; the build-up of the backlog of cases over the years; the country's penchant for litigation. *Developments in 2008 and 2009*: Following the dissolution of the Italian Parliament in February 2008, the newly elected government, from its inception, set about reforming justice according to a programme whose guidelines seem to continue those set up in the previous legislatures. A second bilateral meeting on excessive length of judicial proceedings took place, once again in Rome, in October 2008. On the occasion of this meeting between the highest government authorities (M Letta, Under Secretary to the Presidency of the Council of Ministers, M Alfano, Ministry of Justice, as well as many senior officials of different ministries and judicial bodies) and the Department of Execution of the judgments of the European Court, the Italian government, gave an exhaustive presentation of the legislative measures already taken and those on the way to adoption by the Parliament, as well as of organizational measures, completed by statistical data, and also reaffirmed its strong commitment to reaching a definitive solution to the structural problem of the length of proceedings. For the detailed presentation of the measures taken or envisaged see the information document CM/Inf/DH(2008)42. At the 1059th meeting (March 2009), the Deputies adopted Interim Resolution CM/ResDH(2009)42 on the progress achieved and outstanding issues in this field. A draft decision will be prepared subsequently on the basis of the information provided at the meeting.

The case Gurguchiani v Spain is also relevant. This case concerns the violation of the principle of «no punishment without law», in that the sentence imposed on the applicant for an offence for which he was convicted was harsher than that provided by law as it stood at the time of commission of the offence (violation of Article 7). In January 2003 the applicant, a Georgian national residing unlawfully in Spain, was sentenced to eighteen months' imprisonment for attempted burglary. Following his conviction the Police Directorate asked the judge responsible for the execution of sentences to deport the applicant pursuant to Article 89 of the Criminal Code, which makes it possible for the judge to replace a prison sentence of less than six years imposed on a foreign national residing unlawfully in Spain with his or her expulsion from Spanish territory and an exclusion order of between three and ten years. The judge dealing with the case decided not to authorize the applicant's deportation as he considered it more appropriate that he served a prison sentence. Nevertheless, the applicant's deportation from Spain and a ten-year exclusion order were authorized in a decision handed down on 6/04/2004 by the Barcelona *Audiencia Provincial* pursuant to the redrafting of Article 89 of the Criminal Code in force since 1/10/2003. According to the new version of Article 89, a prison sentence of less than six years imposed on a foreign national residing unlawfully in Spain should be replaced by the convicted person's deportation in all but exceptional

cases. The Court observed that, following this amendment to the legislation, expulsion had become the rule and was no longer subject to the judge's assessment of the case, other than in exceptional circumstances which the applicant was no longer able to rely on when appearing in court. Finally it noted that the 2003 version of the provision at issue required that the convicted person was deported and refused permission to return to Spain for ten years, a much harsher sentence than that provided in the former version of the same provision, which provided expulsion from Spanish territory and an exclusion order of between three and ten years, at the judge's discretion[9].

The Member States of the European Union must also make efforts in the field of executional criminal procedure and prison law especially regarding the execution of the principal punishments. As it is stipulated in the Guide to Criminal Procedure, initiated by the Belgian OSCE Chairmanship, a sentence of imprisonment shall be served in facilities appropriate as far as possible to his individual condition, in compliance with the European standards. That means that the competent penitentiary authority shall guarantee effectively international standards ensuring inter alia the following minimum standards: prisoners shall be treated alike without any form of discrimination; prisoners' rights to medical care, to education and cultural development, to have contact with members of their family, to socialize with other prisoners, to be informed about the daily news, to be allowed to practice their religious or philosophical/moral beliefs and to be protected against all forms of violence; to have access within the prison to meaningful work and appropriate payment in order to be prepared for his reintegration in society.

In particular the law shall ensure the effective application of the above mentioned international standards, the registration of prisoners and their sentences, the legality and compliance of internal regulations with relevant national and international standards and will ensure that appropriate measures to prevent torture and cruel, inhuman and degrading treatment are in place.

International legal co-operation in criminal justice, serves to render the prosecution and adjudication of trans-national and international crimes, national crime, and organized (national/trans-national) crime more effective and efficient. Existing international instruments, ratified by the Member States of the European Union, are part of the Criminal Procedure Law and shall be implemented in good faith, in compliance with the international law principle *pacta sunt servanda*. That is to say, implemented with the aim of effectively and as efficiently as possible, combating crime whilst ensuring the fundamental principles of the Rule of law and protecting Human Rights and Fundamental Freedoms.

International legal co-operation between two or more States covers extradition/surrender and various forms of mutual judicial/legal assistance and aid inter alia : letters and commissions rogatory, securing and collecting evidence and exchange of data ,technical assistance, service of writs and record of decisions, appearances of witnesses abroad, transfer of proceedings and prisoners and the execution of sentences abroad including confiscation and forfeiture of illegal assets, and coercive measures. As it is stipulated in the Latvian Code of Criminal Procedure there are different types of international cooperation in criminal matters from a foreign state that ensure cooperation: in the

[9] Preliminary information was provided by the authorities on 24/03/2010. Bilateral discussions are currently under way to secure the additional information necessary to present an action plan/action report to the Committee. The Deputies decided to resume consideration of this item at the latest at their 1100th meeting (December 2010) (DH), in the light of an action plan / action report to be provided by the authorities.

extradition of a person for criminal prosecution, litigation, or the execution of a judgment, or for the determination of compulsory measures of a medical nature; in the transfer of criminal proceedings; in the transfer of a convicted person for the execution of a sentence of deprivation of liberty; in the execution of procedural actions; in the recognition and execution of a judgment; in other cases provided for in international treaties. Criminal-legal co-operation with international courts and with courts and tribunals established by international organizations shall provide for the transfer of persons to international courts, for procedural assistance for such courts, and for the execution of the adjudications of international courts.

In this context, the principle of territoriality is relevant. According to the national legislation of the Member States of the European Union, the criminal procedure law applies in the territory of the each Member States unless otherwise provided by an international agreement. The law defines the State bodies and the rules that govern the international criminal cooperation.

According to the section 154 b of the German Code of Criminal Procedure[10] the Preferment of public charges may be dispensed with if the accused is extradited to a foreign government because of the offence. The same shall apply if he is to be extradited to a foreign government or transferred to an international criminal court of justice because of another offence and the penalty or the measure of correction and prevention which might be the result of the domestic prosecution is negligible in comparison to the penalty or measure of reform and prevention which has been imposed on him with binding effect abroad or which he may expect to be imposed abroad. Preferment of public charges may also be dispensed with if the accused is expelled from the territorial scope of this statute.

The law defines the procedure and criteria by which an extradition/surrender request is admissible even though the State is not bound by a bilateral or multilateral treaty with the requesting State. The law also defines the procedure and criteria by which a request to extradite is formulated to another State even though the State is not bound by a bilateral and /or multilateral treaty with the requested State.

In conclusion, improving the national legal provisions that regulate the institution of the Enforcement of the Criminal Judgments amounts to improving not only the national criminal procedure law but also the executional or prison law of the Member States of the European Union as well as the European legislation framework in this domain of interest, in this context the cases of the European Court of Human Rights having a substantial contribution.

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[10] The German Code of Criminal Procedure, in the version published on 7 April 1987 (Federal Law Gazette I, page 1074, 1319) as last amended by Article 2 of the Act of 31 October 2008 I 2149).

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- www.echr.coe.int.

GENERAL ASPECTS CONCERNING STATE RESPONSIBILITY IN INTERNATIONAL LAW AND EUROPEAN UNION LAW

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Abstract

The rules of state responsibility determine, in general, when an obligation has been breached and the legal consequences of that violation. According to the general principle in international law, any violation of an obligation arising from a legal rule means the cessation of the breach and triggers the responsibility of the authors breach and its obligation to repair any damage. This article examines the similarities and the differences between the juridical regime of state/member state responsibility and the procedure when there is a breach in EU law or international law.

Keywords: *State Responsability, International Law, EU Law*

I. Introduction

1. European Union Law – a new typology of law. Starting from the general theory of law, the existence of certain settled legal parameters[1] does not foreclose the process of change, of permanent transformation of the law. In the light of economic, social, ideological and cultural factors, this process involves amendments within the binding contents of the law, quantitative and qualitative changes as regards the structure of law institutions and disciplines. The idea of juridical progress[2] has been admitted in this context.

In the context of the typologies of law already established[3], the Western-European economic integration gradually achieved an institutional and substantially Community right, composing a legal system which is differentiated by specific features, a *community legal order*

For the purpose of a new juridical typology an autonomous volition is needed in order to control the decision-making legal process; therefore, it is necessary to have a volition which should not represent a simple arithmetical sum of individual volitions of the states. The states are committed to conform to a juridical volition, distinct from their own.

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[1] See, to that effect, the concept of the essence of law in *Nicolae Popa*, Teoria Generală a Dreptului, 3rd ed., C.H. Beck, Bucharest, 2008, p. 49.

[2] For further details, see Idem, p. 55.

[3] *The typology* involves the failure to have regard to insignificant individual differences for the purpose under consideration, as any typology is subordinated to certain aims of the research, especially in relation with the setting of some uniformities and the determination of an expository value.

According to the Romanian doctrine "the position and credibility of this new typology is supported by a new typology of social European organisational schemes, corresponding to the objective tendency of multi-fold integration – economic, political and consequently, juridical"[4].

The newly conceived legal arrangement points to a new typology of whose structure has been eventually compared either to a *federal order* or to a *confederal order*[5].

Federation? The new typology exhibits the characteristics of a federal state but it varies very widely from it. The issues on which that typology differs shall be related to:

- *the absence of a Constitution* (a measure of national law). The Communities (currently the European Union[6]) have their origin and operating agreement in the Treaties they set them up;

- *the quality of subject of law*. The Member States of the European Union did not give up boosting their ability to act as subjects of international law;

- *the competence*. The European Union shall not have the general responsibility or the power to determine the allocation of responsibilities between its institutions and the member states[7].

Confederation? Relating to the usual responsibilities of a confederation: the foreign and defence policy, we could state that the European Union did not reach this stage, but exceeded it through the single currency, the institutional system, the possibility of passing decisions by a majority etc.

The European Union occupies a "*grey area*" situated between the international level (characterized by unanimity) and the nation state (characterized by sovereignty). The European Union combines, within a specific dialectic, the supranational level with the nation state within a certain order with new qualitative determinations[8].

Going even further in an attempt to identify the juridical nature of the European Union we shall also refer to the *supranationalist theory and internationalist theory*.

The Theory on Supranationalism. According to the criteria of classification of international organisations in relation to their institutional structure[9], which distinguishes between international cooperation structures and international integration structures, the European Union subscribes although it cannot be considered a supranational organisation within the theoretical meaning given to that term while referring to integration organisations.

Within the theoretical meaning given to the term of supranational organisation, these structures tend to impose their decisions on governments and governors of the Member States, hence their supranational character[10].

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[4] *Nicolae Popa*, Teoria generală a dreptului, 3rd ed., C.H. Beck, Bucharest, 2008, p. 60.

[5] See *Augustin Fuerea*, Drept comunitar european. Partea generală, All Beck, Bucharest, 2003, p. 31.

[6] Under Article 1 TEU "the European Union (n n.) is founded on the present Treaty (The Treaty on European Union, n n.) and on the Treaty on the Functioning of the European Union. (...) The Union shall replace and succeed the European Community".

[7] Within Title I: *Categories and Areas of Union Competence* of the Treaty on the Functioning of the European Union the Union exclusive competence in specific area (art. 3) and the competence shared with the Member States (art. 4). The Member States also rule exclusively national competences in fields such as culture, language, civilization, education. In these specific areas the Union shall have competence to carry out actions to support, coordinate or supplement (art. 6).

[8] *Nicolae Popa*, Teoria generală a dreptului, 3rd ed., C.H. Beck, Bucharest, 2008, p. 61.

[9] *Raluca Miga-Beşteliu*, Drept internaţional public, vol. II, C.H. Beck, Bucharest, 2008, p. 66.

[10] *Raluca Miga-Beşteliu*, Organizaţii internaţionale interguvernamentale, C.H. Beck, Bucharest, 2006, p. 17.

The requirements to be fulfilled by a supranational organisation are nevertheless at a theoretical level, given the fact that they cannot be found in none of the existing integration organisations and the European Union makes no exception, although it could be characterized as the organisation with the highest degree of integration.

As further arguments to the above mentioned we shall make the following:

- The functioning of the Union depends on the cooperation between the governments of the Member States;

- Its main decisions represent compromises given and taken between the positions of participating countries;

- Although some decisions taken by the institutions of the European Union have binding force for the Member States and/or even enforceable direct effect for subjects of national law, the applicability domains of such decisions are agreed subsequent to some negotiations between Member States;

- The European Union does not act on behalf of the Member States only to the extent and in the fields where they have previously concluded certain agreements which subsequently granted competences in the respective areas[11].

The Internationalist Theory. For the followers of this theory, the European Union, established through an international Treaty, is entirely retrievable to the scope of the international law, but not as international structures but as special structures. The European Union cannot be assimilated to common international organisations, those classical structures, due to the independence of institutions in relation with the Member States and to the Institutionalising of the setting and enforcement of the law. The essential element which differentiates the European Union from the international organisations represents the direct effect conferred upon the Community legislative measure[12].

2. Relation between the National Law, the International Law and the EU Law. In order to get an overview over the triangle "national – EU – international"[13] we shall briefly review the types of relations to be established between them, comparable one for one.

A. International Law and National Law. The two systems of law represent two distinct types of law acting within different schemes and with different means, without nevertheless ignoring the existence of some important interference effects relevant to the influence of the states, around which they are organized and through which they activate.

These interferences raised the issue of the report established between them, so that to ascertain whether and which of these systems may eventually result in an upward pressure on the other[14].

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[11] See Title I TFEU, *supracit.*; *Raluca Miga-Beşteliu*, Drept internaţional public, vol. II, C.H. Beck, Bucharest, 2008, p. 67.

[12] *Augustin Fuerea*, Drept comunitar european. Partea generală, All Beck, Bucharest, 2003, p. 32.

[13] An important aspect in examining this triangle is the way in which international law takes effect in national law through EU law. For further information see Ion Gâlea, The Relation between National Law, Community Law and International Law – A Difficult Triangle, AUB, Law Series, IV-2007, p. 37.

[14] *Raluca Miga-Beşteliu*, Drept internaţional public, vol. I, 2nd ed., C.H. Beck, Bucharest, 2008, p. 10.

The system of the international law provides the application of international rules of law. These are included within international treaties, and pursuant to them the States become parts as they are bound to take all reasonable steps in the field of their internal legislation, for the purpose of performing and fulfilling the obligations under these treaties..

The system of the national law provides the application of measures which are specific for each state and establish the carrying out conditions governing the activities and relations of the respective state with other subjects of international law which generate effects into the international order.

The international law doctrine, through several different schools of thought, tried to provide a solution focused on the report between these two systems of law. Although debated for a long time, the carrying out of the full array of international relations did not absolutely confirm any of these directions.

The theoretical constructions developed by the specialized doctrine consider the *dualism* and the *monism*.

The dualism supports the clear distinction between the two juridical systems. These systems act on different plans with different scopes and areas of intervention and without communication between them, bearing distinct origins and separate addressees.

The monism contemplates the law as an organic structure, composed of mandatory norms regardless of the structures they address.

There are two directions within the current of monism[15] and they advocate:

1.*The primacy attached to international law taking precedence over the national law*. According to the supporters of these guidelines[16], the existence of a universal juridical order is claimed, which would be superior to internal juridical orders adopted by different states, starting from the competences allocated to the states within the universal order.

2.The primacy attached to the national law taking precedence over the international law. According to its advocates[17], the reports established between the states are essentially power reports which generate and maintain the war situation due to their interdependence and complete sovereignty. Under these circumstances, the international law should be considered simply a mere "projection into the sphere of reports established between the states, of some rules of domestic law[18].

An illustration of the reports existing between the domestic law and the international law is provided by the very Constitution of Romania, within which Article 11 and 20 should be approached from a pragmatic perspective as these equally prove out the characteristics of both dualism and monism[19].

B. The EU Law and the National Law. As mentioned earlier, the European Union combines the supranational and the national within a certain order bearing new qualitative determinations. The

[15] As regards the European Community law the monism arises from the very nature of the Communities.

[16] The most representative advocate was Hans Kelsen and, generally, the Normativist School or the Vienna School (after World War I).

[17] M. Wenzel, E. Kauffman and A. Zorn (Bonn School, XIX century).

[18] *Raluca Miga-Beşteliu*, Drept internaţional public, vol. I, 2nd ed., C.H. Beck, Bucharest, 2008, p. 11.

[19] *Ioan Muraru, Simina Tănăsescu*, Constituţia României, comentariu pe articole, C.H. Beck, Bucharest, 2008, p. 110-121, 169-175.

autonomy of the system of EU Law is alleged within the resolutions taken by the Court of Justice enlarging either upon a juridical order of international right or directly mentioning a proper juridical order[20].

What is relevant and bearing within our analysis is the settlement of the situation comprising antinomies between EU rules and the rules of national law. Under these circumstances, the response depends on the competences which the states agreed to give up or which they intended to reserve in virtue of the treaties.

Proceeding even further, the EU juridical order in relation with the national law of the Member States is characterized by three essential aspects[21]:

1.The rule of EU law automatically acquires positive law statute within the internal order of the states – with immediate applicability;

2.The EU rule is likely to create by itself rights and obligations for private entities – with direct effect; national judges are bound to apply the Community law – direct applicability;

3.The EU rule takes precedence over any national rule – primary applicability.

Coming back to the Constitution of Romania we should definitely mention Art. 148. - integration into the European Union.

Although the priority is one of the fundamental principles of the Community juridical order, „ the ways of tackling the divergences between the European Union law and the law of the Member States, engaged by the various juridical systems of the Member States, are far from being uniform"[22].

The conclusion which results from the analysis of Article 148 displays as follows: the national law of the Member States should be in full compliance with the European Union law, regardless the domestic hierarchy of the respective rules, and its enforcement should be direct and immediate, according to the above mentioned[23].

C. The International Law and the EU Law. The convergence points of the two systems of law are represented by the legal nature of the European Union, by the external action and its legal personality (expressly granted by Article 47 TEU: "The Union has legal personality").

Legal nature. As can be seen from the analysis under point I of this paper, the European Union could be limited to a certain international organization of integration (supranational), representing the organisation with the highest level of integration without being deemed as a supranational organization in its theoretical meaning.

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[20] See, to that effect, the Notice 1/91 dated 14 December 1991 of CJCE which states that: "the founding Treaties established a new legal order for the benefit of which the states have limited their sovereign rights, in ever wider fields and the subjects of which comprise not only Member States but also their nationals".

[21] These aspects have been largely debated within the specialized doctrine, and the Court of Justice of the European Communities established through its case law the guidelines regarding the enforcement of the European Community law. For more information see *Augustin Fuerea*, Drept comunitar european. Partea generală, All Beck, Bucharest, 2003, p. 153; *Augustin Fuerea*, Manualul Uniunii Europene, 4th ed., Universul Juridic, Bucharest, 2010, p. 163; *Ioana Eleonora Rusu, Gilbert Gornig*, Dreptul Uniunii Europene, 3rd ed., C.H. Beck, Bucharest, 2010, p. 95, 120; *Paul Craig, Grainne de Burca*, Dreptul Uniunii Europene (comentarii, jurisprudență, doctrină), 4th ed., Hamangiu, Bucharest, 2009, p. 334, 431.

[22] *Augustin Fuerea*, Manualul Uniunii Europene, 4th ed., Universul Juridic, Bucharest, 2020, p. 167.

[23] *Ioan Muraru, Simina Tănăsescu*, Constituția României, comentariu pe articole, C.H. Beck, Bucharest, 2008, p. 1425-1441.

External Action. As regulated both in TEU, and in TFEU, "the Union's action on the international scene shall be guided by the principles (...): democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law". We shall also add the action of the European Union in humanitarian aid which is performed in compliance with the principles set forth under the international law and in accordance with the principles of transparency, neutrality and non-discrimination (art. 214 TFEU).

Legal personality[24]**.** Major innovation of the reform Treaty, the European Union therefore benefits from: representability, the negotiating capacity, the capacity to conclude international agreements, including the adhesion to the European Convention of the humna rights, the capacity to become a member of some international organization, the capacity to engage the international legal liability.

3. Responsibility – General Principle of Law. Responsibility is closely related and accompanies the freedom. Hayek believed that freedom is inseparable from responsibility. In order to outline this idea, we mention the general principle according to which *the right of a certain party is impaired at the point where the other's party right is reached*, as regarded from the permanent correlation between rights and obligations, followed by the action for liability in the event of non-observance.

"Responsibility is a social phenomenon and expresses an act of commitment of the individual within the process of social integration"[25].

The law should not be considered solely in the light of the infringement or offence already committed – *post festum*, in cases where the penalty should be laid down but also through the contents of its preemptive prescriptions, for the substantiation of a certain cultural attitude of the individual towards the legal framework.

The responsibility, as an essential component of any form of social organisation, existed since the primeval society, being placed in the field of the moral philosophy. Subsequent researches revealed the need to continue this concept and to also extend it within the area of law.

The notion of responsibility developed gradually, to the extent that the society invented new forms of manifestations: moral, religious, policy, cultural, legal.

The responsibility should be understood and interpreted as an obligation "to bear the consequences arising from the non-compliance with certain conduct rules, an obligation incumbent upon the author of the infringement contrary to these rules and which always bears the imprint of social disapproval in relation with such a deed"[26].

A significant element of the responsibility, as results from the above mentioned, is the *penalty*, the two being considered even as two sides of the same social phenomenon. The penalty, in its both negative and positive form, constitutes a powerful element intended for social control.

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[24] See more on this subject *Veronica Ionescu*, Consecinţele recunoaşterii exprese în Tratatul de la Lisabona a personalităţii juridice internaţionale a Uniunii Europene, Romanian Journal of International Law no. 9/2009, p. 221 ("The responsibility of EU does not automatically remove the liability of Member States, so it can either be the sole responsibility of the European Union or a joint responsibility, depending on the event of injury").

[25] *Nicolae Popa*, Teoria generală a dreptului, 3rd ed., C.H. Beck, Bucharest, 2008, p. 98.

[26] *Mircea Costin*, Răspunderea juridică în dreptul R.S.R., Dacia, Cluj-Napoca, p. 19 apud *Nicolae Popa*, Teoria generală a dreptului, 3rd ed., C.H. Beck, Bucharest, 2008, p. 235.

Forms of liability. Each discipline of law advances a form of specific liability, hence the variety of the forms of liability: legal political liability, civil liability, criminal liability, administrative liability, disciplinary liability, contraventional liability.

Regardless its form, the legal liability conforms to certain **principles** which emphasize the presence of some characteristic common notes: the legality of the liability, the principle of liability on fault or attributable blame, the principle of personal liability, the presumption of innocence, the principle of proportionality of the penalty in relation with the severity of the deed and the circumstances of its participating in such acts[27].

The conditions of legal responsibility. In order to release the responsibility under all its forms the cumulative existence of three conditions is required:

1.*The unlawful conduct*: a behaviour – action or inaction – which overrules a legal provision. The illegal activity of the respective conduct shall be established in immediate relation with a provision comprised within a legal measure. The degree of social menace, as resulted from the illegal conduct, delimits the forms of legal wrongful act (civil, administrative, penal etc.).

2.*The guilt*: the psychic attitude specific for that person who commits an offence in connection with its deed and its consequences. The guilt involves the freedom of the subject's volition, the deliberate nature of its act and the bearing of the risk associated with the respective conduct without excluding the case of committing an illegal deed not involving the guilt. The guilt could take the form of intention or fault, the legal sciences analysing in detail the existence modalities of these forms.

3.*The causal link between act and result:* for the purpose of releasing the liability the illegal result should be the immediate consequence of an action performed by a certain subject. The state organism, by its coercive force, is the structure which establishes the causal link. To be more precise, the analysis shall take into consideration the exact circumstances of the cause, the necessary elements which characterizes the generation of the action, its consequences but especially the removal of contingencies.

4. The International Responsibility of States within the International Law. As mentioned in the previous chapter, *the responsibility* is a general law principle, according to which any infringement of an obligation stemming from a legal rule shall therefore release the liability of the author responsible for the respective infringement and his obligation to repair the eventual prejudice.

The institution of states' liability shall designate, within the international law, the consequences which arise, for a certain state, from the violation of an international liability[28]. As regards international life, no state might be able to act on a discretionary basis. The states could manifest their sovereignty only to the extent imposed by the international law. This does not mean that the international liability of the states could be interpreted as prejudicing to their sovereignty[29] but, on the contrary, it constitutes a manifestation of their international personality.

The codification of rules governing the international liability of the states represented a concern of international fora since the period 1924-1930, but without succeeding the elaboration of a

[27] See *Nicolae Popa*, Teoria generală a dreptului, 3rd ed., C.H. Beck, Bucharest, 2008, p. 237 and the authors cited there.

[28] *Raluca Miga-Beşteliu*, Drept internaţional public, vol. II, C.H. Beck, Bucharest, 2008, p. 27.

[29] For a detailed analyse on sovereignty see *Raluca Miga-Beşteliu*, Drept internaţional public, vol. I, 2nd ed., C.H. Beck, Bucharest, 2008, p. 21.

coherent set of regulations. The issue has been resumed under the aegis of the United Nations Organisation, within the International Law Commission (ILC), ever since the year 1949. The proper codification works started in 1955, but only in 2001 the *Draft Articles* on *Responsibility of States for Internationally Wrongful Acts*[30] was proposed to the General Assembly of ONU and of the Member States by the International Law Commission

For the analysis of the international responsibility of the states we retain the **constitutive elements of the responsibility**, elements assumed *mutatis mutandis* from the general theory of the responsibility, namely: the illegal conduct (the infringement of a rule of international law) and the imputability (whether answerable for the infringement) of this conduct to an international law subject. Although these two elements are deemed as necessary and sufficient (art. 2 of the Draft Articles) a third element shall be added in order to release the international responsibility, namely the prejudice, as a *sine qua non* condition of the responsibility[31].

A special application of these elements is to be found in the event of the states' responsibility for harmful consequences arising from activities which are not forbidden by the international law[32].

Within the analysis of the first component element of the responsibility, *the unlawful conduct*, we shall examine **the internationally wrongful act**, as a basis for international liability. The doctrine and the case law oscillated between two main conceptions related to the foundation of international responsibility, but we shall only retain that acquired by the International Law Commission within the Draft Articles, namely the principle according to which it is sufficient to ascertain the commission of an internationally wrongful act in order to engage the international responsibility of a state.

According to this conception, the crucial factor when one appreciates the international responsibility of the states is not the psychological attitude of individuals acting as agents of the state, but the objective conduct of the state's bodies. Therefore, the state shall be held liable for the infringement of an international obligation without having to demonstrate the existence of a psychological culpable attitude of the agent.

According to Article 1 of the Draft Articles any internationally wrongful act of a state engages its international liability. The expression "international liabilty" corresponds to the new legal relation which germinates within the international law subsequent to the commission, by a state, of an internationally wrongful act. Fundamentally, this new legal relation has a bilateral nature: between the blamed and the author state. Nevertheless, there are certain illegal deeds which could bind the responsibility of a state towards several states, a group of states or even the international community, as a whole.

As regards the wrongful conduct, as a constitute element of the international responsibility, **the conventional** or **customary** origin of an international obligation is not relevant for establishing the liability of the state which violated this obligation. To that effect, the violation by the state of an international obligation, whatever its origin – customary, conventional or other – shall constitute an internationally wrongful act.

Given the diversity of situations and numerous incidents where infringements of the rules of international law could be registered and especially because the determination of the wrongful nature

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[30] (*http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf*)

[31] For this purpose, refer to *N.Q. Dinh, P. Daillier, A. Pellet*, Droit international public, LGDJ, Paris, 2002, p. 694, *"The responsibility for the infringement of a rule of international law remains purely theoretical if the internationally wrongful act did not generate any prejudice"* .

[32] *Raluca Miga-Beşteliu*, Drept internaţional public, vol. II, C.H. Beck, Bucharest, 2008, p. 44.

of an act generating international liability cannot be carried out *in abstracto*, without taking into account the objective circumstances under which it resulted, the International Law Commission proposed a classification criterion within the Draft, depending on the modalities through which such infringements could be reached, namely by a positive action or an omission (abstention)[33].

For that purpose, Article 2 of the Draft Articles states that: *"There is an internationally wrongful act of the state when a conduct, consisting in an action or omission, (a) is likely to be attributed to a state, according to the provisions of international law and (b) this conduct represents an infringement of an international obligation"*.

After having established the existence of a conduct which could be attributed to the state, according to the provisions of international law, the violation, subsequent to the carrying out of the respective conduct, of an international obligation under the charge of that state, we carry on the analysis of Article 3 of the Draft Articles and identify two additional elements: the entity entitled to qualify an international act as wrongful anf the actuality of the obligation infringed. Therefore, the qualification of an "act committed by the state" as "internaţionally wrongful" appertains to the international law - an eventual classification of the same act by the national law shall have no impact whatsoever. In order to withdraw from an international liability or to motivate its infringement, a state cannot invoque the national law, including the Constitution[34]. At the same time, the responsibility of the state is engaged when the obligation infringed is effective during the generation of the infringement.

To this extent, article 40 of the ILC Draft makes, in the field of international responsibility of states, a qualitative distinction between various violations of international law, thus generating, indirectly, two separates legal responsibility regimes[35]:

- common international responsibility, incident if the two conditions indicated in article 2 of the Draft are met;

- an aggravated international responsibility, with two conditions whose fulfillment draws some specific consequences. The two aggravating conditions refer to: (i) the nature of the obligation breached and (ii) the gravity of the violation[36].

One of the conditions for releasing the international liability of the states for the infringement of an international obligation resides in the fact that the wrongful act should not lose its *illegal*

[33] For a practical exemplification, the international dispute regarding the Corfu Channel, between the Great Britain and Albania, settled by the International Court of Justice in 1949, provides a classical example of establishing the responsibility of the states, resulting both in actions and in omissions. The International Court of Justice Curtea Internaţională de Justiţie considered the case and charged Albania for having omitted to notify that a mine field was located in its territorial waters, and also the fact that permitted the use of its territory in a manner which violated the rights of other states. The Court also retained the liability of the Great Britain for having carried out, on its own initiative, operations of mine clearing in the Albanian territorial waters.

[34] While applying the law of the European Union the same rule operates (see, to that effect, the case Costa vs. Enel, no. 6/64, 1964, where the general principle of supremacy of the entire Community Law binding on the national law was established. According to the Court, the national contrary rule shall never be enforced regardless its legal force or the date of its adoption as compared the Community one).

[35] For an interesting oppinion on a different legal responsability regime (penal responsability of states), see *Alain Pellet*, Răspunderea statului şi răspunderea penală individuală în dreptul internaţional, Romanian Journal of International Law no. 4/2007, p. 2.

[36] See *Raluca Miga-Beşteliu*, The Law of the International Responsability of States. Codification and Development in the Vision of the UN International Law Commission, Romanian Journal of International Law, no. 2/2006, p. 21.

nature, i.e. that at any point in time **exonerating circumstances** are required not to occur. The occurrence of these circumstances results in holding harmless the author. Such circumstances may ensue from the victim's conduct or are beyond of its reasonable control.

A. Circumstances which ensue from the conduct of the victim

The consent of the victim (art. 20 under ILC Draft). Conditions: the consent should be expressly and validly formulated, expressed previously to the commission of the act and it should not refer to the infringement of a *ius cogens* rule.

Self-defence (art. 21 under ILC Draft). The actions of a state, non-complying with the international law shall not constitute the grounds for the international liability of that state unless they were not performed as an answer to the wrongful acts of another state or aimed against it.

Countermeasure (art. 22 under ILC Draft) shall represent actions non-complying with the international law, but nevertheless legitimate, as they are executed by a state as a response to a wrongful conduct of another state oriented against it. Conditions: proportionality, its temporary or reversible character and so on.

B. Circumstances which are beyond of the reasonable control of the victim

The Force Majeure or unforeseeable circumstances (art. 23 under ILC Draft) shall represent actions non-complying with the international obligations of a certain state but which are beyond the contrl of the respective state, such as unforeseen external events or which intervene independent of the will of man and not in his power to control. Conditions: the event of Force Majeure should be unpredictable and insurmountable, beyond the control of the state and the state should not have contributed to its occurrence.

The state of danger (art. 24 under ILC Draft) shall refer to the situation when a state deliberately decides to infringe an international obligation while facing a danger which menaces major interests of its citizens. Conditions: to be extreme; the wrongful act did not occur as a result of some fraudulent dealing and the infringement of the international obligation represent a preferable alternative in comparison with the danger to be avoided

The state of necessity (art. 25 under ILC Draft) shall represent a number of measures taken by a state when it considers that its fundamental interests are menaced (territorial statutel, form of government, the state's independence or capacity of action). Conditions: the rule violated should not be a *ius cogens* measure and the vital interests of another state should not have been jeopardized, the violated international obligation should not have been expressly excluded from the possibility to be invoked as state of necessity according to the clauses of a treaty concluded between the two states.

As regards the **imputability of the internationally wrongful act**, the analysis should be carried out according to three levels, depending on the subject of the infringement.

Acts of public authorities. Within the Draft Articles it was provided that the act committed by a state, according to the international law, is deemed as being the conduct of any public authority in possession of such status under the national law of this state, provided that actions should have been carried out on that basis under the respective circumstances (art. 5).

Acts of private persons. In principle, the state is not responsible for the conduct of private persons and their acts cannot be imputed upon it. However, the liability of the state can be engaged, through omission, in the event its bodies did not take all usual and reasonable steps in order to prevent that crime and for the identification and punishment of the author[37].

[37] For example, we mention the litigation between USA and Iran regarding the embassy and consulate staff on behalf of the USA at Teheran. In this case law CIJ made a distinction as regards the illegal conduct of the Iranian state,

Acts of rebellion. The issue of liability of a state for prejudicies brought to some foreigners on its territory, in the event of war or insurrection is directly connected to the denouement of the events. In case the insurrection fails, the state is responsible for the acts committed by its agents but not for the acts of the insurgents. If the insurrection is triumphant the recently instaured government shall be held liable for all the acts committed during the occurrence of events, including those performed by the authorities overthrown.

Making further arguments, after the commission of an internationally wrongful act took place, we analyse the *legal consequences* of the respective act which fall under the responsibility of the state which committed the act. In the following we shall consider:

The cessation of violation. The reestablishment of the legal relation previous to the occurrence of the internationally wrongful act shall impose, above all, the cessation of the illegal conduct and the submission of guarantees according to which the respective act shall not be repeated.

Fulfilment of the obligation violated. Taking the responsibility for the legal consequences of the internationally wrongful act does not mean the extinction of the legal relation already in effect when that act was committed. The primary obligation which was infringed shall remain and the state, as author of the violation, must fulfil it.

Before stepping further, we shall reintroduce within the context the third element of the responsibility, namely *the prejudice*. The legal consequences of the illegal act shall often concern more than the first two points mentioned above, as for the most part an internationally wrongful act also generates a prejudice.

Obligation to redress the damage. Although, generally, the occurrence of an internationally wrongful act generates new legal reports, from state to state, it cannot be ruled out that such a deed could entice legal consequences within the relations between the state, as author of the act, and persons or entities, different from the states.

The obligation to entirely redress the damage is the second general obligation, subsequent to the cessation of the infringement, which is stemming for the state responsible for the commission of an internationally wrongful act[38].

The compensation for the damage should, as far as possible, cope with all consequences of the illegal act and to re-establish the state which would have existed if the respective act had not been committed. According to the terms of the Draft Articles, the general obligation to redress the damage is conceived as a corollary of the state's responsibility. It represents an obligation of the state which committed the illegal deed, stemming from it, and not a right of the injured state or states.

The infliction of a prejudice gives rise to a new legal report between the author of the infringement of the international rule and another subject of international law. From the point of view of the first state, we could assert that its responsibility is engaged since the violation of an international rule subsequent to an imputable conduct. From the point of view of the victimized state,

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namely: on one hand, *the attack conducted against USA Embassy* – the authorities were charged for having omitted to prevent the attack and to ensure the immunity of the premises and of the Embassy staff, and on the other hand *the practice of taking hostages among the members of the USA Embassy staff* – the Iranian state was deemed as directly responsible for the activities executed by Islamic militants.

[38] The general principle related to the recovery of the prejudice, resulted from an internationally wrongfl act, was expounded by the Permanent Court of International Justice in the case of Chorzow Plant, showing that: "The fact that the violation of a commitment entails an obligation to redress, under an adequate form, represents a principle of international law. The recovery is therefore the indispensable complement to the application of a convention without being inscribed within the very convention".

the right to invoke the international responsibility of another state and to request compensation for damages results at the same time with the infliction of a prejudice.

Consequently, the injured state should demonstrate the causality report between the prejudice and the illegal conduct. The victimized state shall acquire the right to request the compensation of the damage suffered unless it can demonstrate the damages was generated by the wrongful act committed by another state.

Generally, the causality is assessed according to the evidence, the commonsense, the logical deduction, În general, cauzalitatea se apreciază conform evidenței, bunului simț, deducției logice, thus considering a natural, direct causality. On the other hand, the prejudice should be *individualised*, affect a subject of determined international law. The serious infringements of the international law are exempted from this requirement, in which cases the right to invoke the international responsibility belongs to any state, member of the international community.

The prejudice comprises any material and moral damage arising from the wrongful act committed by a state (art. 31 under ILC Draft). Consequently, it results that solely the prejudice arising from an internationally wrongful act, imputable to a certain state, should be compensated. However, not all consequences of the illegal deed are imputable on behalf of the violator state. The determination of the size of recovery shall be founded, first of all, on the causality connection between the internationally wrongful act and the prejudice.

The illegal conduct might affect economic goods or activities of the victimized state, in which case it is known as *moral damage* and it is quantifiable, from an economic point of view; therefore, it could constitute the subject matter of a compensation in-kind, or, especially, by way of financial equivalent. *The moral damage*, immaterial by its specific nature, has an abstract character. It represents the prejudice brought against the honour and dignity of a state, its sovereigny, such as, for instance, the burning of the state flag, the violation of the airspace by the military aircrafts of another state, so on and so forth.

Also as a general principle, the state responsible for an internationally wrongful act could not rely on the provisions of its national law in order to justify the failure to comply with the obligations imposed on it in relation with the cessation of violation and the compensation of the damage caused.

As regards the extent of the international obligations imposed, mentioned within the second part of the Draft Articles regarding the contents of the international liability of the states, we assert that, according to article 33, the obligations of the state, as author of the internationally wrongful act, depend on the nature and subject matter of the international obligation infringed and on the circumstances under which the infringement occurred. Such obligations could be due to one state, to several states or to the international community, as a whole.

Direct damage, mediated damage. Diplomatic protection. The damages caused by a illegal deed could be *direct*, when they concern the state as such or when affect a state body or agent.

The damage has a *mediated* nature, when the victim is not the state or one of its bodies or agents, but natural or legal entities of national law. As these entities are not subjects of international law, they cannot directly give rise to the lodging of a complaint related to the state, as author of the damage, in order to be redressed. Solely the national state of the victim, on behalf of the *diplomatic protection* it decides to grant to the victim, could assume the individual complaint and transform it into a report between the states. Under the present circumstances it is important to underline that the protective state shall not recover, internationally, the right of the protected person, but its own proper right, *"to determine the observance of the international law, by its nationals"*.

A state could invoke, on behalf of diplomatic protection, the international liability of another state, provided that the following conditions are cumulatively fulfilled:

- the "protective" state is held for showing convincing evidence that the action or the omission of the other state which prejudiced the interests of the private person also represent an infringement of a rule of international law;
- the diplomatic protection can be exerted by a state solely in the favour of its own citizens or for the benefit of some legal entities registered within its internal order.

Forms of redressing the damage. Establishing the liability. The seeking to establish the liability, through the checking of the three constitutive elements analysed under previous sections results and finally entails the compensation of the damages suffered. In certain cases the recovery of the consequences resulted from a certain illegal conduct could be preceded by the action of compelling the author to cease such a conduct. This *ex nunc* obligation does not exonerate the liable state from the obligation (*ex tunc*) to redress the damages produced until the cessation of the illegal conduct. The compensation of the damage could be achieved by one of the following modalities:

Restitution in kind (*restitutio in integrum*) pursues the restablishment, where appropriate, of the previous situation which would have existed if the illegal deed had not been committed. This intervenes in the event of material damages, but it is often unattainable as the illegal deed might have generated irreversible effects. The restitution obligation is not unlimited. It prevails when it is neither impossible in material terms nor completely disproportionate. The restitution is material but there is also the case of legal restitution.

Redress by way of financial equivalent (compensation for damages) is the most frequent used form of redressing and it is applicable to material damages, but also to moral damages, in the event the latter cannot be redressed by way of another modality.

The calculation of the overall amount due for damages poses a number of problems in practice and could extend the definitive settlement of some disputes. The fact that the compensation for damage should include both the effectively suffered loss (*damnum emergens*) and the proceeds not obtained (*lucrum cessans*) represents a generally accepted rule. Consequently, the indemnities should compensate all material damages resulting from the illegal act, including "a benefit which could have been accomplished during the normal progress of events". The eventual speculative gains and the accidental and undetermined damages cannot be taken into consideration.

Satisfaction represents the specific form of redressing some moral damages. In practice it is carried out by showing regrets or official excuses. The state, author of the damage, could also impose internal penalties (administrative or disciplinary measures) against its agent culpable for the generation of the illegal deed. In some cases, the satisfaction may consist in the official acknowledgement, within the judgment enforced by an arbitray or legal instance, of the wrongful nature of the incriminated conduct.

The satisfaction, as a modality to redress the damage, intervenes when and to the extent that the damage cannot be compensated through restitution or by way of financial equivalent. In either case, the satisfaction should not be disproportionate in relation with the damage and should not assume a degrading form for the author of the violation.

For a **case-law exemplification** in state responsability regime we will list the following cases from International Court of Justice: United Kingdom vs. Albany (Corfu Channel, 1949), Nicaragua

vs. United States (military and paramilitary activities in Nicaragua, 1986), Iran vs. United States (oil platforms, 2003), Congo vs. Uganda (armed activities on the territory of the Congo, 2005)[39].

5. Responsibility of the States within the EU Law

Differences Related to the Responsibility of the States within the International Law. The liability of the states governed by the Community law is different from the liability of the states governed by the international law first of all by the domain on which they generate their effects. If in the case of the international law the liability of the states is analysed within the international society, on the basis of international relations established between subjects of international law, the examination of the liability of the states to be dealth with under the European Community law shall be carried out in the European Union, an international organisation for integration, on the basis of relations between the states and the Union, subsequent to its adhesion.

Legal basis for the Liability of the States within the European Union Law. In EU law, the enforcement of the European Community law represents a general obligation of the Member States, which entails from the provisions of Article 4 (3) of the Treaty on European Union:

"The Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European 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."

These provisions shall subscribe to the principle of loyal cooperation which the Union should develop with the Member States, having as purpose the mutual respect and reciprocal aid for the accomplishment of the missions resulting from the Treaties.

In the absence of specific legal grounds, we could therefore state that Article 4 (3) TFEU represents *the general legal basis* of the action agains a Member State[40].

The adhesion of a state to the European Union shall imply the transposition into national law of the Community legislation arising from the founding Treaties or from the derived Community legislation. We shall not restrict ourselves to the obligations related to the transposition of the Community legislation, as each Member State "should adopt the necessary measures so that the Community rule should be applied within the national law, and ensure the compliance of national rules with the Community directive as well as its correct enforcement"[41].

Mechanisms to Ensure the Observance of the EU law. The Treaty on the Functioning of the European Union provides various mechanisms to ensure the compliance of the European

[39] See *Ioana Gabriela Stancu*, Rolul jurisprudenţei în prevenirea şi reprimarea folosirii forţei: jurisprudenţa Curţii Internaţionale de Justiţie, Romanian Journal of International Law no. 8/2009, p. 183.

[40] *Nicoleta Diaconu*, Acţiunea în neîndeplinirea obligaţiilor comunitare de către statele membre, Romanian Journal of Community Law no. 2/2008, p. 56.

[41] *Monica-Elena Oţel*, Procedura acţiunii pentru constatarea neîndeplinirii de către statele membre a obligaţiilor ce decurg din Tratatul CE şi dreptul comunitar al mediului, Romanian Journal of Community Law no. 2/2006, p. 55.

Community law involving judicial proceedings against the Member States (we hereby remind Article 108 regarding the state aids, Article 114 referring to the measures on the internal market)[42].

The common procedure for ensuring the observance of the European Community law is established under Article 258 TFEU:

If the Commission considers that a Member State has failed to fulfil any obligation imposed under [this Treaty/the Treaties], it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union".

The Parties of the Proceedings wihin the Liability of the States for the Non-fulfilment of Obligations. Subsequent to the analysis of the above-cited article we could identify the actors/interested parties of these proceedings:

- *the Member State*, the holder of the general obligation related to the enforcement of the EU law;

- *the Commission* (has the competence to file appeals against the Member States when it "estimates"[43] they infringed their obligations provided under the Community law);

- *The Court of Justice* (subsequent to the reading of the non-adversarial proceedings the Commission may bring the case before the Court of Justice which shall determine whether the Member State infringed any of its obligations imposed under the Treaties; the decision of the Court is purely declaratory, the Member State being "forced" to take the measures in order to enforce the judgment; the Court may impose to the Member States to pay the amount of the lump sum or penalty payment)[44];

- according to the provisions of Articole 259 TFEU it results that "A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union".

When we use the expression of "member state" we also refer to any natural or legal person, national of a member state[45]. As with Article 258, the Member State which refers the matter to the Court shall not prove any interest or direct damage, as the wording of the Treaty uses the same phrasing, namely „estimates". But before the institution of the proceedings, the Treaty stipulates that the enforcement of these proceedings shall be conditioned by the matter being referred to the

[42] See *Paul Craig, Gráinne de Búrca*, Dreptul Uniunii Europene, Comentarii, jurisprudenţă şi doctrină, 4th ed., Hamangiu, Bucharest, 2009, p. 537.

[43] The appeal against the non-fulfilment of the obligations is not conditioned by the existence of a certain interest. It could be invoked by the Commission without the operation of having recourse to the principle of direct effect of Europea Community law. The recall of its attribution to ensure compliance with Community rules by the Member States (Article 17 TEU) shall be sufficient.

[44] The role and relation between the two institutions of the Union within these proceedings is very clearly expressed under Article 17 TEU, *"The Commission shall oversee the application of Union law under the control of the Court of Justice of the European Union*".

[45] We shall also cite, in support of this thesis, the cause Van Gend en Loos, C-26/62, point 15: "the Community represents a new legal order of international law, to the benefit of which the states limited their sovereign rights, although for a restricted number of domains, and their subjects of law are not only the states but their nationals, as well".

Commission which, after giving the states the possibility to submit their written and oral observations in contradictory, shall issue a reasoned opinion.

The Discretionary Power of the Commission. The Discretionary Power[46] of the Commission to initiate the proceedings provided under Article 258 TFEU raised many controversies, taking into account:

- either the indulgent or selective manner manifested by the Commission in relation with some member states;
- or the wrongful or oppressive use of the proceedings in order to ensure the Community law.

These potential scenarios arise from the non-existence of some "sufficient constraints regarding the terms and the proceedings to be imposed upon the Commission"[47], as well as from the fact that certain situations might result where political arguments or different reasons can determine the Commission to use its margin of appreciation in the sense of "non-initiation of the action for failure to fulfil the obligations, even in the case when it is undeniable that a Member State flagrantly violates the Community law"[48].

Yet, the attributions of the Commission have been very distinctly outlined. We hereby mention the Case 96/81, *Commission v. the Netherlands*, Judgment dated 25 May 1982, point 6: "In proceedings under Article 169 ECT (Article 258 TFEU) for failure to fulfil obligations, the Commission is required to establish the evidence of the infringement claimed to have occurred. The Commission shall provide the Court the necessary elements required for the checking of the infringement without considering, as legal basis, any presumption to the case".

The Action for Failure to Fulfil Obligations Assumed by the Member States. While fulfilling the role of guardian of the Community Treaties, the Commission has the duty to monitor the observance, by the Member States, of the obligations set forth under the provisions of the Treaty or under the European Community law, on a general basis. The legal, accessible instrument which the Commission uses for the accomplishment of this duty is represented by the action for failure to fulfil, by the Member States, the obligations according to Community Treaties[49], also known as the *infringement proceedings*[50].

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[46] The case law of the Court of Justice is quite rich in connection with this aspect. We shall mention only a few judgments: Case C-200/88, Commission v. Greece; Case C-466-476/98, Commission v. United Kingdom, the conclusions of General Attorney Tizzano; Case C-7/68, Commission v. Italy, the conclusions of General Attorney Gand; Case C-416/85, Commission v. United Kingdom etc. See, to that effect, Paul Craig, Gráinne de Búrca, European Union Law, Comments, Case Law and Doctrine, 4th Edition, Hamangiu Publishing House, Bucharest, 2009, p. 546-549 and the case law cited therein.

[47] *Paul Craig, Gráinne de Búrca*, Dreptul Uniunii Europene, Comentarii, jurisprudenţă şi doctrină, 4th ed., Hamangiu, Bucharest, 2009, p. 545.

[48] *Paul Craig*, Once Upon a Time în the West: Direct Effect and the Federalization of EEC Law", apud *Paul Craig, Gráinne de Búrca*, Dreptul Uniunii Europene, Comentarii, jurisprudenţă şi doctrină, 4th ed., Hamangiu, Bucharest, 2009, p. 545.

[49] *Dragoş-Marian Bârlog*, Consideraţii privind unele acţiuni judiciare în dreptul comunitar, Romanian Journal of Community Law no. 1/2006, p. 86.

[50] Although the term *infringement* is basically English, the Member States assumed this expression. In order to exemplify: Romanian language - *acţiune în neîndeplinirea obligaţiilor*, French language - *procédure d'infraction*, German language - *Vertragsverletzungsverfahren*, Spanish language - *procedimiento de infracción*.

From the point of view of the evolution of this action[51], we can invoke:

- Article 88 of the ECSC Treaty invested the Commission (High Authority) with the exclusive competence to initiate the appeal. The Commission was empowered to ascertain the non-fulfilment by a certain state of the obligations imposed without previously referring the matter to CEJ. The state could subsequently bring the respective matter to the attention of the Court, challenging the judgment by an "appeal under full jurisdiction";

- Articles 169-171 (226-228) EC and Articles 141-143 CEEA/EURATOM. Within the two Treaties, the Member States could, besides the Commission, initiate the appeal. The right to refer the matter to the Court is also admitted for natural and legal persons who could give rise to the lodging of a complaint addressed to the Court.

The Notion of "Non-Fulfilment of Obligations". Although the definition of this notion has a tremendous significance as the judgment of the Court greatly depends on it, we cannot find a legal definition within the wording of the Treaties. As in many other situations, the Community case law contributed to this issue[52].

Certain conditions must be discharged and performed in order to charge the states for the non-fulfilment of a certain obligation as mentioned within the specialized doctrine[53]: (i) the obligation should arise from the primary European Community law, derived or case-law; (ii) the obligation should be determinate; (iii) the non-fulfilment of the obligation should have a precise nature.

In an attempt to give a general definition, "the failure to fulfil the obligations of a Member State shall mean any violation of the obligations imposed to the respective state in virtue of the rules provided by the *European* Community law (our note) regardless the category under which the respective act is classified"[54].

Types of Obligations. There are several types of obligations that might be infringed by a Member State: obligation to take action or to refrain from doing so, the obligation of due care or the performance obligation (obligation to achieve a specific result), conditional and unconditional obligations etc.[55]

By correlation with the public international law, within the European Union law, the wrongful conduct of the Member States can appear under the following versions: *an action* (when the European Community rules instituted the obligation to refrain from taking action) or *an inaction or ommission* (when the European Community rules instituted the obligation to take action)[56].

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[51] For a detailed analyse see *Nicoleta Diaconu*, Acţiunea în neîndeplinirea obligaţiilor comunitare de către statele membre, în Revista Română de Drept Comunitar nr. 2/2008, p. 56-61.

[52] In Joined Cases C-46/93 and C-48/93, Brasserie du pêcheur v. Federal Republic of Germany and The Queen v. Secretary of State for transport, ex parte (for one party) Factortame, so on, point 25 "the issue of existence and area of extent of the state liability for damages ensuing from the infringement of the obligations imposed pursuant to the *European* Community law (our note) is related to the interpretation of the Treaty – an aspect which falls, as such, under the powers of the Court", in *Georgiana Tudor, Dragoş Călin*, CJEC Case Law, vol. II, C.H. Beck, Bucharest, 2006, p. 437.

[53] *Nicoleta Diaconu*, Acţiunea în neîndeplinirea obligaţiilor comunitare de către statele membre, î Romanian Journal of Community Law no. 2/2008, p. 55.

[54] Idem, p. 56.

[55] Idem, p. 55. Case C-31/69; Commission v. Italy, C-31/69, Judgment dated 17 February 1970.

[56] *Nicoleta Diaconu*, Acţiunea în neîndeplinirea obligaţiilor comunitare de către statele membre, Romanian Journal of Community Law no. 2/2008, p. 55.

Types of Infringements on behalf of the Member States within the EU Law[57]**.** The wording of the Article 258 TFEU describes under general terms the infringement by the Member States of the obligations imposed pursuant to the Treaties. Various cases, sometimes even unusual matters[58] have been brought before the Court in the course of time. According to a very detailed analysis[59], "certain types of infringements constitute, more often than others, the subject matter of the actions for failure to fulfil the obligations". According to the study cited, we mention:

a) *the infringement of the obligation to loyal cooperation provided under Article 4 TEU.* The Member States are bound to facilitate the accomplishment, by the Commission, of the duties imposed, including the monitoring of compliance with the Treaties[60];

b) *the inappropriate implementation of the European Union Law.* More often than not the reasons of the complaints by the Commission are not the complete non-transposition of the EU legislation but its inappropriate implementation (referring to the method of implementation selected, the absence of publicity etc.)[61];

c) *the infringement of a positive obligation to ensure the efficiency of the Community law.* This type of infringement appears under two forms: (i) in the event a Member State does not punish those parties violating the EU law in the same manner that it sanctions those infringing the national law and (ii) when a Member State does not prevent the action of other parties which prejudice the objectives of the EU[62];

d) *general and persistent infringements.* The State may be held liable for a certain infringement even when the legislation is appropriately implemented, in the event an administrative

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[57] For a detailed analyse on how ECJ case law has developed see *Tudor Chiuariu*, Dezvoltarea liniei de jurisprudenţă a Curţii Europene de Justiţie privind răspunderea civilă delictuală a Statelor Membre pentru încălcarea de către instanţele judecătoreşti naţionale a dreptului comunitar, Curierul Judiciar no. 12/2006, p. 104 (Francovich, Brasserie du pêcheur, Factortame, Köbler, Traghetti, Kapferer cases).

[58] We hereby cite the Case C-459/03, Commission v. Ireland, the judgment dated 30 May 2006, within which Ireland initiated, against the United Kingdom, a procedure for the settlement of disputes which involved the interpretation of the European Community law in connection with MOX Nuclear Recycling Plant in the United Kingdom, before a Court which operated on the basis of the International Convention regarding the maritime law and not before the European Court of Justice.

[59] See, to that effect, *Paul Craig, Gráinne de Búrca*, Dreptul Uniunii Europene, Comentarii, jurisprudenţă şi doctrină, 4th ed., Hamangiu, Bucharest, 2009, p. 556 and the following. Another analysis, stemming from the Romanian doctrine, this time, retains three situations which determine the initiation of the infringement procedure in the field of the environmental law: (i) the omission to notify the national regulations which transpose and implement the directives; (ii) the non-compliance of the national legislation with the requirements of the European Union rules; (iii) the unappropriate application of the European Union regulations (*Monica-Elena Oţel*, Procedura acţiunii pentru constatarea neîndeplinirii de către statele membre a obligaţiilor ce decurg din Tratatul CE şi dreptul comunitar al mediului, Romanian Journal of Community Law no. 2/2006, p. 57).

[60] C-96/81, Commission v. the Netherlands; C-217/97, Commission v. Germany; C-221/04, Commission v. Spain; C-272/86, Commission v. Greece; C-508/03, Commission v. United Kingdom; C-392/96, Commission v. Ireland; C-240/86, Commission v. Greece; C-35/88, Commission v. Greece; C-48/89, Commission v. Italy; C-374/89, Commission v. Belgium; C-272/86 ş.a.

[61] C-163/73, Commission v. France; C-96/81, Commission v. the Netherlands; C-160/82, Commission v. the Netherlands; C-29/84, Commission v. Germany; C-365/93, Commission v. Greece; C-96/95, Commission v. Germany; C-162/99, Commission v. Italy; C-300/95, Commission v. the United Kingdom; C-338/91, Commission v. the United Kingdom; C-129/00, Commission v. Italy, so on and so forth.

[62] C-365/97, Commission v. Italy; C-494/01, Commission v. Ireland; C-441/02, Commission v. Germany, so on and so forth

practice infriges the EU law, at least when the respective practice is deemed as constant and generalized[63];

e) *the action of the Instances of a Member State.* The Member States are even responsible for the actions and omissions of independent state bodies from a constitutional point of view[64].

The Circumstances which Exclude Liability of the States for the Failure to Fulfill the Obligations Assumed. As we mentioned earlier within the chapter related to the liability of the states in international law, one of the conditions necessary for the initiation of the states' liability is the absence of exonerating circumstances. The existence of these circumstances results in exonerating the author. Although the Member States have tried several times to invoke various defences in order to motivate the failure to fulfil the obligations, the Court was not very receptive hereunto. Among the more often invoked reasons we mention[65]:

a) *Force Majeure.* The Court of Justice accepts its invocation only when there are insurmountable difficulties which render impossible the observance of Treaties[66];

b) *Absence of intention on behalf of the state.* The Court investigates the cause only when the non-fulfilment of the obligations occurred as it has been claimed, and the deed should not involve an intentional infringement or a form of default on behalf of the state[67];

c) *Illegality of the Community measure on which the action for failure to fulfil the obligations is based.* Such grounds could be accepted in the event the Community measure would be affected by a procedural flaw so serious that it would render it inexistent from a legal point of view or in the event a constitutional principle is being violated[68];

d) *The infringement was committed by other Member States.* The Court of Justice rejects the idea that the obligation to observe the European Union law is a reciprocal one, dependent on its compliance by other Member States[69].

The Stages of the Infringement Proceedings. Several opinions have been formulated within the specialized literature regarding the stages of the procedure.

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[63] C-68/88, Commission v. Greece; C-143/83, Commission v. Denmark; C-265/95, Commission v. France; C-60/01, Commission v. France, so on and so forth

[64] C-129/00, Commission v. Italy; C-224/01, Gerhard Köbler v. Austria; C-30/77, Régina v. Bouchereau Pierre, so on and so forth

[65] A se vedea *Paul Craig, Gráinne de Búrca*, Dreptul Uniunii Europene, Comentarii, jurisprudenţă şi doctrină, 4th ed., Hamangiu, Bucharest, 2009, p. 562 şi urm.

[66] C-33/69, Commission v. Italy; C-70/86, Commission v. Greece; C-334/87, Greece v. Commission (the Court constantly endorsed that the notion of force majeure supposes the existence of some circumstances beyond the control of the person invoking it, circumstances which could be characterized as unusual or unpredictable and of which consequences could not be avoided despite taking the appropriate steps required) so on and so forth.

[67] C-301/81, Commission v. Belgium ("Admissibility of an action grounded on article 258 TFEU only depends on the objective acknowledgement of the failure to fulfil obligations, and not on the evidence of some intention or opposition on behalf of the member state under consideration"); C-43/97, Commission v. Italy; C-385/02, Commission v. Italy; C-146/89 Commission v. United Kingdom, so on and so forth.

[68] C-226/87, Commission v. Greece; C-204/86, Commission v. Greece; C-74/91, Commission v. Germany; C-6 and 11/69, Commission v. France; C-70/72, Commission v. Germany; C-156/77, Commission v. Belgium, so on and so forth.

[69] C-146/89, Commission v. United Kingdom; C-26/62, Van Gend en Loos; C-52/75, Commission v. Italy; C-266/03, Commission v. Luxemburg, so on and so forth

Within a first opinion[70], which we also follow, "the proceedings take into account two significant, distinct stages which in turn comprise several actions, namely an administrative, pre-litigation stage and a judicial stage with proceedings before the Court". During the first stage the proceedings take place between the Commission and the state which violated the EU law and this is a stage allowing for an amiable settlement of the situation. In the event the first stage does not end by the compliance of the state with the reasoned opinion of the Commission, then the latter could refer the matter to the Court of Justice and the second stage of the proceedings follows – the stage of preceedings before the Court.

Within another opinion[71], three phases of the procedure are identified, namely: "an initial, diplomatic stage, broadly outlined by the Commission, a subsequent, more judicial stage, influenced by the case law of the Court but still dominated by the negotiator nature of the Commission and a third stage, clearly judicial, subsequent to the application of a pecuniary penalty against the state".

Within a third opinion[72], "the proceedings for failure to fulfil the obligations imposed on the Member States pursuant to the Treaties could be divided into four distinct stages": negotiation during the pre-litigation, initial stage; the official notification in connection with the respective claimed infringement, under the form of a letter on behalf of the Commission; the issuance of a reasoned opinion on behalf of the Commission further submitted to the state under consideration and the final stage – referring the case to the Court by the Commission.

Pecuniary Penalties: lump sum and/or penalty payments. According to Article 260 TFEU, "If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation assumed under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court."

If the state under consideration does not take the measures in order to comply with the judgment of the Court, the latter may impose the payment of a lump sum or some penalty payments.

According to the Commission Communication on the implementation of Article 228 ECT (260 TFEU) SEC (2005)1658, the determination of the penalty should rely on the objective of the rule which constitutes the effective enforcement of the Community law. The Commission estimates that this determination should be based on three fundamental criteria: (i) the gravity of the infringement; (ii) the duration of the infringement; (iii) the need to ensure the fact that the deterrence of the penalty could avoid the second offence.

The penalties proposed by the Commission to the Court of Justice should be predictable for the Member States and estimated according to a method which should observe both the principle of proportionality and the principle of equal treatment between Member States. It is also important to advance a clear and uniform method as the Commission must justify before the Court the modality according to which it established the amount proposed.

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[70] *Roxana-Mariana Popescu*, General aspects of the infringement procedure, în Augustin Fuerea, Manualul Uniunii Europene, 4th ed., Universul Juridic, Bucharest, 2010, p. 248.

[71] *Carol Harlow, Richard Rawlings*, Accountability and Law Enforcement: The Centraliyed EU Infringement Procedure, apud *Paul Craig, Gráinne de Búrca*, Dreptul Uniunii Europene, Comentarii, jurisprudență și doctrină, 4th ed., Hamangiu, Bucharest, 2009, p. 541.

[72] *Paul Craig, Gráinne de Búrca*, Dreptul Uniunii Europene, Comentarii, jurisprudență și doctrină, 4th ed., Hamangiu, Bucharest, 2009, p. 542.

The above mentioned Commission Communication specificates the modalities used for establishing the amount of the penalty payment and of the lump sum. Subsequently, the Commission updated the information related to the calculation of penalties and lump sum and issued a new Communication SEC (2010) 923/3 which amended the previous Communication. On 11 November 2010, the Commission issued a new Communication SEC (2010) 1371 final regarding the implementation of Article 260 (3) of TFEU.

Although the wording of the Treaty uses the conjunction "or" between the two types of penalties, the Court stated in the Case C-304/02, Commission v. France, the judgment dated 12 July 2005, the possibility to cumulate the two penalties: "the concurrent imposition of both the penalties and of the lump sum may be applied, especially when the infringement of obligations imposed on the states pursuant to Treaties has continued for a long period of time and tended to persist"[73].

II. Conclusion

The liability of the states governed by the Community law is different from the liability of the states governed by the international law first of all by the domain on which they generate their effects. If in the case of the international law the liability of the states is analysed within the international society, on the basis of international relations established between subjects of international law, the examination of the liability of the states to be dealth with under the European Community law shall be carried out in the European Union, an international organisation for integration, on the basis of relations between the states and the Union, subsequent to its adhesion.

Article 36 of International Court of Justice Statute outlines four bases on which the Court's jurisdiction may be founded (the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; the nature or extent of the reparation to be made for the breach of an international obligation).

The responsibility of EU does not automatically remove the liability of Member States, so it can either be the sole responsibility of the European Union or a joint responsibility, depending on the event of injury.

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[73] In the Case mentioned the Court imposed on France the payment of penalties in amount of 57,761,259 Euro for every 6 months starting with 12 of July 2005, as well as a lump sum in amount of 20,000,000 Euro. See MEMO/05/482, Bruxelles, 14 December 2005.

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COMPARISON BETWEEN COPYWRIGHT AND OWNERSHIP IN COMMON LAW

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Abstract
This study is meant as a comparison between copywright and ownership of the common law, starting from the fact that the present legislation, namely Law nr. 8/1996 on copyright and related rights, approaches the copyright analitically, by talking about moral and economic rights that are due to the author of a literary, artistic or scientific work, but it does not claryfy the legal category that they fall into. This comparison is important in terms of shaping the legal nature of copyright given that this issue has been and continues to be the subject of controversy and given the fact that it approaches the real rights as exclusive rights of exploitation through the specific way of recovering the copyright by the author or his heirs (successors).Copyright holders have their attributes as jus possidenti, jus utendi, jus abutendi and jus fruendi and, from this perspective, they can be classified as real rights covering intangible assets, similarly to the property rights. Intellectual creation is considered the most personal, most legitimate, most sacred and most unassailable of all properties. The monopoly unpon the exploitation of copyright offers a striking analogy with the ownership in property rights. This is the most complete mastery that involves spiritual works and a modern form of appropriation of property. Copyright holder is the only entitled to exploit the intellectual property subject to his right, having the use of the work directly and immediately. Having all these in mind we can state that copyright implies more aspects than ownership itself.

Keywords*: property, copyright, uzus, fructus, abusus*

1. Introduction

Protecting intellectual property by special laws, society pursues three goals: the first is to give legal expression to the moral and economic rights of creators over their creations, the second is to ensure public access to these works, the third is to encourage creative activity, which is the foundation of economic and social progress.[1]

Some authors believe that recognition and protection of authors' new creations law has only one goal: to encourage the creative act for the benefit of the general public, "the reconciliation of social utility sacred rights of the author"[2]. In other words, once the right of the author has been protected, the audience can experience the intellectual pleasure, can benefit from training, etc. but all these without prejudicing the author's rights through getting enriched on his expenses.

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[1] V. Roş, D. Bogdan, O. Spineanu-Matei, *Copyright and related rights. Tratat*, Publishing House All Beck, Bucharest, 2005, p. 4

[2] C. Hamangiu*, Writers and Artists*, Carol Müller, Bucharest, 1897, p. 65.

The economic, social and cultural evolution of society is founded on the spiritual or creative work. Thus the relationship between progress and creation can be seen as a direct one[3].

The continuous expansion of scientific and technical progress reveals the growing importance of copyright and therefore the need to determine the legal nature of this right.

The purpose of this paper is to analyze the content of the subjective copyright by comparing[4] it with ownership as the real property law, and to determine the legal nature of copyright, given that the 1996 legislature has not clearly determined which categories of legal right it really belongs to.

The current legislation, namely Law no. 8/1996 on copyright and related rights[5], copyright legislature examined analytically, speaks about moral and economic rights of the person creating literary, artistic or scientific works, without clarifying the legal category those rights fall into.

Copyright has a significant role in the development of human culture, especially during the last three decades, when world's political map has changed considerably because many states gradually became more independent, new states were established and middle developed countries were confronted with problems of educating their people[6], of raising awareness that cultural values are of particular importance to their strengthening and long lasting existence.

Our analysis has a significant role in terms of shaping the legal nature of copyright, given that this issue has been and continues to be the subject of controversy and since the way the author of copyright or his heirs recovers his rights, it approaches it to real rights as exclusive rights of exploitation but its content makes it a complex law with a dual nature.

Below we are going to define notions of "copyright", "intellectual creations" and "intellectual property right" to highlight the historical debate over the consecration of the legal nature of copyright, the position adopted towards this problem of different laws in different states, similarities and differences between the subjective right of copyright and ownership, as real right, to show features of the subjective copyright, all of these only to determine its legal nature.

So far we cannot speak of a complete research paper devoted exclusively to the legal nature of copyright, which is why this study is to detail the problem of determining the legal nature of this right, given the fact that copyright has similarities to a wide range of subjective civil rights, but also, given its complex content and its specific features that hinder its classification in a certain category of rights. In this regard we consider the legal nature of personal rights (moral) and patrimonial rights (economic) of the author, to demonstrate the interdependence and individuality of these rights.

Related to copyright protection, there have been adopted several international conventions until now, the most important being the 1886 Berne Convention on the Protection of Literary and Artistic Works[7] and the 1971 World Convention on Copyright[8], which demonstrate the worldwide

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[3] S. St. Tulbure, *The Copyright*, Publishing House. Didactică şi pedagogică Bucharest, 2005, p. 7

[4] *Comparison* means that juridical operation by which the researcher or analyst of the legal phenomenon is to find either identical or divergent elements in two types of phenomena under investigation. *Tertium comparationis* designate a concept derived from the comparison of two concepts or institutions. The propre comparison means comparing similarities and differences between the terms. (See C. Voicu. General Theory of Law. Universitary Course, National Publishing House, 2004, p. 25 et seq.)

[5] Article 1 provides that "copyright of a literary, artistic or scientific work, as well as other works of intellectual creation is recognized and guaranteed under this law. This right vests in the author and embodies attributes of moral and economic.

[6] OMPI, Introduction to intellectual property, Publishing House „ROSETTI", 2001, Bucharest, ediție îngrijită de Pîrvu Rodica, p. 63

[7] International Treaties, Volumul 9, Moldpres, Kishinev , 1999, p. 134

[8] International Treaties, Volumul 4, Moldpres, Kishinev , 1998, p. 98

importance granted to the copyright, which is in fact, recognized as being of great importance as it protects the most sacred and undeniable human right - the right to the intellectual creation of art, literature or science.

2. The legal nature of copyright

2.1. The concepts of "copyright", "intellectual creations" and "intellectual property right"

Incipient forms of copyright have existed in various forms since the ancient Greece and Rome[9], without being legally established, and this is why the penalties for copyright violations were, in antiquity, especially moral. According to some authors, the determining factor in the emergence of modern copyright law was the German invention of Gutenberg's[10] printing press that facilitate reproduction and printing of books and industry, thus leading to special relationship between the publishers and the King, i.e. – the king offered editor (not author) privileges, expressed by the exclusive right to exploit a work for a certain period. These privileges, however unjust they were, provided the basis of recognition of rights for authors, at first by judicial interpretation, then by rules with legal content, such as the "Statute of Queen Anna".

The term "copyright" was first used by the Jules Renouard in his famous treatise entitled "Traité des droits d'auteur dans la littérature, les sciences et les beaux arts", published in 1838[11]. Using as title of his treaty the word "copyright" is remarkable and significant, because in this context the term substituted for the first time the term "literary and artistic property" or "intellectual property" which was accepted at that time by legislation and doctrine. Wanting to emphasize the multiplicity of rights that derives from the creation of a certain in its concrete, objective form, Jules Renouard used as title of his treaty the term "copyrights" in the plural, and our believe is that this is the correct use of the term.

By creating the work and expressing it in an objective form "which allows its reproduction" the author acquires a set of rights (powers), which are amplified after the publication of the work

[9] Digests seem to contain references to all legal regulations of the time in Ancient Rome. Although some reviews have concluded that they do not refer to copyright (see A. Breuliers, Du droit de perpétuité de la propriété intellectuelle, Paris, Libraire August Durand, 1995, p. 17-20) in a closer research of the Digests particular mentions to the theft of manuscripts were found. These goods were a distinct category among the others that were removed. Hence it was concluded that the manuscripts were not only goods with economic value, but also related to their individual creator, whose work is contained in the manuscript-spiritual creation. (see also C. Colombet, Propriété littéraire et artistique et droits voisins, Dalloz, 1997, 8eme edition, p. 1).

[10] J. Genfleisch also known as "Zum Gutenberg" named after the house they lived in. Gutenberg came from a family of goldsmiths. Borrowing money to buy parchment paper and ink for "printing books" from a wealthy burgher, Johann Fust, and unable to carry out its commitments, in 1455 lost his case with his creditor. Later on, Fust associated with a former worker of the inventor to implement the printing operation. It is believed, however, that Gutenberg made his own workshop where the printed books. In 1465 he was knighted by the archbishop elector of Mainz for personal services made as a typographer.

[11] Jules Renouard, *Traité des droits d' auteur, dans la literature, les sciences et les beaux-arts,* citat de M. Cornu, I. de Lamberterie, P. Sirinelli, C. Wallaert, *Dictionnaire comparé du droit d'auteur et du copyright*, CNRS editions, Paris, 2003, p. 12.

with a much richer content than the subjective right of ownership that is to be reduced to three constitutive elements: "to possess", "to use" and "to have" the object of that individual right.

Correlation between the rights conferred upon the author's work is not much clearer either in the glossary of the World Intellectual Property Organization (WIPO), under which consideration copyright (taken subjectively) means making possible for the author, by the power of law, to be called "creator of work" as an exclusive right, to reproduce, broadcast and make it work to the public in any way or means, and allow third parties to exploit his work in different ways.[12]

WIPO Glossary shows that all these subjective exclusive rights made "available to the author " are independent, have no correlation, no subordination between them, except the fact that they all are forms of property for the author. It was considered that only the right to be called "creator of work" is a self-contained primary personal right, which derives directly from law (leges), the others being in a close relationship and subordination to the first one as elements of the subjective copyright content.[13]

Romanian doctrine, copyright seen as legal institution, was defined as all the legal rules governing social relations that arise from the creation, publication and exploitation of literary, artistic or scientific works[14]. While the terms *copyright* or *copyrights* are used with other meanings, such as identifying *copyright* to the economic rights accruing to the creators of a certain work[15]. *Copyright* is a word defining the law that refers to the protection of creative works. Therefore "creative works" means any intellectual creation, including both scientific and technical work, as well as those due to the imagination.[16]

"The right of intellectual creation" was defined by the legal texts as "rules of law governing personal property and patrimonial social relations that are born with the creation, processing and use of intellectual property"[17].

In civil terms "goods" are generally associated to everything that is capable of appropriation. In terms of intellectual property, notions like creativity, talent cast in concrete form, artistic expression, knowledge, skill, ingenuity, experience are assets with economic value, characterized in that they are closely related to the individual author.

"Opera/work" was defined in doctrine[18] as an original product of intellectual activity of the human individual in the literary, artistic or scientific field, which is legally protected no matter how creative or how the concrete form of expression, value or intended use, provided that it is in accordance with public law and morality.

No.8/1996[19] copyright law, firstly establishes the general coordinates of the object of copyright, then provides an illustrative list of original intellectual creations that can be confined to the

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[12] Glossary of copyright and related rights, Published by the World Intellectual Property Organization, - Geneva, 1981. –c. 59 .

[13] V. Volcinschi, D. Chiroşca, *„Issues in Defining Copyright*", published RRDPI nr. 2/2007, p. 58

[14] St. D. Cărpenaru, Civil Law. Intellectual Creation Law, University Bucharest, 1971, p. 7

[15] V. Roş, D. Bogdan, O. Spineanu-Matei, *Op. cit.* , p. 33

[16] V. Roş, D. Bogdan, O. Spineanu-Matei, *Op. cit.* , p. 33

[17] Ligia Dănilă, Copyright And Industrial Property Rights, Publishing House C. H. Beck, Bucharest, 2008, p. 5.

[18] T. Bodoaşcă, *Copyright*, Publishing House Universul Juridic,2010, p. 18

[19] Article 7 "The object of copyright are original works of intellectual creation in the literary, artistic or scientific field, no matter the creation source, form or manner of expression and independent of the value and destination, such as: a) literary and journalistic writings, lectures, sermons, pleadings, lectures and other works written or oral, and computer programs, b) scientific works, written or oral, such as communications studies, university

object in question, i.e.: the literary and journalistic writings, sermons, pleadings, lectures and other works either written or oral, computer programs, scientific works, musical compositions, dramatic works, choreographic and mimed works, works of cinematographic and other audiovisual works, photographic works and other works expressed analogous to photography, works of fine art, works of architecture and works of arts.

According to the Convention[20] establishing the World Intellectual Property adopted on 14th July 1967 in order to encourage intellectual and creative activity, while promoting intellectual property in the world and facilitating the harmonization of national legislation in this area, "intellectual property/copyright refers to a set of rights relating to literary, artistic and scientific works, interpretations and executions of performers, phonograms and broadcasts, inventions in all human activities, scientific discoveries, industrial designs, trademarks manufacturing, service trade, and trade names, protection against unfair competition and all other related rights of intellectual activity in the industrial, scientific, literary and artistic field".

According to an official statement of the European Commission regarding the interpretation of article 2 / Directive of the European Parliament and the Council 2004/48/EC of 29 April 2004 on copyright[21] states that "the scope of the Directive covers the following intellectual property: intellectual property (copyright), rights related to copyright, sui generis rights of database creators, the rights of creators of topographies of semiconductor products, rights relating to trademarks, designs, patents, geographical indications, utility models, plant varieties and trade names ... "[22].

Copyright is based on two fundamental premises which we find enshrined in the Universal Declaration of Human Rights[23], namely: on the one hand, the right of every person to participate and freely enjoy cultural achievements of society, and scientific progress, on the other hand, the right of any person / author to protect the material and moral interests arising from the creation of his scientific, literary or artistic work. These premises justify the existence of two principles that have emerged in this area, constituting the basis of copyright:

- the author is the owner of his work and as such he is entitled to the remuneration due to the use of his creation;
- the access to works created by society.

These principles are closely interdependent, so that in case of copyright, regulations are subordinate to the goal of achieving a fair balance between them. In response to these challenges, the law recognizes authors an exclusive right to exploit their works for a limited duration, meant to

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textbooks, projects and scientific documentation, c) musical compositions with or without text, d) dramatic, dramatic-musical, choreographic and mimed works; e) cinematographic works and other audiovisual works; f) photographic works and other works expressed through a process analogous to photography; g) works of graphic or plastic art such as: works of sculpture, painting, engraving, lithography, monumental art, stage design, tapestry, ceramics, glass and metal, drawing, design, and and other works of art applied to products intended for practical use, h) works of architecture, including drawings, models and graphic works that form an architectural project; i) works, maps and drawings of the topography, geography and science in general".

[20] Art. 2 alin. VIII of the Convention

[21] Published in JOCE nr L 157 , 30th April 2004

[22] Bucura Ionescu**,** *Enforcement of Industrial Property Rights in Romania, In "Protecting inventions through patent and utility model"* Publishing House OSIM, Bucharest, 2006, p. 146.

[23] According to art. 27 of the Universal Declaration of Human Rights adopted by UN General Assembly Resolution 217A (III) of 10 December 1948: „ (1) Everyone has the right to participate freely in cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to protection of moral and material interests resulting from any scientific, literary or artistic work whose author is "

provide the author and his family a protection (an income needed for living). After the expiry of protection, the work enters becomes public and can be unconditionally exploited by anyone. On the other hand, the exclusive right of the author knows the limitations imposed by general interests, such as the loan made by public library with educational and cultural purposes, when the use of the work no longer requires the consent of its author, neither payment, or any remuneration to the creator.

The term 'intellectual property' is almost universally adopted and accepted[24] and highlights the advantage of a specific feature for this category of rights, namely to have as object of protection, mainly products of creativity, of intelligence and beside that being protected by rules that derogate from the common law.

Traditionally, the name of discipline that treats copyright is "intellectual property", a term which legally means that intellectual property rights bear on incorporated goods, protected by special regulations.[25]

2.2. Comparison between copyright and ownership of the common law. Theories on the legal nature of copyright

The subjective copyright is actually a free conduct, an open field offered by the legal rules that govern the protection of intellectual creation, to the author of the a literary, scientific or artistic work, within which the author may act freely and unhindered by certain actions and legal acts, actions that are prohibited to other persons without his consent[26].

Ownership as a real right is the right that someone has to exclusively and absolutely enjoy and have a certain good[27].

Napoleonic Civil Code, as an example that was adopted by the Romanian Civil Code of 1864 as well, placed ownership at the top of the pyramid, considering it as a part of the natural even divine order, and constituting, along with freedom of contract, the backbone of the Civil Code. As its authors disclosed in the explanatory memorandum, the individuals were identified with their property, a sacred right that is required of the Sovereign himself[28]. The quote from Marty G., P. Raynaud in Thiers is even more significant in what concerns ownership: "Through property God civilized world, he led lead people from desert to city, from cruelty to kindness, from ignorance to knowledge, from barbarism to civilization"[29].

In this way consistency of positive law is given to a principle proclaimed in the Universal Declaration of Human and Citizen Rights of 1789, which origins must be sought much earlier, beginning with Aristotle, Thomas d'Aquinas, and continuing with the brilliant representatives of the modern natural law school. Under this principle, ownership, as legal expression of domination exercised on things, is one of man's natural rights, which was assigned to him before the establishment of political power of state. Thus the state intervention is justified and therefore

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[24] W. R. Cornish, *op. cit.* , p. 3; A. Bertrand, *La propriété intellectuelle, livre II, Marques et brevets. Dessins et Modèles*, Paris, Delmas, 1995, p. 3; A. Chavanne, J. -J. Burst, *Droit de la propriété industrielle*, Dalloz, 1993, p. 1.

[25] . Macovei, *Treaty on intellectual property law*, Publishing House C. H. Beck, Bucharest 2010, p. 5

[26] V. Volcinschi, D. Chiroşca, *op. cit.* , p. 61

[27] Romanian Civil Code Article 480

[28] Portalis citat de G. Marty, P. Raynaud, *Droit civil. Les biens, ed. a II – A*, Publishing House Sirey, Paris, 1980, p. 33

[29] A. Boar, *Uzucapiunea. Prescription, possession and advertising rights*, Publishing House Lumina lex 1999, p. 4

legitimate because it is seen as an attempt to give solutions to any conflicts that could arise from this form of property, not as a restriction. This does not mean that ownership, as an unlimited natural right, does not impose any restriction to the owner in exercising his right.

J. Locke argues that property is not legitimate in itself but simply because it always helps to better preserve the human species as a whole, commandment that God forced upon people[30]. An individual has not rightly/legitimately any good except in case he uses them as property and not let them die or if their use is dedicated to the public. The free disposal of a good cannot be regarded as legitimate ownership unless it is dedicated to such purposes as previously mentioned when the owner contributes by this rule to meet the requirement of preserving the human community[31]. This means that the relation between an individual/collectivity and the material things he/they master shows no possibility for them to freely dispose of that good and each and every of their actions to be completely fair and legitimate.

It is notably, however, that while ownership of material goods is at its origin the result of an occupational act, intellectual creative activity is closely related to the human being, to the human unmediated intellectual work, the result being represented not only by material goods, but by intangible assets which indisputably belongs to the creator as well. Spiritual goods obviously represent the most direct and personal creation i.e. "property", the most legitimate and less susceptible to appeal. This idea was formulated as such and publicly exposed in the French Parliament by the end of the eighteenth century, although the argument was often used before the courts starting with 1725[32].

The real paradox is that while ownership on spiritual goods was so evident and undeniable, ownership of material goods was first institutionalized and legalized. Or, maybe this late record of intellectual property as a specific right made "humanity unfair to the work of art which was so poorly and lately protected by laws"[33].

Ownership is an absolute right as the owner can claim any achievement of his right, or its correlative obligation to refrain from any action which might constitute a prejudice.

Regarding the composition and content of absolute subjective human reports, the legal literature has highlighted two fundamental orientations.

The first opinion, initially dominant, likely to be still met, is that the absolute legal state is represented by the relationship between a person and a good, legally consecrating the individual ruling of the asset. Absolute legal reports/states have a single subject (holder of rights) which is opposed to his good as the object of its domination.

This opinion has been widely spread in German doctrine, especially in pandects[34] literature, but it was shared by many French[35] and Russian lawyers.

Erga omnes opposability approaches ownership to the category of personal non-patrimonial rights, which are closely related to the person of the holder and may also be opposable to all the other subjects of law. Consequently, if the limits of the existence in time for the non-patrimonial rights are

[30] J. F. Spitz, *Imperium et dominium chez Locke, în Droits. Revue francaise de theorie du droit*, nr. 22, 1995, p. 28

[31] Ibidem

[32] C. Colombet, op. cit. , p. 4.

[33] Deputies from the Report on the Law no. Literary and artistic property 126/1923 (Official Gazette. no. 68/28. 06. 1923) presented by John Pill, B. Scondăcescu reproduced, I. Devesel, C. Duma, op. cit. , p. 15.

[34] F. Savigny, Das Obligationenrecht als Teil des heutigen romishth Rechts, 1851

[35] G. Baudry – Lacantinrie et M. Chauveau, Traite theorique et pratique de droit civil. Les biens, 1896

strictly determined, usually by those of human beings which they accompany, the absolute character of ownership concerns a temporal value as well (that gives perpetuity): as a principle, it is intended as time unlimited, as long as there is the good that it covers. Seen from this point of view, perpetual vocation is the feature that makes the difference between ownership and the relative rights, claiming rights, and other real rights, which last until the end of the holder's life.

In terms of copyright, as is clearly derives from its legal definition, it is closely related to the author having both attributes of moral conduct (non-patrimonial) as well as attributes of patrimonial rights, thus having a complex content. If ownership is, by its nature, perpetual, logic requires that literary or artistic property (copyright) to be similarly perpetual.[36]

The first replication, among the few applications of this rule of common law to the copyright law, was made in France, on 30th August 1777, when the Royal Council, from the disposal of King Louis XVI, adopted two decisions that constituted the first French Code for literary property, code which stated the principle that the author is entitled to claim for himself and his heirs the privilege to perpetually edit and sell his work, but this privilege was limited to the extend of the author's life for the hypothesis that he assigned his rights to a publisher. The solution was violently criticized by Cochu, the lawyer arguing that it is difficult to understand how can be possible that copyright assignment consented by the author to change the nature of a privilege[37]. His criticism had no value because the situation had already had a precedent, in practice, by the time it was legally stated, since Jean Jacques Rousseau, in 1762, had an editing contract done for his work "Emile" by which the author "sell and transfer one manuscript to his and his followers' joy as an asset that belongs to his own property"[38].

Napoleon Bonaparte was the one who opposed the recognition of a perpetual property right and has imposed terms which lasted as a principle until the present times. Napoleon's[39], practical arguments were as follows: "perpetuity of property for the author's family would meet inconvenience. A literary property is intangible property that can be divided, with the time passing, by successive inheritance between different individuals and thus splited, becoming insignificant. This happens as if a large number of owners often distant from each other barely got to know their relatives, after several generations. How could they get together and understand in order to commonly contribute to the reprint of their ancestor's work? However, if they fail to understand, and only they have the right to publish that work, the best books will slowly disappear from circulation"[40]. It is interesting to note that although the majority in that period were the authors prone to the expansion of copyright duration, there were voices that spoke in favour of its limitations, providing the most interesting arguments to sustain their plea. Thus, in an article devoted to this issue in France at the end of the eighteenth century, it was alleged that "since the author has revealed the work, exposing it to the public, the later has been favoured by an irreversible outcome".

In the contemporary era, Dietz makes two arguments in favour of limiting the duration of economic rights: first, deducted from the special nature of copyright, the second, from reasons of social interest: intellectual works have, by their nature and functionality, the trend of dissipation into

[36] V. Roş, D. Bogdan, O. Spineanu-Matei, op. cit, p. 288
[37] In this respect, see A. Lucas, H. -J. Lucas, *op. cit.* , p. 9.
[38] Idem, p. 7.
[39] Exposed when discussing the Decree of 1810
[40] In this respect, see A. Bertrand, *op. cit.* , p. 289, where the quote was taken from.

human consciousness, in turn, people tending to view them as public goods, available to everyone and freely to be used[41].

The 1886 Berne Convention for the Protection of Literary and Artistic Works was considered by some countries as excessive in protecting the interests of authors, and this is why certain states, that have shown less concern for the rights of authors, concluded in Geneva on 6th September 1952, the Universal Copyright Convention. The Convention[42] contains less onerous rules in protecting authors and adapted to copyright.

Social interest, to prevent excessive and harmful monopoly on culture in general and the special nature of copyright are the main reasons for the imposing the rule of temporary nature of the copyright, and this rule has been generalized in the sense of recognition of rights for authors throughout his life, but for his heirs for a specified period of time.

At first this term was 5 years[43] post mortem[44], being extended in time to 70 years post mortem. This solution is contained in the Berne Convention, with a shorter protection for some categories of works, but this is still not universally accepted, which is why it was reaffirmed by the Directive 93/98/EEC harmonizing the term for copyright and related rights protection[45].

The copyright is characterized by the access of the holder to an exclusive use of his subjective right. Copyright gives to the authors of spiritual works the exclusive economic right in addition to moral rights[46], as well as the right to authorize use of his work in any way, which means it can be treated like a property which may be assigned or transferred similarly to goods property[47].

Legal personality of the owner is recognized by law and has two aspects: a positive and a negative one[48].

The positive aspect consists in the fact that the holder is the only person entitled to a direct and unmediated exploitation of his intellectual property.

The negative aspect is represented by the right of the author to prohibit any use of his property by others without his consent. The opposition of the holder to the use of his property force the parties into not doing anything likely to affect the exercise of ownership for the author[49].

Ownership as real exercise all powers gives its holder knows that the law: possession, use and disposal.

The opposition of the holder of property determines the parties to the obligation of not doing anything likely to affect the exercise of ownership rights.

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[41] Ibidem.

[42] 84 States have adhered to the Convention.

[43] The years 1791-1793 in France

[44] See A. Bertrand, *op. cit.* , p. 289.

[45] V. Roş, D. Bogdan, O. Spineanu-Matei, *Op. cit.* , p. 289

[46] According to art. 10 of Law no. 8 / 1996 the author of a work has the following moral rights: the right to decide whether, how and when work will be brought to the public, the right to claim authorship of the work for recognition, the right to decide under what name will be brought opera to the public the right to demand respect for the integrity of the work and to oppose any changes, and any interference with the work, if prejudicial to the honor or reputation;

[47] V. Roş, D. Bogdan, O. Spineanu-Matei, *Op. cit.* , p. 33

[48] I. Macovei, *op. cit*, p. 5

[49] See: Y. Eminescu, *Industrial property treaty*, vol I, *new creations*, Publishing House Romanian Academy, Bucharest,1982, page 15 and next. ; A. Petrescu, L. Mihai, Industrial property law. Introduction to industrial property rights. Invention. Innovation, University Bucharest, 1987, p. 23 et seq.

As a real right, ownership gives its holder the exercise of all the prerogatives known and accepted by the law: possession, use and disposal.

In order to designate the person who created the work, copyright science uses the notion of owner of the work protected by copyright.

The "owner of the work" means the person who carries all the attributes of a work of real property law, namely jus utendi, jus fruendi, jus posedendi, and jus abutendi.

The use known as ”jus utendi” and ”jus fruendi” stand for that particular prerogative under which the owner may dispose the good ("jus utendi") and can reap its fruits (jus fruendi"), whether natural, commercial or civil[50].

The possession, in common speech, means possession of a good or ”having a good in possession”.

Romanian Civil Code[51] defines possession as ”holding something” or ”use of a right", by ourselves or by another on our behalf.

Possession is an indispensable means of each owner to achieve its purpose, i.e. economic use of his property. Every owner should be able to use the good in his property, otherwise the property would remain just a mere utopia

”Jus abutendi” is the prerogative of the owner to freely dispose of his property.

In this sense, the owner is free to decide the fate of that good. It could dispose of it against a gratifying benefit or freely, rent it, bequeath it, abandon or destroy it. Exercising this right shall be conducted within the limits determined by law, in pursuit of his interests without harming another person. Abusive exercise of property rights entails legal liability of the holder, guilty of committing the abuse.

Ownership is defined as a real right whose holder is entitled to possess, use and dispose of a thing absolutely and exclusively by its own power and pursuing self interest, but within the limits determined by law[52].

Naturally, to a certain point in the existence of the work, the concept of ownership of the work is to be confused with the notion of authorship of the work, because the author is intrinsically the owner of his work.

The concept of "work" from this point of view, has two aspects, namely: the intellectual good, the result of a creative intellectual effort, and material good in itself, which incorporate the author's creative effort.[53]

Copyright, even if it does not refer to a tangible good, but to a work of the spirit, approaches, undoubtedly, to the ownership right, particularly in that it is enforceable against third parties, but it does not identify completely to this right[54].

Romanian jurisprudence[55] since 1887, applying the Press Law of 1862 (which regulated copyright in only 11 articles), together with its implementing regulations in 1863, shows that literary

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[50] In this sense, art. 482 Civil Code provides that: "movable or immovable property of a thing in law on all the work and take on everything that connects with working as an accessory in a naturally or artificially

[51] Art. 1846 Civil code

[52] G. Boroi, M. M. Pivniceru, T. V. Rădulescu, C. Al. Anghelescu, Civil law. Primary real rights. Lecture notes. Relevant case law , Ed.Hamangiu 2010, p.7

[53] L. Dănilă, Copyright And Industrial Property Rights , Ed. C. H. Bech, Bucharest, 2008. p. 20

[54] V. Roş, D. Bogdan, O. Spineanu-Matei, *Op. cit.* , pag. 3

[55] C. Hamangiu, N. Georgean, Writers and Artists , Carol Muller, Bucharest,1897, p. 580 (Ilfov Court, Division II, Decision of 17 March 1887*)*

property is easier to recognize than other forms of property and is best impregnated by the author's personality (the rightholder). Although this property is composed of ideas it can not be the product of all, and benefits of this work cannot be missed neither by the author, nor by his descendants.

The author of a work, having the atributte of freely disposing it, and exercising this right at own will, (lending, selling or giving it by all means of civil law), can correct and modify his work, he can suppress it in whole or in part. All these actions show that copyright is a complete and absolute right, thus jus utendi and jus abutendi proving it as having essential character of property.

That being so, although we have no special law governing literary property rights, even if it meets real property conditions, we have art. 480 Civil Code, which governs property rights in general and also regulates the ownership of literary works. Therefore, literary works exists as a form of property and is set in the art. 480 Civil Code. Art. 339 et seq. Penal Code sees as criminals and provides penalties for those who print or strike with any means, without the author's consent, any edition of writings, seeing them as criminals".

The distinction between the result of intellectual work and material property is very clear in the case of works of art, architecture, computer software, etc.

Thus, the owner of intellectual creative work that falls under copyright may be the author but the owner of the property where the work is incorporated may be another person.

In common law, possession in good faith of a tangible movable property creates a presumption of ownership over that good.

While speaking of copyright, the owner or the holder of the material support of the work has property right only on this support, not on the work of creation itself (good incorporeal). The owner and the material support holder have the obligation to allow the author's access to his work, whether this is necessary to exercise his copyright. The author in turn must not prejudice the legitimate interests of the owner or possessor in good faith. The owner or possessor may claim an amount representing the market value of the original, or some sort of remuneration. The owner of an original work has no right to destroy it before offering it to its author for a covering price. If the return of the original is not possible, the owner will allow the author to make a copy of the work, in an appropriate manner. In case of an architectural structure, the author has the right to take photographs of the work and to require the owner the duplicates of the project.[56]

The provisions of copyright law regard the protection of property rights, on the one hand, namely the possession of good faith and, on the other hand, the institution of copyright with the specific sanctions for possible abuses of the law.

Copyright was an integral part of civil law. Over time, the emergence of social relations which required to be governed by distinct rules of law, the specific object of protection, the degree of professional training of holders of rights, the emergence and development of computer programs, all these have had a direct concern of the legislature to create the legal framework of such social relations[57].

Long time the comparison of the writer selling his book to the farmer selling his crop was still in use. Lamartine said that literary property is "the most sacred of property" Therefore, developing this idea, he said that literary property is most personal, most intimate form of property, as it the represents the man himself and his thinking, while common property relates to external things[58].

[56] Art. 23 Law no. 8/1996 copyright an related rights, supplemented and amended.
[57] L. Dănilă, *op. cit*, Ed. C. H. Bech, Bucharest, 2008. p. 14
[58] M. Planiol si G. Ripert "Les Biens", Librairie Generale de Droit et de Jurisprudence, Paris, 1952,p. 345

A long period of time, copyright of literary and artistic works has been considered and protected as an application of the property. In France, the idea is first formulated by Louis d'Hericourt and resumed later[59] by another lawyer, Cochu who considered property of the authors on their work as "the most sacred.[60]"

Diderot[61] claimed that "either the author is the owner or his work, or no one is master of his property". During that time there were also views that the copyright can not be associated with the concept of property, this right being understood only as a reward for a social service[62].

French jurisprudence[63] assimilated literary property with property of movable goods, the only difference being their lasting in time, limited for reasons of public interest.

Later on[64], French jurisprudence replaced the word "property" with "monopoly" and "exclusive right" because the idea of "ownership" of intellectual creation associated with the product it represented was in favour of ignoring, even denying the moral rights of the authors of works[65]. Thus, the French Court of Cassation held that "the author and the monopoly rights that it confers are described, unfairly, in common language as well as in legal language as the - property." Far from being assimilated to that type of property defined by the Civil Code that regulates the movable and immovable property, copyright gives the holder the exclusive privilege of a temporary operation: the monopoly of exploitation comprises the right to reproduce and sell copies of the work and is governed by law, making it subject to international conventions such as right based on the realization of inventions and designs the Civil Code defines and regulates the movable and immovable property, rights of authors giving the holder the exclusive privilege of a temporary exploitation. This monopoly of exploitation comprises the right to reproduce and sell copies of the work and is governed by law, making it subject to international conventions similar to the right derived from inventions; industrial designs and trade marks, all these being known as "industrial property".

However, most of the French doctrine remained committed to the idea that intellectual property is another form of property. Proudhon argued in a paper that made him famous and hated in the same time that "property is theft"[66], in which case the view that copyright could not be equated with property rights, would be to embrace the view of Proudhon. Proudhon's opponents responded with a no less famous axiom: "property is a fair remuneration for work." Opera is the result of the authors' work and it seemed so natural the assertion that they should be afforded the right to property and that "among all the forms of property, the less likely to be disputed is without doubt the productions of human mind. [67]"

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[59] In 1777

[60] C. Colombet, op. cit. , p. 3

[61] Denis Diderot (1713-1784), philosopher, writer and French aesthetic, the originator and principal editor of " French Encyclopaedia, author of dramas and novels.

[62] C. Colombet, *op. cit.* , citing the Renouard, p. 12.

[63] In a 1880 decision

[64] In 1887

[65] C. Colombet, *op. cit.* , p. 12

[66] "How to acknowledge that human thoughts, expressed in an infinite variety of shapes, lines, colors, sounds, thoughts which are his work, not once had or were expressed in some form? He could not admit that the seizure of tangible property is theft, still less that the work, the result of direct work of the author, not his property! "

[67] Le Chapelière citat de C. Colombet, *Op. cit.* , p. 4.

It was considered too insignificant for the authors the assertions that copyright is a just or fair pay for work, or that "intellectual property" is the right of the author to enjoy their creations, in general, and does not capture the full essence of Copyright[68].

Press Law adopted in Romania on 13 April 1862 regulating the rights of authors of literary and artistic works, recognize writers, composers and creators of works not only the ownership rights over the work, but "the right to enjoy property" during their entire life, and the right to reproduce, sell or dispose of their works as well. [69]

Romanian jurisprudence considered at that time that "literary property differs from other form of property being easily recognized and individualized by the author's personality and the author of a work is the one to use this work according to his free will (i.e. he can change the work), that being another proof that copyright is a complete and absolute right, with jus utendi and jus abutendi, essential characters of ownership[70].

Common law rules of property can not provide full protection to intellectual creation and to the authors of such creations, even if it ignores the need for moral rights protection. This is because, once a work, a product of the spirit, is brought to the public, the author can not exercise control over its use.

Since the second half of the nineteenth century theories were formulated in order to justify copyright protection, establishing the legal nature of this right, taking into account the fact that the doctrine strongly challenged the idea that copyright should be completely assimilated to ownership.

At the foundation of modern regulatory protection of intellectual creation by special rules in the idea that, unlike common law, protection by the possession of the object is not possible when speaking of copyright.

Thus, different theories have been made around the legal nature of copyright. Copyright was qualified either as a property right, or as a right of goodwill, an intangible right of property, a right of personality, all these theories being challenged by various arguments.

The theory that "copyright equals ownership" assimilates the spiritual rights to property rights, even if the intellectual creation is considered more personal, more legitimate, more undeniable and most sacred of all property. Adherents of this theory consider that the exclusive right of exploitation of the author provides a striking analogy to the right of the owner on his property.

Theory of the property was enshrined in the law of French Revolution, being shared by practice and doctrine. Theorists showed that the monopoly of exploitation provides a striking analogy of copyright to ownership. He is the most complete mastery that involves spiritual works and is a modern form of appropriation of property[71].

One of the supporters of this theory was L. Josserand, stating that "the modern notion of property rights is broad and nuanced enough to encompass forms of possesion, very different from each other", beside this, intellectual creation "carries an exclusive and enforceable opposition against all, this turning it into a kind of property.[72]"

Pierre Recht, appreciating the different nature of "intellectual property" shows that the ownership of intellectual creations is not identical to the ownership of tangible property. He argued

[68] V. Roş, D. Bogdan, O. Spineanu-Matei, *Op. cit.* , p. 3
[69] Y. Eminescu, *op. cit.* , p. 22
[70] V. Roş, D. Bogdan, O. Spineanu-Matei, *Op. cit.* , p35
[71] I. Macovei, *op. cit*, p. 6
[72] L. Josserand*, Cours de droit civil positif français*, Paris, 1938, p. 846.

that "differences, imposed by the nature of the object, do not send to the nature of the right that derives from the relationships established between the holder of a good and others. This is a new form of property rights – intellectual property - which is layered and divisible: on the one hand, what we would call domminium eminens, which belongs to the entire community once the work has been published, and on the other hand, what we could call dominium utile, belonging to the author, who remains the holder of the right to use the work.[73]"

Theory of copyright as property right has been severely criticized by E. Picard, who believed that "the desire to insert by force, like hammering, these new rights in the category of real rights is clearly a scientific heresy[74].

Professor Stanciu D. Cărpenaru argued that this theory is debatable because "intellectual creation, by its nature, is incompatible with the notion of ownership[75]."

On the contrary, we can not ignore the fact that this theory, fairly criticized in terms of reducing up to denial the importance of moral rights of the author, gave rise to different solutions for protection: on the one hand - the continental system placing moral rights above all and, on the other hand, the Anglo-Saxon system where copyright is treated as a real property right. The past "success" of this theory was due to the fact that it created two separate interpretation systems. Once the U.S. joined the Berne Convention[76] the differences between these systems became obsolete, and theory being virtually abandoned.

Separation of "intellectual property" from "common property" occurred only in the nineteenth century[77], this constituting an extremely important step for the evolution of the discipline.

Rightly was noticed that one can not equate the result of intellectual creation and ownership, subject to common law, and common law rules along with the solutions occasionally emerged for protecting spiritual works are not satisfactory.

The theory of "ownership" profoundly affected the institution of copyright, the concept of "intellectual property", "literary and artistic property", "industrial property" or "scientific property" continue to be used to designate a new legal category, called by Edmond Picard "intellectual rights"[78].

The right to intellectual creation is considered as a separate group of rights, these rights are called sui generis intellectual rights[79].

The idea of intellectual property as a special category of property has enjoyed great success, being assumed up and supported in various ways.

According to a particular opinion[80], personal and real rights grouping are not complete. Copyright which includes literary and artistic property rights can not be included in any of these

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[73] P. Recht, *Le droit d'auteur, une nouvelle forme de propriété*, în Droit d'auteur nr. 5, 1969.

[74] Apud *A*. Puttemans, op. cit. , p. 21.

[75] St. D. Cărpenaru, Civil Law. Intellectual Creation Law, ed. a II-a, 1979, p. 18.

[76] S. U. A. acceded to the Berne Convention in 1989

[77] In Romania, until the nineteenth century, intellectual property rights were not among the concerns of the time. It should be noted, however, from the charter of Alexander Ypsilanti from 1774, who formed a committee of eight landowners to deal [...] to "invent new orders for any good that can be for the benefit and ornament of the country".

[78] V. Roş, D. Bogdan, O. Spineanu-Matei, *Op. cit*. ,p. 36

[79] See : E. Picard, *Des droits intellectuals a ajouter comme quatrieme terme de la division classique des droits en personnels, reels et d'obligation*, Bruxelles, 1877; Idem, *Le droit pur*, Paris, 1920, 1920, p. 94

[80] In this respect, A. Colin, H. Capitant, *Traite de droit civil, vol. I*, Dalloz, Paris, 1953, p. 36

categories. Copyright has particular features being patrimonial, giving the holder an exploitation monopoly, being opposable erga omnes, and covering spiritual activity and human thinking unlike the real rights.

According to another opinion[81], rights are classified according to their object, into: personality rights, real rights, claiming rights and intellectual rights. Intellectual rights have a pecuniary value without connection to the value of a particular good and without constituting claiming premises against debtors. They consist of intellectual creations, literature, art, inventions, designs, signs to attract customers, trade name, logo, trademarks, brands, rights as those accorded to representatives, insurance agents, members of liberal professions.

By their opposability erga omnes and their immediate characteristics, intellectual rights are related to real rights

Another opinion[82] stated that prerogatives constituting the intellectual rights are no longer separated. Splitting the two aspects, moral and economic, would mean disregarding the fundamental principle of the division of rights by the nature of the object. Intellectual rights are classified as property rights, where there are to be found iura in re corporali and iura in re incorporali.

To explain the nature and basis of this category of rights as separate rights, various authors have used other arguments, new theories are formulated in order to justify copyright protection and to establish the legal nature of this right. Among the most important theories that have marked the evolution of the overall concept of copyright and rules adopted we include: theory of intangible assets, which argues that the purpose of copyright is an intangible good which does not exclude the idea of property rights, theory of clientele rights, theory of monopoly rights and personality rights.

Theory of copyright - "the right over immaterial/intangible assets" based on the finding that the work, creation of the human spirit, has a material existence, therefore the protection and rights recognized to the author is based on the social utility and is a reward for a social service. Works of art, scientific works, inventions, have a purely intellectual original existence, even before any concrete form of expression. The author has an absolute right over his work, but this right can not be perpetual as spirit productions are thought to be part of the cultural inheritance of humanity. The theory was formulated by Joseph Kohler and was meant to protect intellectual creations as intangible assets through a special right concerning both its nature and object. The theory has influenced debates and resolutions of the Berlin Conference of 1908 to revise the Berne Convention.

Following other authors, the term "intangible property" and "clientele rights" are synonymous[83].

This theory is criticized as failing to provide an answer to the problem of defining the legal nature of intellectual creations[84].

According to the theory of "the clientele' rights", the rights recognized to the author create a clientele which brings the holder certain advantages over his competitors. The clientele right is to ensure the holder a right opposable to everyone i.e. the holder is entitled to the exclusive reproduction of a new creation or mark it with distinctive sign. Intellectual creations are separated into: creations of form, commonly called literary and artistic *property* in and creations of substance, which include mainly inventions.

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[81] In this respect, G. Marty, P. Raymond, *Droit civil, vol. I*, Sirey, Paris,1956, p. 248 .
[82] In this respect, J. Dabin, *Le droit subjectif*, Dalloz, Paris,1952, p. 103 .
[83] A. Françon, *op. cit.* , p. 5.
[84] I. Macovei, *Protection for the Industrial Creation*, Ed. Junimea, Iaşi, 1984, p. 16.

The theory is shared and developed by prestigious authors in France[85], who argue that copyright does not have a stable and defined purpose and that it is a movable/changeable right. While claims and property are part of the static legal practice, clientele rights are part of the dynamic legal practice.

This theory is charged with using an economic concept to explain the legal nature of a right that serves to determine its nature[86] and that does not touch all of the moral aspects related to the intellectual creations[87].

Theory of ”monopoly rights” refers to the structural fundamental nature of the privative rights and the competitive function exerted. In light of their typical features, they may not be included into the category of obligation, personal or real rights. For all these rights, the most appropriate term is monopoly rights, having as an essential feature the fact that the holder can prevent third parties who bought the subject of invention or the work to reproduce, duplicate and sell it[88].

Otto Girke formulated the theory of "rights of personality" considering that the author's right has its source in the creative intellectual activity, and this is an extension of personality. Therefore, copyright is a faculty that can not be separated from the author's creative activity, neither during the process of creation, nor after its publication[89]. In this view, the work is the emanation of personality and moral rights have all the rights of personality.

The opponents of Otto Girke's theory argue that it seeks the subordination of property rights to the moral element, that the work is, indeed, expressing the author's thinking, but that it belongs exclusively to the author only as long as it is not materialized and published. Once the work takes a certain form and is published, it is detached from its author having its own destiny.

None of the theories reviewed do not justify or explain, by themselves, the complexity of the rights recognized to the authors of works protected, taken into consideration the fact that the intellectual creation has an abstract existence. It is however the result of some creative activity having its own value and, like any good that has value, it belongs to the person who created it.

There were statements that ownership of material goods, unless they were acquired by occupation, has the same source as the copyright: the work[90].

Intellectual property is more legitimate than the ownership of material goods because ownership of material goods only means that someone has become the owner of particular goods by appropriated them, while the ”owner,, of intellectual property is its creator not only its holder.

In the case of "intellectual property" the appropriation aims to his own creation, as an asset that does not exist till then, an asset that truly belongs to the author and is part of the author himself[91].

2.3. The complex legal nature of copyright. Copyright as sui generis right

The complex character of copyright is acknowledged in the system of Berne Convention[92] for the protection of literary and artistic works of September 9, 1886 and it has been adopted, with some

[85] Roubier, citat de C. Colombet, *op. cit*. p. 13.
[86] A. Bertrand*, Marques et brevets. Dessins et modèles*, Delmas, 1995, p. 3.
[87] S. D. Cărpenaru , *Civil Law. Intellectual Creation Law* , ed. a II-a, 1979, p. 10.
[88] In this respect, R. Franceschelli, *Nature juridique des droits de l'auteur et de l'inventeur, Melanges en l'honneur de Paul Roubier, vol. III*, Dalloz, Paris,1961, p. 453 et sqq..
[89] B. Scondăcescu, D. Devesel, C. Duma, *op. cit*. p. 35.
[90] C. Colombet, *op. cit*. , p. 14.
[91] V. Roş, D. Bogdan, O. Spineanu-Matei, *Op. cit*., p. 38
[92] Art. 6 bis - Berne Convention

reserve, by the member countries of Berne Union. The Convention stipulates that "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 ".

Internationally, the recognition of copyright has been granted the status of normative act since 1886, when the Convention was signed. This document represents the first means to ensure international protection of copyright.

The Berne Convention was adopted by 9 member states[93] which have the quality of founders; these states made up the Union for the protection of literary and artistic copyright.

In 2010 the Berne Union comprised 164 member states, including Romania that joined the Convention by the Law no 152/1926[94].

Although adopted, disputes concerning the complex legal nature of copyright have not been concluded. Thus, new theories were formulated, proposing to adopt either a monist or unitary solution or a dual one.

The "monist theory" claims that there is a close relationship between the author's personality and his/her works, which makes it impossible to dissociate between moral and patrimonial rights and to rank them. According to this idea, moral rights constitute prerogatives of copyright, having the same value and duration as patrimonial rights.

The monist system allows complete copyright transfer to the heirs or the persons indicated as successors in title, moral rights having the same absolute and discretionary character as if possessed by the author[95].

Nowadays the monist system has been stipulated in the German law of copyright and the related rights since 1965[96].

The theory was criticized on the following grounds:

- it loses sight of the fact that although both moral and patrimonial rights come into being at the same time, the patrimonial ones become effective only if the author publishes his/her work. The resulting work confers the creator patrimonial benefits only after publication;

- it makes no cause-effect connection bewteen the activity of creation and the resulting work, which creates confusion between these two elements;

- it does not consider the fact that both the protection of moral rights and the satisfaction of the patrimonial ones imply different areas of application and that both stand for different objectives[97].

According to the "dualist theory", moral and patrimonial rights, that make up the content of copyright, "have a distinct existence and legal regime" [98], moral rights being more important for copyright.

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[93] Belgium, Swiss, France, Germany, Haiti, Italiy, Great Britain, Spain and Turkey

[94] Over time The Convention has undergone several revisions and additions [4] and was modified on 28 September 1979. Romania has ratified this Convention by Law 77/1998 published in M. O. Part I, no. 156 of 17 April 1998

[95] See Y. Eminescu, *op. cit.* , p. 142.

[96] Ibidem, p. 142.

[97] V. Roş, Intellectual Property Law. Universitary Course*r* , Ed. Global Lex, 2001 . p. 53 et sqq.

[98] Ibidem

Not only do moral rights precede the patrimonial ones, but they survive them, exercising a strong and permanent influence over the moral rights, meaning that they are felt even after the author's death and even after the cessation of the patrimonial rights transferred to the heirs.

The arguments advanced in order to support the complex character of copyright are the following:

- the author's patrimonial right to have material benefits from using his/her work results from exercising his/her moral right to disclose his/her creation and communicate it to the public. The author has discretionary powers to freely decide if his/her creation represents him/her and if it deserves to be known.The author's right to have material benefits is therefore the consequence of exercising the author's right of disclosure and the authorization granted to the third parties to use his/her work. Taking into consideration the fact that patrimonial prerogatives depend on non-patrimonial ones, by making a derogation from common law, the legislator decided that the author's patrimonial rights can be transferred on a limited period of time[99]**;**

- no aspect of copyright does not escape the influence of moral right, whose action is so powerful that it forbids the aplication of common law rules in matters of property.Moral rights rights precede patrimonial ones, they survive and exercise influence over them on permanent basis. Moral rights acknowledge the connection between the work created and the author's personality, while patrimonial rights ensure the satisfaction of the author's material interests;

- the author's right to patrimonial damage results from the violation of his/her moral rights; the law explicitly stipulates the right to damage for infringing moral rights.

In the Romanian law, the Decree No 31/1954 concerning individuals and legal persons[100] ranges the author's nonpatrimonial rights, along with the rights to name or nickname, designation, honor, reputation in the category of moral rights. But honor, reputation and other moral values are forged by an individual through his/her behaviour in public and private life and they have a general character, while intellectual creation is an expression of the author's thoughts, feelings and emotions, an emanation of his/her spirit, whose personal touch is laid on the creation. This is the reason why the copyright belongs to a limited category, namely that of the works that have been released to the public.

The idea that copyright is a complex right was shared by most European countries, except, as we have already shown, for Germany.

The necessity to sterngthen the position concerning the legal nature of copyright was determined, in most European states, by the fact that the copyright law was considered as a complex right in the revised text of the Berne Convention[101] as a result of the Rome Convention of 1928.

In 1989, the United States of America adhered to the Berne Convention which resulted in diminishing the differences between the two largest protection systems of copyright: the continental system which gives priority to moral rights and the copyright system, in which moral rights are acknowledged, yet with a restrained impact, but no longer ignored.

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[99] Y. Eminescu, *op. cit.* , p. 139.

[100] Art. 54 stipulates that " The person that suffered prejudice in his right to name or nickname, honor, to designation, in the personal nonpatrimonial authorship related to a scientific work, or to any other persoanl nonpatrimonial right, will require the court the cessation of the criminal deeds which prejudice rights shown above. Also, the one who suffered such prejudice might ask the court to compel the author of the offence to publish on his/her account, in the conditions set by the Court, its judgment or to meet any other conditions intended to restore the right.".

[101] The revision became applicable starting with August 1, 1931

With respect to the position of our country, referring to the two theories above, it is remarkable that the first laws concerning this matter appeared in 1862.

The law of the press shares the dualist thesis of copyright which is sustained in the doctrine of the most outstanding personalities of the Romanian law: A. Ionaşcu, C.Stătescu, F. Deak, St. D. Cărpenaru, Y. Eminescu.

In this respect, the motivation of the Decision no 268 of May 9, 1934 of the Appeal Court of Oradea[102] shows that, in keeping with the law of 1923 in the way it was amended[103], the legislator stipulates the theory of the double right, meaning that right to benefit from one's work and to represent it bear patrimonial character, while the right to retract and the author's right to oppose to any modification of his/her work without his/her consent, represent moral rights.

The law of literary and artistic ownership of 1923, one of the most complete and modern of that time[104], distinguished, in terms of authors' subjective rights thar are acknowledged and protected for them, between patrimonial ans moral rights. The authors of literary or scientific works, painters, drawers, sculptors, architects, gravors, in general all the creators of an intellectual work benefited, along their lives, from the exclusive right to publish their work, to exploit, to sell it, to represent it, to donate or leave it as inheritance by will.

In case the work is transferred, the author or the heirs preserved the inalienable moral right and it did not become the object of any act of giving up preventing its modification. The heirs' right survived the author over a period of 30 years.

Currently, in our system of law, in Law no 8/1996 such as it was amended and completed[105] in paragraph 1, the final sentence of the first article stipulates that "This right (copyright) is connected to the author and bears attributes of moral and patrimonial nature, legalizing the solution of copyright, as complex, dualist right.

The complexity of the copyright law, according to which it includes both moral and patrimonial rights, is, therefore, admitted ex lege; the birth of the right is determined only by the fact of creating work, without having to accomplish any formalities. In other words, the mere fact of creating leads to the recognition and protection of the work.

The law of copyright and the related rights no 8/1996 regulates the content of copyright in three articles[106] stipulating that the author of any work has as moral rights the right to decide whether, how and why the work will be brought to the public attention; the right to claim the acknowledgement of his/her quality of author of the work in question; the right to decide under what name the work will be brought to public attention; the right to claim compliance with the integrity of the work and to oppose to any changes and any damage of the work, if this is prejudicial to the

[102] V. Roş, D. Bogdan, O. Spineanu-Matei , *op. cit*. p. 40-41

[103] The law was amended February 17, 1932

[104] In this respect, we mention Romania's Constitution of 1923 which was sanctioned by the King Ferdinand's Royal Decree no 1360 of 28 March 1923 and published in O. M. no 282 of 29 March 1923. Being a modern fundamental law, it was repealed on February 27, 1938 by the Constitution of 1938, known as Carol II's Constitution. However, the Constitution of 1923 was called into force, having a partially amended form and structure, modified by the Royal Decree no 1626 of August 31, 1944 for setting the rights of Romanians in the limits of the Constitutiunii of 1866, published in O.M. no 202 in September 2, 1944. For more details, see I. Muraru, Gh. Iancu, M. L. Pucheanu şi C. L. Popescu, Constituţiile României – texts, notes and comparative presentation, published by Regia Autonomă " Monitorul Oficial", Bucharest,1993, p. 71 and sq.

[105] Revised and completed by law nr. 202/2010, published in O.M. no.. 716/26.10.2010;

[106] Art. 10-13 of Law nr. 8/1996 modified and completed

author's honor or reputation; the right to retract the work, paying damages, if necessary, to the persons holding the right of use and who are prejudiced by the act of retraction; the exclusive patrimonial right to decide whether, how and when his/her work will be used, and to consent to the use of the work by others.

The article 11 paragraph 2 of the law stipulates that after the author's death, the following rights are transferred through inheritance, according to the civil law, for an unlimited period of time: the right to decide whether, how and why the work will be brought to the public attention; the right to claim the acknowledgement of the quality of author of the work in question; the right to claim compliance with the integrity of the work and and to oppose to any changes and any damage of the work, if this is prejudicial to the author[107]'s honor or reputation. These rights have a temporary character limited to the author's lifetime and cannot be exercised by successors or by collective administration bodies, the right to name and the right to retraction.

The solution of the common law concerning nonpatrimonial rights after the death of the rights' holder cannot be received and, in the matter of copyright, since the author's personality is reflected in his/her work, which survives him/her, it should be protected after his/her death.

The author's right to benefit from the use of his/her work is recognized as being the first in the favour of creators, having also universal recognition, while the moral right may be regarded with reluctance or may even be ignored in some systems of law[108].

Both in the copyright system and in the European Union one, the patrimonial content of copyright is regulated based on an analytical approach, each patrimonial attribute being regulated separately.

Patrimonial rights pertaining to the authors of the work which has been brought to public attention are, under current law, the right to use it and to consent to its use by third parties in order to obtain material benefit[109]s, the use of the work conferring the author distinctive patrimonial rights to authorize or prohibit the use in the ways shown in the law[110] and in the related rights[111].

The distinctive patrimonial right to authorise or prohibit the use of work is opposable erga omnes. This right has a complex legal content, based on which more prerogatives are granted to the author: the right to decide whether the work will be used; the right to decide when the work will be used; to decide the ways in which the work will be used; to consent to the use of the work by others; to enjoy the material benefits resulting from the use of the work; to oppose to the abusive or illegal use of the work by others.

Nowadays it is almost unanimously agreed that copyright is not an ownership interest, but a sui generis right which is regulated by specific rules

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[107] Our legislator has not been consistent in the solution adopted since, in the case of performers and artists, he admitted the transmission through succession, for unlimited duration, of all the moral rights granted to them by the law. (art. 97 of the law).

[108] See A. Françon**,** *op. cit.* , p. 227.

[109] Art. 12 of the law;

[110] Art. 13 of the law stipulates that " The use of a work grants distinctive and exclusive patrimonial rights to the author to permit or prohibit: a) reproduction of the work; (b) Distribution of the work; (c) importation of copies (with teh author's consent) for marketing in the domestic market; (d) hiring of the work; (e) loan of the work; f) direct or indirect public communication of the work by any means, including making the work available to the public, so that it can be individually accessed at any place and at any moment by the public;g) broadcast of the work;h) cable transmission of the work; i) making derived works.

[111] Established by art. 21 of the law.

Copyright, which does not refer to a corporal right, but to the work of the spirit, is related to the right of ownership, in particular since it is opposable in an absolute manner, but it does not share all its characteristics.

The Romanian legislation in the matter of copyright meets and is mostly responsible for the requirements formulated by the European Union in the eight Communitary Directives that are currently applicable[112].

As regards the implementation of these directives, the Romanian Office for Copyright (ORDA in Romanian) is, in accordance with Law no 8/1996, the single authority on the Romanian territory dealing with the record, observation and control of the apllication of the legislation in the matter of copyright and the related rights. ORDA is empowered to supervise the functioning of the authors'collective administration companies and of other ownership rights, the creation of the companies being another way to implement the regulations in the field. The differences in the Romanian law compared to the Communitary regulations led to the modification and completion of Law no 8/1996.

3. Conclusions

As it has been shown above, copyright makes the object of international legal protection since the end of the 19th century, its legal nature still being controversial, although both the real practice and the doctrine accurately spotted the content of this right.

The theories formulated by various authors along the time concerning the legal nature of copyright, some of which mentioned above, namely *ownership right*, *right to clients*, *right to immaterial possessions*, *right to monopole*, *right of personality*, cannot offer a full and acceptable explanation with repect to the nature of copyright rights.

It is true that the intellectual creation is an abstract entity, but this is not likely to justify the author's being deprived of the potential material benefits resulting from creating.

The monist theory denies the possibility to dissociate moral rights from the patrimonial ones, both being considered as falling in the same way under the scope of time, whereas the dualist theory distinguishes between moral ans patrimonial rights, which have a different legal status within this theory.

Currently, legislators in almost all Europe have adopted the dualist theory, which sustains the dependence of patrimonial rights on the moral ones.

Although the Romanian legislator of 1996 does not state expresis verbis in the text of law in what legal category the copyright falls,considering the way the contents of the law was regulated, i.e

[112] We mean Directive 2009 /24/EC of April 23, 2009 on the legal protection of computer programs; Directive 2006/115/CE of December 12 2006 on renting and lending rights and certain rights related to copyright in the intellectual field ; Directive nr. 93/83/CEE of September 27, 1993 on coordination of certain stipulations relating to copyright and related rights applicable to the broadcast of programmes through satellite and retransmission cable; Directive 2006/116/CE of December 12, 2006 concerning the duration of protection of copyright and of certain related rights ; Directive 96/9/CE of March 11,1996 on legal protection of databases; Directive 2001/29/CE of May 22, 2001 on harmonisation of certain aspects related to copyright and related rights inthe informational society; Directive 2001/84/CE of September 27, 2001 on related rights in favour of an original work creator; Directive 2004/48/CE of April 29, 2004 on observing the intellectual ownership rights.

"closely related to the author and which involves attributes of moral and patrimonial nature", he seems to have granted it a complex nature, envisaging it as a sui generis right.

Although considering the way way the author or his/her heirs can enjoy the benefits of the works created, the copyright is similar to real rights as exclusive rights of exploitation, having the attributes of jus possidendi, jus utendi, jus fruendi and jus abutedi; from this perspective, it is possible to placed them in the category of real rights having as object incorporal goods, their valorification being achieved through special contracts (of editing, distribution, etc.) which create legal obligatory relationships.

All these elements lead to the solution of the complex and intermediary character of copyright and intellectual property.

The qualitative and quantitative evolution achieved under the Law no 8/1996 on copyright and the related rights, with subsequent amendments and additions, places our country on a level that is comparable to other European states, the difference from the previous regulation of copyright, i.e Decree no 321/1956 being at the level of content. Besides, this law is of absolute novelty since it is the first time the rights related to copyright are legally regulated. The legal framework created by the Law no 8/1996 is intended to balance the authors' rights and obligations with the rights and obligations of the company, in such a manner that "the legal contractual proportion" created between the parties will reflect the legal equity, observing one of the principles specific to civil law.

Moreover, the application of the copyright and the related rights law has the merit to contribute to developing cultural industries related to books, phonograms, computing, cinematography, which, in all advanced countries, bring huge profit to the national and individual economy and whose dynamic and evolution are more striking than the other branches of the national economy[113].

The economic importance of copyright and of the related rights is expressed as percentage of the gross domestic product made by the industries mentioned above or by the number of active people working within these strains of activity.

De lege ferenda, it would be useful if the legislator specified in the contents of the decree regulating the copyright in what legal category this right falls, in order to provide greater security to the protection of copyright and of the creators of artistic and literary works.

The law of copyright and the related rights represents in our opinion, the appropriate and necessary legal background, bearing new amendments and additions brought about by the current technological situation which rapidly and continuously penetrates our country, in the information revolution era.

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NEW REGULATION OF PUBLIC-PRIVATE PARTHERSHIP

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Abstract
This paper presents the definition, scope and methodology of the Public-Private Partnership, under regulations introduced by law 178/2010. The notion of public-private partnership in a extended meaning covers all forms of association made between a public partner and a private partner, being important to define and delimit public-private partnership governed by law 178/2010 from public private partnerships governed by other applicable laws. Public private partnerships represent an area of great importance since their objects consists of a good or a service of public utility with significant social and economic impact, a careful regulation of these partnerships being essential. This paper aims to examine the Law 178/2010, to explain the initiation, organization and operation of public-private partnerships in terms of new regulations.

Keywords *: public, privat, project, contract, stages*

1. Introduction

The Law 178/2010 of public-private partnership was adopted on the 1st of October 2010. The new act regulates a form of association between public and private partners in which the private partner has a major role, becaming from a supplier of goods or services to the public partner a directly involved active partner in achieving the public good or service. The Law 178/201 represents a legislational novelty that when practically applied, can create complex situations that both public and private partners and also legal practitioners couldn not face because of their lack of experience. This paper aims to provide a brief description of the legal text and to explain how the legislature sought to regulate the establishment and functioning of a public private partnership.

Public private partnerships are a subject of increasing interest today. The recent financial crisis has made public partners to focus more and more on attracting private partners and their financial resources in public projects, an interest equally expressed by private partners. It is thus expected in the following period of time the completion of several public-private partnerships projects which have as objective the development of large scale public projects.

The legal framework for their implementation was created by the Law 178/2010, but its practical application, establishment and operation of such partnerships is still a challenge for all parties involved. In this context, it is useful to describe the new regulations for the familiarization with the legal provisions of such partnerships.

To understand public-private partnership governed by the Law 178 it is first required to delineate it from other forms of partnerships between public and private partners covered by legislation in force. The next step is the text analysis of the Law 178/2010, with the description of

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how public-private partnerships can take delivery, fitting of legal public-private partnership contract, the operation of the project company, and rules imposed by the provision in force.

Considering the fact that with the repeal of GO /2002 the public private partnerships were not regulated, a specialized literature in the field is lacking. This paper is based on the analysis, the description and the organization of this law.

Delimitation of the public partnership from other forms of cooperation between public and privat partners.

2. Delimitation of public private partnerships from other forms of cooperation between public and private partners

Althought there are many definitions of the notion of public private partenership, irrespective of its shape, the concept represents a form of cooperation between a public authority and the private sector for the development of a project.

The systems of public private partnership have an old tradition in France, where the collaboration between the public authority and the private sector take the shape of concession of the public goods, starting at the end of the XIX century and the beginning of XX century. The modern system of public private partnership evolved in early ’80 in the Unites States, as a way of decreasing the unemployment in the urban areas of financial decline, by providing public services through a collaboration between the public and the private sector.

Regulated through “ *Job training Partnership Act*” on the first of October 1983 at a federal level, the public private partnership also extended to other areas, surpassing the level of providing the public services, to infrastructure projects, being progressively used by other developed countries.

In Romania the first structures of public private partnerships formed ad-hoc at a national level even from the mid ’90, when new sectorial or national strategies were elaborated (The National Strategy of Durable Development – 1999, The Strategy of Medium Term Delevopment – 2000).

Subsequently, the Law nr. 219 was implemented that concerned the concession regime with different modifications and GO 16/2002 involving the public private partnership contracts, approved by the Law 470/2002, modified and completed by the GEO 15/2003 approved with modification and completions by the Law nr. 293/2003.

The Ordinance 16/2002 was abrogated by GO 34/2006 for the atribution of public procurement contracts, the concession of public projects contracts of the concession of services contracts. The new legislation was adopted in the context of the commitment assumed by Romania in the EU accession process repealing the regulations in the field the old Law 219/1998 on the concessions regime and GO 16/2002, compliant with European regulations. By GEO 34/2206 notion of public-private partnership has been virtually removed from our legislation and was replaced with the notion of "*public works concession*" and "*service concession*" as a particular form of this concept, more specifically defined in the acquis Community (Directives and 18/2004EC 17/2004/EC).

The concession as the classical form of creating a partnership between public and private partners is regulated by Government Ordinance 34/2006 regarding the works concession contracts and services concession contracts, and Ordinance 54/2006 regarding the concession contracts of goods public property.GO 34/2006 defines public works concession contract as the contract that has the same features as the contract projects (public projects contract), except that the contractor in exchange for work performed, as a concession, receives from the public authority, as grantor, the

right to exploit the result of the work for a determined period or this right accompanied by payment of a predetermined amount of money.

Similarly it is also defined the service concession contract. Service concession is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with the payment. A concession agreement usually involves financing an investment objective by the private sector, the recovery of the investment is generally accomplished directly by the fees charged to users or the contracting authority or a mixed payment system obtained by combining the two above. The duration of the concession is established in the concession contract and represents the period of time the concessionaire will perform the works and will provide the services that are subject of his exploiation right.The public goods resulting from the concession contract are transferred freely to the Contracting Authority, in good shape and free of any charge or obligation at the end of concession. The parties of a concession contract are the Grantor (public partner or the contracting authority as it is named by GO 34/2006) and Concessionaire, which can be any person or entity of the private law, Romanian or foreign, or group of such persons. A Concessionaire could also by a society created especially for achieving the object of concession, named Project Company, constituted by the Grantor and the Concessionaire together, or only by the Concessionaire. This last version assembles the public private partnership governed by Law 178/2010.

The concession of public property is governed by the Ordinance 54/2006 approved by the Law 22/2007. The ordinance regulates the legal regime of the concession of public property as the contract concluded in written form by a public authority, called the grantor, shall give, for a determined period, to a person known as concessionaire, which acts on his risk and responsibility, the right and obligation to service a public good in exchange for royalties property. Payment of royalty and its value is determined by the public authority, making it came of the state budget or local budgets as appropriate. The object of concession contracts is represented by the state property or the public property of the dministrative-territorial unit. The concessionaire may be any person or entity, Romanian or foreign. The concession contract is made for a period not exceeding 49 years, and can be extended for a period at least equal or more than half of its original length.

The public procurement, regulated by GEO 34/2006, implies a contract of a public procurement, defined as the contract for pecuniary interest made in writing between one or more of the contracting authority, on one hand, and one or more operators on the other hand, with the execution of projects, supply of products or services.

The joint ventures regulated by art. 251-256 Commercial Code, is another form of association used for collaboration between public and private parties. Joint ventures can be defined as an agreement whereby two or more persons agree to pool something in common in the pursuit, one of them, of a commercial activity or more commercial activiyes, and each of the parties to share the benefits and business losses. The joint venture agreement gives birth to a new commercial company without legal personality. The public authority often participates in such ventures with public goods they offer to their private partners as a contribution in the joint venture, while the privat partner will contribute with capital investment and will ensure the management of the association. The joint venture contract is not the best solution for association between public and private parties. On the one hand the completion of such contracts can be made arbitrarily by the public authority without complying with the principles of free competition and non-discrimination, the control of public authority over the administration of joint ventures is limited to net profit verification and not on all aspects of the association budget, and on the other hand, the joint venture agreement itself is not

sufficiently covered by legislation, interpretation and application of rules for such such contracts raising difficulties even for law practitioners.

It is important to make a distinction between the concept of public private partnership, established by contract – Public Procurement and Concessions (PPPC) and the notion of institutionalised public private partnership (PPPI). [1]The difference that exists at European level becomes applicable for the national legislation once with the adoption of Law 178/2010. If PPPC are created solely based on contractual relations (concession), PPPI involve participation of the public partner and private partner togheter in a new entity with a mixt capital. The community law has no specific rules to regulate the creation of PPPI. However the European Commission published on February 5, 2008 an Interpretative Communication on the application of Community law on Public Procurement and Concessions to instititionalised PPP (PPPI). The interpretive communication was written after a public consultation on the Green Paper on Public-Private Partnerships and Community law on public contracts and concessions, which showed that was a considerable need for clarification on the rules for so-called PPPI.

3. New statutory – public private partnership Law 178/2010

178 Public-Private Partnership Law was adopted on 01.10.2010 and published in the Official Gazette on 05.10.2010, and through Government Decision 1239/2010 have been approved norms for its application.The normative act aims at regulating the mode of operation of a public private partnership project, the goal represented by the law is the regulation of the initiation and realization of projects of public - private partnership in various fields, with private funding (Article 1 and Article 2 Law 178/2010).

The Law 178/2010 applies to the development of a PPP project by setting up a new company, named Project Company, the capital of which is held jointly by the contracting entity or public partner and the private partner, whose purpose is to design, to construct, to develop, to rehabilitaten, to modernize, to operate, to maintain and to complete a public purpose.

The closing stages of a public private partnership

The establishment of a public private partnership must comply with the procedure established by the Law 178/2010, the procedure consists of several stages:

Initiating public-private partnership project by publishing the announcement of intent by the public partner.

In view of preparing and publishing the announcement of intent the public partner is required to develop and approv the pre- feasibility study or the background study.

Pre-feasibility study is documentation that includes technical and economic justification for the PPP project, the main feature, and its technical-economic indicators. The results of the feasibility study should provide complete information on: the benefits which the project can bring to the community, the analysis of project alternatives, how the project meets the requirements and policies of the public partner, the financial closure in case the project cost can not be covered by public

[1] Commission of The European Communities (2008). " Commission interpretative communication". Commission interpretative communication on the aplication of community law on Public Procurmend and Concessions to Instutionalised Public-Private Partnerships (IPPP). http :// ec.europa.eu /internal_market/ publicprocurement/ docs/ppp/comm_2007_6661_en.pdf . 3 march 2011

revenues, the content and form of participation of the public partner in the project compliance with the law.

The background study is usually more developed than the feasibility study and which made for larger and complex projects, and contains documentation which includes technical and economic justification for public-private project, and the main characteristics and its technical-economic indicators. The background study results should provide complete information to justify : the project meets the requirements and policies of the public partner, were analyzed various alternatives of the project and that the best option is public-private partnership option, the project receive financial closure if the project cost can not be covered by the public revenues, public participation as partner in the project, with the observance of law.

Based on the pre- feasibility study or background study the public partner develops the attached file to the announcement of intent.

The attached document is aimed at publishing the presentation of the PPP project, and of the services which the public partner wants to find on the market, to inform potential investors about the target audience to be achieved through public-private partnership, evaluation criteria and the way of implementation of public-private partnership. The attached document should provide sufficient and consistent information to allow potential investors to submit a complete application letter, to formulate their views in terms of technical capacity, economic and financial measures necessary to achieve public-private partnership project, to provide clarification on project risks and how they will be distributed between the public and investor. The attached document must contain at least the required information on the public partner and initiated PPP project, details of the assessment of letter of intent for select investors that will conclude project agreements, general terms and conditions of the attached document, format, date limit and place of receipt of letters of intent, the information that investors need to submit the offer. The announcement of intent and the document attached are subject to approval of Deliberative Authorites, Government or deliberative organes which are managing public partners, as appropriate. The announcement of intent is published in the Electronic public procurement (ESPP) and if the amount of the project exceeds 5 million euro in the Official Journal of the European Union.

Preliminary analysis and selection of private investors for concluding agreements for the project.

The procedure for establishing the private investor who ends the public-private partnership is done in two stages: the stage of analysis and the selection and negotiation phase. In order to evaluate letters of intent and the accompanying documents of interested private investors the public partner appoints an evaluation committee.

Evaluation committee of letters of intent and of accompanying documents must be formed from at least five members within the experts and specialists of the public partner, and, if necessary, local and county councilors, ministers, state secretaries, members of boards of directors, or any other person with expertise in public private partnership project objective as an expert recruited. The role of the evaluation committee of letters of intent and of accompanying documents is to review and select candidates to sign agreements with the project.The criteria for the assessment of candidates with which to sign the project agreement must take into account the candidate's ability to understand the objectives of public-private partnership projects, the concept of financing and managing the project, the estimated value of the investment, the period determined by the PPP contract, and finally,

the concept of collaboration in the project company. Other assessment criteria for candidates belong to the general presentation of the candidate, his economic and financial situation, as well as his technical and professional capacity. The evaluation phase of the letters of intent ends with a evaluation report of the evaluation committee that is presented to the public partner for approval. The selected investors are invited by the public partner for negotiation and for signing the project agreement forms.

Project Agreement is the legal document prepared in advance of the PPP contract, concluded between the public partner and the investor in order to prepare the public-private partnership contract. Each project agreement has attached the investor letter of intent, the risk matrix together with the documents submitted by the investor. The Project Agreement must contain the general terms as: the definition of the signatory parties, the setting privacy conditions, the validity period of the project agreement, the obligations and rights of the parties, and the method of extinguishing mutual obligations during the negotiations, specific terms like the enumeration of the main criteria on which negotiations will take place, stating the compliance agreement.

Negotiating the public-private partnership contract with private investors.

In order to commence negotiations, the public partner has the obligation to negotiate the formation of the committee and its appointment.

The commission to negotiate with selected private investors, is made up of at least five members of the public partner experts and specialists, as appropriate, local and county councilors, ministers, state secretaries, members of the board or executive members of the public partners, or any other person with expertise in public private partnership project objective. The role of the negotiating committee is to negotiate the private partner that will make the final offer and will sign the contract of public-private partnership. The criteria for negotiation with candidates who signed the project agreement are: clear identification of responsibilities of the public partner and investor in public private partnership projects, determining the legal responsibilities of the partners in the previous stages of organization of the Project Company, clear identification of technical and financial responsibilities of the partners, to establish, under legislation and supporting documents, concrete rates of contribution of the two partners in the project company. Other criteria for negotiating with private partners consist of : clear identification of performance standards, schedules of activities on the performance of the PPP contract, determining the total amount of investment, clear description of parties participation, providing cost control, quality, service, safety, control operating and maintenance requirements, determination of the distribution and balance risk-sharing , the identify mechanisms for tracking performance, establish the terms for the transfer of public-private project objective, establish the terms and form public-private partnership contract, other objectives set by the public partner. Each negotiation session will end with a concluding part addressing the main issues discussed and the results obtained in the negotiation, with detailed outcomes of negotiations and the conditions agreed with each private investor. The conditions for the PPP project are agreed and accepted as a basis for defining the terms of the public-private partnership.

4. Closing public-private partnership contract

Following the development of the negotiations the private partner presents its final offer to the public partner. The public partner is obliged to prepare and communicate simultaneously to all

investors his decision on the hierarchy of investors by best offer criteria, submitted after negotiating process, expressed in terms of techno-economic and financial.

Any interested investor has the opportunity to appeal the decision on the appointment of the private partner and any other decisions taken by the public partner on the period of the award process, directly to the public partner, or in court, under the Administrative Litigation Law 554/2004The appeal shall be filed in writing at the public authority, which must consider all appeals filed, formulate a response and send it to investors who have questioned the decision in a prioritization manner. The public authority decision may be appealed in the administrative court according to the law. The appeal does not suspend further the proceedings for the conclusion of public private partnership contract, the court solution becomes mandatory on the date of delivery of a final court ruling.

The contract for public-private partnership project ends between the public and the private investor partner, selected with the procedure stipulated, and considering the agreed the type of activity, setting concrete obligations of the parties depending on the type of activity within public-private partnership project, timing definition of the contract, the rates of participation in the PPP, risk-sharing between the two partners, the performance criteria, the terms of withdrawal from the project, the penalty for the situation they do not meet the targets set in the contract. The PPP project agreement, in the negotiated form, is submitted as applicable, for approval of the Government or public authority, as holders of rights to manage the asset subjects to public-private partnership. The final form as approved may be modified only by the mutual agreement of the parties.

5. Setting up the project company

The project Company is organized and operates according to the Law 31/1990 regarding the economic companies, later republished as amended and supplemented, and other applicable laws, as a company, whose capital is owned by the public partner and private investor. The company operates througt the period of performance of the PPP contract, and is liquidated according to the law in its closing date. The Project company's main activity is operation and management on economic principles, according to the law and its establishment and functioning statute, of all phases of the PPP contract by taking over the obligations of the Contracting Parties. During the entire period of operation of the project company, it can not change the objects of activity and can not carry out economic transactions outsight the express purpose of PPP project, for which was created . The Project Company is led by a Board of Directors, in which both partners are represented in proportion to the participation in public-private partnership project. Evaluation of public partner participation to the capital and assets of the project company, to establish the proportionality of representation of the two partners in the Board will be done before starting the selection procedure by adding the value of propertys and services provided to the project. The property of the public partner participating in the project is evaluated by evaluators or legal authorized persons, at market value, according to the standards. The project company has no right to make decisions on the form of ownership or the administration of public or private property of the public partner that participates in public private partnership projects, on the entire duration of the PPP contract. Art. 33 paragraph 2 of Law 178/2010 establishes that between the project company and the bought public and private parties will be sign a management contract for goods and assets entrusted for administration and a service contract. Implementing Rules stipulates that the two contracts are based on the PPP contract and are the basic

elements for the internal rules of organization and operation of the project company. The contract management of assets entrusted to administration not to raise a particular difficulty beeing clear the object and purpose of this type contract. Instead the service contract could end up in practice problems as are not precisely defined and subject to signing such a contract. Instead the service contract could raise problems in practice because are not precisely defined the purpose and the subject such a contract.

Conclusions

This paper presents the forms of association governed by the laws in force for a correct understanding and differentiation of public-private partnership governed by Law 178/2010. It is important to delimit public-private partnership from other forms of association allowed by applicable law, the defining element of public-private partnership governed by Law 178/2010 being the completion of it `s objectives, by setting up by the two partners, public and private together, of a company project that aims to achieve the object of public-private partnership. To conclude the public private partnership Law 178/2010 provides a long and cumbersome procedure, its exposure in the legal text being confusing, with the use of ambiguous terminology. Implemeting rules comes to clarify the legal text by detailing and explaining the procedure for concluding public-private partnerships, keeping still some confusions between the notions. The paper proposes a clear presentation of the procedure as it is regulated in the law and its implementing rules, describing the stages that must be completed for the conclusion of public-private partnership, the parties involved and their obligations, and the main documents underlying the conclusion of such partnerships. Legislative framework of public private partnerships should ensure a balance between the interests of both public and private partners, by establishing a simple, clear and transparent procedure which can be easily applied. This kind of collaboration can be a economic growth factor, but the conclusion of such partnerships should be done with utmost care and responsibility by public partners. Besides the issues related to interpretation and application of legislation in regard, the conclusion of public-private partnerships, can raise problems pertaining to economic aspects, development of such partnerships without a long term investment strategy can attract negative effects.

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PEACEFUL SETTLEMENT OF DISPUTES IN THE UN SYSTEM

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Abstract
Peace and war have always been pressing issues for the international community. International actors perceived, defined and approached these concepts throughout time in various ways. From the classical perception of peace as a temporary situation between wars to the internationally newly embraced vision on structural peace and cooperation, the international community and its members have experienced, learned and evolved. During the 20th century a new basis was established for the international system and new political and judicial organisms were developed with the noble scope of maintaining peace and security in the world. The purpose of the present paper is that of revealing the importance of the consecration in the UN Charter system of the peaceful settlement of international disputes as a principle of international law and its consequences on the international, political and juridical evolution. One of the main objectives of the paper is that of analysing and explaining the principle of peaceful settlement of international disputes from a systemic point of view by revealing its relations to other twinned principles of international law, consecrated by the UN Charter. The paper also aims at identifying the specific means of peaceful resolution used by UN's main organs – the Security Council, the General Assembly and the Secretary-General – and briefly analysing the specific features of the International Court of Justice as UN's judicial organ and effective instrument in the peaceful resolution of international disputes.

Keywords*: United Nations, international, dispute, settlement, peaceful*

1. Introduction

The present paper deals with the peaceful settlement of international disputes in the framework of the UN Charter's system and with the specific procedures of pacification developed within this framework.

The importance of the matter subjected to the present research resides in the impact the consecration of this principle had on the evolution of the international system. Through the consecration of the principle of peaceful settlement of international disputes in the UN Charter, the peaceful means became the only ways of approaching the potentially belligerent situations.

The United Nations Organization – whose supreme goal is that of protecting future generations against war, through the unity of its members, with the noble scope of maintaining peace and security in the world and guaranteeing that force will never be used again in inter-state relations, unless this would be in the general interest of the international community – also created a series of new and specific procedures of peaceful settlement of disputes developed by its main organs (the Security Council, the General Assembly, the International Court of Justice and the Secretary-General) that consolidate, and complete other peaceful means of resolving conflicts, established by

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the UN Charter (art. 33 – international negotiations, mediation, conciliation, international inquiry, international arbitration).

The specific procedures used by UN organs in the process of peaceful settlement of international disputes are based on principles of international justice and are applicable both to cases of inter-state antagonisms that could potentially endanger international peace as well as to tensioned international situations that could lead to a breach of the international security. UN organs can rule over cases that regard its Member states as well as over disputes and situations that implicate or affect non-member states' interests, if the latter had previously accepted this ruling and agreed to respect the Charter's provisions on peaceful settlement of disputes.

The later established specialized institutions that today comprise the United Nations system, also developed, over time, within their framework, specific procedures of dealing with inter-state disputes, in accordance with the specificity of their international personality.

The present paper is elaborated primarily on the basis of document analysis, but it also aims at observing the general level of research in this field, by studying treaties , monographs and other research papers.

The main goals of the present research are that of revealing the essential changes in the international, political and juridical evolution of the world that were brought by the consecration of the principle of peaceful settlement of disputes in the UN Charter, through a systemic analysis of the specific means of peaceful resolution used by UN's main organs.

The present paper offers a general analysis of the vast subject of peaceful settlement of international disputes in the UN system, preparing the ground for a future more thorough research.

2. The Principle of Peaceful Settlement of International Disputes

The peaceful resolution of disputes reunites moral, political and legal aspects.[1] Therefore only a general, interdependent evolution of these three sides of the international system could generate the profound changes of the political and juridical international structures. The consecration of this principle in the UN Charter and of the means of putting into practice this fundamental international rule was possible only as a consequence of this evolution.

Until 1928, when the Briand-Kellogg Pact was adopted, the peaceful settlement of conflicts had not been recognized as a fundamental principle in inter-state relations, although some means of international understanding had been accepted by the states and legally consecrated in international documents (i.e. the 1899 and the 1907 Hague Conventions). But those were only alternative ways, mechanisms subsidiary to war, that were used sporadically by the states.[2] The provisions of the international documents that consecrated them were formulated only as recommendations, optional guidelines of state behaviour.

The 1928 Briand – Kellogg Pact generally condemned war as a way of resolving inter-state disputes, offering the first consecration of two twinned principles of international law – the principle of non-aggression and the principle of peaceful settlement of international disputes. The Pact had no time limits; it was opened to all existing states, thus giving expression to what was to become a long term attitude in international relations.

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[1] Marţian Niciu, *Drept internaţional public,* (Arad: Servosat,1999), 319

[2] *Ibidem*

The process of reconfiguring the international system triggered the adoption of international documents that gave substance to the newly defined principles. Therefore, in 1928 the Assembly of the League of Nations adopted The General Act for the Peaceful Settlement of International Disputes as complementary to the Pact (this was later revised by the UN General Assembly), while in 1933 the problem of defining aggression was strongly debated, culminating with the adoption of the London Conventions[3].

The 1945 UN Charter reflects history's lessons and the limited experience of the League of Nations. The document offers a strong, unequivocal consecration to the principle of peaceful settlement of international disputes. According to article 2, paragraph 3 of the Charter, „all Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

UN was to become an international centre whose noble undertaking was that of harmonizing states' efforts in order to maintain international peace and security, to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, as well as to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all.[4]

The interdiction of the use of force is at the core of the UN Charter system and thus the Member States' obligation of settling their disputes peacefully appears as a corollary to this interdiction, the two principles finding themselves, logically, in an interdependent relation. The provisions comprised in Chapter VI describe the consequences over the UN's institutional order, brought by the consecration of the principle of peaceful settlement of international disputes. Thus, the means of putting the principle into practice are enumerated: "the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."[5] It can be observed that the content of this article is expressed in strong, unequivocal terms: "the parties to any dispute (…) shall, first of all, seek a solution" through peaceful means. Therefore it enunciates, in a clearly, precise manner, an obligation for the states to peacefully resolve their disputes.

Ever since 1945 until nowadays, the international arena has experienced numerous turbulences and recoveries that have generated reconfigurations of the ways of approaching inter-state relations. Nevertheless they have always had the unanimous approval of the states, the peaceful settlement of disputes continuing to be the only accepted manner of approaching these kinds of situations.

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[3] Later, in 1974, the UN General Assembly adopted a Resolution that used the elements identified in the London Conventions to redefine aggression as "the use of armed force by a state against the sovereignty, the territorial integrity and the political independence of another state". According to this resolution the term "state" also included the concept of "group of states". (*UN General Assembly Resolution no. 3314 (XXIX), december the 14th 1974,* art. 1, in Adrian Năstase, Bogdan Aurescu, *Drept internaţional contemporan. Texte esenţiale,* (Bucureşti: Regia Autonomă Monitorul Oficial, 2000), 402)

[4] *Charter of the United Nations,* art. 2, paragraphs 2 and 3, Accessed March 9, 2011, http://treaties.un.org/doc/Publication/CTC/uncharter.pdf

[5] *Ibidem,* art. 33, paragraph 1

In 1970, the interdependent relation between the principle of peaceful settlement, the principle of nonaggression and the other principles defined in the UN Charter, was reaffirmed in the "Declaration on Principles of International Law, Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations". In 1982, the Manila Declaration on the Peaceful Settlement of International Disputes, approved by the General Assembly of the United Nations, in paragraph 13 of its Annex, imperatively states that "neither the existence of a dispute nor the failure of a procedure of peaceful settlement of disputes shall permit the use of force or threat of force by any of the States parties to the dispute"[6].A statement of great importance comprised in the Declaration is that the parties to a dispute as well as the third parties are obliged to abstain themselves from any act that would potentially increase the danger of the situation.[7] The Manila Declaration also enhances the principle of free choice of the peaceful means of settlement for the state parties to a dispute. This provision offers certain flexibility to the process because the peaceful means can be adapted and combined in very diverse manners in order to respond to different practical necessities.

As a consequence of this flexibility, a great number of bilateral and multilateral international instruments containing specific provisions on the peaceful settlement of disputes were adopted over time.[8]

The United Nations Organization was very active in promoting this principle. Thus, under its aegis, cumulating the entire experience gathered from the activities undertaken by the UN Secretary-General, from the support offered by the General Assembly, as well as from the increasingly voluminous jurisprudence of the International Court of Justice, were adopted numerous documents in order to clarify certain issues that raised problems in the practice of the states. For example, the General Assembly Decision no. 44/415, adopted on December, the 4th 1989 ruled over the states' recourse to good offices, mediation and conciliation. Also Resolution no 50/50, adopted on December, the 11th 1995 incorporated "The United Nations Model Rules for the Conciliation of Disputes between States", while Resolution no. 57/26 on the prevention and peaceful settlement of disputes, adopted on November, the 19th 2002 offers a detailed provision of the peaceful means of resolving disputes.[9]

3. The Security Council

According to the UN Charter, the Security Council is primarily responsible for the maintenance of international peace and security[10] because, due to its selective composition and

[6] *A/RES/37/10 Manila Declaration on the Peaceful Settlement of International Disputes,* Accessed March 10, 2011, http://www.un.org/documents/ga/res/37/a37r010 htm

[7] Alexandru Bolintineanu and Adrian Năstase, *Drept internaţional contemporan,* (Bucureşti: Institutul Român de Studii Internaţionale, 1995), 124

[8] For instance, the 1982 Convention on the Law of the Sea created a complex mechanism, according to which the parties to a dispute could choose between the jurisdiction of the International Tribunal of the Law of the Sea, that of the International Court of Justice, a general procedure of arbitration, a procedure of technical arbitration, in more technical sectors, while in other sectors, a recourse to conciliation was mandatory. (Ion Diaconu, *Tratat de drept internaţional public,* vol. III, (Bucureşti: Lumina Lex, 2005), 278

[9] *Resolution no. 57/26 on the prevention and peaceful settlement of disputes, adopted on November, the 19th 2002* in Nicolae Ecobescu, Nicolae Micu and Ioan Voicu,. *Peaceful Settlement of International Disputes,* vol. I, (Bucureşti:Institutul Român de Studii Internaţionale "Nicolae Titulescu", 2003), 17

[10] *Charter of the United Nations,* art. 24, paragraph , Accessed March 9, 2011, http://treaties. un.org/doc/Publication/CTC/uncharter.pdf

permanent functioning, was considered to be more efficient when it came to dealing with potentially dangerous situations and inter-state antagonisms. Any such disputes and situations that might cause a breach of the international peace and security can be brought to the attention of the Council, by any Member state or UN organ and even by a non-member, which is a party to that particular dispute if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the Charter.[11]

Therefore the Council can only intervene if the parties to a dispute give their consent, either through a common initiative or through separate solicitations. Also a cause can be subjected to its procedures if only one of the parties solicits it, when previous attempts of resolving the dispute through negotiations, mediation, conciliation, inquiry, arbitration or other such peaceful means proved to be inefficient. In this case the opposition of the other parties to the dispute does not affect in any way the Council's competence. The Council can also be seized unilaterally with a case, if it had been previously subjected to the judgement of the International Court of Justice and the enforcement of its decision had been blocked by the opponent parties' resistance.[12]

UN Member states that are not parties to the dispute can bring it to the attention of the Security Council if they consider that its persistence could lead to a threat to the international peace and security.

The Council can also be seized by the General Assembly or by the Secretary-General, if it is considered that the respective situation could endanger international peace. In such situations, the Council itself may take note of the problem and act spontaneously, even against the will of the parties to the dispute.[13]

When seized the Council firstly investigates if the situation qualifies to be introduced in its daily agenda. This inquiry can sometimes generate tensions, based on political differences. In order to avoid such discussions, it has been decided that if 9 members out of 15 vote in favour, the dispute shall become part of the agenda, without the possibility of veto from the permanent members of the Council.[14] This decision does not address in any way the Council's competence or the essence of the issue, but merely gives the parties the opportunity of presenting their case.

Usually the Council agrees to investigate any dispute or situation, even if its potential danger for the international peace is not evident. It is consider that any such endeavour is a legitimate exercise of its prerogatives.[15]

In order to settle a dispute or a situation brought to its attention and put to the agenda, the Council may organize an investigation (either through a subsidiary organ or a commission consisting of state representatives or independent personalities[16]) with the purpose of establishing whether the

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[11] *Ibidem,* art. 35, paragraph 2

[12] Raluca Miga-Beşteliu, *Drept internaţional. Introducere în dreptul internaţional public,* (Bucureşti: All Beck, 2003), 368

[13] However, in some cases the Council chose to take no initiative and waited for somebody to submit the matter to it and, sometimes, even to be asked specifically to put the item to the agenda. For instance, in 1973, when a Libyan airliner was shot down while flying over the Israeli-occupied Sinai. (Louis B. Sohn, *The Security Council's Role in the Settlement of International Disputes,* The American Journal of International Law, Vol. 78, No. 2 (Apr., 1984), 403)

[14] *Ibidem,* 369

[15] Ion Diaconu, *op. cit.,* 308

[16] For example, dealing with the situation concerning Western Sahara, the Council, at its 1850th meeting, on 22 October 1975, by its resolution 377 (1975), requested the Secretary-General to enter into immediate consultations with the parties concerned and to report to the Council on the results in order to enable the Council to adopt the appropriate measures. (*Handbook on the Peaceful Settlement of Disputes Between States,* Office of Legal Affairs, United Nations, New York, 1992, 112, Accessed March, 12, 2011, http://www.un.org/law/books/HandbookOnPSD.pdf)

respective case is in fact potentially dangerous to international peace and security. If the Council has established a subsidiary organ to carry out an investigation, it reserves the right of making the final determination as to the nature of the dispute or situation.[17]

If such a danger is eventually revealed, the Security Council will decide on the measures to be taken in order to resolve the issue. Usually it recommends appropriate procedures or methods of adjustment that can be general or specific.[18] Through the general recommendations, the Council invites the parties to a dispute to use peaceful means of settlement, while the specific ones actually indicate ways of understanding. Thus, the Council may recommend measures such as mediation or good offices performed by a third party, a commission, a personality or the Secretary-General.[19] According to the Charter, the Security Council should take into consideration the distribution of competence in the field of peaceful settlement of disputes between the Council and the International Court of Justice as the principal judicial organ of the United Nations.[20] Also the appeal to regional arrangements (the League of Arab States, the Organization of American States, the Organization of African Unity) or agencies is not excluded, if such a measure is in accordance with the nature and the characteristics of the dispute.

According to Chapter VI of the UN Charter, the Council adopts the above-mentioned measures through resolutions that are not compulsory for the parties. Nevertheless, because of their political significance and in light of the general responsibility of maintaining peace and security, provided by the Charter, usually the Member states feel obliged to take into consideration any recommendation made by the Council and to examine in good faith the possibility of conforming to it.

If the existence of a threat to the peace, a breach of the peace, or an act of aggression is revealed, the Council may decide to take measures based on the provisions of Chapter VII that are mandatory for the states. In such cases, the Council can also make use of armed force.

The increasingly richer practice of international relations generated divers forms of peaceful settlement from the preventive diplomacy to missions of peace-making, peace-keeping (including mandatory measures and military actions, based on Chapter VII), or peace-building (including both classical peaceful means and stronger measures of intervention). The complexity of the actual practice leads to a variety of combinations of measures when it comes to settling international disputes.

4. The General Assembly

After the Second World War the general mentality was that the most suitable structure, when it came to settling international disputes, was the Security Council, due to its five prominent

[17] *Ibidem*

[18] Raluca Miga-Beşteliu, *op. cit.,* 370

[19] For example, in the Indonesian question (1947), the Palestine question (1948) and the India-Pakistan question (1948-1950) the Security Council adopted decisions involving recourse to procedures of good offices, mediation, conciliation and arbitration or other peaceful means. Moreover, in the India-Pakistan case, the Security Council used a combination of such procedures as investigation, mediation, conciliation, good offices and arbitration (*Handbook on the Peaceful Settlement of Disputes Between States,* Office of Legal Affairs, United Nations, New York, 1992, 116-117, Accessed March, 12, 2011, http://www.un.org/law/books/HandbookOnPSD.pdf)

[20] For example, the Council recommended that the 1947 *Corfu Channel* incidents between Albania and the United Kingdom should be referred to the International Court of Justice. (*Corfu Channel Case (Preliminary Objection, Judgment of 25 March 1948,* Summary of Judgement, Accessed March 12, 2011, http://www.icj-cij.org/docket/files/1/1571.pdf

permanent members. The General Assembly had rather limited attributions in this matter. Nevertheless the Assembly had been endowed with a general competence that allowed it to discuss and make recommendations on any questions within the scope of the Charter or relating to the powers and functions of any organs provided for in the Charter.[21]

It could be said that the General Assembly had only a subsidiary position in the peaceful settlement of disputes. This implies some general attributions such as: examining and making recommendations to Member states or to the Security Council on the general principles of cooperation in the maintenance of international peace and security; discussing and making recommendations on any issues relating to the maintenance of international peace and security brought before it by any Member state, or by the Security Council, or even by a state which is not a Member of the United Nations[22]; recommending measures for the peaceful adjustment of any situation which it deems likely to impair the general welfare or friendly relations among nations.[23]

Despite its limited role in this field, there was certain reluctance towards mixing the attributions of UN's main organs and creating some sort of concurrency between them. In order to avoid such situations, the Charter provided two limitations of the Assembly's general role in the settlement of disputes: the General Assembly can not make any recommendation on any dispute or situation that is being examined by the Security Council, unless it requests so[24]; if a dispute or a situation is considered to be a threat to international security or a breach of international peace, that require stronger measures of containment, the Assembly should seize the Security Council with it.

Although the Assembly's role in the peaceful settlement of disputes lacks the independence that characterizes the Security Council's attributions, its position is of great importance. History revealed that it could play a significant part in ensuring a balance in the UN structure when the international context challenged its efficiency in resolving inter-state antagonisms. Thus, during the Cold War, the Security Council's activity was paralyzed, because of the differences between its permanent members. The solution against the blockage was given by the General Assembly Resolution no. 377 (V), adopted on November, the 3rd 1950. The adoption of this resolution addressed the strategy of the Union of Soviet Socialist Republics to block any decision by the Security Council on measures to be taken in order to protect the Republic of Korea against the aggression launched by military forces from North Korea. The Resolution extended the Assembly's attributions, allowing it to replace the Security Council.[25] Although the Assembly adopted a series of recommendations based on this resolution, it never actually recommended any constraining measures provided by Chapter VII.[26] Naturally, nowadays, the Resolution is no longer applicable.

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[21] *Charter of the United Nations,* art. 10, Accessed March 9, 2011, http://treaties.un.org/doc/Publication/CTC/uncharter.pdf

[22] *Ibidem,* art. 11

[23] *Ibidem,* art. 14

[24] *Ibidem,* art.12, paragraph 1

[25] "…if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security."(*General Assembly Resolution 377 (V) of 3 November 1950* in (*Handbook on the Peaceful Settlement of Disputes Between States,* Office of Legal Affairs, United Nations, New York, 1992, Accessed March, 12, 2011, http://www.un.org/law/books/HandbookOnPSD.pdf*)*

[26] Ion Diaconu, *op. cit.,* 311

In view of the Charter's provisions and the international practice of the states, it can be concluded that, over time, the General Assembly made great use of its attributions, adopting a multitude of recommendations and presenting itself as an effective forum for multilateral diplomacy.

5. The Secretary-General

The Secretary-General of the United Nations has had one of the most interesting evolutions in the history of UN's structures. The challenges of the international environment and the outstanding ways in which they were addressed by the distinctive personalities that filled this function, creating precedents and influencing its future development, have led to a continuous enlargement of its role.

According to article 97 of the Charter, the Secretary-General is "the chief administrative officer of the Organization". On the other hand, article 98 provides that his duty is also that of performing such other functions entrusted to him by the other principal organs, which, naturally, may include those in the field of the prevention and peaceful settlement of disputes. Article 99 specifies the Secretary-General's attributions in the field of peaceful settlement of disputes, providing that "the Secretary- General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security".

Initially, the role of the Secretary-General in the peaceful settlement activities of the consultative organs was very minor, but it radically changed. After the first decade in the existence of the United Nations Organization, the Secretary-General emerged as the dominant agent of peaceful settlement for the Security Council and the General Assembly. This was triggered by the growing need for an impartial and objective agent that could offer mediatory assistance to the states in settling their dispute.[27] Because, over time, the Secretary-General has proven to be a valuable instrument in the field of peaceful settlement of disputes, many functions of this kind were performed, implementing a great number of resolutions of other principal organs.

As to the competence provided in the article 99 of the Charter, it has been used effectively for purposes of the peaceful settlement of disputes, as a fulfilment of the Secretary-General's preventive role.[28]

Besides the attributions exercised on the basis of the Charter's provisions, the unique characteristics of this function, convinced states in some occasions to freely and directly approach the Secretary-General, demanding assistance in order to peacefully settle their disputes.[29]

Although the provisions of the Charter concerning the Secretary-General are not very broad in the way they were formulated, over time they have been interpreted in a free manner, in order to properly address the international realities, thus enhancing the prominent political, diplomatic role of this function.

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[27] This need was evident, for instance, in the conflict over the imprisonment of a number of United Nations fliers in Communist China in I954. Due to the international context of that time, no state could be viewed as acceptable to mediate the dispute. (Mark W. Zacher, *The Secretary-General and the United Nations' Function of Peaceful Settlement,* "International Organization", Vol. 20, No. 4 (Autumn, 1966), 727-728)

[28] One such example is the situation between Iran and Iraq in 1980. (*Handbook on the Peaceful Settlement of Disputes Between States,* Office of Legal Affairs, United Nations, New York, 1992, 131 Accessed March, 12, 2011, http://www.un.org/law/books/HandbookOnPSD.pdf)

[29] For instance, the 1970 dispute between the United Kingdom and Iran over Bahrein.

6. The International Court of Justice

If UN organs' procedures of pacification are compatible with political differences, when legal issues are at stake, an effective instrument of peaceful settlement has proven to be the International Court of Justice (ICJ), as UN's jurisdictional structure. The previous Permanent Court of International Justice had already prepared the ground for what was to be an important mean of dispute resolution. Based on principles of independence, neutrality, impartiality, the Court's jurisprudence has increased over the years, gaining popularity on the international arena.

Comprised of 15 independent magistrates, chosen by the General Assembly and the Security Council from among personalities of high moral reputation and exceptional professional background, mandated for 9 years, with the possibility of being chosen again for the function, the Court's jurisdiction is opened to all states members to the Statute of the Court, that is to all UN member states. States that are not UN members could have access to the Court's jurisdiction, if they agree to respect the provisions of the Charter, the Court's Statute and its rules of procedure. Moreover, according to article 93 of the Charter, "a state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council"[30]. Individuals and international organizations, as well as other structures, can not appear as parties before the Court.

One aspect that is particular to this organism and differentiates it from internal law jurisdictions is its facultative character. UN member states are not obliged to appeal to the Court every time they have a legal argument, unless they have previously agreed to do so, through a facultative clause. Nevertheless, according to the Court's Statute, states may at any time declare that they recognize as compulsory *ipso facto* its jurisdiction, without the requirement of any previous special agreement if the legal differences involve: the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; the nature or extent of the reparation to be made for the breach of an international obligation.[31]

The disputes are subjected to a two-phased contradictory procedure consisting in a preliminary written phase, followed by an oral one. Sometimes the preliminary phase can last for years. In such cases, the judgement proves to be an excessively long-term one.[32] Sometimes parties can avoid this by choosing to submit their dispute to a summary procedure, that is a simplified procedure, with a shorter preliminary phase. The summary procedure allows parties to renounce the oral phase of the procedure, in order to speed the process.[33]

The Court's judgement is based on: international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized; the judicial decisions

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[30] *Charter of the United Nations,* art. 93, Accessed March 9, 2011, http://treaties.un.org/doc/Publication/CTC/uncharter.pdf

[31] *Statute of the International Court of Justice,*art. 36, paragraph 2, Accessed March 9, 2011, http://treaties.un.org/doc/Publication/CTC/uncharter.pdf

[32] For instance, the dispute regarding the mandate over South-West Africa, between Ethiopia and Liberia, on one side, and South Africa, on the other side, was settled by the Court in six years. (George Elian, *Curtea Internaţională de Justiţie,*(Bucureşti: editura Ştiinţifică, 1970), 52)

[33] Nicolae Daşcovici, Mihail Ghelmegeanu, Alexandru Bolintineanu, *ONU. Organizare şi funcţionare,* (Bucureşti: editura Academiei Republicii Populare Române, 1962), 440

and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[34]

One particularly interesting feature regards the applicable law and consists of the Court's possibility of basing its decisions on the ex aequo et bono principle, if the parties agree to it. Although the Court's Statute provides it, the use of equity in its judgements has been rather controversial. It has been sustained that this would transform the whole process in a sort of arbitration which is not, actually, compatible with the normal judicial procedure.[35]Nevertheless, the Court did use equity in some cases regarding the interpretation and the applicability of certain provisions of international law and, also, in some special cases that exceeded any international norms.[36] It is to be noted that, although states never really asked the Court to base its judgement solely on the equity principle, neither would they resist against the use of equity in the Court's ruling.

During the process, the Court can adopt ordinances, ruling over procedural issues. Such rulings form the procedural jurisprudence and may be invoked before the Court in other cases.[37] Of great importance are, nevertheless, the Court's final decisions that actually settle the dispute. Their particularity resides in the international character of the parties and regards especially the possibility of enforcement. The decisions are adopted with the majority of the present magistrates and, once pronounced, they are compulsory for the parties to that specific dispute. If one of the parties resists its enforcement, the other party may seize the Security Council. In such cases, the Council may adopt recommendations or decide over the measures to be taken in order to ensure the enforcement of the Court's decision. Although the Security Council is not obliged to take such measures, it can politically sanction the resisting state, if considered necessary. Jurisdictional sanctions can also be applied by the Court, but their enforcement is rather problematical.

Since 1947, when the first case was referred to it, until nowadays, the Court has ruled over a very wide range of issues – from territorial problems to competency issues – contributing substantially to the evolution of the international law, although the Court's decisions are not considered sources of law, but only auxiliary means of determining it. Also the advisory opinions given by the Court to UN organs and specialized institutions, in accordance with the provisions of its Statute, have enriched, completed and clarified some aspects of international law.

Moreover, it must be said that this instrument of peaceful settlement, offering an impartial and neutral framework, has often been preferred by states. Similar structures have been founded at a regional level, in different parts of the world. Also, specialized jurisdictions were developed in order to settle legal disputes from various fields of activity.

7. Aspects regarding the peaceful settlement of disputes within the framework of UN's specialized institutions

The specialized institutions functioning within the UN system have elaborated and used, over time, special mechanisms of dispute settlement in their area of activity. In some instances, special organisms were created with the specific function of resolving disputes related to a certain field of activity.

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[34] *Statute of the International Court of Justice,* art. 38, paragraph 1, Accessed March 9, 2011, http://treaties.un.org/doc/Publication/CTC/uncharter.pdf

[35] George Elian, *op. cit.,* 50

[36] Alexandru Bolintineanu, Adrian Năstase, *op. cit.,* 152

[37] George Elian, *op. cit.,* 56

Within the economical organizations the diplomatic means of dispute settlement, such as negotiations, inquiry, conciliation and mediation are usually preferred. These flexible mechanisms are considered to be the most adequate and compatible with the less strict nature of these specialized structures. In most cases their goal is that of preserving the future cooperation between states and finding an equitable arrangement that would satisfy the parties to the dispute, as well as the organization itself.[38] Some institutions, such as the World Trade Organization, have even developed special and complex organisms for the peaceful settlement of disputes. Also the plenary organs play an important part in the settlement of disputes.

According to most of the constitutions of the UN's specialized agencies with financial and economic activities any question of interpretation of the constitutive treaties arising between any members of the organization or between a member and the organization is submitted to the organ of restricted membership for decision. If one of the parties is not represented in that organ, it will be entitled to representation. In any case where the organ has given such a decision, any member may require that the question be referred to the plenary organ, whose decision shall be final. Also disputes between the organization and a former member shall be submitted to arbitration.[39]

The technical organizations also prefer negotiations, but if the dispute persists, in many cases, it is subjected to their plenary organs. As a last resort, when the legal aspects of an issue are more prominent, they appeal to arbitration (e.g. the World Meteorological Organization) or to the jurisdiction of the International Court of Justice (e.g. World Health Organization)**.** In some cases (e.g. International Civil Aviation Organization, UNESCO), the organs of restricted membership are endowed with competencies regarding the peaceful settlement of disputes. Within the International Civil Aviation Organization, the Secretary-General of ICAO is sometimes asked to participate in the process of peaceful settlement, for instance, by performing investigations to determine de facts related to a dispute.[40]

In order to settle legal arguments of a specific nature, within the system of the United Nations there have been created special jurisdictions. One such example is the Tribunal for the Law of the Sea, based on the 1982 UN Convention on the Law of the Sea. In some aspects (regarding its structure and procedure), this specialized tribunal is similar to the International Court of Justice. Also the administrative jurisdictions such as the Administrative Tribunal of the International Labour Organization or the Administrative Tribunal of the United Nations are jurisdictional organs specialized in the settlement of disputes that might appear between UN institutions and their agents.

The creation of specialized jurisdictions and mechanisms of peaceful settlement within UN's framework is, in fact, an expression of the 20th century reconfiguration of the international system. It is proof of the fact that the principles of nonaggression and peaceful settlement of disputes and their numerous and various manifestations in the actual evolution of the international relations, are at the core of any future development of the international system.

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[38] Ion Diaconu, *op. cit.,* 312

[39] *Handbook on the Peaceful Settlement of Disputes Between States,* Office of Legal Affairs, United Nations, New York, 1992, 131 Accessed March, 15, 2011, http://www.un.org/law/books/HandbookOnPSD.pdf), 139-140

[40] *Ibidem*, 143

8. Conclusions

It can be observed that the consecration of the principle of peaceful settlement of international disputes, along with other principles that form the core of UN Charter, reflects the radical changes of the international system, incorporating new rules protecting values that emerged in international relations, as a consequence of their continuous evolution. Such values are durable peace and international security.

The procedures regarding the peaceful resolution of disputes and tensioned international situations developed by UN organs respond precisely to the need of ensuring international peace. Over time, they evolved and adapted their mechanisms in order to properly address the dynamics of international relations.

UN's Security Council still bears the main responsibilities of peaceful settlement of inter-state antagonisms and potentially dangerous situations. The range of instruments used in this endeavour has enriched, including skilful and creative combinations of measures. But in order to ensure the efficiency of its interventions, a close collaboration with other UN main organs is necessary. Thus, the General Assembly and the Secretary–General play an important part in the process of dispute settlement. The General Assembly became an important and effective forum of multilateral diplomacy, while the Secretary - General's political and diplomatic role was enhanced by its skilful activities, gaining popularity and appreciation in the international arena. On the other hand, the International Court of Justice, with its clearly defined competencies, completes the UN's system of peaceful settlement of disputes. UN's imposing jurisdictional organ proved its efficiency, surpassing problems regarding the enforcement of its decisions. Also its advisory opinions and voluminous jurisprudence are of great value for the evolution of international law. The UN Charter's system of peaceful settlement of disputes was reflected at a smaller scale and adapted to specific fields of activity within the UN's specialised institutions. Nevertheless, despite some obvious similarities, the specialised institutions have also developed procedures and organisms with original features.

The few general observations captured in the present paper may raise some interest to the future development of the UN's system and prepare the ground for more a thorough research on this subject, with the goal of trying to predict its future evolution, the obstacles that might appear and the optimal ways of surpassing them.

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THE INCOMPATIBILITY OF THE QUALITY OF TRADING COMPANY ADMINISTRATOR WITH THE ONE OF EMPLOYEE

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Abstract
Taking into consideration the provisions of the legislative modifications occurred in the field of society law, the clarification of the legal nature of the relationship between the administrator and the managed company comes as necessary, even more so that this subject was the source of controversy and divergences of doctrinary opinions. Far from elucidating the problem regarding the cummulation of the employee position with the one of trading company administrator, we only intend to present pro's and con's, starting from the doctrinary opinions and legal provisions in effect – Law no. 31/1990[2].

Keywords*: trading company administrator, labour contract, administrator mandate, the quality of employee, sole administrator, member of the administration council'.*

1. Introduction

Article 294 from the Labour Code states that '***in the sense of the present code, employees in management positions are understood as employee administrators [...]'.*** Although the possibility of concluding a labour contract with the trading company's administrators is not foreseen *expressis verbis*, the law test allows the entirely exceptional solution of cumulating the administrator position with the employee position. In opposition, Law no. 31/1990 regarding trading companies, as modified by Law no. 441/2006 and the Emergency Governmental Ordinance no. 82/2007, introduces an entirely contrary provision, according to which '***in order to fulfill their obligations, the administrators can not conclude a labour contract with the company'*** (article 137^1 Par. 3). A question is raised – which if the two legal texts represent a legislative error and which of them contains the adequate solution? We believe that an administrator can not conclude a labor contract, and this first of all because of an argument related more to the common sense, namely that such a contract will lack an essential feature of the legal labour relation, respectively the employee subordination to the other party, but at the same time, as far as the sole associate administrator is concerned, the conclusion of a labour contract would be similar to a self-employment.

2. Administrator's Position in the Joint Stock Company The adoption of the Law no. 441/2006 determined multiple amendments in the traditional structure of a trading company. On of

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[2] Republished in the Official Gazette no. 1066/17.11.2004, modified by Law no. 441/2006 for the amendment and completion of the Law no. 31/1990 regarding trading companies and by the Emergency Government Ordinance no. 82/2007, published in the Official Gazette no. 446/29.06.2007.

the innovating aspects[3] is the organization of two management mechanism of the trading companies, the unitary system with one or more administrators, case in which they make up the Board of Directors and a dual system with a directorship and supervision council.

In the *unitary administration system,* the General Ordinary Assembly of the stockholders is the body whose task also implies the assignment of the administrations, with a sole exception, that is the first administrators appointed by the articles of incorporation, according to Article 8 from the Law no. 31/1990. According to Article 137[1] paragraph 3 and 4 from the Trading Companies Law, introduced by the Law no. 441/2006 '*during the fulfillment of their mandate, the administrators cannot conclude a labour contract with the company. In case the administrators have been assigned among the company's employees, the individual labour contract is suspended during the assignment.*

The administrators can be any time revoked by the general ordinary assembly of the stockholders. In case the revocation intervenes without a just cause, the administrator is entitled to claims'.

Relevant for the analyzed problem are the provisions or article 144[1] in the form modified by the Emergency Government Ordinance no. 82/2007, stating the following in paragraph 1: '*the members of the Board of Directors will execute their mandate with the prudence and due diligence of a good administrator',* and paragraph 6, ' *the content and duration of the duties* (of not disclosing the confidential information and trading secrets of the company) *are foreseen in the administration contract'.*

So, during the mandate execution, the administrator can not conclude a labour contract with the trading company, according to the labour law legislation. According to the new regulations, the relationships between an administrator and trading company are governed by the laws applicable to the trading mandate, but whose execution requires the conclusion of an administration contract (referred to in paragraph 6 of Article 144[1] from the law) - which basically is still a commercial mandate contract.

We believe that by virtue of these legislative amendments, a logical distinction is made between the appointment (assignment) of the administrator, respectively the administrator mandate, grating him/her the rank of company body, and the conclusion of an administration contract between the administrator and the company, stating the administrator's obligations regarding the company's management. The administrator's appointment is independent from the conclusion of the administration contract, and in case of dismissal from the position, the administration contract can subsist (it will be terminated according to the own regulations). In this way, the administrator mandate can be terminated any time, even when the termination is abusive. And this because the mandate is based on the trust granted to the proxy by the mandate and since the trust in the proxy is gone, the principle is entitled to replace him/her, as trust can not be imposed.

In change, the administration contract, regarded implicitly as a contract separated from the legal mandate relationship, pertaining to the appointment in the position of administrator, can not be

[3] The innovation of the Romanian legislative with respect to the trading company management was required especially in relation with the French and German civil law, where the two management forms monist and dual are found, but especially in relation with the community law, respectively the ones in the Regulation no. 2157/ 08. 10.2001 regarding the organization and operation of the European joint stock company (S.E) with direct applicability on January 1st 2007. For details see D. Velicu – *O nouă dilemă în administrarea societăţii pe acţiuni. Sistemul monist sau dualist. [A New Dilemma in the Joint Stock Company Administration. The Monist or Dualist System]*, in RDC no. 1/2007, page 35-41.

terminated unilaterally and discretionary by the company, like the mandate contract. If the company still resorts to this measure, it is liable to the administrator for all damage caused to him/her by the unexpected termination (so, the provisions of Article 137[1] paragraph 4, thesis IIa are also applied). As a consequence, once the appointment is revoked, even when discretionary, the administrator can no longer act in this quality within the company and relationship with third parties. The administration contract is transformed in a simple service rendering contract and no longer has an object. The sole effects it can still have are the possible claims of the parties. Also, the duty of not disclosing the confidential information and commercial secrets of the company to which it has access in the quality of administrator (obligations expressly foreseen in the administration contract), also exists after the termination of the administrator mandate, according to Article 144[1] par. 5.

Another interesting innovation brought by the legislative modification is the definition of the director[4] position, and the clarification of his/her legal statute. According to the law, the director of the joint stock company is only the person which company management duties were assigned to. As a consequence, any other person will be excluded, no matter the technical denomination of the position occupied within the company (article 143, par. 5). Regarding their legal statute, article 152 refers to the provisions of Article 137[1] paragraph 3, stating that they apply to the directors under the same provisions as for the administrators. So, *the directors can not conclude a labour contract with the company, and in case they have been appointed among the company's employees, the individual labour contract is suspended during the appointment.* As such, they will not conclude a labour contract with the company, according to the labour law legislation, and the relationship between the director and trading company are currently governed by the rules applicable to the commercial mandate.

Prior to these legislative modifications, according to Article 152, paragraph 1 from the Law no. 31/1990, in the initial form, the execution of the company's operations could be entrusted to one or more *executive directors,* company officers. As the trading company's laws did not include provisions regarding their statute, the provisions of Article 294 Labour Code were applied in their case, being considered employees in management positions. So, in practice, the directors of the trading companies concluded a labour contract with him/her. With all this, according to Article 152, paragraph 3 from the law, they 'were liable to the company and third parties as administrators, for the execution of their duties …even if a contrary clause were to exist'. In other words, although they were employees, due to their position in the company, the executive managers were liable just like the administrators. So, in practice it was decided that: 'the executive directors are assimilated to the administrators, *even in case they are employees of the trading companies,* and have a civil liability and not a material one, according to the Labour Code, for damage caused to the company by their fault and in connection with their work. Under these circumstances, the damage claimed to be caused to the company by the executive director can not be recovered based on an enforceable title foreseen by the Labour Code (imputation decision), but a lawsuit is necessary for the employment

[4] Similar to the previous provisions, the administrator council is acknowledged to have the power to assign the company's management to one or more directors, following that one of them is appointed as general director. The organization manner of the directors' activity can be determined by the articles of incorporation or by decision of the Board of Directors. The directors can be appointed among the administrators or outside the Board of Directors. If foreseen by the articles of incorporation or by resolution of the general assembly of the stockholders, the president of the company's Board of Directors can be appointed as general director. In case of the joint stock company, whose annual financial situations are subject to a legal financial auditing obligation, the assignment of the company's management to the directors is mandatory.

/determination of liability."[5] In the same respect, 'the economic director is liable for the damage incurred by the trading company based on the legal provisions regarding the mandate and not according to the labour legislation'.

In case of the dualist administration system, the joint stock company will be administrated by a directorate to which a supervision council is added. The company's management is the sole responsibility of the directorate, executing the necessary and useful deeds for the performance of the company's object of activity, with the exception of the ones reserved by law as a responsibility of the supervision council and general assembly of the stockholders, also representing the company in the relationships with third parties (Article 153^1 paragraph 1, in connection with article 153^3 paragraph 1). Also, the assignment of the directorate's member is the responsibility of the supervision council, granting one of them the position of president of the directorate (Article 153^2 paragraph.1). Also, the members of the supervision council are appointed by the general assembly of the stockholders, with the exception of the first members, appointed by the articles of incorporation (article 153^6 paragraph1).

Regarding the legal relationship between the directorate's members and the ones of the supervision council, the law leaves no room for interpretations. Namely: The directorate's members can not the position of employees, as it stands out from the reference norm of Article 153^2 paragraph 6 to the provisions of article 137^1 paragraph 3, analyzed above; following the same idea, Article 158^8 paragraph 1, introduced by the Law no. 441/2006, expressly foresees that the members of the supervision council can not cumulate the quality of member with the position of employee within the company.

As such, neither the directorate's members, nor the ones of the supervision council can conclude a labour contract with the company, according to the labour law legislation, so that the relationship between them and the trading company are exclusively governed by the rules of the commercial mandate, included in their appointment document (articles of incorporation and resolution of the general assembly of the stockholders for the supervision council, respectively resolution of the supervision council by which the directorate's members are appointed).

Regarding the *remuneration* of the administrators/members of the administration council in a unitary system or of the supervision council's members in a dualist system, it is determined by the same document granting them the administration mandate: incorporation document, respectively the decision of the general assembly of the stockholders, according to article 153^{17} paragraph 1. The same text, in paragraph 2 also allows the determination of additional remunerations granted by the administration council, respectively supervision council, but only when allowed by the articles of incorporation or resolution of the stockholder's general assembly.

Regarding the directors', respectively directorate members' remuneration, it is determined by the body with competence for their appointment – the Board of Directors, respectively the supervision council, but within the limits allowed by the articles of incorporation or by resolution of the stockholders' general assembly.

In the situation in which, currently, during the mandate execution, the members of the Board of Directors (Article 137^1 paragraph 3), the directors (article 152, paragraph 1, in connection with

[5] The decision no. 5795/2004 of High Court of Cassation and Justice, civil and intellectual property section, in B.C no. 2/2005, page 42 ('The use by the defendant trading company of an enforceable title foreseen in the Labour Code (the imputation order) for the recovery of a damage claimed to be produced to the company by the general director T.N. is illegal, as it can be recovered solely based on a common law lawsuit').

article 137[1] paragraph 3), respectively the members of the supervision council (article 153[8]) and the ones of the directorate (Article 153[2] paragraph 6, corroborated with article 137[1] paragraph 3) can not conclude a labour contract with the company and so, they can not have the position of employees, as a consequence their remuneration is not similar to the wage.

Under this aspect, the provisions of article 152, paragraph 2 and 3 from the Law no. 31/1990, with amendments, are relevant, as according to them *the remuneration of the managers and members of the directorate, obtained based on the mandate contract is similar to the wage*, from the fiscal point of view, under the aspect of the owed taxes, as well as from the point of view of the duties resulting from the legislation regarding the public pension system and other social securities rights.

3. Administrator's Situation in the Limited Liability Company As far as the limited liability company is concerned, the legislative amendments intervened first by Law no. 441/2006 and subsequently by the Emergency Governmental Ordinance no. 82/2007 are far from resolving the issue of cumulating the quality of employee of the trading company's administrator.

So, in the initial regulation of Article 196[1] paragraph 3 from the Trading Company Law, introduced by the Law no. 441/2006 '*the sole associate can have the quality of employee of the limited liability company whose sole associate is, except for the case in which he/she is sole administrator or a member of the Board of Directors'*. The law text was clear, the sole associate could also have the quality of company's employee, but in other positions than the ones specific for administration. So, in an indirect manner the sole administrator or member of the Board of Directors was forbidden from cumulating the administrator mandate with the employee position within the managed company.

It must be mentioned that the legal text ends even for a short period of time, the doctrinary and jurisprudence divergences regarding the possibility of the sole associate to conclude a labour contract with the trading company, no matter if it has the quality of an administrator or not.

So, until the mentioned legal provision came into effect[6] it was argued that the conclusion of the individual labour contracts between the trading company and associates, including the sole associate from the limited liability company – no matter if they have the quality of administrators or not – for the development of activities useful to the company (others than the ones specific for the administration), is perfectly admissible from the legal point of view. The situations in which there are express provisions for the opposite, mentioned in the company contract and statute, represent an exception. In strict reference to the individual labour contract of the sole associate of a limited liability company, it was argued that it can not be sustained that we are in the presence of a contract concluded with himself/herself, because the same persons signs the same contract, but in different qualities. So, if the sole associate of a limited liability company or the sole administrator of a trading company concludes an individual labour contract with him/her, he/she signs twice, and each time, having a double position. Namely, on the one hand as company's representative being employed, and on the other hand as employee. As such, the contract is concluded between two different law subjects – the trading company and the employee – even if the same person signs for both, having different qualities.

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[6] S. Beligrădeanu – Acceptability of concluding labour contracts or civil contracts between the trading companies with private stock and their associates, in RDC no. 6/1993, page 126-128.

I. Tr. Ştefănescu – *Asociatul unic-administrator poate fi concomitent şi salariat al societăţii sale cu răspundere limitată? [Can the sole associate-administrator be also the employee of his/her limited liability company?]* , in RDC no. 4/1998, page 29.

The labour law[7] practice, took a completely different position, determining the impossibility of the sole associate to conclude an individual labour contract with his/her own limited liability company. Even more so, we believe that the interdiction of concluding such a contract by the sole associate-administrator was necessary, even for the development of activities useful to the company, others than the ones specific to the administrator. In this manner, 'the sole associate of a limited liability trading company incorporated according to the Law no.

31/1990, republished, regarding trading companies, can not conclude an individual labour contract, with its own company. But, from the legal point of view, even in the performance of the labour right foreseen by the Romanian Constitution, nothing prevents the sole associate to render an activity based on an individual labour contract on another trading company'. The conclusion is based on the specific nature of the individual labour contract, as legal document from the labour law. 'The lack of essential features, specific for the labour contract, such as subordination, as well as the impossibility of bilateral negotiation of this legal document, the sole associate finding himself/herself in the paradox situation of being both employer as well as its own employee, leads to the thesis according to which the sole associate can not conclude an individual labour contract with its own trading company'.

Following the modification occurred by the Emergency Government Ordinance no. 82/2008, currently, the same law text (article 196[1] paragraph 3) has the following content: *'the sole associate can have the quality of employee of the limited liability company whose sole associate he/she is'* , leaving aside the phrase 'except for the case in which is has the quality of sole administrator or member of the administration council', offering the possibility of different interpretations.

So, it was argued that [8] in applying the text of law, a short term or long term labour contract will be concluded between the sole associate and the company, governed by the labour code. . The sole associate can have the quality of employee of the limited liability company, no matter if it has the quality of administrator, as, unlike the regulation previous to the approval of the Emergency Government Ordinance no. 82/2007, currently this text no longer makes distinctions in this respect. The same conclusion would come out from the provisions of Article 197 paragraph 4, expressly foreseeing that the provisions regarding the administration of the joint stock company, also including the administrator's interdiction of being an employee, do not apply to the limited liability companies.

Also, it was stated [9] that in case of limited liability companies with a sole associate, the cummulation between the quality of administrator and the one of employee is allowed, solution resulting from the provisions of Article 196[1] paragraph 4 from the law (now Article 197 paragraph 4, following the modification occurred by the Law no. 88/2009) , according to which the provisions regarding the administration of the joint stock company are not applicable to the limited liability companies.

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[7] From the practice of the Ministry of Labour, Social Solidarity and Family - questions and answers in the Labour law, no. 1/2004, page 187.

[8] C. Cucu, M.V. Gavriş, .C.G. Bădoiu, C.Haraga – Law of trading companies, no 31/1990. Bibliographical bench marks. Legal practice, decisions of the Constitutional Court, notes. Hamangiu Publishing House, 2007, page 442.

[9] M. Fodor, I. Rădulescu – *Aspecte privind cumulul de funcţii în cazul administratorilor societăţii comerciale* [*Aspects Regarding the Cummulation of Positions in Case of Trading Companies's Administrators]* in R.R.D.M. no. 6/2007, page 33. *Furthermore,* authors wrongly consider that such a solution is legally applied, sustaining in note 27 that '*prior to the legislative application of this solution,* the doctrine allowed for the sole associate –administrator to be the employee of his/her limited liability company, at the same time".

Furthermore, a part of the doctrine extrapolated the possibility of cumulating the quality of employee for all administrators of the limited liability company and not just for the sole associate – administrator. So, it was stated[10] that 'since the provisions of the Law no. 31/1990 regarding the administration of joint stock companies are not applied to the limited liability companies, it means that the administrators can have the quality of employee'. In the same manner, it was considered that [11] „based on the mandate contract, *if the administrators are also employees (situation possible in case of limited liability companies)*, the liability is still civil and not connected to the labour law".

At the same time, the issue was judiciously raised [12] if Article . 196[1] paragraph 3, 'allows the sole associate of the limited liability company to have the quality of company employee both of the position of administrator, as well as *for any other position,* or on the contrary, *exclusively* for other positions (such as legal advisor, economist, engineer, etc.) within it. In the sense of the first hypothesis, respectively the article applies both regarding the position of company administrator, as well as for any other position existing within its structure. Starting from a historical interpretation it was argued towards the previous regulation that 'the Government Ordinance no. 82/2007, rephrasing the content of the norm under discussion, suppressed the exception from its end, and this very cancellation proves, beyond doubt, the legislative's intention of allowing the sole associate to exercise the position of company administrator within the limited liability company (administrator or member of the Board of Directors), by concluding an individual labour contract in this respect (between him/her and the company).' In this manner, it was shown that *de lege lata*, Article 196[1] paragraph 3 from the Law no. 31/1990 regulates an exception from the rule (which we completely agree with), that all administrators of the trading companies, shareholders/associates of the company or not, including administrators (sole or members of the Board of Directors) of the limited liability company can have this quality, according to the Law no. 31/1990, exclusively based on a mandate contract. But, as an exception, the sole associate of the limited liability company whose sole associate he/she is, has the option of fulfilling the activity of sole administrator or member of the Board of Directors, either by concluding an individual labour contract, or based on a mandate contract. In conclusion, as an exception, the law for the administrator – sole associate of a limited liability company states that he/she can be employed as an administrator.

We believe that on a more thorough analysis, the legislative provision is far from being that clear, offering the possibility of interpretation. So, first of all, Article 196[1] paragraph 3 is desired to be an exception regulation, in the sense that only the sole associate can have the quality of employee of the limited liability company. *Per a contrario*, in case of the limited liability company with more than one associate, they can not hold the position of company employees.

Second of all, the sole associate can have the quality of employee of the limited liability company, but only for different positions than the one of administrator, and if it is also an administrator it will cumulate its mandate with the quality of company employee. Otherwise, there

[10] S. Angheni, M. Volonciu, C. Stoica – *Drept comercial, [Commercial Law]* edition 4, All BECK Publishing House, Bucharest 2008, page 185.

[11] C. Leaua – Trading companies. Special Procedures, C.H Beck Publishing House, 2008, page 242. With a critical note that the administrator can not be employees for any limited liability trading company, but such a situation, which currently seems to be possible exclusively for the associate, as administrator of the limited liability company, see I.T Stefanescu, S Beligrădeanu – *Natura raportului juridic dintre societăţile coerciale şi administratorii sau directorii acestora* [*Nature of the Legal Relationship between the Trading Companies and Their Administrators or Directors]* in the Law no. 8/2008, page 51.

[12] Likewise.

would be an unjustified difference of a legal regime between the sole associate – administrator that can be an employee of the company whose sole associate he/she is, and the unassociated administrator, that as it does not comply with the limiting provisions of Article 196[1] paragraph 3, could not have the quality of employee.

Thirdly, if in case of a limited liability company with a sole associate, he/she would be allowed to be employed in the position of administrator, a different legal regime would be created than in case of the limited liability company with more associates. So, compared with the restrictive provisions of Article 196, paragraph 3, in the sense that only the sole associate can have the quality of company employee, it clearly stands out, that in case of a limited liability company with more associates, they can not conclude a labour contract with the company. If the law text would regard the employed sole associate of the company also in the administrator position, we can not see a reason for which the law would not order a different regime for the limited liability company with more associates, which as it does not comply with the limiting provision of the law it might not conclude a labour contract with the company as associate administrators.

So, with regard to these reasons, the text must be interpreted in a restrictive manner, in the sense that the sole associate can have the quality of company employee, but only for other activities than the one of company management. And, if the sole associate is also the administrator, he/she can conclude a labour contract with the company, bit for other activities than the ones developed as an administrator (engineer, accountant, legal advisor, doctor – for the trading companies with such a unique object of activity). Only in this respect, does the current legislation allow the cummulation of the quality of company employee with the position of administrator. In the situation in which the sole associate would have also been allowed to be employed in the administrator position, the law must have foreseen this in a precise manner. As a consequence, the sole associate does not have the option of fulfilling the administrator activity, either based on a labour contract, either based on a mandate contract, but exclusively based on a mandate contract and he/she can conclude an individual labour contract with the company only regarding any other positions than the one of administrator.

4. Conclusions

The provisions of Article 137, paragraph 3 from the Law no. 31/1990, introduced by the Law no. 441/2006, also have special importance, and according to them '*during the fulfillment of their mandate, the administrators cannot conclude a labour contract with the company. In case the administrators have been assigned among the company's employees, the individual labour contract is suspended during the assignment*'. The law text introduces a new case of incompatibility, namely the one of the quality of administrator with the one of employee[13]. The incompatibility flows from the antithetic character of the legal relationships implied by each of the two activities.

Some determinations are necessary regarding the text above:

First of all, although among the regulations regarding the unitary system for the joint stock company administration, the text does not only target the sole administrator but also the members of the Board of Directors. Quite the contrary it is incident regarding the directors (article 152, paragraph 1), respectively the directorate's members (article 153[2] paragraph 6) from the joint stock companies,

[13] S. Angheni, M. Volonciu, C. Stoica – *Drept comercial, [Commercial Law]* edition 4, All BECK Publishing House, Bucharest, 2008, p.150; M. Fodor, I. Rădulescu – *op. cit*., în R.R.D.M no. 6/2007, page 32.

as well as the administrators of the stock partnerships (article 187). The solution results from the provisions of the mentioned articles, which regarding the directors and directorate's members, expressly refer to the Article 137 [1] paragraph 3. Regarding the members of the Supervision Council, in the dualist administration system of the joint stock companies, the law expressly foresees the interdiction of cumulating the quality of Board member with the one of employee.

Regarding the stock partnership, article 187[14] from the law, refers generally to the norms applicable to the joint stock company, with the exception of the ones regarding the dualist administration system, resulting that the administrations of the stock partnerships also act according to the provisions of article 137 [1] paragraph 3, and as a consequence, they too can not have the quality of company employees, during the execution of their mandate.

Also, the legal text applies together with the Emergency Government Ordinance 82/2007, also for the administrators of the limited partnership companies and unlimited companies, since Article V from the Ordinance does not include limitations or exceptions.

Referring to the limited liability companies, article 197 paragraph. 4 from the law, determines that 'the provisions regarding the administration of the joint stock company are not applicable to the limited liability companies'. The mentioned text considers the fact that the provisions of the unitary or dualist administration system are not applied for this type of company and they remain specific for the joint stock company. It can not be extended to the administrator's interdiction of being employees, determined by article 137[1] paragraph 3, in the sense of not applying the interdiction for the limited liability company. As such, even in the case of limited liability companies, the administrators can not also be employees, and they can not conclude a labour contract during their mandate.

In conclusion, although the laws forbidding the administrators to conclude a labour contract refers to the administrators of the joint stock companies, in reality it refers to any administrator, no matter the company's legal form[15].

Second of all, from the text formulation, that during the mandate, the administrators can not conclude a *labour contract with the company,* it stands out that they cannot be company employees neither for the position of administrator, nor for any other position[16]. In other words, currently the law forbids any form of cumulating the quality of administrator with the one of employee. The solution is also deduced from the provisions of Article 138[2] paragraph 2, letter b from the law, enumerating among the criteria for appointing the independent administrator that of the person 'not being employed within the company or another company controlled by it or not having such a labour relationship in the last 5 years'. As such, if the administrator has been appointed among the company's employees, his/her labour contract is suspended during the mandate. In this manner, the legislative, aside from the incompatibility case, also introduces a case of suspending the labour contract by law. It is about a suspension by law, operating by effect of the commercial law (and not

[14] According to Article 187 from the law ' The provisions of the present chapter (respectively the one regarding stock partnerships) are completed by the norms regarding joint stock companies, except for the ones regarding the dualist administration system'.

[15] In this respect, see S.D. Cărpenaru – *op. Ci.t,* edition 4, page 234; I.T. Ştefănescu, Ş Beligrădeanu – „Natura raportului juridic dintre societăţile coerciale şi administratorii sau directorii acestora" [Nature of the Legal Relationship Between the Trading Companies and their Administrators or Directors] in Dreptul [The Law] no. 8/2008, page 55.

[16] Since the legislative uses the expression 'the administrators can not conclude with the company...', it means that such a cummulation is possible, but not at the same employer. See M. Fodor, I. Rădulescu – *op. cit*. în R.R.D.M. no. 6/2007, page 32, footnote 11.

of the law regarding the labour relationships), to which the provision of Article 50, Labour code is added. The moment when the labour contract is suspended is the same moment when the administrator is appointed (the appointment for the statutory administrator, and selection for the one subsequently appointed), appointment materialized by the company's registration to the Trade Registry, respectively by registering amendments at the Trade Registry regarding the new administrator.

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THE PILOT JUDGMENT PROCEDURE OF THE EUROPEAN COURT OF HUMAN RIGHTS. THE CASE OF MARIA ATANASIU V. ROMANIA

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Abstract
This article analyses not only the case of Maria Atanasiu and Others v. Romania (the "case of Maria Atanasiu"), but also the new "pilot judgment procedure" of the European Court of Human Rights (the "Court" or the "ECtHR"), aimed at resolving the systemic human rights violations occurring in the Member States. The pilot judgment procedure has had a slow and uncertain start, since its inception in the case of Broniowski v. Poland in 2004. Although it has drawn some criticism, the pilot judgment procedure clearly has the potential to help solving the problem of high numbers of similar applications coming before the Court. When the Court is faced with a large number of cases raising the same issue, the pilot judgment procedure should be tried. This article analyses also if the repetitive cases are the symptoms of the failure to take appropriate general measures as part of enforcement process. Through the prism of Maria Atanasiu's case, we attempt in this article to discern the effectiveness of pilot judgments in tackling systemic human rights violations.

Keywords*: ECHR, pilot judgement procedure, Maria Atanasiu, Broniowski, systemic.*

1. Introduction

The Court started functioning in 1959 at the heart of the Council of Europe, an international organisation set up after Second World War to protect democracy against dictatorship and thereby to avoid the recurrence of the massive human rights violations of the war. It is well known that from a timid beginning the Court has grown into a full-time institution successfully dealing with thousands of cases each year. Its case law is generally perceived to be among the most developed and extensive of all international human rights institutions and most of its judgments are routinely implemented[1] by the Contracting Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms (the "*ECHR*" or the "*Convention*").

But the accession of Central and East European States into the Convention system was both *a threat* and *a promise* to the system, as Professor Sadurski underlines[2]. *The threat* resulted not only from the substantial increase of the number of Contracting Parties and that of the case-load, but also

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[1] Buyse Antoine, *The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges,* Published in Nomiko Vima (Greek Law Journal), 2009, p. 1;

[2] Sadurski Wojciech, *Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments*, Human Rights Law Review 9/2009, Oxford University Press, p. 397 - 398;

from the demise of a consensus which was, originally, presupposed by the system of protection of human rights in Western Europe: original members of the Council of Europe were "*like-minded*" and the Convention system did not represent a challenge to their internal patterns of human rights protection. The *promise* consists in the possibility for the Court to abandon the fiction that it is merely a sort of super-appellate court which scrutinises individual decisions rather than laws in Contracting Parties. This shift towards a quasi-constitutional role, going beyond the simple identification of wrong individual decisions so as to point to systemic legal defects, was triggered by systemic problems within the new Contracting Parties, while also facilitated by collaboration between the Court and national constitutional courts. The emergence of so-called "*pilot judgments*" is the best and most recent illustration of this trend.

Nowadays, it is considered that the ECHR system represents the most effective human rights regime in the world.

2. Paper content

2.1. The Reform of the Court

It is important to underline that the Convention is alive, it evolves, it is a *"living instrument which must be interpreted in the light of present-day conditions"*[3], and therefore its text is amended from time to time through protocols. The last protocol (*i.e. the Protocol no. 14*) entered into force on 1st June 2010, after a long period of struggle, although the Contracting Parties agreed the text of the institutional and legal reforms of Protocol no. 14 in May 2004.

However, in 2004 President Wildhaber expressed the view that Protocol no. 14 would not "*solve all the Court's problems*". Consequently, the Strasbourg authorities have been exploring the possibilities of even more radical long-term reforms of the ECHR system.

In May 2006, the Ministers' Deputies representing the Contracting Parties at the Council of Europe, published a Report on this topic disclosing that 10 States (*i.e. Andorra, Azerbaijan, Belgium, Bosnia and Herzegovina, Czech Republic, France, Poland, Portugal, Russian Federation and Turkey*) had yet to ratify Protocol no. 14. At that time, the Court was already prepared for the implementation of the Protocol and awaited with "*some impatience*" full ratification. The Deputies adopted new Rules governing the Committee of Ministers' supervision of the execution of Court judgments and friendly settlements[4], according priority to the supervision of cases where the Court has identified a systemic problem in the legal/administrative system of a State ("*pilot judgment*" cases of which *Broniowski v. Poland*[5] was the first example). They were hopping that through the new Rules to achieve a swift general solution to a problem that affects many persons and relieve the Strasbourg authorities from having to determine a multitude of similar applications.

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[3] The ECtHR acknowledges in several judgments; for example in the case of *Vo v. France*, Application no. 53924/00;

[4] Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements, 10 May 2006; available at https://wcd.coe.int/wcd/ViewDoc.jsp?id=999329&Site=CM;

[5] Application no. 31443/96; available at http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Broniowski&sessionid=66977104&skin=hudoc-en;

In May 2005, the Heads of State and Government of the Council of Europe decided to establish a Group of Wise Persons[6] (the "*GWP*") to develop proposals for the long-term effectiveness of the ECHR control system. From the Interim Report of the GWP submitted to the Committee of Ministers in May 2006[7], we learn that the caseload crises facing the Court is continuing to increase, despite the Court's enhanced productivity in processing applications. At the end of September 2006, 89,000 cases[8] were pending before the Court. Whilst the GWP considered that the reforms contained in Protocol no. 14 will be "*extremely useful*" they estimated that the changes will only increase the productivity of the Court by 20% to 25%.

Therefore, the GWP had to produce recommendations that will be even "*more radical*" to enable the Court to perform its responsibilities over the long term. The GWP's basic premise was that the Court should be "*relieved*" of a significant number of cases. Manifestly inadmissible and repetitive cases are two categories that should be considered for new methods of processing. In the opinion of the GWP, the Court ought to "*concentrate on its function as the custodian of European public order in the human rights field*".

As Professor Alastair Mowbray distinguishes[9], *nine categories of reform measures* were identified by the GWP as deserving further consideration. *First*, enabling the Committee of Ministers to amend, by unanimous resolution, the organisation of the Court. The GWP noted that such a flexible procedure, which does not require the drafting and ratification of a Protocol, had been used a number of times within the European Communities. However, the GWP emphasised that such a power should be limited to matters affecting the Court's operating procedures and only be invoked at the request of the Court.

Secondly, the GWP is contemplating advocating the creation of a new body, the "*Judicial Committee*", to process specified categories of applications. The Judicial Committee would be "*integrated with the Court but separate from it*", so that applications would be determined by a judicial, and not an administrative, decision, whilst enabling the Court to be relieved of large numbers of cases. If some Registry staff were allocated to support the work of the Judicial Committee, the costs of this reform would be reduced.

Thirdly, the GWP envisaged a more active role for the Council of Europe's Commissioner for Human Rights in the future work of the ECHR's control system. The Commissioner could develop

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[6] The GWP's members were *Mr Rona Abay*, Professor of Law, Istanbul Bilgi University and a member of the Human Rights Chamber for Bosnia and Herzegovina; *Ms Fernanda Contri*, the first female Justice of the Italian Constitutional Court; *Mr Marc Fischbach*, former Judge at the Court; *Ms Jutta Limbach*, former President of the German Constitutional Court; *Mr Gil Carlos Rodriguez Iglesias* (elected chair), former President of the European Court of Justice; *Mr Emmanuel Roucounas*, President of the Academy of Athens; *Mr Jacob Soderman*, former European Ombudsman; *Ms Hanna Suchocka*, former Prime Minister of Poland; *Mr PierreTruche*, former President of the French Court of Cassation; *Lord Woolf of Barnes*, former Lord Chief Justice of England and Wales; and *Mr Venaimin Fedorovich Yakovlev*, Chief Justice of the Russian Supreme Arbitration Court; available at https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM(2006)203&Language=lanEnglish&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864;

[7] Interim Report of the Group of Wise Persons to the Committee of Ministers, 10 May 2006, CM(2006)88; available at https://wcd.coe.int/wcd/ViewDoc.jsp?id=1063779&Site=CM;

[8] According to the Court, approximately 139,650 applications were pending before a judicial formation on 1 January 2011[8];

[9] Mowbray Alastair, *Beyond Protocol 14*, Human Rights Law Review, 6/2006, Oxford University Press, p. 581*;*

his cooperation with national ombudsmen to seek to identify systemic problems in Member States and secure redress without the need for complainants to take their cases to the Court.

Fourthly, the GWP considered the possibility of enabling the Court to give "*judgments of principle*" that would be binding upon all Contracting Parties. Where a case involves an issue of principle that affects States other than the respondent State, all Contracting Parties would be invited to participate in the proceedings. Empowering the Court to deliver such judgments would enhance its constitutional role and also reduce the need for separate judgments in cases involving different States. *Fifthly*, the GWP endorsed the Court's adoption of the "*pilot judgment procedure*" and considered that the ECHR might need amendment to facilitate this new procedure.

Sixthly, the GWP recognised that complaints about the unreasonable length of domestic proceedings[10] continue to represent a great burden for the Court[11]. Many of these complaints concern the failure of domestic legal systems to provide redress for such delays[12]. Therefore, the GWP proposed drafting a "*convention text*" which would oblige the Contracting Parties to establish domestic measures of redress for delayed proceedings (and excessive detention on remand in breach of Article 5(3) of the ECHR). *Seventhly*, the GWP considered that the relationship between the supreme courts of Contracting Parties and the Court was of "*paramount importance*". The possibility of introducing a mechanism for a preliminary ruling by the Court, based upon the European Union system, was considered to be unsuitable by the GWP.

However, the latter believed that it was worthwhile considering whether it would be desirable to enable supreme courts to request consultative opinions from the Court on interpretations of the ECHR. In the opposite direction the Court might be given powers to remit suitable cases to national courts. These could include the determination of the precise amount of compensation to be awarded as just satisfaction, following a judgment by the Court finding a breach of the applicant's Convention rights; and cases governed by existing judgments of the Court.

The GWP supported the *extension of the Council of Europe's Information Office in Warsaw project*, which, *inter alia,* provides guidance to potential applicants on the process and conditions of lodging complaints at Strasbourg, to other Contracting Parties where similar services are needed. By providing potential applicants with information on domestic remedies and the admissibility criteria of the ECHR, an information office can help reduce the numbers of ineligible applications requiring formal determination by the Court. The final topic examined by the GWP was *the need for increased dissemination of the jurisprudence of the Court*. The GWP believed that primary responsibility for translation and distribution lay with the Contracting Parties. The Committee of Ministers noted the submission of the GWP's Interim Report and approved its publication.

2.2. The "*Pilot Judgment Procedure*"

A traditional perception of the status and reach of the ECtHR's judgments was that they carried a purely individualised implication. The Court was perceived as a kind of tribunal of last resort, whose role was limited to specific cases of rights violations after the exhaustion of all domestic remedies. According to this view, it did not fall on the Court to assess the validity of

[10] Contrary to Article 6, paragraph 1of the ECHR;
[11] Amounting to 25% of the Court's judgments in 2005;
[12] See, for example, the unanimous Grand Chamber's judgment in *Riccardi Pizzati v Italy* Judgment of 29 March 2006 (Application no. 62361/00), finding the Pinto Law in breach of Article 6, paragraph 1 of the ECHR;

domestic laws themselves. However, this traditional perception was never completely accurate[13]. As Professor Sadursky underlines, drawing a sharp distinction between bad decisions and bad laws ("*bad*" in light of the rights enshrined in the Convention as interpreted, at various points of time, by the Court) is not very credible. For instance, when deciding on an alleged breach of Articles 8 - 11, once the Court has ascertained that the challenged decision was taken on the basis of a "*law*" (which is the first tier of analysis, as required by the clauses providing for legitimate limitations of those rights), the two subsequent tiers scrutiny inevitably involved at times a critical analysis of the law itself.

And the Court has on occasions admitted this explicitly long before the so-called "*pilot judgments*": "*Article 25 of the Convention entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it*"[14]. The fact that, well before the concept of pilot judgments was coined, a number of the Court's rulings related to the breach of rights led many States at various times to amend their own domestic legislation, in explicit or implicit response to the Strasbourg Court's judgments, is the best proof, if one needs one, that the scope of the Court's decisions went well beyond the simple condemnation of an individual domestic judicial decision[15]. But this was always carried out cautiously, without explicitly stating the systemic nature of the problem.

So, in the eyes of the States, the Court's legitimacy relied largely on a tacit assumption that the Court would not interfere with the democratic processes of the Contracting Parties which resulted in a given legislative choice, but, rather, that it would provide enlightened leadership to the national courts which may occasionally fail to properly interpret their domestic legislation and national Constitutions fully in accordance with the Court's authoritative interpretation of the rights enshrined in the Convention.

The inadequacy of this approach became finally evident with the new arrivals into the CoE system where it clearly appeared that many problems were not so much due to the national courts but rather have to do with the substance of the laws themselves. The hypocrisy of the traditional „*good law - bad decision*" could no longer be sustained[16]. In 2004, the Committee of Ministers adopted a resolution and a recommendation which provided the political ground for future pilot judgments. The Resolution invited the Court "*to identify in its judgments ... what it consider[ed] to be an underlying systemic problem and the source of that problem, in particular when it [was] likely to give rise to numerous applications*"[17]. In turn, the Recommendation adopted conjointly was addressed to Contracting Parties and pointed out that, in addition to individual remedies, States have a general obligation to solve the problems underlying the violations found[18]. The Court was more than happy to take up the invitation and act accordingly, as is evident from its own case law, and from the

[13] Sadurski Wojciech, *op. cit.*, p. 412;

[14] See for instance the case *Marckx v. Belgium* (Application no. 6833/74), paragraphs 26 and 27; available at http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Marckx&sessionid=66627729&skin=hudoc-en;

[15] Sadurski Wojciech, *op. cit.*, p. 413;

[16] SadurskiWojciech, *op. cit.*, p. 414;

[17] Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem, 12 May 2004, available at https://wcd.coe.int/wcd/ViewDoc.jsp?id=743257&Lang=fr;

[18] Recommendation Rec(2004)6 of the Committee of Ministers to Member States on the improvement of domestic remedies, 12 May 2004; available at https://wcd.coe.int/wcd/ViewDoc.jsp?id=743317;

eagerness with which it communicated to the world its own self-enhanced role by the device of coining a new category of judgments.

The pilot-judgment procedure was developed as a means of dealing with large groups of identical cases that derive from the same underlying problem. The repetitive cases represent a significant proportion of the Court's workload and therefore contribute to the congestion of the Court's activity[19]. When the Court receives a significant number of applications deriving from the same root cause, it may decide to select one or more of them for priority treatment. In dealing with the selected case or cases, it will seek to achieve a solution that extends beyond the particular case or cases so as to cover all similar cases raising the same issue. The resulting judgment will be *a pilot judgment*. In this judgment the Court will aim:

(i) to determine whether there has been a violation of the Convention in the particular case;
(ii) to identify the dysfunction under national law that is at the root of the violation;
(iii) to give clear indications to the Government as to how it can eliminate this dysfunction;
(iiii) to bring about the creation of a domestic remedy capable of dealing with similar cases or at least to bring about the settlement of all such cases pending before the Court.

The pilot judgment is therefore intended to help the national authorities to eliminate the systemic or structural problem highlighted by the Court as giving rise to repetitive cases. In doing this it also assists the Committee of Ministers in its role of ensuring that each judgment of the Court is properly executed by the respondent State.

An important feature of the procedure is the possibility of adjourning or "*freezing*" the examination of all other related cases *for a certain period of time*. This is an additional means of encouraging the national authorities to take the necessary steps. Such adjournment, which will usually be for a set period of time, may be subject to the condition that the respondent State acts promptly and effectively on the conclusions drawn in the pilot judgment. Where cases are adjourned in this way, the importance of keeping applicants informed of the development of the procedure is fully recognised by the Court. It should be stressed that the Court may at any time resume its examination of any case that has been adjourned if this is what the interests of justice require, for example where the particular circumstances of the applicant make it unfair or unreasonable for them to have to wait much longer for a remedy.

The central idea behind the pilot judgment procedure is that where there are a large number of applications concerning the same problem, applicants will obtain redress more speedily if an effective remedy is established at national level than if their cases are processed on an individual basis in Strasbourg. It is not every category of repetitive case that will be suitable for a pilot-judgment procedure and not every pilot judgment will lead to an adjournment of cases, especially where the systemic problem touches on the most fundamental rights of the person under the Convention.

The first pilot-judgment procedure – concerning the so-called *Bug River* cases from Poland - was taken to a successful conclusion since new legislation was introduced and pending cases were settled. The Court will continue to monitor the operation of the procedure in other cases to see what further lessons may be drawn.

[19] ECtHR, *The Pilot-Judgment Procedure*, Information note issued by the Registrar of the ECtHR, available at http://www.echr.coe.int/NR/rdonlyres/DF4E8456-77B3-4E67-8944-B908143A7E2C/0/Information_Note_on_the_PJP_for_Website.pdf;

With the *Broniowski* judgment, the Court established the practice of the "*pilot*" judgment as a response to breaches revealing structure deficiencies, without specifying the type of general measures the defending State should take, nor suspending the handling of similar cases while waiting for the adoption of such measures.

When the "*pilot*" case is qualified as such by the Court, all similar demands against the same State are suspended while waiting for general measures to be taken at a national level in order to solve the issue identified by the Court for all relevant individuals[20].

Accordingly, the Court states the type of measure the State should take, under the supervision of the Committee of Ministers and pursuant to the principle of subsidiarity, in order to prevent a large number of similar cases to be brought before the Court. The Committee of Ministers recommends all States to review, after pilot judgments, *the effectiveness of domestic redress*, and if necessary *to set up effective redress* to prevent repetitive cases to be brought before the Court.

The pilot judgment procedure is a very interesting resort, since the retained solution is not only relevant to the sole claimant, but a whole set of individuals who are in the same situation.

This is how enforcing judgments requires general measures at a national level, which should take into account all relevant individuals beyond the case itself in order to solve the systemic flaw which is behind the breach report. The "*pilot judgment*" should help the State concerned to find solutions at a national level while sparing the Court from having to consider different cases raising the same issue. Accordingly, all similar requests should be postponed until the relevant general measures are established.

At the Interlaken Conference[21], it was pointed out by several speakers that *repetitive cases* arising from *systemic problems* make up a very large part – an excessive part in fact – of the Court case load. According to the Secretary-General of the Council of Europe, it is then necessary to find new responses to the issue, both at national and European levels, through co-operation between both levels, but also between the Council of Europe bodies.

At the Warsaw Seminar in May 2009, Mr Darcy of the Registry noted that "*The arguments in favour [of attempting to incorporate the pilot judgment procedure into the Rules of Court] were recognised – transparency, clarity, predictability. However, they did not prevail for the moment... That is not to say that the pilot judgment procedure will forever be a creature of the case law. But as it is still seen by the Court as a work in progress, the time for crystallising it in written rules is still some way off*"[22].

The pilot judgment procedure fulfils a wish of the former President of the Court, Luzius Wildhaber (whose view is shared by most judges), who declared that such "*leading cases*" contribute to Human Rights case law at a European level, and build European "*public order*". These judgments replace the Court in its very «*constitutional*» role, which consist in deciding on mainly "*public order*" issues.

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[20] Council of Bars and Law Societies of Europe (CCBE), *Comments on the Pilot-Judgment Procedure of the European Court of Human Rights*, available at http://www.ccbe.org/fileadmin/user_upload/NTCdocument/EN_Commentaires_CCBE1_1277718645.pdf;

[21] http://www.echr.coe.int/ECHR/EN/Header/The+Court/Reform+of+the+Court/Interlaken+conference/;

[22] Darcy John, *Pilot judgments from the perspective of the Court and possible elements of the pilot judgment procedure which could be drafted*, in Pilot Judgment Procedure in the European Court of Human Rights, proceedings of the 3rd Informal Seminar for Government Agents and other Institutions (Warsaw, 14-15 May 2009), p. 36 - 40;

However, there is somehow a kind of contradiction between the Court injunctive power and the subsidiarity issue. The use of pilot judgments is limited to the extent that their scope only concerns aspects arising from the circumstances of the case.

If inter-State claims and pilot judgments are considered as useful means against systematic breaches of human rights, such measures should not prevent individuals whose rights were infringed from receiving individual compensation, including acknowledgement of the breach suffered and financial compensation or other before the Court through a judgment which should gather all pending claims (it should not select one and deem other claims as inadmissible).

The pilot judgment technique has been scarcely used by the Court, so there is a risk in the future in view of the lack of established case law. Even if the pilot judgment procedure is an opportunity for the Court to show a clear and *objective* balance of shortfalls in domestic regulations, no constraint is provided to oblige the relevant State to take the appropriate measures. The procedure has its basis in the Convention itself, notably Article 46, paragraph 1, according to which Contracting Parties "*undertake to abide by the final judgment of the Court*". The ECtHR has also invoked Article 1 (the general obligation on Contracting Parties to respect human rights) reflecting the principle of subsidiarity and Article 19 (the function of the ECtHR to ensure states' observance of the ECHR) in support of its use of pilot judgments. This treaty basis is also underpinned by the political support of the Committee of Ministers through its 2004 Resolution on judgments revealing an underlying systemic problem[23].

In the doctrine it is mentioned that the criteria that define a "*full*" pilot judgment[24] are:

(i) the explicit application by the ECtHR of the pilot judgment procedure;

(ii) the identification by the Court of a systemic violation of the ECHR; and

(iii) the stipulation of general measures in the operative part of the judgment in order that the respondent state should resolve the systemic issue (which may be subject to specific time limits).

The "*revolution*" triggered by the pilot judgments lies more in the rhetoric and structure of the judgment than in reality[25]. Indeed, the fiction according to which, before its pilot judgments, the Strasbourg rulings dealt with specific cases, and not with the law, was just that: a fiction. On several occasions, the Court reminded the Contracting Parties that "*in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it. Consequently, it is for the respondent State to remove any obstacles in its domestic legal system that might prevent the applicant's situation from being adequately redressed*" though, as a matter of rhetoric and structure of the judgment, it avoided placing the general, systemic recommendations in the operative parts of its decisions. However, the rhetoric and drafting strategy have their own important effect: they are a good indicator of the decision-maker's intentions, and especially, of the self-perception of the decision-maker. If the Court can now announce that it is authorised (even compelled) to identify systemic defects in a legal system and to prescribe major legislative changes, its self-perception as a "*constitutional*" court of sorts is quite clear.

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[23] Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem, 12 May 2004, available at https://wcd.coe.int/wcd/ViewDoc.jsp?id=743257&Lang=fr;

[24] There is another group of cases relating to systemic violations of the ECHR, which are characterised as "*quasi-pilot judgments*". These are cases in which the ECtHR also invokes Article 46(1) ECHR, but the ECtHR does not describe the decision as a pilot judgment. Only very rarely in "*quasi-pilot*" judgments does the ECtHR also prescribe general measures in the operative part of the judgment (two examples being *Lukenda v. Slovenia,* Application No. 23032/02 and *Xenides-Arestis v. Turkey,* Application No. 46347/99);

[25] Sadurski Wojciech, *op. cit.*, p. 421;

2.3. The case of *Broniowski v. Poland*

In the following section, we shall discuss about the first pilot judgment, *Broniowski v. Poland*, where the Court found that broad measures needed to be undertaken so as to provide a general compensation for those claimants who had been repatriated in the course of a re-drawing of Poland's borders during the Second World War. In particular, it related to the claims of those who had been repatriated from the territories beyond the Bug River which constituted the Eastern border of Poland after the end of the War. In its judgment, the Grand Chamber found a violation of Article 1 of Protocol no. 1 and noted that the violation was a result of "*a malfunctioning of Polish legislation and administrative practice*" affecting a large class of claimants (point 4 of the operative part of the judgment). In this case the real source of the problem is the persistent failure by the executive to give effect to the relevant legislation[26].

In *Broniowski*, the assumption of about 80,000 cases potentially to be brought to the Court[27] was not borne out by the facts: there were, all in all, between 200 and 300 Broniowski-type cases ultimately brought to the issue "*pilot judgments*". Referring to the first pilot judgment, *Broniowski*, Judge Zupančič indicates that, if the pilot judgment scheme had not been adopted, "*there would have been 80,000 cases pending before the Court*", and the Court would have to react by mechanically reiterating, in a "*copy-paste*" manner, the *Broniowski* ruling 80,000 times[28]. In a nice piece of judicial rhetoric, Judge Zupančič likens the substance of *Broniowski* to the following message: "*Look, you have a serious problem on your hands and we would prefer you to resolve it at home...! If it helps, these are what we think you should take into account as the minimum standards in resolving this problem"*[29]. The language of the rulings is stern, peremptory and imperative, none of the "*hey, if you want our advice, here it is, but feel free to do what you want*". It rather says what the Polish State "*must*" do ("*in order to put an end to the systemic violation... the respondent State must... secure in its domestic order a mechanism*")[30]. No wonder that another judge of the same Court observed that one of the main characteristics of a pilot judgment is that it *„constitutes not a mere recommendation but a command, at least in respect of those of its components included in the operative part of the judgment"*[31].

Thus, the Court "*behaves more as a general and prospective lawmaker than as a judge whose reach is primarily particular and retrospective*"[32].

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[26] SadurskiWojciech, *op. cit.*, p. 414;

[27] See Broniowski, paras 162 and 193,

[28] See *Hutten-Czapska* (2), Application no. 35014/97, at partly concurring, partly dissenting opinion of Judge Zupančič; available at http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Hutten-Czapska&sessionid=66977104&skin=hudoc-en;

[29] See *Hutten-Czapska* (2) at partly concurring, partly dissenting opinion of Judge Zupančič; available at http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Hutten-Czapska&sessionid=66977104&skin=hudoc-en;

[30] See *Hutten-Czapska* (2) at partly concurring, partly dissenting opinion of Judge Zupančič; available at http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Hutten-Czapska&sessionid=66977104&skin=hudoc-en;

[31] Wojciech Sadurski, *op. cit.*, p. 424;

[31] See *Hutten-Czapska* (2) at partly concurring, partly dissenting opinion of Judge Zupančič; available at http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Hutten-Czapska&sessionid=66977104&skin=hudoc-en;

[32] See *Hutten-Czapska* (2) at partly concurring, partly dissenting opinion of Judge Zupančič; available at http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Hutten-Czapska&sessionid=66977104&skin=hudoc-en;

The Polish Government - which, in July 2005, passed a new law setting the ceiling for compensation for Bug River property at 20% of its original value – has undertaken the following:

(i) to implement as rapidly as possible all the necessary measures in terms of domestic law and practice to secure the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu;

(ii) to intensify their endeavours to make the new Bug River legislation effective and to improve the practical operation of the mechanism designed to provide the Bug River claimants with compensation;

(iii) to ensure that the relevant State agencies do not hinder the Bug River claimants in enforcing their "*right to credit*";

(iiii) to make available to the remaining Bug River claimants some form of redress for any material or non-material damage caused to them by the defective operation of the Bug River legislative scheme.

2.3.1. Principal facts

The applicant, Jerzy Broniowski, is a Polish national, born in 1944 and living in Wieliczka (Poland). The case concerned the alleged failure to satisfy the applicant's entitlement to compensation for property (a house and land) in Lwów (now Lviv, in the Ukraine) which belonged to his grandmother when the area was still part of Poland, before the Second World War. That entitlement was first bequeathed to the applicant's mother and, after her death in 1989, to the applicant. The applicant's grandmother along with many others who had been living in the Eastern provinces of pre-war Poland was repatriated after Poland's eastern border had been redrawn along the Bug River, in the aftermath of the Second World War.

The area was known as the "*Borderlands*" and also, "*territories beyond the Bug River*". Following the so-called "*republican agreements*" between the Polish Committee of National Liberation and the governments of the former Soviet Republics of Lithuania, Belarus and Ukraine, Poland undertook to compensate those who had been "*repatriated*" from the "*territories beyond the Bug River"* and had had to abandon their properties. Since 1946, Polish law has entitled those repatriated in such circumstances to compensation in kind; they have been entitled to buy land from the State and have the value of the abandoned property offset against the fee for the so-called "*perpetual use*" of this land or against the price of the compensatory property or land.

However, following the entry into force of the Local Government Act of 10 May 1990 and the enactment of further laws reducing the pool of State property available to the Bug River claimants - in particular, by excluding the possibility of enforcing their claims against State agricultural and military property - the State Treasury has been unable to fulfil its obligation to meet the compensation claims because it has had insufficient land to meet the demand. In addition, Bug River claimants have frequently been either excluded from auctions of State property or have had their participation subjected to various conditions. According to the Government, the anticipated total number of those entitled to compensation was nearly of 80,000 persons. On 19 December 2002 the Polish Constitutional Court declared the provisions that excluded the possibility of enforcing the Bug River claims State agricultural and military property unconstitutional. However, following that judgment, the State agencies administering State agricultural and military property suspended all auctions, considering that further legislation was required to deal with the implementation of the judgment.

On 30 January 2004, when the Law of 12 December 2003 entered into force, the Polish State's obligations towards the applicant, and all other Bug River claimants who had ever obtained any compensatory property under the previous legislation, was deemed to have been discharged. Claimants who had never received any such compensation were awarded 15% of their original entitlement, subject to a ceiling of 50,000 PLN.

On 15 December 2004 the Constitutional Court declared unconstitutional certain provisions of the Law of 12 December 2003, among other things, (i) the section fixing the 15% and 50,000 PLN ceiling on claims and (ii) the section excluding from the scope of the compensation scheme under that Act anyone who, like the applicant, had received at least some compensation under previous laws.

On 2 March 2005 the Government submitted a bill to Parliament proposing that the maximum compensation available to Bug River claimants should be 15% of the value of the original Bug River property and that the "*right to credit*" could be realised either, as previously, through an auction procedure, or, through cash payment to be distributed from a special compensation fund. The first reading of the Bill took place on 15 April 2005, following which the matter was referred to the Parliamentary Commission for the State Treasury. During discussions that took place in May and June 2005 the ceiling of 15% was criticised by many deputies and it was suggested that, in order to secure compliance with the Court's principal judgment in the case, the level of compensation should be increased. On 8 July 2005 the *Sejm* (first house of the Polish Parliament) passed the July 2005 Act, which set the statutory ceiling for compensation for Bug River property at 20%. The law entered into force on 7 October 2005.

2.3.2. Procedure of the Court

The application was lodged with the European Commission of Human Rights on 12 March 1996 and transmitted to the Court on 1 November 1998. On 26 March 2002 the Chamber of the Court dealing with the case relinquished jurisdiction in favour of the Grand Chamber. The Grand Chamber delivered its principal judgment on 22 June 2004, finding that: there had been a violation of Article 1 of Protocol no. 1 to the Convention; that the violation had originated in a systemic problem connected with the malfunctioning of Polish legislation and practice caused by the failure to set up an effective mechanism to implement the "*right to credit"* of Bug River claimants; and, through appropriate legal measures and administrative practices, that Poland was to secure the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu.

The Court also found that the question of an award in respect of any pecuniary or non-pecuniary damage was not ready for decision at that time. The applicant was awarded EUR 12,000 for costs and expenses. On 7 March 2005 the Polish Government asked the Registrar for assistance in negotiations between the parties, aimed at reaching a friendly settlement of the case. Following instructions by the President of the Grand Chamber, representatives of the Registry held meetings with the parties in Warsaw on 23 and 24 June 2005 and again on 5 and 6 September 2005, following which the parties signed a friendly settlement agreement.

2.3.3. Summary of the Judgment

2.3.3.1. Implications of a "*pilot judgment procedure*"

The Court noted that the friendly settlement in the applicant's case had been reached after the Court delivered its principal judgment, in which it held that the violation of the applicant's

Convention right originated in a widespread, systemic problem as a consequence of which a whole class of people had been adversely affected. The judgment had made clear that general measures at national level were called for in execution of the judgment and that those measures had to take into account the many people affected and remedy the systemic defect underlying the Court's finding of a violation.

It stressed that once such a defect has been identified, it fell to the national authorities, under the supervision of the Committee of Ministers, to take, retroactively if appropriate, the necessary remedial measures in accordance with the subsidiary character of the Convention. In this case, its object was to facilitate the most speedy and effective resolution of a dysfunction affecting the protection of the right of property in the national - Polish - legal order.

In *Broniowski*, the Court, after finding a violation, had also adjourned its consideration of applications deriving from the same general cause "*pending the implementation of the relevant general measures*". In the context of a friendly settlement reached after the delivery of a pilot judgment on the merits of the case, the notion of "*respect of human rights as defined in the Convention and the Protocols thereto*" necessarily extended beyond the sole interests of the individual applicant and required the Court to examine the case also from the point view of "*relevant general measures*". In view of the systemic or structural character of the shortcoming at the root of the finding of a violation in a pilot judgment, it was evidently desirable for the effective functioning of the Convention system that individual and general redress should go hand in hand.

The respondent State had to take the necessary general and individual measures at the same time and to proceed to a friendly settlement with the applicant on the basis of an agreement incorporating both categories of measures, thereby strengthening the subsidiary character of the Convention system of human rights protection and facilitating the performance of the respective tasks of the Court and the Committee of Ministers, under Articles 41 and 46 of the Convention. Conversely, any failure by a State to act in such a manner necessarily placed the Convention system under greater strain and undermined its subsidiary character. In those circumstances, in determining whether it could strike the present application out of its list on the ground that the matter had been resolved and that respect for human rights as defined in the Convention and its Protocols did not require its further examination, it was appropriate for the Court to consider not only to the applicant's individual situation but also measures aimed at resolving the underlying general defect in the Polish legal order identified in the principal judgment as the source of the violation found.

2.3.3.2. Terms of the friendly settlement agreed by the parties

The Court noted that the friendly settlement reached between Mr Broniowski and the Polish Government addressed the general as well as the individual aspects of the finding of a violation of the right of property under Article 1 of Protocol no. 1 made by the Court in the principal judgment. The parties had recognized the implications, for the purposes of their friendly settlement, of the principal judgment as a pilot judgment.

General measures

The July 2005 Act and the Government's undertakings in their declaration in the friendly settlement were evidently designed to remove the practical and legal obstacles on the exercise of the "*right to credit*" by Bug River claimants. The declaration, as far as general measures were concerned, related both to the future functioning of the Bug River legislative scheme and redress for any past prejudice suffered by Bug River claimants as a result of the previous defective operation of that scheme.

In particular, the Government had referred to specific civil law remedies in connection with enabling the remaining Bug River claimants to seek compensation before the Polish courts for any material and/or non-material damage caused by the systemic problem found to be in breach of Article 1 of Protocol no. 1 in the principal judgment and thus to claim redress, as would be possible under Article 41, if the Court were to deal with their cases on an individual basis. On the other hand, the Polish law regarding the recovery of compensation from State authorities for non-material damage was less clear. In their declaration in the friendly settlement the Polish Government had suggested that compensation in kind for past non-material damage suffered by Bug River claimants, in particular frustration and uncertainty, had already been provided under the July 2005 Act.

However, the Government had also undertaken not to contest that Article 448 read in conjunction with Article 23 of the Civil Code would be capable of providing a legal base for a claim in respect of non-material damage should any Bug River claimant wish to bring one before the Polish courts. In their amending legislation and in their declaration in the friendly settlement, the Polish Government had, in the Court's view, demonstrated an active commitment to take measures intended to remedy the systemic defects found both by the Court in its principal judgment and by the Polish Constitutional Court. While the Committee of Ministers evaluated those general measures and their implementation as far as the supervision of the execution of the Court's principal judgment was concerned, the Court, in exercising its own competence to decide whether to strike the case out of its list under Articles 37, Section 1(b) and 39 following a friendly settlement between the parties, could not but rely on the Government's actual and promised remedial action as a positive factor.

Individual measures

As to the reparation afforded to the individual applicant, Mr Broniowski, the Court noted that the payment to be made to him under the settlement provided him with both accelerated satisfaction of his "*right to credit*" under the Bug River legislative scheme and compensation for any pecuniary and non-pecuniary damage sustained by him. Also, he remained free to seek and recover compensation over and above the current 20% ceiling on compensation fixed by the July 2005 Act in so far as Polish law allowed that, in the future, there was nothing to prevent a future challenge of that ceiling before either the Polish Constitutional Court or ultimately the ECtHR.

Conclusion

The Court concluded that it was satisfied that the settlement in the case was based on respect for human rights as defined in the Convention and its Protocols (Article 37, Section I of the Convention and Rule 62, Section 3 of the Rules of Court) and that the case should therefore be struck out of the list.

On 4 December 2007 the Court decided in *Wolkenberg and others* decision to strike out of its list a number of the cases of Bug River claimants whose applications it had adjourned during the pilot procedure. A large group of these applicants had been offered compensation by Poland under an accelerated procedure in 2006. But many of them were not satisfied with the amount (20% of the original value) they received and indicated that they wished to pursue their application in Strasbourg. In *Wolkenberg* the Court evaluated the 20% compensation ceiling and found it not to be unreasonable. The Court also assessed, once again, the broader issue: it evaluated how the compensation scheme had functioned since its introduction in 2005 and held that the system seemed to function satisfactorily, although improvements in its efficiency were still necessary.

The pilot procedure cycle finally ended in October 2008 when the Court struck out the last 176 Bug river claimant cases[33].

2.4. The case of Maria Atanasiu and Others v. Romania

On 22 October 2010, the Court has delivered towards Romania the first pilot-judgment in the case of *Maria Atanasiu*.

The Romanian authorities have for 20 years been aware of problems relating to the nationalized buildings. The presence of the problem is so common that a new conviction at the ECHR on Article 1 of Protocol no. 1 of the Convention does not produce a boom for some time, as long as that conviction is not a pilot judgement[34]. Through the pilot judgement of *Maria Atanasiu*, the Court wants within 18 months to solve our problem of nationalized buildings, while the Court desires a break from ruling clone and repetitive cases. The Court does not care how we will make it, it did not made us a scheme or an action plan; its desire is that in only a year and a half things to be otherwise.

2.4.1. Principal facts[35]

The case of *Maria Atanasiu* concerns the issue of restitution or compensation in respect of properties nationalised or confiscated by the State before 1989.

A series of restitution laws was enacted in Romania following the collapse of the communist regime, based on the principle of restitution in kind, or compensation where restitution was not possible. The compensation was capped during some periods and not during others and was payable in cash at some times and in either cash or shares at others; since 2005 it has been paid through the *Proprietatea* Fund, which has yet to be listed on the stock exchange. Several hundred thousand individuals in Romania continue to wait processing of their claims for restitution or compensation.

The applicants in *Maria Atanasiu*'s case are three Romanian nationals who live in Bucharest. The first two applicants, Maria Atanasiu and Ileana Iuliana Poenaru (application no. 30767/05), were born in 1912 and 1937 respectively. They are the heirs of Mr Atanasiu, the former owner of a building in Bucharest which was nationalised in 1950 and is now divided into several flats. After 1989, relying on the provisions of ordinary law, they secured the return of seven of the flats and compensation in respect of an eighth, the domestic courts having held that the nationalisation of the building had been unlawful. With regard to the last remaining flat, which is the subject of the case in question, the Romanian High Court of Cassation and Justice (the "*HCCJ*") on 11 March 2005 declared the applicants' action for recovery of possession inadmissible, on the ground that they should have made use of the restitution or compensation procedure applicable at the time under Law no. 10/2001 on the legal status of nationalised property. As they did not receive any reply within the statutory time-limit in response to the claim they lodged under that law for restitution of the flat, the

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[33] ECtHR, *Press Release First "pilot judgment" procedure brought to a successful conclusion Bug River cases closed*, 6 October 2008; http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=31443/96&sessionid=66628738&skin=hudoc-pr-en;

[34] Lancranjan Alexandra, *Hotararea pilot Maria Atanasiu si altii contra Romaniei… sau ce mai vrea CEDO de la noi!*, 2010, http://alexandralancranjan.wordpress.com/2010/10/30/hotararea-pilot-maria-atanasiu-si-altii-contra-romaniei%E2%80%A6-sau-ce-mai-vrea-cedo-de-la-noi/;

[35] Press release issued by the Registrar of the Court no. 742 dated 12.10.2010; http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=66628738&skin=hudoc-pr-en&action=request;

applicants brought proceedings against Bucharest City Council, which on 18 April 2005 was ordered by the HCCJ to give a decision. Until the judgement of the case by the ECHR, the applicants' claim for compensation has still not been determined by the city council.

The third applicant, Ileana Florica Solon (application no. 33800/06), was born in 1935. She complained of her inability to obtain compensation on the basis of Law no. 10/2001 for the damage sustained on account of the nationalisation of an area of land for use by the University of Craiova. Mrs Solon applied for compensation to the University, which refused her request in a decision of 10 July 2001. Subsequently, the HCCJ, in a final judgment of 30 March 2006, ruled that Mrs Solon was entitled to compensation in the amount claimed. However, the applicant has received no compensation. In June 2010 the Romanian Government informed the Court that her claim would receive priority treatment. The Court decided to deal with the case under the "*pilot-judgment*" procedure, which is aimed at the overall settlement of large groups of identical cases. The Court has already found over 150 violations in cases of this kind, and several hundred similar cases are pending before it.

2.4.2. Procedure of the Court

The first two applicants complained that they had not had access to a court in order to claim restitution of one of the nationalised flats. All three applicants complained of delays on the part of the administrative authorities in giving a decision on their applications for restitution or compensation. They relied on Article 6, paragraph 1 and Article 1 of Protocol no. 1. A hearing was held in public in the Human Rights Building, Strasbourg, on 8 June 2010.

2.4.3. Summary of the Judgment

2.4.3.1. Article 6, paragraph 1 of the ECHR

At the material time, in view of the lack of response from the administrative authorities, Mrs Atanasiu and Mrs Poenaru had had no possibility of claiming restitution of the flat in question through the Romanian courts. The Court considered that the authorities' failure to reply and the lack of a remedy had imposed a disproportionate burden on Mrs Atanasiu and Mrs Poenaru which was in breach of their right of access to a court. Subsequently, the HCCJ, in a judgment of 19 March 2007, ruled that, where the administrative authorities failed to reply within the statutory time-limit, the courts could determine claims on the merits in their place and could, if appropriate, order the restitution of the property in question. As the length of the proceedings for restitution or compensation of which Mrs Solon complained under Article 6, paragraph 1 had resulted from the ineffectiveness of the compensation mechanism, the Court examined her complaint from the standpoint of her right to the peaceful enjoyment of her possessions.

2.4.3.2. Article 1 of Protocol no. 1 to the ECHR

The Court took the view that entitlement to compensation arose once the domestic courts had established that the person concerned met the requirements laid down by the legislation and had exhausted the available remedies. Accordingly, the applicants had at least a right to compensation amounting to a "*proprietary interest*" sufficiently established in Romanian law and covered by the notion of a "*possession*" under Article 1 of Protocol no. 1. The latter was therefore applicable.

In the applicants' case, the final court rulings ordering the authorities to give a decision on the claim lodged by Mrs Atanasiu and Mrs Poenaru and fixing the amount of compensation due to Mrs

Solon had not been enforced. The Romanian Government has not given any reasons to justify the failure to secure the applicants' right to compensation. That failure, and the uncertainty as to when the compensation might be paid, had imposed a disproportionate and excessive burden on the applicants which was incompatible with their right to the peaceful enjoyment of their possessions under Article 1 of Protocol no. 1.

2.4.3.3. Implications of a "*pilot judgment procedure*"

The pilot-judgment procedure, which the Court decided to apply to the case of *Maria Atanasiu*, was designed to assist the Contracting Parties in fulfilling their role in the Convention system by resolving structural problems at national level. That entailed an assessment by the Court extending beyond the case of the individual applicant, in the interests of other potentially affected persons. Several judgments by the Court – in the cases of *Viaşu, Faimblat* and *Katz*[36] – had already resulted in findings of a violation of Article 6, paragraph 1 and Article 1 of Protocol no. 1 on account of shortcomings in the Romanian system of compensation and restitution[37]. Those judgments had identified some of the causes of the problems in question, in particular the gradual extension of the reparation laws to cover virtually all nationalised immovable property, resulting in a heavy workload for the authorities.

The simplification of the procedures as a result of Law no. 247/2005 represented a step in the right direction, provided that it was backed up by the appropriate human and material resources. The Court noted, however, that by May 2010, out of a total of 68,355 files registered with the Central Compensation Board, only 21,260 had resulted in a decision awarding a "*compensation certificate*", and that fewer than 4,000 payments had been made[38]. While the Court took note of the very substantial cost to the State budget[39] represented by the restitution and compensation scheme, it observed that the listing of the *Proprietatea* Fund on the stock exchange, which had been due to take place in 2005, had still not been accomplished[40], although the diversion towards the stock market of some of the claims from persons in receipt of "*compensation certificates*" would reduce pressure on the budget.

In view of the large number of problems which persisted after the adoption of the *Viaşu, Faimblat* and *Katz* judgments, general measures were called for. In that context the Court drew attention to the recommendations of the Council of Europe[41] and observed that, while it was not for

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[36] *Viaşu v. Romania* (Application no. 75951/01), *Katz v. Romania* (Application no. 29739/03) and *Faimblat v. Romania* (Application no. 23066/02);

[37] This case came to be considered following the above-mentioned judgments, unlike other pilot cases (*Broniowski* and *Hutten-Czapska v. Poland*), in which the failings in the domestic legal system were identified for the first time;

[38] Statistics supplied by the National Agency for Property Restitution;

[39] According to an estimate provided by the Romanian Government, the sum needed to pay the compensation under the relevant laws would total EUR 21 billion;

[40] Starting with 25 January 2011, the Proprietatea Fund is finally listed on the Bucharest Stock Exchange (i.e. FP). We underline, however, that despite the fact that Proprietatea Fund was finally listed on the stock exchange, compensated former owners are not satisfied with the value at which shares are listed. The question is to what extent this entity is an effective and fair compensation mechanism? The actors involved in the development process of restitution should consider with responsibility this type of compensation;

[41] Resolution Res(2004)3 and Recommendation Rec(2004)6 of the Committee of Ministers of the Council of Europe, adopted on 12 May 2004; available at https://wcd.coe.int/wcd/ViewDoc.jsp?id=105993&Site=COE;

the Court to determine what measures of redress should be adopted by the State, the former should nevertheless offer suggestions in order to lend the authorities the assistance they had requested.

General measures

In this case the Court recommended that simplified and effective procedures be put in place as a matter of urgency on the basis of legislation and of coherent judicial and administrative practice, while striking a fair balance between the interests at stake. The Court took the view that the Romanian authorities should be afforded the degree of discretion required by that exceptionally difficult exercise.

It considered the Romanian Government's proposal to establish binding time-limits for each stage in the administrative procedure to be of interest, provided that such measures were realistic and subject to review by the courts. In addition, measures taken by other States might provide a source of inspiration for the Romanian authorities; included overhauling the legislation in order to create a more foreseeable compensation scheme, setting a cap on compensation and allowing payment in instalments over a longer period. Since the impact of such a scheme on the entire country was considerable, the Romanian authorities must retain full discretion in the choice of general measures.

As the pilot-judgment procedure was aimed at allowing rapid redress to be afforded at national level to all those affected by the structural problem identified, the pilot judgment could indicate that examination of all similar applications would be adjourned pending the adoption of general measures. In this case, in view of the very large number of applications concerning similar issues, the Court decided to adjourn examination of those applications for 18 months from the date on which the present judgment became final, pending adoption by the Romanian authorities of measures capable of providing adequate redress to all those affected by the reparation legislation.

Individual measures

As to the reparation afforded to the individual applicants, by way of just satisfaction, the Court held that Romania was to pay EUR 65,000 jointly to Mrs Atanasiu and Mrs Poenaru to cover all damages. It awarded Mrs Solon EUR 115,000 in respect of all damages and EUR 3,151.48 for costs and expenses.

2.5. The Maria Atanasiu's Problem and the Romanian Authorities' Response

In the judgement it is foreseen that, if somewhere in the glorious past of our country we have chosen to not give back anything in nature and to not give any compensation (which is about the *current situation*) the Court would not had any problem with the State because it was not competent to examine what happened before the Convention's ratification. But because we have chosen this path, we must fulfil our obligations. The Court reminds us also that in a rule of law state, if somebody has a court decision, enforcement must be guaranteed.

The Romanian authorities have for many years been aware of problems relating to the enforcement of domestic judgments, and they have acknowledged the gravity of the issue. It is necessary a mechanism to compensate people for unreasonable length of proceedings and for the failure of authorities to implement court decisions. We hope that the *Maria Atanasiu* judgment shall increase public awareness of the issue as a systemic problem.

The State had the choice to pay compensation to a capped level, which did not violate its obligations arising from the Convention's ratification, but the decision at the national level was to

give full compensation at market price at present time. ECtHR underlines that this is not the problem of the Court but of the State and that national authorities bear full responsibility for the lack of solutions.

The legislation's harmonisation is a step in the right direction provided to bring simple rules. The development of the functioning of the Central Compensation Board is another good step if properly equipped with resources, procedures for analyzing claims, and limit its time to verify the claims. It would be also great if a magic formula for the Proprietatea Fund would be found, if possible.

The Court recommends us to analyse the legislation of other States to find solutions which we have not yet found. It can be a shock to many, but we are not the only ones who have previously had a dictatorial regime, who have property confiscated by the communist state and have been before a decision on repairs and refunds. What others have found and we have not yet, are effective solutions. For this reason, we enjoy pilot judgment and they do not, we have a lot of new applications to the Court and they do not, we are condemned under continuous fire and they do not[42].

As mentioned before, Poland is again a success story; although the Poles have not found the right way the first time, they have chosen to define the persons entitled, to not restitute in kind and to not pay compensation to the actual value of the property. It can not deny an inconsistency of the law, but the decision to reduce state compensation in 2005 was received by the Court as a measure justified and proportionate.

Bulgaria, for example, was one of the first countries that have adopted laws on the issue of restitution, although in 1996 the act which provided compensation at market price, Bulgaria realized in time that this was impossible and rushed to rethink its legislation. Another interesting thing is that all Bulgarian neighbours thought a system whereby in exchange for property confiscated by the State, the entitled persons were given an apartment in buildings erected for that purpose.

The few cases that *Slovenia* has had in this area have been successful rejected by the Court as inadmissible. The amazing result is due to the system's consistency: Slovenia has chosen not to offer compensation in cash, but in bonds, not in one lump sum but on a 15 years term – the Court did not object and did not find any violation of Article 1 of Protocol no. 1 in the *Dolhar* case.

Similarly, *Hungary* decided through a law in 1991 that individuals can receive compensation up to 21,000 U.S. dollars for the seized properties. The amount was not paid in cash, but in vouchers that could be used to buy land at state auctions or actions of state-owned companies. Several years later the Government has implemented a mechanism for compensation for properties that could not be restituted to religious cults: they could ask a state-funded annuity, a mechanism that worked if we consider the agreements concluded after the adoption of the law.

Latvia and *Estonia*, anticipating problems that may arise in connection with the buildings taken by the state in Soviet times, have decided to exclude this area from the Court's jurisdiction through the reserves to Protocol no. 1 to the Convention. As laws on restitution and compensation enter in the scope of this reserve, the applications filled have been rejected as inadmissible *ratione materiae*.

All the examples mentioned above only shows that it is possible and otherwise. Maybe with small obstacles and inconsistencies, with a decision from time to time of the Court and minor complaints from citizens against state decisions. So back to the question "*What does the ECtHR from*

[42] Lancanjan Alexandra, available at: http://alexandralancranjan.wordpress.com/2010/10/30/hotararea-pilot-maria-atanasiu-si-altii-contra-romaniei%E2%80%A6-sau-ce-mai-vrea-cedo-de-la-noi/;

us?" – the sad answer is that ECtHR wants to become responsible and to assume the mistakes made, whether historical or not.

It should be noted that an inter-ministerial working group was set up in order to cooperate on the evaluation of potential solutions in the field of property restitution and compensation. As Justice Minister, Mr Predoiu declared at the conference on "*The issue of property restitution and granting compensations in terms of ECHR jurisprudence*", it is possible that "*in the following two or three months to be presented this package of measures, leading to the implementation of the pilot judgement conclusions into legislation*"[43].

The *Maria Atanasiu* judgement became final on 12 January 2011, therefore from that date, the 18 months term begins to accrue. However, we know the ECtHR recommendations since October 2010. Six months have passed and the great inter-ministerial committee appointed by the prime minister to resolve the problems failed to do much, no measure glimpses. Fifteen months remain… We look forward to be taken and implemented the appropriate measures.

3. Conclusions

There is high-level political support from Council of Europe member states for the ECtHR's innovatory pilot judgment procedure, as is evident from the Interlaken process in February 2010[44]. This augurs well. An effective response by states in terms of their implementation of the general measures specified by the ECtHR in pilot judgments is evidently the key to the future development of the procedure[45]. The application of the procedure in a situation where a State then fails to introduce the necessary domestic remedy could discredit it. Its use in the Polish cases of *Broniowski* and *Hutten-Czapska* has broadly been regarded as having been successful, as new legislation was enacted as a consequence, which has since been implemented. The imposition of time limits by the ECtHR (for example, 6 and 12 months in *Burdov* (No 2), 18 months in *Maria Atanasiu*) may be an important factor as regards the adequacy of the States' response. Reasonably time limits were welcomed by some authors, but others expressed doubts that they were realistic, particularly where new legislative measures were required[46]. We consider that simple changes in legislation would not be sufficient, rather there needed to be more fundamental changes in the practice of the Romanian domestic courts for the systemic problem to be resolved.

Indeed, only by providing adequate remedial justice will the ECtHR be able to continue to be "*the tangible symbol of the effective pre-eminence on [the European] continent of human rights and the rule of law*"[47].

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[43] http://www.juridice ro/135932/razvan-horatiu-radu-problematica-restituirii-proprietatilor-priveste-toate-statele-postcomuniste html;

[44] High Level Conference on the Future of the European Court of Human Rights - Interlaken Declaration, 19 February 2010, available at: http://www.coe.int/t/dc/files/Source/2010_interlaken_actes.pdf;

[45] Leach Philip, Hardman Helen, Stephenson Svetlana, *Can the European Court's Pilot Judgment Procedure Help Resolve Systemic Human RightsViolations? Burdov and the Failure to Implement Domestic Court Decisions in Russia*, Human Rights Law Review, 2010, p. 358;

[46] Leach Philip, Hardman Helen, Stephenson Svetlana, *op. cit*, p. 358;

[47] Wildhaber Luzius, President, Eur. Ct. Hum. Rts., Address at the Warsaw Summit of the Council of Europe (May 16, 2005), available at http://www.ena.lu/address_given_luzius_wildhaber_council_europe_summit_warsaw_16_2006-020006044 html;

However, the pilot-judgment procedure cannot claim to be the solution to all the difficulties caused by the Court's excessive workload, but it has the potential to make significant inroads into that workload, and to provide for the elimination of some of the root problems which lie behind repetitive applications as well as establishing a remedy for those adversely affected by them[48].

The pilot judgment procedure has become an important part of the Convention system. We more or less know a pilot judgment when we see one[49], even if it may be difficult to give a precise, universal definition. But what exactly should, or could, be codified? Should the "*pilot judgment*" be defined and codified? But what exactly is a pilot judgment? Should the Court define the situations in which a pilot judgment may be given? Or should it rather be the pilot judgment procedure that is codified, or certain specific elements of it?

In this respect, there would seem to be *four key procedural aspects*:

(i) the *adjournment* of similar applications;

(ii) *negotiations* between respondent State and applicant *towards a friendly settlement* based on the general measures indicated by the Court;

(iii) *assessment by the Court* of the State's implementation of the general measures, both in the instant and adjourned cases;

(iiii) *striking out* of these cases following a positive assessment.

Going back to the classical idea of codification as defined in the ILC Statute: the pilot judgment procedure is not customary international law; it has not been the subject of "*extensive State practice, precedent and doctrine*"; and any exercise of codification would not aim to result in agreed rules that are binding as a matter of law.

Interestingly, the pilot judgment procedure is both looking forward and backward[50]. On the one hand, it requests Contracting Parties to remedy *past* injustice to the person affected in the particular case and to those in a similar situation. On the other hand, it is also *future* oriented by indicating, albeit often in broad strokes of the legal brush, the actions a state should pursue in order to take away the underlying cause of the violation. This feature of a pilot procedure fits with general public international law. When an international obligation has been violated by a State, there is not only *a duty to repair*, but also *a duty of non-repetition*. The future-oriented aspect of the general measures ordered in pilot judgments relate to this latter duty.

The whole pilot judgment procedure depends to a large extent on the defendant State's willingness to cooperate. Since a pilot judgment by its very character addresses a broader situation than only the predicament of an individual applicant, state cooperation could be called its *Achilles' heel*. The first two full pilot procedures, *Broniowksi v. Poland* and *Hutten-Czapska v. Poland*, show how different a state's attitude can be. Whereas in *Broniowski* the Polish government was fully willing to cooperate, in *Hutten-Czapska* the same State contested that a pilot procedure should be used at all. Nevertheless, as described above, the Court in its judgments on just satisfaction sometimes assesses whether the state has *prima* facie shown willingness to undertake reforms[51].

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[48] *The Pilot-Judgment Procedure*, Information note issued by the Registrar of the ECtHR, http://www.echr.coe.int/NR/rdonlyres/DF4E8456-77B3-4E67-8944-B908143A7E2C/0/Information_Note_on_the_PJP_for_Website.pdf;

[49] Responding to Systemic Human Rights Violations: Pilot judgments of the European Court of Human Rights and their impact at national level, Strasbourg, 14 June 2010, *Codification of the Pilot Judgment Procedure*, Presentation by David Milner, Council of Europe;

[50] Buyse Antoine*, op. cit., p. 9;*

[51] Buyse Antoine, *op. cit., p. 14;*

The pilot judgment procedure is a legal novelty which builds on an older trend to look beyond the facts of a particular case and into the underlying systemic problems. What used to be a question of mere rigorous analysis, has now become a necessity for the Court. The pilot judgment can be perceived as part of three larger processes. *First*, efforts at increasing the efficiency of dealing with applications within the Court. *Secondly*, pilot judgments reflect a wider trend of constitutionalization of the Court's work. Through a pilot judgment the Court to a certain extent reviews whether laws and policies conform with the ECHR instead of just assessing whether national authorities have or have not violated human rights in an individual case. *Finally*, it fits in the broader development of increasing the Convention's effectiveness on the national level.

The pilot procedure is a promising way to channel the cooperation between national and Strasbourg institutions to improve compliance with the ECHR. Obviously, this depends on a more active role by the primary organ supervising the implementation of the Court's judgments. It is a welcome step that the Committee of Ministers decided in May 2006 to "give priority to supervision of the execution of judgments in which the Court has identified what it considers a systemic problem"[52]. In addition, the Parliamentary Assembly has started to prioritize the examination of major structural problems concerning cases in which unacceptable delays of implementation have arisen. This is done *inter alia* by way of visits by Assembly rapporteurs to the countries concerned. All of this shows a commitment by the Council of Europe's institutions to take the issue of structural problems seriously. This support will be crucial for the Court in the years to come.

The pilot judgment procedure is still in its early years and more experience is necessary. Nevertheless – and bearing in mind the concerns about legal basis, the interests of applicants in parallel cases, the choice of the right case as a pilot and other matters – it would be commendable if the Court would devise clear guidelines for itself on how it will deal with the whole process of a pilot judgment from beginning to end, including the selection of pilot cases and the possible freezing of comparable applications. This would serve both the interests of potential applicants and of the state parties to the Convention. If this "*pilot*" keeps flying, the Court at the very respectable age of fifty will be able to continue to function as the ultimate guardian of human rights throughout Europe[53].

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THE DEVELOPMENT OF ROMANIAN JUVENILE DELINQUENCY EDUCATIONAL CENTERS – THE CHRONOLOGY STARTING WITH THE XIX-TH CENTURY

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Abstract
In the process of understanding the developments that took place, concerning the judicial treatment of juvenile delinquency phenomena, we must not ignore both the evolutions and the involutions of the institutions that were given the legal rights for hosting and educating the juvenile offenders. In the case of Romania the situation must be analyzed in accordance with the historical evolution of the three principalities Moldavia, Wallachia and the Grand Principality of Transylvania. For all three the first references date back to the XIX-th century. Few references prior to this century exist concerning the entire prison system. A short description of children living with their parents, sentenced to prisons dates from 1690.
For the Grand Principality of Transylvania the first references date from 1886 when an institution focused entirely on incarcerating juvenile delinquents was built in the city of Koloswar (nowadays Cuj-Napoca). For the Principality of Wallachia the first reference dates from 1852 – Condica Criminala published while Barbu Stirbei leadership. No references were found concerning the Principality of Moldavia for the entire period of the XIX-th century. This paper is focused upon the evolution of these institutions until nowadays, without an in depth analysis of the legal framework which will be the subject of a future presentation.

Keywords*: juvenile delinquents, juvenile offenders, history.*

1. Introduction

Without further theoretical add-ons, concerning the re-educational process of a juvenile delinquent – as a part of his social rehabilitation process, I will emphasize some aspects concerning the physiognomy of this concept. Institutionalizing reeducation in Romanian Penal system is done by introducing educational measures in the sentencing system in case of juvenile delinquency.

In this way the re-educational penal institution for juvenile delinquency combines two aspects. The first one, strictly related to an adequate prevention policy as society, in general terms speaking, shows its position towards juvenile delinquency phenomena, position associated with the option concerning the use of legal means for rehabilitating juvenile delinquents. The second aspect is the practical, law-in-action approach given the sentences imposed against juvenile delinquents. In the Romanian judicial doctrine, by taking into account the final purpose of the educational sentences (re-

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education of juveniles), various authors consider that educational measures are in fact re-educational measures.

It is visible, given past and present legal framework, that the re-educational process brings a soften penal treatment in case of crimes committed by juvenile delinquents (practically a limitation of the repressive means used and a diminished level of their intensity while enforced). The concept of re-education has, in this case, a solid judicial and ethical foundation. The legislators have an incentive to enact a soften penal framework in case of juvenile delinquents given the obvious fact that these persons have not reached yet their maturity, thus the personality is still in development. Such treatment is far more adequate to this psychological and social evolution, encouraging future prospects of successful social rehabilitation.

Given the legal framework, the concept of re-education, in the Romanian penal system, is incident in case of an offense committed by a juvenile delinquent and it cannot exist outside the legal boundaries.

2. Content

A brief chronological description shows how the entire system of re-education focused upon the juvenile delinquents and their social rehab and the concepts used were developed and implemented in Romania.

1852 "Condica criminala" is implemented in The Principality of Wallachia, legalizing a special framework concerning juvenile delinquents. The imprisonment, used only in case of children committing crimes with diligence, takes place in a monastery, given the specifics of the crimes and the guilt, for a period lasting from 3 months up to 3 years. For those children who committed crimes without diligence, the law stipulates their return to their families for care taking and supervision. The possibility of parental supervision, in case of juvenile delinquency, is thus legally available. It firstly appeared in Caragea Law – 1818 - when it was used as an alternative for beatings in case of the sons of local nobility. For crimes punishable with death, the juvenile delinquents were sent at Snagov Monastery or Mărgineni, for a period of time that could have last for 2 to 10 years.

1862 Given the "Condica criminala" (still in place until 1864 Code), it is adopted and implemented, under the leadership of Cuza, "The Rules for Prison Establishments". Articles no. 7 and 8, for the first time in Romania legislation, mention the founding/the need of ating a prison for juvenile delinquents with ages varying from 8 to 20 years.

1864 Still in accordance with "Condica Criminala" - because no other measures were at that time taken, "The General Rule for Districts Arrests Houses for Entire Country" was adopted, stipulating the separation of adults and underage offenders in all the prisons. In a short while the first prison for juvenile offenders was established in Romania, at Cernica Monastery (first established in 1608 by Cernica Surheiu).

1865 The first Romanian Penal Code is adopted. Article no. 64 stipulates that prison sentences ruled in juvenile offenders cases, must be carried in a special establishment or in a separate part of a correctional&educational house.

1868 The prison for juvenile offenders from Cernica Monastery was moved to Balamuci, due to overcrowding, with the purpose of establishing a correctional facility solely dedicated to underage crime offenders. After a short while it was moved again at Cascioarei Monastery.

1872 The correctional facility from Căscioarei Monastery was moved again at Reni – nowadays part of the Moldavian Republic.

1874 "Prison Regime Rule" was adopted, replacing the aforementioned regulations (1862 and 1864). It emphasized the principle of gender separation in all prison establishments. The underage, in accordance with article no. 24, were to be imprisoned in special facilities called "Houses for correctional education". This regulation can be considered the birth act of the juvenile offenders correctional facilities. In the vicinity of every underage correctional facility a farm and labor workshops were to be established, in accordance with article 25. When released, every offender was to be provided with clothes and money for travel arrangements for their return home, plus a small amount of money "for easing his come back", in accordance with article 27. Ab initio, these correctional facilities were only available for males, while the underage female offenders were sent to Plataresti Prison for adult females, established as a double purpose correctional facility by the same law.

1874 "The General Regulation For The Correctional Headquarter" was adopted and it developed the principles contained in the 1874 law.

1878 Due to political reasons the correctional facility from Reni (nowadays Moldavian Republic) was transferred at Mislea Monastery, where, until 1883, juvenile offenders were housed in the same facility with military convicts.

1883 From this moment Mislea Prison was the sole juvenile correctional facility in our country until WWI. Due to overcrowding, many juvenile offenders were sentenced to adult prisons.

1883 On 21st of October 1883 the Hungarian Justice Ministry bought near Cluj land for building an institute for young or underage offenders. The activity started in 1886[1]

1886 Mislea Prison was reorganized into two sections. One was used for juvenile offenders and one for juvenile offenders reaching their adulthood age while convicted. For the first section a four years elementary school was established having young offenders enrolled as pupils (actually it was the first school in the prison system outside Transylvania), a carpentry workshop and a sculpture workshop.

1887 The aforementioned school extended its activity with the second section in the same correctional unit, with an increase in the number of its pupils. The quality of products manufactured

[1] Only children with ages above 10 were in custody. The institute copied the family organization having teachers as parents. For their work the children received money they could spent according with their own wishes. Daily program consisted of 4 hours of school plus qualification courses. "Drept execuțional penal" - prof.univ.dr. Chiș Ioan, Ed, Wolters Kluwer, 2010 Bucharest, page 31.

in its workshops (carpentry and sculpture) was awarded with the gold medal in an cooperatives exhibit in Bucharest – the same year.

1907 "Romanian Society of Patronage" was founded, with an entire section dedicated to support and sponsorship of juvenile offenders during their trial and also while serving time in prisons.

1913 Gherla Prison was transformed into a "Preventive Institute For Juvenile Offenders". It remained like this until 1918, when it was changed again into a prison.

1914 An initiative led by the Prefect of Bucharest City and the Chief of "Siguranță" (an official body, active till 1944, with legal competences equivalent to nowadays police) established in Mălureni (Argeş County) a penal disciplinary colony for underage beggars and vagabonds, populating the capital city streets, exposed to a higher risk of committing crimes. Under the supervision of a painter the juveniles in custody learned how to make pottery. The products were displayed and sold in one of the Bucharest markets located in the Saint Anthony Square. Two gardeners initiated the young offenders the skills of gardening planting and harvesting various vegetables and other agricultural products.

1919 Once the National Unification process ended the national prison administration had more units to coordinate from Transylvania like the Correctional Institute from Gherla – established in 1886 (ending its activity in 1940) - and the underage prison in Cluj (for boys only). Both were to be called, after 1929 Prison Rule, Preventive Institutes For Juvenile Offenders. In these two institutions Romanian professor Al. Roşca, researched 272 subjects (235 booys and 37 girls) and thus publishing his famous study "The Juvenile Delinquent"-Cluj, 1932.

1921 An initiative led by the Romanian pedagogue Constantin Meissner (former school inspector between 1892-1901) with the help of "Sheltering Children" Society (established in 1910 by the same person), created in Copou – Iaşi, the first school for "correcting children with bad habits". This institution functioned with good results for over three decades.

1921 Decree no.2908 – "The Beggery And Vagrancy Infringement Law" was adopted. In accordance with its provisions there were established: schools for correctional measures and sheltering, working colonies for beggars and vagabonds with ages between 10 and 18 as well as abandoned children.

1921 Female Juvenile Offenders Center in Herăstrău is established in accordance with the provisions of the aforementioned law of infringement.

1926 "The Primary Schools Law" was adopted and it had regulations concerning the scholastic activities in the correctional facilities, the staffing of these institution and the conditions for establishing such institutions.

1929 "Prisons and Preventive Institutions Law" was passed – also called The Iunian Law, after its initiator. This regulation replaced the former 1874 law, which was never actually materialised.

In accordance with its provisions there were established: correctional institutions, compulsory-education institutions, institutions for abandoned children, beggars and vagabonds.

1937 A new Romanian Penal Code was adopted, with an advanced sanctioning approach. It consisted of regulations concerning *"safety measures"* (parole/supervised freedom and correctional education) – measures with an educational purpose and *sentences* (admonitions and correctional sentences or prison sentences). The sentences time was served in institutions for correctional education. For the first time in 1936 an initiative led by the Romanian legislators (to modify the Romanian Criminal Procedure Code) created special courts for juvenile delinquents - article no. 55.

1938 By modifying the Romanian Penal Code, for the first time the term "minor" - juvenile offender was used in the Romanian legislation. It is still in use nowadays.

1948 Reeducation Center no.1 from Roşu – Ilfov county, was established, housing youngsters and adults (beggars and vagabonds, burglars et cetera) with ages between 18 and 65.

1949 The Reeducation Center no. 1 from Rosu – Ilfov County, established on 1st of December 1948, changed its profile housing only female juvenile offenders coming from Herastrau Girls Center. The coordination of this center was given to a teacher officially entitled "pedagogue leader".

1951 By Decree no. 75/S/1951, the problem of reeducation for some categories of juvenile offenders had passed from The Social Previsions Ministry to the Ministry of Interior. In that way the reeducation of juvenile offenders with ages between 11 and 16 underwent in educational colonies for juvenile offenders specialized in case of vagrancy, beggary, prostitution and other similar cases. The term "colonie" - colony is used for the first time in Romanian legislation.

1951 Reeducation Center no. 1 from Roşu – Ilfov County, was subordinated to the Ministry of Internal Affairs, in accordance with the terms of 75/S/1951 Decree. Some of the training staff (labor instructors) remained on the payroll of a Romanian factory called "Dinamo". The Center changed its name into "Reeducational Colony". It became the sole correctional colony for female juvenile offenders. The juvenile female offenders from the other colonies (Herastrau, Brezoianu, Buzau, Budila) were brought here. That process ended in 1959.

1951 The Decision no. 1240, adopted by The Ministries Council, brought some add-ons to the 75/S/1951 Decree. In that way the abandoned children who were housed in special facilities belonging to the Public Education Ministry, could had been sent in correctional colonies, in case they created problems or broke the disciplinary regulations. Also pupils from primary and elementary schools could had been sent in those correctional facilities in case of serious misconducts – in accordance with article no. 2 from that law.

1952 The Decree no.504 from 22nd of December 1952 brought some clarifications to the Decree 75/S/1952, stipulating that only healthy juvenile offenders will be housed and be the subjects of those correctional procedures taking place in the educational correction facilities.

1952 Newly found Slatina Re-educational Colony for juvenile offender (established in 1951) started its work. It was used as a training facility in various job qualifications like welder, driver,

locksmith, snip, miller, shoemaker, turner. In 1960 it ceased its activity and the entire staff was transferred in Paltiniş – Harghita County, where a new colony was established.

1954 The Romanian Family Code was adopted by the Law no.4 from 4th of January 1954. Regulations were focused upon legal condition of children, parental supervision, greatly influencing the process of reeducation takink place in correctional colonies.

1954 The Council of Ministries Decision no.809 from 4th of June 1954 concerning children abandoned or without parents, or lacking the possibility of being raised by their families, describes the entire protective system focused upon these categories, correctional colonies being included:

The Public Education Ministry:

1. special facilities (infancy houses) for children with ages under 3
2. special facilities (pupils houses) for children with ages between 3 and 14

The Health Ministry:

1. special facilities for children under 3 years of age

Under the supervision of The Ministry of Labor and Social Previsions:

1. Special facilities for children with various disabilities.

Under the supervision of The Ministry of Internal Affairs:

1. educational colonies for juvenile offenders.
2. reception points

Decision 809 was in place till its revocation by the Law no. 3 from 1970, concerning the legal regime of some types of juvenile offenders.

1956 In Tîrgu Ocna a new colony for male juvenile offenders was established, having its name changed from "Colony" into "Special Institute For Juvenile Offenders Reeducation" (1966-1977), "Reeducational Center for Juvenile Delinquents" (1972-1977), "Special Labor and Reeducational School" (1978-1992), "Reeducational Center" starting with 1992. It was closed for a few months in 1977 because of the infamous general amnesty signed by Ceausescu in that year (Decree no.147 from 1977). In 1997 the Center activity was suspended temporarily because the National Training Institution For Prisons Officers was moved in the same location. It started all over again in 2001. The future prison officers were involved in juvenile offenders re-education process,

1957 When Council of Ministries adopted its 817 Decision in 1957 vocational schools were established in the correctional colonies for children reaching the age of 14 or older.

1960 A Decree adopted in September 1960 changed the name of all correctional facilities from "colony" into "special institutes for juvenile offenders reeducation"

1960 In Paltinis – Harghita County, a Reeducation Colony was established for male juvenile offenders. It had the personnel and the offenders transferred from Slatina Colony after its closing. Starting with September 1960 its official name was "Special Institute of Reeducation", title kept till the definitive closure in 1977 as the result of Decree 147, adopted in that year.

1962 The Council of Ministries adopted the Decision no. 1051 concerning the the inmates allocation/distribution in the centralized socialist labor market after their release. This decree had a positive impact upon the social rehabilitation of juvenile offenders after their release.

1966 In Gaesti – Dâmbovița County, an Institute for Juvenile Offenders Reeducation was established. The history of this unit starts in 1959 when, given the Order of the Ministry of Internal Affairs no. 3640-59, Penitentiary Ocnele Mari was transformed into a restrictive colony for juvenile offenders. This institution was transferred many times, on 15th of November 1963 in the town of Sfântul Gheorghe, in 1965 in Paltiniș near Miercurea Ciuc city and starting with 1966 it was settled in Gaesti. In January 1988 the Center was shut down in accordance with the provisions of Decree 11 from the same year. Surprisingly, in a few month, at the end of that year it was opened again, on 15th of September.

1969 The new Romanian Penal Code was adopted on 21st of June 1968. The correctional facilities used for the fulfillment of educational sanctions imposed against juvenile offenders are still called "Special Institute for Reeducation" and "Medical and Educational Institute" for those with special needs. It was only one such institute, at Zam Hunedoara County. Nowadays Romania does not have such an institute despite the fact that the Penal Code stipulates its existence[2]. The institute at Zam has become a Psychiatric Hospital.

The legal sanctioning system for juvenile offenders was a mixture of compulsory educational measures (admonition, parole with supervision, compulsory internment in an educational center, compulsory internment in an medical and educational institute) and prison sentences diminished for underage offenders.

1970 Law no.3 from 1970 was adopted. It stipulated that special reeducation school were to be established under the supervision of the Ministry of Labor for the underage offenders without criminal liability (14 years old or younger or with no discernment)

1971 The Juvenile Offenders Prison was established in Bucharest. Its sole purpose was the preventive custody of underage offenders coming from Bucharest and those brought to the Supreme Court of Justice. It was closed in 1977.

1972 Decree 545 was adopted. Its legal provisions enhanced the quality of the reeducation process, taking place in Romania. It is still used nowadays. The Decree once again makes a shift, changing the name of the correctional facilities from "Re-educational Institute" to "Re-education Center".

I must underline the fact that after the closure of "Restrictive Colony Ocnele Mari", the number of re-educational centers in Romania was diminished to 5 (4 for male juvenile offenders and 1 for female juvenile offenders) in Găeşti, Târgu Ocna, Păltiniş, Alexandria and Bucharest.

1973 In the Jilava Penitentiary in Bucharest, in a newly built building, was established, in accordance with the provisions of Decree 545 from 1972, The Reception, Observation and Assignation Center For Juvenile Offenders. It was closed in 1977 and never reopened.

[2] An analysis made by the Romanian Superior Judicial Counsel in 2010 noticed the existence of this problem and some recommendations concerning the establishment of this type of institute were made. Until this moment no steps were taken in fulfilling this goal, www.csm1909 ro/csm/linkuri/06_09_2010__34613_ro.doc last visited on 9th of March 2011 – pages 156 and 162.

1977 When Decree no.115 from 8th of may 1977 was adopted, all the juvenile offenders were released from prisons.

1977 When Decree no.147 was adopted on the 1st of June 1977, all juvenile offenders from re-educational centers were released and all these special correctional facilities were closed.

The juvenile offenders coming both from prisons and re-educational centers were entrusted for supervision and education to workers collectives and schools (in accordance with their qualifications and their level of education). That entire evolution was to be an ab initio failure.

1977 The Transitional Decree no 218 published in The Official Bulletin on 17th of July 1977 adopts a new sanctioning system completely different from the previous one. Only two types of sanctions were to be used:

1. The juvenile offenders were to be entrusted for supervision and education to workers collectives (in factories) and schools or;
2. For serious offenses, juvenile offenders were to be placed into a special school for work and re-education for a period of time no longer than 5 years.

1977 A prison for youngsters was established in Bucharest, by replacing the underage offenders prison which was closed down. This correctional facility functioned until 1988 when it was transformed into a regular prison. This happened when Rahova Penitentiary was teared down and all the inmates transferred.

1978 When Decree no. 80 was adopted (not available for the public) the correctional facility required by the Transitional Decree no. 218, was finally established. It is The Special School For Work And Education from Găeşti. It was used for the custody of male and females juvenile offenders, separated between them. This correctional institute functioned in accordance with the provisions of Decree 545 from 1972.

1981 By Presidential Decree no. 218 from 1977 a new special school for work and education was established in Tichileşti – Brăila County. Its activity started in 1981. It was closed down in 1991 and reopened in 1993. This was to become the Re-education Center For Juvenile Offenders. Later, in 2004, it was transformed into a prison for underage or young offenders. It is still operational, serving its purpose.

1998 At Craiova – Dolj County another Prison Underage or Young Offenders is established, In the same location until 1993 existed a Re-education Center For Juvenile Offenders. This correctional facility started as a Special School For Work And Education first established in that location in 1992.

2004 With some European financing, trough PHARE program, a new Reeducation Center for Juvenile Offenders was established in Buzias – Timis County, a facility with exceptional conditions and endowments.

2011 Three Reeducation Centers For Juvenile Offenders and two prisons for juvenile and young offenders are in place. The centers are located in Gaesti, Târgu Ocna, Buziaş and the prisons are located in Craiova and Tichilesti

Conclusions

Obviously we can talk about the underdevelopment of these correctional facilities dedicated to juvenile offenders when we talk about all three Romanian historical provinces. We can estimate the fact that, with few exceptions the problems related to the offenses committed by the underage were never so relevant in fighting crimes in any given moment of the XIX-th century when talking about Romania. Political instability and economical turmoils, plus the lack of specialists generated gloomy perspectives for the successful social rehabilitation of juvenile offenders. Discrimination, given the social status differences, were common in the XVII-th century, thus the offenses committed by the underage offsprings belonging to nobility were treated less severe than those committed by the others.

An evolution was visible and it grew rapidly in the beginning of the XIX-th century, when the foundation of nowadays system was built. Even under the communism, despite the fact that the the regulations from 1972, implemented at that time and still in use, reached their best, the system had its ups and downs. The general amnesty from 1977 closed down many correctional facilities for adults an all the facilities used for young offenders and juvenile delinquents. Many specialists were left unemployed and a process with a promising evolution, that started in 1972, after Decree 545 was adopted, lost its momentum.

Nowadays, two main problems reside. The first one, the most common when talking about the public sector is the financial deficit. The second one is the need to change current regulations, too old and too rigid. Steps are taken to change the current status but until this moment with little success.

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L'INFLUENCE DE LA JURISPRUDENCE DE LA COUR EUROPEENNE DES DROITS DE L'HOMME SUR LE DROIT PRIVE ROUMAIN[1]

Ionuț MILITARU[2]
Hristache TROFIN[3]

Abstrait
L`article a pour but d`analyser l'influence médiate ou immédiate de la jurisprudence de la Cour Européenne des Droits de l'Homme sur l'évolution du droit privé en général et, espéciallement, sur l`aplication et l`interprétation du droit interne roumain. On prend en discussion le développement de «l'effet horizontal direct» de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, c'est-à-dire son application non plus seulement aux relations entre l'État et les individus, mais également aux relations privées. Dans ce contexte, les auteurs analysent les affaires contre la Roumanie qui ont eu un effet important sur le droit substantiel civil.

Mots-clés: Droits de l'Homme – CEDH – jurisprudence – effet direct – invocabilité – subsidiarité – droit privé

I. Introduction

1. La Convention de sauvegarde des droits de l'homme et des libertés fondamentales – plus connue sous le titre simplifié de Convention européenne des droits de l'homme (ci-après «la Convention EDH» ou «la CEDH») –, élaborée dans le cadre du Conseil de l`Europe et signée à Rome le 4 novembre 1950, a été constitutionnalisée en Roumanie par la Loi n° 30 de 20 juin 1994.[4]

L`article 20 de la Constitution de la Roumanie[5], prévoit que: «(1) Les dispositions constitutionnelles relatives aux droits et libertés des citoyens seront interprétées et appliquées en concordance avec la Déclaration Universelle des Droits de l'Homme, avec les pactes et les autres traités auxquels la Roumanie est partie. (2) En cas de non-concordance entre les pactes et les traités portant sur les droits fondamentaux de l'homme auxquels la Roumanie est partie, et les lois internes,

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[1] L`étude est développée au cadre du projet «CERDOCT - Bourses doctorales pour soutenir la recherche doctorale dans les domaines techniques et humaines, de protection de l'environnement et de la santé, de législation nationale, européenne et mondiale, avec impact éco-économique et socio-économique "CERDOCT" ID 79073. L`étude a été coordonnée par M. Prof. Univ. Dr. Liviu Stănciulescu.

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[4] Corneliu Bîrsan, *Convenţia europeană a drepturilor omului. Comentariu pe articole. Vol. I – Drepturi şi libertăţi*, Ed. C.H. Beck, Bucarest, 2005, p. 3.

[5] Modifiée et complétée par la Loi de révision de la Constitution de la Roumanie n° 429/2003, publiée au Journal Officiel de la Roumanie, Ière Partie, n° 758 du 29 octobre 2003; republiée avec la mise à jour des dénominations et une nouvelle numérotation donnée aux textes, au Journal Officiel de la Roumanie, Ière Partie, n° 767 du 31 octobre 2003.

les réglementations internationales ont la primauté, sauf le cas des dispositions plus favorables prévues par la Constitution ou les lois internes».

Ce sont les prémisses qui justifient l`analyse approfondie de l'influence médiate ou immédiate de la jurisprudence de la Cour Européenne des Droits de l'Homme sur l'évolution du droit privé interne. La nécessité du thème est motivée par la multitude d`affaires contre la Roumanie dans lesquelles la Cour a constaté la violation des droits de l'homme et des libertés fondamentales, arrêts qui ont eu un effet important sur le droit substantiel civil.

Les conclusions ont pour fondement la nature des droits de l'homme et des libertés fondamentales et d`autres critères qui définissent les dimensions - verticale et horizontale - de l'effet direct de certaines dispositions conventionnelles. Le point central de cette recherche juridique est le développement de «l'effet horizontal direct» de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, c'est-à-dire son application non plus seulement aux relations entre l'État et les individus, mais également aux relations privées.

2. Le système des droits de l`homme représente l`ensemble des normes juridiques internationales par lesquelles on reconnait à l`individu des attributs et des facultés qui lui assurent la dignité, la liberté et le développement de sa personnalité et qui bénéficie de garanties institutionnelles.[6]

La fondamentalité de ces droits peut être appréciée par le biais d'un critère formel ou substantiel (différenciés du fait de leur forme ou de leur contenu), permettant ainsi d'isoler les droits fondamentaux des droits de l'homme et des libertés publiques, tout en apportant des éléments de définition.[7]

II. La nature des droits de l'homme et des libertés fondamentales

3. **La conception formelle** de ces droits souligne la valeur supérieure de la norme qui les met en valeur. La distinction s'opère donc en fonction de leur supériorité de leur fondement. Souvent rattachés à la Constitution ou à une norme internationale, ces droits revêtent en conséquence une valeur importante, un *«ancrage constitutionnel»*[8], leur assurant une protection large et un respect de tous les pouvoirs.[9]

Aborder la fondamentalité de ces droits sous un angle formel revient d'ailleurs à justifier que les droits fondamentaux puissent s'appliquer tout autant de manière verticale entre l'individu et la personne publique que de manière horizontale entre les individus.[10]

Pour autant, certains droits fondamentaux qui ne sont pas des droits constitutionnellement consacrés - qualifiés de *«conventionnels»*[11] - ont une influence sur le droit interne et mettent en

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[6] Frédéric Sudre, *Droit Européen et international des droits de l`homme*, 6ème éd. refondue, PUF, Paris, 2003, p. 14.

[7] Henri Oberdorff, *Droits de l'homme et libertés fondamentales*, LGDJ, 2008, p. 30.

[8] *Ibidem*, p. 31.

[9] Clémentine Caumes, *L'interprétation du contrat au regard des droits fondamentaux*, Thèse de doctorat, Académie d'Aix-Marseille - Université d'Avignon et des Pays de Vaucluse, 2010, http://tel.archives-ouvertes fr/docs/00/54/33/19/PDF/These_ClA_mentineCaumes.pdf, p. 5.

[10] H. Oberdorff, *op. cit.,* p. 30.

[11] L. Favoreu, P. Gaia, R. Ghevontian, F. Melin-Soucramanien, O. Pfersmann, J. Pini, A. Roux, G. Scoffoni, J. Tremeau, *Droit des libertés fondamentales*, 3ème éd., Précis Dalloz, 2005, p. 89.

oeuvre non pas une hiérarchie des normes au sein de l'ordre juridique interne, mais soumettent l'ordre juridique interne dans son entier au respect d'une hiérarchie plus large.

La Roumanie, comme la plupart des États membres, a intégré la Convention EDH au sein de son ordre juridique interne, s`agissant donc de *«droits fondamentaux conventionnels nationaux»*.[12]

4. **La conception substantielle** vise à mettre en avant le contenu de ces droits pour justifier de leur fondamentalité. Du fait même de leur contenu - c'est-à-dire de l'objet de leur protection - certains droits, comme le droit à la vie, le droit de ne pas subir de traitements inhumains ou dégradants, l'interdiction de l'esclavage, le droit à la non-rétroactivité de la loi pénale constituent des droits dits fondamentaux intangibles, le *«noyau dur»* des droits de l'homme,[13] qui du fait de leur contenu ne peuvent pas être altérés. Leur fondamentalité s'exprime donc à travers le fait qu'aucune dérogation n'est permise qui pourrait justifier une violation à leur égard.[14]

Autour de ces droits graviteraient d'autres droits fondamentaux de second rang, des droits conditionnels, dont le contenu permet d'envisager des dérogations ou des restrictions à leur application qui seraient justifiées par la défense de l'intérêt général ou la préservation de l'ordre public. Ces dernières doivent répondre à certaines conditions. Elles doivent être prévues par la loi, viser un but légitime et être nécessaires dans une société démocratique. En outre, la restriction au droit ne doit jamais atteindre la substance même de ce droit.

Une certaine relativité entache l'approche substantielle, mais on peut cependant considérer que la condition posée tenant à l'impossibilité d'atteindre la substance même du droit[15] permet de redonner souffle à cette approche de la fondamentalité, en ce qu'il y aurait toujours, au sein d'un droit fondamental, une part plus ou moins large de son contenu qui ne peut être atteinte.[16]

III. Les critères abordés pour définir les effets de la CEDH

5. L'influence de la Convention EDH en droit interne est très importante, à tel point que le paysage juridique s'en trouve modifié. La jurisprudence relative à la justiciabilité des traités internationaux protecteurs des droits de l'homme est construite autour de l'effet direct. Un traité d'effet direct crée des droits dont les particuliers peuvent se prévaloir directement devant les juridictions nationales et conditionne la capacité du juge national à appliquer la norme internationale.[17] Il y a deux dimensions de l'effet direct de certaines dispositions conventionnelles: d'une part verticale, d'autre part horizontale.[18]

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[12] *Ibidem*, p. 92.

[13] F. Sudre, *op. cit.*, p. 206, n° 143.

[14] P. Muzny, « *Essai sur la notion de noyau intangible d'un droit, la jurisprudence du tribunal fédéral suisse et de la Cour EDH »*, Revue de droit public (RDP 2006), p. 989 et suiv.

[15] Cour EDH, *Rees c. Royaume-Uni*, 17 octobre 1986, série A n° 106: *«Les limitations en résultant ne doivent pas le restreindre ou réduire d'une manière ou à un degré qui l'atteindraient dans sa substance même»*.

[16] C. Caumes, *op. cit.,* p. 8.

[17] Carine Laurent-Boutot, *La Cour de cassation face aux traités internationaux protecteurs des droits de l'Homme*, thèse de doctorat, Universite de Limoges - Faculté de droit et des sciences économiques, 2006, http://www.unilim fr/theses/2006/droit/2006limo0520/html, p. 40.

[18] Les études relatives à ce sujet sont nombreuses: Erik Claes, Arne Vandaele, «*L'effet direct des traités internationaux. Une analyse en droit positif et en théorie axée sur les droits de l'homme»*, Actualité et droit international RBDI 2001/2, p. 411 et suiv.; Louis Dubouis, *La portée des instruments internationaux de protection des droits de l'homme dans l'ordre juridique français* dans *Les droits de l'homme dans le droit national en France et en*

6. **Le critère subjectif** de l'effet direct découle de la formulation de l'article 1er de la CEDH, qui prévoit que «l*es Hautes parties contractantes reconnaissent à toute personne relevant de leur juridiction des droits et libertés définis au titre I de la Convention*». Ce texte suggère que les auteurs ont entendu reconnaître des droits d'effet direct au bénéfice des individus.[19]

Par ailleurs, les articles suivants définissent ces droits en s'adressant aux individus. Les formulations «*Nul ne peut…*» ou «*Toute personne a…*» sont employées et aucune mention d'un simple engagement des Etats ''à garantir'' n'est exprimée par les dispositions conventionnelles du titre I de la CEDH.[20]

7. **Le critère objectif** de l'effet direct est plus visible, car les dispositions conventionnelles sont suffisamment précises et revêtent les caractéristiques de normes autoexécutoires (*self executing*[21]), ne nécessitant pas de mesures complémentaires d'exécution.[22] Elles créent des droits subjectifs dans le patrimoine juridique des individus, qui peuvent se prévaloir directement des dispositions conventionnelles devant le juge national.[23] Cette interprétation de la CEDH est renforcée par l'existence de l'article 13 garantissant «*l'octroi d'un recours effectif, devant une instance nationale, alors même que la violation aurait été commise par des personnes agissant dans l'exercice de leurs fonctions*».[24]

Ainsi que le précise l'article 1er de la CEDH, ces arguments ne se rapportent qu'au titre I, qui consacre les droits substantiels. Il faut rattacher à ceux-ci les différents droits, de même nature, consacrés par les protocoles additionnels, qui sont venus enrichir la CEDH[25]. Cette argumentation est renforcée par la jurisprudence de la Cour EDH, qui a constaté, dans son arrêt *Irlande contre Royaume-Uni* du 18 janvier 1978, que *le Titre I de la Convention est destiné à produire des effets directs dans l'ordre juridique interne des Etats membres*.[26] La Cour ne définit pas ici une obligation

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Norvège, Édition Eivind Smith, Presses Universitaires d'Aix-Marseille, Economica, 1990, p. 131; F. Dumon, « *La notion de disposition directement applicable en droit européen »*, Cahiers de droit européen, 1968, p 369; Jacques Velu, «*Les effets directs des engagements internationaux relatifs aux droits de l'homme»*, RBDI, 1980, p. 233.

[19] Claudia Sciotti-Lam, *L'applicabilité des traités internationaux relatifs aux droits de l'homme en droit interne*, Bruylant, 2004, Bruxelles, n°641-643.

[20] C. Laurent-Boutot, *op. cit.,* p. 52.

[21] Corneliu-Liviu Popescu*, Protecţia internaţională a drepturilor omului – surse, instituţii, proceduri*, Ed. All Beck, Bucarest, 2000, p. 12.

[22] Gérard Cohen-Jonathan, *La Convention européenne des droits de* l homme, PU d'Aix-Marseille, Economica 1989, p 244 ; du même auteur, La *place de la Convention européenne des droits de l'homme dans l'ordre juridique français* in *Le droit français et la Convention européenne des droits de l'homme 1974-1992*, Ouvrage sous la direction de Frédéric Sudre, Editions N.P. Engel. Kehl. Strasbourg. Arlington, 1994; Vincent Coussirat-Coustere, *Convention européenne des droits de l'homme et droit interne: primauté et effet direct* in *La Convention européenne des droits de l'homme: Actes de la journée d'étude du 16.11.1991*, sous la direction de Louis-Edmond Pettiti, Vincent Coussirat-Coustere, Pierre Lambert, Didier Durand et Marc-André Eissen, Collection droit et justice, Nemesis, 1992, Bruxelles (n°5 et suivants).

[23] Frédéric Sudre, *La Convention européenne des droits de l'homme*, 6ème édition, PUF 2004, Paris, p. 15.

[24] Louis Pettiti, *L'applicabilité directe de la Convention en droit français*, Annales de l'Université des sciences sociales de Toulouse, T XXIX, 1981, p 57; Olivier de Schutter: *Fonction de juger et droits fondamentaux: transformation du contrôle juridictionnel dans les ordres juridiques américain et européen*, Bruylant, 1999, Bruxelles, p 295 et suiv.

[25] Frédéric Sudre, *op. cit*., p. 7 et suiv.

[26] Cour EDH, *Irlande c. Royaume-Uni,* no 5310/71, arrêt du 18 janvier 1978, Série A n°25; arrêts *De Wilde, Ooms et Versyp c. Belgique*, 18 juin 1971, série A n°12, § 43 et *Syndicat suédois des conducteurs de locomotives c. Suède*, 6 février 1976, série A n°20, § 50.

internationale imposant aux Etats de reconnaître l'applicabilité directe[27]. Toutefois, elle déduit les effets du traité dans l'ordre juridique interne et renforce son argumentation par les arrêts ultérieurs[28].

Par contre, cette interprétation de l'effet direct ne se rapporte pas au titre II de la CEDH, qui définit la procédure applicable au recours devant la Cour EDH, au titre III, qui précise l'engagement des Etats au titre de l'application territoriale, des réserves, de la dénonciation, de la signature et de la ratification, car ces dispositions conventionnelles sont à destination des Etats, non des individus. Les protocoles additionnels respectent le même schéma: apres l`énonciation des droits, ils en déterminent l'application territoriale, les mécanismes de signature et de ratification.[29]

Pourtant, les dispositions de l'article 53 du titre III de la CEDH pourraient être qualifiées d'effet direct: «*Aucune des dispositions de la présente Convention ne sera interprétée comme limitant ou portant atteinte aux droits de l'homme et aux libertés fondamentales qui pourraient être reconnus conformément aux lois de toutes parties contractantes*». Ce texte garantit l'application de la clause la plus favorable, également évoquée par les termes «*clause de surenchère*»[30]. Il n'est pas impossible d'admettre que l`intéressé se prévale de l'application de la clause la plus favorable, combinée avec le texte national ou international lui reconnaissant des droits subjectifs plus importants que ceux consacrés par la CEDH.

IV. La sphère des droits susceptibles d`effet direct

8. En conclusion, il faut retenir le principe que seul le titre I et les droits substantiels énoncés dans les protocoles seraient susceptibles d`entraîner un effet direct. Il faut aussi preciser que **l'approche globaliste positive de l'effet direct** est tout à fait impossible à accepter, car elle n'aboutit pas à une solution cohérente, alors même qu'elle serait motivée par la volonté de reconnaître l'effet direct de tous les droits consacrés par un traité.

Tout d'abord, pas toutes les dispositions conventionnelles peuvent avoir un effet direct indépendant. L'article 14 de la CEDH, définissant le principe de non-discrimination, bien que disposant d'une certaine autonomie[31], ne peut pas être appliqué seul. Un justiciable ne saurait s'en prévaloir sans le combiner avec une autre disposition conventionnelle créatrice d'un droit substantiel énoncée par la CEDH. Reconnaître l'effet direct global de la partie I du traité ne permet pas de spécifier cette caractéristique du principe de non-discrimination.[32]

L'approche globaliste positive, bien qu'impraticable, est moins dangereuse que **l'approche globaliste négative** (la négation globale de l'effet direct), qui est incompatible avec le caractère objectif des droits de l'homme.

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[27] Olivier de Schutter, *La coopération entre la Cour européenne des droits de l'homme et le juge national*, RBDI, 1997/1, p. 28.

[28] Cour EDH, *Van Oosterwijck c. Belgique*, 6 novembre 1980, série A n°40, § 33; Cour EDH, *Eckle c. Allemagne*, 15 juillet 1982, série A n°51, § 66.

[29] C. Laurent-Boutot, *op. cit.,* p. 53.

[30] Dimitrios Evriginis, *L'interaction entre la dimension internationale et la dimension nationale de la Convention européenne des droits de l'homme: notions autonomes et effet direct* in Festschrift *für Herman Mosler, Völkerrecht als reshtsordnung internationale gerichtsbarkeit menschenrechte*, Springer Verlag, 1983, Berlin, Heidelberg, New York, p. 193 et 199.

[31] Cour EDH, *Inze c. Autriche*, 28 octobre 1987, Série A n° 126, § 36; *Gaygusuz c. Autriche*, 16 septembre 1996, Recueil 1996-IV, § 36; *Van Raalte c. Pays-Bas*, 21 février 1997, Recueil 1997-I, § 33.

[32] C. Laurent-Boutot, *op. cit.,* p. 53.

V. Les deux dimensions de l`effet direct

9. L'effet direct d'une disposition conventionnelle revêt devant le juge national deux dimensions, verticale et horizontale, chacune dépendant du texte impliqué et de la particularité du litige.

L'effet horizontal tel qu'on peut l'identifier et le distinguer aujourd'hui correspond à une extension du champ d'application normal de la Convention EDH, celui de la verticalité. Il faut souligner aussitôt que pas toutes les dispositions conventionnelles d'effet direct vertical ont vocation à jouer un effet horizontal.

Dans cet article on va analyser particulièrement la mise en oeuvre de la dimension horizontale de l`effet direct.

10. Généralement, l'effet direct des traités internationaux protecteurs des droits de l'homme se concrétise dans un **rapport vertical**. Bien que les juridictions nationales tranchent des litiges nés entre personnes privées, les problèmes juridiques se placeront autour des divergences existant entre les dispositions conventionnelles et les normes édictées par l'Etat ou les actes émanant de ses représentants, le justiciable essayant à établir une contradiction entre certains droits garantis et le droit interne.

En effet, la Convention EDH est applicable, dans son premier sens, aux relations unissant l'État aux individus. Seule la responsabilité de l'État du fait des actes directement adressés à un particulier y est envisagée (article 34 de la Convention). On a exprimé l`opinion que la Cour EDH n'était compétente, *rationne personae,* que pour les violations commises par l'un des États signataires, qu`elle ne mettait aucune obligation à la charge des individus, dont la violation par ces derniers pourrait être sanctionnée par les organes de Strasbourg. L'admission d'une atteinte causée par un individu à un autre individu et dont l'État serait responsable ne constituait pas une hypothèse envisagée dans la Convention EDH lors de son adoption.[33]

11. **L'effet horizontal** «*vise à assurer l'effectivité des droits protégés, y compris contre les agissements des tiers*».[34] La notion se réfère *à* l'effet produit par une norme au sein des relations entre personnes privées, par opposition à l'effet vertical, dont la vertu est de protéger les individus contre les atteintes que l'État pourrait causer aux droits fondamentaux.

Il signifie que les droits protégés par la Convention doivent être respectés aussi bien dans les relations verticales liant un individu à l'État, que dans les relations horizontales liant deux individus entre eux. Le juge européen est désormais tenu de contrôler que la protection de l'individu à travers ses droits fondamentaux est assurée contre les agissements d'autres individus. Il ne s'agit plus alors de défendre ses droits contre l'État, mais davantage de *garantir l'exercice effectif de ces droits par l'État*. Par l`extension de cette dimension de la Convention EDH, elle est devenue non plus seulement un instrument de défense contre l'État, mais *un mécanisme de protection généralisée*.[35] L'extension du champ d'application de la Convention EDH de son aspect vertical à son aspect horizontal recouvre l'idée d'une *extension de la responsabilité étatique*.[36]

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[33] C. Caumes, *op. cit.,* p. 46.

[34] F. Sudre, *Grands Arrêts de la Cour européenne des Droits de l'Homme (GACEDH)*, Thémis, PUF, 3ème Édition, 2005, Paris, p. 30.

[35] L.-E. Pettiti, R*éflexions sur les principes et les mécanismes de la Convention. De l'idéal de 1950 à l'humble réalité d'aujourd'hui*, in L.-E. Pettiti, E. Decaux, et P.-H. Imbert (dir.), *La Convention européenne des droits de l'homme, Commentaire article par article*, Paris, Economica, 1995, p. 33.

[36] C. Caumes, *op. cit.,* p. 50.

L'influence des droits fondamentaux sur le droit privé sera déterminée en fonction de l'attitude adoptée par l'État à l'égard du litige auquel il est confronté.

VI. Présentation des rapports juridiques à analyser

12. **Quand le conflit résulte de l`action de l'État**, par l`adoption d'une loi par exemple[37], la faute sera d`avoir favorisé l'atteinte des droits de l`homme. En insérant les dispositions d`une telle loi dans un contrat, ou en se servant des avantages qu'elle peut lui conférer, l'individu peut ainsi porter atteinte aux droits d'un autre du seul fait de l'existence de cette norme dans un contrat.

La responsabilité de l'État peut-être engagée non pas du fait du législateur, mais aussi du fait de *l'action du juge,* qui n'ait pas rendu une décision d'interprétation conforme à la Convention.[38]

Si l'on reproche à l'État une ingérence active, il faut vérifier – le cas échéant - que cette ingérence est prévue par la loi, qu'elle poursuit un but légitime, et qu'elle est nécessaire dans une société démocratique.[39]

13. **Quand l`obligation positive à la charge de l'État est ignorée**, on parle de son *inaction*, bien qu`elle semble déterminante pour le rapport juridique. L`ingérence passive de l'État peut consister à un défaut d'actions d'ordre matériel ou législatif, normatif plus largement.[40] La prise en compte du *«juste équilibre à ménager entre l'intérêt général et les intérêts de l'individu»*[41] est décisive.

Par exemple, dans l'affaire *Hutten-Czapska c. Pologne*[42] la Cour européenne a condamné une loi qui avait pour conséquence de priver les propriétaires d'immeubles de loyers décents, et mettait les locataires dans des situations bien trop avantageuses. Les violations privées sont ici imputables à l'appareil législatif de l'État. La législation de ce dernier rend possible la violation par un tiers d'un droit fondamental d'un individu.[43]

Pourtant, cette distinction délicate est perdue dans certains arrêts[44], la théorie des obligations positives étant appliquée, alors que la violation est due au droit interne de l'État. La Cour européenne demande donc à l'État de manifester une action, alors qu'une action a déjà été réalisée. L'obligation positive intervient ici non pas pour pallier l'action, mais pour remédier une ingérence.[45]

L`ingérence dite négative ou passive permet à un individu de s'engouffrer dans le droit fondamental d'un autre du fait d'une carence de l'action étatique, ou provoque en soi une atteinte au droit fondamental.[46] Plus fréquemment, le juge européen reproche à l'État son inaction face aux violations interindividuelles parce qu'il n'a pas satisfait à son obligation positive de protéger les individus les uns envers les autres.[47]

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[37] Cour EDH, *Airey c. Irlande*, 9 octobre 1979, série A n° 32: *«un obstacle de fait peut enfreindre la Convention à l'égal d'un obstacle juridique»*.

[38] Voir *infra* § n° 21.

[39] C. Caumes, *op. cit.,* p. 52.

[40] Ibidem.

[41] Cour EDH, *Goodwin c. Royaume-Uni*, 11 juillet 2002, Grande Chambre, n° 28957/95, *RTD civ.* 2002, p. 862, obs. J.-P. Marguénaud;

[42] Cour EDH, *Hutten-Czapska c. Pologne,* 22 février 2005, n° 35014/97, Recueil 2006-VIII.

[43] Voir *infra* § n° 23.

[44] Cour EDH, *Odievre c. France*, 13 février 2003, n°42326/98, Recueil 2003-III.

[45] Voir *infra* § n° 24-26.

[46] Cour EDH, *Lopez Ostra c. Espagne*, 9 décembre 1994, série A n° 303-C.

[47] C. Caumes, *op. cit.,* p. 53.

Les obligations positives *«peuvent impliquer l'adoption de mesures visant au respect de la vie privée jusque dans les relations des individus entre eux»*[48]. Les décisions antérieures n`étaient pas si univoques: en 1978 la Cour de Strasbourg précisait dans l'affaire *Irlande contre Royaume-Uni* que *«la Convention ne se contente pas d'astreindre les autorités suprêmes des États contractants à respecter elles-mêmes les droits et libertés qu'elle consacre (...); elle implique aussi qu'il leur faut, pour en assurer la jouissance, en empêcher ou en corriger la violation aux niveaux inférieurs»*.[49]

VII. L'effet direct horizontal de la disposition conventionnelle

14. Cependant, les droits consacrés par les traités internationaux protecteurs des droits de l'homme doivent également être respectés entre individus.[50] L'effet horizontal, dit également réflexe, est d'origine allemande.[51]

L'admission d'une présomption d'effet direct en faveur des dispositions conventionnelles issues des traités internationaux protecteurs des droits de l'Homme ne constitue pas une idée nouvelle en doctrine.[52] Il est possible de tirer avantage de l'exemple communautaire[53], car la juridiction communautaire a développé, depuis longtemps, une jurisprudence favorable à l'admission de l'effet direct du droit originaire et dans une certaine mesure du droit dérivé.[54]

La Cour EDH a rapidement constaté que les individus pouvaient être victimes d'une violation commise par d'autres particuliers. Elle a, par conséquent, consacré l'application horizontale de certains droits définis par la CEDH. Cette approche soulevait un problème d'imputabilité puisque seuls les Etats peuvent faire l'objet de poursuites devant le juge européen. Il a été donc nécessaire de déterminer comment l'Etat pouvait être tenu responsable des atteintes commises par des individus ou des groupements privés. La Cour a, tout d'abord, considéré que l'Etat peut être débiteur d'une obligation positive, lui imposant de veiller au respect d'une disposition conventionnelle entre les sujets de droit privé.[55]

Le mécanisme est sensiblement différent devant les juridictions judiciaires. A l'occasion d'un litige, un individu peut opposer les droits garantis par le traité aux violations commises par un

[48] Cour EDH, *X et Y c. Pays-Bas*, 26 mars 1985,série A n° 91; *Lopez Ostra c. Espagne*, 9 décembre 1994, série A, n°303-C.

[49] Cour EDH, *Irlande* c. Royaume-Uni, 18 janvier 1978, série A n° 25.

[50] Vincent Coussirat-Coustere, *Convention européenne des droits de l'homme et droit interne: primauté et effet direct in La Convention européenne des droits de l'homme*, Actes de la journée d'étude du 16-11-1991, sous la direction de Louis-Edmond Pettiti, Vincent Coussirat-Coustere, Pierre Lambert, Didier Durand et Marc-André Eissen, Collection droit et justice, Nemesis, 1992, Bruxelles, p. 11; Dean Spielmann, *L'effet potentiel de la Convention européenne des droits de l'homme entre personnes privées*, Bruylant, 1995, Bruxelles, p. 18 ; Arlette Heymann-Doat, *Le respect des droits de l'homme dans les relations privées* in *Cinquantième anniversaire de la Convention européenne des droits de l'homme*, sous la direction de Catherine Teitgen-Colly, Nemesis, Bruylant, 2002, Bruxelles, p. 219.

[51] «*Direkte drittwirkung*».

[52] C. Laurent-Boutot, *op. cit.,* p. 108-109.

[53] Denys Simon, *Le système juridique communautaire*, 3ème édition, PUF, 2001, Paris, n° 315.

[54] En opposition avec la solution classique du droit international, la CJCE semble proclamer une présomption d'effet direct dans son arrêt *Van Gend et Loos,* 5 février 1983, 26/62, Rec. I.

[55] Dean Spielmann, *Obligations positives et effet horizontal des dispositions de la Convention* in *L'interprétation de la Convention européenne des droits de l'homme*, sous la direction de Frédéric Sudre, Bruylant, 1998, Bruxelles, p. 133.

particulier ou un groupement privé.[56] Grâce à l'effet direct horizontal, la Convention peut être invoquée à l'encontre du contrat privé et le juge a l` obligation de vérifier la compatibilité du contrat au traité.[57]

Bien que les contractants puissent définir certaines clauses applicables aux conventions les unissant, cette liberté doit s'exercer dans le respect des droits définis par la CEDH. Par exemple, si on a intégré au contrat une clause abusive, par laquelle le bailleur viole le droit au respect de la vie privée garanti par l'article 8 de la CEDH, la clause doit être annulée. Par-delà la reconnaissance d'un effet horizontal direct du droit au respect de la vie privée se dessine la subordination du droit des obligations à la CEDH.[58]

15. La reconnaissance de l'effet direct d'une disposition conventionnelle relève du pouvoir d'interprétation du juge[59], qui lui appartient, en propre, au sens de la jurisprudence de la Cour EDH.[60]

Dès 1961, la Commission européenne des droits de l'homme affirme qu'en ratifiant la CEDH «*...Les Etats n'ont pas voulu se concéder des droits et obligations réciproques utiles à la poursuites de leurs intérêts nationaux respectifs..., les obligations souscrites par les Etats contractants dans la Convention ont essentiellement un caractère objectif, du fait qu'elles visent à protéger des droits fondamentaux des particuliers contre les empiétements des Etats contractants plutôt qu'à créer des droits subjectifs et réciproques entre ces derniers*».[61]

Elle est rejointe par la Cour EDH qui affirme, dans son arrêt *Irlande contre Royaume-Uni* du 18 janvier 1978, que «*à la différence des traités internationaux de type classique, la Convention déborde le cadre de la simple réciprocité entre Etats contractants..., elle crée des obligations objectives qui aux termes de son Préambule, bénéficient d'une ''garantie'' collective*».[62]

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[56] 361 Patrick de Fontbressin, *L'effet horizontal de la Convention européenne des droits de l'homme et l'avenir du droit des obligations* in *Liber Amicorum Marc André Eissen*, Bruylant, 1995, Bruxelles, p. 157; Dean Spielmann, *L'effet potentiel de la Convention européenne des droits de l'homme entre personnes privées*, Bruylant, 1995, Bruxelles, p. 30; Julien Raynaud, *Les atteintes aux droits fondamentaux dans les actes juridiques privés*, thèse de doctorat présentée sous la direction du Professeur Eric Garaud, Université de Limoges, Faculté de droit et de sciences économiques, p. 60 et suiv.; Olivier Lucas, *La Convention européenne des droits de l'homme et les fondements de la responsabilité civile*, JCP G 2002, I n°111, p. 286; Béatrice Moutel, *Une lente appropriation de l'effet horizontal* in *CEDH et droit privé: l'influence de la jurisprudence de la Cour européenne des droits de l'homme sur le droit privé français*, sous la direction de Jean-Pierre Marguenaud, La documentation française, 2001, Paris, p. 162.

[57] Cour EDH, *Van Kuck c. Allemagne*, 12 juin 2003, n° 35968/97, § 69 et suivants; Revue trimestrielle de droit civil (RTDCiv. 2004), p. 361, observations Jean-Pierre Marguenaud; arrêt *Pla et Puncernau c. Andorre*, 13 juillet 2004, n°69498/01, § 42 et suivants; Actualité juridique de droit administratif 2004, p. 1812, observations Jean-François Flauss; RTDCiv. 2004, p. 804, observations Jean-Pierre Marguenaud.

[58] C. Laurent-Boutot, *op. cit.,* p. 90 et suiv.

[59] Denis Alland, *L'applicabilité directe du droit international considéré du point de vue de l'office du juge: des habits neufs pour une vieille dame?,* RGDIP, 1998, Vol I, p. 203 et suiv.

[60] Cour EDH, *Beaumartin c. France,* 24 novembre 1994, Série A n° 296 B; arrêt *Chevrol c. France* du 12 février 2003, RTDCiv. 2003, note Remy Libchaber, p. 572.

[61] Comission EDH decision *Autriche c. Italie,* 11 janvier 1961, n° 788/60.

[62] Cour EDH, *Irlande c. Royaume-Uni,* 18 janvier 1978, n°5310/71, § 239.

VIII. La subsidiarité des dispositions conventionnelles protectrices des droits de l'Homme

16. Le mécanisme de subsidiarité[63], aussi connu du droit communautaire[64], est fondé sur la règle que le juge national est le premier appelé à assurer l`exercice des droits consacrés par la Convention, qui impose leur respect par l`Etat, mais aussi l`élimination des conséquences des violations souffertes par les particuliers.[65]

Les dispositions conventionnelles permettent d'identifier deux dimensions au caractère subsidiaire du traité.[66] La première relève de l'article 35 paragraphe 1, selon lequel la Cour EDH ne sera saisie qu'après l'épuisement des voies de recours internes. Il s'agit d'une **subsidiarité procédurale**[67] ou **juridictionnelle**[68]. Elle renforce le rôle du juge national, juge naturel du traité.[69]

La seconde pourrait être rattachée, du moins de manière implicite, à l'article 53 du traité européen selon lequel: «*Aucune des dispositions de la présente Convention ne sera interprétée comme limitant ou portant atteinte aux droits de l'homme et aux libertés fondamentales qui pourraient être reconnus conformément aux lois de toute Partie contractante ou à toute autre Convention à laquelle cette Partie contractante est partie*». La subsidiarité est ici «**substantielle**»[70]. Elle conditionne, partiellement, l'application coordonnée des normes par les juridictions internes.

17. **L'invocabilité d'exclusion** s'appuie sur l'impérativité de garantir la primauté dans l'ordre juridique interne, en obtenant un effet de substitution de la norme conventionnelle; elle n'a qu'une seule vocation: évincer les textes d'origine nationale (normes étatiques ou clauses des conventions privées) contraires à la disposition conventionnelle.

Les droits imprécis permettront d'exclure la norme interne contraire, tout en considérant que plus l'imprécision est large, moins l'incompatibilité est probable. De même, les droits simplement programmatiques permettront l'éviction de la norme nationale qui entraverait les objectifs posés par le traité.[71]

Si l'invocabilité d'exclusion de la disposition conventionnelle ne sera pas envisageable, car le juge ne dégage pas un droit subjectif ou ne découvre pas dans son arsenal juridique interne les fondements lui permettant de trancher le litige, il peut encore interpréter le droit national à la lumière du traité, par la voie de **l'invocabilité d'interprétation conforme**.[72] Afin d'interpréter le droit interne, le juge national devra déterminer, entre plusieurs sens possibles, celui qui concorde le mieux

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[63] Jacques Raynard, *A propos de la subsidiarité en droit privé* in Mélanges Christian Mouly, Litec, 1998, Paris, p. 131 ; Philippe Casson, *Le subsidiaire et le droit privé*, RRJ, 2001-1, p. 143.

[64] Vlad Constantinesco, *Le principe de subsidiarité: un passage obligé vers l'Union européenne?* Mélanges en l'honneur de Jean Boulouis, *L'Europe et le droit*, 1991, Paris, p 35; Guy Issac, Marc Blanquet, *Droit communautaire général*, 8ème édition, Armand Colin, 2001, Paris p. 46-48; Jean Charpentier, *Quelle subsidiarité*, Pouvoirs, 1994, n°69, p. 49.

[65] Corneliu Bîrsan, *op. cit.*, p. 98.

[66] Marc Verdussen, «*La protection des droits fondamentaux en Europe: subsidiarité et circularité* in *Le principe de subsidiarité»*, sous la direction de Francis Delperee, LGDJ, Bruylant, 2002, Paris, Bruxelles, p. 311 et suiv.

[67] Elisabeth Lambert, *op. cit*.

[68] Marc Verdussen, *op. cit*.

[69] C. Laurent-Boutot, *op. cit.,* p. 265 et suiv.

[70] Jacques Normand, *La subsidiarité de la Convention européenne des droits de l'homme devant la Cour de cassation* in *La procédure dans tous ses états*, Mélanges Jean Buffet, PA, 2004, Paris, p. 357 et suiv.

[71] C. Laurent-Boutot, *op. cit.,* p. 166.

[72] *Idem,* p. 175-176.

avec une disposition conventionnelle, prise comme norme de référence.[73] L'invocabilité d'interprétation conforme du droit national à la lumière des dispositions conventionnelles est un mécanisme emprunté à la jurisprudence de la Cour de Justice des Communautés Européennes.[74]

L'interprétation conforme diffère fondamentalement de l`invocabilité d'exclusion en ce qu'elle n'aboutit pas à l'éviction du droit national divergeant. Au contraire, il subsiste et s'applique au litige soumis au juge, mais à la lumière des dispositions conventionnelles.

IX. L`application des principes énoncés au système de droit roumain

18. La Roumanie a intégré la Convention EDH au sein de son ordre juridique interne (voir *supra* n° 1), conformément aux dispositions de l`article 11 paragraphe 2 de la Constitution de la Roumanie, révisée, selon lequel les traités ratifiés par le Parlement, conformément à la loi, font partie du droit interne.

En ce qui concerne la procédure, chaque personne peut invoquer une éventuelle contrariété entre une norme juridique interne concernant un droit protégé par la Convention et les dispositions de celle-ci, sur le fondement de l`article 20 paragraphe 2 de la Constitution de la Roumanie, devant les autorités publiques appelées à appliquer la norme en discussion ou devant les juridictions internes,[75] vu le principe général de l`accès au tribunal.

La sanction incidente en tel cas est celle de l`inapplicabilité de la norme interne contraire à la Convention EDH pour le rapport juridique concret et pour la situation conflictuelle analysée.[76] Autrement dit, la sanction de l`inapplicabilité de la norme juridique produit des effets *inter partes*.[77]

Quand la contrariété vise une disposition constitutionnelle, interprétée à la lumière de la Convention européenne, dans un litige en cours, il s`agit de la procédure du contrôle de constitutionnalité de la loi, qui a comme effet, le cas échéant, la déclaration de l` inconstitutionnalité de la norme juridique interne (*erga omnes*). Si l`instance de contentieux constitutionnel va conclure que la norme nationale este compatible avec les dispositions de la Convention, elle va rejeter l`exception de inconstitutionnalité.[78]

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[73] Claudia Sciotti-Lam, *op. cit.*

[74] La CJCE a ingénieusement contourné l'absence d'effet direct des directives communautaires en élaborant le mécanisme d'invocabilité d'interprétation conforme. A l'occasion de son arrêt Von Colson et Kamann, rendu le 10 avril 1984663, en considérant que le juge interne devait interpréter son droit national «*à la lumière du texte et de la finalité de la directive*». Voir Catherine Haguenau, *L'application effective du droit communautaire en droit interne: analyse comparative des problèmes rencontrés en droit français, anglais et allemand*, Bruylant, 1995, Bruxelles, p. 269.

[75] Dans l`affaire *Roşca Stănescu et Cristina Ardeleanu c. Roumanie*, la Cour EDH a noté que le Tribunal du Département Bucarest, en appel, a jugé que les dispositions de l'article 238 du Code pénal roumain n'étaient pas applicables à la presse, car les affirmations en question visaient des aspects politiques, pour lesquels la liberté d'expression telle que garantie par l'article 10 de la Convention était plus large (Cour EDH, décision du 19 février 2002, n° 35441/97, Recueil 2002-III, p. 492).

[76] Corneliu Bîrsan, *op. cit*., p. 102 et suiv.

[77] Voir aussi C.-L. Popescu, *op. cit*., p. 264 et suiv.

[78] Voir, par exemple, les décisions de la Cour Constitutionnelle de la Roumanie n° 35/2004, publiée dans la Journal Officiel de Roumanie n° 132 de 13 février 2004; n° 55/2004, publiée dans la Journal Officiel de la Roumanie n° 199 du 5 mars 2004.

L`intéressé peut choisir une des procédures mentionnées (le principe *electa una via* n`est pas applicable), parce que leur objet est différent. Même si le tribunal a estimé que la norme interne n`est pas contraire aux dispositions de la CEDH, l`intéressé peut solliciter le contrôle de constitutionnalité par rapport aux dispositions constitutionnelles pertinentes, à la lumière de la Convention, et la solution de la Cour Constitutionnelle de la Roumanie s`imposera au tribunal, en produisant des effets *erga omnes*.

X. La force juridique de la jurisprudence de la Cour EDH dans le droit interne

19. Les dispositions de la Convention EDH et des protocoles additionnels ne peuvent pas être interprétées et appliquées correctement qu`en les rapportant à la jurisprudence de la Cour EDH (elles forment un ***bloc de conventionnalité***). Dans le système roumain de droit, la jurisprudence de la Cour EDH est directement applicable, a une force constitutionnelle et supralégislative. Par conséquence, les autorités roumaines sont obligées à appliquer les solutions jurisprudentielles des organes de la Convention, indifférent si elles ont été rendues dans les affaires contre la Roumanie ou – le plus souvent – contre les autres Etats membres de la Convention.[79]

La Cour Constitutionnelle de la Roumanie a statué dès l`année 1994 que l`interprétation de l`instance de contentieux européen des dispositions de la Convention, en vertu du principe de la subsidiarité, s`impose à l`instance nationale de contentieux constitutionnel, raisonnement réaffirmé fréquemment dans sa jurisprudence ultérieure.[80]

20. Dans l`affaire *Dumitru Popescu c. Roumanie (n° 2)*, la Cour EDH a constaté que, par une décision n° 159 du 3 février 2000[81], la Cour Constitutionnelle de la Roumanie avait conclu à la compatibilité de la loi nationale en cause avec l'article 8 de la Convention et avec les principes qui se dégagent de la jurisprudence de la Cour en la matière. Par une décision n° 766 du 7 novembre 2006[82], prononcée au cadre du contrôle de constitutionnalité de la loi initié par un autre requérant, la Cour Constitutionnelle de la Roumanie a eu la même conclusion, qui s`est puis heurté au constat de la Cour EDH énoncé aux paragraphes 84 et 85 de l`arrêt *Dumitru Popescu*, de violation de l'article 8 de la Convention.[83]

La Cour EDH a estimé qu'un système basé sur la primauté de la Convention et de sa jurisprudence sur les droits nationaux est à même d'assurer au mieux le bon fonctionnement du mécanisme de sauvegarde mis en place par la Convention et ses protocoles additionnels. Il n'est pas dépourvu d'importance de rappeler à cet égard, que, dans sa Recommandation du 12 mai 2004[84], le

[79] Corneliu Bîrsan, *op. cit.*, p. 103.

[80] Voir, par exemple, la décision de la Cour Constitutionnelle de la Roumanie n° 105/2004, publiée dans la Journal Officiel de la Roumanie n° 301 du 6 avril 2004.

[81] Publiée dans la Journal Officiel de Roumanie n° 159 du 17 avril 2000.

[82] Publiée dans la Journal Officiel de Roumanie n° 25 du 16 janvier 2007.

[83] Il convient néanmoins de rappeler qu'il n'appartient pas généralement à la Cour EDH de connaître les erreurs de fait ou de droit prétendument commises par une juridiction interne ou par le juge constitutionnel national (voir, entre autres, *García Ruiz c. Espagne* [GC], n° 30544/96, § 28, CEDH 1999-I; *Perez c. France*, [GC], n° 47287/99, § 82, CEDH 2004-I; *Coëme et autres c. Belgique*, n° 32492/96, 32547/96, 32548/96, 33209/96 et 33210/96, § 115, CEDH 2000-VII).

[84] Recommandation Rec (2004)6 du Comité des Ministres aux Etats membres sur l'amélioration des recours internes, adoptée le 12 mai 2004, lors de sa 114e session.

Comité des Ministres s'est félicité de ce que la Convention faisait partie intégrante de l'ordre juridique interne de l'ensemble des Etats parties. Cela implique l'obligation pour le juge national d'assurer le plein effet de ses normes en les faisant au besoin passer avant toute disposition contraire qui se trouve dans la législation nationale[85], sans devoir attendre son abrogation par le législateur.[86]

Or, la Cour a relevé que le statut conféré à la Convention en droit interne permet justement aux juridictions nationales d'écarter – *ex officio* ou à la demande des parties – les dispositions du droit interne qu'elles jugent incompatibles avec la Convention et ses protocoles additionnels. Le simple fait qu'elles ont choisi, en l'espèce, la voie d'un renvoi à la Cour constitutionnelle – qui statue sur la compatibilité de la loi avec le droit interne dont la Convention fait partie intégrante – et qu'elles n'ont pas elles-mêmes tranché cette question alors qu'il leur était également loisible de le faire[87], ne saurait en soit entraîner une méconnaissance de l'article 6 de la CEDH. Il en va d'autant plus ainsi que ni la Convention en général, ni son article 13 en particulier, ne prescrivent aux Etats contractants une manière déterminée d'assurer dans leur droit interne l'application effective des dispositions de cet instrument[88].

XI. Analyse des cas concrets de nature jurisprudentiellle

21. L`affaire *Bock et Palade c. Roumanie*[89] est un exemple pour le principe général que la méconnaissance des normes de droit interne peut conduire à une violation des droits de l`homme, dans le domaine du droit de propriété (article 1 du Protocole n° 1).

En fait, le droit de propriété que les requérants ont fait inscrire dans le livre foncier portait sur l'immeuble entier et le terrain afférent, sans aucun démembrement ou condition. En vertu de l'arrêt définitif de la Cour Suprême de Justice, les requérants ont vu leur droit de propriété limité, car ils ont perdu le droit de superficie afférant à la partie de l'immeuble passée dans la propriété du conseil municipal. La Cour Suprême de Justice a considéré que le droit du conseil municipal en qualité de superficiaire sur les constructions resulte du fait d`avoir bâti sur le terrain un bloc d'appartements, avec la conviction qu'il est le propriétaire du bien entier. principe de la sécurité juridique

La Cour EDH a rappelé que le droit de superficie est un droit réel qui permet à une personne (le superficiaire) d'être propriétaire des constructions, ouvrages ou plantations sur un terrain appartenant à une autre personne, terrain sur lequel le superficiaire a un droit d'usage. Le droit de superficie constitue une exception à la règle de l'accession immobilière artificielle régie par l'article 492 du Code civil. Il est défini comme un droit réel immobilier, perpétuel et imprescriptible.

Le régime juridique du droit de superficie n'est défini par aucune disposition légale interne. Néanmoins, plusieurs actes législatifs font référence à l'expression «droit de superficie» comme, par exemple, l'article 11 du décret-loi n° 115/1938 relatif à l'unification des livres fonciers, l'article 22 du décret n° 167/1958 relatif à la prescription extinctive, l'article 21 de la loi n° 7/1996 sur le cadastre et la publicité foncière et l'article 488 du Code civil, tel que modifié par la décision gouvernementale n° 138/2000.

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[85] Voir, *mutatis mutandis*, *Vermeire c. Belgique*, arrêt du 29 novembre 1991, série A n° 214-C, p. 84, § 26.

[86] Cour EDH, *Dumitru Popescu c. Roumanie (n° 2),* 26 avril 2007, n° 71525/01, § 99-105.

[87] Cour EDH, *Ivanciuc c. Roumanie*, décision d`irrecevabilité du 8 septembre 2005, n° 18624/03, Recueil 2005-XI, sur le refus des tribunaux nationaux de saisir la Cour constitutionnelle.

[88] *Mutatis mutandis*, *Syndicat suédois des conducteurs de locomotives*, arrêt du 6 février 1976, série A n° 20, § 50; *Silver et autres c. Royaume-Uni*, arrêt du 25 mars 1983, série A n° 61, § 113.

[89] Cour EDH, *Bock et Palade c. Roumanie*, 15 février 2007, n° 21740/02.

Ainsi, le régime juridique de la superficie a été le résultat de la jurisprudence et de l'œuvre doctrinale. S'agissant en particulier de la constitution du droit de superficie, tant la doctrine[90], que la jurisprudence[91], s'accordent à dire que le droit de superficie s'acquiert en vertu de la convention des parties, du legs, de la prescription acquisitive ou encore de la loi.

En l'absence d'une disposition légale, d'un legs ou si les conditions de la prescription acquisitive ne sont pas remplies, l'existence d'une convention entre le propriétaire du terrain et la personne ayant bâti les constructions est indispensable afin d'obtenir le droit de superficie[92]. Le simple fait d'ériger des constructions, même de bonne foi, en l'absence d'une convention, ne conduit pas à l'obtention d'un droit réel de superficie, le titulaire des constructions ne pouvant acquérir qu'une simple créance à l'encontre du propriétaire du terrain. Plusieurs décisions de justice constatent cela[93].

La Cour EDH a souligné, en l`espèce, que l'article 1 du Protocole n° 1 exige, avant tout et surtout, qu'une ingérence de l'autorité publique dans la jouissance du droit au respect de biens soit légale: la seconde phrase du premier alinéa de cet article n'autorise une privation de propriété que «dans les conditions prévues par la loi»; le second alinéa reconnaît aux États le droit de réglementer l'usage des biens en mettant en vigueur des «lois». Il s'ensuit que la nécessité de rechercher si un juste équilibre a été maintenu entre les exigences de l'intérêt général de la communauté et les impératifs de la sauvegarde des droits fondamentaux de l'individu[94] ne peut se faire sentir que lorsqu'il s'est avéré que l'ingérence litigieuse a respecté le principe de la légalité et n'était pas arbitraire.

Les mots «dans les conditions prévues par la loi», au sens de l'article 1 du Protocole n° 1, veulent d'abord que la mesure incriminée ait une base en droit interne, mais ils ont trait aussi à la qualité de la loi en cause. *En tout état de cause, la Cour est appelée à vérifier si la manière dont le droit interne est interprété et appliqué produit des effets conformes aux principes de la Convention*.

La Cour a constaté que le «droit de superficie» n`avait pas de normes juridiques spécifiques établissant son régime juridique, mais on ne saurait faire abstraction de la jurisprudence abondante des tribunaux portant sur le droit de superficie. A cette fin, la Cour a rappelé qu'elle a toujours entendu le terme «loi» dans son acception «matérielle» et non «formelle»; elle y a inclus à la fois des textes de rang infralégislatif[95] et le «droit non écrit». Les arrêts *Sunday Times, Dudgeon et Chappell* concernaient certes le Royaume-Uni, mais on aurait tort de forcer la distinction entre pays de

[90] Voir, par exemple, Liviu Pop, *Drept civil. Drepturile reale principale*, Editions Universul Juridic, Bucarest, 2006 pp. 256-264; Ion Dogaru et T. Sâmbrian, *Elementele dreptului civil, vol. 2. Drepturile reale*, Editions Oltenia, Craiova, 1994, p. 154; Gabriel Boroi, Liviu Stănciulescu, *Drept civil. Curs selectiv. Teste grilă*, Ed. Hamangiu, Bucarest, 2010, p. 210-212.

[91] Voir, par exemple, l'arrêt n° 574 du 22 mai 1997 de la Cour d'Appel d'Iaşi, les arrêts n° 165 du 28 janvier 1998 et n° 240 du 10 février 1998 de la Cour d'Appel de Cluj, cités dans Marin Voicu et Mihaela Popoaca, *Dreptul de proprietate şi alte drepturi reale. Tratat de jurisprudenţă,* Editions Lumina Lex, Bucarest, 2002, p. 267-274 et l'arrêt n° 2199 du 16 mars 2004 de la Haute Cour de Cassation et Justice.

[92] Cristian Alunaru, « *Noi aspecte teoretice şi practice ale dreptului de superficie* », Dreptul n° 5-6/1993, p. 65-73, et Irina Sferidan, *Discuţii referitoare la dreptul de superficie*, Dreptul n° 6/2006, p. 54-79.

[93] L'arrêt n° 892 du 1er avril 1994 de la Cour Suprême de Justice; l'arrêt n° 694 du 12 mars 1996 de la Cour d'Appel de Ploieşti; l'arrêt n° 240 du 10 février 1998 de la Cour d'Appel de Cluj; l'arrêt n° 5351 du 17 juin 2005 de la Haute Cour de Cassation et de Justice, citées dans l`arrêt *Bock et Palade c. Roumanie,* § 32-33.

[94] Cour EDH, *Sporrong et Lönnroth c. Suède*, 23 septembre 1982, série A n° 52, § 69; *Iatridis c. Grèce* [GC], n° 31107/96, CEDH 1999-II, § 57.

[95] Cour EDH, *De Wilde, Ooms et Versyp c. Belgique,* 18 juin 1971, série A n° 12, § 93; *Sunday Times c. Royaume-Uni n° 1*, 26 avril 1979, série A n° 30, p. 30, § 47; *Dudgeon c. Royaume-Uni*, 22 octobre 1981, série A n° 45, § 44; *Chappell c. Royaume-Uni*, 30 mars 1989, série A n° 152-A, § 52.

common law et pays «continentaux»; La loi écrite (*statute law*) revêt aussi, bien entendu, de l'importance dans les premiers. Inversement, la jurisprudence joue traditionnellement un rôle considérable dans les seconds, à telle enseigne que des branches entières du droit positif y résultent, dans une large mesure, des décisions des cours et tribunaux. La Cour l'a du reste prise en considération en plus d'une occasion pour de tels pays[96]. A la négliger, elle ne minerait guère moins le système juridique des États «continentaux» que son arrêt *Sunday Times* du 26 avril 1979 n'eût «frappé à la base» celui du Royaume-Uni s'il avait écarté la *common law* de la notion de «loi».

Au demeurant, les requérants ne prétendent pas que les termes «prévue par la loi» exigent pareil texte dans tous les cas. Ils allèguent seulement que les tribunaux internes n'ont pas fait application de la jurisprudence constante portant sur les modalités de constitution du droit de superficie, ce qui touche au cœur même du principe de la sécurité juridique.

En l'espèce, la Cour note que l'arrêt de la Cour Suprême de Justice a établi que le conseil municipal a acquis le droit de superficie en vertu d'une «situation de fait qui n'est pas voulue ou connue par les intéressés» et qui permet de donner effet à «l'apparence de droit». Or, en vertu de la jurisprudence des tribunaux internes, le droit de superficie résulte uniquement de la loi, de la prescription acquisitive, du legs ou de la convention des parties. Le simple fait d'ériger des constructions sur le terrain d'autrui, même en toute bonne foi, ne pourrait constituer un droit de superficie au bénéfice du constructeur, en l'absence d'un des quatre éléments susmentionnés. La Cour a constaté ainsi que l'apparence de droit à laquelle renvoie la Cour Suprême de Justice n'entre pas dans les catégories d'actes et faits pouvant fonder le droit de superficie. Il en résulte de toute évidence que l'ingérence dans le droit au respect des biens des requérants ne trouve pas de base dans le droit interne.

Partant, la Cour a considèré que l'ingérence litigieuse n'etait pas «prévue par la loi» au sens de l'article 1 du Protocole n° 1 et, par conséquent, est incompatible avec le droit au respect des biens des requérants. Une telle conclusion la dispense de rechercher si un juste équilibre a été maintenu entre les exigences de l'intérêt général de la communauté et les impératifs de la sauvegarde des droits individuels. Dès lors, il y a eu violation de l'article 1 du Protocole n° 1.

22. Dans l`affaire *Velcea et Mazăre c. Roumanie*,[97] la Cour EDH a eu la possibilité de statuer sur la conventionalité de l'article 655 du Code civil, qui dispose que: «Peut être déclaré indigne de succéder: 1. quiconque est condamné pour avoir donné ou tenté de donner la mort au défunt; 2. quiconque est condamné pour dénonciation calomnieuse du défunt lorsque les faits dénoncés emportaient la peine capitale; 3. l'héritier majeur qui n'a pas dénoncé à la justice l'homicide du défunt».

La jurisprudence et la doctrine internes étaient majoritaires pour l`opinion qu`il est nécessaire que l'héritier soit condamné pénal pour l`infraction de meurtre ou pour la tentative et que l`arrêt soit définitif.[98] Sinon, il ne sera pas indigne. Parmi les situations qui justifient une telle opinion, on a énuméré: la légitime défense, l`irresponsabilité, la prescription pénale, le decès de l`auteur. Dans la

[96] Cour EDH, *Müller et autres c. Suisse*, 24 mai 1988, série A no 133, § 29; *Salabiaku c. France*, 7 octobre 1988, série A no 141, § 29; *Kruslin c. France*, 24 avril 1990, série A n° 176-A, § 29.

[97] Cour EDH, *Velcea et Mazăre c. Roumanie*, 1 décembre 2009, n° 64301/01.

[98] Voir Francisc Deak, *Tratat de drept* successoral, II[ème] édition, Editions Universul Juridic, 2002, p. 62*;* Gabriel Boroi, Liviu Stănciulescu, *op. cit.,* p. 482-483.

littérature de spécialité[99], il y avait aussi l`opinion contraire, minoritaire, que l`instance civile peut constater le fait qui attire la sanction de l`indignité, quand les organes pénales ont prononcé une solution de non-lieu, qui n`a pas d`autorité de chose jugée.[100]

En l'espèce, la Cour a observé que le requérant a dénoncé pour l'essentiel le fait qu` au héritage de sa fille est venue une personne, en sa qualité de frère du meurtrier (gendre du requérant), qui s`est suicidé immédiatement après avoir tué sa femme. S'appuyant sur une jurisprudence constante quant à l'interprétation de l'article 655 § 1 du Code civil roumain, les tribunaux internes ont refusé de qualifier d'indigne le gendre du requérant, au motif qu`il n'avait pas été condamné pour meurtre par une décision de justice définitive. Son frère a ainsi pu prendre sa place dans la succession et hériter de la fille du requérant.

La Cour EDH a souligné que la vie familiale ne comprend pas uniquement des relations de caractère social, moral ou culturel, par exemple dans la sphère de l'éducation des enfants; elle englobe aussi des intérêts matériels, comme le montrent notamment les obligations alimentaires et la place attribuée à la réserve héréditaire dans l'ordre juridique interne de la majorité des États contractants. Par ailleurs, la Cour a déjà affirmé que le domaine des successions et des libéralités entre proches parents apparaît intimement associé à la vie familiale[101].

Les droits successoraux constituent donc un élément non négligeable de la vie familiale. La Cour a rappelé que l'article 8 de la Convention n'exige pas pour autant la reconnaissance d'un droit général à des libéralités ou à une certaine part de la succession de ses auteurs, voire d'autres membres de sa famille: en matière patrimoniale aussi, il laisse en principe aux États contractants le choix des moyens destinés à permettre à chacun de mener une vie familiale normale et pareil droit n'est pas indispensable à la poursuite de celle-ci.

Pour la Cour, les limitations apportées par le Code civil roumain à la capacité du requérant à recevoir une certaine partie de la succession de sa fille en raison de l'existence des dispositions successorales en faveur d'un conjoint ne se heurtent pas en elles-mêmes à la Convention[102]. Toutefois, la Cour a constaté qu'il ne s'agit pas en l'espèce du droit à une certaine part de la succession, comme le soutient le Gouvernement, mais plutôt d'une contestation quant à la qualité des successeurs. En conclusion, l'article 8 de la Convention entre en ligne de compte.

La Cour a noté que la présente affaire concerne un litige successoral entre deux personnes privées. L'affaire pourrait être examinée sous l'angle d'une ingérence des tribunaux nationaux dans le respect de la vie familiale du requérant si l'interprétation donnée par eux aux dispositions légales applicables devait être considérée comme méconnaissant l'article 8 de la Convention ou sous l'angle de l'omission des tribunaux, dans des rapports existant entre personnes privées, de respecter leurs obligations positives découlant de l'article 8 et visant à l'adoption de mesures efficaces, raisonnables et adéquates pour la protection du droit à la vie familiale du requérant dans l'application desdites dispositions légales[103].

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[99] Vasile Pătulea, Note n° II à la décision civile n° 365/1982 du Tribunal Dép. Mures, in Revista Română de Drept n° 9/1983, p. 52.

[100] Lucian Manoloiu, «*Nedemnitatea succesorală a rudelor ucigaşului defunctului»,* Revista Forumul Judecătorilor n° 4/2010, p. 130.

[101] Cour EDH, *Marckx c. Belgique*, arrêt du 13 juin 1979, série A n° 31, p. 23-24, § 52; *Pla et Puncernau c. Andorre*, n° 69498/01, § 26, CEDH 2004-VIII.

[102] Voir, *mutatis mutandis*, *Marckx,* précité, § 53; *Merger et Cros c. France*, n° 68864/01, § 47, 22 décembre 2004.

[103] Cour EDH, *Schaefer c. Allemagne* décision du 4 septembre 2007, n° 14379/03.

Que l'on aborde l'affaire sous l'angle d'une obligation positive, à la charge de l'État, d'adopter des mesures raisonnables et adéquates pour protéger les droits que le requérant puise dans le paragraphe 1 de l'article 8, ou sous celui d'une ingérence d'une autorité publique à justifier sous l'angle du paragraphe 2, les principes applicables sont assez voisins. Dans les deux cas, il faut avoir égard au juste équilibre à ménager entre les intérêts concurrents de l'individu et de la société dans son ensemble; de même, dans les deux hypothèses l'État jouit d'une certaine marge d'appréciation pour déterminer les dispositions à prendre afin d'assurer le respect de la Convention. En outre, même pour les obligations positives résultant du paragraphe 1, les objectifs énumérés au paragraphe 2 peuvent jouer un certain rôle dans la recherche de l'équilibre voulu[104].

La Cour relève que deux intérêts se trouvaient confrontés: d'une part, l'intérêt du requérant qui entendait voir son gendre déclaré indigne d'hériter de sa fille, et, d'autre part, celui d`un autre personne d'hériter de son frère, y compris la partie des biens qui avait appartenu à l`épouse tuée, en l'absence d'une décision définitive de condamnation visant son frère. L'exigence d'une décision judiciaire définitive de condamnation pour meurtre afin de qualifier une personne d'indigne peut trouver sa justification dans la protection des droits et libertés d'autrui, l'un des buts légitimes prévus par l'article 8 paragraphe 2 de la Convention. Une telle décision de condamnation apporte en principe un gage de sécurité juridique par rapport à tout autre constat de culpabilité de la personne prétendument indigne, ce qui sert les intérêts de la société.

La Cour a rappelé que la Convention n'exige pas d'un État membre qu'il adopte des dispositions législatives en matière d'indignité successorale. Toutefois, une fois ces dispositions adoptées, elles doivent être appliquées d'une manière conforme à leur but. Ainsi, en l'espèce, afin d'établir si les tribunaux nationaux ont ménagé un juste équilibre entre les intérêts concurrents, la Cour se doit de prêter particulièrement attention à la portée de la règle prévue par le Code civil en matière d'indignité, et plus particulièrement à son application en l'espèce[105].

En tant qu'exceptions à l'exercice du droit au respect de la vie familiale, les arguments des tribunaux appellent un examen attentif et soigneux par la Cour[106]. La Cour ne méconnaît pas qu'il revient au premier chef aux autorités nationales, singulièrement aux instances juridictionnelles, d'interpréter et d'appliquer le droit interne et elle ne substituera pas sa propre interprétation du droit à la leur en l'absence d'arbitraire[107]. Néanmoins, dans la mesure où la Cour est compétente pour contrôler la procédure suivie devant les tribunaux internes, elle considère qu'une application trop rigide des dispositions légales peut se révéler contraire à l'article 8 de la Convention.[108]

Sans ignorer l'importance du principe de la sécurité juridique dans tout ordre juridique national, principe dont elle a, à maintes reprises, affirmé l'importance, la Cour a estimé, au vu des circonstances particulières de la présente espèce, que l'interprétation de la disposition du Code civil régissant les causes d'indignité a été trop restrictive, au détriment de la vie familiale du requérant. Selon elle, il n'y avait aucun doute quant à la culpabilité de l`auteur du meurtre et les tribunaux sont allés au-delà de ce qui était nécessaire pour assurer le respect du principe de la sécurité juridique.

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[104] Cour EDH, *Powell et Rayner c. Royaume-Uni*, 21 février 1990, § 41, série A n° 172; *López Ostra c. Espagne*, 9 décembre 1994, § 51, série A n° 303-C, et *Hatton et autres c. Royaume-Uni* [GC], n° 36022/97, § 98, CEDH 2003-VIII.

[105] Cour EDH, *Osman c. Royaume-Uni*, arrêt du 28 octobre 1998, *Recueil* 1998-VIII, § 150.

[106] Cour EDH, *Emonet et autres c. Suisse*, n° 39051/03, § 77.

[107] Cour EDH, *Bulut c. Autriche*, 22 février 1996, *Recueil* 1996-II, § 29, et *Tejedor García c. Espagne*, 16 décembre 1997, *Recueil* 1997-VIII, § 31.

[108] Cour EDH, *Velcea et Mazăre c. Roumanie*, § 129-134.

Il n'en reste pas moins que la reconnaissance formelle, par les autorités, du caractère illicite de tels agissements avant de conclure à une décision de classement de l'affaire déterminée par le décès de la personne concernée devrait constituer, d'une part, un message clair envoyé à l'opinion publique que les autorités ne sont pas disposées à tolérer de tels agissements, et, devrait servir, d'autre part, aux intéressés, dans les prétentions à caractère civil qu'ils peuvent avoir.

Le respect de la vie familiale du requérant aurait exigé la prise en compte des circonstances particulières et, pour ainsi dire exceptionnelles, de l'affaire pour éviter une application mécanique des principes d'interprétation des dispositions de l'article 655 § 1 du Code civil. La Cour en conclut que, eu égard à la situation très particulière en cause dans la présente affaire, et compte tenu de la marge d'appréciation étroite dont l'État défendeur bénéficiait pour une question touchant à la vie familiale, un juste équilibre n'a pas été ménagé entre les intérêts des particuliers. Il y a donc eu violation de l'article 8 sur ce point.

La Cour a pris nonobstant acte avec intérêt du récent changement législatif relatif à la clause sur l'indignité successorale dans le nouveau Code civil roumain, changement qui va dans le même sens que son raisonnement exposé ci-dessus.[109]

23. Dans l`affaire *Radovici et Stănescu c. Roumanie*[110], la Cour a analysé les rapports entre les anciens propriétaires qui ont obtenu la restitution de leur biens immobiliers et les locataires qui ont bénéficié des dispositions de l`Ordonnance d`urgence du Gouvernement n° 40/1999.[111]

La Cour a relevé qu'il n'est pas contesté que l' Ordonnance, dont l'application par les tribunaux a entraîné le maintien des locataires dans les appartements des requérants, s'analyse en une réglementation de l'usage des biens et que le second alinéa de l'article 1 du Protocole n° 1.

Elle a souscrit à l'avis du Gouvernement selon lequel les mesures d'urgence adoptées en 1999 – destinées, d'une part, à contrôler l'augmentation des loyers et, d'autre part, à prolonger la validité des baux en cours, sauf dans quelques situations exceptionnelles, notamment en cas de refus du locataire de conclure un bail avec le nouveau propriétaire - poursuivaient un but d'intérêt général, à savoir la protection des locataires face à la crise du logement. Le système ainsi mis en place par les autorités nationales n'etait pas critiquable en soi, vu notamment la grande marge d'appréciation autorisée par le second alinéa de l'article 1 du Protocole n° 1. Cependant, dès lors qu'il comportait le risque d'imposer au bailleur une charge excessive quant à la possibilité de disposer de son bien, les autorités étaient tenues d'instaurer des procédures ou des mécanismes législatifs prévisibles et cohérents, en prévoyant certaines garanties pour que leur mise en œuvre et leur incidence sur le droit de propriété du bailleur ne soient ni arbitraires ni imprévisibles[112].

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[109] Les dispositions pertinentes de l`article 958 (indignité de droit) du nouveau Code civil roumain du 17 juillet 2009, qui n'est pas encore entré en vigueur, se lisent ainsi: «1. Est indigne de succéder de droit: a) quiconque est condamné au pénal pour avoir commis une infraction avec l'intention de donner la mort au défunt; (...) 2. Si la condamnation au pénal pour les faits mentionnés au premier alinéa est empêchée par le décès de l'auteur des faits (...), l'indignité opère si lesdits faits sont constatés par une décision de justice civile définitive. 3. L'indignité de droit peut être constatée à tout moment, sur demande de la personne intéressée ou d'office par le tribunal ou par le notaire public, sur la base de la décision de justice d'où ressort l'indignité».

110 Cour EDH, *Radovici et Stănescu c. Roumanie*, 2 novembre 2006, n^{os} 68479/01, 71351/01 et 71352/01.

[111] Andreea Vasile, Ionuţ Militaru – « *Acţiunea în evacuare întemeiată pe O.U.G. nr. 40/1999 din prisma jurisprudenţei Curţii Europene a Drepturilor Omului* », Revista Forumul Judecătorilor n° 2/2009, p. 94.

[112] Voir, *mutatis mutandis*, *Immobiliare Saffi c. Italie* [GC], n° 22774/93, §§ 49 et 54, CEDH 1999-V; *Scollo c. Italie*, arrêt du 28 septembre 1995, série A n° 315-C, p. 55, § 40, et *Hutten-Czapska c. Pologne* [GC], n° 35014/97, 19 juin 2006, §§ 221 et 222.

L'impossibilité pour les requérantes, pendant plusieurs années durant lesquelles l' Ordonnance était en vigueur, d'exiger tout loyer – fût-il plafonné par la loi – des occupants de leur immeuble et l'absence de tout mécanisme juridique permettant aux propriétaires de compenser ou d'atténuer les pertes entraînées par l'entretien de leurs biens (*Hutten-Czapska* précité, § 224), vu le refus des locataires de les considérer comme les nouvelles propriétaires – et donc l'absence de tout rapport contractuel entre eux –, en raison des dispositions défectueuses et des lacunes relevées dans la législation d'urgence sur le logement, n'ont pas ménagé un juste équilibre entre la protection du droit de l'individu au respect de ses biens et les exigences de l'intérêt général.

Certes, l'Etat roumain a dû hériter de la période communiste une pénurie aiguë de logements à louer à un prix raisonnable et a dû, de ce fait, arbitrer sur des questions extraordinairement complexes et socialement sensibles que posait la conciliation des intérêts antagonistes des propriétaires et des locataires. Il avait à protéger le droit de propriété des premiers, d'une part, et à respecter les droits sociaux des seconds, d'autre part. Néanmoins, les intérêts légitimes de la collectivité appellent en pareil cas une répartition équitable de la charge sociale et financière que supposent la transformation et la réforme du logement dans le pays. Cette charge ne saurait, comme c'est le cas en l'espèce, reposer sur un groupe social particulier, quelle que soit l'importance que revêtent les intérêts de l'autre groupe ou de la collectivité dans son ensemble (*mutatis mutandis*, *Hutten-Czapska* précité, § 225).

L`influence directe de la jurisprudence de la Cour EDH sur le droit privé (effet direct horizontal, dans les rapports entre les particuliers) résulte avec la force de l`évidence de l`évolution de la jurisprudence des tribunaux nationaux[113] formée après les affaires répétitives de type *Radovici et Stănescu*.[114]

24. Une autre catégorie d`arrêts avec influence directe sur le droit privé sont rendues en matière des actions en revendication.

Une affaire très importante est *Păduraru c. Roumanie*[115], relative à la non restitution des biens immobiliers à cause de l'incertitude juridique produite par le chaos législatif et les contradictions jurisprudentielles dans le domaine. La Cour a analysé le problème sous l'angle des obligations positives et, après avoir remarqué la grande latitude des Etats pour décider les conditions dans lesquelles il faut transiter du système totalitaire à un système démocratique, elle a conclut à la violation du droit au respect des biens, pour l`omission de se doter d'un arsenal juridique adéquat et suffisant pour assurer le respect des obligations positives qui lui incombent.

Si la Convention n'impose pas aux Etats l'obligation de restituer les biens confisqués, et encore moins de disposer de ceux-ci conformément aux attributs de leur droit de propriété, une fois une solution adoptée par l'Etat, celle-ci doit être mise en œuvre avec une clarté et une cohérence raisonnables afin d'éviter autant que possible l'insécurité juridique et l'incertitude pour les sujets de droit concernés par les mesures d'application de cette solution.

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[113] Andreea Vasile, Ionuţ Militaru, *op. cit.*; Cristina Nica, *Protecţia chiriaşilor. Jurisprudenţa în materia O.U.G. n° 40/1999 şi a Legii n° 10/2001,* Ed. Hamangiu, Bucarest, 2006.

[114] Par exemple: Cour EDH, *Cleja et Mihalcea c. Roumanie,* n° *77217/01,* 8 février 2007; *Popescu et Toader c. Roumanie*, n° 27086/02, 8 mars 2007; *Spanoche c. Roumanie*, n° 3864/03, 26 juillet 2007; *Tarik c. Roumanie*, n° 75849/01**,** 7 février 2008; *Arsenovici c. Roumanie*, n° 77210/01, 7 février 2008; *Burzo c. Roumanie*, n° 75240/01, 4 mars 2008; *Oancea et autres c. Roumanie*, n° 5984/02, 29 juillet 2008; *Marcel Roşca c. Roumanie*, n° 1266/03, hotărârea din 7 octobre 2008; *Vînătoru c. Roumanie*, n° 18429/02, 14 octobre 2008; *Kerekeş c. Roumanie*, n° 2736/02, 13 novembre 2008; *Postolache c. Roumanie*, n° 24171/02, 16 décembre 2008.

[115] Cour EDH, *Păduraru c. Roumanie*, 1 décembre 2005, n° 63252/00.

La Cour a constaté que l'Etat a manqué à son obligation positive de réagir en temps utile et avec cohérence face à la question d'intérêt général que constitue la restitution ou la vente des immeubles entrés en sa possession en vertu des décrets de nationalisation. L'incertitude générale ainsi créée s'est répercutée sur le requérant, qui s'est vu dans l'impossibilité de recouvrer l'ensemble de son bien alors qu'il disposait d'un arrêt définitif condamnant l'Etat à le lui restituer. Par conséquent, l'Etat a manqué à son obligation de reconnaître au requérant la jouissance effective de son droit de propriété garanti par l'article 1 du Protocole no 1, rompant ainsi le «juste équilibre» entre les exigences de l'intérêt public et les impératifs de la sauvegarde du droit de l'intéressé au respect de ses biens (*mutatis mutandis*, *Sovtransavto Holding c. Ukraine*[116], § 96).

25. La Cour de Strasbourg a constaté une pareille violation de l'article 1 du Protocole n° 1 dans l'affaire *Străin et autres c. Roumanie*[117], dans laquelle les requerants avaient été propriétaires d'une maison nationalisée en 1950. Les intéressés avaient entamé une procédure en restitution. L'Etat a vendu le bien alors qu'il était attaqué en justice par les requérants, lesquels s'estimaient victimes d'une nationalisation abusive, et alors qu'il venait de refuser de vendre les autres appartements situés dans le même immeuble. Le tribunal jugea que la nationalisation de la maison était illégale et que les requérants en étaient dès lors les propriétaires légitimes. Le tribunal rejeta toutefois la demande d'annulation de la vente conclue entre l'Etat et les acheteurs, au motif que ces derniers étaient des acquéreurs de bonne foi.

De l'avis de la Cour, une telle attitude de l'Etat ne saurait se justifier par aucune cause générale d'utilité publique, qu'elle soit d'ordre politique, social ou financier, ni par les intérêts de la société dans son ensemble. Non seulement cette attitude a fait naître une discrimination entre les différents locataires qui souhaitaient acquérir leurs logements respectifs, mais de plus elle était de nature à compromettre l'effectivité du pouvoir judiciaire saisi par les requérants en vue de la protection du droit de propriété qu'ils prétendaient avoir sur l'immeuble en question.

En conséquence, compte tenu de l'atteinte portée par cette privation aux principes fondamentaux de non-discrimination et de primauté du droit qui sous-tendent la Convention, la Cour EDH a retenu que l'absence totale d'indemnisation a fait supporter aux requérants une charge disproportionnée et excessive incompatible avec le droit au respect des biens garanti par l'article 1 du Protocole n° 1.

La Cour a statué dans le cas d'espèce que *l'obligation positive de protection de la propriété a été enfreinte* et ce problème va s`avérer le plus grand du système juridique roumain.

Par deux arrêts n^{os} 53 et 33 des 4 juin 2007 et 9 juin 2008, publiés au Journal Officiel de la Roumanie les 13 novembre 2007 et 23 février 2009, l'Assemblée plénière de la Haute Cour de Cassation et de Justice, statuant également sur deux recours dans l'intérêt de la loi, a décidé qu'après l'entrée en vigueur de la Loi n° 10/2001, les actions en revendication des biens expropriés ou nationalisés avant 1989, introduites en parallèle avec la procédure de restitution régie par la Loi n° 10/2001, étaient irrecevables. Cependant, à titre d'exception, la Haute Cour a jugé que la personne qui possédait un «bien», au sens de l'article 1 du Protocole n° 1 à la Convention, pouvait introduire une action en revendication à condition que celle-ci ne portât pas atteinte aux droits de propriété acquis par des tiers de bonne foi.

[116] Cour EDH, *Sovtransavto Holding c. Ukraine*, n° 48553/99, CEDH 2002-VII.
[117] Cour EDH, *Străin et autres c. Roumanie*, 21 juillet 2005, n° 57001/00.

Les recours dans l'intérêt de la loi n`ont pas solutionné le problème[118], ce qui a conduit à la condamnation de la Roumanie dans l`affaire *Maria Atanasiu et autres c. Roumanie*[119], qui va être analysée ci-dessous.

26. La technique de l'arrêt pilote, dégagée par la jurisprudence de la Cour EDH, consiste à faire appliquer la décision prise par l`instance européenne à toutes les situations similaires à celle jugée.[120]

La Cour, en estimant que la norme juridique n'est pas conforme à la Convention EDH va solliciter l'État pour qu'il prenne les mesures nécessaires afin qu'elle cesse de nuire.[121] En effet, l'État doit réagir, en mettant un terme à la violation, puisqu'il est acteur défaillant du fait de son action ou de son inaction. Deux types d'arrêts pilotes sont souvent distingués: ceux s'attaquant à une question spécifique et ceux qui relèvent d'une *«défaillance systémique»*.

La technique de l'arrêt pilote a été appliquée pour la première fois au travers d'une relation verticale.[122] Dans un premier temps, la Cour EDH identifie le *«problème structurel»* rencontré dans l'État parti. Dans un second, elle indique quelles sont les mesures générales ou individuelles que l'État doit adopter en vue d'y remédier. Enfin, dans un troisième processus, la Cour prononce la suspension de toutes les affaires répétitives au même problème, pendantes devant elle, jusqu'à ce que l'État prenne les mesures appropriées.

Dans l'arrêt pilote *Maria Atanasiu et autres c. Roumanie* la Cour a décidé que l'Etat défendeur doit garantir par des mesures légales et administratives appropriées le respect du droit de propriété *de toutes les personnes* se trouvant dans une situation similaire à celle des requérantes, en tenant compte des principes énoncés par la jurisprudence de la Cour concernant l'application de l'article 1 du Protocole n° 1. Ces objectifs pourraient être atteints, par exemple, par *l'amendement du mécanisme de restitution actuel*, dont la Cour a relevé certaines faiblesses, et la mise en place d'urgence de procédures simplifiées et efficaces, fondées sur des *mesures législatives* et sur une *pratique judiciaire et administrative cohérente*, qui puissent ménager un juste équilibre entre les différents intérêts en jeu. Eu égard au grand nombre de personnes concernées et aux lourdes conséquences d'un tel dispositif, dont l'impact sur l'ensemble du pays est considérable, les autorités nationales restent souveraines pour choisir, sous le contrôle du Comité des Ministres, les mesures générales à intégrer dans l'ordre juridique interne afin de mettre un terme aux violations constatées par la Cour.

La procédure d'arrêt pilote a avant tout pour vocation d'aider les Etats contractants à remplir le rôle qui est le leur dans le système de la Convention, en résolvant ce genre de problèmes au niveau national, reconnaissant ainsi aux personnes concernées les droits et libertés définis dans la Convention, comme le veut l'article 1, en leur offrant un redressement plus rapide tout en allégeant la charge de la Cour[123].

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[118] Dragoş Călin (coord.) et. al., *Hotărârile CEDO în cauzele împotriva României (1994-2009) – Analiză, consecinţe, autorităţi potenţial responsabile*, Ed. Universitară, Bucarest, 2010, p. 1727 et suiv.

[119] Cour EDH, *Maria Atanasiu et autres c. Roumanie,* arrêt pilote du 12 octobre 2010, n° 30767/05 et 33800/06.

[120] Cour EDH, *Evans c. Royaume-Uni*, 7 mars 2006, renvoyé devant la Grande Chambre le 10 avril 2007.

[121] C. Caumes, *op. cit.,* p. 78 et suiv.

[122] Cour EDH, *Broniowski c. Pologne*, 22 juin 2004, n° 31443/96, *RTDH* 2005, p. 203.

[123] Cour EDH, *Broniowski c. Pologne* (règlement amiable) [GC], n° 31443/96, § 35, CEDH 2005-IX, et *Hutten-Czapska c. Pologne* [GC], n° 35014/97, §§ 231-234, CEDH 2006-VIII.

27. La jurisprudence de la Cour de Strasbourg d`application de l`article 1 du Protocole n° 1 a influencé aussi la modalité d`interpréter les conditions du cadre processuel actif dans la procédure de revendication en droit interne.

L`affaire *Lupaş et autres c. Roumanie*[124] porte sur l'application de la règle de l'unanimité des copropriétaires pour revendiquer un bien indivis. Bien qu'aucune disposition législative n'ait prévu, l'ancien Tribunal Suprême de la Roumanie avait conclu, dans un arrêt du 24 novembre 1972, à l'impossibilité pour un seul copropriétaire d'exercer une telle action, dans les termes suivants: « (...) tant que l'indivision demeure, les droits des copropriétaires sur le bien en question n'étant pas déterminés, ils ne sauraient prétendre à un droit exclusif sur leurs quotes-parts qu'après le partage du bien, lorsque chacun en aura obtenu une partie en propriété exclusive. Il en ressort qu'un [*seul*] copropriétaire ne saurait revendiquer un bien indivis avant le partage, car l'action en revendication implique l'existence d'un droit exclusif et déterminé qu'un copropriétaire n'acquerra que par l'effet du partage».

La jurisprudence créée par le Tribunal suprême a été suivie par la majorité de la doctrine et des juridictions, à quelques exceptions[125], dont l'arrêt du 29 septembre 2000 de la Cour suprême de justice qui, après avoir rappelé la règle de l'unanimité, a conclu: « (...) en l'espèce et plus généralement dans le cas des actions en revendication des immeubles nationalisés pendant la période du 6 mars 1945 au 22 décembre 1989, la situation juridique de ces immeubles et des personnes qui allèguent que la nationalisation était erronée, diffère essentiellement des cas classiques. Les anciens propriétaires ou leurs héritiers sont dans l'impossibilité de solliciter le partage du bien avant sa revendication car on leur opposerait l'absence du titre de propriété tant que le caractère erroné de la nationalisation et l'absence du titre de propriété valable de l'Etat ne seraient pas établis. Dans ces cas «sui generis», les actions en revendication ont un caractère complexe et dépassent le modèle de l'action classique en revendication; un ou plusieurs copropriétaires, ou un ou plusieurs de leurs héritiers, mais pas nécessairement tous, peuvent introduire une action en justice pour démontrer (...) que l'Etat ne possède pas de titre de propriété valable (...) et par conséquent obtenir la confirmation de l'existence du bien, à tort nationalisé, dans le patrimoine du propriétaire ou de sa succession. Ensuite, ils pourront demander le partage.»

La Cour n'a pas trouvé nécessaire en l`espèce de trancher la controverse, qui relève de la théorie et de la pratique internes de droit civil.

En effet, elle a constaté que la règle de l'unanimité n'a pas seulement empêché les requérants de voir les tribunaux examiner le bien-fondé de leurs actions. En réalité, compte tenu des circonstances particulières de l'espèce et notamment de la date de la nationalisation et des difficultés qui en découlent pour identifier les héritiers d'un ancien copropriétaire, ainsi que du refus de l'héritier d'un autre ancien copropriétaire de se joindre à leurs actions, elle est un obstacle insurmontable pour toute tentative future de revendication des biens indivis.

Vu l'impossibilité de recueillir le consentement de l'ensemble des héritiers des anciens copropriétaires, la Cour estime qu'une éventuelle demande d'intervention de la part des quatorze autres requérants n'aurait en rien changé l'issue de cette action.

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[124] Cour EDH, *Lupaş et autres c. Roumanie,* 14 décembre 2006, n^os 1434/02, 35370/02 et 1385/03.

[125] Dan Chirică, *Posibilitatea exercitării acţiunii în revendicare de către un singur coproprietar coindivizar*, in Dreptul n° 11/1998, p. 23-30. Voir aussi Ion Lulă, *Opinii privitoare la posibilitatea exercitării acţiunii în revendicare de către un singur coproprietar*, in Dreptul, n° 4/2002, p. 75 et suiv. Les auteurs affirment que l'action en revendication devrait être considérée comme un acte de conservation du bien à la disposition de chaque copropriétaire et qui profiterait à l'ensemble des copropriétaires.

Par conséquent, en rappelant que *toute disposition de la Convention ou de ses protocoles doit s'interpréter de façon à garantir des droits concrets et effectifs et non théoriques et illusoires*, la Cour n`a pas accepté l'argument du Gouvernement consistant à dire que le rejet des actions des requérants ne représente qu'une limitation temporaire de leur droit d'accès à un tribunal. A cet égard, la Cour a noté également que le Gouvernement n'a indiqué aucun autre moyen juridique de nature à permettre aux requérants de faire valoir leurs droits successoraux. L'application stricte de la règle de l'unanimité a imposé aux requérants une charge disproportionnée qui les a privés de toute possibilité claire et concrète de voir les tribunaux statuer sur leurs demandes de restitution des terrains litigieux, portant ainsi atteinte à la substance même de leur droit d'accès à un tribunal.

Dans quelques autres affaire, la Cour EDH a apprécié que les circonstances de l'espèce ne confirment pas l'existence d'une impossibilité absolue, pour le requérant, de faire valoir son droit dans le cadre d'une nouvelle action en revendication tout en respectant la règle de l'unanimité, voie qui, compte tenu du caractère imprescriptible de l'action, reste toujours ouverte.

Pour apprécier s'il y a eu ou pas atteinte disproportionnée au droit d'accès à un tribunal, la Cour a examiné, dans les circonstances de chaque espèce, la difficulté pour les requérants d'identifier tous les copropriétaires du bien en cause et l'éventuel refus opposé par l'un de ces derniers à l'action en revendication (*Derscariu et autres c. Roumanie,* décision du 26 août 2008, n° 35788/03; *Costea et autres c. Roumanie* décision du 31 mars 2009, n° 4113/04, §§ 20-27 ; *Paul-Sergiu Sobieschi c. Roumanie,* décision du *2 mars 2010,* n° 29844/02). Dans les trois dernières affaires précitées, la Cour a constaté que les requérants n'avaient pas épuisé les voies de recours internes avant de saisir la Cour, puisqu'il n'y avait pas de difficultés ou de refus tels que mentionnés ci-dessus les empêchant de saisir à nouveau les tribunaux internes d'une action en revendication, action imprescriptible, en respectant la règle de l'unanimité.

La loi n° 287/2009 concernant la modification du Code civil écarte expressément la règle de l'unanimité (article 643 alinéat 1 du nouveau Code civil), effet auquel la jurisprudence de la Cour EDH a eu son incontestable influence.

28. Qu'il soit appliqué en matière de responsabilité délictuelle ou contractuelle, en droit civil ou social, l'article 8 de la CEDH demeure le texte le plus exploité par la jurisprudence relative à l'effet direct horizontal de la CEDH.

Il a été interprété comme impliquant certaines exigences procédurales, lesquelles sont particulièrement nettes lorsque le conflit est relatif à l'autorité parentale[126]. Les conflits entre parents portant sur l'autorité parentale relèvent, devant la Cour, de l'effet vertical de la Convention. Néanmoins, les juges européens exigent que la procédure interne tranchant le conflit entre le père et la mère soit équitable, affirmation qui se rapporte à l'effet horizontal. Ainsi, lorsqu'une procédure de placement d'un enfant a été mise en place, la Cour recherche «*si les parents ont pu jouer dans le processus décisionnel, considéré comme un tout, un rôle assez grand pour leur accorder la protection requise de leurs intérêts*»[127]. A défaut, les juges considèrent que l'Etat n'a pas respecté ses engagements conventionnels. Ils ont également énoncé que le processus de transfert de l'autorité parentale au père doit ménager à la mère un rôle respectant ses intérêts[128] et que les autorités doivent faciliter l'exécution d'une décision de justice accordant un droit de visite à l'un des parents[129].

[126] F. Sudre, *op. cit.*
[127] Cour EDH, *W. c. Royaume-Uni,* 8 juillet 1987, série A n° 121-A, § 64.
[128] Cour EDH, *Ignaccolo-Zenide c. Roumanie,* 25 janvier 2000, n° 31679/96.
[129] Par exemple, Cour EDH, *Larfargue c. Roumanie,* 13 juillet 2006, n° 37284/02.

L'Etat doit «*fournir une procédure judiciaire qui soit dotée des garanties de procédure nécessaires et qui permette donc aux tribunaux de trancher efficacement et équitablement tout éventuel litige entre des personnes privées*»[130]. Cette évolution de la jurisprudence européenne suscite quelques inquiétudes quant au caractère principal ou accessoire du contrôle procédural au regard du contrôle substantiel[131]. Pourtant, il faut convenir que «*la transformation des droits substantiels en droits à double visage (substantiel et procédural) améliore sensiblement leur protection comme elle renforce l'obligation des Etats parties de prévenir et d'empêcher leur violation*»[132].

29. Parallèlement à l'affirmation croissante d'obligations procédurales fondées sur des dispositions matérielles, l'article 6 CEDH fait l'objet d'invocations dans beaucoup d`affaires ayant des implications horizontales. Depuis l'arrêt *Hornsby c. Grèce* du 19 mars 1997[133], les Etats doivent garantir l'exécution des décisions prononcées par leurs tribunaux. Afin d'observer cette obligation positive, il appartient à chaque Etat de se doter d'un arsenal juridique adéquat et suffisant.

Ainsi, l'Etat a l'obligation de faire exécuter une décision judiciaire reconnaissant la qualité de parents adoptifs aux requérants et enjoignant à un établissement privé chargé de l'accueil d'enfants de confier les mineures aux requérants[134].

Si un individu obtient une décision de justice imposant à son voisin de démolir les constructions, l'Etat doit adopter les mesures nécessaires[135].

Il peut aussi arriver que l'exécution des décisions de justice ne dépende pas de la seule volonté des autorités étatiques. Lorsqu'une décision judiciaire impose à un employeur la réintégration de l'un de ses salariés, le débiteur peut opposer un refus persistant à cette mesure et préférer supporter des sanctions pénales et financières. Cette attitude constitue un obstacle au respect de ses obligations par l'Etat, «*une impossibilité* de facto *d'exécuter*»[136].

La Cour considère alors que l'Etat doit avoir un comportement diligent et assister le créancier dans l'exécution[137]. Les juges européens vérifieront si l'Etat a déployé les efforts nécessaires et, dans l'affirmative, considéreront que le refus du débiteur d'exécuter l'obligation ne lui est pas

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[130] Cour EDH, *Sovtransavto Holding c. Ukraine,* 25 juillet 2002, n° 48553/99, § 97.

[131] Béatrice Moutel, *L'«effet horizontal» de la Convention européenne des droits de l'homme en droit privé français. Essai sur la diffusion de la CEDH dans les rapports entre personnes privées,* Thèse de doctorat, L'université de Limoges, 2006, http://www.unilim fr/theses/2006/droit/2006limo0516/moutel_b.pdf, p. 156.

[132] J. Andriantsimbazovina, « *La Cour européenne des droits de l'Homme à la croisée des chemins, Réflexions sur quelques tendances de la jurisprudence de la Cour européenne des droits de l'Homme de 1999 à 2002 »*, Cahiers de droit européen 2002, p. 757.

[133] Cour EDH, *Hornsby c. Grèce,* 19 mars 1997, n° 18357/91.

[134] Cour EDH, *Pini et Bertani et Manera et Atripaldi c. Roumanie,* 22 juin 2004.

[135] Cour EDH, *Ruianu c. Roumanie,* 17 juin 2003, n° 34647/97; *Papuc c. Roumanie,* 27 mai 2010, n° 44476/04.

[136] Cour EDH, *S.C. Magna Holding S.R.L. c. Roumanie,* 13 juillet 2006, n° 10055/03, § 35. En l'espèce, la société requérante alléguait une violation de l'article 6 au motif que les autorités seraient restées inertes face au refus d'un tiers de signer un contrat de vente avec la requérante, et ce en dépit d'une décision de justice enjoignant ce tiers de contracter. La Cour a conclu à l'absence de violation de l'article 6, en raison du refus manifeste de la débitrice de s'exécuter et parce que la requérante n'avait pas envisagé des moyens d'exécution par équivalence.

[137] Cour EDH, *Fociac c. Roumanie,* 3 février 2005, n° 2577/02, § 70.

imputable[138]. A l'inverse[139], ils constateront une violation de l'article 6 § 1 si les autorités n'ont pas pris toutes les mesures que l'on pouvait raisonnablement attendre d'elles.[140]

XII. Conclusions

30. Les mécanismes présentés reflètent la mise en oeuvre d'un effet direct vertical, garantissant aux justiciables la possibilité de se prévaloir du traité à l'encontre du droit et des pratiques internes. Toutefois, l'effet direct bénéficie d'une autre dimension, puisque les dispositions conventionnelles peuvent être soulevées à l'encontre d'un particulier ou un groupement privé qui les auraient violées. Il s'agit, alors, d'un effet direct horizontal[141], pour l'instant découvert au bénéfice de certaines dispositions issues de la CEDH.

La reconnaissance de l'effet horizontal de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales permet au juge européen de contrôler l'application des droits fondamentaux dans les rapports juridiques privés.

Par le biais de la conduite étatique, manifestée par une action ou une inaction de l'État - sur la base possible d'une double assise (critère subjectif ou objectif), qu'il s'agisse de l'article 1er de la CEDH ou la théorie des obligations positives - la Cour EDH a instauré un climat général favorable à son influence sur l'action du juge interne, en développant les possibilités offertes par l'effet horizontal.

La spécificité de l'effet horizontal ne peut être ignorée dès lors que l'on a institué une procédure de réexamen des décisions civiles après un constat de violation de la Cour Européenne des Droits de l'Homme, si les graves conséquences de telles violations continuent à produire des effets et il n`y a pas d`autre remède (voir l`article 322 point 9 du Code de procédure civile roumain).

Le juge peut, ainsi, rechercher si chaque disposition conventionnelle soulevée au soutien du pourvoi réunit les conditions de l'effet direct. Si tel est le cas, le droit consacré par le traité bénéficiera d'une application dans deux hypothèses.

S'il n'existe pas, en droit national, de texte équivalent, la disposition conventionnelle sera appliquée directement, puisque créatrice d'un droit inexistant dans l'ordre juridique roumaine. Le plus souvent, le droit interne fera l'objet d'un contrôle de conventionnalité afin de vérifier s'il est conforme à la disposition conventionnelle[142]. Si cette confrontation démontre une divergence, le texte national moins favorable sera évincé au bénéfice de la disposition conventionnelle.

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[138] Dans l`affaire *Roman et Hogea c. Roumanie*, decision du 31 août 2004, n° 62959/00, la Cour avait relevé «le caractère spécial de l'obligation à exécuter en l'espèce, qui nécessite l'intervention personnelle du débiteur» (le 17 février 2005 la Cour a constaté un règlement amiable et a radié l'affaire du rôle).

[139] Cour EDH, *Ghibuşi c. Roumanie,* 23 juin 2005, n° 7893/02, § 48.

[140] Béatrice Moutel, *op. cit.,* p.156-157.

[141] Patrick de Fontbressin, *op. cit.*, p. 157; D. Spielmann, *L'effet potentiel de la Convention européenne des droits de l'homme entre personnes privées*, précit., p. 30.

[142] Béatrice Moutel, *op. cit.,* p. 275.

THE PROTECTION OF STATE SECRET AND RESTRICTED INFORMATION UNDER THE PROVISIONS OF THE NEW CRIMINAL CODE OF ROMANIA

Radu SLĂVOIU[1]

Abstract
The new Criminal Code introduces a series of new incriminating norms in regards to the field of state secret protection. The current crimes are re-defined for the purpose of a better compliance with the requirements of a predictable criminal law, in accordance with the European provisions. Generally, the penalties for these crimes are milder than those stipulated under the current Criminal Code.

Keywords*: new Criminal Code, state secret information, classified information, restricted information, high treason, and illegal intelligence structures*

I. Introduction

The Romanian Constitution sets out, in art.31, the fundamental rights of citizens to information. According to the text, a person's right to access any information of public interest cannot be restricted and the public authorities are bound to provide corect information to the citizens in public affairs and matters of personal interest.

For the development of the constitutional norm, the Act no 544/2001 was issued, regarding free access to information of public interest[2], a normative act which regulates the procedure through which the public authorities, the public institutions and the independent administrative institutions use the public financial resources to ensure the exercise of the rights of natural persons and legal entities. According to art.2 (b) of this act, "information of public interest" means any piece of information referring to the activities or emerging from those activities of a public authority or a public institution regardless of its means, form or way of deliverance.

The doctrine[3] stated that, generally, the right to information includes: a person's right to be informed promptly, correctly and clearly on the measures to be taken and most of all those taken by the public authorities; the free access to sources of public, scientific and technical, social, cultural, sports information; the possibility for a person to directly and normally receive the radio and TV broadcastings; the obligation for the governmental authorities to create the material and legal conditions to broadcast any kind of information in a free and plentiful manner.

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[2] Published in the Official Bulletin no 663, 23 October 2001.

[3] See M. Constantinescu, A. Iorgovan, I. Muraru, E.S. Tănăsescu, *Constituţia României revizuită – comentarii şi explicaţii*, Ed. All Beck, Bucureşti, 2004, p. 65.

The dimensions of the fundamental right to information refer only to the information of public interest. The Constitution itself sets out the limits for the exercise of this right, establishing, within art.31 para.3, that it shall not be prejudicial to the measures of protection of young people or national security. Act no544/2001 provides the details of these limits in art.12 para.1, rendering the categories of information that are not available to Romanian citizens.

The public information is the antonym for secret information. In common language, "secret information" means a set of knowledge that a person or a group of persons possesses and that shall not be disclosed, as it is concealed, inaccessible to the public. Legislation provides, as technical/juridical concepts, various categories of secret information, as for example: state secret information and restricted information (the ground for this being Act no 182/2002 regarding the protection of classified information[4]), the trade secret (the ground for this being Act no 11/1991 regarding the combat of unjust competition[5]), the professional secret in banking field (the ground for this being Act no111 and the following articles from U.D. no99/2006 regarding credit units and adequacy of the capital[6]).

Generically speaking, the reason for which the legislator protects this type of information is given by the injure or damage it could cause to a series of social values protected by law, their disclosure to the public, in general, or to certain categories of persons, in particular. The liability for this kind of offences can have one of the following natures civil, delinquent or penal.

The purpose of this study is an analysis of the means through which the new Criminal Code guarantees state secret information and restricted information, with regards to the different aspects in the light of the current regulation, along with a short historical foray.

II. Contents

II.1. History on the matter. The Romanian legislation has had a permanent evolution in regards to the protection, by Criminal Code means, of state secret information and of restricted information. In the Criminal Code from 1864, Book II, Title I, chapter I regarding the crimes against the exterior security of the state, the offences committed by a person who, during wartime, hands over to the enemy the military operational plans (art.68 para.4). Similarly, the code should have punished the public officials, the agents of the Government or any other person who, either assigned or officially warned about the secret of a negotiation or expedition, disclosed that secret to the agents of a foreign power or to the enemy (art.70). The law also stipulated as a crime the act of a public official or agent who, being assigned, in compliance with his prerogatives, to keep the plans of the fortifications, the arsenal, the ports or roadsteads, discloses them to the agents of the enemy (art.71) or to the agents of a foreign power, either neutral or allied (art.72).

In Title III, Chapter II regarding the offences and the delicts committed by public officials exercising their duties, the legislator introduced – with the Act issued on 21 February 1882 –art.140 para.6-7, which punished the offence of a person who, without the authorization of the Government, publishes or discloses directly the diplomatic acts or documents known, communicated or entrusted to him in compliance with his duty as a public official, even if the offence is committed after he stopped working or his mission ended.

[4] Published in the Official Bulletin no 248, 12 April 2002.
[5] Published in the Official Bulletin no 24, 30 January 1991.
[6] Published in the Official Bulletin no 1027, 27 December 2006.

There was also incriminated the disclosure of the professional secret (art.305), within Title IV, Chapter I, Section VIII – false statements, slanders, injuries, the disclosure of secrets.

The Military Justice Law from 1873 used to sanction with death penalty the act of a military who betrayed to the enemy or in the latter's interest "the password or the secret of an operation, expedition or negotiation" (art.198 (1)).

On its turn, the Special Justice Code for the Marine Corp from 1884 incriminated, in art. 25 para.1, the act of the person who, during wartime, provides the enemy with the means of signal communication.

The Act on espionage during peacetime, from 31st of January 1913, introduces a series of new offences meant to protect state secret information. Accordingly, there were incriminated the acts of the agents or the officials in charge of the Government or of any other entity who, directly, hand over, procure or disclose to a foreign Govern, to its agents or to any other entity who is not authorized to know about them, the plans, sketches, drawings, photos, scripts or documents, even incomplete or inaccurate, information or notes regarding: the defence of the territory, the security of the state, the mobilization and concentration of the army, the state, quantity and quality of the military material, the forts, the military and maritime arsenals, the war vessels, equipments and any other knowledge about objects or papers which, for the interest of the national security, must not be disclosed, and which had been provided to the perpetrator or of which the latter found out about in compliance with his duties or his assignment (art.1 (a)). It was also incriminated the act of a person who "would have communicated, or disclosed, not the act itself or the secret document, but only pieces of information or knowledge from it" (art.1 para.c), as well as the copy or the publication without any authorization of these documents (art.2 para.2). Therewith, it was incriminated the act of "a person who, by negligence, without taking notice of the regulations, instructions, orders and directives, allows them to be circumvented, taken, destroyed" the abovementioned official documents "which were entrusted to him, or he possessed them in compliance with his duties, status or profession, or mission he had been assigned with" (art.4).

The Act issued in 1913 is modified by the Act on espionage and treason during peacetime from 26 June 19030, especially for the purpose of establishing more severe punishments. Similarly, there is precisely incriminated the transmission, procurement or disclosure of "secret notes of military order" (art.1), and also the offence committed by a person who, by negligence, discloses information, signs or proofs, collected during researches regarding the crimes of treason and espionage (art.9).

The Criminal Code from 1936 does not bring significant changes in regards to the incriminations issued to protect state secret information. In Book II, Chapter I – offences and delicts against the exterior security of the state, we find once again the following crimes: treason by infidelity (art.190), treason (art.191 and art.192), espionage (art.194), delict of negligence against the security of the state (art.197) – offences which are similar to those incriminated by the law from 1864 and by art.1, 2, 4 and 9 from the Acts regarding espionage and treason from 1913 and 1930.

The disclosure of the professional secret continues to be incriminated, under the title "revelation of the professional secret" (art.505).

A new disposition in regards to the previous legislation, but referring to restricted information, can be found in Title XIII, Chapter II, Section IV – the violation of secret information. Accordingly, in compliance with art.506, there is incriminated as a delict the disclosure of the industrial or trade secret committed by a person who "discloses a licit trade or manufacturing secret from an enterprise, where the perpetrator works or has worked, or in compliance with his duties, he

found out about it, or he uses this secret for his own enterprise or of another's, in order to obtain an unlawful benefit, for himself or for another or to cause damages to the enterprise which secret he disclosed or used", as well as the act of a person who "uses, in his trade or enterprise, or of another's, a licit trade or industry secret, which was revealed to him under the abovementioned circumstances, or about which he found out by fraud, in order to cause damages to the enterprise or to the trade of that which secret was disclosed".

The Code for Military Justice from 1937 included in art.499 para.1 and art.588 para.1) art.500 and art.589 para.2, similar incriminations to those from art.198 para.1 and, respectively, art.199 para.3 from the former military legislation. There was also incriminated, as specific military marine crime, the disclosure, committed by "the litigants from the board justice councils", of facts or acts regarding service that, according to the orders, had to be kept secret (art.581 para.6).

Under the provisions of the Criminal Code from 1969, currently in force, the criminal protection of the state secret is rendered by the incrimination of the following crimes treason by the transmission of state secret information (art.157), espionage (art.159), disclosure of the secret jeopardizing national security (art.169) and negligence in keeping state secret information (art.252). Besides these crimes, there is also the crime of organizing intelligence activities jeopardizing state security, provided in art.19 from Act no51/1991[7].

The current Criminal Code does not use the term of state restricted information, but the collocation no publicity information, the authors of the Code considered them to be equivalent[8]. The typical crime in this field is the disclosure of economic secret (art.298).

II.2. Criminal protection of state secret information. The new Criminal Code incriminates a number of 7 offences that harm the regime of protection of state secret information: treason by the transmission of state secret information (art.395), high treason (art.398) espionage (art.400), the disclosure of the secret that jeopardize national security (art.407), the constitution of illegal intelligence structures (art.409), the disclosure of state secret information (art.303) and the negligence in preserving the information (art.305).

The first 5 offences presented above are part of the same category of crimes against national security, regularized by Title X from the special part of the new Criminal Code. The legislator includes in the group of service offences (chapter II from Title V) the crimes – the disclosure of state secret information and the negligence in preserving this information.

The premise. None of the abovementioned offences cannot be conceived nor committed without a previous existence of the *state secret information*. The social relations rising and developing around this state secret information, for the protection of which it is necessary to protect this type of information, are in fact the specific juridical object for these crimes, either as a component of the set of relations regarding national security, either of those referring to the welfare of the legitimate activities and interests of the public authorities, of the public entities or of the legal persons that administrate or exploit the goods of the public property.

From a criminal point of view, in compliance with art.178 para.1, by state secret information, we understand the information classified thereby. This explanatory norm makes reference to Act no182/2002. The decision taken by the legislator to define the state secret information using a

[7] Published in the Official Bulletin no 163, 7 August 1991.

[8] V. Dongoroz, S. Kahane, I Oancea, R. Stănoiu, I. Fodor, N. Iliescu, C. Bulai, V. Roşca, *Explicaţii teoretice ale Codului Penal român (*further referred to as *Explicaţii),* Ed. Academiei şi Ed. All Beck, Bucureşti, 2003, vol. IV, p.456-457.

reference norm to a non-criminal law was criticized in juridical literature, arguing that the error regarding a non-criminal norm is assimilated to the error de facto, and such an incriminating content can rise the problem of the principle of incrimination, especially the certainty and predictability *(lex certa et praevia)* of the incriminations[9].

According to art.15 (d) from Act no182/2002, the state secret information that refers to national security, by the disclosure of which national security and protection of the country can be jeopardized.

The category of state secret information is subdivided into three levels of secrecy:

(1) top secret information - the unauthorized disclosure of which would cause exceptional grave damages to national security. For example, the information regarding the state code or the pans for the whole army mobilization;

(2) secret information - the unauthorized disclosure of which would cause serious damages to national security. For example, the information regarding maxim levels and the intangible stocks of the products from the state bank of Romania or those regarding the technical means used by national intelligence services for the technical surveillance of the communications of those persons who are suspected of committing offences against national security;

(3) confidential information - the unauthorized disclosure of which would damage national security. The difference between the levels of secrecy is rendered by the value of the information for national security and by the gravity of the potential damages due to an unauthorized disclosure. For example, the information regarding the radioactive metals stockpiles (as uranium) either quantitatively and qualitatively known or estimated, for every deposit in Romania.

According to art.19 from Act no182/2002, those authorized to classify an information as top secret information are only certain categories of persons, for example: the president of Romania, the president of the Senate, the president of The Chamber of Deputies, the members of the Supreme Council of National Defence, the Prime-minister, Government members and the Secretary General of the Government, the governor of Romania National Bank, the directors of the national intelligence services, the director of The Administration of The National State Reserve Currency etc. Moreover, in the case of secret information, there are also the state-secretary ranking officers, and in the case of classified information, there are also the undersecretary ranking officers of state, secretary general or the general director, depending on the situation. The standards for classification levels are set out by Government Order (art.24 para.3 from Act no182/2002).

The information itself preserves the same class and level of secrecy until it is downgraded or declassified. According to art.20 para.1 and art.23 para.1 from G.D. no585/2002[10], declassification (losing the status of state secret information or restricted information) can emerge in four different situations: (1) when the classification period ends; (2) when the disclosure of information can no longer jeopardize national security, the defence of the country, the public order or the interests of the public or private entities that hold this information; (3) when the level of secrecy was given by a person not legally authorized; (4) when the classified information is undoubtedly compromised or irremediably lost.

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[9] See V. Mirişan în M. Basarab, V. Paşca, Gh. Mateuţ, T. Medeanu, C-tin. Butiuc, M. Bădilă, R. Bodea, P. Dungan, V. Mirişan, R. Mancaş, C. Miheş, *Codul penal comentat. Vol. II. Partea specială (*further referred to as *Basarab II),* Ed. Hamangiu, 2008, p.599.

[10] Published in the Official Bulletin no 485, 5 July 2002.

The abovementioned aspects indicate that the new Criminal Code sets out a new depiction of the term "state secret information", replacing art. 150 para.1 of the present Criminal Code, which defines state secret information as those documents and data, of obviously secret nature, as well as those certified or labelled as so by a Government order. This definition - which establishes two criteria for the identification of the information class (the real criterion and the formal one[11]) and which has not been changed since the present Criminal Code is in force - was similar to that given by the former Criminal Codes; according to art. 2 from Decree no 430/1969[12] and later, by art.2 para.1 from Act no23/1971[13] (currently, both of them are abrogated) there were two categories of state secret information: (1) those certified and labelled as so by a Government order. (2) those which were obviously secret, though there was no formal certification, by law. This concept is no longer in compliance with Act no182/2002[14] that, as we have already mentioned, defines state secret information referring to its own content.

The information has to be classified, state secret information at the time the offence, incriminated by the Criminal Code, and was committed. If the action or inaction, which represents the material element of the physical element, regarded declassified information, the offence is not a crime. If, at a subsequent moment, the information was reclassified and modify from state secret information into restricted information, we shall have the elements of the crime "disclosure of state secret information or non-public information", (art.304), if the other conditions are fulfilled in compliance with this incriminating norm.

The classification of information as state secret information must not be mistaken with the corresponding marking of its material form. The information becomes state secret information in accordance with its value, as a result of its own content, for national security and in respect to the gravity of the damages that might be caused due to an unauthorized disclosure. Marking is the technical operation made with the purpose of pointing out to the people who handle the information or access classified information that they are the holders of information in regards to which they must apply the specific measures of access and protection (art.15 from G.D. no585/2002).

Consequently, the information represents a state secret information if it meets the conditions provided by art.15 (d) and (f) and art.17 from the Act no 182/2002, even if its form (paper, tape, video CD or DVD) was not properly marked. Certainly, if the conditions for the physical element are accomplished (for example, an agent of a foreign power was handed over an official document containing state secret information, but not properly marked), it does not necessarily mean that the act is a crime; one must examine to what extent the perpetrator knew about the nature of the information, in order to establish whether the conditions for the mental element are accomplished. If, at the time of the action, the subject did not have the representation of the nature of the information as state secret, he was in error (art.30 para.1), which means that, not acting intentionally, the offence is not a crime. The act, although a typical one (provided as such by the Criminal Code), is

[11] For further details, see *Explicaţii*, vol. III, p.51; O.Aug. Stoica, *Drept penal. Partea specială,* Ed. Didactică şi Pedagogică, Bucureşti, 1976, p.30; Gh. Nistoreanu, V. Dobrinoiu, Al. Boroi, I. Pascu, I. Molnar, V. Lazăr, *Drept penal. Partea Specială,* Ed. Europa Nova, Bucureşti, 1997*,* p.46; A. Filipaş, *Drept penal român. Partea specială,* Ed. Universul Juridic, Bucureşti, 2008, p.64-66 şi p.71

[12] Published in the Official Bulletin no 57, 15 May 1969.

[13] Published in The Official Bulletin no 157, 17 December 1971.

[14] See M. Basarab în *Basarab II*, p.8.

irreproachable to the person who committed it[15]. If the act is sanctioned when committed by negligence, it is also necessary that the circumstance of unawareness regarding the nature of state secret information is not the result of the perpetrator's negligence (art.30 para.2).

Not knowing the nature of the state secret information is not equivalent with the perpetrator's doubt regarding this circumstance. The error must not be mistaken with doubt, which means that the subject is aware that he cannot understand the reality, in other words, he is aware that the information could fall into the category of state secret information, this meaning he should not act. If he still takes action, although he is aware of the fact he does not know the reality, the subject shall be responsible for the offence committed because he accepted the result, which is socially dangerous, thus acting involuntary[16].

Treason by the transmission of state secret information (art.395). The offence committed by transmission of state secret information to a foreign power or organization or to its agents, as well as the procurement of documents or data classified as state secret information or possession of such documents by a person who is not qualified to know them, in order to transmit them to a foreign power or organization or to its agents, committed by a Romanian citizen.

The present Criminal Code sets out the offence in art. 157.

A first different aspect refers to the special juridical object of the offence. Under the current regulation, the special juridical object is represented by the group of social relations that protect state secret information (typical nature provided by art.157 para.1 C.C.) as well as the information that, although not comprising state secret data, due to its nature and significance gives the act the capability of causing damages to national security (mitigating form provided by art.157 para.2 C.C.).

Distinctively, the new Criminal Code refers only to the protection of state secret information, as described in art. 178 para.1. The reason for the limitation of the number of conditions in which the offence is incriminated resides in the present content of the term "state secret information". As we have already mentioned, state secret information is, in compliance with Act no182/2002 (which art.178 para.1 refers to), that information regarding national security and which disclosure would jeopardize national security and the defence of the country. Consequently, there is no further object for the thesis according to which the information, though not part of the category of state secret, could cause, due to its nature and significance, damages to state security by the transmission to a foreign power or organization or to its agents, or the procurement or possession in order to transmit it. This information is still state secret information.

Another new aspect refers to the capacity of the active subject. It has to be a Romanian citizen, unlike the current regulation where the active subject can have either the capacity of a Romanian citizen or a person with no citizenship domiciling in Romania. Thus, it responds to the concept according to which the crime treason (including treason by the transmission of state secret information and treason by helping the enemy), which expresses the lack of loyalty and the infidelity

[15] For further details, see M.A. Hotca, Noul Cod penal şi Codul penal anterior. Aspecte diferenţiale şi situaţii tranzitorii, Ed. Hamangiu, Bucureşti, 2009, pag. 19.

[16] See *Explicaţii*, vol. I, p.373; C. Mitrache, Cr. Mitrache, *Drept penal român. Partea generală,* Ed. Universul Juridic, Bucureşti, 2006, ed. a V-a, p.168; C. Bulai, B.N. Bulai, *Manual de drept penal. Partea generală,* Ed. Universul Juridic, Bucureşti, 2007, p.274; M. Basarab în M. Basarab, V. Paşca, Gh. Mateuţ, C-tin. Butiuc, *Codul penal comentat. Vol. I. Partea generală (*further refered to as *Basarab I),* Ed. Hamangiu, 2007, p.310-311; M.A. Hotca, *Codul Penal. Comentarii şi explicaţii,* Ed. C.H. Beck, Bucureşti, 2007, p.607.

towards his own country[17], can be committed only by those persons whom the fidelity towards Romania is mandatory, and they can only be – according to art.54-55 from the Constitution – Romania citizens.

If, at the moment the offence is committed, the active subject does not have the capacity of Romanian citizen, either he is a foreign citizen or a person with no citizenship; the act is punished as espionage (art.400). One can see that the legislator has yielded the current distinction between persons with no citizenship not domiciling on the Romanian territory and those domiciling outside this territory; the offence set out in art.395 committed by a stateless person, shall be qualified as espionage regardless of the fact that the perpetrator domiciliates or not in our country.

Furthermore, however, the double capacity of the active subject, in compliance with the current regulation, in the case of "possession" (Romanian citizen and a person who is not authorized to know state secret information) extends itself, also comprising, under this new regulation, the case of "procurement". In other words, according to the new Criminal Code, the Romanian citizen who procures state secret information, in order to transmit it to a foreign power or organization or to its agents, commits the offence in the consummated form unless he has the capacity to know this information. In case the perpetrator is a person authorized to access this information, the act of procurement, in order to transmit it to a foreign power or organization or to its agents, is not a consummated offence, but only a preparatory act for the transmission, assimilated to the punishable attempt. (art. 412 para.2).

The mitigating form of the crime in art.157 para.2 C.C. is disincriminated. Consequently, the principle of retroactiveness of the Criminal Code becomes the rule (art.4). There are also exceptions, in case the offence has all the elements of another crime, we encounter a change in the title of the offence; as it is the case of transmission to unauthorized persons of the information which, without being a state secret one, is still a non-public information, and this act could form the elements of the crime disclosure of restricted information or non-public information (art.304).

High treason (art.398). The offence is represented by the offences, set out in art. 394-397, committed by the President of Romania or by any other member of the Supreme Council of National Defence.

By referring to the provisions of art. 395, this is a means of defending state secret information.

The crime of high treason has no correspondence in the present Criminal Code[18]. The incrimination of the offence was necessary in order to ensure the efficiency, under criminal aspects, of the provisions of art.96 para.1 from the Constitution; according to the text "The Chamber of Deputies and the Senate may decide the impeachment of the President of Romania for high treason,

[17] See *Explicaţii III*, p.26; O.Aug. Stoica, *op. cit.,* p.27; Gh. Nistoreanu, V. Dobrinoiu, Al. Boroi, I. Pascu, I. Molnar, V. Lazăr, *op. cit.,* p.41; A. Filipaş, *op. cit.,* p.61 şi p.66. M.A. Hotca, *Codul Penal. Comentarii şi explicaţii, op. cit.,* p.869.

[18] The offence of high treason was incriminated by art. 204, Criminal Code from 1936, but with a significant different content. According to the text: "(1) any attempt to the life, corporal integrity or freedom of the King, is a crime of high treason and is punished by silnic labour for life. (2) The same attempts against the Quinn, the inheriting Prince or against other members of the royal family, are punished by silnic labour from 10 to 25 years, unless the offence is punished harsher by the law (for further details, see C.G. Rătescu, H. Aznavorian, I. Ionescu-Dolj, Tr. Pop, I. Gr. Perieţeanu, M.I. Papadopolu, V. Dongoroz, N. Pavelescu, *Codul Penal Carol al II-lea adnotat,* Ed. Librăriei Socec, Bucureşti, 1937, vol. II, p.47-51). Thus, in respect to the content of the law, the crime of high treason regulated by the Criminal Code from 1936 resembles the crime of attempt that jeopardizes national security in the present and in the new Criminal Code.

in a joint session". From a criminal point of view, the constitutional norm is currently inapplicable, because –as juridical literature stated[19] - the crime of high treason is not provided (it is not explained) by the Criminal Code nor criminally punished; consequently, a potential impeachment of the President of Romania for high treason would violate the principle of the legitimacy of incrimination (*nullum crimen sine lege*), provided by art.2 C.C.

The active subject of the crime of high treason may be someone else besides the President of Romania, for example a member of the Council of National Defence. According to art.5 para.2-3 from Act no415/2002[20], the members of this authority are: the President of the Senate, the Prime-Minister of the Government of Romania (both, as vice-presidents), the Minister of National Defence, the Minister of Internal Affairs and Administration, the Minister of Foreign Affairs, the Minister of Economy, Commerce and Affairs Environment, the Minister of Public Finance, the Director of the Romania Intelligence Service, the Director of the Romania Foreign Intelligence Service, the Chief of General Staff and the counsellor to the president for national security affairs.

The criminal norm does not claim that the offences are committed by these subjects in connection with their duties as members of the Supreme Council of National Defence, or at the time they carry out their duties. Our opinion is that the offence continues to subsist independently of these circumstances; for example, the act of one of the abovementioned persons of transmitting state secret information to an agent of a foreign power constitutes the crime of high treason even if the information is not associated to the duties of the Supreme Council of National Defence. If, by incriminating the offence of high treason, the legislator had wanted to settle a new special protection regime for the classified information analysed by this public authority, then he would have had to point it out. Art.398 does not stipulate such a mention. We consider that, under these circumstances, which high treason was *exclusively* incriminated on the account of the extremely high social peril rendered by the perpetration of the offences provided in art.394-397 by the active subjects with a special quality, who are high public officials – members of the Supreme Council of National Defence. Another argument to support our point of view is rendered by the fact that the offence of disclosure of state secret information regarding the activity of the Supreme Council of National Defence to the agent of a foreign power if committed by other subjects than those stipulated by art.398 (for example, a senator or a deputy[21]) shall not be a crime of high treason, but a crime of transmission of state secret information, although national security is jeopardized equally in both situations.

Although, as we have previously mentioned, the crime of high treason has no correspondent under the present Criminal Code, still we encounter a new incrimination. High treason is nothing but a qualified form, of species, for the crimes of treason, treason by the transmission of state secret

[19] See, for this matter, A. Iorgovan, *op.cit.,* vol. II, p. 426; I. Neagu, *Drept procesual penal. Tratat*, Ed. Global Lex, Bucureşti, 2006, vol. I – Partea generală, p. 299, nota de subsol nr. 46; O. Rădulescu, P. Rosenberg, A. Tudor, *Probleme controversate privind răspunderea penală a demnitarilor*, în Dreptul nr.11/2008, p. 220; V. Dobrinoiu, M.C. Sinescu, *Suspendarea cursului prescripţiei răspunderii penale în cazul persoanelor cu funcţie şi demnitate publică*, în P.R. nr.7/2010, p.71. For a different opinion, see Şt. Deaconu, *Câteva aspecte de natură constituţională privind răspunderea Preşedintelui României*, în Dreptul nr.12/2007, p. 39-41.

[20] Published in the Official Bulletin no 494, 10 July 2002.

[21] According to art.9 from Act no 415/2002, for the sessions of the Supreme Council of National Defence, there are also invited, the representatives of the Parliament of Romania. According to art.7 para.4 from Act no 182/2002, the access to state secret information is granted to the deputies and senators on condition that they were elected and made the oath.

information, treason by helping the enemy or actions against the constitutional order. Accordingly, the perpetration of the abovementioned act by the President of Romania or by the members of the Supreme Council of National Defence, with the guilty form required by the law, is a crime as provided by art.155, art.156 or art.157 C.C., because these persons have the capacity required by the law for the active subject (Romanian citizen).

Consequently, not having a new incrimination, the principle of non-retroactiveness of the Criminal Code is not applicable. If the abovementioned persons commit these offences, the act being a crime both under the provisions of the former and the new law (the difference resides in the juridical designation), the principle *mitior lex*[22] shall apply.

Espionage (art 400). The crime is represented by the offences committed, as set out in art.395, by a foreign citizen or by a person with no citizenship.

In the present Criminal Code, the crime is incriminated by art.159.

We further sustain the previous remark in regards to the capacity needed for the active subject of the crime. The comments are similar to those made in regards to the analysis of the crime of treason by transmission of state secret information.

The disclosure of the secret jeopardizing national security (art.407). The crime is regulated in a typical and a mitigating form.

In the case of typical form, the crime consists of disclosure of documents or data, which represent state secret information, by the person who knows it due to his duty prerogatives, if the offence jeopardizes national security.

The mitigating form consists of possessing outside duty prerogatives a document, which contains state secret information, if the offence jeopardizes national security.

In the present Criminal Code, the offence is incriminated – in both forms – by art.169 (1)-2.

A first difference refers to the material object of the crime, under the new regulation; this is exclusively represented by those documents, which are labelled as state secret information and not for other documents. Consequently, the new Criminal Code does not provide the form set out by art.169 para.3 of the present regulation (the text incriminates the possession outside duty prerogatives of other documents in order to disclose them, if the offence can cause damage to the national security of the state). As a rule, we encounter a disincrimination (art.4). The exception appears in the case of disclosure of certain documents which, without being state secret information, still non-public, committed by a person who knows it due his duty prerogatives – an offence which, if a person's interests or activities are harmed, is still incriminated by art.304. para.1.

Another difference refers to the capacity of the active subject of the crime, who – under the normative conduct provided by the new Criminal Code – can only be a person knowing about state secret information due his duty prerogatives. The provisions of art.407 do not comprise a norm equivalent with that provided by art. 169 para.4 C.C., which sanctions the perpetration of the abovementioned offences committed by any other person. We believe that it was just a slip of the

[22] Judicial literature (see C. Barbu, *Aplicarea legii penale în spaţiu şi timp,* Ed. Ştiinţifică, Bucureşti, 1972, p.206 şi p.215) noted that, in order to determine which is the most favourable of two criminal acts, the courts shall never take into consideration the titles of the crimes – which, if changed, this does not mean that they are disincriminated – but their contents, as provided by the texts of the law. Likewise, the Bill that brings into force the application of the Criminal Code added, later to its publication on www.just ro, a second paragraph in art.4, according to which: „The provisions of art.4 from the Criminal Code do not apply to the situation when the offence is incriminated by the new act or by another one in force, even under a different title".

legislator as, although the new Criminal Code does not incriminate by an autonomous text the offences committed, by any other person except for the officer, as provided in art.407 para.1-2, it still stipulates as a different crime, a less serious one - the unauthorized disclosure of state secret information or non-public information – also in case the offence is committed by any person who becomes aware of this information, and not just by the person who knows it due to his duty prerogatives; moreover, the latter offence can be committed not only by intent (art.304 para.2), but also by negligence (art.305 para.2).

This elision is corrected by the Bill for the entrance into force of the Criminal Code[23] that incriminates, in art.246 point13, "the unauthorized disclosure of certain documents or data that are state secret information, by the person who becomes aware of it outside his duty prerogatives[24]" - in favour of which we plead.

A third difference refers to the main condition associated to the material element. The new regulation requires that the offence jeopardize national security, unlike the present Criminal Code that requires that the offence have the nature of jeopardizing state security. From this point of view, one can notice an aggravation of the condition of incrimination.

Accordingly, art.407 requires a result, and not a possibility; under the new regulation, it is not enough to identify the real possibility, as resulting from the circumstances, that national security[25] is jeopardized, but this peril itself. That is to say, if the disclosure or the possession did not jeopardize national security, but this possibility existed, and did not materialize, we do not have the constituent elements of this crime.

Constitution of illegal intelligence structures (art.409). The crime means the initiation, organization or constitution on the Romanian territory of an intelligence structure, in order to collect, state secret information or their development of activities of collecting or processing this information, outside the legal framework.

Currently, the offence is incriminated by art.19 from Act no51/1991[26], which provides the following: "(1) The initiation, organization or constitution on the Romanian territory of intelligence structures, the support offered by any means to them or adhesion to them, the possession, the making-off or the illegal use of specialized means to survey communication, as well as the collecting and the transmission of secret or confidential information, by any means, outside the legal framework, is a crime and shall be punished with imprisonment from 2 to 7 years, if the offence is not a more severe crime. (2) The attempt is punishable."

By comparing these texts, one can see, in the first place, the perpetuation of the present legislative technique in the provisions of this crime. In regards to art.19 from Act no51/1991, the doctrine has already stated, explicitly[27] or implicitly[28], that although the autonomous incrimination of at least three distinct acts was_required - the initiation, organization or constitution of illegal

[23] After its publication on www.just ro

[24] It advices that this text becomes para.3, art.407

[25] See *Explicaţii,* vol. III, p.141.

[26] Published in the Official Bulletin no163, 07 August 1991.

[27] See A. Ungureanu, A. Ciopraga, *Dispoziţii penale din legi speciale române*, Ed. Lumina Lex, Bucureşti, 1996, p. 124.

[28] A series of authors, though not explicitly mentioning this issue, consider that the offences provided by art.19 from the Act no51/1991 represent a unique crime (see Gh. Diaconescu, *Infracţiunile în legi speciale şi legi extrapenale*, Ed. All, Bucureşti, 1996, p. 12-15; Gh. Nistoreanu, V. Dobrinoiu, Al. Boroi, I. Pascu, I. Molnar, V. Lazăr, *op. cit.,* p. 81-83).

intelligence structures; (2) the possession, the making-of or illegal use of means to survey communication; (3) the illegal collection and transmission of secret or confidential information – although the purpose of the legislator was to provide a unique crime. Judicial practice agrees with this point of view[29].

We consider that the crime provided in art.409 is a unique one, though it would have been better if there had been two autonomous crimes: (1) the initiation, organization or constitution of illegal intelligence structures and (2) the development of illegal intelligence activities.

Here are the arguments in favour of the thesis for the unique crime:

- the actions comprising the material element of the physical element may appear in different variants ("the initiation, organization or constitution [...] or development [...] of activities of collecting or processing information"), and according to the rule that, for the crimes where the material element is alternative, the material element may be accomplished by any or more variants, this does not change the uniqueness of the crime;

- both the means-action (the initiation, organization or constitution of illegal intelligence structures) and the purpose-action (the collecting or processing of state secret information) are provided alternatively in a unique incriminating norm, and the law does not mention whether the rule of plurality of crimes is applicable. When the legislator intended that the purpose-action and the means-action formed distinct crimes, he provided it explicitly, with regards to the institution of plurality, as it is the case of, for example, the crimes of facilitating the illegal stay on the Romanian territory (art.264) or the constitution of an organized criminal group (art.367);

- in the structure of the incriminating norm, the sanction is expressed by using the singular form ("the initiation, organization or constitution [...] or development [...] of activities of collecting or processing [...] *is punished"*) and not the plural form (they are punished).

According to the abovementioned arguments, the conclusion is that the perpetrator who – for example – takes part in the constitution of the illegal intelligence structure in order to collect state secret information, and, later, on behalf and interest of this structure, he collects and processes this information, he commits only one offence, and not a plurality of offences. Certainly, his personal contribution is taken into consideration at the moment of the individualization of the punishment, in compliance with the criteria in art.74.

Still, we consider that, in case the collection and processing of the state secret information is committed for the particular purpose of transmitting it to a foreign power or organization or to its agents (and the perpetrator is a person who does not have the capacity to know this information), there is a plurality of offences including the constitution of illegal intelligence structures (in the normative manner of initiation, organization or constitution, depending on the situation) and treason by transmission of state secret information or espionage (in the normative manner of procurement or possession, depending on the situation). In the latter situation, one can notice that, although the initiation, organization or constitution of intelligence structures represents a preparatory act for the crime of treason by transmission of state secret information (or, in another situation, espionage), due to the fact that the social peril of the perpetration is extremely high, the legislator decided to incriminate it distinctively, in a consumed form; thus it is a derogation from the general rule according to which, in regards to the crimes against national security, the preparatory acts are assimilated to attempt (art.412 para.2).

[29] T. Iaşi, sent. pen. nr.239/1998 (unpublished)

Secondly, the new Criminal Code provides certain modifications to the physical element of the crime.

In regards to the material element, one can see that the new code maintains the actions of initiation, constitution or organizing an intelligence structure, as well as those of collecting information; however there are no more the actions of assisting of an intelligence structure and the adherence to it. Consequently, the persons who assist or adhere to an intelligence structure shall be considered as accomplices and not as authors, as it is the case under the present regulations.

On the other hand, it was introduced a new commissive action in the structure of the material element: the processing of state secret information. "Processing" means the totality of successive actions of investigating, completing, assessing and synthesizing information, in order to obtain a better informational product.

Other new aspects refer to the essential conditions associated to the material element. Accordingly, the activities of collecting and processing must refer to state secret information, as stated in art.178 para.1, unlike the present regulation that refers to secret or confidential information. Furthermore, we consider that the purpose of collecting state secret information must be considered a precondition, as it represents the physical destination of the action of initiation, organizing or constitution of the intelligence structure and it does not represent a mental aim of the perpetrator (therefore, it does not characterize the mental element of the crime).

A third observation refers to the active subject of the crime, for the normative manners of collecting or processing state secret information. According to art.409, it is represented by the intelligence structure, which implies a legal plurality of perpetrators.

Accordingly, the capacity of the authors belongs to those individuals who, as members of the structure, assist in any manner (direct executional acts; provocation; material or moral assist, before or simultaneously) the perpetration of the offences of collecting and producing the information. The condition for an active subject does not imply the necessity that all the members of the intelligence structure, not even at least two members, commit the operations of collecting or processing state secret information. One member may perform these activities alone, under the condition that he acts on behalf and for the interest of the intelligence structure which member he is, and not acting independently of it. By the provisions of art.409, the legislator intends to punish also the perpetrator who, outside the legal framework, collects and processes information as an agent (mandatory) of the illegal intelligence structure and for the purpose of which it was constituted.

Consequently, according to the law, the active subject is the intelligence structure, if it becomes a legal person (for example, it carries on clandestine activity, under the cover of a non-profit making legal person – company, foundation), there is a case of mandatory criminal liability of the legal person (art.305), even if the natural person that committed the acts of collecting or processing of state secret information cannot be criminally sanctioned. The accumulation of the criminal liability of the legal person with that of the natural person is not excluded, but the condition for the crime is that the processing or collecting of state secret information was committed on behalf and for the interest of the intelligence structure, that is by the intelligence structure itself as a legal person. If one cannot demonstrate that the natural person acted in accordance with his status as the representative of the intelligence structure, both *de jure* or *de facto,* there is no crime as stipulated by art.409; the natural person shall be punished, for example, for the crime of treason by disclosure of state secret information (art.395) or disclosure of state secret information that jeopardizes national security (the mitigating form as stipulated by art.407 para.2).

In return, if the processing or collection of information is committed on behalf of and for the interest of the legal person, the offence is a crime of constitution of illegal intelligence structure even if some of the natural persons did not act in intent and are not criminally responsible (for example, they were in error in regards to the state secret information, which they thought to be public information as it had not been properly marked by the issuer). Certainly, under such circumstances, it is necessary that the intelligence structure, through its other members, knew that the information was classified, as, according to art.16 para.1, „the offence is a crime unless committed with the mental intention stipulated by the criminal law", for this case being intent. Criminal liability of the legal entity is a personal one, based on fault, and not an objective one. If the other members of the intelligence structure as well as those, who committed the offence of collecting or processing, were in error of the fact of state secret information, the offence is not a crime as it lacks the fundamental element of impunity.

Disclosure of state secret information (art.303). The offence is incriminated in a typical, mitigating and aggravating form.

The typical form consists in an offence committed through an unauthorized disclosure of state secret information by the person who knows it due to his duty prerogatives, if thus the interests of a legal person, according to art.176 are harmed.

The mitigating form consists in the unauthorized possession, outside duty prerogatives, of a document that contains state secret information, if it can harm the activity of one of the legal persons provided by art.176.

The aggravating form consists, according to art.309, when the abovementioned acts caused very grave consequences, meaning, according to art.183, a material prejudice of more than 2.000.000 lei.

The crime has no correspondent in the present legislation. The present Criminal Code provided a similar incrimination at the time of its entry into force, containing, in art. 251 C.C.; the crime of disclosure of secret information regarding public interests. The text was yet decriminalized by art.2 (1) from the Decree-Act no12/1990[30].

Both normative variants imply that the act has a similar content with the crime of disclosure of the secret jeopardizing national security (the active subject, the physical element and the mental element).

The main significant difference is rendered by the precondition associated to the material element, meaning that the crime provided by art.303 implies that the disclosure or the possession harms or can harm the interests or the activity of one of the persons set out in art.176, while in the case of the crime of disclosure of the secret jeopardizing national security, the act must jeopardize national security.

The doctrine[31] stated that the two acts are different in respect to their juridical object. The social relations that form represent indeed, in the case of disclosure of state secret information, the generic juridical object represents the social relations that form and develop around the activities of the authorities and of the public institutions, as a social value, while in the case of disclosure of the secret that jeopardizes national security, we encounter those social relations that gravitate around and depend on the protection of national security. The crimes resemble one another in regards to the special juridical object: the social relations that can develop normally only if the state secret is well

[30] Published in the Official Bulletin no 7, 12 January 1990
[31] See *Explicaţii*, vol. IV.

guarded. Furthermore, although theoretically, the category of the generic subject is different, in fact we encounter a relation between unit and part. The act of jeopardizing national security by disclosing state secret information includes, in a natural manner, also a violation of the activities of the authorities and of the public institutions. National security is, in fact, a state of stability and normality of internal and external relations of the state[32] of justice, as a political organization of the society and as unit of the public authorities – legal, executive, judicial[33]. One cannot conceive a situation that jeopardizes national security as a social value without damage on a public authority or institution.

This relation unit-part gives us the chance to assess that, in particular cases, the crime of disclosure of the secret that jeopardizes national security includes in a natural manner also the disclosure of state secret information. It is a natural complexity case[34]. If the disclosure or possession of state secrets, as a material element of the physical element, does not jeopardizes, due to various reasons, national security, one must examine if it harms or can harm the interests or activity of one of the persons set out in art.176 and, in case of a positive answer, the offence shall be the crime provided by art.303.

We notice a difference between the precondition for the typical form of the crime of disclosure of state secret information and the precondition for the mitigating form. Accordingly, in regards to the typical form, the norm requires that the act of disclosure harm the interests of one of the legal person set out in art.176. This implies that the violation exists and is visible, the possibility for that to happen not being enough. On the contrary, the mitigating form requires that the possession can harm the activities of the public authorities and institutions or of a legal person that administrates or operates the goods of the public institutions. Consequently, the consumed form of the crime postulated in art.303 para.2 shall exist when the unauthorized possession, outside duty prerogatives, of a document containing state secret information has the physical and abstract capacity to harm the activity of the legal persons postulated in art.176, even if there was no result (the violation of the activity) in reality. Suffice is to mention that there is a real possibility for the result to happen.

The disclosure of state secret information is similar to the disclosure of the secret that jeopardizes national security in regards to their special juridical object: the protection of state secret information. The difference between them is the consequence: the violation of the interest or the possibility to harm the activity of those legal persons set out in art.176, in the first case, jeopardizing national security, in the second.

In the typical form of this crime, the disclosure of state secret information is similar in regards to the consequences of the disclosure of restricted or non-public information, for the typical form (art.304. para.1). The difference between them is the specific juridical object: the protection of state secret information, for the first case, respectively the protection of restricted or non-public information for the second.

Accordingly, one can see that the crime provided by art. 303 para.1 is similar, in regards to the juridical object, to the crime provided by art.304 para.1. Therefore, we can asses that the disclosure of state secret information is less than the disclosure of the secret jeopardizing national

[32] See O.Aug. Stoica, *op. cit.*, pag. 25.
[33] See Gh. Nistoreanu, V. Dobrinoiu, Al. Boroi, I. Pascu, I. Molnar, V. Lazăr, *op. cit.,* p. 28-29.
[34] See, for details, *Explicaţii,* vol. I, p.262; C. Mitrache, Cr. Mitrache, *op. cit.,* p.265-266; C. Bulai, B.N. Bulai, *op. cit.,* p.515; C-tin. Butiuc, *Infracţiunea complexă*, Ed. All Beck, 1999, p.24. Juridical literature (see F. Mantovani, *Diritto penale. Parte generale*, CEDAM, Padova, 1992, p.483 *apud* M.A. Hotca, *Codul Penal. Comentarii şi explicaţii, op. cit.,* p.478) refered to these crimes also as "possible complex crimes".

security, because the result is less dangerous for the society, and it is more than the disclosure of restricted or non-public information, because the conduct prohibited by the criminal norm is exercised on a more significant and a more strictly protected information.

Therefore, this intermediary crime implies the disclosure of state secret information, respectively the information that regards national security and when disclosed, national security and the defence of the country may be jeopardized (art.15 (d)) from Act no182/2002), but the result is typical for the disclosure of classified information, respectively the disclosure of that particular information that can cause prejudices to a legal person, part of the public or the private law (art.15 (e) from Act no182/2002).

This is not a contradiction *in terminis*. "State secret information" is the information that, if disclosed, *can (our note – R.S)* jeopardize national security and the defence of the country. Act no182/2002 does not impel a link between the classification and the accomplishment of a result, but the possibility of it to produce. When classifying information as state secret information, one must take into account the damaging consequences that one can cause to national security in case of a disclosure, and not those generated in a concrete situation and that cannot harm this social value.

The legislator took into account this result when he criminalized the offence of disclosing state secret information. Art.303 incriminates the act of disclosing information to unauthorized persons that could cause damages to national security, but the act, due to the factual circumstances of the perpetration, does not produce such a result, and it only harms the interests of one of the legal persons provided by art176. Here is a clarifying example: an employee at a national intelligence service (X) discloses to someone close to him, a Romanian citizen (Y), state secret information regarding the technical means used for the surveillance of a foreign citizen's (Z) telephonic discussions, who has come to Romania in order to organize an espionage operation. Without knowing the classified character of the information, Y tells it to some friends and Z finds out about this information. As Z knows that he is under the surveillance of the authorities, he flees the country, giving up the operation of collecting classified information, as he had planned. On his return to his country, Z advises that another agent is sent to resume the operation of espionage, and he also informs him about the secret methods that national intelligence service use for the investigation of this new agent's activity, and he recommends that the latter take the necessary action to combat them. In this situation, X, as an employee of the national intelligence service discloses state secret information, but national security is not jeopardized, as the planned espionage operation is no longer running, and Z has fled the country of Romania. Nonetheless, the legitimate interests of the national intelligence service are harmed, as the future use of the same technical means for the surveillance of the communications made by the agents of a foreign power, on the Romanian territory, will be useless, as they already knew them.

Even if the result of the disclosure is the violation of the interests or the possibility of violating the activities of a legal person as provided in art.176, this result must identify its cause within the act of disclosure of state secret information and not of restricted information. Accordingly, we do not have all the constituent elements of the crime provided by art.303 in case the information is upgraded: for example, the disclosure refers to a piece of information that was wrongly classified as state secret information, while in fact it was part of the restricted category (this is the case of a crime of disclosing restricted or non-public information – art.304). The problem of over-classification (as well as under-classification) is a prior issue in the criminal trial[35], thus it shall be

[35] See V. Paşca în *Basarab I*, p.702

solved by the criminal court via competence prorogation[36], because it falls, by its nature, under the jurisdiction of the administrative courts[37].

When the information is under-classified, the solution is different, depending on whether the perpetrator knows that the disclosed information is part of a category (state secret) that is superior to the one assigned (restricted). If the perpetrator is aware of this circumstance, he shall be criminally punished for the crime of disclosure of state secret information (art.303). If he is not aware of it, we shall have the crime of disclosure of restricted or non-public information (art.304), because, in regards to the subject's aspect, the perpetrator's will and conscience were based on wrong aspects of the reality; he thought he was disclosing a restricted information, without being aware of the circumstance of under-classification, the information being restricted. One must apply the cause of removing the liability due to error, in compliance with art.30 para.3: "there is not an aggravating circumstance nor an aggravating circumstantial element when the perpetrator was not aware of the state, situation or circumstance at the time he committed the offence. "

In respect to the mental element, for the typical form of the crime, the form of guilt can be either intent or negligence (art.305 para.2). In respect to the mitigating form, the form of guilt is intent.

We note that the new Criminal Code introduces a new special cause of impunity for the mitigating form of this crime. Thus, according to art.303 para.3, the person who possesses a document containing state secret information, that can affect the activity of one of the legal persons stipulated in art.176, is not punished if he immediately hands over the document to the institution that issued it. For the application of this provision, the law requires that the person hands it immediately and only to the issuer. If the document is given to another person but the issuer, the impunity cause usually does not apply, as this hypothesis is equivalent with the disclosure to an unauthorized person. Consequently, for a homogeneous reasoning - ubi ratio eadem est idem lege – we consider that, although the law does not stipulate, still the perpetrator is not punished if, for example, he hands over the state secret information to the legal issuer (as it may be the case of possessing a secret message for the president of Romania, issued by a secret intelligence service). For the same reason, if the perpetrator cannot identify the issuer of the document (for example, he possesses only one page of the secret document), he shall not be punished if he hands it over immediately to an institution that is legally authorized to issue, manage and handle state secret information.

Negligence in the keeping of information (art.305). *The act consists in negligence that resulted in* the destruction, damage, loss or theft of a document containing state secret information, as well as negligence that led to another person's knowledge of such information.

The present Criminal Code incriminates the act in art.252.

We notice that the legislator abandoned the precondition that the act can harm the state interests, which is postulated in the present Criminal Code. The explanation comes from the specific nature of the information, as its qualification as state secret implies, as a *sine qua non* condition, the physical and abstract possibility to harm national security and the defence of the country, and thus

[36] See, for details, I. Neagu, *op. cit*., vol. I – partea generală, p.325-326; Gr. Theodoru, *Tratat de drept procesual penal*, Ed. Hamangiu, 2008, ediția a II-a, p.332-333.

[37] According to art.20, Act no182/2002, any Romanian natural or legal person can report an offence, to the authorities that classified that information, against the classification of the information, the period of time for their classification, as well as against the way the classification was made. The litigation shall be solved in compliance with the provisions of the administrative law.

implicitly the state interests, in case of an unauthorized dissemination (by disclosing, in intent or by negligence or as a result of the public official's negligence).

This is yet an explanation on a conceptual level.

From a technical-juridical point of view, the lack of this condition from the structure of the crime makes negligence constitute an offence both when the offence has the vocation to harm state interests, and when this possibility does not exist in reality. For example, we shall have the crime provided by art.305 both when, as a result to the negligence of a public official who is the employee of another national intelligence service, the state secret document is stolen by an agent of a foreign power and national security is jeopardized, and also when an employee of another national intelligence service becomes aware of that state secret information, an employee who is authorized to access classified information, but who does not need to know that information in regards to his duty prerogatives[38].In the last example, the offence committed by the public officials by negligence constitutes a crime, even if, in reality, it does not have the vocation to harm state interests (because, for example, the person who later has the possession of the document protects it and returns it to the issuer).

The circumstance, in a real situation, the negligence that does not harm the state interests must not be mistaken for the lack of the physical and abstract vocation of the information, if disclosed, to harm national security. That is to say, even if the real action does not harm state interests, it is necessary that the potential disclosure of the information had the vocation to generally jeopardize national security in the case of negligence in keeping the information.

There shall be no crime if the cause of the lack of possibilities to harm the state interests is still the lack of the physical and abstract vocation of the information to harm national security in case of unauthorized disclosure of information. In the latter situation, the information was wrongly over-classified (in the category –classified, although it should have been classified as restricted or it should not have been classified at all), and, consequently, there is no premise for the crime to exist. Accordingly, the crime provided by art.305 does not exist if the negligence followed by the destruction, alteration or stealth of the documents or another person's knowledge of the information, would not have had the vocation to jeopardize national security.

Consequently, by abandoning the precondition that the act has the vocation to harm state interests, the new Criminal Code hardens the incrimination conditions for the crime of negligence in the keeping of information. This means that the principle of nonretroactivness shall apply (art.1 para.2) for all the cases, which happened before the entrance into force of the new regulation, under which negligence – followed by the destruction, alteration, loss or stealth of a state secret document or that provided to another person the possibility to become aware of a state secret information – did not have the vocation to harm state interests.

IV. Protection of restricted information under criminal law. The new Criminal Code stipulates an incriminating norm particular for the protection of state secret information, without a concrete provision in the present regulation, that is the disclosure of state secret or non-public information (art.304). The crime is part of the group of duty crimes.

[38] According to art..33 G.D. no 585/2002, access to classified information is authorized, in compliance with the "need to know" principle, only for the persons who possess a security clearance or an access licence, valid for the level of secrecy of the information he needs to know due to his duty prerogatives. Accordingly, legally speaking, a certificate or an access licence is not sufficient to know a piece of information, thus the awareness must be necessary for duty prerogatives. Consequently, simply possessing a clearance does not automatically authorize the individual to view any piece of information falling under this category.

Currently, the offences of unauthorized disclosure of this type of information are punished as disclosure of economic secret information (art.298 C.C.)[39] or as a crime assimilated to the crimes of corruption (unauthorized access to non-public information, for the purpose of gaining unlawful benefits – art.12 (b) from Act no 78/2000[40]) or the crime regarding unjust competition (disclosure of trade secret information – art.5 (e-f) from Act no 11/1991), depending on the situation.

Restricted information, as a *premisis* for the existence of this crime, has no definition in the criminal law not even by using a norm of reference, as in the case of state secret information. We encounter a definition in art.15 (e) from Act no 182/2002, which provides that restricted information is that information that if disclosed could cause damages to a legal person either of public or private law. For instance, the information regarding the industrial technologies used by a commercial company to produce an unique category of market products or those referring to the conditions of the offer that a commercial company is about to put in for a competition of public acquisition.

Extra criminal protection of this type of information is rendered in compliance with the provisions of G.D. no781/2002[41], which makes reference to the rules stipulated by G.D. no585/2002. Accordingly, for example, in the field of restricted information one must apply the provisions for state secret information in regards to its classification and declassification. In terms of differences, we note that restricted information is classified as such by the manager of the legal person (art.31 from Act no182/2002) that may be jeopardized in case of disclosure.

The crime is stipulated in a typical, a mitigating and three aggravating form.

In the typical form, the active subject has a particular capacity; the law stipulates the condition that it is a person who is aware of the information due to duty prerogatives. Accordingly, the illegal offence can be committed only by a person who holds a certain position inside the legal person, either of public or private law that possesses the information and who, being authorized by his manager in compliance with art.6-7 from G.D. no781/2002, knew that information due to his duty prerogatives.

In the mitigating form, the active subject can be any person who has the general conditions for the criminal liability and no matter of the way he becomes aware of that information: due to his duty prerogatives or outside them, legally or illegally.

The element of conduct is an act of disclosure. Although the offence is generally a commissive one, it can also be committed by omission (art.17); for example, with the purpose of providing an unauthorized person with that information, a public official from an independent administrative institutions leaves a restricted document at sight, on the desk, offering that person the possibility to read it.

The law entails two fundamental conditions. First of all, the disclosure has to be unauthorized, that is without a legitimate cause; for example, if the legal person approved the disclosure, the act shall not be a crime. Secondly, the disclosure has to refer to restricted or non-public information.

Non-public information, as provided in art.304, refers to information that has a restrained area of circulation regarding the economic, business relations of natural persons, which could suffer prejudices, if the information was unauthorizedly disclosed. For instance, the information that refers

[39] See Gh. Nistoreanu, V. Dobrinoiu, Al. Boroi, I. Pascu, I. Molnar, V. Lazăr, *op. cit.,* p.530 ; O.Aug. Stoica, *op. cit.,* p.359; C. Miheş în *Basarab II*, p.871.

[40] Published in the Official Bulletin no 219, 18 May 2000.

[41] Published in the Official Bulletin no 575, 5 August 2002.

to banking operations made by a natural person (the so-called bank secret). Its unauthorized disclosure does not jeopardize a legal person (it is the case of a state secret information), but a natural person.

Nevertheless, we note that art.304 does not refer to that information regarding a person's private life, which, although public, is the object of another distinct provision, its revelation being sanctioned as a crime of disclosure of professional secret information, in compliance with art.227 (for example, the information regarding intimate relations, confessed to a doctor or a priest). Likewise, we believe that in case the disclosure refers to a certain type of confidential information, provided by particular incriminating norms meant to protect from a criminal point of view certain social values and relations of great significance, as those regarding the enforcement of justice and the correct and efficient activity of managing this public service, these texts represent the particular norm and they apply as a derogation from art.304, which represent a general norm of protection in the field of restricted information.

For instance, if the information is disclosed to unauthorized information regarding the conditions in which evidence is rendered (for example, date, place, means of surveillance and recording a private talk between two persons who are suspects of preparing or perpetrating a serious crime) and thus the criminal investigation is circumvented or hampered, the offence shall be considered a crime of compromising justice interests (art.277 para.1).

The result is represented, in the case of the typical form of the crime, by the harm on a person's interests or activities. This result must be determined in fact, as the possibility of happening is not enough; from this point of view, we note a difference in comparison with the present regulation of the crime of disclosure of economic secret, which only requires that the offence have the vocation of causing damages.

We have both the case of harm on a legal person's interests or activities, as well as on a natural person. Even if the concept of restricted information is associated only with that information which disclosure has the vocation of causing damages for the legal person, of public or private law, its unauthorized disclosure shall comprise the elements of the crime stipulated in art.304 also when, in fact, the offence only harms the interests of a natural person. For instance, if an undercover investigator was engaged in the operation, and, later, in the course of his examination as a witness, his real identity is revealed, the criminal investigation activity might not be affected, as the evidences had already been presented, but the legitimate interest of the undercover agent are harmed (regarding the protection of his life and his bodily integrity etc.).

In the case of mitigating form, the immediate result is represented by a state of peril for the legitimate interests and wellness of the activity of the legal person that possesses the restricted or non-public information. In other words, the offence of disclosure, although it did not actually harm the interests and activities of a certain person, it still had the vocation of harming them. Whether nor this possibility can be taken into account, the act shall not be considered a crime, thus being the case of a overclassification of the information; the information was wrongly marked as restricted, under the circumstances that its disclosure does not have the vocation, in any case, to harm a person's interests.

The first two aggravating forms of the crime are conceived in regards to the mediated consequences of the offences incriminated in art.304 para.1-2. Accordingly, the crime is more serious if, besides the harm on a person's interests or activities (typical form) or besides the peril for these values (the mitigating form), it was followed by the perpetration of an offence against the undercover investigator, the protected witness or against one of the persons included in the Witness Protection

Programme, or by the perpetration in intent of an offence against life. Thus, for these aggravating forms to be accounted, one must establish a double causality connection: on the one hand, between the offence of disclosure and the immediate results as provided in para.1-2; on the other hand, between the offence stipulated in para.1-2 and those provided in para.3, art.304.

The effect crime is committed as a consequence to the unauthorized awareness of restricted or non-public information, due to its previous disclosure under the circumstances stipulated in art.304 para1-2.

It is not necessary that the disclosure is the unique cause of the subsequent crime or that the two crimes are connected from an etiological point of view. We shall have the aggravating form also when the perpetrator who had disclosed the information did not act with the purpose of assisting the perpetration of a subsequent offence and also when he had not even foreseen the possibility of its future perpetration. It is sufficient that the offence of disclosure represents, objectively, one of the causes that had determinated the perpetration of the effect crime.

Likewise, we shall have the aggravating form both if the perpetrator of the subsequent crime found out of the information directly from the author of the disclosure, or through mediators. It is not necessary for the active subject of the effect crime neither to know the active subject of the disclosure nor to be aware of the identity of the person who provided the information, and also it is not necessary that the latter foresee that the information he had disclosed, was or would be possessed by the first. The law does not require that the author of the effect crime knows that the information he possesses is restricted.

We believe that the aggravating forms of the crime analysed here exclude, *ab initio*, the plurality with the effect crime.

This is because, on the one hand, the author of the disclosure in the aggravating form cannot be also the author of the subsequent crime. The offence against the undercover investigator, the protected witness, or the person included in the Witness Protection Programme or the offence against life has to be a result of the disclosure, in other words to represent a consequence and to be committed in association with the awareness of the restricted or non-public information, as a result to the disclosure. Otherwise said, if he had not found out about that information, the author of the effect crime would not have committed it. This means that the author of the subsequent crime cannot be the person who disclosed the restricted or non-public information that would have been the third person that became aware of the information, which is subjected to protection.

If the author of the disclosure himself later commits one of the crimes stipulated in para.3, there shall be a pluraty between this crime and that of disclosure of restricted or non-public information, but in the typical form or, depending on the situation, the mitigating form (art.304 para.1 or para.2). One cannot say the succeeding crime is the result of the awareness about the information previously disclosed, as a disclosure to oneself is not possible. For instance, that is the case when, for the purpose of concealing the offence of disclosing the real identity of the protected witness, the author murders the person whom he delivered the information; here the crime of disclosure does not take the aggravating form because the homicide was not committed in consideration of the information the victim became aware of, but for the concealment of the offence of disclosure.

On the other hand, the person who discloses the information may be a party to the offence (other than the perpetrator) in committing the effect crime: he intentionally abets or aids the person who discloses the information to commit the subsequent crime. For instance, an employee in a trade company, X discloses to Y, a managing director in a competitor company, restricted information regarding a new scientific research developed by an expert Z working in the same company, thus

knowing he will determine Y kill Z, in order to hinder the first's possibility of putting into practice the result of his project.

We consider that, in such a case, we encounter an ideal concurrence between an abet or, depending on the situation, an aiding to commit the crimes homicide and disclosure of restricted or non-public information, but not in compliance with the typical form stipulated in art. 304 para.1, or, depending on the situation, the mitigating form issued in art.304 para.2, and not the aggravating form as in art.304 para.3. Thus, this would mean that the same factual circumstance (the disclosure of information followed by the homicide crime) is maintained twice, both in the aggravating form of disclosure and in the participation in the homicide crime.

Furthermore, one can see that for the two aggravating forms, the offence that represents the proximate result of the act of disclosure of restricted information has to be a crime, meaning it has to comprise all the four necessary conditions stipulated in art.15 para.1. Consequently, we cannot have the aggravating forms as provided in art.304 para.3, if the impunity cause (for example, minority or lack of liability of the offender) is applied to the subsequent offence.

The third aggravating form of the crime emerges when the offences have caused the extremely grave consequences (art.309).

In respect to the guilt form, the crime can be committed either in intent or by negligence (art.305 para.2).

III. Conclusions

As a whole, the new Criminal Law does not reconfigure in a decisive manner the coordinates in respect to the protection of classified information.

The term of state secret information was redefined in compliance with the specific norms of the domain, although we consider that the legislator's decision is objectionable in respect to the explanation given to an idiom used in the praxis of the criminal field, using a reference norm.

A series of new incriminating norms were added, necessary from a theoretical, practical point of view, as high treason or disclosure of state secret information.

Generally, the incriminating domain is limited, the most significant being the introduction of the condition for the offences that harm the protection regime of classified information, to jeopardize national security or to directly violate a person's interests or activities. As a rule, the new Code does not render a criminal meaning to those acts that could only cause harm to those social values – which, in our opinion, represents a progress as it removes a certain dose of uncertainty specific to the current provisions in this field.

On the other hand, the punishing regime is, as a whole, milder than the present regulation. The specific limits of penalties were reduced for the crimes treason by the transmission of state secret information, espionage, and negligence in preserving information, having been increased only in the case of the crime constitution of illegal intelligence structures.

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THEORETICAL AND PRACTICAL CONSIDERATIONS RELATED TO LAW 76/2008 ON THE ORGANIZATION AND FUNCTIONING OF THE NATIONAL SYSTEM FOR JUDICIAL GENETIC DATA

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Abstract
The purpose of this paper is to analyze the conditions and the categories of persons from whom biological samples can be taken to determine their genetic profiles in order to discover the persons involved in certain categories of crimes or, on the contrary, to eliminate such persons from the circle of suspects.

Keywords*: DNA; genetic profile; suspects*

Introduction

One of the regulations giving rise to controversy and consequently leading to different decisions ruled by the courts is the Law 76/2008[1] on the organization and functioning of the National System for Judicial Genetic Data, called hereinafter S.N.D.G.J. The Law 76/2008 has been adopted to create the national legal framework necessary for the implementation of the Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation.

The purpose of this regulation, as stated in article 1 of Law 76/2008, is „*to establish a National System for Judicial Genetic Data aimed at preventing and fighting against certain categories of crimes that severely infringe against the fundamental human rights and freedoms, especially against the right to life and physical and mental integrity, as well as at identifying the corpses with unknown identity, the missing persons or the persons deceased in natural disasters, mass accidents, manslaughter or terrorist attacks*".

The conditions and the categories of persons from whom biological samples can be taken

The law states the conditions under which the biological samples can be taken, the persons from whom such samples can be taken in order to determine their genetic profiles, as well as the conditions under which the data registered in the S.N.D.G.J. can be processed.

The Annex to the regulation contains a list of crimes for which biological samples can be taken in order to determine genetic profiles in the S.N.D.G.J.

Foe example: murder, first-degree murder, aggravated murder, torture, burglary, genocide etc.

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[1] Law 76/2008 was published in the Official Gazette of Romania, Part I no. 289 of April 14, 2008.

The examples mentioned above lead to the conclusion that biological samples may be taken only in case of crimes with high social risk.

The biological samples are taken using non-invasive methods, i.e. methods that do not violate the personal intimacy and physical integrity, by collecting skin cells by scraping the oral mucosa or by collecting skin cells from the face.

The biological samples can be taken using one of the following methods: with the consent of the person in question or, in the absence of such consent, at the request of the prosecution, by order of the court which decides to have or, as the case may be, not to have such biological samples collected without the consent of the person in question.

Article 4, par. 1 of Law 76/2008 limits the categories of persons from whom biological samples may be taken. Thus, according to the legal provisions mentioned above, S.N.D.G.J. contains genetic profiles, personal data and case data on the following categories:

a) suspects;

b) persons with a final sentence to serve time for committing one of the crimes mentioned in the Annex;

c) biological samples collected during the investigation conducted at the scene of the crime;

d) corpses with unknown identity, missing persons or persons deceased in natural disasters, mass accidents, manslaughter or terrorist attacks.

It results from the previous paragraph that the law refers to a novelty in the current law of criminal procedure, namely the position of suspect.

While the collection of biological samples from the other categories stated in article 4 par. 1 letters b) – d) of Law 76/2008, i.e. persons with a final sentence to serve time, biological samples collected during the investigation conducted at the scene of the crime or corpses with unknown identity does not give rise to difficult situations, the collection of biological samples from persons with „suspect" status has led to different conclusions in judicial practice.

The controversies that have arisen, refer both to the time when the court may decide to collect biological samples and to the possibility of enforcing this procedure in the absence of other evidence or solid indication that the person from whom biological samples shall be taken has committed one of the crimes indicated in the Annex to Law 76/2008.

I. As regards the first issue, name the time when the court may decide to collect biological samples in the absence of the consent of the person in question, we deem that such decision may be taken only after the prosecution has decided to begin prosecuting the person from whom biological samples shall be collected.

Thus, article 4 par. 1 of Law 76/2008 defines the suspect as the person „*for whom data and information exist that they could be authors, instigators or accomplices to the crimes mentioned in the Annex*".

Some courts considered that the collection of biological samples can be ruled for the very purpose of deciding on the initiation of the criminal proceedings[2], while others have rejected the proposal of the prosecution considering that no criminal proceedings have been initiated against the person in question[3].

We believe that the latter solution given by the court is the grounded solution.

[2] Bucharest Court, Criminal Division, decision no. 559/2009, not yet published.
[3] Bucharest Court, Criminal Division, decision no. 954/2010., not yet published.

Thus, the definition of the „suspect" according to article 4 par. 1 letter a) of Law 76/2008, i.e. the person for whom data and information exist that they could be authors, instigators or accomplices, shows the intent of criminal proceeding, not of preliminary actions.

This also results from the provisions of article 11 par. 2 of the law stating that „the provisions of the Code of criminal procedure concerning the expert opinions apply accordingly to the judicial genetic tests conducted in the laboratories mentioned under par. 1)". In our opinion, an expert opinion cannot be requested in the stage of the investigation preceding the beginning of the criminal prosecution.

As the law uses for the definition of the suspect the expression person *for whom data and information exist* that they could be committed a crime, it results that the person who, in the absence of the consent, could be forced by the court to give biological samples, must stand as accused or defendant in the criminal trial.

The Bucharest Court - Second Criminal Division gave a sentence in the same spirit. Consequently, with the decision no. 954/2010[4] the Court denied the request to collect biological samples from the respondents M.I.D. and V.M as ungrounded.

For this decision, the court took note that the request formulated by the Prosecutor's Office of the High Court of Cassation and Justice - Criminal Prosecution and Criminalistics Division by virtue of article 5 par. 3 of Law 76/2008 requested the authorization to collect biological samples from M.I.D. and V.M. using non-invasive methods (skin cells by scraping the oral mucosa) in order to determine their genetic profile, as the two respondents refused to willingly give samples.

In the motivation of its proposal, the prosecution stated that the forensic report showed that the ammunition collected during the investigation conducted at the scene of the first-degree murder exhibited a mix of genetic profiles originating from at least three persons.

In this case, it is our opinion that the correctly ruled that the request formulated by the prosecution was ungrounded, considering that „*the analysis of the documents in the file showed that the two respondents appeared only as witnesses at this stage of the investigation, so that the court cannot force them to undergo the procedure of biological sampling*".

As already shown, the current legislation requires that, prior to the request of the prosecution addressed to the court to authorize the collection of biological samples from a person, there is sufficient data showing the person committed a crime and consequently that the conditions for initiating the criminal prosecution are met.

In another decision we do not agree with for the reasons already stated, the Bucharest Court – Second Criminal Division allowed the request formulated by the Prosecutor's Office of the High Court of Cassation and Justice to authorize the collection of biological samples from a person and concluded that the sample was necessary for the decision to initiate the criminal procedure or, on the contrary, to eliminate the respondent from the circle of suspects.

II. It is equally important to know what the solution is in case the only evidence the prosecution has is the biological samples collected during the investigation conducted at the scene of the crime and eventually a circle of suspects and, in order to identify the persons involved in the crime it is necessary to determine the genetic profile of those suspected to have committed the crime.

We believe that in this situation the current regulation does not allow the collection of biological samples from these persons in the absence of other evidence or indication that they have

[4] Final for failure to appeal in the case.

committed the crime; the evidence should allow the prosecution to begin the criminal prosecution against those persons and subsequently to request the authorization for collecting biological samples.

This is a legislative flaw that should be remedied in a future amendment so as to comply with the practical situation.

As the collection of biological samples affects the right to private life according to the provisions of article 8 of the European Convention on Human Rights, the court has to grant special attention to these circumstances in regard to this regulation.

According to national law, the investigation authorities are bound to comply with and to apply the principles governing the course of the criminal trial. Consequently, according to article 3 Code of criminal procedure, „*in the course of the criminal trial, the purpose is to find the truth about the facts and circumstances surrounding the case, as well as about the perpetrator*".

At the same time, according to article 62 Code of criminal procedure, „*for the purpose of finding the truth, the prosecution and the court must clarify the case in all respects based on evidence*".

According to the Community law, i.e. article 12 of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations by Resolution no. 217 A (III) of December 10, 1948, „No one shall be subject to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks". Nevertheless, article 29 (2) of this international documents states that „ In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".

The European Convention on Human Rights allows in article 8 (2) the interference of a public authority with the exercise of the right for private life „ except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

The case-law of the European Court of Human Rights states that the benefit of the doubt mentioned in article 6 (2) of the Convention is granted even in case of presenting evidence obtained from the defendant against his will, but that exist independently of the suspect's will. Such is the case of the documents obtained during a search, as well as the biological samples taken for DNA testing (Case Saunders vs. Great Britain, decision of December 17, 1996).

The Constitutional Court of Romania ruled on the constitutional character of the provisions of article 5 par. 3 of Law 76/2008 in the decision no. 485 of April 2, 2009 stating that „the rights stated in article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms are not absolute rights, as they can be subject to limitations or restrictions applied by the authorities. The right to private life is among the rights protected by article 8 of the Convention, but this right may be interfered with provided that such interference is according to the law, has a legitimate purpose, is necessary in a democratic society, concerns a right protected by the Convention and is proportional to the intended purpose".

In the recitals of this decision is stated that „the judge, as representative of the authority, has the right, despite the absence of the consent of the person in question, to decide the necessity of collecting biological samples from a certain category of persons, namely from the suspects".

Nevertheless, going back to the starting point of the discussion, we disagree with the decision to collect biological samples in the absence of other evidence able to justify the initiation of the criminal procedure so that the collection of biological samples can then be authorized.

Thus, by virtue of a criminal decision[5], the court allowed the request to collect biological samples, as formulated by the Prosecutor's Office. To substantiate its decision, the court made note of the fact that the request of the prosecution, as authorized party involved in the act of justice and subject to the principle of finding the truth, was formulated as a result of the natural necessity of conducting the criminal investigation, and that the genotyping of the biological samples taken from the persons considered suspect is a necessary measure in a democratic society and is not contrary to the provisions of article 8 of the Convention.

The court found that the request formulated by the Prosecutor's Office for the purpose of collecting biological samples and submitting the DNA evidence is fully justified both for reasons concerning the compliance with and the application of the principle of finding the truth governing the course of the criminal trial and in the interest of the respondent – defendant, that is to be eliminated from the circle of suspects and to remove any suspicion hovering over the respondent.

Law 76/2008 represents the proper legal framework for handling the requests to collect biological samples and there are also guarantees for serving the general interest and to protect the personal right of the respondent. Moreover, the lawmaker issued Methodology Norms to regulate the enforcement of Law 76/2008 and set clear, precise and detailed rules concerning the procedure to be applied in case the collection of biological samples is necessary.

The instrumentation of the criminal prosecution requires submitting all evidence necessary for finding the truth for the purpose of protecting the general interest of the society and the personal interest of the individuals and from this perspective the request formulated based on the provisions of article 5 par. 3 of Law 76/2008 is the legal instrument aimed at obtaining evidence for the purpose of clarifying all aspects of the case.

The court stated that the respondent's personal interest is subordinated to the general interest of finding the truth, considering that according to article 1 par. 3 letter a of Law 76/2008 the comparison of genetic profiles and of the personal data is conducted for *eliminating the persons from the circle of suspects and for identifying the offenders.*

Simultaneously, considering the respondent's status of defendant in the criminal file for which the prosecution requested the collection of biological samples, the court allowed the request to collect biological samples as it deemed that the evidence requested by the prosecution was necessary for the criminal prosecution, for clarifying all the suspicions occurred during the instrumentation of the file, for identifying the origin of the genetic profiles discovered at the scene, which can also result in the possible elimination of the respondent from the circle of suspects, considering his refusal to have biological samples taken.

In our opinion, this decision can be subject to criticism as it does not refer to data and information as defined by article 4 par. 1 letter a of Law 76/2008, intended to justify such measures.

Based on the regulations mentioned above, allowing the request to collect biological samples requires the existence of data and information that a person committed a criminal act.

[5] Neamț Court, Criminal Division, decision no 12/P/2011, not yet published.

It is exactly the court's role to determine whether the file submitted by the prosecution contains data and information able to justify the disposition of such measures.

The fact that a person has the status of a defendant and considering that there is no other data and information that he/she committed a crime does not justify in itself the measure of allowing a request to collect biological samples.

To take such measure, that is to decide the collection of biological samples without the consent of the person and in the absence of data and information that the person committed a criminal act is tantamount to annulling the role of the court as a result of the fact the mere status of a person as defendant in a criminal trial would automatically involve the court's obligation to allow such requests.

But if the mere status of defendant were necessary and sufficient to collect biological samples, the lawmaker would not have used the expression ***persons for whom data and information exist,*** but would have defined the suspect as the person against which the criminal procedure was initiated as author, instigator or accomplice.

Although the law fails to state expressly what exactly should be the data and information justifying such measures, we believe that it should be strong evidence and indication or *plausible reasons* that the respondent committed a criminal act, as this is a measure interfering with the human fundamental rights and freedoms.

The terms of sound evidence and indication are defined by articles 63 and 64 Code of criminal procedure and article 68^{1} Code of criminal procedure and the European Convention on Human Rights defines the term of plausible reasons as *the existence of acts or information likely to convince an objective observer that the person could have committed the crime.*

It is our opinion that the current legislation does not allow the collection of biological samples except when there is data and information that the person targeted by this measure could be author, instigator or accomplice to a crime mentioned in the Annex as only in this way the fundamental human rights and freedoms can be observed.

Conclusions

Referring to the objective and the assumptions of the study mentioned from the beginning and after those presented therein, we conclude that on the one hand, the court may decide to collect biological samples in the absence of the consent of a person only after the prosecution has decided to begin prosecuting the person from whom biological samples shall be collected, and on the other hand, the collection of biological samples may be decided by the court only if there is data and information that the person could commit a crime.

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INSTITUTIVE AND ALTERING TREATIES ON THE EUROPEAN UNION'S LEGISLATIVE ACTIVITY

PhD Graduand Andronache Gabriel[1]

Abstract
The paper aims to emphasize, from the point of view, of institutive and modifying treaties the originality and evolution of European Union`s legislative activity.

1. Introduction

The European Union has evolved throughout the time, from its definition as sui generis entity to the original subject of international law.

The purpose of the European construction is expressed in the beginning of the establishment Treaty of the European Union: "determined to continue the process to create an even closer union among the European peoples, where the decisions should be made as close as possible to the citizens, in accordance with the principle of subsidiarity,

In the perspective of the following stages which will have to be undertaken for the European integration to develop,

They have decided on the establishment of a European Union …", which according to Article 13 of the Treaty "has at its disposal an institutional framework which aims at promoting its values, at pursuing its objectives, at supporting its interests and those of its citizens and member countries, as well as at ensuring coherence, efficiency and continuation of policies and actions".

Under these circumstances, the European institutional construction has also evolved, being governed by the following principles – the principle of autonomy of will, the principle of shared competence and the principle of cooperation. The content of these principles avails the original manner in which the parts of the European institution were established by the parents of the European construction (Jean Monet and Robert Schuman):

The principle of shared competence – shares the competences without making a clearly cut distinction in the national constitutional systems, based on the principle of the separation of powers in state postulated by Montesqiueu. From this perspective, of great interest for our scientific approach is the assignment of the legislative competence achieved by the institutive and altering treaties to the Parliament and the Council. It is worth keeping in mind the fact that according to the shared competence principle "the institutions are carrying out only those attributes that are assigned to them

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specifically. At this level, for reasons of rigor and coherence, it is not allowed to carry out implicit or induced attributes"[2].

We also induce the principle of autonomy of will, according to which, within the limits of the institutive treaties, the institutions establish their own rules of working. These rules cannot

lead to a separate working from other institutions, as this may affect the very existence of the Union We will keep in mind however the fight, carried out throughout the time, including by means of working regulations, by the European Parliament on his endeavor to become a European Law generator The working rules are conceived in the direction of encouraging inter-institution collaboration in order to achieve the competences established in the institutive documents with the goal of achieving the community (union) purposes.

From what has been mentioned above, we induce the third principle, namely the principle of institutional balance having as main component institutional cooperation.

Practically, „the principle of the institutional balance joins two essential constituent parts, namely:

- The separation of powers, and institutions' competences respectively;
- Collaboration and cooperation among institutions.

The first constituent part involves the impossibility of delegation, of transfer, of accepting competences or assigning competences from one institution to another. This separation involves the obligation of each institution not to block the carrying out of attributions by other institutions. Consequently, no institution should be blocked from fulfilling its own attributions. In this case, we will see put into practice the principle of mutual advantageous conduct.

This principle does not exclude, but on the contrary, it involves a closer cooperation among the institutions in order for all of them to carry out the objectives that they have been assigned. For instance, the collaboration among institutions in the field of norms; concretely, one may notice that adopting the European Union budget is the faithful reflection of the cooperation among institutions.

Thus, the European Commission centralizes all the proposals on the budget, coming from all other institutions. These proposals are forwarded, as a draft project by the Commission, to the Council. The Council elaborates budget project and forwards it, for approval, to the European Parliament. The European Parliament has the role of adopting the budget or to reject it, should it be the case"[3].

On the manner and the means to achieve the legislative activity in the European Union, we underline the uniqueness of the EU institutional construction in the whole of the intergovernmental international organizations. As a general rule, "an international organization is defined as the subject of international law, made up of several states, with their own constitutions, their own leadership bodies and with their own capacity to have international relations.

The EU is much more than this. It is the only subject of international law which is not established as a state, which has in its basic institutional structure a above-national body with legislative attributions elected through universal vote, directly, equally, secretly and freely expressed.

This body is considered to be the representative for the interests of the union's citizens and shares the legislative power with another body made up of ministers of the member states of the union, called Council and considered to the representative for the interests of the member states.

[2] Augustin Fuerea, European Union Manual, edition IV , Universul Juridic publishing, Bucharest, 2010, p.81
[3] Augustin Fuerea, c.w. ,p. 81

2. The Development of the European Union institutional capacity in the legislative field

By the institutive treaties, the European Communities' legislative, the Council has been established and it had, in the beginning, various names: the Special Council of Ministers (Paris Treaty, establishing EAEC) and the Council (Rome Treaties, establishing the EEC and Euratom)."[4]

The European Parliament initially named the Common Assembly(ECCA) or Assembly (EEC and EURATOM) was established as a forum for political debate, having a minor role in the legislative procedure (consultancy in a few fields of communities' activities). It also had the power to dissolve the Commission by censorship motion.

The investment of the European Parliament, ever since its establishment in 1952 with the right to exert political control over the European executive brings supporting arguments to the opinion that the intention of the European construction parents was to establish, in time, an elected, not appointed, legislative body. This statement is also supported by the constitutional judicial reality met at the level of the national parliaments elected by universal vote and which exert, as law generator body, in most of the cases, the right to dissolve the executive body (the examples of Germany, France, Italy or Luxemburg, from the founder states, and Austria, Denmark, Great Britain, Sweden,Danemarca, Great Britan, Suedia, Irlanda, Grecia, Ireland, Portugal, Czech Republic, Estonia, Latvia, Lithuania, Malta, Poland, Slovak Republic, Slovenia, Hungary, Bulgaria, Romania, Finland)[5].

As a matter of fact, the framing of the Parliament's capacity to be part of the EU legislative process has been made quite slowly, after certain obstacles were overcome, obstacles generated at certain times by the very owner of the legislative power – the Council itself.

We should mention in this respect the opposition shown by the Council with regards to the decision in 1962 by which the Common Assembly decided to change its name into Parliament.

„The Council's opposition was generated by the fact that it would see its own European law generator attributions threatened."[6]

„Even though a symbolic gesture, by adopting the name of European Parliament, they intended to increase the importance of this institution and to bring it closer to the role of the parliament at the national level, in spite of the European institutive treaties which had given it only a consultative role."[7]

After its symbolic evolution from Assembly to Parliament, yet rich in significance as it was the reflection of the EU's will to evolve from a simple international cooperation organization to the status of subject of international law, with integration character, having the basic elements of a federal state, the second step was taken, namely in 1976, when the European Deputies' appointment by national parliaments was changed to universal, direct election.

Initially, the Parliament was made up of 198 members appointed according to a pattern established by the institutive treaties, by the national parliaments, having the role to represent the

[4] Augustin Fuerea, c.w. ,p. 82

[5] See also Radu Constantin Pricope, Florin Alexandru Hrebenciuc – Legislativ activity in the European Union field , Musatinii publishing, Suceava, 2009

[6] Dacian Cosmin Dragos, European Union, Institution ^ Mechanisms, edition 3, C.H. Beck publising, Bucharest, 2007, p. 60

[7] Idem

community citizens' opinion on the European executive activity, as above-national body. The change in 1976 is significant as it brings more contents to the first transformation from 1962. The Parliament, according to the Act of 1976 is no longer appointed by other structures (the national parliaments), but it becomes an elected institution, after the universal, direct, secretly and freely expresses vote.

„The 1979 election for European Parliament took place, having as minimum basic rules, the following, established by the 1976 Act:

The principle of the unique vote;

The elections to take place in a frame of time starting Thursday morning and ending in the following Sunday, the first time frame being decided by the Council which unanimously stipulates, after consultation with the European Parliaments;

The minimum age for vote is 18."[8]

Thus, „the European Parliament was elected for the first time following a universal vote. This thing was meant to confer increased democratic legitimacy and to generate political debates on the European issues, but also created a full program for the Parliament members, focused on the European issues."[9]

The number of elected European members of Parliament increased in time with the joining of new members, from 410 elected members in 1979, to the current number of 736, the highest number of seats belonging to „Germany (99), and the lowest, Malta (5 representatives)"[10].

At the same time, (1962 – 1979), when the European Parliament grew stronger, its institutional capacity increased by the introduction of new budget procedures, established by the budget treaties of 1970 and 1975.

Thus, „in the 1970 and 1975 budget treaties, the Council and the Parliament were the budget authority and established together the annual budget, trying to fit within the fixed income limit. Although the budget approval procedures are complicates, they allow the Parliament both to modify it and to have the final vote on its adoption or rejection. In 1975, they agreed on the conciliation procedure to avoid potential conflicts among the legislative powers of the Council and the Parliament's budget powers. The procedure established that in case the Council disagreed on the Parliament's opinion, the problem should be forwarded to a conciliation committee made up of the Council's members and to an equal number of Parliament members"[11].

As a paradox, the strengthened institutional capacity of the European Parliament in relation with the whole mighty Council was achieved by the intervention of the Justice Court and not by the political will of the member states. A resolution, less commented, the Isoglocose resolution, established the premises for the cooperation procedure in the legislative field between the Council and the European Parliament.

„In 1980, the Isoglucose resolution of the Court of Justice (cases 138 and 139/79) gave a blow to the legislation, as the Council had adopted it before the Parliament stated its opinion on it. This Court resolution gave the Parliament the de facto power, of prorogation, that it could use in negotiating potential changes. Obviously the negotiator position of the Parliament was stronger at

[8] Augustin Fuerea, c.w. ,p. 106

[9] Richard Corbertt, Fr. Jacobs, M. Schackleton, European Parliament, edition VI , Monitorul Oficial publishing, Bucharest, 2007, p. 4

[10] Augustin Fuerea, op. cit., p. 107

[11] Richard Corbertt, Fr. Jacobs, M. Schackleton, c. w., p. 4

that time when a fast decision was necessary, but this fact helped the Council to get used to the necessity to negociate with the Parliament"[12].

„The Court established that the community legislation cannot be adopted by the Council before receiving approval from the Parliament, in cases where the treaties require this thing. In the resolution, the Court mad a connection between consulting the Parliament and the democratic character of the Community. It was stated that the dispositions of the treaty which established that the Parliament must be consulted were means that allow the Parliament to play an effective role in the Community's legislative process. Such a power is an essential factor for the institutional balance aimed by the treaty. Even though limited this reflected, at the community level, the fundamental democratic principle according to which the citizens should be part of the power through a representative assembly. A consultation of the Parliament in the cases considered by the treaty, represented, therefore, an essential procedure, and avoiding this, implies the cancelation of the measure. "[13]

Later on, „the Parliament sought to take advantage of the Court's resolution according to which its approval was indispensable, in order to finalize the legislative procedure. Particularly, the Parliament adopted a new regulation whose dispositions are still valid at present time, according to article 53 of the Procedure Regulation, with the help of which it may decide, upon the President's proposal or of the responsible commission representative, to postpone the vote related to the Commission's proposal, until the Commission adopts a position on the amendments brought by the Parliament. In case the Commission refuses to accept them, the Parliament can send the matter to be reanalyzed by the Commission, thus delaying the issuing of an approval, but also the procedure itself.

At the moment when they obtain a sufficient guaranty from the Commission or when they reach a compromise, they can go to the final vote. The importance of the acceptance by the Commission of the Parliament's amendments, resides in the fact that they are further on incorporated into a revised proposal that the Council can alter only with unanimity. "[14]

„…The Isoglucose resolution provided the Parliament an important tool that it can use in case of dissatisfaction with the response received from the other institutions."[15]

We will underline the fact that the intervention of the Court of Justice occurred in the context of a time frame (1960 - 1980) of stagnation of political will at the level of the inter-governmental institutions, materialized in the difficulty with which "the Commission managed to obtain agreement on its proposals in the Council. The consequence was a significant delay in achieving the Treaty's objectives.

The very existence of this stagnation is reflected in the continuous influx of reports from that time, confirming the need for an institutional reform, connected with a change of the approach from the strategic institutional players. This fact may supported with an example of the report of the Three Wise Men of 1978 which recommended the strengthening of the above-national elements of the Community and the diminishing of the inter-governmental impact, but without putting any of it into practice; … a radical reform was suggested also by the European Parliament on the Draft on the European Union Treaty of 1984, but it was mostly ignored." [16]

[12] Idem, Richard Corbertt, Fr. Jacobs, M. Schackleton, c. w., p. 4
[13] Richard Corbertt, Fr. Jacobs, M. Schackleton, c.w., p.199
[14] Richard Corbertt, Fr. Jacobs, M. Schackleton, c.w., p. 200
[15] Idem
[16] Paul Craig, Grainne de Burca, The Law of the European Union, edition IV , Hamangiu publishing, 2009, p. 15

Coming back to the intervention of the Court of Justice in the context of an increased blockage, it is worth mentioning the efforts taken in 1960-1980 to affirm and consolidate the principle of the community lay supremacy in relation with the national law of the member states, enhancing the "Community's above-national dynamism"[17].

The aspects pointed out underline how special the European institutional construction is. At the moment when the determining factor in configuring the European law – the inter-governmental will – was in a blockage, the light of the European judges replaced it and contributed in the development of the law generating process at the Community's level. The introduction achieved by the Court of Justice on the cooperation procedure in the field of law between the Council and the Parliament, will be consecrated in the European Unique Act (EUA).

„The EUA achieved a series of significant institutional reforms" [18].

„The Preamble of the EUA is related to the transformation of the relations of the members of EU"[19].

„The most important of these changes increased the role of the European Parliament in the legislative process, by creating new cooperation procedures, article 252 CE, which turns, for the very first time, the European Parliament into a genuine player in the law generating process of the Community, also transforming the entire decision making process within the Community. The European Parliament was also granted the veto right on the joining of new members and in the signing of agreements with associates states. " [20]

This is the moment when the European Parliament starts playing its role or it fulfills its contents. The attributions established starting with the EUA and up to the Lisbon Treaty, form the content of the European Parliament's activity, among which generating laws is the most important one, as it is a fundamental attribute, corresponding to the very status of Parliament. **The development of the decision competence within the European Union.**

The European Unique Act adopted in 1985 marked the breaking of the barrier in the European institutional system, which used to put obstacles to the increasing of the European Parliament's legislative competence and the diminishing of the exclusive character in the law field of the Council, with the natural consequence of achieving a balance in the field of law, between the Parliament and the Council.

In this context, Paul Craig and Grainne de Burca showed in their study "The Law of the European Union" that "in spite of the fact that it did not have such a wide range as the one of the reforms supported by the report in the 70s and the 80s, the European Unique Act managed to achieve however a serried of significant institutional reforms. The most important of these changes increased the role of the European Parliament in the legislative process, by creating new cooperation legislative procedures, article 252 CE, which turns, for the very first time, the European Parliament into a genuine player in the law generating process of the Community, also transforming the entire decision making process within the Community…".

The shift to the cooperation procedure practically meant the removal of the monopoly on the legislative activity, conferred by the institutive treaties, to the Council. As a matter of fact, this was a natural move from the establishment stage of the European Union, to the consolidation stage. Later

[17] Paul Craig, Grainne de Burca, c. w., p. 14
[18] Paul Craig, Grainne de Burca, c. w., p. 15
[19] Augustin Fuerea, c.w., p. 46
[20] Paul Craig, Grainne de Burca, c. w., p. 15

on, we will notice the practical needs, generating from the complexity of the legislative system (especially with regards to the drafting of the technical norms), all these have determined the Council to delegate the legislative competence also to the executive of the European Union, the European Commission. The procedure of the shared competences, delegated from the Council to the Commission is also known by the name "commitology".

Regarding the cooperation procedure established by the European Unique Act, we will point out the significantly higher increase of the legislative power of the European Parliament, in relation with the previous stage, of consultation, by the fact that not adopting the legal document by the Parliament, forwarded by the Council, means rejection. Consequently, the opposition exerted by the Parliament was not longer consultative, but it turned into a real veto right. It was also due to the European Union that the veto right of the European Parliament was established with regards to the "joining of new member countries and to the signing of agreements with associate states"[21].

„The cooperation procedure, initially applied to a number of ten articles of the Treaty, adds a second reading at the traditional consulting procedure, as it claimed that the Council's proposal be forwarded for approval to the Parliament which had ten months in order to approve it, to reject it (in which case the proposal would be out of discussions, unless in three months, the Council rejects the Parliament unanimously) or to request changes (which, once supported by the Commission may be rejected only unanimously within the Council, while the text being revised may be approved by vote with a qualified majority).

The procedure of the conform approval conferred to the Parliament equal rights to those of the Council by the fact that it was necessary to have the Parliament's approval in order to ratify the joining treaties and the association agreements. "[22]

The increase of the degree of complexity of the economic and social relation within the union, especially at the level of some very sensitive fields of activity, such as agriculture or competition, determines the states to leave to the European institutions' task to draft the technical norms.

This fact overwhelmed the Council which needed to identify a judicial mechanism to allow translating to the European executive the activity of drafting the norms of application of certain legal documents, using the experts that the Commission had.

„A moment of reflection will show why it was necessary to delegate the attribute of adopting the regulations. There are fields of community policy, such as agriculture, which require numerous regulations, most frequently rapidly adopted, in order to keep up with the changes in the market features. If we applied patterns in adopting the community norms, the process would be blocked, as it would be impossible to adopt such a huge number of norms, in such a short time. Thus, we can explain why the Council, by a regulation authorized the Commission to adopt more detailed regulations in certain areas of activity, such as agriculture or competition.

Yet, the Council was not willing to give a carte blanche to the Commission and to use this mechanism in generating laws. It submitted the exertion of the delegated legislative competences to some institutional constraints materialized in some committees which could represent the interests of some member states…" [23]

[21] Paul Craig, Grainne de Burca, c. w., p. 15
[22] Richard Corbertt, Fr. Jacobs, M. Schackleton, c.w., p. 4
[23] Paul Craig, Grainne de Burca, c. w., p. 147

The first step in establishing the commitology was achieved by the EUA which modified article 202 of the EEC Treaty with the "purpose of conferring a solid base to this delegation"[24].

According to Article 10 of the EUA which modified article 202 of the EEC Treaty, "The Council will … grant to the Commission attributions to implement the rules established by the Council. The Council may impose requests with the exertion of the respective attributions. The Council may also use, at its own will, in specific situations, the right to exerts directly the implementation attributes. The procedures that are mentioned above must be put in accordance with the principle and the rules that are to be established previously by the Council, acting unanimously based on e proposal from the Commission and after being granted the European Parliament's approval" [25].

This norm was "a step forward by the fact that it forced the Council to confer, for the first time, implementing attributes to the Commission."[26]

Based on the text mentioned above, "the Council adopted in 1987 the Commitology Resolution (Resolution 87/373) to establish the principles and rules that must be observed.

The resolution explained the structure based on committees".

Practically, by adopting a delegated regulation, the Commission was able to establish an expert committee to draft the law in order to be adopted, starting from the idea that the experts not having the burden of the national or political interests will be able to identify the implementing mechanisms, for the good use and progress of the entire community.

„Resolution 87/373/EEC adopted by the Council on July 13th 1987 established three main types of committees:

Type I – the consultative committees.

Type II – management committees.

Type III – regulation committees." [27]

The procedure established by the decision of the Council in 1987 was declared as being unacceptable by the European Parliament as the latter considered itself as being excluded from the drafting and adopting of certain norms in some sensitive fields at the national level, and also with profound consequences on the activity of some large categories of European citizens.

„The Parliament attempted to contest the resolution of 1987 in front of the Court of Justice, but the latter decided that the former did not have (at that time) the right to initiate such an approach. Later on, the Parliament, sought to remedy the problems mentioned before, mainly in three ways.

First, it insisted on using those procedures of the committees that gave more freedom to the Commission, as they considered that the Commission should be allowed to operate efficiently, as, unlike the Council, the Commission could be held accountable by the Parliament. Therefore, the Parliament, attempted in various occasions to alter the legislative proposals in order to avoid the types of commitology that limited the most the Commission … Secondly, the Parliament wanted to be fully informed on what was being sent to the committees used in the execution process and about the committees in general (structure, reunions, daily agenda, decisions).

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[24] Paul Craig, Grainne de Burca, c. w., p. 148

[25] David Spence, Geoffrey Edwards, European Comission, Monitorul Oficial publishing, Bucuresti, 2008, p. 242

[26] Idem

[27] Paul Craig, Grainne de Burca, c. w., p. 152

Thirdly, they attempted to expand the right to revise the application disposition which were not satisfactory. ” [28]

A note should be made in order to point out the fact that the Parliament's action in front of the Court of Justice of the European Union in the commitology issue was the first action introduced by the Parliament to the Court (Action 16/88 vs. the Council).

Further on, as we have already shown, the Parliament, as a consequence of the reaction had, is consulted in the commitology issue, thanks to the "Plumb – Delors Procedure, named after the Presidents of the Parliament and of the Commission, who signed the agreement"[29].

This procedure "gave the Parliament the chance to answer to the questions which needed decisions to be made, within the committees"[30] .

„Another example of use of this procedure was the contestation by the Parliament of the proposal of the Commission regarding instant milk. This was one of the many dispositions, issued by the Commission, to apply a directive on food products with certain nutrition uses. The Parliament wanted to apply the principle of the World Health Organization according to which instant milk manufactures should not distribute free samples to young mothers without the doctor's approval, and their advertising to be restricted to medical magazines.

The project of the application disposition was forwarded to the Parliament and analyzed by the Environment Commission, which criticized the Commission, motivating that this project does not have enough strict provisions.

The Commission's officials appeared in front of the Parliamentary Commission, and the Commission Chairman (Ken Collins) had talks with the respective commissary, and the matter was, after all, debated in plenary session.

Consequently, the commission altered its proposal and included the restrictions regarding the distribution of free samples and the advertising, as wanted by the Parliament." [31]

The sharing and separation of the legislative activity between the Council and the Parliament at the European Union level became a reality at the moment of the adoption of Maastricht Treaty.

The treaty on the establishment of the European Union, adopted in 1994 consecrated the co-decision procedure in the legislative field for several regulation fields.

„The European Union Treaty introduced the co-decision procedure which prevented the adoption of a measure without the approval of the Council and of the European Parliament, pointing put the area of interest for a text jointly approved." [32]

This became the "method to adopt o part of the majorly important community legislation"[33].

We have to underline the fact that the co-decision procedure is a quality progress of the cooperation procedure, granting the Parliament other instruments to impose its point of view in achieving the legislative actions. The new instruments which particularize the co-decision procedure from the cooperation procedure, reflected in article 251, are: "including an official counseling committee which had the task to negotiate compromise solutions between the Council and the Parliament; the Parliament's option to reject the Council's decision following the conciliation, thus

[28] Richard Corbertt, Fr. Jacobs, M. Schackleton, c.w., p. 287-288
[29] Richard Corbertt, Fr. Jacobs, M. Schackleton, c.w., p. 288
[30] Idem
[31] Idem
[32] Paul Craig, Grainne de Burca, c. w., p. 141
[33] Idem

causing the cancelation of the respective legislation… This procedure was applied almost to the entire legislation that the EUA addressed to the cooperation procedure, beside a number of new fields;

…The cooperation procedure (by the Treaty on the establishment of the EU) was extended to almost all the other fields in which the Council operates with qualified majority.

At the same time, the approval procedure was extended too, comprising a larger category of international agreements, and also a number of other fields." [34]

The Amsterdam Treaty modified "article 251 in the sense of accelerating the procedure and the consolidation of the European Parliament position"[35].

"Article 251 has a solid legal base. The European Parliament made pressures for a long time in order to obtain an equal role to the one of the Council in the legislative process. The changes brought by the Amsterdam Treaty contribute significantly in achieving this goal"[36].

It "considerably extended the area of co-decision in such a manner that today most of the legislation meant for non-agricultural fields are submitted to this procedure"[37]. „The attitude of the institutions has considerably changed since the beginning of the 80s. The concentration of attention on democracy and legitimacy in the 90s has helped in providing a closer and more constructive role to the European Parliament in the legislative process" [38]

„In the next step of the legislative development of the EU with respect to the decision-making process, we find the changes brought to the Nice Treaty, of smaller size, but which continued the expansion of the co-decision sphere, and conferred to the Parliament the general right to bring in front of court of justice other institutions…"[39]

Up to the entry into force of the Lisbon Treaty, in 2009, "co-decision became the usual manner to adopt the decisions for numerous important community norms. The procedure operates well in practice, and its normative base is solid. At the same time, it also represents a means to facilitate the dialogue among the Commission, the European Parliament and the Council, allowing taking into account the point of view of every element involved in the process of drafting the legislation"[40].

Later on, in 2007, by adopting the Lisbon Treaty, the legislative procedure underwent a structuring process with the purpose of providing clarity and efficiency.

"Among the changes triggered by the entry into force of the Lisbon Treaty … the European Parliament and the national parliaments will have a larger contribution in the decision-making process of the European Union"[41].

The changes imposed by the Lisbon Treaty which entered into force in 2009, with regard to the legislative activity are to be found especially in article 289, paragraphs 1 and 2 of the Treaty on the working of the EU which consecrated the ordinary and special legislative procedures.

„According to article 289, paragraph 1 of the Treaty on the working of the European Union - the ordinary legislative procedure consists in adopting, jointly, by the European Parliament and the

[34] Richard Corbertt, Fr. Jacobs, M. Schackleton, c.w., p. 5
[35] Paul Craig, Grainne de Burca, c. w., p. 141
[36] Paul Craig, Grainne de Burca, c. w., p. 146
[37] Richard Corbertt, Fr. Jacobs, M. Schackleton, c.w., p. 5
[38] Paul Craig, Grainne de Burca, c. w., p. 146
[39] Richard Corbertt, Fr. Jacobs, M. Schackleton, c.w., p. 5
[40] Paul Craig, Grainne de Burca, op. cit., p. 147
[41] Augustin Fuerea, c. w., p. 75

Council, of a regulation, of a directive or of a resolution, following the Commission's proposal. Further on, paragraph 2 mentions the fact that - in specific cases, stipulated in the treaties, adopting a regulation, a directive or a resolution by the European Parliament with participation of the Council, or by the Council with the participation of the European Parliament, represents the special legislative procedure."[42]

Consequently, nowadays, „there are two legislative procedures through which the judicial documents of the European Union are adopted, namely: the ordinary procedure and the special procedure" [43].

From the perspective of the manner in which the Lisbon Treaty consecrated the sharing and separation of the legislative function at the union level, we may induce from the analysis of articles 14 and 16 of the EU Treaty, that we are now the witnesses of a pseudo-legislative European bicameral, as the institutional balance between the Parliament and the Council is deduced at the principle level, from the manner in which the member states have beaten any hierarchy, when they regulate in article 14, paragraph 1 that "the European Parliament[44] exert together with the Council the legislative and the budget function, and in article 16 (1), the Council [45] exerts with the European Parliament, the legislative and the budget functions".

The repetition of the same disposition, with the subjects being inverted, in two different articles (14 and 16) would have not been necessary, unless the member states had wanted to point out the full equality and co-sharing of the legislative and the budget functions.

3. Conclusion

We are ending our assessment stating that "as a consequence of the changes, we are now facing within the European Union, the so-called bicameral legislative power, where the Council represents the states and the European Parliament represents the citizens (Hix, 1999). Whether it is classical or not, the drafting of the common policy at the European level is not only the task of the governments, but also of the Parliament, elected through direct vote"[46]. „The Parliament plays an important role also in verifying the executive power, represented by the European Commission. The Commissaries are politicians appointed (just as the national ministers) by the prime-ministers or by the presidents. The entire team of commissaries needs a majority vote in the Parliament in order to put into force their mandate, and once they are appointed, they can be dismissed only by non-trust vote, given by the European Parliament.

The situations presented point out clearly how different the European Union is from a traditional intergovernmental organization. Indeed, it is sufficient to think what the European Union would be like without the Parliament: a system of bureaucrats and diplomats superficially monitored by the ministers who are flying periodically to Brussels. The existence of a body with permanents representatives for making decisions in Brussels, who would ask questions, who would knock at doors, who would point a spotlight on the darker corners, maintaining a permanent dialogue with the

[42] Augustin Fuerea, c. w., p. 147
[43] Augustin Fuerea, c. w., p. 147
[44] My italics
[45] Idem
[46] Richard Corbertt, Fr. Jacobs, M. Schackleton, op.cit., p. 5 – 6

electorate from home, makes the European Union system to be more open, more transparent and democratic than in any other given circumstances." [47]

The development of the legislative activity of the European Union shows us, without a shadow of a doubt, that the present regulations stipulated in the Lisbon Treaty, are not the end of the road, but on the contrary, they represent a transformation that will open the path for new union developments, much expected by the European citizens.

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[47] Richard Corbertt, Fr. Jacobs, M. Schackleton, op.cit., p. 6.

THE LEGAL REGIME OF ACTS OF DISPOSITION OF SOMEONE ELSE'S PROPERTY

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Abstract

In the present study we aimed at analyzing the legal effects created by certain legal acts of disposition concluded by a non-owner and having as object a good belonging to somebody else, in a contrastive perspective from the point of view of the current Civil Code as well as of the future legislative modifications propounded by the new Civil Code.

Thus, we set forth to analyze comparatively the legal effects produced by the sale of somebody else's good both between the contracting parties as well as towards third parties (including the owner of the sold good), the legal effects of the donation contract having as object somebody else's good and the legal effects produced by the mortis causa legal documents, namely the testamentary legacy having as object somebody else's good.

As a general rule, in the case of property constitutive or property transfer legal acts, the person concluding the legal document must have the quality of owner, of holder of the transmitted right. This rule is based on a consecrated principle that goes back to the Roman Law, according to which nobody can bind validly to something he/she does not possess or that to something in excess of what he/she has. (nemo dat quod non habet or nemo plus juris ad alium transferre potest, quam ipse habet).

Unlike the French Civil Code, the regulation contained in the Romanian Civil Code in force contains no disposition with regard to the rules applicable to the sale-purchase contract having as object somebody else's good, so that the role of finding adequate legal solutions to such unnatural juridical operation rested on the practice and doctrine. Nevertheless, the solutions adopted by the legal practice have not always converged with those propounded by the doctrine. The new Civil Code dedicates art. 1.683 to the sale of somebody else's good, stating the validity of such sale, with the possibility of contract cancellation for the situation when the seller fails to transfer the property right to the buyer.

With regard to the donation contract having as object somebody else's good, the invalidity of such operation was agreed upon, starting from the fundamentally irrevocable character of the donation, without an expressly legal consecration of this particular situation.

However, both Civil Codes set down express solutions for the hypothesis when the testator disposes by means of the legacy with regard to a good he/she doesn't possess, thus consecrating a seemingly absurd solution.

Key-words: *sale-purchase, donation, bequest, somebody else's property, legal consequences*

1. Introduction

An honest legal and civil attitude requires the participants to social relations to enter legal acts of disposition only for the goods in their property. However, in practice, one can meet abnormal

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situations when, due to ignorance or unlawful intent, an individual may dispose of goods he/she does not own, using various means.

Such being the case, the goal of the present study is to analyze the legal consequences of three categories of acts of disposition of different legal nature having as object someone else's property, as well as the solutions suggested by the legislator or by the judicial practice in the field.

We shall make reference to the sale of someone else's property, a situation not expressly regulated in the current Civil Code and inconsistently regulated by the future Civil Code, to the donation of someone else's property and to the bequest of someone else's property. If, in the case of the sale of someone else's property, the current juridical practice and the juridical literature failed to agree with regard to the solution to be promoted, in the case of the other two legal acts there are no controversies due to the fact that, on one hand, the legal texts that directly or indirectly regulate them are clear, and, on the other hand, to the fact that these legal acts are not as frequent as the act of sale. Nevertheless, we preferred to analyze them together to show that, while the situation seems to be the same, from a legal standpoint the effects are different and therefore the solutions to be adopted are different.

We haven't aimed at a pros and cons analysis of the points of view already expressed mainly in the matter of the sale of someone else's property, but at presenting these perspectives briefly so we can advance in our research and, particularly, to be able to underline the inconsistency of the future regulations contained in the new Civil Code.

2. The sale of someone else' property

The lack of an express regulation in the matter of the sale-purchase acts having as an object the goods owned by someone else, either in the sense of forbidding such operation (see also art. 1599 French Civil Code[1]), or in the sense of allowing it under specific circumstances, has given birth to countless controversies both in the doctrine and in the legal practice. As we mentioned before, the Civil Code in force dedicates no explicit text for such an abnormal legal operation, but contains instead regulations that refer indirectly to it (see 1895-1897 Civil Code in the matter of the short term usucaption). On the other hand, the problem appears only when the sale has as an object individually determined goods and not generically determined goods.

The opinions held in the course of time in the legal literature have oscillated between absolute or relative nullity, on different grounds, of the sale having as an object someone else's property and the validity of such sale, yet revocable, following the seller's failure to transfer the property right or, according to an isolated opinion, following the seller's failure to observe the obligation of warranty against eviction.

Without further detailing these points of view, extensively approved or fought against at the time of their expression, we simply wish to enumerate them so we can have the background necessary for developing the theme of the present study.

Thus, one first opinion held that a sale having as an object someone else's property is subject to absolute nullity due to the lack of cause, as the seller is not the owner and cannot transfer to the

[1] The text of art. 1599 French Civil Code states: "La vente de la chose d'autrui est nulle: elle peut donner lieu à des dommages-intérêts lorsque l'acheteur a ignoré que la chose fût à autrui".

buyer the property of the purchased goods, hence the buyer's obligation to pay the price lacks a juridical cause.[2].

According to other opinions, such a sale is only subject to relative nullity due to the error of wrongful consent, either on the substance of the object the buyer believed to be as the seller's property[3], or on the seller's person whom the buyer mistook for the owner[4]. Recently, there were voices that claimed that the sale-purchase contract concluded for goods that are not in the seller's property is similar to the situation when at the moment of the conclusion of the contract the goods have totally disappeared, which determines the sanction of the relative nullity of the contract, as the protected interest is a particular one[5].

In the legal doctrine there is also an opinion that such sale is not subject to nullity, but that it is a revocable sale based on the provisions of art. 1020-1021 Civil Code, due to the seller's failure to transfer the property right on the goods sold to the buyer[6] or, in a different interpretation, due to the seller' failure to observe the warranty obligation against eviction[7]. These last opinions argue for the validity of the sale-purchase contract in order to salvage the legal act which was signed and which corresponds to the will of the contracting parties, while on the other hand having no impact on the interests of the real owner[8].

An inconsistent juridical doctrine has led to an inconsistent judicial practice and vice-versa. Thus, certain courts have sanctioned with absolute nullity such a sale, motivating the solution with the lack of cause for such convention, "as the seller, being different from the owner of the goods, cannot comply with the purpose of the buyer"[9].

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[2] Dimitrie Alexandresco, *Explicaţiunea teoretică şi practică a dreptului civil român,* vol. VIII, part II (Bucharest, 1925), 93. Anotehr variant of this idea is that such a sale is subject to absolute nullity for false cause [see Marian Nicolae, in Flavius A. Baias, Bogdan Dumitrache and Marian Nicolae, *Regimul juridic al imobilelor preluate abuziv: Legea 10/2001 comentată şi adnotată*, vol. I, (Bucharest: Rosetti, 2001), 267].

[3] Matei B. Cantacuzino, *Elementele dreptului civil* (Bucharest, 1921), 635; Constantin Hamangiu, Ion Rosetti-Bălănescu and Alexandru Băicoianu, *Tratat de drept civil român,* vol. II (Bucharest: All, 1998), 555; Irina Sferdian, „Opinie privind eroarea asupra substanţei în vânzarea lucrului altuia," Dreptul 3 (2006): 99-100.

[4] Francisc Deak, *Tratat de drept civil: Contracte speciale* (Bucharest: Actami, 1999), 56-57; Liviu Stănciulescu, *Drept civil: Contracte şi succesiuni* (Bucharest: Hamangiu, 2008), 53-54; Gabriel Boroi, *Drept civil: Partea generală. Persoanele,* (Bucharest: Hamangiu, 2008), 237-38; Dumitru Macovei and Iolanda-Elena Cadariu, *Drept civil: Contracte* (Iaşi: Junimea, 2004), 34-35; Codrin Macovei, *Contracte civile* (Bucharest: Hamangiu, 2006), 41.

[5] Dan Chirică, *Tratat de drept civil: Contracte speciale*, vol. I, *Vânzarea şi schimbul,* (Bucharest: C.H. Beck, 2008), 67. In a previous edition of the lecture, the author propounded the solution of cancellation of such a sale for seller's failure to observe the obligation to transfer the property right, an opinion the author rejects at the moment. [also see Dan Chirică, *Drept civil: Contracte speciale,* (Bucharest: Lumina Lex, 1997), 64].

[6] Camelia Toader, *Drept civil: Contracte speciale*, (Bucharest: C.H. Beck, 2008), 55-56; Mircea Dan Bocşan and Sergiu Bogdan, „Consideraţii civile şi penale asupra vânzării lucrului altuia," Dreptul 6 (1999): 46; Edgar Jakab and Bogdan Halcu, „Consecinţe civile şi penale ale vânzării lucrului altuia," Pandectele Române 1 (2005): 247.

[7] Ion Lulă, „Discuţii referitoare la controvesata problemă a consecinţelor juridice ale vânzării bunului altuia," Dreptul 3 (1999): 65-68.

[8] C.S.J., civil sentence, Dec. no. 132-1994, in *Buletinul Jurisprudenţei: Culegere de decizii pe anul 1994*, (Baia Mare: Proema, 1995), 39; I.C.C.J., civil and intellectual property sentence, Dec. no. 5801/2004, in Dreptul 7 (2005): 245-46.

[9] See C.A. Suceava, Civil Decision no. 60/1994, in Petru Perju, „Sinteză teoretică a jurisprudenţei instanţelor din Circumscripţia Curţii de Apel Suceava în materie civilă," Dreptul 5 (1995): 77; Trib. Suceava, civil and administrative sentence., Dec. no. 346/1993, Dreptul 10-11 (1993), 111. Such solutions can be found in older practice – The Supreme Court, Civil decision no. 1120/1966, in *Culegere de decizii pe anul 1966*, 93.

Other courts, both in old and recent practice, have favored the solution of relative nullity for the error of wrongful consent on the quality of owner of the seller[10].

There have also been solutions that considered such a sale as valid, allowing for revocation upon buyer's request for the seller's failure to execute the obligation of transfer of property[11].

In the legal practice there is nevertheless a constant attitude in adopting the solution of relative nullity of the sale-purchase contract having as an object someone else's property, the sanction of absolute nullity being adopted predominantly in those cases where both contracting parties acknowledged the lack of the quality of owner of the seller, when the ill will of the parties and the intent of fraud are mainly sanctioned and not the legal operation in itself[12], and the solution of the revocable sale has been adopted quite rarely.

The new Civil Code[13] regulates expressly the sale of someone else's property in art. 1.683, stating its validity. Thus, according to line 1 of the above quoted article, "if, on the date of the contract concluded for a determined individual good, that particular good is in the property of a third party, the *contract is valid* and the seller is bound to ensure the transfer of the property right from its owner to the buyer".

Line 2 of art. 1.683 of the new Civil Code also stipulates the means by which this obligation of transfer of the property right can be done. Thus, the obligation is deemed as complied with "either if the goods are transferred to the seller's property or if the owner ratifies the sale, or by any other means, directly or indirectly, which gives the buyer the property over the goods".

In the absence of contrary legal or conventional stipulations, the property will be deemed as rightfully transferred to the buyer when the seller gains the property right on the sold goods or on the date of act of ratification signed by the third owner (line 3).

We believe that the solution adopted by the new Civil Code takes into consideration both the case of the sales having as an object someone else's property when both parties or at least the buyer manifests good faith, having therefore a distorted representation on reality and, particularly, on the quality of owner of the seller and the case when the parties entered the contract having the exact representation of the absence of the quality of owner of the seller, to the extent the parties did not act with obvious ill faith or fraud intention, situation in which the act is subject to absolute nullity for breach of law and might enter the incidence of the criminal law, the sale being evidently sanctioned by absolute nullity for breach of law.

We draw this conclusion because the legislator makes no distinction with regard to the sale of someone else's property, whether the parties have or have not been aware of the seller's misrepresentation as owner. The conclusion seems plausible given the fact that the text of line 3 of art. 1.683 of the new Civil Code stipulates that such a sale does not transfer the property right to the

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[10] C.S.J., civil sentence, dec. no. 132/1994, Dreptul 5 (1995): 77; C.S.J., civil sentence dec. no. 2467/1992, Dreptul 10-11 (1992): 113; The Supreme Court, civil sentence, dec. no. 279/1976, in *Culegere de decizii pe anul 1976*, 81; The Supreme Court, dec. no. 2257/1967, Revista Română de Drept 5 (1969): 162.

[11] The Supreme Court, civil sentence, dec. no. 412/1980, in *Culegere de decizii pe anul 1980*, 20. The solution is also found in the older practice of the courts – Case I, no. 168, 8 May 1885, quoted by Constantin Hamangiu, in Constantin Hamangiu and N. Georgean, *Codul civil adnotat,* vol. III, (Bucharest: All Beck, 2002), 449.

[12] I.C.C.J., civil sentence dec. nro 632/2004, in *Buletinul Jurisprudenţei;* C.A. Bucharest, section IV civil dec. no. 2353/2000, in *Curtea de Apel Bucuresti: Culegere de practică judiciară în materie civilă pe anul 2000*, (Bucharest: Rosetti, 2002), 104.

[13] Adopted by Law no. 287/2009 published in the Official Monitor no. 511 from 24 July 2009 which will be enforced on 1 October 2011.

buyer (impossible, as long as this right is inexistent in the seller's patrimony) but that the property right is rightfully transferred subsequently (namely when the seller gains the property of the goods or the third party ratifies the sale, thus manifesting the owner's will).

In the case of this latter sale (when the parties entered the contract aware of the fact that the seller is not the owner), we can interpret the will of the parties in the sense that the seller acknowledged the supplementary obligation to gain property him/herself of the goods, the transfer of the right of property taking place at that particular moment to the buyer or that the seller bound to determine the third owner, by legal means, to ratify the sale, the property right being transferred to the buyer at the moment of ratification. Moreover, that is because the sale concluded between the seller who is not the owner and the buyer cannot affect in any way the third owner, the property right remaining in the patrimony of the latter.

According to art. 4 of art. 1.683 of the new Civil Code, in the event the seller fails to ensure the transfer of the property right to the buyer, the buyer is entitled to cancel the contract and claim the restitution of the price and, as the case may be, default damages.

We appreciate that when the buyer acknowledged the absence of the quality of owner of the seller, and still entered the contract, the buyer will not be entitled to damages if the seller fails to ensure the transfer of the property right, the buyer's sole option being to claim and obtain the rightful cancellation of the sale and the restitution of the paid price. The buyer's right to claim damages would be however accepted in the event the seller breaches a contractual obligation, failing therefore to take the necessary measures for fulfilling the acknowledged obligation of property transfer.

We notice therefore that the perspective of the new Civil Code is to consider the sale of someone else's property as valid, the transfer of the property right being affected by a suspensive condition, namely that meanwhile the seller becomes the owner or the real owner ratifies the sale. Until that moment the transfer of the property right to the buyer's patrimony is inexistent, and, on the date either the seller gains property or the third owner ratifies the sale, the property right is validly transferred to the buyer' patrimony, unless otherwise stipulated, retroactively in our opinion.

An subsequent legal act signed by the buyer with regard to the goods that made the object of the sale of someone else's property will have the same legal fate as the sale itself, being retroactively enforced or annulled as a result of the sale cancellation.

The solution of the validity of the sale of someone else's property is justified in the light of the new Civil Code, as long as based on the new legal dispositions, the quality of owner of the transferred right can no longer be considered a previous condition of the validity of acts of property disposition which might determine the solution of nullity and the transfer of the property right cannot be considered as a particular effect of the sale, as the transfer of the property right is expressly regulated as seller's distinct obligation, together with the obligation to deliver the goods which constituted the object of the sale and the obligation of warranty against eviction and hidden flaws.

Thus, the seller's faulty breach of the obligation to transfer the property right to the buyer entitles the latter to claim the cancellation of the sale-purchase contract with the effect of restitution of the price in the event the payment took place and, possibly, with the seller's obligation to pay damages for the loss created and demonstrated, and, on the buyer's part, of restitution of the goods, if delivered.

There arises the natural question regarding the buyer's interest to solicit the cancellation of the sale for the non-transfer of the property right by the seller, especially if the goods were delivered and the payment was done. In such a situation (the buyer enters in the possession of the goods) corroborated with the passivity of the actual owner who takes no action to reclaim possession of the

goods, maybe it would be wiser for the buyer to wait for the 10 years' limit art. 930 of the new Civil Code refers to and usucapt if the conditions required by this article are met. Certainly, moral and civic imperatives bind the buyer to have a fair legal conduct, but this is usually just a desideratum.

In the event the sale of someone else's property has as an object an individually determined movable good the real owner gave up voluntarily, the dispositions of art. 937 line 1 of the new Civil Code also apply, stipulating that "the person who, in good faith, *signs with a non-owner an act of property disposal for valuable consideration* having as object a movable good, *he/she becomes the owner of that particular good from the moment of its effective possession*". In such a situation, therefore, the sale is valid with no reservations and the simple possession in good faith of the movable good is equal to its property. Obviously, the legislator's solution fails to apply if the buyer was aware or should have been aware, under the circumstances, of the fact that the person with whom he/she signed the contract was not the owner of the goods (art. 938 of the new Civil Code), a situation when only the dispositions of art. 1.683 of the new Civil Code apply, the property being transferred under the conditions stipulated by line 2 of the same article.

As a conclusion regarding the new regulation of the Civil Code we can assert that, by validating the sale of someone else's property, the legislator attempted to grant legal efficiency to the situation created by such a sale, as well as to the consenting will of the contracting parties, thus saving the legal operation concluded, not to mention that it has no impact whatsoever on the patrimony of the real owner.

The buyer will be entitled to claim the cancellation of the sale if the seller fails to observe the contractual obligation. The seller, however, will not be entitled to claim the cancellation of the contract, as the seller would have to avail himself of his own contractual breach, which is not admitted based on the principle *nemo auditur propriam turpitudinem allegans*.

With regard to the third owner of the sold goods, if he has lost possession of the goods, he is entitled to claim in court the restitution of the goods, in order to regain possession. In the event the owner is still in the possession of the goods, he has no interest to take any legal action, as his patrimony is not affected because the buyer cannot threat by usucaption in order to become owner (as the buyer doesn't have a useful and individualized possession of the goods, he cannot invoke usucaption – art. 930 of the new Civil Code refers to a 10 years' possession, and art. 931 refers to the inscription of the right in the land property register without legitimate cause, but, in this case, the buyer has a contract).

Although the legislator of the new Civil Code has drawn inspiration largely from the Civil Code of Quebec, a different solution was nevertheless adopted in the matter of the sale of someone else's property. Thus, art. 1713 line 1 of the Civil Code of Quebec stipulates that: "the sale of goods by a person other than the owner or than a person charged with its sale or authorized to sell it may be declared null". According to line 2 of the same article, the sale may not be declared null if the seller becomes the owner of the sold property[14].

As far as we are concerned, we have certain doubts regarding the solution chosen by the new Romanian Civil Code. Obviously, the main justification of the thesis of revocation preferred by the Romanian legislator is the regulation of the transfer of the property right as a seller's distinct

[14] The text of art. 1713 line 1 Civil Code of Quebec stipulates: „La vente d'un bien par une personne qui n'en est pas propriétaire ou qui n'est pas chargée ni autorisée à le vendre, peut être frappée de nullité", while in line 2 „Elle ne peut plus l'être si le vendeur devient propriétaire du bien" – available on 02.03.2011 at: http://www2. publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/CCQ/CCQ html.

obligation and not as a particular and legal effects of the sale-purchase contract, as it is the case in the current regulation, thus answering the objections of the skeptics with regard to the solution of cancellation.

The justification is only apparent though, because, although the new Civil Code regulates the transfer of the property right as a distinct and express obligation of the seller (see the text of art. 1.672 and art. 1.673 of the new Civil Code), in art. 1.674 it is stipulated that, otherwise legally or conventionally indicated, "the property is rightfully transferred to the buyer at the moment the contract is signed, even if the property has not been yet delivered or the price has not yet been paid". There results that the seller has no particular obligation to carry out the transfer of the property right, and that the transfer is done automatically, on the basis of the law, at the moment the seller and the buyer agree on the sale.

With regard to immovable property, according to art. 1.677 of the new Civil Code, the property right is transferred in agreement with the rules stipulated in the matter of the land register. In this matter, art. 885 line 1 of the new Civil Code states that "the real rights on the buildings contained in the land register are gained, both between the parties and towards third parties, only by their recording in the land register, based on the act or fact that justified the record".

Therefore, in the light of the new regulation, the inscription in the land register no longer has just a role of opposability of the act towards third parties, but also has a constitutive character of real rights, which means that the property right having as an object an immovable property will arise *erga omnes* not at the moment the seller and the buyer agree, but later, when the inscription is formally carried out (namely on the date of the registration of the request according to art. 890 of the new Civil Code). Usually, the inscription in the land register is done upon the buyer's request, most often at the public notary's request who authenticates the sale-purchase act.

From the interpretation of art. 1.674 there results that the property in the case of general goods is transferred to the buyer *ope legis*, based on the legal dispositions and without the intervention of the parties, and in the special case of immovable property, based on certain material deeds conducted by another person (it is evident that the seller may also request inscription, but he cannot fulfill it himself or as the main agent).

In fact, art. 1.683 line 3 of the new Civil Code regarding the sale of someone else's property also stipulates that the property is rightfully transferred to the buyer at the moment the seller becomes the owner of the sold goods or the third owner ratifies the sale.

There results therefore that the property right is transferred from the seller to the buyer automatically, by the special effect of the law and of the contract concluded between the parties, and not by the seller's action or material deeds to this purpose.

If we take into consideration the dispositions of art. 1.483 of the new Civil Code, we can see how confusing the legislator is in this matter. Thus, this article stipulates that "the obligation to transfer the property includes that of delivery and conservation of the property until delivery" and, in the matter of the immovable property recorded in the land register, "the obligation to transfer the property also comprises the obligation to submit the necessary documents for the inscription". It is clear that the obligation to transfer the property is mistaken for the obligation to deliver the property, being one and the same thing; and than we wonder why art. 1.672 indicated them as two distinct obligations?

In front of this legislative incongruence, we conclude that the transfer of the property right is not an effective obligation of the seller but remains a particular and automatic effect of the sale-purchase contract.

Therefore, we can state that the solution chosen by art. 1.683 of the new Civil Code regarding the cancellation of the sale of someone else's property is not the most accurate or thoroughly grounded. We conclude that the solution of the relative nullity for the absence of the quality of owner stated by a certain part of the doctrine and legal practice is much more appropriate[15].

3. The donation of someone else's property

With regard to the second problem raised for discussion, namely the donation contract having as an object someone else's property, the situation is much easier to solve and presents no serious contradictions.

Art. 801 of the current Civil Code stipulates expressly the irrevocable character of the donation, which means that once the donation is made it cannot be revoked by the unilateral will of one of the parties, unless expressly and restrictively stipulated by the law. As it is expressly stipulated by the law, the irrevocable character of the donation is a particular, special one[16], exceeding by far the irrevocable character of any other legal act, becoming a condition of its validity[17]. Any clause stipulated in the donation contract contrary to the principle of irrevocability leads to the absolute nullity of the contract.

Such being the case, a donation contract having as object someone else's property (we refer, as in the case of the sale-purchase contract, to individually determined goods) is in flagrant contradiction with the principle of the irrevocability of the donation, because, if in the future the donor fails to own the property in order to transfer it to the buyer, it would lead to the revocation of the donation by the will of the latter in other cases than those expressly stipulated by the law[18].

We believe that the same solution and the same judgment apply in the new regulation by the Civil Code which expressly states the principle of the irrevocability of donation in art. 1.015 line 1.

4. The bequest of someone else's property

With regard to the bequest of someone else's property, the solution is different from the one presented above, on one hand because the testament in itself is an essentially revocable legal document (therefore opposed to the donation act, which is essentially irrevocable) and, on the other hand, while it is an onerous act, its effects are not binding on the date of conclusion, but later, on the death of the testator and do not affect his patrimony, but his heirs' patrimony.

In this matter, both the current Civil Code (art. 906-907), and the new Civil Code (art. 1.064) contain texts that refer expressly to this situation. The solution adopted is the same in both codes[19].

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[15] See Chirică, *Tratat de drept civil,* 67-69.

[16] Stănciulescu, *Drept civil,* 112-13.

[17] In the juridical doctrine a 2nd degree irrevocability is mentioned in the case of the donation contract. See Deak, *Tratat de drept civil,* 141; Toader, *Drept civil,* 126; François Terré and Yves Lequette, *Droit civil. Les successions. Les libéralités*, (Paris: Dalloz, 1997), 351.

[18] Deak, *Tratat de drept civil,* 127; Stănciulescu, *Drept civil,* 112; Toader, *Drept civil,* 124; Macovei and Cadariu, *Drept civil,* 123; C.S.J., civil sentence, dec. no. 5789/2001, Curierul Judiciar 2 (2002): 45.

[19] According to art. 1021 French Civil Code, the bequest of someone else's property is null, regardless whether the testator was or was not aware of the fact that the good was not in his property („Lorsque le testateur aura légué la chose d'autrui, le legs sera nul, soit que le testateur ait connu ou non qu'elle ne lui appartenait pas").

The difficulty arises only in the case of the bequest of a particular title and only if the object of such a bequest is an individually determined good (as in the two cases above) which is not to be found in the testator's patrimony on the date the succession procedure is opened. If the good has entered the property of the legatee meanwhile, we can no longer speak of the bequest of someone else's property, but the bequest of one's own property, being thus perfectly valid.

Thus, there is a distinction according to the manner the testator bequeathed someone else's property, in full knowledge of the fact or being wrongfully convicted that the property is in his possession.

In the first case, when the testator was aware on the date of writing the testament that the good is not in his property, the testament is valid, the legislator appreciating that the testator charged the will executor or his legal heirs or the universal legatee to find the property somewhere else and to deliver it to the legatee by particular title. Such a bequest is legally binding not on the date the succession procedure is opened, but on the date the property is identified and can be delivered to the legatee. The person charged with the execution of the testament will have completed his task either by the actual delivery of the bequeathed property or by the deliver of the value of the property on the date the succession procedure is opened.

In the opposite situation, when the testator drew up the will falsely believing that he owned the property, the bequest is subject to absolute nullity for the error of wrongful consent on the object of the legal document[20], assuming that had the testator been aware of the situation, he wouldn't have made the bequest.

5. Conclusions

Although the new Civil Code expressly regulates the sale of someone else's property and provides a solution for this situation, in the present study we attempted to prove that the provisions of art. 1.683 are not flawless, and, instead of solving the existent controversies, they still generate new ones. Maybe, until the new code is enforced, the legislator should reflect more in this matter.

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[20] Petru Perju, „Sinteză teoretică a jurisprudenței instanțelor judecătoreşti din circumscripția Curții de Apel Suceava în materie civilă (July 1994 – July 1995)," Dreptul 2 (1996): 91.

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VARIOUS THEORETICAL ASPECTS REGARDING THE NOTION OF *STOCK IN TRADE*

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Abstract
Stock in trade is rarely used by the legislature, in the Romanian Law, as well as in French Law. The notion of "stock in trade" is hard to define, especially because it is very often confused with other similar notions. The stock in trade is qualified as an intangible movable asset, and is subject to the legal regulation specific to movables. In spite of its legal qualification as movable, some rules of stock in trade are inspired from the real estate law techniques.

Keywords*: Stock in trade, patrimony, dedicated patrimony, enterprise, universitas facti, intangible movable assets.*

1. Introduction

It was not until late that the institution of stock in trade was legally instated, so that legal doctrine and case law has assumed the role of configuring its legal regime. Summarizing the various definitions that have occurred in doctrine[1] in a long time, there can be concluded that stock in trade represents the group of mobile and immovable assets, tangible and intangible, that a trader allocates to their business in order to attract clients and, implicitly, profit.

The expression "Stock in trade" is seldom used by the lawmaker, both in the Romanian and French law[2]. In the Romanian Law, there are only isolated references in several special laws, such as: art. 2 and art. 42 of Law no. 26/1990 regarding the Trade Registry, as revised, which regulates the obligation of recording with the Trade Registry the assignment, lease, pledge on the stock in trade, as well as Law 99/1999 regarding various measures of accelerating economic reform, which regulates a security interest on stock in trade. Currently, for the first time in our law[3], the lawmaker defines stock

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[1] I.N. Finţescu, *Curs de drept commercial (Course on Commercial Law)*, Bucureşti, 1929, vol. 1, p. 163.; I.L. Georgescu, *Drept comercial roman (Romanian Commercial Law)*, Editura All Beck, Bucureşti, 2002, p. 23.; Stanciu D. Cărpenaru, *Tratat de drept comercial roman (Treatise of Romanian Commercial Law)*, Editura Univers Juridic, Bucureşti, 2009, p. 132.; O. Căpăţână, *Caracteristici generale ale societăţilor comerciale (General Characteristics of the Commercial Companies)*, in *Dreptul (Law)* Magazine, no. 9-12/1990, pg. 23.

[2] Please refer to Smaranda Angheni, *Les fonds de commerce en droit roumaine et en droit francais*, in *Revue Internationale de Droit Economique*, Bruxelles, 1996, no. 2, p. 237-255; Idem, *Quelques aspectes, concernant le fond de commerce en droit roumain et en droit francais*, in *Revue roumaine des sciences juridiques*, tome VII, no. 1, 1996, p. 56-73.

[3] In French law, Law dated 17 March 1909 (the Cordelet Law), which includes regulations regarding stock in trade, is limited to merely establishing a few rules regarding the sale, securing and monitoring stock in trade.

in trade in Law no. 298/2001 regarding the amendment and completion of Law no. 11/1991 regarding the combating of unfair competition. According to art. 1^1, letter c) of this normative act, "stock in trade is the group of mobile and immovable assets, tangible and intangible (trademarks, firms, logos, patents, pool of clients) used by a trader in order to conduct their business".

Although this is a most welcome first step in shaping the notion of *stock in trade*, doctrine has reasonably reported that the legal definition is incomplete.[4]

2. The elements of the stock in trade

For a better understanding of the notion of *stock in trade*, we will present below in brief the elements that constitute stock in trade.[5]

As we have already pointed out, the definition given by the lawmaker does not clearly show the component elements of stock in trade. However, a complete listing of the constitutive elements would certainly be very difficult to achieve, as the composition of stock in trade varies and is variable.[6] This means, on the one hand, the composition of stock in trade varies according to the specificity of the trader's business and, on the other hand, the elements of stock in trade can be altered according to the business needs, without affecting the existence of stock in trade. In the same respect, a limitative listing of the elements of stock in trade would not be desirable, because otherwise the trader would not have the option of adding other elements on an ongoing basis.

In the specialized literature and case law, there is generically considered that the elements of stock in trade are split in two main categories: tangible elements and intangible elements. The tangible elements can be: immobile or mobile. Thus, the category of immobile elements includes[7]: buildings that house trading operations and on which the trader may have a title deed or a right to use (store, works, plant, registered office), elements that are added as contribution to the share capital. The category of tangible mobile goods includes: raw materials, materials, equipment, the goods resulted from the commercial activity or purchased with a view to resale.

Without minimizing the role of the tangible elements that are part of the structure of stock in trade, it is unanimously recognized that intangible elements are the main elements of stock in trade. This category mainly includes: the company, the logo, the clients, market share, patents, trademarks and geographical indications, intellectual property rights, drawings and models of the products, know-how (savoir-faire) etc.

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[4] Smaranda Angheni, Magda Volonciu, Camelia Stoica, *Drept commercial(Commercial Law)*, Editura C.H. Beck, Bucureşti, 2008, p. 49.

[5] In French doctrine, in order to shape the concept of stock in trade, two methods are used, both showing the constitutive elements of stock in trade. Thus, the first method (also adopted by the lawmaker) determines the elements that can be included in the composition of stock in trade. The second one tries to identify the elements indispensable to stock in trade.

[6] See Stanciu D. Cărpenaru, *Op. cit.*, p. 137.

[7] For a detailed analysis of the categories of immobile that can be included in stock in trade, please refer to Smaranda Angheni, *Câteva specte privind consecinţele juridice ale includerii imobilelor în fondul de comerţ (Various Aspects regarding the Legal Consequences of Including Buildings in Stock in trade*, in the *Curierul judiciar* magazine, no. 5/2002, p. 2-10. Also see: O.Căpăţînă, *Op. cit.*, *Dreptul* magazine, no. 9-12/1990, p. 23; G. Papu, *Despre excluderea imobilelor din domeniul dreptului comercial (On the Exclusion of Buildings from the Scope of Commercial Law)*, in *Revista de drept comercial*, nr. 2/1998, p. 69-85.

Also, mention must be made that most of the authors do not consider receivables and liabilities as elements of stock in trade. The conclusion is supported by a legal argument according to which stock in trade does not constitute a legal universality, but a universality in fact. Receivables and liabilities are components of the patrimony and not of the stock in trade, that is why they are not passed to the acquirer in case of transferring the stock in trade. Nevertheless, there can be taken over by the assignee various utilities contracts (power and water supply, gas, telephone subscription), employment contracts, export licenses, if such contracts have not been terminated. Anyhow, the transfer of such contract does not operate "ipso facto" by the mere assignment of the stock in trade and in all cases the assignment of receivable should be notified to the debtor under art. 1393 of the Civil Code. As the Civil Code forbids the assignment of receivable, the transfer of the liabilities can only be made by novation, with the creditor's acceptance, under the conditions of art. 1128, Civil Code. Mention must be made that the new Civil Code (Law no. 287/2009) allows the assignment of a liability and regulates in the text of Book V, Title VI, Chapter III, the institution of "taking over a liability". Thus, according to the provisions of art. 1599, "the obligation to pay an amount of money or to perform some other action can be transferred by the debtor to another person:

a) either by a contract concluded between the initial debtor and the new debtor, with the creditor's agreement,

b) or by a contract concluded between the creditor and the new debtor, under which the latter assumes the obligation".

In French doctrine[8], we always find tangible elements such as materials and goods, and intangible elements such as the clients and the market share (achalandage), the distinctive signs, intellectual property and bail right[9]. There are excluded from stock in trade, receivables and liabilities, as well as buildings.

3. Delimitation of the notion of "stock in trade" from other resembling notions

An important step in the effort of defining the notion of *stock in trade* is the delimitation of stock in trade from other resembling notions, for which it can be mistaken.

First of all, the notion of *stock in trade* should delimited from the one of ***patrimony.*** Mention must be made here that, sometimes, in the doctrine, we find stock in trade under the name of *commercial patrimony*. However, this phrase does not have any legal significant, but a mere economic meaning referring to the goods meant to be used for conducting the business. In legal terminology, the commercial patrimony is also called stock in trade[10].

Although in Romanian law, there is no legal definition of the notion of patrimony, most of the doctrine[11] considers that patrimony is a legal universality of rights and obligations of an economic

[8] See M. de Juglart, B. Ippolito, *Cours de droit commercial*, Montchrestien Publishing House, Paris, 1984, p. 335-343 şi J. Derruppe, *Le fonds de commerce*, Edition Dalloz, 1994, p. 4.

[9] Right to use the space in which the stock in trade is operated.

[10] I.L. Georgescu, *Op. cit.*, p. 462; St. D. Cărpenaru, *Op. cit.*, p. 133.

[11] C. Bârsan, *Drept civil. Drepturile reale principale (Civil Law. Main Real Rights),* All Beck Publishing House, Bucureşti, 2001, p. 6; V. Stoica,*Drept civil. Drepturile reale principale (Civil Law. Main Real Rights),* Editura Humanitas, Bucureşti, 2006, p. 47.

value[12]. Therefore, stock in trade represents just a component of the trader's patrimony, as the lawmaker defines stock in trade as comprising a *group of goods,* mobile and immobile, tangible and intangible (trademarks, firms, logos, patents, market share) *used by the trader in conducting their business*. Therefore, stock in trade is a universality in fact, and not in law, of goods united by a common purpose, namely, the business. Being considered a universality in fact, stock in trade cannot include receivables and liabilities, the latter being part of the trader's patrimony. As different from the universality in fact, the universality in law comprises both elements of assets and liabilities, the asset and liability being defining elements for the legal universality. According to the doctrine, we cannot speak about the existence (subsistence) of patrimony, even if it were made exclusively of liabilities.[13] We cannot say the same thing of stock in trade, as the latter cannot subsist in the absence of the elements of liability.

Stock in trade does not include future goods, whereas the inclusion of the latter in the nation of patrimony has to do with the essence of this concept.

Also, mention must be made that the structure of stock in trade includes only the elements of asset "used by the trader in their business"; as a result, patrimony includes, beside liability, other values of asset that are not included in stock in trade.

Considering stock in trade as a real patrimony means that an individual or legal entity acting as trader would have two patrimonies, one civil and another one commercial, which runs counter to the theory of sole patrimony instated by the Civil Code (art. 1718).

Secondly, given that our law has introduced the notion of ***dedicated patrimony***, mention must be made that stock in trade should not be mistaken for it either.[14]

In approaching the dedicated patrimony, in order to be able to compare it with and delimit it from the notion of *stock in trade*, we should consider the distinction made by the theoreticians of law between the institution proper of dedicated patrimony (according to the theory of dedicated patrimony) and the concept of dedicated patrimony imagined as a group of assets belonging into the same patrimony (according to the modern theory of patrimony).

Thus, according to the theory of dedicated patrimony, or of patrimony of purpose (weckvermögen) conceived by the German lawyers Brinz and Bekker, the connection between the patrimony and the person of its holder (defining for the notion of patrimony) is broken. The unity of patrimony is related to the purpose allocated to it. As a result, the patrimony does not belong to a person, but to a destination (purpose). It has thus been substantiated the recognition of a patrimony regarded as a legal universality, without a holder, person, "the subject" (holder) of the patrimony being its purpose.[15]

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[12] Some reference works include the in the notion of patrimony also the goods to which the rights and obligations of an economic value refer (T. Ionaşcu, S. Brădeanu, *Drepturile reale principale în Republica Socialistă România (Main Real Rights in the Socialist Republic of Romania)*, Editura Academiei, Bucureşti, 1978, p. 13).

[13] V. Stoica, *Op. cit.*, p. 50.

[14] In the doctrine we find interpretations according to which the legal nature of stock in trade could be characterized as being the one of the dedicated patrimony. In this regard, see Camelia Stoica, Silvia Cristea, *Reglementarea în legislaţia română a noţiunii de întreprindere, fond de comerţ şi patrimoniu de afectaţiune (The Regulation in the Romanian Law of the notion of enterprise, stock in trade and dedicated patrimony)*, in *Curierul judiciar,* no. 9/2009, p. 498-499; Gheorghe Piperea, *Pentru o nouă formulă a întreprinderii (For a New Formula of Enterpise)*, in *Analele Universităţii din Bucureşti*, *Drept (Law) Series*, no. III-IV/2008, p. 58.

[15] See V. Stoica, *Noţiunea juridică a patrmoniului (The Legal Notion of Patrimony),*in the supplement to *Pandectele române,* nr. 1/2003, Editura Rosetti, p. 179-180; I. Lulă, *Drept civil. Drepturile reale (Civil Law. Real Rights)*, Editura Presa Universitară Română, Timişoara, 2000, p. 20-21.

Regarded from the point of view of modern theory of patrimony, the concept of dedicated patrimony is completely different. This is not regarded as a distinct patrimony, but as a group of assets included in the sole patrimony. The modern theory of patrimony manages to reconcile the classical theory of a sole and indivisible patrimony (the personalism theory) with the one of dedicated patrimony, shifting the weight centre of the idea of purpose, which ceases to undermine the indissoluble relation between patrimony and person (together with the possibility of individuals to become partners and set up a legal entity – commercial company, having a distinct patrimony, it has no longer been necessary to multiply the patrimony of an individual by means of the idea of purpose), thus becoming the ground of recognizing the divisibility of patrimony in several groups of assets, with distinct legal regimes.

Thus, there is reached the conclusion that there is no contradiction between the idea of unity of the person and patrimony and the idea of divisibility of patrimony. The latter, although split in several groups of rights and obligations with economic value, remains united and the unity of patrimony is the one that ensures the communication between the various patrimonial groups. A reference work shows that "although the formula of the divisibility of patrimony is instated, in reality it is not the patrimony that is divided in fractions, but the rights and obligations in distinct, each having its own distinct legal regime"[16].

Although each group of assets constitutes a distinct entity, both the individual component elements and the universality of patrimony, it cannot be sustained that these represent a legal personality proper, as such an interpretation would infringe on the unity of patrimony. However, the idea of legal universality is to be found, in an improper manner, also in relation with the groups of assets, as the latter borrow certain features of patrimony, understood as *universitas juris*.[17] The extension of the idea of legal universality to the groups of assets is useful for, among other things, distinguishing this legal universality from the universalities in fact. As such, such a group of assets is regarded as a *universitas juris*, and not as a *universitas facti*, as stock in trade is.

Once this proposed distinction is made, mention must be made of the fact that both the provisions of GEO no. 44/2008 *regarding the conducting of businesses by authorized free lancers, individual companies and family companies,* which introduce in the Romanian law the phrase *dedicated patrimony***,** and the provisions of the new Civil Code do not instate the theory of dedicated patrimony, but the concept of splitting the patrimony in several patrimonial groups allocated to performing a profession, according to the modern theory of patrimony.[18] The new legal provisions do not infringe on the principle of sole patrimony and divisibility of patrimony, a principle that can also be found in the provisions of the new Civil Code, art.31.

According to the provisions of art.2, letter j) of GEO no.44/2008, the dedicated patrimony represents the totality of goods, rights and obligations of the authorized free lancer, the holder of

[16] Valeriu Stoica, *Op. cit.*, p. 60.

[17] Idem, *ibidem*; Lucia Herovanu, *Dreptul român şi patrimoniul de afectaţiune (Romanian Law and Dedicated Paterimony)*, in *Revista de drept comercial (The Commercial Law Magazine)*, no. 6/2009, p. 68.

[18] In this respect, Lucia Herovanu, *Op. cit.*, p.75; Emilian Lipcanu, *Consideraţii în legătură cu OUG nr. 44/2008 privind desfăşurarea activităţilor economice de către persoanele fizice autorizate, întreprinderile individuale şi întreprinderile familiale (Considerations regading GEO no.44/2008 regarding the conducting of businesses by authorized free lancers, individual companies and family companies,* in *Law Magazine*, no. 10/2008, p. 19; Contrary, see Cornelia Lefter, O. I. Dumitru, *Reglementarea desfăşurării activităţilor economice de către persoanele fizice, întreprinderile individuale şi întreprinderile familiale, în baza OUG nr. 44/2008 – între noutate şi controversă*, în *Revista română de drept privat (Romanian Magazine of Private Law)*, no. 1/2009, p. 113-114.

individual company or the members of a family company, dedicated to the conducting of a business and constituted as a distinct fraction of the patrimony of the authorized free lancer, holder of individual company or members of the family company, separated from the general pledge of their personal creditors. The comparison of this definition with that of stock in trade, included in art.3, letter c) of Law no. 11/1991, as revised, represents only a part of the dedicated patrimony, this including, similarly to the patrimony, both the receivables and liabilities.

Stock in trade is not one and the same as dedicated patrimony in none of its interpretations. Thus, regarded as a distinct patrimony, the dedicated patrimony represents a "real" patrimony, a legal universality in proper sense, with all the consequences deriving from it and the arguments already presented can be used "mutatis mutandis" also for delimiting *stock in trade* from *the dedicated patrimony*. Not even when seen as a set of rights and obligations grouped within the same unitary patrimony, dedicated patrimony is not the same as stock in trade because:

- an asset group represents a legal universality, whereas stock in trade represents a universality in fact;
- as different from stock in trade, which is constituted by the will of their holder, in the specific case of the dedicated patrimony, the will of the holder can be relevant only indirectly, but the resulting asset group originates directly from the law;
- setting up the dedicated patrimony is optional, being left at the trader's choice; as a result, in performing their trade, the trader can set up or not the deduicated patrimony, whereas the setting up of the stock in trade is indispensable to their business.

A third distinction is the one between the *stock in trade* and the one of ***enterprise***. An isolated opinion claims that there would be equivalence between the notion of *stock in trade* and the one of *enterprise*, in the sense that they would be two facets of the same institution: stock in trade would represent their static form, whereas the enterprise would represent stock in trade in a dynamic status[19].

Currently, the text of GEO no.44/2008, the enterprise is defined as a business conducted in an organized, permanent, systematic, manner, comprising financial resources, attracted labour force, raw materials, logistic and IT means, at the risk of the entrepreneur (art. 2, lit. f)). This definition is compatible with the generally accepted definition of doctrine[20], according to which enterprise represents the autonomous organization of a business, by means of production factors (acts of God, capital and labour) by the entrepreneur at their own risk, for the purpose of obtaining profit. Against this background, mention must be made that under the provisions of art. 3 paragraph 3 of the new Civil Code, the "operation of an enterprise" is defined, not the enterprise, without including in this definition the element of the risk assumed by the entrepreneur, considered an essential, defining element even for the notion of enterprise.

Starting from these definitions and comparing them with the one of stock in trade, we can draw a first conclusion: the notion of enterprise is wider than that of stock in trade. The enterprise also includes elements that are not part of the stock in trade. The organization of the enterprise does not regard only the goods allocated to conducting the business (which are part of the structure of stock in trade) but also the capital and labour. On the other hand, the enterprise is not limited to

[19] D. Gălăşescu-Pyk, *Drept comercial(Commercial Law)*, Bucureşti, 1948, p. 350.

[20] Smaranda Angheni, Magda Volonciu, Camelia Stoica, *Op. cit.*, p. 23; Stanciu D. Cărpenaru, *Op. cit.*, p. 46-47; O. Căpăţână, *Op. cit.*, p. 29; Camelia Stoica, Silvia Cristea, *Op. cit.*, p. 498; Gheorghe Piperea, *Op. cit.*, p. 37-39; A. Jauffret, *Manuel de droit commercial*, Paris, 1973, p. 73.

commercial activities, as there are also civil enterprises, liberal professions, handicraft, in the field of agriculture. The enterprise includes both material and human elements organized by the trader, where stock in trade lacks the human factor.[21]

Regarded from the point of view of its organization forms, the enterprise can be a matter of law, therefore it may have legal independence (the hypothesis of corporate enterprise – the commercial company), whereas stock in trade lacks patrimonial independence, even if some of the goods have a legal regime different from the one recognized for the majority of goods in the trader's patrimony.

We can thus assert that stock in trade is the central element of the enterprise and the latter cannot be conceived in the absence of stock in trade that allows its operation. Stock in trade is the necessary element, the invariable element of the notion of enterprise. After all, an enterprise comes to life thanks to the notion of *stock in trade*.[22] Therefore, the two notions are indissolubly related, but they do not coincide.

Fourthly, the notion of *stock in trade* needs to be delimited from the notion of ***commercial company***.

The commercial company is, from a legal point of view, a matter of law, as it has legal independence, whereas stock in trade comprises a group of companies that belong to a commercial company. Starting from this reality, the doctrine shows that there is a traditional legal connection between stock in trade and the company, namely the connection between person and goods.[23] Stock in trade is a constitutive element of the notion of commercial company, more precisely; it represents an element of the company's patrimony. The same commercial company may have several stock in trades if it performs different production activities (independent fields of activity).

Eventually, the notion of *stock in trade* differentiates from that of ***branch***.

According to the provisions of art. 43 paragraph 1 of Law no. 31/1990, regarding the commercial companies, as revised, "branches are elements without legal independence, taken from and belonging into the commercial companies", being known as secondary offices, the same as agencies, representative offices and other secondary offices. As the term of branch does not have a legal definition, doctrine and case law have tried to make up for this overlooking by the lawmaker. Thus, it has been established that besides the absence of the legal independence, a branch has management independence, within the limits set by the company.[24] For the purpose of conducting the business for which it has been set up, a branch is equipped by a (primary) company with certain goods. A part of such goods constitutes the stock in trade of the branch, distinct from that of the company, but this stock in trade does not identify itself with the branch, as the branch, beside the material elements includes the human factor. In the absence of the legal independence, the legal

[21] Reasonably considering that in traditional interpretations the focus being on the material aspect, the enterprise being defined as a group of assets, which the entreprenuer allocates to conducting their business, contemporary doctrine proposes a definition, according to which the main element is the subjective one, the enterpise representing a human group coordinated by an entrepreneur for the purpose of conducting a business.

[22] Yves Reinhard, *Droit commercial,* Edition Litec, 1996, p. 273.

[23] Smaranda Angheni, Magda Volonciu, Camelia Stoica, *Op. cit.*, p. 52.

[24] In this regard, Supreme Court of Justice, Commercial Department, Decision no. 752/1995, in *Revista de drept comercial (Magazine of Commercial Law)*, no. 4/1996, p. 123.

documents needed for conducting the business of the branch are concluded by the representatives (proxies) designated by the commercial company.[25]

4. The legal nature of stock in trade

Below, you can find various mentions regarding the legal nature of stock in trade, in order to clarify this concept.

Both the Romanian and French doctrine considers that stock in trade is a universality in fact, created by the will of its holder and within the limits of this will. As different from simple goods, in which the constitutive elements are kept together by a unitary and homogeneous individuality, stock in trade is a complex item whose component elements are united, but not by a physical cohesion, as it happens with material goods (*corpora que ex pluribus cohaerentibus constant*), but by the will of a person that confers them an economic and legal destination (*corpora que ex pluribus distantibus constant*).[26] Given that in this group of heterogenous goods related by a purpose, the decisive element is the will of their holder, stock in trade existing to the extent where the holder's will unites them. Thus, stock in trade is considered an *universitas factis*, as opposed to *universitas juris*, whose existence as an autonomous item does not arise from the will of the holder, but from that of the lawmaker. Each individual item, less the company, can by subject to a distinct legal document: one can sell the logo, goods, but the trader can treat such goods also as a unit. The existence of such universality originates from the will of their holder and to the extent of such will. Seen from the point of view of this theory, stock in trade has an independent identity and is not reduced to its component elements; however, this unit does not have a legal character; but each of its elements has its own statute.

The theory of universality in fact is supported by various provisions of Law 99/1999, regarding security interests. According to art. 10 paragraph 3., a security interest may have as purpose a mobile individualized item or a universality of mobile goods. In case where the item subject to the security interest comprises a universality of mobile goods, including in the stock in trade, the contents and features of such universality are to be determined by the parties before the date of constituting the security interest.

5. Conclusions

The conclusion that stock in trade is an universality in fact is also grounded on the legal argument that stock in trade does not have its own asset and liability, the receivables and liabilities being components of the trader's patrimony. Currently, the notion of *universality in fact* is recognized by the lawmaker. Thus, the provisions of art. 541 of the new Civil Code define the universality in fact as being "the group of goods that belong to the same person and have a common destination, set by the will of the respective person or by law".

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[25] See D. A. Dumitrescu, *Valabilitatea împuternicirii acordate sucursalei de a reprezenta societatea primară în relaţiile cu terţii şi în justiţie (the validity of the power of attorney granted to the branch to represent the primary company in the relations with third parties)*, in *Revista de drept comercial*, no. 3/2005, p. 102-108.

[26] I. L. Georgescu, *Op. cit.*, p. 471.

Regarded as an universality in fact, stock in trade is a unitary item, a summary item, that includes all the goods that are comprised by it, without the stock in trade's losing its individuality. In order to establish the legal nature of this unitary item, case law has generally decided that stock in trade is an intangible movable asset, considering the argument that the elements that prevail in stock in trade are the intangible movable assets. As we have already pointed out, the lawmaker, under Law no. 99/1999, provides for a security interest on the stock in trade, therefore considering it a movable asset. Nevertheless, considering the hypothesis according to which stock in trade also includes immovable assets (as those can also be part of stock in trade, according to the legal definition), no security interest can be applied with regard to the respective immobile goods, but only mortgage, which presupposes certain validity and publicity conditions.[27]

We note that although the Romanian lawmaker includes among the elements of stock in trade also the building in which stock in trade is operated, stock in trade as an universality in fact and as a unitary item that absorbs the building, still the legal regime of the documents regarding the respective immovable asset (sale, lease, donation) is governed by the rules of the immovable assets, differentiated from the legal regime of the stock in trade as universality and from all the other component elements.

The topic of clarifying the notion of *stock in trade,* which naturally involves establishing the legal nature of stock in trade, is a rather complex one and, as such, it cannot be exhausted by this study. The various and contradictory doctrine opinions require as a necessity a regulation that should configure the legal regime applicable to stock in trade.

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[27] Smaranda Angheni, *Câteva aspecte privind consecinţele juridice ale includerii imobilelor în fondul de comerţ (Various Aspects regarding the Legal Consequences of Including Buildings in Goodwill)*, in *Curierul judiciar*, no. 5/2002, p. 7.

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CONSIDERATIONS ON THE POSSIBILITY OR THE OBLIGATION OF THE NATIONAL COURTS TO ASK THE COURT OF JUSTICE OF THE EUROPEAN UNION FOR A PRELIMINARY RULING

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Abstract
The paper intends to explain the meaning of national court or tribunal of a member state and to analyze the second and third paragraphs of article 267 of the Treaty on the Functioning of the European Union, with references to the CJEU's relevant case law. The emphasis is on the situations in which national courts have the possibility to ask the CJEU to give a preliminary ruling or the obligation to do so, on the extent of their power of discretion. The study is meant to be a useful instrument for practitioners that are confronted with such legal issues.

Keywords: *national court or tribunal; member state; Court of Justice of the European Union; preliminary question; preliminary ruling; article 267 of the Treaty on the Functioning of the European Union.*

I. INTRODUCTION

At present, the judicial system of the European Communities[1] is named the Court of Justice of the European Union. It consists, actually, of three courts: the Court of Justice, the General Court[2] and the Civil Service Tribunal[3]. The courts are a creation of the international treaties that constitute the legal basis for the existence of the European Communities. Their main task is stated explicitly in article 19 of the Treaty on the European Union[4]: to "ensure that in the interpretation and application of the Treaties the law is observed."

Article 19, paragraph 3 of the same Treaty provides that the Court of Justice of the European Union shall rule on actions brought by a Member State, an institution or a natural or legal person,

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[1] At present, there are two European Communities: the European Union and the European Atomic Energy Community. After the Treaty of Lisbon came into force, on December 1, 2009, the European Community became The European Union, but the European Atomic Energy Community continues to exist as a separate, specialized, international organization.

[2] Created in 1988 by a decision of the Council of the European Union, to take on some of the growing case load of the Court of Justice of the European Communities. Its legal basis can be found in the Single European Act (signed at Luxembourg and Hague on February 17 and 28, 1986; in force from July 1, 1987; repelled by the Treaty on the European Union). It started functioning in 1989.

[3] Created by the Council's Decision from November 2, 2004. The possibility of establishing specialized chambers was provided by the Treaty of Nice (signed on February 26, 2001, in force since February 1, 2003).

[4] Consolidated version, after the Treaty of Lisbon.

give 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 and rule in other cases provided for in the Treaties.[5]

The jurisdiction and attributions of each court are established and clarified by the Treaty on the functioning of the European Union, the Statute of the Court of Justice of the European Union (Protocol no. 3 to the Treaty), the Procedure Regulation of the Court of Justice[6] and Supplementary Rules[7], the Procedure Regulation of the General Court[8] and the Procedure Regulation of the Civil Service Tribunal[9].

The possibility of national courts to ask the Court of Justice of the European Union for a preliminary ruling is detailed in article 267 of the Treaty on the functioning of the European Union:

"The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

a) the interpretation of the Treaties;

b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions 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."

References to the CJUE "are always made in the course of proceedings before a national court and cannot be made after the case has been decided. When dealing with preliminary references, the ECJ does not decide the case concerned, it simply renders a decision concerning the interpretation of a point of Community law which is essential to the outcome of the case. Once the decision is given, the case returns to the national court which takes into account the ECJ interpretation in order to come to its decision."[10]

"Through this process, as a former President of the Court has remarked, national judges have become ordinary Community judges. […] The preliminary reference procedure has also enabled

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[5] Andreşan-Grigoriu, Beatrice; Ştefan, Tudorel: *Tratatele Uniunii Europene. Versiune consolidată.*, Hamangiu Publishing, Bucharest, 2010, pages 16-17.

[6] From June 19, 1991, as amended subsequently (published in the Official Journal L 176, 4.7.1991, p. 7 and OJ L 383, 29.12.1992).

[7] Done at Luxembourg on December 4, 1974 (OJ L 350 of 28.12.1974, p. 29) with amendments dated 11 March 1997 (published in OJ L 103 of 19.4.1997, p. 4) and of 21 February 2006 (published in OJ L 72 of 11.3.2006, p. 1).

[8] From May 2, 1991 (published in OJ L 136, 30.5.1991, amended in OJ L 317, 19.11.1991, p. 34).

[9] From July 25, 2007 (OJ L 225, 29.8.2007, p. 1amended in OJ L 69, 13.3.2008, p. 37).

[10] Horspool, Margot; Humphreys, Matthew; Harris, Siri; Malcolm, Rosalind; *European Union Law*, Fourth Edition, Oxford University Press, 2006, page 104.

individuals, whose means of direct access to the ECJ are fairly restricted, to bring a significant number of disputes before the Court."[11] and to ask it to control the validity of EU legislation[12].

The national court determines if a preliminary question is necessary and, in doing so, has a certain power of discretion. The purpose of this study is to determine the meaning of "national court or tribunal of a member state" and to analyse the extent of this power, with focus on the interpretation of the second and third paragraphs of article 267 of the TFEU.

II. THE POSSIBILITY OR THE OBLIGATION OF NATIONAL COURTS TO ASK FOR A PRELIMINARY RULING

1. National court or tribunal

In the interpretation of the ECJ, the meaning of "national court or tribunal" is not restricted to the judicial system *stricto sensu*, but includes, also, bodies authorised to give rulings of a judicial nature. The characteristics of such a body were defined by the ECJ in Case – 246/80 *Broekmeulen*[13].

In this case, the Appeals Committee for General Medicine raised a preliminary question in the context of an appeal lodged by doctor Broekmeulen, of Netherlands nationality, who obtained a diploma of doctor in Belgium and was refused authorization to practice medicine in The Netherlands by the Registration Committee.

Both the Registration Committee and the Appeals Committee were private bodies, established by the Royal Netherlands Society for the Promotion of Medicine, a private association. The great majority of doctors in The Netherlands belonged to this society.

The Court noted that a study of the internal legislation revealed it was impossible for a doctor who intended to practise in The Netherlands to do so and to be recognized by the sickness insurance schemes, without being registered by the Registration Committee. If registration was denied, an appeal could be made to the Appeals Committee. This body was composed of medical practitioners, representatives of university medical faculties and government representatives, appointed for 5 years. Thus, it included a significant degree of involvement on the part of public authorities. Also, it determined disputes on the adversarial principle and its decisions could be challenged in the ordinary courts, but that had never happened before.

The Court observed that this body was acting under a degree of governmental supervision and, in conjunction with the public authorities, created appeal procedures which could affect the exercise of rights granted by Community law. Thus, the Court considered imperative, in order to ensure the proper functioning of Community law, that it should have the opportunity of ruling on issues of interpretation and validity arising out of such procedures.

The court concluded that, as a result of the foregoing considerations and in the absence, in practice, of any right of appeal to the ordinary courts, the Appeals Committee, which operated with the consent of the public authorities and with their cooperation, and which, after an adversarial

[11] Dehousse, Renaud; *The European Court of Justice – The Politics of Judicial Integration*, St. Martin's Press Inc., New York, 1998, page 33. See also Galan, Marius; *Recursul prejudicial la Curtea de Justiție a Comunităților Europene*, Curierul Judiciar, number 7-8, 2007, page 88.

[12] Mathijsen, P.S.R.F.; *A Guide to European Union Law*, Sixth Edition, Sweet&Maxwell Publishing, London, 1995, page 99.

[13] Judgment of 6 October 1981*, Broekmeulen / Huisarts Registratie Commissie* (246/80, ECR 1981 p. 2311).

procedure, delivered decisions which were, in fact, recognized as final, must, in a matter involving the application of Community law, be considered as a court or tribunal of a member state.

The solution of the ECJ was different in case C – 138/80 *Jules Borker*[14], in which another professional body, the Bar Council of the Cour de Paris, was not considered a judicial body able to ask the Court for a preliminary ruling. The ECJ observed that it does not have jurisdiction to give a ruling, since it can only be requested to give judgments in proceedings intended to lead to a decision of a judicial nature. The Bar Council was not under the legal duty to try the case. It was only requested to give a declaration relating to a dispute between a member of the bar and the courts or tribunals of another member state.

According to the settled case-law, the criteria used by the ECJ to determine if a body is a court or tribunal able to make a preliminary reference to the Court are: whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes,* whether it applies rules of law and whether it is independent.[15] These criteria were laid down in case C – 54/96 *Dorsch*[16]. The preliminary reference was made by The German Federal Public Procurement Awards Supervisory Board, on the interpretation of an article from a Directive, relating to the coordination of procedures for the award of public service contracts.

After rendering the criteria mentioned above, in para. 23 of the judgement, the Court stated that The German Federal Public Procurement Awards Supervisory Board, which is established by law as the only body competent to determine, upon application of rules of law and after hearing the parties, whether lower review bodies have committed an infringement of the provisions applicable to procedures for the award of public contracts, whose decisions are binding and which carries out its task independently and under its own responsibility, satisfies the conditions necessary to be considered a national court.

The conclusion of the Court was the same in joint cases C – 9 and 118/97 *Jokela and Pitkäranta*[17] with respect to the Finnish Rural Businesses Appeals Board, which was established by law and composed of members appointed by public authority and enjoying the same guarantees as judges against removal from office, which had jurisdiction by law in respect of aid for rural activities, gave legal rulings in accordance with the applicable rules and the general rules of procedure, and, under certain conditions, an appeal lied against its decision to the Supreme Administrative Court.

Another example is case C – 407/98 *Abrahmsson and Anderson*[18]. The Appeals Commission of the University of Göteborg was a permanent body, set up by law to examine appeals against certain decisions taken in relation to higher education, with members appointed by the government (three must be or must have been serving judges; at least three must be lawyers), the parties were given an opportunity to submit observations and to examine the information provided by the other parties, its decisions were binding and not subject to appeal. Although an administrative authority, it

[14] Order of 18 June 1980, *Borker* (138/80, ECR 1980 p. 1975).

[15] Craig, Paul; De Búrca, Gráinne; *Dreptul Uniunii Europene*, Hamangiu Publishing, Bucharest, 2009, page 581.

[16] Judgment of 17 September 1997*, Dorsch Consult Ingenieursgesellschaft / Bundesbaugesellschaft Berlin* (C-54/96, ECR 1997 p. I-4961).

[17] Judgment of 22 October 1998*, Jokela and Pitkäranta* (C-9/97 and C-118/97, ECR 1998 p. I-6267).

[18] Judgment of 6 July 2000*, Abrahamsson and Anderson* (C-407/98, ECR 2000 p. I-5539).

was vested with judicial functions, it applied rules of law and the procedure before it was *inter partes*. The judgement was given without receiving any instructions and in total impartiality[19].

On the contrary, in case C – 53/03 *Syfait*[20], the Court considered that the Greek Competition Commission did not satisfy the criteria because it was subject to the supervision of the Minister for Development, which implies that that minister was empowered, within certain limits, to review the lawfulness of its decisions. Even though its members enjoyed personal and operational independence, there were no particular safeguards in respect of their dismissal or the termination of their appointment, which was not an effective safeguard against undue intervention or pressure from the executive on those members. In addition, it was not a clearly distinct third party and it could be relieved of its competence by a decision of the Commission of the European Communities, where the Commission initiated its own proceedings, with the consequence that the proceedings initiated before it would not lead to a decision of a judicial nature[21].

With regard to arbitral courts[22], in case C – 61/65 *Widow Vaassen*[23], the ECJ ruled that an arbitral tribunal constituted under Netherlands' law, whose members were appointed by a minister, with permanent activity, bound by rules of adversary procedure similar to those used by ordinary courts of law and bound to apply rules of law, can be considered a national court.

However, in case C – 102/81 *Nordsee*[24], the Court concluded that an arbitrator who decides a dispute in virtue of a clause inserted in a contract between parties is not a national court, within the meaning of article 177 of the Treaty[25], because the contracting parties are under no obligation, in law or fact, to refer their dispute to arbitration and the public authorities in the member state concerned are not involved in the decision to opt for arbitration and are not called upon to intervene automatically in the proceedings before the arbitrator.

The Court stated that, if in the course of arbitration, questions of Community law are raised which the ordinary courts may be called upon to examine in the context of their collaboration with arbitration tribunals or in the course of a review of an arbitration award, it is for those courts to ascertain whether it is necessary for them to make a preliminary reference, in exercising such functions.

Also, in case C – 318/85 *Criminal Proceedings against Regina Greis Unterweger*[26], the preliminary reference was declared inadmissible, on ground that the body asking the preliminary

[19] See also the judgment of 24 June 1986, *Drake / Chief Adjudication Officer* (150/85, ECR 1986 p. 1995), in which the British Chief Social Security Officer was considered a national court able to ask CJEC a preliminary question. See case C – 110/98, Judgment of 21 March 2000, *Gabalfrisa and others* (C-110/98 to C-147/98, ECR 2000 p. I-1577), in which the Court came to same conclusion with regard to the Tribunales Económico-Administrativos, a body which ruled on complaints lodged against the decisions of the departments of the tax authority.

[20] Judgment of 31 May 2005, *Syfait and others* (C-53/03, ECR 2005 p. I-4609).

[21] See also Judgment of 19 October 1995, *Job Centre* (C-111/94, ECR 1995 p. I-3361); Judgment of 12 December 1996, *X* (C-74/95 and C-129/95, ECR 1996 p. I-6609); Judgment of 12 November 1998, *Victoria Film* (C-134/97, ECR 1998 p. I-7023); Judgment of 14 June 2001, *Salzmann* (C-178/99, ECR 2001 p. I-4421).

[22] See also Brînzoiu, Laurenţiu; *Examen de jurisprudenţă a Curţii de Justiţie a Comunităţilor Europene în material admisibilităţii trimiterilor preliminare*, Revista Română de Drept Comunitar, number 6, 2007, pages 96-97

[23] Judgment of 30 June 1966, *Vaassen-Goebbels / Beambtenfonds voor het Mijnbedrijf* (61/65, ECR 1966 p. 261).

[24] Judgment of 23 March 1982, *Nordsee / Reederei Mond* (102/81, ECR 1982 p. 1095).

[25] Ex-article 177 of The Treaty establishing the European Economic Community. Current article 256 of TFEU, the consolidated version.

[26] Order of 5 March 1986, *Greis Unterweger* (318/85, ECR 1986 p. 955).

question, a Consultative Commission for currency offences, was not competent to resolve disputes (to give a ruling in proceedings which are intended to result in a judicial decision), but its task was to submit an opinion within the framework of an administrative procedure.

Even if a body may be considered a court or tribunal when it is exercising a judicial function, if the preliminary question is submitted to the Court when the body is exercising other functions, like administrative ones, the question can be deemed inadmissible[27].

2. Court or tribunal "of a member state"

Only courts, tribunals or bodies that fulfil the requirements to be considered as such from a member state of the European Union can ask CJEU for a preliminary ruling. However, in the case C – 335/98 *Bar and Montrose Holdings Ltd*[28], the Court held that its jurisdiction applied to the Isle of Man, which is not covered by the entire EC Treaty, but to which a special Protocol annexed to the Treaty applies, since the Protocols have the same legal force as the Treaty itself[29].

In another case, C – 355/89 *DHSS v Barr*[30], the Court held that its jurisdiction in preliminary ruling proceedings extends to Protocol Number 3 on the Channel Islands and the Isle of Man, whose uniform application in the Isle of Man requires the courts and tribunals established there to be deemed authorized to refer questions to the Court concerning the interpretation of the Protocol itself, the interpretation and validity of the Community legislation to which that Protocol refers, and the interpretation and validity of measures adopted by the Community institutions on the basis of the Protocol.

The Court also declared its jurisdiction over French Polynesia, in joint cases C – 100 and 101/89 *Kaefer and Procacci*[31]. The administrative tribunal was situated in French Polynesia. The Court noted that it was not disputed that the administrative tribunal was a French court and that part four of the EEC Treaty empowers the institutions of the Community, in particular the Council, to lay down provisions relating to the overseas countries and territories on the basis of the principles set out in the Treaty. Since the preliminary reference concerned such a provision, the Court decided it had jurisdiction to answer the question raised by the administrative tribunal.

ECJ declined jurisdiction in case C – 321/97 *Andersson*[32]. The Court stated that, although it has jurisdiction, in principle, to give preliminary rulings concerning the interpretation of the Agreement on the European Economic Area (EEA) when a question arises before one of the national courts, since the provisions of that Agreement form an integral part of the Community legal system, that jurisdiction applies solely with regard to the Community, so that the Court has no jurisdiction to

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[27] See case C - 440/98, Order of 26 November 1999, *RAI* (ECR 1999, p. I-8597). The Italian Court of Audit sent a preliminary question while exercising an administrative function. See case C – 182/2000, Judgment of 15 January 2002, *Lutz and others* (C-182/00, ECR 2002 p. I-547). The preliminary question was raised by the Landesgericht Wels, acting as a Handelsgericht, in connection with the maintenance of the register of companies, while exercising a non-judicial function. It was not dealing with a dispute, but simply maintaining a register of companies.

[28] *ILRO / Commission* (C-335/89). See case T-159/98.

[29] Horspool, Margot; Humphreys, Matthew; Harris, Siri; Malcolm, Rosalind; *European Union Law*, Fourth Edition, Oxford University Press, 2006, page 114.

[30] Judgment of 3 July 1991, *Department of Health and Social Security / Barr and Montrose Holdings* (C-355/89, ECR 1991 p. I-3479).

[31] Judgment of 12 December 1990, *Kaefer and Procacci / French State* (C-100/89 and C-101/89, ECR 1990 p. I-4647).

[32] Judgment of 15 June 1999, *Andersson and Wåkerås-Andersson* (C-321/97, ECR 1999 p. I-3551).

rule on the interpretation of the EEA Agreement as regards its application in the states belonging to the European Free Trade Association (EFTA). The fact that the EFTA state in question (Sweden) subsequently became a Member State of the European Union, so that the question emanates from a court or tribunal of one of the member states, cannot have the effect of attributing to the Court of Justice jurisdiction to interpret the EEA Agreement as regards its application to situations which do not come within the Community legal order. Thus, the Court has no jurisdiction to rule on the effects of that Agreement within the national legal systems of the contracting states during the period prior to accession[33].

"Where the parties to a dispute agree to submit their differences to arbitration and to be bound by the arbitrator's decision, the arbitrator is by no means necessarily a court or tribunal of a member state. He may well be independent of the state, even though his decision is binding and even though the person chosen as arbitrator may be in fact a national judge."[34]

Another issue was raised in case C – 337/95 *Parfums Christian Dior*[35]. The preliminary question was sent by the Benelux Court of Justice, a court common to three Benelux member states (Belgium, The Netherlands and Luxembourg). The ECJ concluded that, in order to ensure the uniform application of Community law, this common court, faced with the task of interpreting Community rules in the performance of its function, must be regarded as entitled to refer questions to the Court of Justice for a preliminary ruling.

3. The possibility to ask for a preliminary ruling

"One of the distinguishing features of European Community law is the capacity to give rise to rights and duties that must be protected, not by the Court of Justice of The European Communities, but by national courts. The European Court has, however, the duty to ensure the uniform interpretation and application of Community law in the courts of the several member states. For this purpose, the founding treaties confer on some domestic courts the power, and impose on others the duty, of referring questions of Community law to the European Court for its rulings."[36]

Para. 2 of article 267 TFEU is the legal basis for a national court to address the CJEU a preliminary question[37]. The national court may do so if it considers that a decision on the question is necessary to enable it to give judgment. Thus, the national court is free to decide whether the point of European Law is relevant to its decision or not and if an answer from CJEU on the validity or the interpretation of European law is necessary. The domestic court may not refer a point if it finds the interpretation to be clear, not posing any difficulty.

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[33] For the same solution, see also C - 140/97, Judgment of 15 June 1999, *Rechberger and others* (ECR 1999 p. I-3499).

[34] Usher, John A.; *Plender and Usher's Cases and Materials on the Law of the European Communities*, Third Edition, Butterworths, London, Dublin, Edinburgh, 1993, page 154.

[35] Judgment of 4 November 1997, *Parfums Christian Dior / Evora* (C-337/95, ECR 1997 p. I-6013).

[36] Usher, John A.; *Plender and Usher's Cases and Materials on the Law of the European Communities*, Third Edition, Butterworths, London, Dublin, Edinburgh, 1993, page 147.

[37] "The willingness of national courts to use the preliminary ruling procedure is demonstrated by the sheer number of cases." Petersen, John; Shackleton, Michael; *The Institutions of the European Union*, Second Edition, Oxford University Press, 2006, page 134.

"It is also within the discretionary power to decide whether the question has been raised in good faith, or whether it is a purely procedural move initiated by one of the parties, for instance to delay the judgement."[38]

In an English case (*Bulmer Ltd. And Another v J. Bollinger S.A. and Others*, 1974), four guidelines were given in order to determine if asking a question is necessary:

a) the point must be conclusive of the case;

b) the national court may follow a previous CJEU ruling, but can refer the same point again if it wishes to obtain a different ruling;

c) it may apply the doctrine of *acte clair* – the national court may consider the point is reasonably clear and free from doubt;

d) in general, it is better to decide the facts first, as they might make a reference unnecessary.[39]

"Courts should bear in mind factors such as length and extra cost of proceedings, and the importance of not unnecessarily adding to the workload of the ECJ. These guidelines have been cited many times by English courts, but they have also been subject of much criticism and the courts in later cases have endeavoured to refine and qualify these arguments."[40]

In the preliminary ruling procedure, the CJUE does not have jurisdiction to take cognisance of the facts of the case or to criticise the reason for reference[41].

This does not mean that the question can be merely hypothetical. The ECJ refused to answer such a question in case C – 83/91 *Meilicke*[42], stating that the national court, which alone has direct knowledge of the facts of the case, is in the best position to assess, having regard to the particular features of the case, whether a preliminary ruling is necessary to enable it to give judgment. Consequently, the ECJ is, in principle, bound to give a ruling. Nevertheless, it is a matter for the Court of Justice, in order to determine whether it has jurisdiction, to examine the conditions in which the case has been referred to it. The spirit of cooperation which must prevail in the preliminary ruling procedure requires the national court to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the member states and not to deliver advisory opinions on general or hypothetical questions.

The Court observed that it may be convenient, in certain circumstances, for the facts of the case to be established and for questions of purely national law to be settled at the time the reference is

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[38] Mathijsen, P.S.R.F.; *A Guide to European Union Law*, Sixth Edition, Sweet&Maxwell Publishing, London, 1995, page 101.

[39] Usher, John A.; *Plender and Usher's Cases and Materials on the Law of the European Communities*, Third Edition, Butterworths, London, Dublin, Edinburgh, 1993, page 159.

[40] Horspool, Margot; Humphreys, Matthew; Harris, Siri; Malcolm, Rosalind; *European Union Law*, Fourth Edition, Oxford University Press, 2006, page 115.

[41] Judgment of 9 July 1969, *Portelange / Smith Corona Marchant International* (10/69, ECR 1969 p. 309) The ECJ held that there is a clear separation of functions between national courts and the Court of Justice, which does not permit the latter to take cognizance of the facts of the case or to pass judgment on the reasons for requests for interpretation. The question whether the provisions or concepts of Community law, whose interpretation is requested, are in fact applicable to the case in question, lies outside the jurisdiction of the Court of Justice and falls within the jurisdiction of the national court. Where a court or tribunal requests the interpretation of a Community provision or of a legal concept connected with it, it must be assumed that that court or tribunal considers such interpretation necessary to the solution of the dispute before it.

[42] Judgment of 16 July 1992, *Meilicke / ADV-ORGA* (C-83/91, ECR 1992 p. I-4871)

made to the Court of Justice, so as to enable the latter to take cognizance of all the features of fact and of law which may be relevant to the interpretation of Community law which it is called upon to give.[43]

The national court (whether a court, a tribunal or a judicial body) cannot be deprived by national law of the right to refer a preliminary question to the CJEU. In case C – 166/73 *Rheinmühlen*[44], the Court was asked if the second paragraph of article 267 TFEU gives to a court against whose decisions there is a judicial remedy under national law a completely unfettered right to refer questions to the Court of Justice or does it leave unaffected rules of domestic law to the contrary, whereby a court is bound on points of law by the judgments of the superior courts.

The ECJ answered that article 177 TCEE (current article 267 TFEU) is essential for the preservation of the Community character of the law established by the treaty and has the object of ensuring that in all circumstances this law is the same in all states of the Community. It thus aims to avoid divergences in the interpretation of Community law which the national courts have to apply.

National courts have the widest discretion in referring matters to the Court of Justice if they consider that a case pending before them raises questions involving interpretation, or consideration of the validity of provisions of Community law, necessitating a decision on their part. Thus, a rule of national law whereby a court is bound on points of law by the rulings of a superior court cannot deprive the inferior courts of their power to refer to the Court questions of interpretation of Community law involving such rulings.

The Court observed that it would be otherwise if the questions put by the inferior court were substantially the same as questions already put by the superior court. On the other hand, the inferior court must be free, if it considers that the ruling on law made by the superior court could lead it to give a judgment contrary to Community law, to refer to the Court preliminary questions which concern it.

The national court cannot be deprived of the right to refer a preliminary question to the CJEU neither by the Court[45], nor by an EU rule[46].

4. The obligation to ask for a preliminary ruling

The third paragraph of article 267 of TFEU establishes that national courts have an obligation to refer a preliminary question to the CJEU if the question is raised before a court or tribunal against whose decisions there is no judicial remedy under national law.

The abstract theory suggests that the relevant court or tribunal must be the highest court in the member state, whereas the concrete theory states it must be a court or tribunal whose decisions are not subject to appeal in the case in question.[47]

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[43] See also Judgment of 10 March 1981, *Irish Creamery Milk Suppliers Association* (36 and 71/80, ECR 1981 p. 735).

[44] Judgment of 16 January 1974, *Rheinmühlen Düsseldorf / Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (166/73, ECR 1974 p. 33)

[45] Judgment of 5 October 1977, *Tedeschi / Denkavit* (5/77, ECR 1977 p. 1555).

[46] Judgment of 30 January 1974, *BRT / SABAM* (127/73, ECR 1974 p. 51).

[47] Hanlon, James; *European Community Law*, Second Edition, Sweet&Maxwell Publishing, London, 2000, page 143. See also Fabian, Gyula; *Drept instituțional comunitar*, Third Edition, Hamangiu and Sfera Juridică Publishing, 2010, page 421 and Craig, Paul; De Búrca, Gráinne; *Dreptul Uniunii Europene*, Hamangiu Publishing, Bucharest, 2009, page 584.

It appears that the CJEU has opted for the concrete theory. For example, in case C – 6/64 *Costa v ENEL*[48], the judge duly referred the question, even though he occupied an inferior rank within the Italian judiciary, since the case before him was a small claim and in such situations there was no judicial remedy against his decision in Italian law.[49] The ECJ noted that it has no jurisdiction to apply the EEC Treaty to a specific case or to decide upon the validity of a provision of domestic law in relation to the Treaty, to investigate the facts or to criticize the grounds and purpose of the request for interpretation, but it has the power to extract from a question imperfectly formulated by the national court those questions which alone pertain to the interpretation of the Treaty.[50]

On the other hand, in case C – 107/76 *Hoffman – La Roche*[51], the Court was asked whether the national court has the duty to refer, when a preliminary question arises during interlocutory proceedings for an interim order, when in such proceedings no appeal lies against the court's decision, but when it is open to the parties to have the question concerning the subject-matter of the interlocutory proceedings made the subject-matter of an ordinary action.

The Court answered in the negative. It stated that the third paragraph must be interpreted as meaning that a national court is not required to refer to the Court a preliminary question, when that question is raised in interlocutory proceedings for an interim order, even where no judicial remedy is available against the decision to be taken in the context of those proceedings, provided that each of the parties is entitled to institute proceedings or to require proceedings to be instituted on the substance of the case and that during such proceedings the question provisionally decided in the summary proceedings may be re-examined and may be the subject of a preliminary reference to the Court.

The ECJ also considered that, although it was not called upon, in this case, to interpret the second paragraph, it was necessary to note that there is no doubt that the summary and urgent character of a procedure in the national court does not prevent the court from regarding itself as validly seised under the second paragraph, whenever a national court or tribunal considers that it is necessary to make use of this legal text.

Thus, the third paragraph or article 267 of TFUE cannot be interpreted as meaning that every time a question on European law arises, the final court must ask CJEU for a decision. The reference must be made only if the question will affect the outcome of the case. Also, a reference may prove unnecessary if the CJEU has already decided on the interpretation or the validity of the same text, in a previous ruling.

Furthermore, the ECJ may refuse to analyse a preliminary question if it has already answered an identical point.

In the *CILFIT* case[52], the ECJ stated that the third paragraph of article 177[53] is based on cooperation, established with a view to ensuring the proper application and uniform interpretation of Community law in all the member states, between national courts, in their capacity as courts responsible for the application of Community law, and the Court of Justice. More particularly, the

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[48] Judgment of 15 July 1964, *Costa / E.N.E.L.* (6-64, ECR 1964 p. 585).

[49] Usher, John A.; *Plender and Usher's Cases and Materials on the Law of the European Communities*, Third Edition, Butterworths, London, Dublin, Edinburgh, 1993, page 163.

[50] Another example is case C – 99/2000, Judgment of 4 June 2002, *Lyckeskog* (C-99/00, ECR 2002 p. I-4839).

[51] Judgment of 24 May 1977, *Hoffmann-La Roche / Centrafarm* (107/76, ECR 1977 p. 957).

[52] Judgment of 6 October 1982, *CILFIT / Ministero della Sanità* (283/81, ECR 1982 p. 3415)

[53] The current article 267 of TFEU.

aforesaid provision seeks to prevent the occurrence within the Community of divergences in judicial decisions on questions of Community law.

The mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of Community law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning of that article.

Analyzing the relationship between the second and third paragraphs of article 177, the Court further stated the courts or tribunals referred to in the third paragraph have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of Community law is necessary to enable them to give judgment. Accordingly, those courts or tribunals are not obliged to refer to the Court of Justice a question concerning the interpretation of Community law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case. If, however, those courts or tribunals consider that recourse to Community law is necessary to enable them to decide a case, article 177 imposes an obligation on them to refer to the Court of Justice any question of interpretation which may arise.

The authority of an interpretation already given by the court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case or where previous decisions of the court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical. However, it must not be forgotten that in all such circumstances national courts and tribunals, including those referred to in the third paragraph of article 177, remain entirely at liberty to bring a matter before the Court of Justice if they consider it appropriate to do so.

The Court concluded that the third paragraph is to be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community.

"The application of the *CILFIT* rules needs to take account of the balance to be maintained between the obligation to refer which is essential for the uniform application of Community law and the need to avoid adding an unnecessary burden to the already excessive workload of the ECJ if a case concerns a genuine *acte clair*."[54]

In a number of judgments the ECJ contended that the preliminary question could clearly find an answer in its previous case-law. For example, in case C – 307/99 *OGT Fruchthandelsgesellschaft*[55], the national court asked whether two articles of GATT[56] 1994 are such as to create rights which individuals

[54] Horspool, Margot; Humphreys, Matthew; Harris, Siri; Malcolm, Rosalind; *European Union Law*, Fourth Edition, Oxford University Press, 2006, page 118.

[55] Order of 2 May 2001, *OGT Fruchthandelsgesellschaft* (C-307/99, ECR 2001 p. I-3159)

[56] The General Agreement on Tariffs and Trade, created in 1947, is the instrument that laid the foundation for international commercial arbitration. 123 states became a part to this agreement, representing 90% of international trade. The ministerial conference in Marrakech (Morocco), in 1994, marks the end of GATT and, from 1995, all trade related aspects were taken over by the World Trade Organisation.

may rely on directly before a national court. The ECJ found that the answer to this question could be clearly deduced from its existing case-law. Since the Court already held, first, in case C – 149/96 *Portugal v Council* [1999], and, afterwards, in joined Cases C – 300/98 and C – 392/98 *Dior and Others* [2000], that, having regard to their nature and structure, the WTO Agreement and the agreements and understandings annexed to it (including TRIPPS[57] and GATT) are not such as to create rights on which individuals may rely directly before the courts by virtue of Community law, the same must apply, for the same reasons, to the provisions of GATT 1994.

The importance of precedents can be deduced from the Court's conclusions in case C – 453/2000 *Kühne & Heitz* [58]. The Court observed that the principle of cooperation imposes on an administrative body an obligation to review a final administrative decision, where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the Court where: under national law, it has the power to reopen that decision; the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance; that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under the third paragraph of Article 234 TEC[59]; and the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court.

The national courts do not have the power to decide on the validity of acts of the institutions, bodies, offices or agencies of the Union. This was stated clearly by the ECJ in case C – 314/85 *Foto-Frost*[60]. The CJEC held that national courts against whose decisions there is a judicial remedy under national law may consider the validity of a Community act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid. In contrast, national courts have no jurisdiction to declare invalid acts of Community institutions, whether or not a judicial remedy exists against their decisions under national law. The power to declare the act invalid is reserved for the Court of Justice.

The Court emphasized that this conclusion was dictated, in the first place, by the requirement for Community law to be applied uniformly. Divergences between courts in the member states as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract it from the fundamental requirement of legal certainty. Secondly, it was dictated by the necessary coherence of the system of judicial protection established by the treaty.

In case C – 66/80 *International Chemical Corporation*[61], the ECJ decided that, where one if its judgements declares an act of a Community institution to be void, it is sufficient reason for any other national court to regard that act as void for the purposes of a judgment which it has to give. However, this does not deprive national courts of their power to decide whether there is a need to raise once again a question which has already been settled by the Court. There may be such a need

[57] The Trade-Related Aspects of Intellectual Property Rights Agreement was concluded by all the WTO member states. It entered into force on January 1, 1995 and is the most complex multilateral agreement on intellectual property rights.

[58] Judgment of 13 January 2004, *Kühne & Heitz* (C-453/00, ECR 2004 p. I-837).

[59] The current article 267 TFEU.

[60] Judgment of 22 October 1987, *Foto-Frost / Hauptzollamt Lübeck-Ost* (314/85, ECR 1987 p. 4199)

[61] Judgment of 13 May 1981, *International Chemical Corporation / Amministrazione delle fianze dello Stato* (66/80, ECR 1981 p. 1191).

especially if questions arise as to the grounds, the scope and, possibly, the consequences of the nullity established earlier.

"Accordingly, even a national judge against whose decision there is a judicial remedy will have no option other than to refer to the European Court a question on the invalidity of Community legislation if he considers that a decision on that question is necessary to enable him to give judgement, and if the point is not so clear that he can simply declare the legislation to be valid."[62]

III. CONCLUSION

The preliminary ruling procedure is an instrument at the disposal of the national courts or tribunals, who have the possibility and, sometimes, the obligation to ask the CJEU for its judgement on the interpretation of the Treaties, the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. "The preliminary reference procedure thus establishes a real dialogue between the national and the supranational judge."[63]

"The right is claimed under Community law, despite the absence of any provision of national law, or in opposition to national law."[64] This is due to the CJEU's duty to ensure the uniform interpretation and application of EU law in the courts of the several member states. Over the years, the rich case-law resulted from preliminary rulings demonstrates that this procedure is an important means to achieve this goal and, also, a way for the Court to bring its contribution to the development of EU law[65].

In the interpretation of the CJEU, the meaning of "national court or tribunal" includes, also, bodies authorised to give rulings of a judicial nature, bodies established by law, permanent, with compulsory jurisdiction, which follow an *inter partes* procedure, apply rules of law and are independent.

This right may be exercised by the national judge only in pending actions – either civil or criminal cases[66] – if an answer from CJEU is necessary to enable it to give judgment. Thus, the point of European Law must be relevant to the solution. The domestic court may not refer a point if it finds the interpretation to be clear, not posing any difficulty.

National courts have an obligation to refer a preliminary question to the CJEU if the question is raised before a court or tribunal against whose decisions there is no judicial remedy under national law. Still, the reference must be made only if the point of European law will affect the outcome of the case. Also, a reference may prove unnecessary if the CJEU has already decided on the interpretation or the validity of the same text, in a previous ruling or if the question is raised in interlocutory

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[62] Usher, John A.; *Plender and Usher's Cases and Materials on the Law of the European Communities*, Third Edition, Butterworths, London, Dublin, Edinburgh, 1993, page 164.

[63] Dehousse, Renaud; *The European Court of Justice – The Politics of Judicial Integration*, St. Martin's Press Inc., New York, 1998, page 28.

[64] Brown, Neville; Kennedy, Tom; *The Court of Justice of the European Communities*, Fourth Edition, Sweet&Maxwell Publishing, London, 1994

[65] See Mathijsen, P.S.R.F.; *A Guide to European Union Law*, Sixth Edition, Sweet&Maxwell Publishing, London, 1995, page 98.

[66] For example: Judgment of 31 October 1974, *Centrafarm BV and others / Sterling* Drug (15/74, ECR 1974 p. 1147), Judgment of 31 October 1974, *Centrafarm BV and others / Winthorp BV* (16/74, ECR 1974 p. 1183), Judgment of 20 May 1976, *De Peijper* (104/75, ECR 1976 p. 613), Judgment of 14 December 1979, *Henn and Darby* (34/79, ECR 1979 p. 3795).

proceedings for an interim order, provided that each of the parties is entitled to institute proceedings on the substance of the case.

However, if a matter of invalidity of EU legislation is raised, the national judge cannot declare the European act invalid. If a decision of the CJEU is necessary to enable the court to give judgement and if the point is not as clear as to simply declare the legislation to be valid, the domestic court is under the obligation to send the question to the CJEU, even if a judicial remedy is available under national law.

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CRITICAL INCIDENTS MANAGEMENT. NATIONAL AND INTERNATIONAL ISSUES ON ANTITERRORIST/COUNTERTERRORIST INTERVENTION

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Abstract.
A critical incident is any event or situation that threatens people and/or their homes, businesses, or community. While we often think of floods, tornadoes, terrorist incident, hurricanes, or armed assailants as posing critical incidents, the true definition of a critical incident includes any situation requiring swift, decisive action involving multiple components in response to and occurring outside of the normal course of routine business activities, as defined in national and international legislation. Based on two case studies, the paper proposes critical incident management approach on three levels: strategic, operational and control point and formulate the principles to develop the incidents management.

Key words: *law, management, incident, international comparison*
JEL Classification: K42, M12, N4

Introduction

The risks and menaces that the security international framework is confronted nowadays are more complex and provocative as ever, especially as a result of the globalization process. Hence, both the social environment and the competent authorities need to have at their disposal efficient instruments, to establish dynamic procedures, in order to approach the security issues, thus to prevent their transformation into conflicts or crisis situations and to diminish the negative impact against the human society. To that end, a motivated elaboration of the specific decisions becomes a priority in critical situations and may reduce the probability and gravity of a terrorist act.

Generally speaking, preventing critical incidents or risk situations is the common denominator of the action, within the political and economic relations[1]. In order to understand the causality of the critical incidents, there is a need for "reform" by adapting to three directions: *globalism, nationalism and regionalism.*

Certainly, critical situations, with an effect on the security, need some legal resources designated to prevent their upcoming, and to diminish the consequences. The preventive and combative legal resources regard both the public administration and the specific authorities, which

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[1] Marciej Perczynski, *From Interdependence to Global Partnership*, in Agenda for Change: New Tasks for the United Nations (ed. Klaus Hüfner), Leske Budrich, Opladen, 1995

have tasks and responsibilities in the conception, planning, organizing and controlling the measures and actions in the public security area.

The usual security management uses some concepts as discouraging, identification and diminution of any situations that might generate incidents. The complexity, the area of applicability and potential consequences of a terrorist menaces or act needs a quick and decisive capacity to solve it.

A real incident imposes a higher coordination in law enforcing, criminal investigation, protection activities, emergency situations management and technical expertise, at all levels.

Even when there are not differences between the goals, interests and motivations, individuals might create incidents. Their own way of understanding some social aspects is different from the one of the society as an entity. That is why members of a certain group may come up to a conflict, because their different points of view upon some reasons, decisions or issues. The management of a crisis situation mandatorily belongs to the society. The intervention special forces, which we shall talk about in the following, do not do anything else but to temporarily stop the incident and to ensure that it would not have any direct consequences against the society.

We may state that solving a conflict is not totally a special units' task and it does not have to finish necessarily with the destruction of the defeated, might it appear as a perpetrator, attacker or terrorist. Its annihilation does not mean automatically the end of the crisis.

1. The influence of the intervention resources during critical situations on human rights

According to the European Union[2], and the procedures regarding *"common approach on the fight against terrorism"* respectively, national and international efforts in combating terrorism has to respect human rights and freedoms, laws and, where applicable, humanitarian law.

During the specific actions of reducing this type of incidents, as well, there should not be permitted limitations of the human rights and freedoms, except the ones established by the relevant instruments regarding the matter. The involvement of the specialized structures or judicial institutions should carry out according to the international laws on human rights.

Using special forces in special conditions or the presence of the security structures officials will have, every time, as a consequence, the inertial limitation of e.g. freedom of movement, which, otherwise, would not have been touched in some normal situation. It should be understood that a temporary limitation of some rights and freedoms does not mean necessarily an infringement or violation by law enforcement authorities, which have as a main duty to protect and promote them.

In normal conditions, civil rights protection has not to be ensured by affecting democratic values. That is why Resolution no. 1400/2004 of the European Council states that "*lack of democracy means victory for terrorism*". Human rights protection is playing a very important role in the fight against cross-national terrorism, credibility and trust in the governmental structures depending on these rights in the first place.

2. Fundaments of the terrorist danger

We think that the internal environment of the criminality is integrated within the process of the "crime globalization". So, we agree to carry on the specialization and improvement of the international cooperation.

[2] **The Guide regarding Common Approach on the Fight against Terrorism** relies on the document emitted in 1986 and revised in 1996 and 1999. The last version has been significantly modified after September 11, 2001.

The "non-security" generating sources[3] (attacks, menaces, hostage takings, assassinations, etc.) remain, from geographical point of view, within the main risk areas. Both at global level, but mainly in the European area, the risk factors may be found in a rather *continuous form*, not necessarily increasing, some of them being isolated in the international security dynamics.

The competent authorities within the EU states, especially ones with tasks on implementing the law and ensuring a social security climate, develop specific actions, simultaneously with the existence of the risk factors, for diminishing and removing them. The security risks and menaces approach is made, in the first place, through international police cooperation, strengthening the exchange of information, through proactive projects of civic education and promotion of security culture, with the goal of improving the quality of the preparedness against crime and terrorism.

The connection between the organized crime and terrorism phenomena exists, without any doubt. Both the terrorism and the organized crime are serious menaces to the society and to national security of the worldwide countries, keeping on being a real danger, for the social structure and cohesion, and for security of the individuals and the states, as well. From this point of view, the connection between the organized crime and terrorist organizations is a menace by itself.

Through its defining characteristics (violence, menace of violence, planning, premeditation, financing, training, etc.) the terrorism may be taken as organized crime, but it is actually just a form of manifestation of it. Because of the illegal actions, we may say that the organized crime is *the forerunning factor and the support element* of the terrorism which, at its turn, is a particular form of the extreme violence.

3. International and national legal framework for combating terrorism

European Union policies on Justice and Home Affairs (JHA) have as a goal maintaining a justice and security area on border control, crime combating or judicial and police cooperation, as well. In accordance with the EU framework, national regulations have some specific elements, as presented in Table 1 and Addendum 1. Specific aspects of the international law protection against hostage taking are presented in Addendum 2.

Table 1

A. European Union specific legal framework

Name of the act	*Interest area*
Maastricht Treaty	• Police cooperation on EU territory • The security policy of the member states may go on as previous, except when it is against common decisions • Instrument for *combating terrorism, cross-border crime and illegal immigration*
Lisbon Treaty	• Establish obligations for EU member states to support and strengthen police actions and other relevant authorities, as well as *their cooperation in order to prevent and combat criminality that affects two or more countries, and all the crime forms that affect EU security policies.*

[3] News Bulletin regarding analysis of the international terrorist phenomenon and transborder organized crime, Romanian Gendarmerie's Special Brigade for Intervention, no. 2, 2010

Prüm Treaty	• States as compulsory that police forces have at their disposal practical methods to act fast and efficient during their fight against the three pillars. • Establish the necessity of common patrols or other type of intervention, including air-marshals, mutual support in cases of big events and cross-border intervention when an immediate danger may affect life or public security
Decision 2002/475/JHA of the EU Council	***Terrorist crimes*** are considered to be, under specific circumstances, the following: • Taking life of a person • Seriously injuring a person • Kidnapping or hostage taking • Massive destruction of some governmental or public plants, transportation system, infrastructure, including IT systems, oil platforms on the continental shelf, public place or private property, which may endanger human lives or to cause serious economic losses • Hijacking planes, ships or other means of transportation for passengers or goods • Making, possession, buying, transportation, providing or using fire weapons, explosives, nuclear, biological or chemical weapons, as well as research and development of such means • Release of dangerous substances or set up of fires, flooding or explosions which may endanger human lives • Disturbance or interrupting water supplies, electricity or any other fundamental resource which may affect or endanger human lives.
	B. France specific legal framework
Name of the act	***Interest area***
Criminal Code Criminal Procedure Code	There are considered to be terrorist acts any action committed willingly, individually or in a group, and refers to public nuisance, by the mean of intimidation or terror, respectively: • Intended damage of life, intended attacks against any person's integrity, kidnapping and hijacking planes, ships or other means of transportation • Stealing, blackmail, destruction or damaging, as well as cybercrimes, when committed for a terrorist purpose • Making or holding explosives • Release into the atmosphere, soil, underground or waters (including the sea) of a substance which may endanger people's, animals' or environment's health • Production, selling, importing or exporting of explosives

	• Buying, holding, transporting explosive substances or devices made of these • Illegal depositing, holding or transporting weapons or ammunition • Joining a terrorist group • Financing, providing, collecting or managing funds designated to terrorist usage
	C. Romania specific legal framework
Name of the act	***Interest area***
Law 535/2004 regarding prevention of and combating the terrorism	Terrorism means all the actions and/or menaces that generates public danger and affects national security, having the following characteristics: • Are intentionally made by terrorist entities, reasoned by extremist conceptions and attitudes, hostile to other entities, against which they act violently or destructively • Have as main goal specific political requests • Regard human and/or material factors, parts of authorities, public institutions, civil population or any other segment of these • Generate strong psychological impact over population, designated to draw attention on their goals • Partnership for committing terrorist acts
Criminal Code, Air transportation Code, specific laws	• Financing terrorist acts • Menace with a terrorist goal • Alert with terrorist goal • Crimes against persons under international protection

4. Cause and risk in the analysis of the terrorist type critical incidents

The events on 9/11 have showed that terrorist organizations have the capability to act at international level and to organize devastating attacks at a global level. For this purpose, al-Qaeda needed a large maneuver area, both for finding financing resources, members' training, but especially for detailed preparation of the action and fighters cover. Freedom of movement is essential for terrorists, especially for the groups that act across multiple regions.

Air pirates involved in the above mentioned events are the best proof. During the months before the events, more of them travelled a lot, in order to organize themselves for the attacks. They trained in special camps in the Arab territories, attended flying courses within the US and Europe and prepared the smallest detail, gathering information in different areas.

The security intelligence system, mentioned by Reason[4], is extremely important in terrorist attacks construction as well, being known that *who has the information, masters the situation*. So, we

[4] Reason, J., *Human error,* Cambridge, Cambridge University Press, 1990, pg. 112

can assess that in order to ensure success for their intended actions, there is a tendency of cooperation between terrorist organizations, especially the ones with common ideological and religious view[5].

Globalization of the terrorism is followed by an extension of its areas of action, keeping though the intervention methods: assassinations, kidnapping, bomb attacks, armed attacks, threatens, etc.

In order to highlight the specific management of such situations, we shall present two case studies, as synthetized in the Tables no. 2 and 3.

Table 2

THE ACTION OF THE FRENCH NATIONAL GENDARMERIE INTERVENTION GROUP – GIGN - DURING THE HIJACKING OF THE AIR FRANCE 8969 FLIGHT

Date	26.12.1994
Location	France, Marseille
Event	A plane of the Air France Company has been hijacked to Algeria, by terrorists of the Armed Islamic Group – GIA (Algerian terrorist organization)
Modus Operandi	Four GIA terrorists succeeded to board on the plain, an Airbus of the French company, disguised as airport security personnel - French minister of foreign affairs set up a crisis cell - French prime minister **E. Balladur** flew to Paris, from mountain resort Chamonix, minister of interior **Pasqua** came from the Ivory Coast, while minister of foreign affairs was leading the crisis cell
Reaction and incident management	- A quick decision to allow the plane to land in Marseille was taken - The Marseille Gendarmerie commander, **Alain Gehimm,** played as an intermediary between the authorities and the terrorists, speaking by radio from the control tower - There have been over 50 hours of negotiation - Release of all passengers was requested
Requests	- Release of some islamist terrorist leaders imprisoned in French detention centers - 27 tons of fuel, in order to fly to Paris
Materials used by the terrorists	- Explosives - 7.62 mm cal. assault rifles
Risks	- High probability of an Lockerbie type air disaster caused by the terrorists above French capital city - The plane was loaded with explosives, the terrorists' intention being to detonate it over Paris - Human resource cost among special forces was quite low
Consequences	- Following the intervention, all the 164 passengers were saved, and all the four terrorists killed

[5] From law enforcement agencies investigation and intelligence resulted that al-Qaeda traditionally gathered around fundamentalist terrorist organizations already existing, using their logistic networks as well (e.g. networks of organizations from Europe, Algeria, Egypt, Cashmere, south-east Asia – Malaysia and Singapore)

Observations	- Time Magazine considers that it has been the most important intervention in the history of terrorism - The assault teams managed to defeat the entire terrorist group, with hostages around, inside a very narrow space, without any innocent victim

Tabelul 3

ROMANIAN SECURITY FORCES ACTION DURING THE OPERATION "BUS"

Date	23.08.1981
Location	Romania, Timisoara
Event	Three men took as hostages the passengers inside a bus, intending to leave the country
Modus Operandi	Attackers got on the bus and seized the passengers
Reaction and incident management	- In the shortest time, there were alerted the 6th Border Company, the County Inspectorates of the Ministry of Interior in the area, the Border forces Brigade in Timisoara and the Timisoara Airport Guard Battalion - One assault group of the Special Unit of Antiterrorist Combat (USLA) has been sent from Bucharest to Timisoara
Requests	The armed terrorists requested that at the Green Forest to be waited by a helicopter and 30,000 $, otherwise they would start to kill passengers
Materials used by the terrorists	- The perpetrators had stolen the night before, three 7.62 mm assault rifles, three 7.65 mm pistols, six ammo full assault rifle magazines, six pistol magazines, three bayonets, three knives, one compass, 55 7.65 mm and 570 7.62 mm cartridges from a police station in Hunedoara county
Risks	- The incident caused a political crisis at national level, the authorities intending to hide the attack from the civil population
Consequences	During operation "BUS", six people have been killed, and other twelve have been injured
Observations	- The incident have been considered a terrorist act according to the international standards - The judicial authorities considered that the authors committed the following crimes: illegal border crossing attempt, public property larceny, illegal possession of arms and ammunition , robbery in public property damage, illegal deprivation of liberty, aggravated murder , serious injury , association to commit crimes. - The event highlighted real deficiencies on negotiating technique of those who managed the incident . -Authorities communication was extremely poor . - Security forces intervention methods was unfortunate . - Bus hijacking surprised authorities , who have acted with no standardized procedures to annihilate terrorists and for hush the event. - authorities have not publicly taken a failure to resolve the incident.

Conclusions and proposals

From the analysis of two case studies we can outline a series of conclusions and make some suggestions to improve the act of management. Case studies, both identified as critical incidents that resulted in hostage, offers prospects for specific and individualized analysis. It is imperative, as a result of such analytical presentations, to understand the practicability of implementing a viable and effective managerial process, adapted to critical situations.

The need for such management, based on credible solutions, lies in facilitating the management of critical situations, for the purposes of limiting the negative consequences on human and material factors.

The two case studies show that every incident is different and therefore the solutions are specific to action commander, the burden of having to decide what strategies and tactics will be chosen to resolve the incident. Tactics and techniques are adapted and updated according to operational requirements, which can not be applied „ad litteram", in each case action commander analyzing and acting on the principles: legality, proportionality and accountability.

The principles are based on experience and training in critical incident management and provides a set directions to follow for action commander.

Finally, effective management of critical situations implies to prevent failure of management actions to minimize the situations with great sensitivity, with the high risk or very high. In this regard, we propose an adaptive set of point solutions, namely the organization and operation of a command structure, a command point (C.P.) and critical incident management principles.

I. Command structure

Critical Incident Management approach requires three levels, as shown in Figure 1.

A. ***The strategic level***: set objectives to address the incident in accordance with law, awarded to the strategic command following tasks:

1. strategy development (political) resolution of the incident;
2. identification of resources (enough) for incident management;
3. setting (assignment) action commander;
4. overall supervision of the incident;
5. revision strategy (policy) as the incident progresses, or take an unexpected direction.

B. ***The operational level***: responsible for achieving the resolution which are set by the Strategic Command. It has the responsibility timing, location, conditions, techniques and tactics needed to resolve the incident. Operations Command has the following responsibilities:

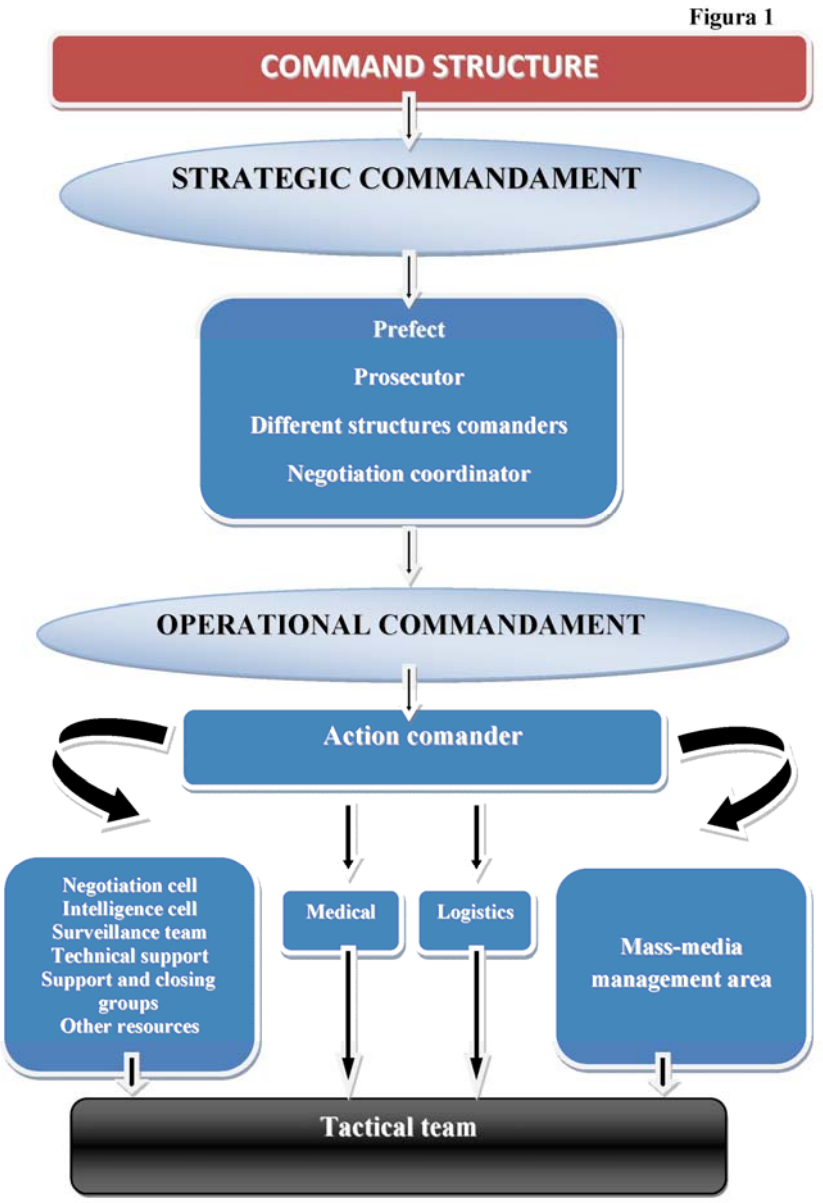
1. responsible for developing, coordinating, implementing and reviewing the Action Plan;
2. leadership and effective coordination of activities on site;
3. liaising between strategic and tactical elements necessary to resolve the incident;
4. monitoring and written records of course of action and decisions;
5. negotiate

C. *Tactical Level*: involves the application of specific components of interventions that aim to gain an advantage on the subject.

Tactical Command Tasks:

1. Action Plan implementation and enforcement of the particular area of competence, legality and accountability intervention;
2. enforcement intervention (last resort).

Figura 1



Critical Incident Management Principles

Figure 2 shows graphically how the integration of the principles in the management of critical incidents.

1. Location

On receiving the set signal announcing a possible critical incident (C.I.), have to determine the resources (human and material) that must be deployed on-site for research to confirm the incident nature and the place and the people who produce it (subject / subjects).

2. Evacuation

The necessity of assessing the degree of public disposal on the spot and its delimitation by analyzing the potential hazard presented by subject / subjects and risk assessment. In this respect, the degree and extent of evacuation should be revised as the incident progresses for varying threat.

3. Isolation

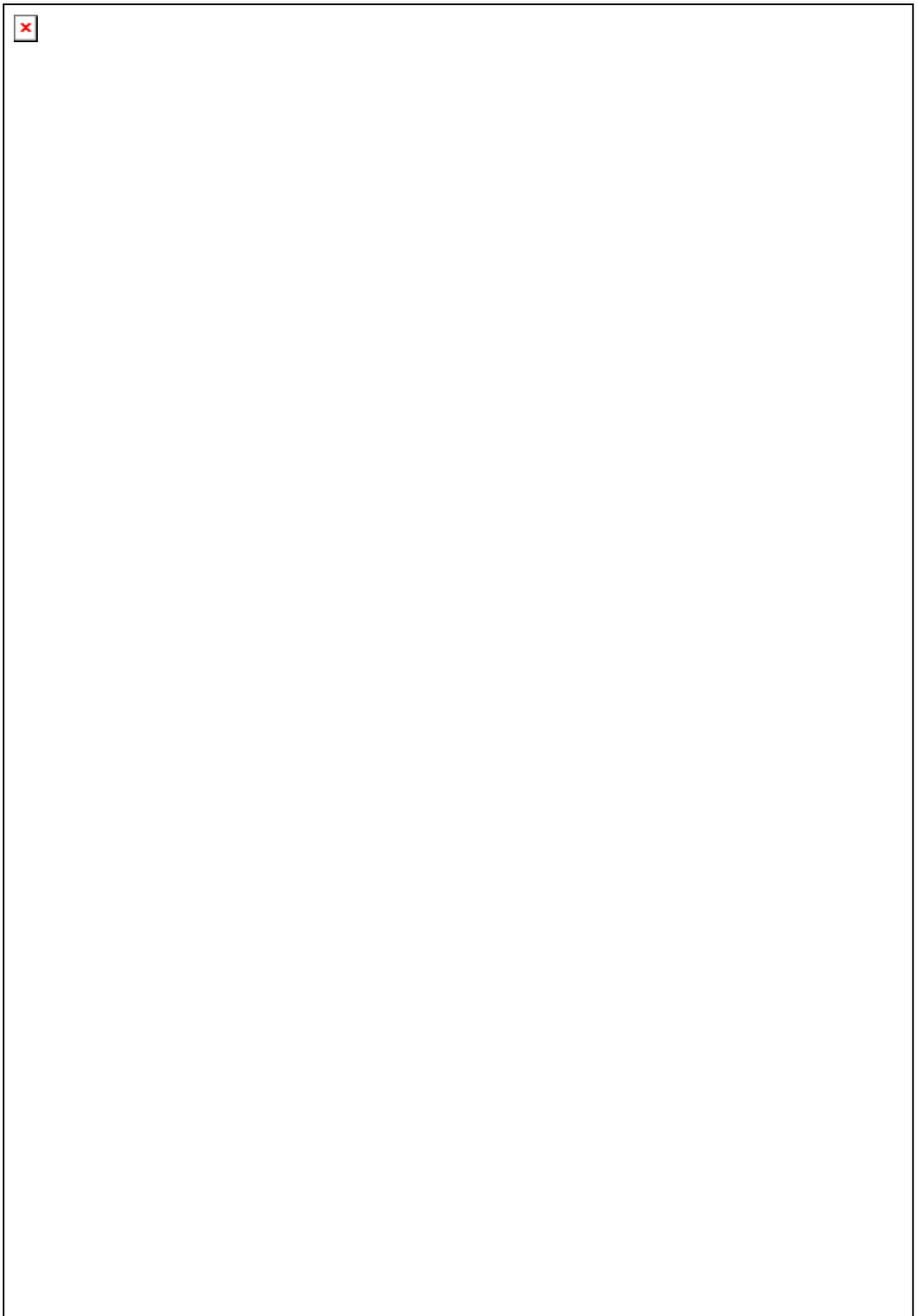
The subject must be isolated as quickly and deployed in a specific area (building, housing, etc..) for controlling the critical incident.

4. Limiting movement

It is vital to impose a degree of stability in the event of an incident (especially in the final stage). This principle has two advantages, namely reducing the risk to the public and gain time to develop the Action Plan.

5. Negotiation

Represents the work of specialist negotiator to guide and control concentrated in an apparent interaction conflicting wills. Negotiation activity is based on the use of rational arguments and psychological power of emotions, feelings and interests.

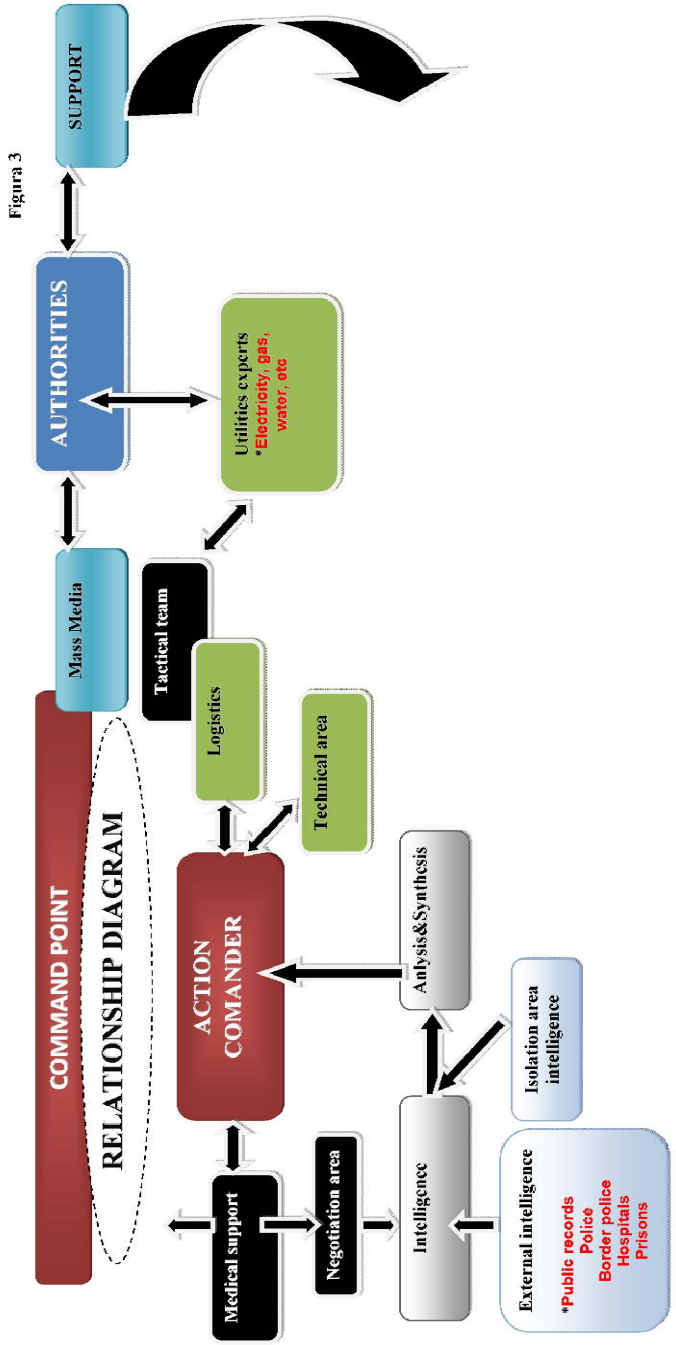


Managing and controlling the operation is performed in the Control Point (CP) which must meet the following requirements:

- secure position possible, but close enough from spot to actually be able to manage the incident;
- capable of housing for various components of the intervention: negotiations, investigations, research, information, technical department, specialists, etc.;
- means of communication to maintain links with strategic Headquarter and other components;
- personnel and logistical resources sufficient to perform duties;
- security measures and protection of the Control Point.

Chart Control Point that reflect these requirements is shown in Figure 3.

Figura 3


SUPPORT
AUTHORITIES
Utilities experts
*Electricity, gas, water, etc
Mass Media
Tactical team
Logistics
Technical area
COMMAND POINT
RELATIONSHIP DIAGRAM
ACTION COMANDER
Anlysis&Synthesis
Isolation area intelligence
Medical support
Negotiation area
Intelligence
External intelligence
*Public records
Police
Border police
Hospitals
Prisons

ANEXA 1

INTERNATIONAL LEGAL PROTECTION AGAINST HOSTAGE TAKING SITUATIONS

In international law the taking of hostages is governed by the International Convention Against the Taking of Hostages, adopted by UN General Assembly on 17 December 1979. For the purposes of the Convention, commits the crime of hostage taking anyone kidnaps a person"s freedom or threaten to withhold and death, injury or continue to hold, to compel a third party (state, international, intergovernmental, corporate or physical) to perform a specific act or refrain from it.

Constraining action or omission of legally appears as an explicit condition of personal freedom .

The Convention provides that a prerequisite - a sine qua non - the signatory states to urgently launch an international cooperation on the issue and adopt effective measures to prevent, combat and punish acts of hostage taking. According to the Convention, taking of hostages is an act of international terrorism.

And at the regional level were adopted to prevent and suppress acts of aggression with reference to the hostages. Thus, we remember :

- ✓ *Convention to prevent and suppress acts of terrorism adopted in Washington DC (02/02/1971) by the Organization of American States ;*

- ✓ *European Convention for the Suppression of Terrorism Strasbourg (January 27, 1977).*
- ✓ *Washington Convention to prevent and suppress acts of terrorism) qualifies as a crime these acts of international terrorism: kidnapping, murder, any damage to life and physical integrity of persons.*

Other conventions condemning the terrorist act of hostage taking :

- ✓ *International Convention against the Recruitment, Use, Financing and Training of Mercenaries (UN, 1979);*
- ✓ *Convention on preventing and punishing crimes against internationally protected persons including diplomatic agents (ONU/1973);*
- ✓ *United Nations Convention on the security staff and associated personnel (New York, 1994).*

ANEXA 2

CRIME LEGISLATION HOSTAGE TAKING UNDER THE LAWS OF SOME COUNTRIES

Republic of Moldova

(Chapter XIII, Crimes against public security and public order, Article 280 **)**

Making or keeping a person hostage in order to force the state, international organization, legal or natural person or group of persons to commit or refrain from committing any action as a condition for the release of the hostage is punishable by imprisonment 5 to 10 years.

Taking hostages committed :
- repeatedly
- on two or more person
- against child knowing that is legally minor
- two or more offenders
- for profit
- with violence dangerous to life or health
- using weapons or other objects used as weapons ,

shall be punished with imprisonment from 12 to 20 years or with fine .

Taking hostages committed :
- by an organized criminal group or criminal organization
- with serious bodily injury or health
- with recklessly causing the victim's death
- challenge other serious consequences

shall be punished with imprisonment from 16 to 25 years.

A person who, voluntarily or on government officials requirements, released the hostage, shall be exempted from criminal liability if their actions do not contain another component of crime.

Republic of Macedonia

(Criminal Code, Article 421)

(1)A person who kidnaps another person and threatening death, injury or deprivation of liberty, intended to convince a state or international organization to do or not do a certain thing, provided the hostage release, will be punished at least one year in jail . (2) If the cause of action in paragraph (1) kidnapped person dies, the perpetrator will be imprisoned at least five years.
(3) If during the action of (a) the perpetrator intentionally killed the kidnapped person, shall be imprisoned at least 10 years or for life

Latvia

(Penal Code, Section 154)

For a person who holds another person as a hostage, if added, and the threat of taking life, causing further injury or deprivation of liberty in order to persuade a state, international organization or group of persons to do or not do something This condition for the hostage release, the sanction imposed shall be imprisonment between 3 and 12 years, with or without confiscation of property. For a person who commits the same offense against a minor, or relapse, the consequences will grow, the sentence is deprivation of liberty between 5 and 15 years with confiscation of property.

Germany
(Penal Code, Section 239)

Whoever kidnaps or deprive another person in the freedom in order to convince or persuade others through threats of death or serious injury or deprivation of liberty for more than a week to do, agree or not to do (with) a certain thing, will be punished with imprisonment for at least five years.

Australia
(Criminal Code, abduction of UN staff and associated personnel)

A person is guilty of a misdemeanor if: - retains another person without its consent and that person is a UN official - UN person during a specific law enforcement missions - UN person is detained for the purpose: to obtain reward or to be held hostage, or being taken or sent outside the country.

War crime - taking hostages
It commits an offense if:
(1).
(a) retain or take hostage one offender or more persons,
(b) the perpetrator threaten to kill, injure or continue detention,
(c) the perpetrator intends to convince the government of a country or an international organization a person or group to act or not act in a certain direction as an explicit or implicit condition for the safety or release of the victim,
(d) the person or persons not actively taking part in hostilities,
(e) the offender knows or is indifferent to the actual circumstances establishing that the person not taking an active part in hostilities,
(f) occurs in the context of criminal behavior and is associated with an armed conflict is a conflict International. The penalty will be imprisonment on 17 years.
(2) For the avoidance of doubt, a reference in section (1) the person or persons not taking active part in hostilities shall include reference to:
(a) a person or persons who are hors de combat, civilians, medical personnel or Judaism does not actively take part in hostilities.

Armenia
(Penal Code Article 218)

Taking hostages in order to force the state organization or a citizen or not a given action provided the hostage issue, is punished with imprisonment from 5-8 years.2. The same actions done:

1) several people who have a prior understanding,
2) using violence dangerous to life or health,
3) using a weapon or any object as a weapon,
4) against a minor;
5) against a pregnant woman clearly visible,
6) against a helpless people,
7) against one or more persons
is punishable by imprisonment for 6-10 years.

The actions referred to in Part 1 and 2 of this article have been committed :
1) by an organized group,
2) led to death through negligence or impairment of health,
is punished with imprisonment from 8-15 years;

Person who voluntarily surrenders to demands and released the hostage is relieved of penalties if their actions do not contain other crimes

THE ECONOMICS OF TRANSFER PRICING

Olivia CHITIC[*]

Abstract
A transfer price is a price set by a taxpayer when selling to, buying from, or sharing resources with a related party. Transfer pricing can affect every company with international affiliates as it offers planning opportunities, but it also requires various compliance obligations depending on the requirements of each jurisdiction. Tax authorities have been faced with the increasing challenge of decreased corporate tax revenue during the recent recession period and they are seeking to prevent erosion of the tax base. In this context, both the taxpayers and the tax authorities are required to analyse whether the transfer prices used in related party transactions are at market value, i.e. whether these transactions would have been undertaken between independent parties. In doing so, they must take into account a wide range of economic circumstances, fiscal legislation and law requirements. This article has a theoretical nature and is designed to outline how the recent academic literature presents the principles of transfer pricing and their complexities that lead to the necessity of a multi-disciplinary approach. From this perspective, the article presents how the transfer pricing concept was developed from both a tax and legal perspective and it focuses on the economic theory that can be used when dealing with a fiscal concept. Specifically, the article presents on the one hand the economic circumstances that the OECD presented as having an impact on dealings between related parties and, on the other hand, the general concepts of economic theory that may be relevant in a transfer pricing economic analysis. The article also outlines a practical example of how economic circumstances can influence related party transactions in the financial services industry.

Keywords: *price, pricing transfers, multinational firms*
JEL Classification: E31, F32

I. Introductory theoretical aspects of transfer pricing

Transfer pricing represents a system of establishing the prices used in transactions performed between the subsidiaries of a multinational enterprise or between a subsidiary and the parent company[1]. It is often the case that these prices are deliberately chosen in order to minimise the fiscal burden of the multinational enterprise at the global level. In this respect, the costs may be overestimated in a country where the corporate income tax rate is high so that the profits can be directed towards a country characterised by lower corporate income tax rates. In addition, significant inter-company transactions are performed with related parties located in tax havens, low tax jurisdictions or entities that benefit from special tax regimes and, as a consequence, the tax base of various jurisdictions is eroded.

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[*] Ph.D. candidate, Centre of Financial and Monetary Research „Victor Slăvescu". The study is elaborated within the frame of the project "CERDOCT – PhD scholarships to support doctoral research in technical and human areas, in environmental health, in national, European and global legislation with eco-economic and socio-economic impact", ID 79073, under the coordination of Professor Ph.D. Elena Pelinescu.

[1] These types of transactions are usually called "**inter-company transactions**" or "**related party transactions**" or "**controlled transactions**".

Transfer pricing is thus the area of tax law and economics concerned with ensuring that prices charged between related-party companies (associated enterprises[2]) for the transfer of goods, services and tangible or intangible property are set at market value. The concept of transfer pricing is organised around the *"arm's length principle",* which requires that prices charged between associated enterprises be equivalent to those that would have been charged between independent parties in the same circumstances. Although the principle can be simply stated, the actual determination of arm's length compensation includes the analysis of the type of transaction under review, as well as the economic circumstances surrounding the transaction.

The Organization for Economic Cooperation and Development ("OECD") refers to this principle as "*the international standard that OECD Member countries have agreed should be used for determining transfer prices for tax purposes*"[3] and declares that "*the arm's length principle puts associated and independent enterprises on a more equal footing for tax purposes. It avoids the creation of tax advantages / disadvantages. In so removing these tax considerations from economic decisions, the arm's length principle promotes the growth of international trade and investment*"[4]. In this regard, one should remember that OECD was organised in order to set up policies within its member countries that would:

1. Achieve the highest sustainable economic growth and employment, and a rising standard of living in member countries;
2. Result in sound economic expansion; and
3. Contribute to the expansion of world trade on a multilateral, non-discriminatory basis.

An alternative approach to the arm's lenght is the *global formulary apportionment*, which represents "*the allocation of the global profits of a multinational group on a consolidated basis among the associated enterprises in different countries on the basis of a predetermined formula*"[5]. However, the OECD members strongly support the arm's lenght principle.

The core of any transfer pricing approach is that all parties to a transaction seek to maximise their profits. Even if this is not achieved in the short- or medium-term, a normal business aims to generate long-term profits in order to invest and grow. An economic profit is more than the basic return needed to perform its main activities, it takes into account the profit necessary for future capital investment and tequity holders return on investment in the business. In microeconomic terms this is the fundamental assumption to the viability of a business's prospects. Generally, the level of profit depends on:

1. The functions the business performs;
2. The risks assumed by the business; and
3. The assets utilised in the business.

In this context, the main aim of transfer pricing for tax purposes is to identify third party comparables, so that a benchmark price can be used to identify what is the price that should be

[2] **Associated enterprises** or **related parties** should be defined to include two or more persons that are owned or controlled, directly or indirectly, by the same interests. A good indicator of such a relationship is the ability to set transfer prices that differ from market prices.

[3] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, July 2010, page 23.

[4] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, July 2010, page 34.

[5] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, July 2010, page 26.

charged between related parties. The comparable transactions may be either "*internal comparables*[6]" or "*external comparables*[7]" and any resulting independent prices obtained by this method are referred to as "*comparable uncontrolled prices*". This is the best way of benchmarking, but in practice, other methods may be used in order to determine an appropriate price level: *resale price method; cost plus method; profit split method; transactional net margin method*. Looking on the market for similar prices used by competitors on similar transactions within industry or on profit margin indicators and accounting results is at the core of all these transfer pricing methods.

In practice, in order to identify appropriate comparable data, taxpayers have to conduct a technical analysis of the prices used in their transactions and this requires a mix of tax, legal and economic circumstances. Specifically, this involves the following considerations:

An analysis of the functions that the business performs;

1. The risks attaching to the functions and activities;
2. The nature of the assets, including ownership of intangibles (patents, trademarks, brand names, know-how, etc.) and royalties paid or received;
3. The contractual terms of any arrangement, business policies, flows of transactions and invoice flows; and
4. Economic background, including geographic location, market performance, competition and business strategies.

The aim of this technical analysis of the above factors is to inquire if the prices used in a controlled transaction are, within a certain range, at market value. The consequences if the transfer prices are not set at arm's length (at market value) are that the tax authorities have the right to adjust the revenues and expenses of the taxpayer so as to reflect the market value so that the country collects its fair share of tax revenue from economic activities conducted within its borders.

Notwithstanding the above, the tax authorities are bound to be aware of businesses making losses in their commercial relationships with associates and multiple years of data should be used to take account of business cycles.

In many cases, tax adjustments lead to controversies and implications beyond taxation must be considered for establishing the results (the effects of corporate restructurings, changes in the business models, allocation of resources). These issues are debated not only between a tax authority and a taxpayer during a tax inspection and in court, but also between tax authorities of different jurisdictions, for example, under a mutual agreement procedure. Thus, transfer pricing is an interdisciplinary area, where:

- tax lawyers advocate the legal parameters to which a transfer pricing policy must respond and which may be relevant in case of transfer pricing litigation;
- accountants transpose commercial performance into the financial results of separate entities within a multinational enterprise;
- economists deal with the environment in which various types of commercial organisations perform their activities and explain their performance results.

As a closing remark of this introduction section, it should be stated that the arm's length principle has been a well-known principle in the developed countries since the 1960s, but was mentioned in Romania for the first time in 1994 and expressly introduced in 2004. An important step

[6] Internal comparables are those experienced by one of the related parties in its dealings with third parties.

[7] External comparables are those transactions or commercial relations between third parties which are in the public domain and can be pointed to as a direct comparison.

in the development of Romanian transfer pricing legislation was the introduction of formal transfer pricing documentation requirements following Romania's accession to the EU in 2007[8]. Although Romania is not a member of the OECD, its tax legislation took a step forward and expressly stipulated that in the application of the transfer pricing rules, the tax authorities will also consider the *Transfer pricing guidelines for multinational enterprises and tax administrations* issued by the OECD ("OECD guidelines").

In line with these international guidelines, Romanian tax law states that all transactions between related parties should be carried out at arm's length and, in order, to assess compliance with the arm's length principle of the related party transactions, taxpayers are required to prepare a transfer pricing documentation file. Such documentation requires the taxpayers to disclose the organisational, legal and operational structure, the business strategy, the economic circumstances, ownership of assets (tangible or intangible), a list of advanced pricing arrangements entered into by the associated enterprises or at the group level, as well as country-specific details of related party transactions and the method chosen for determining the transfer prices.

This paper presents some theoretical and practical aspects of transfer pricing and the role of economic analysis and related economic principles when elaborating or reviewing the factors affecting pricing decisions of multinational companies. The paper is organised into three parts, as follows: the first part presents general theoretical aspects of transfer pricing; the second part relates to the economic environment and its impact on transfer pricing and includes a specific case of the financial industry, while the last part presents the conclusions.

II. The economic concept of price and references to legislation

In general usage, price is the quantity of payment given, that a purchaser is willing and may offer to the producer in exchange for goods or services. The economic theory of price asserts that the market price reflects interaction between two opposing considerations. On the one side are demand considerations based on marginal utility, while on the other side are supply considerations based on marginal cost. An equilibrium price is supposed to be equal to marginal utility (counted in units of income) from the buyer's side and marginal cost from the seller's side.

In the business environment, setting the price of a transaction is the outcome of a dynamic economic process that manifests in the different forms of business organisations. In the current environment of increasing international economic integration, the economic analysis of prices should provide historical and statistical evidence that explains the link between continuing integration and the achievement of higher income levels in all countries participating in the international economy.

The real determinants of economic integration, such as economies of scale and externalities (positive or negative), are taken into account when establishing rational criteria for pricing strategies. As such, it is essential before evaluating particular pricing decisions or results to identify and explain the main elements of the business organisation as well as the trade, financial, corporate, tax, legal, macro and microeconomic factors underlying the creation and existence of multinationals.

The basis of the price system is the complex interaction of the main production factors: *labour*, *land* and *capital*, technologies and more recently, information and the use of these factors in the economic process. Such interactions are outlined by various economic theories, such as the

[8] Order 222 /2008 on the content of the transfer pricing file

Keynesian theory, the neoclassical theory, the new Keynesian theory, and real business cycles theory and are synthesized on the macroeconomic models for the general market equilibrium[9] (and hence the equilibrium price) as the outcome of the interaction between good and services market, the labour market and the money market.

To emphasise the importance of the economic analysis from a transfer pricing perspective, a United States economist, Valerie Amerkhail, states that "*the unrealistic goal of many tax administrations, [...] is to force on all controlled relationships the economic outcome predicted by the theory of perfect competition under long-run equilibrium. A major role of an economist is to provide continual reminders that real companies, whether controlled or uncontrolled, exist in the short run, where there is always disequilibrium and competition is nearly always imperfect*".[10]

Being in fact a way of setting specific prices (i.e. those prices used in transactions between associated enterprises), transfer pricing must take into account and differentiate the general economic background from the specific tax interests of the multinational enterprise. Thus, transfer pricing policies should be in line with business cycle fluctuations, pricing strategy, cost structure, the location of the activities and the impact of macroeconomic policy of a country.

The legislation regarding transfer pricing, which is in line with the general transfer pricing guidelines issued by OECD, contains a number of statements that help both taxpayers and tax authorities to acknowledge that changes in economic conditions or business strategies may render obsolete the transfer pricing arrangements that were previously at arm's length.

One of the most important principles of the OECD guidelines is that *profits of affiliated companies should reflect functions, risks and economic circumstances*. These profits may vary across different markets even for transactions involving the same property or services, however. The OECD guidelines state that in order to achieve comparability it is necessary that the markets in which the independent and associated enterprises operate do not have differences that have a material effect on price or that appropriate adjustments can be made in order to take account of these differences. It is further stated that it is essential to identify the relevant market by taking into account available substitute goods or services and that the economic circumstances should be considered in order to determine market comparability.

Among relevant economic circumstances provided by the OECD, the following are included: the geographic location; the size of the markets; the extent of competition in the markets; the availability of substitute goods and services; the levels of supply and demand in the market as a whole and in particular regions; consumer purchasing power; the nature and extent of government regulation of the market; costs of production, including the cost of land, labour and capital; transport costs; the level of the market (e.g. retail or wholesale); the date and time of transactions, and so forth[11].

As regards the business strategies that can influence the degree of comparability of uncontrolled prices[12], one should take into account many aspects of an enterprise, such as innovation

[9] The general equilibrium is defined as being the economic situation in which all markets are simultaneously in equilibrium, specifically when the prices and the quantities do not change*, according to Macmillan dictionary of modern economics, CODECS Publications, 1999, pg.133.*

[10] "The Role of an Economist in Transfer Pricing Audits and Litigation", *Transfer Pricing: The International Tax Concern of the '90s,* Prentice Hall Law & Business (1991)

[11] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, July 2010, page 49

[12] Uncontrolled prices are those prices used in the transactions between independent enterprises.

and new product development, degree of diversification, risk aversion, assessment of political changes, input of existing and planned labour laws, duration of arrangements, market share and other factors with a bearing upon the daily conduct of business.

By recognising that the above economic factors and differences in business strategies should be taken into account when analysing the reasonableness of transfer prices, the OECD guidelines provide both taxpayers and tax authorities with the possibility of conducting complex transfer pricing analyses and broadens the transfer pricing area to incorporate the theories of macro and micro economics.

In our view, the concrete connection between the economic circumstances presented in the OECD guidelines and the economic theory is outlined in the table presented below:

Table 1 – Applicability of economic theory in dealing with transfer pricing issues

Economic circumstances in the OECD guidelines	**Economic theory**
Geographic location	Location theory, Open vs. closed economy
The size of the markets and market share	Supply and demand analysis
Competition in the market	Elasticity of prices, market equilibrium
Consumer purchasing power	Inflation (monetary policy)
Nature and extent of government regulations	Fiscal policy, government governance
Costs of production	Productivity, economies of scale
Date and time of transactions	Business cycle theory
Availability of substitute goods and services	Supply and demand analysis, market equilibrium
Innovation and product development	Economic growth theory (technological change), strategic management
Degree of diversification	International trade, investment theory
Risk aversion	Financial markets theory, decision theory
Input of existing and planned labour laws	Unemployment theory, demography issues
Duration of arrangements	Economic growth, growth accounting issues

As a conclusion, it can be mentioned that tax specialists (*e.g.* tax advisors, tax specialists of multinational companies, representatives of the tax authorities, academic professionals) should be well equipped with the core economic theories before evaluating particular pricing decisions and should be able to apply them in practical situations and defence the positions they take in evaluating the pricing policy of a multinational enterprise.

III. The impact of the economic environment on transfer pricing

Economics is a social science concerned primarily with those economic problems whose solutions involve the cooperation and interaction of different individuals. It analyses the production, distribution, and consumption of goods and services and aims to explain how economic agents

interact. For the purpose of analysing transfer pricing issues, the economic environment should be depicted in its main components that have an impact on the setting of prices: employment, consumption, production, investment, labour supply and demand, demography, international trade, inflation, economic growth, business cycles, monetary and fiscal policy. From a business perspective, the economic environment may lead to changes in the unemployment rates, levels of personal income taxes and corporate revenues, production line reductions, plant closures, declining sales, operating losses and reorganization costs, technological changes and improvements in quality of products, the pollution taxes or the environments protection regulations.

The current global economic environment is characterised by a very slow and uncertain recovery from the recent global recession[13] and this significantly impacts on the profitability of nearly all industry sectors within both the developed and developing countries. These economic conditions represent a catalyst for business restructurings whereby functions and risks are transferred between various companies of a multinational enterprise in order to relocate business operations in cost-advantageous locations (low labour costs and tax rates, market growth potential, etc.). In Romania, for example, several multinational companies set up shared service centers that provide administrative services (accounting services, IT data centers, call centers) for other subsidiaries in the region or even on a global basis.

In these circumstances the proper application of the arm's length principle does not benefit from the situation of relative economic equilibrium; thus, price-setting policies to present the true market value of a given transaction is limited. In addition to that, the "*caeteris paribus*" principle of economic theory states that the factors remain constant or do not affect the outcome when investigating an economic process or the interference of certain variables.

This assumption is, however, challenged in the real activity. The mechanism of setting the arm's length price should be adjusted, therefore, by a taxpayer or tax authority from a "*caeteris paribus*" context to the uncertainty of the current changes in the economic environment and should advocate that it is unreasonable to assume that taxpayers will act in line with their prior economic behaviour. This would be the case if hindsight is applied: technically, the tax authorities are not allowed to use hindsight in considering the arm's length nature of a past transaction. The rational argument is that taxpayers make decisions based only on information available to them at the time of decision. In related-party as well as in unrelated party dealings, hindsight could always allow some parties to enter into a more profitable situation. The OECD guidelines are clear, however, that hindsight must not be used retrospectively regarding transfer pricing audits.

Special considerations for financial services industry. Further on, an example of how the economic circumstances can be inferred into the analysis of transfer pricing issues is presented and also the economic theory that can be used when analysing intercompany financing and the related arm's length interest rate.

In the financial services industry, credit institutions all over the world face market conditions that are not functioning as theory assumes and they have built a ring fence against these adverse market conditions. For example, in Romania there has been a case where a credit institution sold to a non-Romanian related party a part of its loan portfolio in order to decrease the domestic regulatory

[13] According to the European Central Bank Monthly Bulletin issued in February 2011, "*the recovery in the global economy is continuing and becoming increasingly self-sustained…. At the same time, the strength of the recovery differs across regions*".

constraints and costs. The loans subject to the transaction were granted in a period of strong economic growth, hence, they were supposed to yield a high return, but in the recession period the quality of the portfolio decreased. In these circumstances, it was hard for the Romanian credit institution to perform the sale on the market. Still, in order to be able to perform the sale at market value, the Romanian credit institution needed to request that the parent company issue letters of guarantee in its favour. Thus, from a simple analysis of the level of the market interest rate, it was mandatory that the transfer pricing policies of this credit institution include the analysis of the letters of guarantee fees. While it is possible to use normal interbank market rates in the analysis of the transfer of the loans, a more complex set of indicators may be used for the analysis of the guarantee. This involves:

Step 1: evaluate whether the loan is characterized as a performing loan;

Step 2: evaluate the credit worthiness of the borrower (the customer of the Romanian credit institution);

Step 3: identify reference interest rate;

Step 4: establish credit rating of the Romanian credit institution;

Step 5: use the credit rating of the parent company that issued the letters of credit;

Step 6: establish the final credit spread by taking into account the outcome of all the above steps.

Tax authorities currently take the position that the individual rating of a group borrower should be used in place of the group's credit rating in determining the arm's length rate of interest. This interpretation may lead to strange results, as the financial positions of individual companies may exclude them from obtaining external funding on a stand-alone basis[14]. Hence, the question arises as to whether tax authorities may nevertheless ignore this fact and insist on looking at individual positions. Companies now have the task of developing a defence file that is sufficiently convincing in showing that the group's credit rating (and corresponding interest rates) is in line with the intercompany interest rates and is also relevant for determining individual borrowing capacities.

In order to accomplish this task, taxpayers should determine the correct level of the market rates. To this end, they should analyse the liquidity of the credit markets and they may use the monetary policy theory. One may observe how the central bank of a given country purses the monetary policy and the tools it uses in order to implement the policy: interest rates, reserve requirements, open market operations, lending and deposit facilities, refinancing operations, etc.

For example, the European Central Bank presents[15] in detail the external environment of the euro area, the monetary and financial developments as well as the evolution of the prices, costs, output, demand and the labour market in the period under review. From such information, which is developed and analysed by the European Central Bank using economic theory, one may have deducted that in the middle of the financial crisis, the interbank lending market dried up and interbank lending interest rates increased significantly. The increased interbank rates were accompanied by a decrease of the levels of risk that banks would accept. At the same time, credit ratings of firms, both financial and non-financial, decreased significantly as the possibility of

[14] Isabel Verlinden, Patrick Boone and Christopher Dunn - *Transfer pricing practice in an era of recession*, International Transfer Pricing Journal September / October 2009

[15] Monthly Bulletin on February 2011 published by the European Central Bank

bankruptcies increased. All these factors resulted in extreme increases in the risk premiums faced by nearly all companies.

One impact of these changes in the financial market on intercompany transactions is that companies have looked more and more towards intercompany lending as an alternative to borrowing at high rates of interest from banks or other financial institutions. In the international market, but also in Romania, it can be noticed that in practice special cash management products have been developed in order to manage the liquidity and financing needs at the level of multinational enterprises, with the most important of such product being *cash pooling*. This product is defined as a centralised liquidity management mechanism so as to achieve a more efficient management of liquidity in terms of cost and control by centralising the excess liquidity of the participating companies in a joint bank account and, concurrently, by financing those entities that need temporary liquidity.

The prices (interest rates) used for such an inter-company product have special features and cannot be compared with the prices used by credit institutions when lending to companies. This is because the multinational group as a whole has the aim to finance the income generating activities of its various subsidiaries and it does not need the complex risk assessment mechanisms and capital requirements that a credit institution usually has to cover from the interest income it obtains. At this point, the economic theory could explain the use of a certain fixed interest rate for financing granted to all subsidiaries from the centralized bank account (which would normally pay different interest rates due to their individual credit rating) by the financial markets theory or the investment theory. It could be shown that the interest rate used in the transaction is not a mere price that can be compared with the other interest rates that the market shows for transactions between independent parties: by economic modelling it can be shown that it is a price paid for the overall capital accumulation of the multinational enterprise, whereby the investments in fixed capital assets bring significant output benefits in the future.

IV. Conclusions

This article aims to present the interaction between the transfer pricing concept developed by the OECD only for fiscal purposes and the more general economic (price) theory. Prices are measures of interaction between the supply and demand side of the economy and not in each and every case do they reflect the market value of a transaction.

It is important to outline that the transactions between enterprises that have a common interest have to be analysed more closely, because such transactions may have an adverse fiscal impact. Jurisdictions agreed that they have to defend their sovereignty to raise taxes and they agreed to develop anti-avoidance rules for tax base erosion. This is what led to the transfer pricing theory.

However, because the transfer pricing concept has been developed as a pure fiscal concept, the OECD and, subsequently, more and more tax authorities, developed a framework for analysing if the prices used in transactions between related parties are at arm's length. This framework uses several methods, *i.e. comparable uncontrolled prices, resale price method; cost plus method; profit split method; transactional net margin method,* in order to inquire if the prices used in a transaction are, within a certain range, at market value.

These methods are comprehensive and they covered until the recent years the requirements of the taxpayers and of the tax authorities. However, due to the last years of economic difficulties the

taxpayers entered into more complex inter-company transactions and faced significant challenges from the tax authorities who actively seek to prevent the erosion of the tax base. That is why, a tax professional either being on the taxpayer or on the tax authority side, needs to go beyond the fiscal concept and bring sound economic arguments for any pricing decision under scrutiny.

As we presented in this paper a link between the fiscal side of the transfer pricing and economic theory can be made, so a tax specialist must use sound economic theory like location theory, supply and demand analysis, and decision theory and whichever theory that combines micro and macroeconomic elements that is suitable in explaining the underlying process that lead a group of companies to use a certain price in their inter-company transactions.

The case study presented, with a particular focus on the Romanian market, highlights that credit institutions are selling to non-Romanian related parties part of their loan portfolios in order to decrease the domestic regulatory constraints and costs and are looking more and more towards intercompany lending and developing special cash management products in order to manage liquidity and financing needs.

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MONETARY POLICY IN THE EU NEW MEMBER STATES IN THE CONTEXT OF GLOBAL ECONOMIC AND FINANCIAL CRISIS - POSSIBLE LESSONS

Alina Georgeta AILINCĂ*

Abstract
The current global economic and financial crisis has produced numerous anomalies at both market level and especially at the national and global macroeconomic situation level, switching the interest of macroeconomic policies managers from the inflation control to the fiscal-budgetary deficits control. In this context, the paper intends to monitor the developments in monetary policy, especially at the level of new EU member states, in order to discover the implications of the crisis on the monetary policy conduct. Furthermore, the study tries to identify o series of arguments for the repositioning the role of monetary policy in the current socio-economic landscape.

***Keywords**: monetary policy, EU New Member States, economic and financial crisis*

1. Introduction

As a result of global economic and financial crisis, both the old member states, and especially the new EU member states (NMS) were strongly affected, currently continuing to undertake a series of measures to support economic recovery process. In the context of a moderate domestic demand, a slowdown in lending and a moderation of investment inflows, one of the solutions to economic recovery may be to increase exports. Also, a sustainable growth of domestic consumption, especially from domestic production and importing goods and services only within the real needs of individuals and companies, may be another engine of economic recovery during this period.

Most of the NMS were caught by the crisis when they were still at an early stage of development in structural terms. This can be best captured by an analysis of pre and post crisis. Thus, in NMS, the economic overheating dominated the period before the manifestation of the crisis by an accumulation of phenomena such as: the expansion of manufacturing activity and of private credit, the boom of inflationary phenomenon, the acute current account imbalances and the hardly controlled fiscal-budgetary deficits. Against this general background, it is not surprising that countries which before the global financial crisis have seen the largest increases in capital inflows, but also massive banking funding (as in the case of the Baltic countries, Hungary and Romania), after that have experienced massive capital withdrawals and financing freezing through the channel of external banking credit. Czech Republic and Poland seem to be escaped better from this period of crisis, suffering to the lesser extent of foreign capital inflows or outflows, especially that the

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orientation of these two economies has been based rather on the export than on the domestic consumption from import, as in the case of other NMS.

In crisis conditions, a significant adverse effect was suffered by the countries that have a fixed exchange regime and a high degree of financial integration with the European developed countries, as the case of the Baltic countries. Thus, these countries even before the crisis had a limited number of monetary instruments. For this reason, they have encountered serious difficulties regarding the moderation of credit. Not the same can be said about countries with flexible exchange regime. These, having numerous monetary instruments, allowed among others a temporary appreciation of their currencies. However, to slow down the speculative phenomenon and to calm the credit boom, before the crisis, all of NMS have adopted prudential and supervisory measures by tightening rules on lending[1]; still, these rules have limited effect in the sense of finding other alternative credit channels (e.g. cross-border loans, consolidation of credit lines between the "daughters' banks" and the "mothers banks" etc.).

At the moment of the crisis emergence, countries with fixed exchange regime were not able to use the exchange rate instrument, as the countries with flexible exchange regime; the latter were able to accept a temporary pressure on the exchange rate, together with a more limited pressure on inflation. Thus, in the Baltic countries, the strong economic collapse, which occurred immediately after the crisis outburst, has made the transition from high positive inflation, with more than two figures, in a modest inflation and even deflation to occur extremely brutal, with huge social and economic costs[2].

Instead, the NMS with stable and highly developed economies in terms of trade have past considerably easier through the peak of the crisis, some of them even recording growth (as Poland) and certain price stability.

1.2. Inflation developments in NMS in 2008-2010 - possible implications for monetary policy

With the first signs of global economic and financial crisis in the European Union NMS (since September 2008), inflation moderated, being influenced by the drop in economic activity, but also by the trends of declining commodity prices, of agricultural products prices and fuels prices on international markets. These have exerted a pressure for the reduction of food and energy prices, having a positive contribution to the inflation moderation in the NMS. Thus, we can see that from early 2008 until late 2009, inflation is experiencing a dramatic reduction in almost all new EU Member States (see Figure no.1).

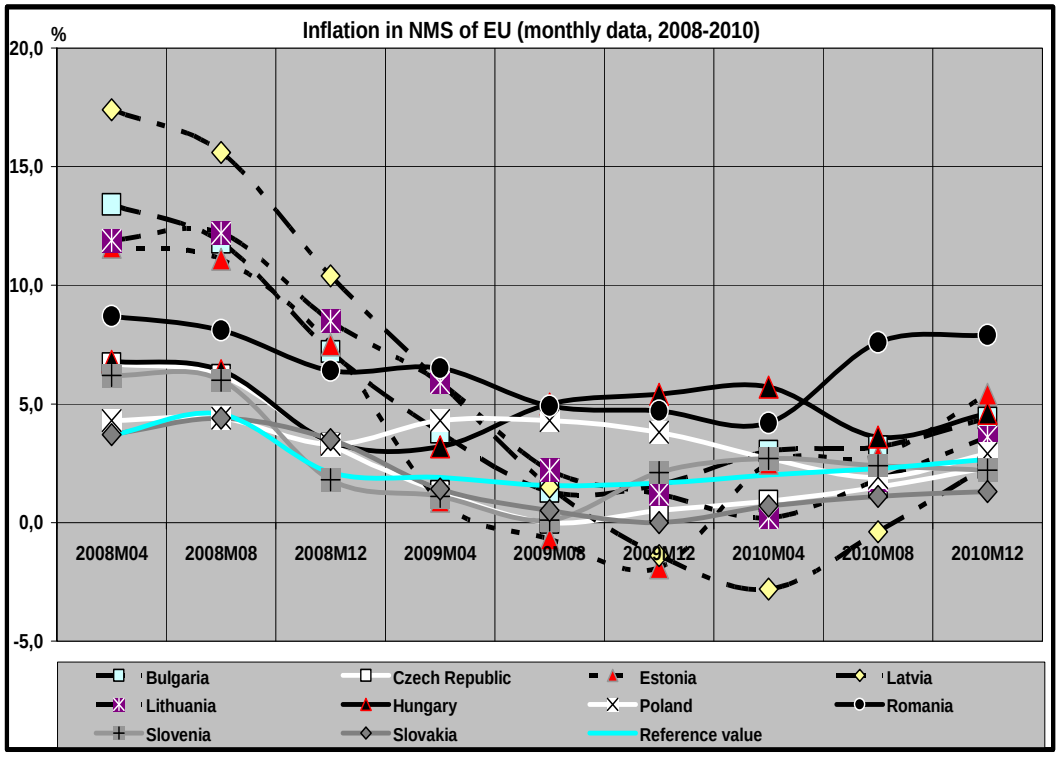
Among the NMS, the Baltic countries were those that registered the strongest decline in inflation, facing the most significant reductions in GDP. In this context, due to austerity measures in the condition of economic recession, public and private sector wages fell significantly, both in nominal as in real terms. Along with the lowering of the wages, reducing or stopping lending and strong tightening of the consumption contributed to a low pressure on inflation developments.

[1] An example in this sense is increasing minimum reserve ratio for loans in foreign currencies or direct control of credit (case of Bulgaria).

[2] Including: the dramatic increase in unemployment, the slow down of economic and social reforms, the growth of social protection spending, the hindering of the access for governments to the external borrowing because of higher country risk, the increasing social tensions etc.

However, in the NMS of the European Union, from the beginning to the end of 2010, inflation has increased considerably due to the inflammation in energy prices, the rise in oil prices, the increasing of tobacco excise duties and the implementation of fiscal-budgetary austerity measures, that were translated into increases in VAT and in administered prices. According to economists, forecasts show that inflation for the next period will be at lower levels than during the period before the crisis emergence, as a result of a still modest domestic demand. In the context of new political tensions in Arab countries appeared in early 2011, there are fears, increasingly more substantiated, regarding the growing inflationary pressures brought by the international oil price rises. Since last summer, oil prices nearly doubled, and along with the utilities and food price increases have pushed euro zone inflation to 2.4% in February 2011[3]. The current level of inflation in the euro area is far above the 2% ceiling agreed by the European Central Bank (ECB), which is giving signals that it intends to increase its key interest rate during 2011.

Figure no.1 – Inflation development in EU NMS, between 2008, April – 2010, December



Source: Eurostat database, author's calculation for inflation reference value

[3]Source: Eurostat databese, data updated on 8 March 2011.

In response to this situation, the European banking system will go into a spiral that will bring up increasingly more the interest rates far above the current levels. This will lead to the escalation of sovereign debt of EU countries, especially of those which already recorded serious problems (case of Greece, Ireland, Portugal and others) and to increased difficulties for heavily indebted households and firms. Thus, initially, the ECB increased interest rates may cause a similar response from other EU central banks, which will be facing a real dilemma: maintaining the current level of key interest rate in order to transmit to the commercial banks the signal of a constant monetary policy for the recession exit or increasing the key interest rate in order to deliver to the economy the signal of a preventive measure in front of the possible capital evictions. However, given that the levels of monetary policy interest rates in the NMS are significantly higher than the ECB's monetary policy interest rate, the NMS central banks might take a much more reserved position in this regard.

A further argument for maintaining the current monetary strategy in the NMS[4], at least in the inflation targeting countries, which have a flexible exchange rate regime, is that the response of inflation to the negative developments of the economies was somewhat moderate, with less dramatic decreases as in the Baltic countries and Bulgaria. Moreover, despite temporary reductions, we can speak of inflation persistence at relatively high levels, particularly in Romania and Hungary.

As regards Romania, although from April 2009 to the corresponding month of 2010 has been a slight disinflation process, it was suddenly stopped by the summer of 2010, due to decisions to increase the VAT and administered prices. Food prices and a weaker exchange rate also contributed to increased inflationary pressures, so that the end of 2010, Romania registered the highest inflation in the entire European Union. Hungary has also not been without similar tensions, inflation oscillating in the period of August 2009 - June 2010 to more than 5%, after that decreasing significantly. Only the Czech Republic is an exception to this trend, in the sense that the inflation in this country has adjusted strongly in the first half of 2009 and has remained low until the early months of 2010 (according to Eurostat, the HICP in April 2010 did not exceed 0,9% in the Czech Republic). Although, it increased to 2.3% at the end of 2010, inflation in the Czech Republic continued to maintain for two years within the Maastricht criteria. Basically, the Czech Republic is the only country in the NMS that would be entitled to enter in the select group of the eurozone, substantiating its indicators development, which fall within the criteria for joining the euro area, on a really solid economic base.

If we look at the entire period 2008-2010, inflation in the NMS has initially registered a natural tendency of reduction (the first half of 2008 until late 2009), followed later by a fluctuating growth throughout the year 2010. Note that the factors leading to higher inflation in the period before the onset of the crisis are the same that have contributed to the lowering of the inflation during the peak of the crisis and to the reinflaming of the inflation thereafter. Thus, overall, international oil prices and food prices play a key role in enhancing or moderating inflationary pressures. However, some of the new European Union member states, especially large ones (Poland, Romania and Hungary) are not without potential and resources in this regard and could counteract these repetitive negative influences by increasing food and energy security of their countries and their region.

In perspective, in the NMS, on the background of difficult recovery in domestic demand, of modest wage growth and of continuing high unemployment, inflation will likely oscillate near present levels or will be reduced gradually, only in the absence of pressure from the international

[4] In general, monetary policies have an anti-cyclical behaviour and in the recession period they are more focused on economic recovery from the crisis than on stopping eventual inflationary pressures.

energy and food prices and from the other measures of fiscal consolidation, which would involve new direct and indirect tax increases.

2.2. The monetary policy conduct in the European Union NMS, in the context of the crisis

Considering that the crisis will occur only in the United States, European Union countries have reacted very late and very slowly to the major changes in the international economic landscape. Excessive debt and strong international financial and trade connections have led to a domino effect in the collapse of confidence of the companies and households regarding the future positive developments of the global economy.

Thus, the financial crisis has rapidly turned into a real economy crisis, and the national macroeconomic policies applied have ranged from financial support of the banking system and of the large companies and a massive restructuring of the public system, internalizing losses and emphasizing the decline in economic activity. In this context, the role of public finances has become controversial and undesirable, the managers of fiscal-budgetary policies being put to choose between: - an active involvement of the government in the economic recovery, in maintaining of the employment and in reducing social tensions, and - a strong restructuring of the public expenditure and of the budgetary apparatus, in the conditions of massive reducing of the budgetary resources caused by the crisis. This dilemma of the public policies orientation has emerged even more dramatically in the case of the European Union NMS, which were surprised by the crisis in the *catching up* process in relation to the more developed EU countries.

Although with acute structural imbalances, the NMS had no national economy areas strongly "vitiated", as in the case of United States and euro zone countries. Thus, the impact of global financial crisis on the economies of the NMS has been rather indirect, through secondary effects on economic activity, on trade, on unemployment, on exchange rate etc. So, naturally, the behavior of the public finances from NMS should have been oriented towards the support economic growth, but poor size of public revenues did not allowed even the keeping of the decisions taken before the crisis. Considerable budgetary and fiscal imbalances, fueled by increased spending on social assistance, due to unemployment growth, made inevitable the fiscal consolidation measures that followed.

The same situation, but less ingrate, has had also the monetary policies in the NMS. Their role was repositioned from the field of credit control and of the inflation moderation to the area of maintaining and of increasing the confidence in the banking system. If in the developed countries of the EU, crisis caused low inflation expectations, in the EU NMS the outlook for inflation were relatively uncertain, claiming, according to country-specific currency regime, various degrees of restrictiveness in the monetary policy conduct. However, with the strongest manifestation of the crisis, the dramatic collapse of inflation in the Baltic States and the substantial price reduction in the other NMS made that the fears of inflation growth to be replaced with concerns about the drop of the domestic demand and the bankruptcy of the financial resources of the state, because of dramatic increase of the budgetary deficits in all NMS.

In this context, in 2008-2010, central banks from NMS have reduced monetary policy interest rates, while maintaining prudent behavior in relation to their timing, so as to maintain the attractiveness of national economies towards foreign capital and to avoid any capital outflows. Countries with flexible exchange rate regime initially tightened monetary policy conduct, increasing the rate of monetary policy throughout 2008, and later on, from the first quarter of 2009, they relaxed

their position by successive gradual reduction of this interest (the case of Poland, Hungary and Romania). Not the same can be said about the Baltic countries, which by the close relationship that they have with the ECB's monetary policy[5], had a very little room for maneuver in adjusting key interest rates to the domestic economic realities of this period.

Moreover, in order to deal with the effects of global financial crisis, monetary policy strategy of the central banks from the Baltic countries was to maintain the monetary anchor to ensure macroeconomic stability, until these countries are ready to adopt the euro at the given parity. Among the arguments in favor of such strategy can be mentioned: - the large share of the euro bank credit of the private sector in the economy - domestic economic structure, based on a high share of imports in exports, making essential the maintenance of stable exchange rate and – the long period of time during which it was used the anchor of the exchange rate, giving up the exchange rate fixity being an equivalent of a major loss of credibility and of macroeconomic stability. Thus, the Baltic countries have implemented measures of internal devaluation, by reducing the wages, the prices and the budget deficits, instead of external devaluation measures, by adjusting of the exchange rates and by raising the domestic interest rates. Although regarded as countries with economies highly flexible compared with the rest of the NMS, however, the Baltic countries through the strategy of internal devaluation were subjected of much higher pressures in relation to the effectiveness of the strategy. Therefore, the emergence of the deflation phenomenon, the lower growth of labor productivity, by reducing only slightly the private sector wages, compared to the public sector wages reduction, the maintenance of high private debt, the decrease of consumption and the restriction of economic activity are just some of adverse effects of this strategy.

However, all of the NMS have implemented prudential measures in field of monetary policy, these being less expensive than managing the effects of monetary policy interest rates changes and the free fluctuation of the exchange rates.

In countries with flexible exchange rate regime, which pursue inflation targeting, the adjustments of monetary policy interest rates depended on the external pressure exerted on the exchange rate. Thus, the key interest rate has increased considerably with the emergence of the crisis in the inflation targeting NMS, partially substituting the rapid and substantial depreciation of the exchange rate. The adverse evolution of the exchange rate affects especially the people and companies indebted in foreign currency, but also the prices of imported products, thereby the exchange rate constitutes the fastest transmission channel of imported inflation. The increase in official interest rates, although counterbalance the negative exchange rate developments, involves the extension of the economic recession period, by delaying the lending recovery and by creating the image of an economy in difficulty. An exception to the above situation is the case of the Czech Republic, whose monetary authorities has allowed throughout the analyzed period (2008-2010) the reduction of the monetary policy interest rate by 3%[6].

Along with a relaxed monetary policy, the only of this kind in Europe after the outbreak of the crisis, fiscal policy also contributed to the positive performance of the Czech economy, by boosting the private consumption, the economic growth and the maintenance of the inflation in the corridor required by the Maastricht convergence criteria. Over time, the Czech Republic was placed in a far

[5] Latvia operates within a fixed currency regime and Lithuania under the currency board regime. The same currency board regime has operated in Estonia before 1 January 2011, when Estonia became the 17th member of the eurozone.

[6] Source: Czech National Bank, http://www.cnb.cz/en/index html

more advantageous economic position compared with Poland and Hungary: a higher per capita income, lower external and budgetary deficits, a less worrying currency debt, a banking sector stronger, more conservative and more balanced (a small margin between active and passive interest rates), a more moderate evolution of prices and bank interests. All this makes the Czech Republic an important milestone for the other NMS in the construction of solid economic fundamentals.

However, for the next period, the Czech National Bank's policy would probably no longer be able to enroll in the same area of monetary relaxation. The Czech National Bank will certainly face the effects of adverse international phenomena (as the increase in international prices of fuel and food, the ECB decisions etc.) and a higher fiscal restriction, amid the need to correct fiscal-budgetary imbalances. The increase in indirect taxes will exert inflationary pressure in the extent that it will press more and more on households and on companies' budgets, affecting not only the consumption but also the saving.

In Poland, the conduct of monetary policy was restrictive only until November 2008 when the benchmark interest rate reached 5.75%. Afterwards, the rate decreased during 2009, with small steps of 75 and of 25 basis points. Thus, in mid-2009, official interest rate in Poland has reached 3.5%, after this point monetary policy becomes neutral by maintaining the constant value of 3.5% until January 2011[7]. Taking into account the stage of economic cycle, the evolution under the potential of the output, the relaxed discretionary fiscal policy and the limited inflation it can be said that such a monetary policy conduct, more relaxed, can have positive effects on economic development of Poland.

In Hungary, initially, the Hungarian national bank (Magyar Nemzeti Bank) has strengthened the restrictiveness of monetary policy by raising the monetary policy interest rate throughout 2008, which during the 12 months increased from 7.5% to 10%. Since January 2009, the cautious attitude of the Magyar Nemzeti Bank was gradually relaxed, the key interest rate decreasing from 9.5% (January 2009) to 5.25% (recorded in April 2010). After this period, given the resurgence of inflation risks, the possible adverse exchange rate variations, but also the economic activity still under potential, the Hungarian monetary authority kept monetary policy interest rates at the same level, in April-November 2010. In November and December 2010, monetary policy interest rate was increased again, each time by 25 basis points, on the background of gloomy outlook concerning the forint depreciation, the high maintenance of lending in foreign currency and the rising of unemployment. Household consumption continues to be hampered by the excessive foreign debt, by the high unemployment, by the Hungarian forint currency depreciation and by the inflation still very high compared with the euro area average. In this context, monetary policy has little margins of maneuver, focusing on increasing liquidity and solvency of the banking system and on strengthening banking supervision. Despite the difficulties, Hungary's economic prospects are favorable to the economic recovery and to the return of foreign investors' confidence.

As regards the Romania, due to the emergence of international crisis, for most of the year 2008 (January-September) monetary policy interest rate increased from 7.5% to 10.25%, afterwards monetary policy became neutral, by maintaining the interest rate at 10.25% until February 2009. From March 2009 until June 2010, monetary policy interest rate has decreased significantly from 10.14% to 6.25%. This development was mainly due to increasing confidence in the economy because of signing multilateral external financing arrangement with the European Union,

[7] When increased by 25 basis points. Source: National Bank of Poland http://www nbp.pl/Homen.aspx?f=/srodeken htm

International Monetary Fund (IMF) and other international institutions. Signing this agreement was intended to protect national economy from the adverse effects of private capital inflows decline and from the adverse adjustments of the internal and external imbalances and also to support the Romanian banking system. However, the national economy did not felt the real benefits of such an agreement because of: - an insufficient adjustment of inflation compared with a sharp drop in GDP - an excessive emphasis on the exchange rate channel in the propagation of imported inflation, mainly because of the increased degree of economy euroisation and of the large share of imported products in the consumer basket - structural rigidities of goods, services and labor markets and also the low economic competition in almost all areas, last not least - lack of government measures to compensate at least partially the compliance with the requirements imposed by the rough terms of IMF's agreement.

In general, fiscal consolidation measures have a pro-cyclical nature that deepens the recession and does not resolve structural problems of the public system. At the same time, small firms are exposed to greater financial pressure than large companies and do not receive strong incentives in order to recover, as it would be normal in a time of crisis. The IMF's agreement does not support the real economic activity, but rather represents a safety net for the banking system. In this context, Romania would have had to carefully weigh the benefits and costs of an agreement with the IMF. Thus, although initially the idea of an international financial aid is welcome, because of the lower interest of IMF's loans and of the unlocking of funding the from the international market, however, the costs of an austerity program in the context of crisis may get to economic and social proportions difficult to fix over time.

Among the negative effects of government measures taken in this period in our country are: - maintaining a persistent inflation within the analyzed timeframe – keeping the annual growth of GDP in a negative territory – the considerable reduction of domestic demand, of credit and of capital inflows - the accumulation of large social imbalances and –increasing restrictiveness of fiscal policy. All these made that the monetary policy of National Bank of Romania to react, at best, by keeping neutrality of monetary policy interest rate from June 2010 until January 2011.

Moreover, for the period ahead, we may anticipate the increase of challenges over the monetary policy in Romania. Thus, the monetary policy will have to manage with a very great caution and wisdom the situation determined by the preservation of the fiscal policy restrictiveness, simultaneously with the need of real and consistent support of the economic activity.

2. Conclusions

The global financial crisis had a profound impact on real economic activities in the EU NMS, among others affecting the domestic demand, the production, the exports, the investments and the lending process. On the background of mistrust, the external financing difficulties have worsened, many of the NMS (Hungary, Latvia and Romania) appealing to the international financial loans from the EU, IMF and the international financial organizations. However, a number of the NMS's countries have avoided borrowing from the IMF. Thus, Lithuania managed to deal with large budgetary deficits through tough measures of internal devaluation. Bulgaria and Estonia have taken restrictive economic strategy, while the Czech Republic and Poland have adopted a relaxed macroeconomic policy, intervening quickly in order to mitigate the negative effects of financial crisis.

At the end of 2010, economic growth appears to have rebounded strongly in almost all the EU NMS, only Romania, Latvia and Bulgaria are still in a negative territory in this respect, restrictive macroeconomic policies in these countries, severely affecting domestic demand, consumption and investment.

In the Baltic countries, despite dramatic economic downturn, have been avoided both nominal currency devaluation and a possible banking crisis, and in countries with flexible exchange regime economic developments have been mixed: Hungary and Romania, which have relied on foreign loans, enduring painful macroeconomic adjustments, continued to struggle in recession, while the Czech Republic and Poland, placed on more stable economic base than the rest of the NMS, have allowed the adoption of anti-cyclical economic policies that will help them in the return of the rapid economic growth.

In general, the crisis conditions, taking into account various fiscal and budgetary solutions adopted by governments of new EU member states, monetary policies had been relatively accurate. These aimed at the maintenance of the monetary and economic stability, and also at the insurance of the liquidity, solvency and soundness of the banking system from NMS.

Looking ahead, the challenges over the monetary policies in NMS remain extremely high, and these policies must implement those measures in order to create the perfect balance between the reduction of inflationary pressures and the need to stimulate the economic activity.

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DETERMINATION OF THE MINIMUM SPANNING TREE

Nicolae Cosmin BLAJ[1]

Abstract
An important category of graphs is that the edges are some linkstype parent - son. Such a graph will be called Arbor. Tree is called a connected graph without cycles. A tree with n vertices has n-1 edges. The first algorithm used to determine the minimum spanning tree is the Prim algorithm wich was wirtten in 1957 and implemented in 1961 by Dijkstra.

Keywords*: spanning tree, lowest cost partial tree, peak, edge*

1. Introduction

Let G be an oriented graph. G is a tree with the root r, if there is a peak r in G from wich we can got o any other peak by an unique route. The definition is available even for an unoriented graph, but the choice of the root will be arbtirary in this case: any tree is a tree with a root, and the root will be fixed in every peak of the tree. This heapens because from any peak we can arrive to the others by a single and unique route

Trees - Getting Started

An important category of graphs is that the edges are some linkstype parent - son. Such a graph will be called Arbor.

Definition:

Tree is called a connected graph without cycles. A tree with n vertices has n-1 edges.

Characteristic properties of a tree:

• There is a node that does not get any arc called tree root.

• With the exception of root, each node has the property that he entered a single spring. It connects the node to another node called called predecessor or parent.

• From a node can get one or more arcs. Each such arc connecting node

• Respectively by another node or child node called a success

• Nodes are organized on the first floor level is occupied by the root node.

• Nodes on the last level is characterized by the fact that neither of them will not leave a bow, and are called terminal nodes or leaves.

• Nodes can contain a so-useful information, the book can be of any type.

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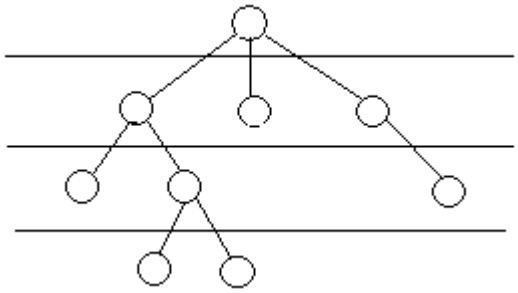
Example*:*



Node 1 is the root of the tree**.**
Tree leaves are 3,8,9**.**

The Prim algorithm (written in 1957 and implemented in 1961 by Dijkstra) eliminates this drawback. It operates with data in the same graph.

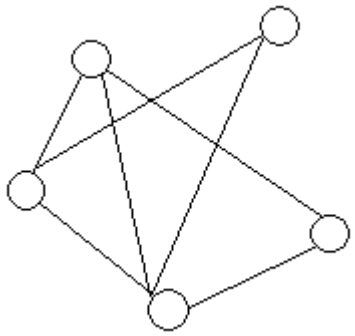
It initially starts, as in Kruskal's algorithm with n isolated vertices (ie from the "n" peaks, but without being drawn between these peaks there a edge), that during these peaks will be linked The minimum length of each tree.

Let G = (X, U) be a related non-oriented graph with n vertices.

Each edge is characterized by an associated integer called cost.

The graph is defined by the cost matrix, which is very similar to adjacency matrix will replace the costs of urma.Notand matrix A, an element

A[i,j] will be: $\begin{cases} 0, there\_is\_not\_a\_edge\_(i,j) \\ the\_cost\_of\_the\_edge(i,j), if\_exists \end{cases}$



For this graph the full cost matrix is:

$$A=\begin{pmatrix} 0,13,16,13,0 \\ 13,0,12,0,15 \\ 16,12,0,17,13 \\ 0,15,13,0,0 \end{pmatrix}$$

We will add the peaks one at a time to the partial tree. We use the three vectors

– the S vector, also known as the characteristic vector. During the construction of the tree each element S[i] is 1 if the peak i has been allready included in the partial tree and 0 otherwise. So, initially all the elements of the vector are 0 and in the moment of the inclusion of a peak i in the tree S[i] will become 1.

– The T vector, also known as the parents vector. For each peak i who is been added to the partial tree, the element T[i] will reprezent the parent peak of i in the tree;

The C vector, also known as the cost vector. For each peak i, the element C[i] will have the cost value of the edge that connects the peak from his parent in the partial tree

We take in the considerations just the edges that have a peak in the tree allready and the other peak outside the tree. From this edges we will pick the one with the lowest cost. We bind together the edge that we picked in the tree and we update the S, the T, and the C vectors. If there are several such edges with the lowest cost, we can choose any one, hence the remark that the minimum spanning tree of a graph is not unique

For the example presented we have initially in the tree the starting peak 1, so at the first step we will take in the considerations only the edges that pass trough the peak 1

Step 1: initializing the vector S[start]=1 start=1;

S=

C=

T=

Step 2: searching for the next edge:

(1,2) with cost 13
(1,3) with cost 16
(1,4) with cost 13

We choose the edge with the lowest edge: edge (1,2) that we bind to te partial tree
We update also the caracteristic vectors S,T,C.
In the partial tree appeared peak 2, fact that we noticed it in the characteristic vector S[2]:=1.
The parent of the peak 2 is peak 1 , so T[2]:=1.
The cost of the edge that binds peak 2 from his parent, peak 1, the edge (1,2) so C[2]:=13.

S= dfasfgasg

T=

C=

3

Step 3:

On the third step we also choose an edge of minimum cost with one end allready in the created partial tree and the other end not yet included in the partial tree. Now, in the partial tree we have peaks 1 and 2, so we will search among the edges passing through these peaks, taking in consideration lines 1 and 2 of the cost matrix. Join the discussion edges (1,3) with a cost of 16, (1,4) with a cost of 13, (2,3) with a cost of 12 and (2,5) with a cost of 15. We don not take the edge (1,2) also because it has both of the ends in the partial tree. From this edges we choose the one with the lowest cost. That edge is (2,3) and has a cost of 12. we bind it to the tree and update the vectors again: S[3]:=1 (we mark the inclusion of peak 3 in the tree), T[3]:=2 (the parent for the new introduced peak is 2); C[3]:=12 (the cost of the chosen edge is 12).

S=

T=

C=

	3	2		

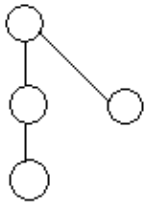
Analogous, on the next step we search through the graph edges, the one who has an end in the crowd (1,2,3) of the peaks that are allready included in the tree an the other end outside this crowd. These edges are (1,4); (2,5); (3,4) and (3,5). Two of them, (1,4) and (3,5) have the lowest cost: 13. We choose the edge (1,4), in wich case the tree and the vectors will be like this:

S=

T=

C=

	3	2	3	



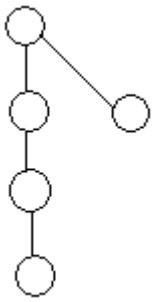
Finally, at the last step remained to be added to the tree only peak 5. In the end we will obtain the partial tree of minimum cost and the vectors below :

S=

T=

C=

	3	2	3	3



The following is the procedure of forming minimum spanning tree:

For start we initialize with 0 value the vectors S,T and C. In a cycle with i=1,2,3,4,….,n we give at each step 0 value tu S[i]; T[i] and C[i]. Then S[start]:=1. We do not modify the T[start] element and C[start] element and they ramain with the initial value wich is 0, because the starting peak has no parent and has no edge wich will connect him to his parent.

Next, we will add each at the time the other n-1 peaks in the partial tree. For this, is enough a single for cycle, in wich the contor k=1,2,3,4,….., n-1 does not have to do nothing except to count the addings. In each step we add a peak to the tree like:

We need to find an edge with to lowest edge, an end in the tree that has allready been made and the other end outside the tree. Let this edge be (n1,n2). For finding it, we need a variable cost_min in wich we memorize the lower cost. We initialize cost_min with Maxint and n1,n2 with -1. The search of the edge will be made in the cost matrix. We traverse all the matrix in two for cycles with i from 1 to n and j from 1 to n. At each step, finding such an edge compels us to do 3 tests :

- if the peak i is allready in the tree (S[i]=1) and j is not in the tree (s[j]=0)
- if exists the edge (i,j)(a[i,j]<>0)
- if the cost of that edge is lower the cost that we have in cost_min variable.

If all three conditions are met, it means that we found the edge (i,j) and we memorize it's ends in n1 and in n2. Then the i and j counters take a new value.

Next we will add in the tree the edge (n1,n2) that we found, with the update of the three vectors :

```
S[n2]:=1;
T[n2]:=n1;
C[n2]:=a[n1,n2];
```

The adjacency matrix in the next example is:

0 13 16 13 0
13 0 12 0 15
16 12 0 17 13
13 0 17 0 0
0 15 13 0 0

```
program tree;
uses crt;
type vector=array [1..50]of integer;
var a:array[1..30,1..30]of integer;
n,i,j,k,start,cost_min,n1,n2:integer;
S,T,C:vector; {S=the caracteristic vector
T=the parent vector
C=the cost vector}
f:text; {f=text file wich contains the adjacency matrix}
procedure citire_matrice;{reads the cost matrix}
begin
assign (f,'date.txt');
reset(f);
read(f,n);
for i:=1 to n do
for j:=1 to n do
read(f,a[i,j]);
close(f);
end;
procedure afisare_matrice;{displays the cost matrix}
begin
writeln ('matricea costurilor este:');
for i:=1 to n do
begin
for j:=1 to n do
write (a[i,j]:3);
writeln;
end;
writeln;
end;
procedure formare_arbore;{builds minimum spanning tree}
begin
 for i:=1 to n do {intialize with 0 the vectors S,T,C}
begin
```

```
s[i]:=0;
t[i]:=0;
c[i]:=0;
end;
write('give the start peak:');
readln(start);
writeln;
s[start]:=1;
for k:=1 to n-1 do
begin
n1:=-1;
n2:=-1;
cost_min:=maxint;
for i:=1 to n do
for j:=1 to n do
if (s[i]=1)and(s[j]=0)then
if (a[i,j]<>0) then
if a[i,j]<cost_min then
begin
cost_min:=a[i,j];
n1:=i;
n2:=j;
end;
s[n2]:=1;
t[n2]:=n1;
c[n2]:=a[n1,n2];
end;
end;
begin
 clrscr;
citire_matrice;
afisare_matrice;
formare_arbore;
writeln('the S vector is:');
for i:=1 to n do
write (s[i]:3);
writeln;
writeln(' the T vector is: ');
for i:=1 to n do
write (t[i]:3);
writeln;
writeln(' the C vector is:');
for i:=1 to n do
write (c[i]:3);
readkey;
end.
```

Conclusions

a. The Prim algorithm (written in 1957 and implemented in 1961 by Dijkstra) eliminates this drawback.

b. It initially starts, as in Kruskal's algorithm with n isolated vertices (ie from the "n" peaks, but without being drawn between these peaks there a edge), that during these peaks will be linked The minimum length of each tree.

c. The algorithm consists within two steps

i. initializing the vector S[start]=1 start=1;

ii. searching for the next edge:

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SOURCES OF POLLUTION OF THE SURFACE HYDROGRAFIC SYSTEM AND THE UNDERGROUND WATER IN THE JIU VALLEY MINING DISTRICT (VALEA JIULUI-ROMANIA)

Ana Nicoleta SEMEN[*]

Abstract

The sources of pollution of the hydrographical system as follows:- industrial waters resulted from the mining activity; - technological waters generated by other economic activities; - domestic waste waters produced by the towns and villages. Mining is the main activity in the region and is the main polluter with mine water and is represented by three mines (E.M. Lonea, E.M. Petrila, E.M. Livezeni) as polluters of the East Jiu, respectively four mines (E.M. Vulcan, E.M. Paroseni, E.M. Lupeni, E.M. Uricani) as polluters of the West Jiu. In order to know the quality of the surface waters, samples from the East Jiu upstream Cimpa (where the water is not polluted) as well as downstream Livezeni and from the West Jiu upstream Campu lui Neag and downstream Iscroni have been taken. The index of global pollution for the East Jiu is placed in the class II of quality and is in the process of natural regeneration. The waters of the West Jiu are more polluted than in the eastern side of the district, being placed in the class IV of quality and measures must be taken to collect and treat the technological and domestic waste waters.

Keywords: *pollution, hydrographic system, industrial waters, mines, quality indicator*

1. Introduction

The surface hydrographic system of the Jiu Valley mining district is represented by the East Jiu and the West Jiu, having a total length of 69.8 km (down to the entrance in the Jiu's defile. Out of the total length, 60% lies in the populated area. Until Cheile Butii for the West Jiu and Rascoala area for the East Jiu the rivers do not cross populated areas and as a result the pollution is insignificant. In addition to the two Jiu rivers, the hydrographic system encompasses secondary rivers (Voevodu, Rosia, Maleia, Slatinioara, Salatruc, Aninoasa, Dealul Babii, Baleia etc) which go through inhabited areas or areas economically active, rivers with a low debit of water, causing a high pollution for these rivers. The underground water related to the secondary rivers is situated at about 4-12 m under the surface of the earth and is affected by the surface water, by the biochemical processes that affect the pluvial water quality and by its route in the underground water.

The organic matter carried by the rain water or contained in the domestic and technologic waste water, the metals and the hydrocarbons retained in the filtering bed use oxygen, produce ammonia, phosphates, dissolved organic carbon, elements that produce an alteration of the quality of the underground water.

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The springs fed by the underground water, which are numerous in the district, do not have clean "spring water", but have contaminated water.

2. Sources of pollution of the hydrographic system

From the point of view of the economic activity in the area we can identify the sources of pollution of the hydrographical system as follows:

- industrial waters resulted from the mining activity;
- technological waters generated by other economic activities;
- domestic waste waters produced by the towns and villages.

The industrial, technological and domestic waste waters affect the emissary as follows:

- change of the physic quality by changing the colour, the temperature, the electric conductivity, by generating deposits, foams or floating pellicles;
- change of the taste and smell;
- change of the chemical quality by changing the pH, increasing the content of toxic substances, change of the hardness;
- decrease of the quantity of dissolved oxygen due to the organic substances;
- destruction of the flora and fauna, favouring the development of the microorganisms.

2.1. The characteristics of the industrial waters resulted from the mining activity. Mining is the main activity in the region and is the main polluter with mine water and is represented by three mines (E.M. Lonea, E.M. Petrila, E.M. Livezeni) as polluters of the East Jiu, respectively four mines (E.M. Vulcan, E.M. Paroseni, E.M. Lupeni, E.M. Uricani) as polluters of the West Jiu (fig. 1).

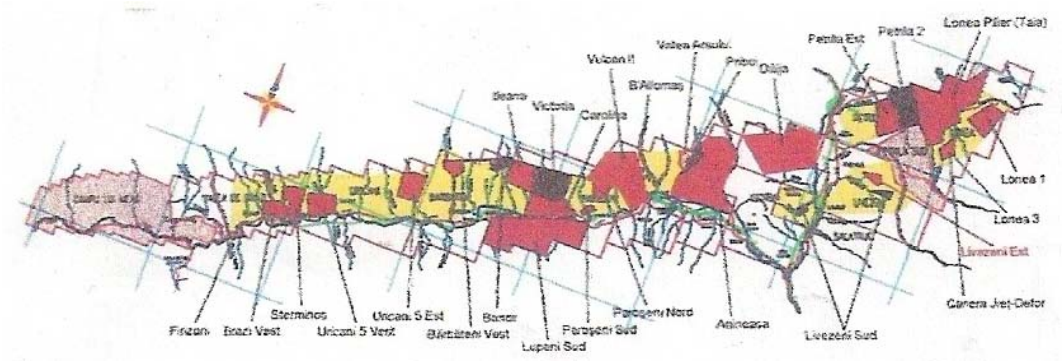

Fig. 1. The coal mining district of the Jiu Valley

In order to know the quality of the surface waters, samples from the East Jiu upstream Cimpa (where the water is not polluted) as well as downstream Livezeni and from the West Jiu upstream Campu lui Neag and downstream Iscroni have been taken.

The laboratory analysis have tried to determine some quality indicators: organic substances **(CCOer)**, suspensions, phosphor, ammonium (NH_4), considered to be the main polluters, and based on this to determine the global pollution indicator. The reliability notes of the quality indicators for the East Jiu are presented in Table 1 and for the West Jiu in Table 2.

Table 1

Reliability notes for the quality indicators for the East Jiu

Quality indicators	Reliability note Nb	
	Upstream East Jiu Section Cimpa	Downstream East Jiu Section Livezeni
Suspensions	8.7	6.3
Ammonium (NH_4)	9	7.7
Phosphor (P)	8.3	5
Chemical consumption of oxygen **(CCOer)**	9	6.5
Global pollution indicator I_{pg}	I_{pg}=1.31	I_{pg}=2.49

The global pollution indicator for the Section Cimpa, upstream the mines has a value of 1.31 – the water is naturally polluted in acceptable limits, the effects are not harmful. The pollution indicator downstream the polluters (2.49) reveals that the acceptable limits are exceeded.

Table 2

Reliability notes for the quality indicators for the West Jiu

Quality indicators	*Reliability note Nb*	
	Upstream West Jiu Section Campu lui Neag	*Downstream West Jiu Section Iscroni*
Suspensions	9	4.2
Ammonium (NH_4)	8.7	5.8
Phosphor (P)	9	4.8
Chemical consumption of oxygen **(CCOer)**	8.5	5.6
Global pollution indicator I_{pg}	I_{pg}=1.29	I_{pg}=3.90

The global pollution indicator reveals that the I_{pg} has a normal value in the sections not affected by the mining industry (1,29) and downstream the polluters it is 3,9 meaning over the acceptable limits and very harmful effects on the flora and fauna.

The global pollution indicators resulted after the mining activity were represented graphically taking into consideration the reliability notes compared to the ideal status (fig. 2).

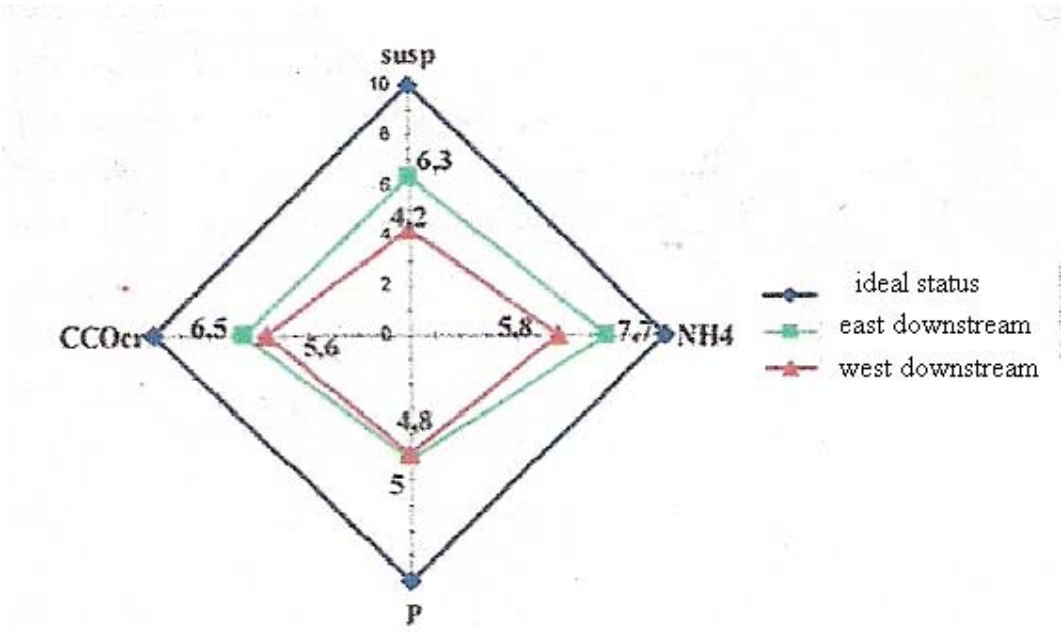

Fig. 2. Graphical representation of the global pollution indicators for the East Jiu and the West Jiu downstream the main polluters

The evaluation of the quality of the mixed mine and domestic waste waters done by the Environment Laboratory of the National Hardcoal Company show variations from one mine to another (see Table 3).

Table 3

Mine	*Fix residuum mg/l*	*Suspensions mg/l*	*pH*	*Ammonium NH_4*	*Dissolved oxygen $Mg\ O_2/l$*
E.M. Petrila	780-1334	26-123	7.06-7.85	4-48	26-100
E.M. Lupeni	814-2145	37-149	7.09-8.4	5-52	28-96
E.M. Uricani	620-1440	24-96	6.8-7.4	3-36	23-88
Maximal admissible concentrations CMA	2000	60	6.5-8.5	3	25

We can see that most of the indicators are over the limits (up to 14 times for the ammonium), 2,5 times for the suspensions, 4 times for the dissolved oxygen, affecting the quality of the water. The quality classes are D, E (poor and very poor).

2.2. The characteristics of the technological waters generated by other economic activities. They are usually represented by the car wash business, five of the in the eastern side of the district and seven in the western side. The waste water generated by these businesses is evacuated in the sewerage system and from here into the emissary.

The analysis regarding the quality of the waters show that the following admissible concentrations are exceeded: phosphor (2.5-4 times), phenols (2-3.5 times), anionic detergents (over 9 times), hydrogen sulphide (2.5 times) and, respectively, active foam. The analysis shows that the concentrations for oil products are two times higher than the maximal admitted concentration (5mg/dm^3).

2.3. The characteristics of the domestic waste water generated by the urban and rural systems as well as by the economic activities. The waste waters generated by urban system and by the economic activities are about 750,000-1,200,000 m^3/year, evacuated in the sewerage system and then in the emissary, either directly or after being treated in the waste water treatment plants (Danutoni and, respectively, Uricani). The analysis shows that the admissible concentrations are exceeded as follows: for the phosphates up to 3 times, for the anionic detergents up to 8 times, for the phenols up to 2 times, for the ammonium up to 3 times, for the organic substances up to 3 times.

The rural system, represented by the villages Cimpa, Campu lui Neag, Valea de Brazi, Dealul Babii has not an sewerage system, the waste waters being evacuated directly into the sources of water, causing high values of concentration for the phosphates, synthetic detergents, phenols, ammonium, organic materials.

3. Conclusions

The analysis of the sources of pollution of the surface hydrographical system and the underground waters in the Jiu Valley district shows the following:

- there are three main sources of pollution, respectively: the mines, other economic activities and the urban and rural systems;
- the main polluter in the waters are the solid suspensions, the concentration growing as the water crosses more industrial zones;
- the degree of pollution is different for the East Jiu and the West Jiu, due to the presence of more mines in the western side;
- the analysis shows that the degree of pollution is increased due to all the sources of pollution identified, causing values over the admitted limits for ammonium, phosphates, organic materials, hydrogen sulphide etc;
- the index of global pollution for the East Jiu is placed in the class II of quality and is in the process of natural regeneration;
- the waters of the West Jiu are more polluted than in the eastern side of the district, being placed in the class IV of quality and measures must be taken to collect and treat the technological and domestic waste waters.

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THE IMPACT OF COAL OPENCAST MINING ON THE ENVIRONMENT

Susana IANCU APOSTU*

Abstract
Contribution is discussing the areas affected by surface coal mining activities in the Jiu Valley Basin and the particular aspects regarding the stability rock of the waste dumps. The paper was be a case study for the Jiu Valley Basin about Coal Opencast Mining. The mining of pit coal in the Jiu Valley is being carried out underground, but there were a number of small open- pits were the reserves in the outcrops of seam 3 in the mine fields: Câmpul lui Neag, Lupeni, Petrila Sud and Lonea- Jiet were mined. Although they represented a small share in the basin output, their impact on the environment, especially on the soil and on the landscape has been particularly harmful.The hard coal has a large ash content (44 per cent) and thus coal dressing is an imperative. The coal dressing processes entail the formation of dumps and slurry ponds while the waste waters are discharged into the Jiu River. The above mentioned fact show that mining activity has a strong impact on the environment and the negative aspects has to be studied.

1. INTRODUCTION

Jiu Valley represents one of the most important mining areas in Romania and its industrial development has generated a high level of pollution in this area. Solid wastes produced by the mining industry occupy large storage areas. During the stage 1992 – 2010 there have been elaborated strategy studies concerning the hard coal mining and processing, studies that have been periodically putted up to date according to macro-economical and financial changes Romania passed through.

During the time, is result of Jiu Valley coal mining and processing activity, important quantities of wastes storied in waste dumps occupying a total surface of over 200 ha have been accumulated, of which 60 % are inactive.

2. ANALYSES OF SOIL FACTOR AND ASSESMENT OF IMPACT TO THE ENVIRONMENT IN JIU VALLEY

Hard coal mining and processing has a significant influence to the environment, due to the fact these processes leads to damage of forestry, agriculture and landscape fund in Jiu Valley.

The soil polluting sources are the followings :- mineral water dumps; industrial wastes and household wastes.

The effects of all these polluting sources to the soil are following : they occupy large areas of agricultural an forestry land, land damage due to infiltration of lubricants and other substances into the soil in the case of inadequate storage of industrial wastes.

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As result of vegetation lack if occurs the erosion of the dump due to the fine material carried by the water factors. The waste dumps represented the most important soil polluting sources in Jiu Valley, resulted from the mining activity. In Jiu Valley waste dumps occupy 207 ha of land.

From geological point of view, these deposits consist of the following types of rocks : shale, marls – shale's, marls, marls – limestone, slimes, cinder, etc.

Common characteristics are following :

- non – uniform geometry and location auto steep land areas ;
- before their settlements no land arrangement works have been carried out, such as: removal of vegetal soil, performing of crossing steps, drainage of streams or water springs in the area ;
- due to the fact that not all over locations there have been carried out waste dumps leveling works and catching of site water springs, this have often lead to local water accumulations.
- in the case of waste dumps afferent to coal processing plants, main problems consist in water included info the material resulting from the press filters that is storied unto these waste dumps, especially during cold period of the year.
- in many cases the material storied auto dumps present self ignition phenomena due to coal fines in it.

In accordance to the rules regarding the design execution and passing information conservation of waste dumps these are classified as presented below :

- according to the types of storied rocks : rock hardness inflammability (dumps with flammable substances) ;
- according to the waste dumps geometry : no. of steps ; height ; surface lands shape;
- according to the environment polluting possibilities influence of powders and water ;
- according to the technology used for setting the waste dumps : dry transportation system.

3. Influence of underground mined spaces onto the surface

Underground mining has negative influence to the surface land. There are producing many landfalls, land subsidence and land breakages affecting the buildings in this area.

Protection of the surface land underground mining works is provided by means of supporting pillars. Underground coal pillars support a total surface of about 2450 ha, and these includes coal reserves amounting about 460 millions tones.

4. The issue concerning investment efficiency within the content of environmental protection and rehabilitation in Jiu Valley

Environment protection and rehabilitation represents, in essence, an investment objective that is considered both as technical issue and as activity of large economical and social issue, which requires management of a large financial, material and informational volume of resources. The specific characteristic of investments concerning the environment protection consist in the fact that exists a lot of non – quantifiable effects, which only the time can quantify and prove.

Analysis of efforts or economical effects concerning the environmental investments has as characteristics the addition of many aspects outside the economic field.

In this sense, the most relevant area are : social field, political field ; local tradition and cultural field and ever ecological field. This expression can be proved even by means of collection system concerning the penalties due of non – complying the environment protection laws, or by means of ecological effects propagation, as result of environmental investment in the social field.

Environmental investments are, in fact, effected by the lack financing sources that in present are formed on the base of own sources of economic agents, in low percentage from State budget, as well as an the base of financing sources provided by different international authorities. The behavior forwards the environmental investments is seriously influenced by the poor economical development of the different economic agents.

It cannot be discussed about economical efficiency under the condition of minimum investment, only for surviving, which does not correspond to the long term strategy concerning the environment protection.

Therefore, it results that the medium term investments are very sensitive, depending mainly on the economical progress. For this reason, it is required that their execution to be performed within a simulative but strict legislative frame in order to achieve a normal environment protective behavior.

In the same time, the medium term investments should be based an economical principles, comparing the efforts with the economical effect, in order to select those investment projects that are really required and useful.

5. Conclusions

The most difficult problem in achieving the economical efficiency of the investments concerning environment protection and rehabilitation, consist in making the feasible factors aware about the followings :

- elaboration of a simulative but strict legislation regarding environment protection;
- provision and responsible usage of certain investment resources in this field ;
- promoting the non – polluting technologies into the productive sector and monitoring the risk ;
- the performance of an international cooperation in the view of achieving larger support for the new concept concerning the sustainable development can be understood as an action concerning the usage of natural resources in the same time with environment protection and conservation.

On short term, for the year 2001, in table 1, there are presented the environment rehabilitation measures and works carried out, as well as the environment costs afferent for each mining unit in Jiu Valley and total for entire mining company.

In table 2 below, there are presented the main environment protection objects and their value foreseen within the investment cost. On long term, the investments required for environment protection should follow the measure in the interval programs of each mine approved by the environmental authority. These measures should be putted up to date in accordance with the possible situation modifying the environment elements.

TABLE 1. Measures concerning environment rehabilitation environmental-Factor SOIL

MINE	NR.	MEASURES/WORKS	Value (Euro)	Total value for mine (Euro)
LONEA	1.	Arrangement of active waste dumps	4000	12.000
	2.	Arrangement of conservation waste dumps	4000	
	3.	Reintroduction of micro-pits into the agricultural circuit	4000	
PETRILA	1.	Waste dumps-reintroduction in economic circuit	5000	7.700
	2.	Industrial waste-protection of the soil	1500	
	3.	Protection of the surface against the influence of the underground mining	1200	
LIVEZENI	1.	Arrangement of active waste dumps	4000	5.000
	2.	Storehouse for carburants and lubricants	4000	
ANINOASA	1.	Reintroduction of terrain occupied by waste dumps	4000	8.000
	2.	Collection and storage of waste	4000	
VULCAN	1.	Arrangement of active waste dumps	3500	8.000
	2.	Arrangement of non- active waste dumps	3500	
	3.	Prevention of soil erosion	1000	
PAROŞENI	1.	Arrangement of active waste dumps	4000	9.000
	2.	Arrangement of non- active waste dumps	4500	
	3.	Protection of the surface against the influence of the underground mining	500	
LUPENI	1.	Drainage of kelety swamp	4000	8000
	2.	Drainage of swamp near Est products	4000	
	3.	Protection of the surface against the influence of the underground mining	1000	
BĂRBĂTENI	1.	Arrangement of active waste dumps	1500	6500
	2.	Arrangement of non- active waste dumps	2500	
	3.	Reintroduction of micro-pits into the agricultural circuit	2500	
URICANI	1.	Arrangement of active waste dumps	2500	10.000
	2.	Arrangement of non- active waste dumps	2500	
	3.	Protection of the surface against the influence of the underground mining	1000	
	4.	Reintroduction of micro-pits into the agricultural circuit	4000	

VALEA DE BRAZI	1.	Reintroduction of micro-pits into the agricultural circuit	4500	7.000
	2.	Collection and storage of waste	1500	
	3.	Protection of the surface against the influence of the underground mining	1000	
TOTAL JIU VALLEY			82.000	

damages on affected by the mining activity, by program effects upon the line concerning the promotion of non – polluting technologies and by all improvements that can be achieved during the implementation of internal programs stipulations.

The present paper aims to contribute to the improvement of ecological management decisional process, in the view of rehabilitant Jiu Valley environment quality – from the point of view of environmental factor – soil – by establishing the necessary objectives.

TABLE 2. Main environment protection objects

MINE	NO.	NAME OF OBJECT	Value (Euro)	Total mine (Euro)
LIVEZENI	1.	Consolidation of auxiliary dumps-Shaft No.3	38.000	45.000
	2.	Rehabilitation works concerning the land inside of Eastern Auxiliary yard	7.000	
VULCAN	1.	Consolidation of auxiliary dumps-shaft no.VII	12.000	12.000
LUPENI	1.	Arrangement of waste dump Ileana	15.000	180.000
	2.	Reintroduction into the agricultural circuit of the open pit and waste dump Victoria	150.000	
	3.	Reintroduction into the agricultural circuit of the lands –Lupeni South	15.000	

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DESIGN OF A INTRACONTURAL WATERFLOODING PROCESS IN A FIVE POINTS NETWORK, WITH AN APPLICATION FOR A RESERVOIR FROM ROMANIA

Ana Maria BADEA*

Abstract
The intracontural waterflooding applies to oil fields with invariant contours, booth to the primary and the secondary exploitation. For this study it used data of physico-chemical parameters of collectors and reservoir fluids from oil Romanian reservoir. It has used the Craig-Morse model and the Buckley-Leverett and Welge theory. Until the reference data the reservoir studied was exploited in drive dissolved gas depletion.

Keywords*: reservoir, flooding, Buckley-Leverett and Welge theory, intracontural, waterflooding, process in five points network, recovery factor.*

1. Introduction. Definition of the Concept

The rational exploitation of the fluid hydrocarbons deposits involves the complete extraction of the relevant material from the deposit, so that this can ensure the fulfilling of the production plan.

The fluid hydrocarbons deposit is a physical-chemical system consisting of a solid porous-fractured-permeable medium saturated with a fluid system composed by hydrocarbons and reservoir waters.

The formation of these deposits of fluid hydrocarbons is determined by physico-chemical conditions of geological time, conditions that generated the composition of the solid porous fractured-permeable medium, the water reservoir formation, the systems of hydrocarbons creation, and all these environmental conditions are involved in the formation of solid waterproof medium and in the generation of the tectonic accidents, which isolated in Earth's crust the tight reservoir.

2. Contents

2.1. The deposits physical model

Geology structure

Geographically the structure is located in the northern part of the Prahova county.

Geologically the Cărbunești structure is on the northern trough of Drajna in the subduction zone with Văleni spur.

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The analyzed structure develops in SW-NE direction and is bounded at the north and west of a major fault line caused by salt (salt fault).

Lithological and geological complexity of the two sedimentation pools is increased by the tectonic relations between them, which is achieved by a major overthrust fault accompanied by other smaller highlighted by seismic prospecting and exploration wells.

Concerning the conditions of hydrocarbon deposits formation we have:

-Bedrocks;

-Reservoir rocks;

-Protective Rocks.

Productive area delineation

Based on geophysical data obtained, a structural map is built, and it determines the position of hydrocarbon/water contact and then the geological sections are built.

2.2. The collector, the hydrocarbons systems and water reservoir physical properties

Knowing the exact temperature of the deposit is required by the fundamental equation of energy. Geothermal energy determined the formation of the solid environmental fluid hydrocarbon deposits, of the mineralized water reservoir and hydrocarbon fluid systems.

Geothermal energy is involved in the formation and diversification of hydrocarbon fluids deposits.

Knowing the initial reservoir pressure is important both for drilling problems and for those of design.

For fluid were established the averages values because of their physical properties are not worth very much from one point to another deposit. For rock parameters were statistically determined. Porosity histogram is a Gaussian curve (a bell in the right frequency with a maximum of 50%).The average value of porosity m * is between the limits:

$$\tilde{m} - \frac{2 \cdot \sqrt{\sigma^{*2}}}{\sqrt{\eta}} < m^* < \tilde{m} + \frac{2 \cdot \sqrt{\sigma^{*2}}}{\sqrt{\eta}}; \qquad (2.1)$$

The value is calculated as an average value with probability of 95% ,if total value exceeds.

Clustering model of data from porosity is shown in table 2.1.

Table 2.1.

Porosity class (%)	Average porosity of the classs(%)	Number of analysis C.M.C	Current frequency f_c (%)	Cumulative frequency f_Σ (%)	Multiplication $m \cdot f_c$
25 -25,5	25,25	1	0,05263	0,05263	1,43416
25,5-26	25,75	2	0,10526	0,15789	2,92096
26-26,5	26,25	4	0,21052	0,36841	5,94719
26,5-27	26,75	3	0,15789	0,52630	4,53933
27-27,5	27,25	4	0,21052	0,73682	6,15771

27,5-28	27,75	1	0,05263	0,78945	1,56574
28 -28,5	28,25	1	0,05263	0,82408	1,59205
28,5-29	28,75	2	0,10526	0,94734	3,23674
29,5-30	29,25	1	0,05263	1	1,64468

Figure 2.1 shows the distribution curve resulted from Table 2.1.

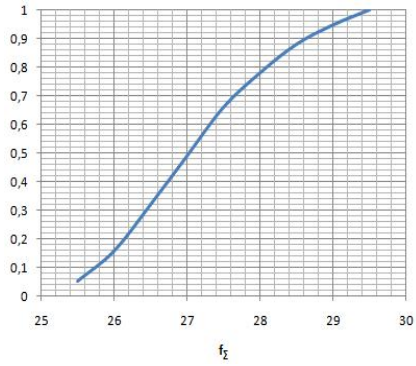

Figure 2.1

The only direct method to determine water saturation in interstitial mechanical coring well consists of oil based fluid.

Table 2.2

S_{ai}(%)	Number of samples	Current frequency f_c (%)	Cumulative frequency f_{Σ}(%)	Multiplication $f_c \cdot S_{ai}$
17,5-18	2	0,10526	0,10526	1,868365
18-18,5	3	0,15789	0,26315	2,881490
18,5-19	1	0,05263	0,31578	0,986810
19-19,5	2	0,10526	0,42104	2,026250
19,5-20	1	0,05263	0,47367	1,039440
20-20,5	2	0,10526	0,57893	2,131510
20,5-21	1	0,05263	0,63156	1,065750
21-21,5	2	0,10526	0,73682	2,236770
21,5-22	1	0,52630	0,78945	1,144700
22-22,5	1	0,05263	0,84208	1,171010
22,5-23	1	0,05263	0,89471	1,197330
23-23,5	1	0,05263	0,94734	1,223640
23,5-24	1	0,05263	1	1,249960

Calculation oil reserves:

For calculation of the reserve oil is used the volumetric method.

$$N=V_m\cdot(1-S_{ai})\cdot\frac{1}{b_{t0}} \quad (2.2)$$

$A_{2p}=1\ 845\ 000m^2$ (2.3);

$V_b=A_{2p}\cdot h_{ef}=7\ 380\ 000m^3$ (2.4);

$b_{to}=1,066$ (2.5)

$N_z=7\ 380\ 000\cdot0,25\cdot(1-0,21)=1\ 457\ 550m^3$ (2.6)

$N_s=1\ 394\ 785m^3$ (2.7)

$M=N_o\cdot r_o=2,915\cdot10^7\ m^3N$ is the value of gas reserve

2.3. The intracontral waterflooding

If artificial flooding of oil deposits, stationary flow is developed, in fact, only when water penetration extraction wells, up to now, the flooding takes place in a nonstationary flow, because the injected water flow far exceeds flow of oil extracted and injected water fills the pores of the coating area operated, pushing her face oil front. The amount of oil extracted from a reservoir operated by injecting water flooding depends on the factor washing. Craig-Morse has combined the experimental results obtained in the laboratory on a 5-point injection model with Buckley-Leverett theory as proposed by Welge. Operation of a panel of injection can take place either at constant injection rate or at a constant pressure drop between the injection wells and extraction.

These data are known at the end of dissolved gas exploitation:

- $p_m=32$ bar$= 32\cdot10^{-5}\ N/m^2$
- $b_{tm}=1,029$
- $\mu_t=3,42cp=3,42\cdot10^{-3}Pa\cdot s$

$\mu_a=0,65cp=0,65\cdot10^{-3}Pa\cdot s$

- $\varepsilon=15\%$
- $m=0,25$
- $h=4m$
- $S_{ai}=0,21$
- $S_{tr}=0,108$
- $b_{to}=1,045$
- $r_s=0,187$

Water fraction is calculated using the formula:

$$f_a=\frac{1}{1-\frac{K_t}{K_a}\frac{\mu_a}{\mu_t}} \quad (2.8)$$

where:

K_t is effective permeability to oil , $K_t=S^4$

K_a - effective permeability to water, $K_a=(1-S)^2(1-S^2)$

μ_t - dinamic viscosity of oil,

μ_a - dinamic viscosity of water

$$S=\frac{S_a-S_{ai}}{1-S_{ai}-S_{tr}} \quad (2.9)$$

Water fraction is calculated for different values of $S_a \in (S_{ai}, S_{tr})$. The values obtained are written in the table:

Table 2.3

S_a	S	K_t	K_a	f_a	$(\frac{df_a}{dS_a})_f$
0,21	0	1	0	0	-
0,25	0,058	0,884	0,0000113	0,000067	0,02222
0,30	0,131	0,742	0,00029	0,0020	0,11533
0,35	0,205	0,605	0,0017	0,0116	0,587
0,40	0,278	0,480	0,0059	0,0607	1,971
0,45	0,351	0,369	0,01517	0,0287	3,273
0,50	0,425	0,270	0,0326	0,388	4,223
0,55	0,498	0,189	0,0615	0,631	4,3
0,60	0,571	0,124	0,106	0,818	2,92
0,65	0,645	0,073	0,173	0,925	1,55
0,70	0,718	0,038	0,265	0,973	0,67
0,75	0,791	0,016	0,391	0,992	0,142
0,89	1	0	1	1	-

where:

$$(\frac{df_a}{dS_a})_f = \frac{f_{a_{j+1}} - f_{a_{j-1}}}{S_{a_{j+1}} - S_{a_{j-1}}} \tag{2.10}$$

Plot the fraction of water saturation and insight, tracing the curve tangent $f(a)=f(S_a)$ and $\frac{df_a}{dS_a} = f(S_a)$.

From the curve $f(a)=f(S_a)$, it reads water saturation front S_{af}, and from the curve $\frac{df_a}{dS_a} = f(S_a)$, corresponding slope value. At the intersection of two curves are obtained until penetration, saturation in water-oil front, the intersection of two curves are obtained, $\overline{S}_{apt}$ remain constant, still leading the tangent to the curve $f(a)=f(S_a)$ at points $f_{a2} > f_{apt}$, is obtained the saturation $\overline{S_a} > \overline{S_{a_{pt}}}$.

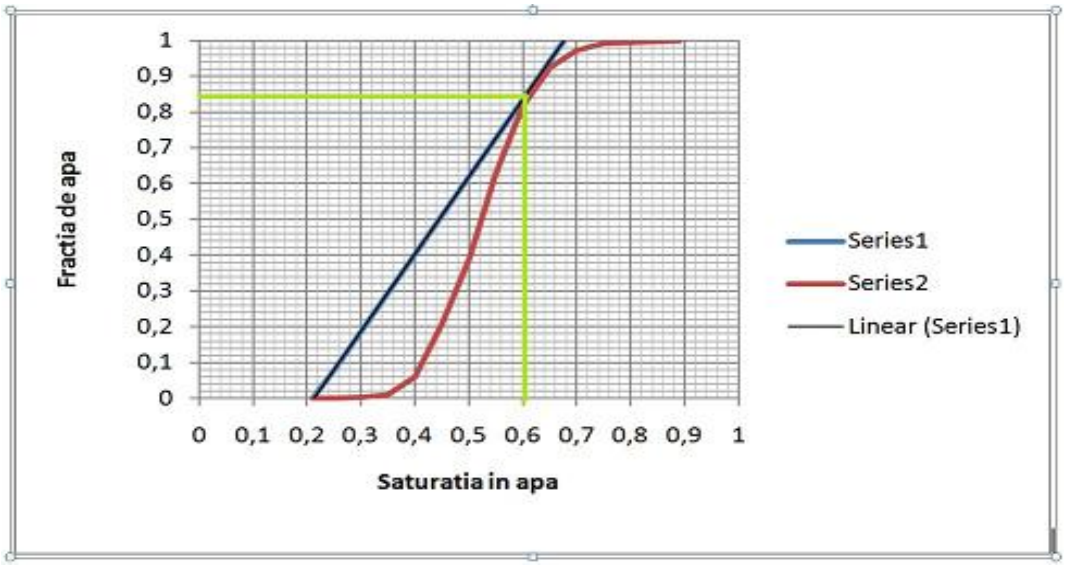

Fig. 2.2. Plot the fraction of water depending on water saturation.

Is played in also building the curve = f (Sa) and still represents the variation of Kt, Ka = f (S).

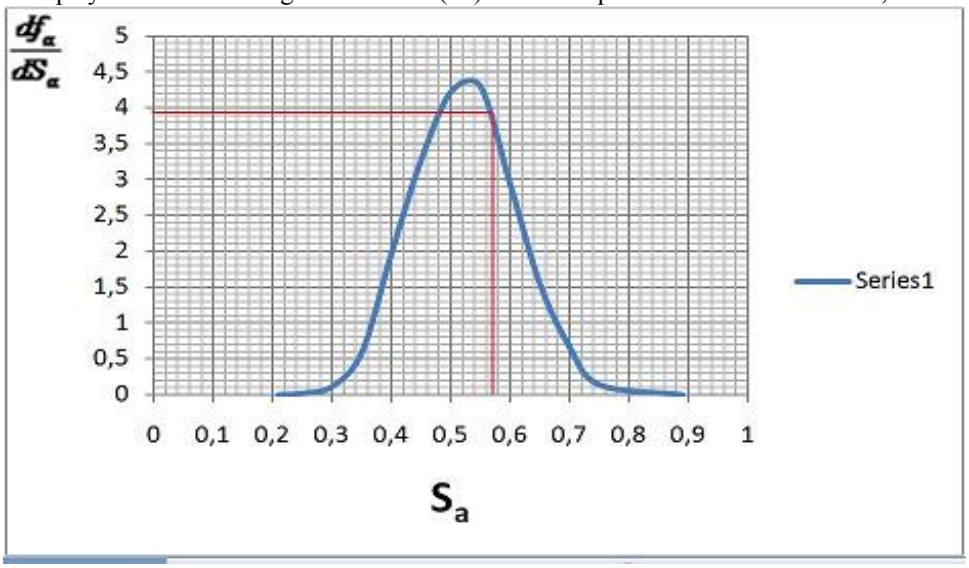

Fig 2.3 Variation $\frac{df_a}{dS_a}$ ***depending on saturation.***

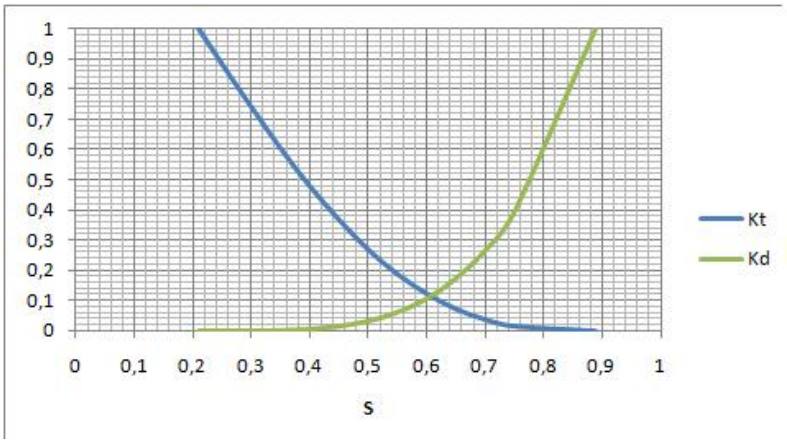

Fig.2.4.Diagram of relative permeability-saturation.

Intracontural waterflooding is considered as water in a 5-point network.

Example of calculation

From the plot read these values: $S_{apt} = 0,6$

$f_{apt}=0,84$

$\overline{S_{a_{pt}}} =0,74$

Calculations are made according to model Craig as the gas saturation value is calculated as:

$$\overline{S_{g_{\max}}} = \overline{c} \cdot (1-S_{ai} - \overline{S_{a_{pt}}}) \quad (2.11)$$

$$\overline{S_{g_{\max}}} =0,98 \cdot (1- 0,21-0,74) =0,049 \quad (2.12)$$

$$S_{g\ in} =1-S_{ai}-S_{tm} = 1-0,21-0,71=0,08 \quad (2.13)$$

Coefficient value $\overline{c}$ is read from the diagram according to M, $\overline{c}$ =0.98.

$$S_{t_{in}} =S_{t0}\left(1-\frac{\Delta N}{N}\right)\frac{b_{t_{in}}}{b_{t_0}} =0,8\cdot(1-0,15)\cdot\frac{1,029}{1,045}=0,78 \quad (2.14)$$

$$M=\frac{K_a}{\mu_a}\frac{\mu_t}{K_t}=\frac{0,26}{0,65}\frac{3,42}{1}=1,36 \quad (2.15)$$

So $\overline{S_{g_{\max}}} > S_{t\ in}$

Network element has side of 200 m.

$V_p=200\cdot200\cdot4\cdot0,25=40\ 000\ m^3$. (2.16)

$$N_{in}=V_p(1-S_{ai}-S_{g\ in})\frac{1}{b_{t_{in}}} =40\ 000(1-0,21-0,08)\frac{1}{1,029}=27\ 599,6 m^3. \quad (2.17)$$

M=1,36.

I_{Apt}=0,57(it be read from diagram)

$W_{inj}=V_p \cdot S_{g\,in}$ =40 000·0,08=3 200m^3.

$W_{inj_{pt}}=V_p.(\overline{S_{a_{pt}}} - S_{ai})\cdot I_{Apt}$=40 000(0,74-0,21)·0,57=12 084m^3 (2.18)

In a 5-point system, the flow of water injection for M = 1.36 and single-phase flow is:

$$q_{inj5} = 0{,}027151\frac{KhK_a * (p_{inj} - p_{in})}{\mu_a \cdot (\ln\frac{D}{r_s} - 0{,}619)} = 0{,}027151\frac{0{,}027151 \cdot 417.64 \cdot 0.26 \cdot (40-32)}{0.65 \cdot \cdot (\ln\frac{200}{r_s} - 0{,}619)} = 22.83 \ \ m^3/day \quad (2.19)$$

$$\Delta t = \frac{W_{inj} - W_{inj_{\text{int erf}}}}{\frac{q_{inj_{\text{int erf}}} + q_{inj_5}}{2}} = \frac{7200-5024}{\frac{196.3+22.83}{2}} = 19.86 \ \ days \quad (2.20)$$

66.08+19.86=85.89 days

In time, on the network element, the injection flow is equal to the flow of oil.

$$q_t = \frac{q_{inj}}{b_{t_{in}}} = \frac{22{,}83}{1{,}029} = 22{,}18\, m^3/zi \quad (2.21)$$

$I_A=2{,}09\cdot 10^{-5} W_{inj}$ (2.22)

$$\Delta t = \frac{\Delta W_{inj}}{q_{inj_5}} = \frac{\Delta W_{inj}}{22{,}83} \quad (2.23)$$

$$\Delta N = \frac{W_{inj} - W_{inj_9}}{b_{t_{in}}} = \frac{W_{inj} - 7200}{1{,}029} \quad (2.24)$$

Calculation results are shown in the table 2.4:

W_{inj}	I_A	Δt	t	ΔN	$\sum = \frac{\Delta N}{N_{in}}$
m^3		days	days	m^3	%
7 200	0,150	-	-	0	0
10 000	0,209	122,64	122,64	2 721,0	4,0
13 000	0,271	131,40	254,05	5 636,5	8,0
16 000	0,334	131,40	385,45	8 551,9	13,0
19 000	0,376	131,40	516,86	11 467,4	18,2
22 000	0,438	131,40	648,26	14 382,8	22,8
25 000	0,501	131,40	779,67	17 298,3	27,4
27 189	0,568	95,88	875,55	19 425,6	30,8

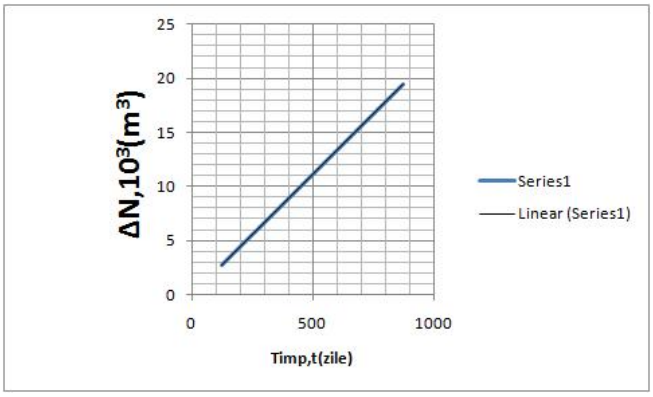

Fig.2.5 Variation in time from cumulative

$W_{inj_{pt}} = 27\ 189$ m

$$Q_i = \frac{Q_i}{Q_p} \cdot Q_p \quad (2.25)$$

It has used the Buckley-Leverett and Welge theory and we obtain:

$\overline{S_a} - S_{a_2} = Q_i \cdot (1 - f_{a_2})$; (2.26)

$$Q_p = (\frac{df_a}{dS_a}) s_a \quad (2.27)$$

$\overline{S_{a_{pt}}}$ =0,69 and

$$df_a / dS_a = 1{,}2. \quad (2.28)$$

S_{ap}=0,69 with

$$\left(\frac{df_a}{dS_a}\right)_{S_{a2}} = \frac{1}{Q_p} \Rightarrow S_{a_2}.$$

$$Q_p = 1:1.2 = 0{,}8 \quad (2.29)$$

$$f_{f_2} = 1 - f_{a_2}$$

$$\overline{S_a} = S_{a_2} + Q_i \cdot \left(1 - f_{a_2}\right)$$

$$\lambda = \lambda\left(\frac{W_{inj}}{W_{inj_{pt}}}\right) \quad (2.30)$$

$$\Delta N'_{p_n} = \lambda \cdot \frac{S_{a_{pt}} - S_{a_i}}{I_{Apt} \cdot (\overline{S_{a_{pt}} - S_{a_i}})} = \lambda \cdot \frac{o,69 - 0,21}{0,57(0,74 - 0,21)} = 1,588\lambda \tag{2.31}$$

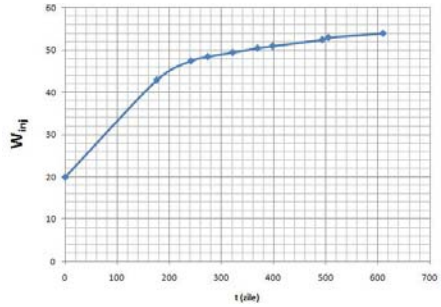

Fig.2.6. Variation in time of cumulative injecte

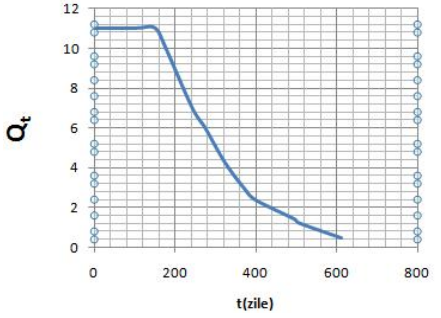

Fig.2.7 Variation in time of flow of oil.

Table 2.5

No.	$W_{inj}(m^3)$	$\frac{W_{inj}}{W_{inj_{pt}}}$	I_A	$\frac{Q_i}{Q_{pt}}$	i	$(\frac{df_a}{dS_a})s_{a_2}$	S_{a2}	f_{a2}	f_{t2}
1	27 189	1,0	0,57	0,91	0,83	1,20	0,468	0,672	0,328
2	33 189	1,2	0,62	1,19	0,85	1,17	0,480	0,687	0,313
3	39 240	1,4	0,66	1,37	0,89	1,12	0,490	0,691	0,309
4	45 291	1,6	0,69	1,54	0,93	1,07	0,500	0,703	0,297
5	51 342	1,8	0,73	1,70	0,98	1,02	0,505	0,725	0,275
6	57 393	2,0	0,76	1,80	1,025	0,97	0,510	0,734	0,266
7	63 444	2,2	0,78	2,20	1,284	0,77	0,519	0,788	0,212
8	78 859	2,4	0,81	2,40	1,349	0,74	0,526	0,798	0,202
9	104 892	3,5	0,91	2,90	1,523	0,65	0,530	0,821	0,179

Table 2.6

No.	$\overline{S_a}$	λ	$\Delta N'_{pn}$	1-$\Delta N'_{pn}$	$\Delta N'_{pv}$	$\Delta N'_{pn}+\Delta N'_{pv}$	RAP/b_t	RAP	S_a-S_{ai}
1	0,730	0,274	0,435	0,565	0,0185	0,4530	1,207	1,207	0,529
2	0,754	0,231	0,366	0,635	0,0198	0,3850	1,597	1,643	0,544
3	0,761	0,200	0,317	0,683	0,0211	0,3380	1,958	2,013	0,551
4	0,774	0,174	0,276	0,724	0,0215	0,2970	2,367	2,435	0,564
5	0,779	0,156	0,247	0,753	0,0207	0,2670	2,745	2,824	0,569
6	0,785	0,142	0,225	0,775	0,0206	0,2450	3,081	3,170	0,575
7	0,788	0,112	0,177	0,823	0,0174	0,1940	4,154	4,274	0,578
8	0,789	0,000	0,000	1,000	0,0202	0,0200	48,504	49,910	0,579
9	0,793	0,000	0,000	1,000	0,0179	0,0179	54,865	56,450	0,583

Table 2.7

No.	A	$\frac{\Delta N'}{N_{in}}$	ΔN' (m^3)	$(K_a)_{Sa}$	M	Cond	q_{inj} (m^3/day)	Q_{ti} m^3/ day	Q_a m^3 day	∑,%	Δt days	T days
1	0,1971	0,277	17443,7	0,2839	1,45	1,01	23,05	10,1	12,8	51	47	175
2	0,2095	0,295	18577,2	0,3232	1,65	1,16	26,48	8,63	17,8	52	49	241
3	0,2122	0,298	18766,1	0,3353	1,71	1,20	27,39	7,57	19,8	53	46	273
4	0,2163	0,304	19144,0	0,3588	1,83	1,22	27,85	6,64	21,2	54	43	321
5	0,2216	0,312	19647,7	0,3683	1,88	1,38	31,50	5,97	25,5	55	42	369
6	0,2247	0,316	19899,6	0,3797	1,94	1,40	31,96	5,47	26,4	56	38	398
7	0,2288	0,322	20277,5	0,3855	1,97	1,48	33,78	4,32	29,4	56	73	493
8	0,2295	0,415	20334,0	0,3875	1,98	1,50	43,24	0,45	33,7	57	59	505
9	0,2309	0,325	20466,4	0,3954	2,02	1,55	35,38	0,40	34,9	58	110	610

$$A=I_{Ap}\cdot(\overline{S_{a_{pt}}}-S_{ai})-\overline{S_{g_{in}}} \quad (2.32)$$

The injection is applied simultaneously in the five points network. Reserve ,early water injection for the 5 points ,is:

$$N_{in}=27\ 599,6\ m^3 \quad (2.33)$$

Reservoir recovery factor is:

$$\sum=0,58\cdot0,8=0,464=46,4\% \quad (2.34)$$

3. Conclusions

The final recovery factor of oil from the reservoir model examined was 46.4%. To increase the ultimate recovery factor can propose a intraconturale injections of water in five points network.

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THE EXAMINATION OF THE LINEAR BUTT WELDING WITH THE HELP OF ULTRASONIC NONDESTRUCTIVE FLAW

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Carmen FLOREA

Abstract
Ultrasonic control of the parts and joints puts out the most types of the volumetric or plane discontinuity (cracks, holes) and is applicable to a wide range of materials, limitations in the case of metals are determined by their grain size. In certain welded constructions (e g. trails pipes) the weld root is no longer accessible after its completion. As a result, the weld root defects cannot be visually observed. Under these circumstances the root must be examined with ultrasounds on the other accessible side of the seam. The paper renders the results of the flaw examination which was subject to an OLT 35 pipe, butt welded, 120 mm in diameter and 2.5mm Φ made it with coated electrodes.

Keywords*: ultrasounds, weld examination, transducers, electric welding*

1. Introduction

The ultrasonic control puts out almost all types of volume or flat discontinuity , the control method has also broader applications for thickness measurements, determinations of elastic constants of the materials etc, and is applicable to a wide range of materials, limitations in the case of metals are determined by the structural grain size.

With a special penetration (transparency) the ultrasounds allow for examining the large and very large thicknesses sections, the distances covered in rolled or forged steel parts reaching up to 5-10 m.Devices are lightweight, portable and autonomous and the method can be applied with special results to the products and complex systems as well as site conditions.The control result is immediately because is operated in real time. It identifies with good precision the coordinates and size of discontinuity. The method sensitivity is around 0.5 mm for volumetric flaws respectively to the higher levels for the hairline cracks, which generally are difficult detected through radiographic methods.

The sound waves are vibrations of elastic media with a superior frequency that produces an auditory sensation (20 * 103Hz) and with a lower frequency (1010 Hz) to the ultrasounds.

Ultrasounds propagate in the form of an elastic wave. For the purpose of fault detection are used two types of ultrasonic waves:

- longitudinal waves – which the particle oscillation and the direction propagation are parallel
- transverse waves - which particle oscillation direction and the propagation direction are perpendicular

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The sound waves propagate in the piece suffer from reflections at a meeting of a defect or to an area with a modified acoustic impedance. Reflected signals will be received by the transducer and transmitted to an oscilloscope. The analysis of the reflected wave allows to assess the defects. In a material without a defect always appears a general reflection of the beam at the material width crossing to a period of time t = g / v where g - thickness, and v -the propagation speed.

If there is a fault which is parallel to the surface, appear more echoes or reflections at time intervals *t* 1 *t* <.The echo takes specific forms which are proper for the type of defect (pores or cracks with rough), which are subsequently processed with the computer which allows the development of an accurate image of the defect. The resistance scale calibration of the device is performed as accurately as possible preferring the method using longitudinal waves, which is the most accurate. The accurate positioning of a discontinuity in welded joints leads to an assessment of the possible nature of the discontinuity

Full examination of welded joints includes the following operations:

- weld root location,
- weld root examination,
- weld examination of longitudinal defects:
- using slanted transducers,
- using normal transducers
- the welded joint examination for cross-defects using slanted transducers
- special examinations.

2. The ultrasounds control results of a weld pipe

The weld root represents the first layer of a metal which realizes the solidarity of the two welded components. To carry through this first layer depends the whole quality of a future welded joints. In certain welded constructions (e g. trails pipes) the weld root is no longer accessible after its completion. This means that certain weld root defects which correspond with the surface cannot be visually observed or repaired. Under these circumstances the root must be examined with ultrasounds on the other accessible side of the seam.

For exemplification we shall assay an OLT 35 pipe, (figure 1)butt welded, 120 mm in diameter It has achieved a manual electric welding (the prescription ISCIR PT CR 7/2010)with an equipment CADDY100 and 2.5mm Φ made it with coated electrodes.

Figure1: Sample of welded pipe

The examination was performed on the entire seam area, i.e. the actual weld, the root and the thermal influence zone.The most used device for the examination is on type Phaser XS 16/16 and is on the conventional setup.Ultrasonic flaw detection consists of a high frequency generator an amplifier, a synchronizer, two quartz plates (transmitter and receiver plate) and a cathode-ray oscillograph.

Check phases of a weld with ultrasonic flaw are as follows:

- high frequency pulse signal to the synchronizer
- impulse transmission to the amplifier, which communicates it to the cathode ray oscillograph whose screen is a point
- simultaneous transmission of a quartz crystal to a pulse transmitter, which will come into this piece, will meet the defect and it will be reflected and then received by the receiver crystal, who shall to the amplifier, but with some delay from the directly pulse, because it had to walk the extra distance to the defect and vice versa: on the cathode ray oscillograph screen will appear a second point.
- the bottom surface of the controlled work piece will reflect light, on the oscillograph screen, and will appear a third point.

Depending on the distances of differences between these points we can appreciate the depth at which the defect is by reading directly on the screen using a scale to measure.Through this system of the fault detection are getting remarkable results, with the only drawback that cannot be determined with all precision the form, the nature and the size of the defect, which is to be made by Gamma radiography or Radiography.

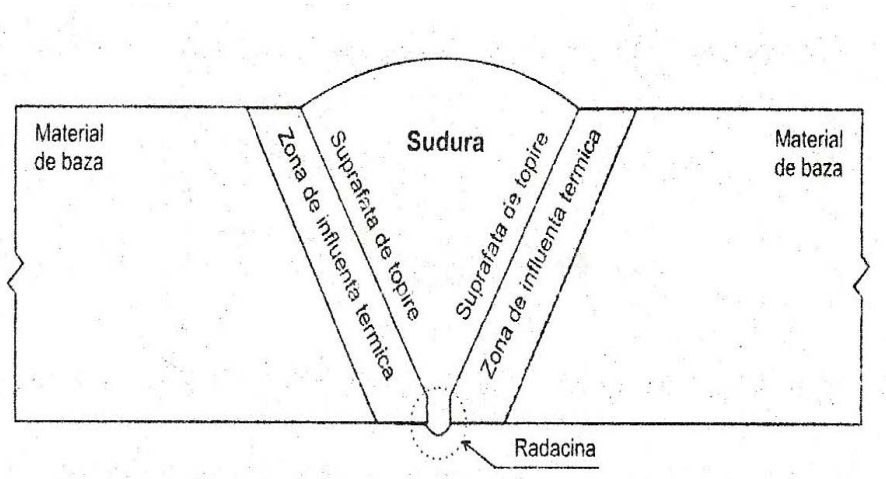

Figure 2: Section through an examined work/piece

ZIT (figure2) extinction depends on the distance that took place the structural transformations during the weld deposit material.

For examination slanted transducers will be used with a nominal frequency of 2 MHz, these representing an opening angle greater than the 4-MHz beam and sees a larger portion of the examined volume.

Examination principle and transducer positioning are presented in Figure 3:

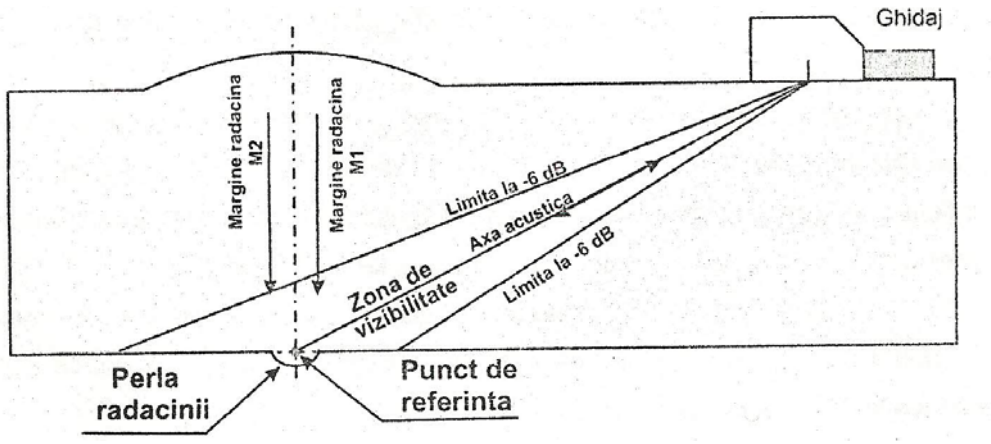

Figure 3: Examination principle of a welded joint using ultrasound

The first operation is to construct a CAD curve on the test system screen. Amplification of the CAD drawing will be considered a basic amplifier. The amplification assessment is the amplification which is set at a level of imperfection causing some echo-indication and should be evaluated.Figure 4 presents the standard curves and parameters which are indicated by the device before measuring and Figure 5 presents the data recorded by the device after reviewing the work.

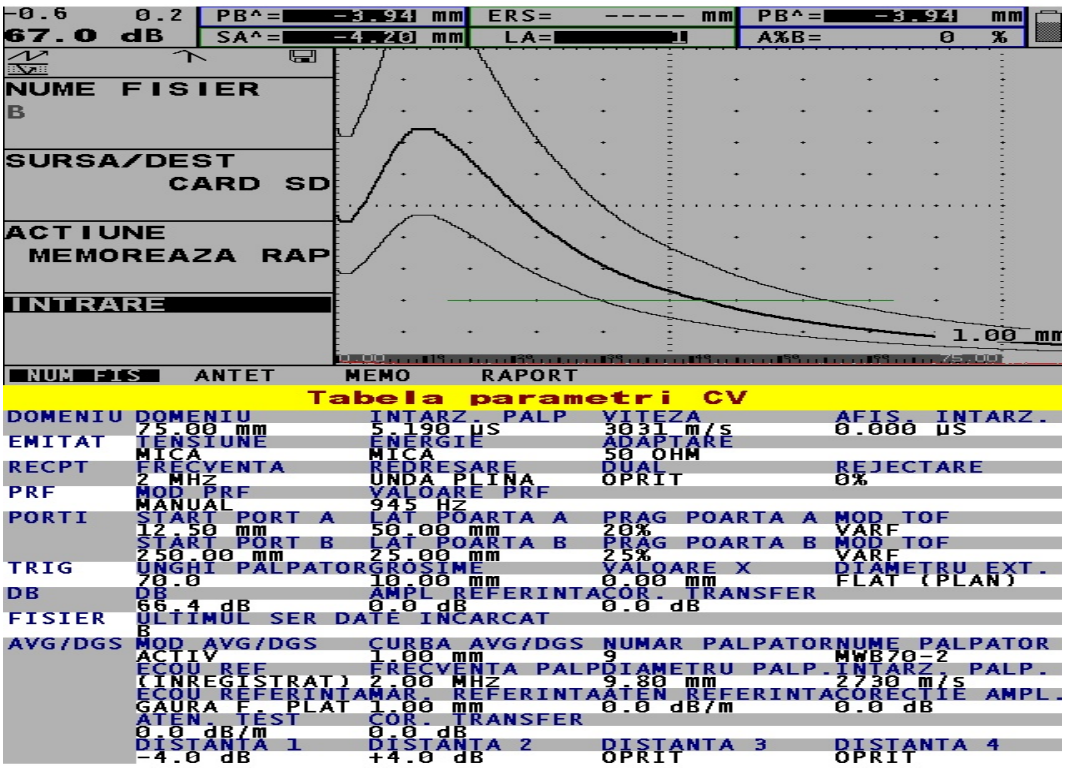

Figure 4.Used Standard Curves to a welded Pipe Control

The curves from the Figure 4 correspond to an empty flat-bottom reflector with an equivalent diameter of 1 mm(present reflector in a specially designed calibration unit), AVG curves are obtained by recording the reflected echo by this gap . All the echoes from the potential reflectors presented in the welding intersect these curves, beating them, and highlights discontinuities with an equivalent size greater than 1 mm, i.e. a DEFECT is found.

The sensitivity adjustment is made on the reference blocks with holes which are specially made, obtaining an echo with a height ranging from 50 to 100% of the screen height. In the case of a fast and information control can be performed the hole on the calibration block or to an approximate value of a sensitivity in longitudinal waves (the *n*-th echo has a height of 75%) .In this case the coupling medium will be dextrin, but we can also use oil but less water.

The examination itself consists of a rectangular moving feeler, by performing a sliding motion, combined with a rotation in one and other direct. The advancing step in the direction of the

welded seam must be smaller than the active width of the feeler. The examination will be made on each side of the weld.The reflected wave ,so the possible echo from figure 5 can demonstrate the lack of melting at the bead root(chamfering lip was not properly melted).

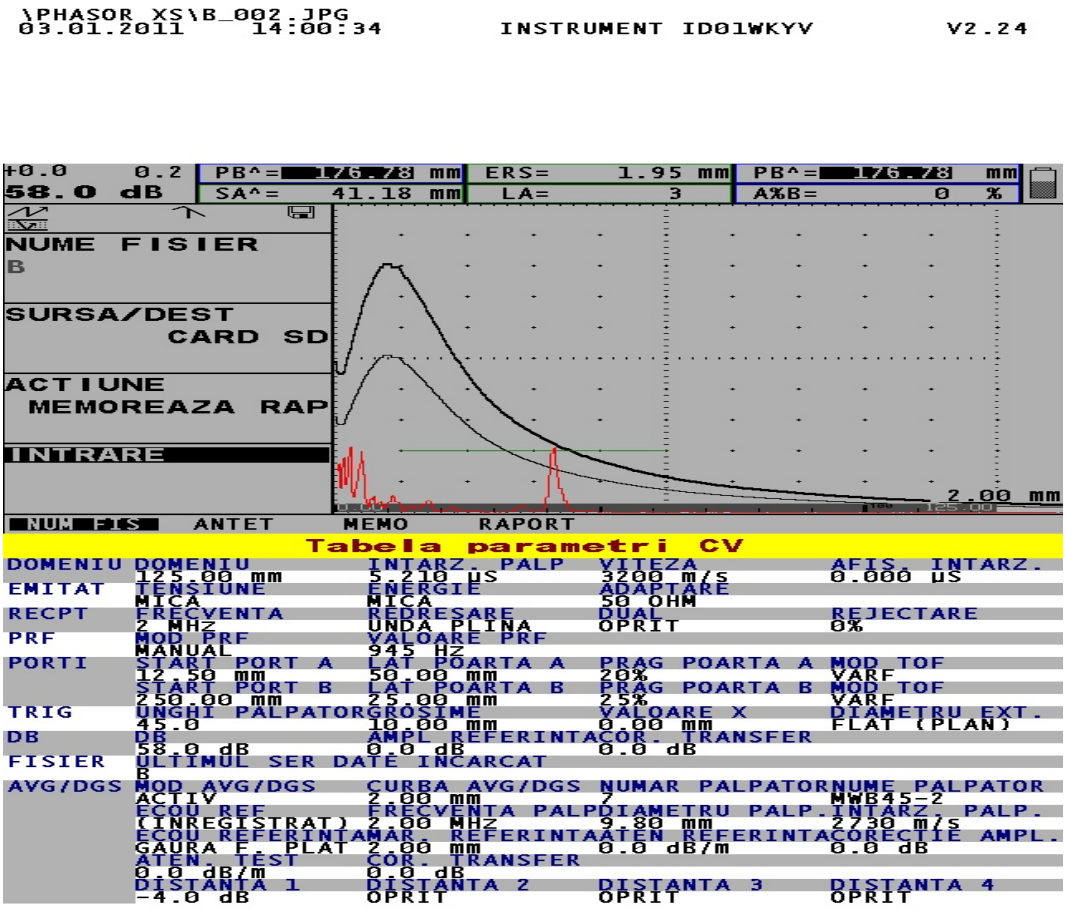

Figure 5: The ultrasounds control results of a weld pipe

3. Conclusions

In the case of the ultrasonic control of a butt weld pipe has observed the following aspects:

- The recorded echo does not exceed the curve, so the reflector does not have the equivalent size of a gap with 1mm flat bottom , so there is not a DEFECT and qualified welding is allowed.

- The welding is performed through the classified-process by the ISCIR PT CR 7/2010 prescription- electric manual with a covered electrode. The inverter welding machine is a 100 CADDY.

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THE IDENTIFICATION OF POLLUTION SOURCES OF JIU RIVER IN THE UPPER COURSE AND ECOLOGIZATION POSSIBILITIES

Paula Cristina OLTEAN[*]

Abstract
The identification of the pollution main sources domestic waste on the Jiu's bank's end elimination of the wastes uncontrolled stored on the banks of the surface waters. Elimination of the wastes uncontrolled stored on the banks of the surface waters is realized by the ecological actions of the affected areas. For the greening of the banks in the hydrographic basin of Superior Jiu I propose the realization of a project accessing the European funds.

Keywords*: surface, water, pollution, greening, European funds.*

Introduction

The water represents the main vehicle of substance and energy changes between various systems and subsystems; space distribution of the water depends on the climatic conditions, geological substrate, the complexity of the relief, the plant coverage rank, anthropogenic component (it usually operates as a disturbing factor); the waters were also the primary environment and they have a polarizing role in territorial distribution of the human communities and habitats.

Surface water pollution and also the groundwater, has serious impacts on the biosphere, affecting aquatic life from microorganisms to insects, fishes and birds, and also the terrestrial animal and plant health; depending on the nature and intensity of pollution, the usability can be diminished or canceled in almost any purpose (physiological, hygienic, industrial, recreational etc).

Act No. 107/1996 provides the water protection legislation, and in terms of quality drinking water by Act No. 458/2002 modified and completed by Law No. 311/2004.

Regulate waste management activities in order to protect the environment and public health is accomplished by several national acts AND the most important act is O.U.G. no. 78/2000.

Jiul is a first order tributary of the Danube and it confluences with the Danube at 629km upstream with the river flowing in the Black Sea.

Jiu upper basin is in the Petrosani City where, before breaking into gorge, it gathers the waters of an area of over 1200 km^2.

Eastern Jiu (Jiu of Petrila) has a length of 28km, area of 479km2, the average flow rate of 7,1m3/s, the main tributaries Taia, Eastern Jiu, Jieţul and Băniţa Valley with the creeks Jigoreasa, Jigorul Mare, Galbena, Red Valley, Saşa Valley, Stoinicioara, Polatişte and it crosses the cities Petrila, Petrosani and Livezeni.

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Western Jiu has a length of 51,4km, an area of 534km2, the average flow rate of 10,6m3/s, main tributaries Buta, Rostoveanu, Fishes Valley and it crosses the cities Uricani, Lupeni, Vulcan, Aninoasa.

The gorge of Jiu Valley has a length of 33km, it is a wild gorge because of its narrow and the rigidly of the walls that define it; it was named National Park because of its high value of its biodiversity; here were listed 701 plant species and 441 animal species protected and endemics.

The geologically formation of Jiu Valley is made by specific characteristics represented by the relief, ground, vegetation and fauna and the weather factors - temperature and precipitations; all these elements represent a strong vertical zonality; the precipitation represents the main source on powering the hydrographic basin.

Besides natural factors, the physical and chemical characteristics of the Jiu River have an influence by the urban activity that determinates specific pollution forms from urban domestic waste that are thrown out on the Jiu's banks.

The identification of the pollution main sources domestic waste on the Jiu's banks has been realized in practice by collecting the information and maps from the Town Halls in the coastal town on administrative organization, collecting information from the household societies of the domestic waste in every town and traveling along the water, the purchased distance, being inventoried and photographed from Cimpa to Lupeni City. For a good organization of the dates and the photographs made on the field, the purchased distance was divided in 7 sections and the sections in areas.

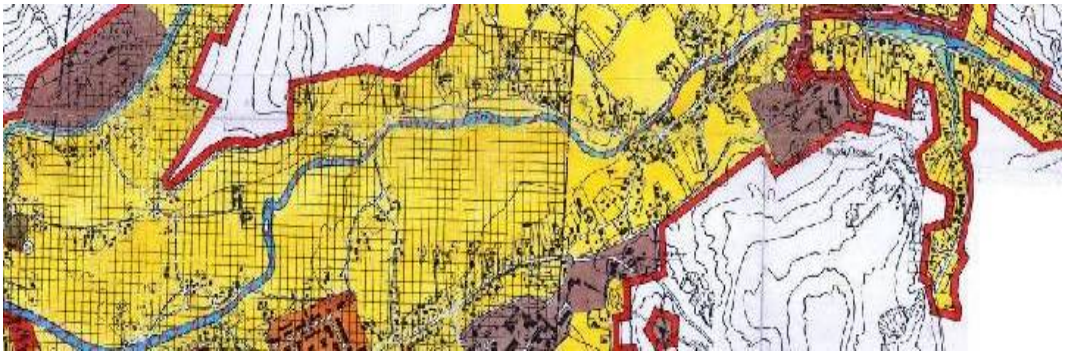
1. Eastern Jiu pollution sources

1.1. Cimpa - Petrila Section is seriously affected by the presence of the domestic waste in water and banks. Cimpa is the most affected by the domestic waste on its whole length, on the both banks, Cimpa being a village where they do not collect the domestic waste, only on the main street, the other ways are not accessible for the collecting equipments. This situation goes to Lonea City. From Lonea to Petrila, the situation goes a little better, not because there are control measures, but because of the vegetation on the banks and dried branches that retain domestic waste from upstream. Of this 5 cities, only Petrila has sewerage network (belong localities Jieţ, Tirici, Răscoala do not have domestic sewerage network).

The potential pollution sources with solid domestic waste of the Jiu River in Cimpa are:

- peasant household in the area;
- gardens and pastures on the Jiu's bank;
- stables and kennels of the households.

In the map of picture no. 1, was marked with hatching the areas where the domestic waste accumulated in the water and Jiu's banks are serious.



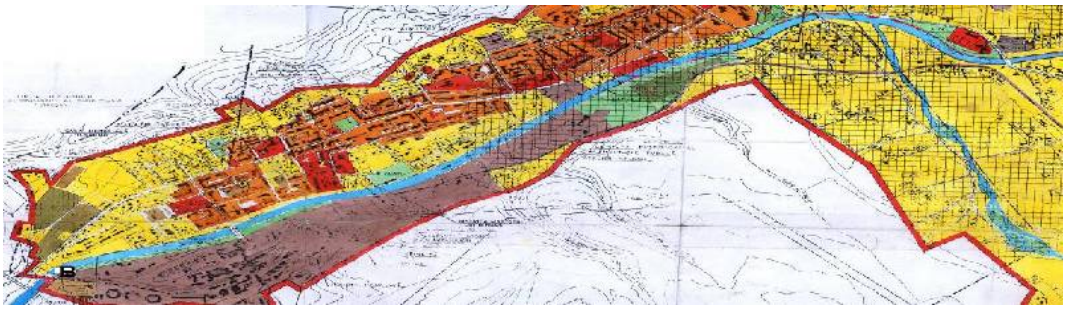
Picture no. 1 – Cimpa

Photos Cimpa

Petrila City is less affected by the presence of the domestic waste that was identified especially on the vegetation of the water's banks.

The potential pollution sources with solid domestic waste of the Jiu River in Petrila are mainly the upstream sources (Cimpa) and in a little measure the households, the institutions and the commercial units that are in the banks neighborhood.

In the map of picture no. 2 can be watched the areas with high accumulation of domestic waste in the water and banks, areas that are marked with the red colors.



Picture no. 2 – Petrila

Photos Petrila

1.2. Dărăneşti - Petroşani Section

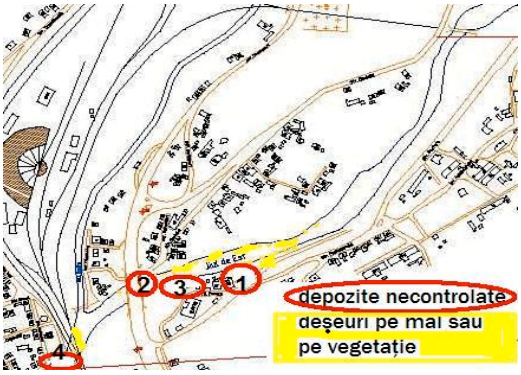
1.2.1. Area 1 - Dărăneşti - from the Petrila entry to Dărăneşti's bridge (picture no. 3)

Following the field observation were identified the areas were are big quantities of solid domestic waste:

- point no.1 - unidentified house in construction - left bank - stable garbage and construction materials;
- point no. 2 - DN 66 bridge;
- point no. 3 - vacant area, left bank;
- point no. 4 - railroad bridge, right bank.

The potential pollution sources with solid domestic waste identified on the Jiu River are all the pollution sources identified in upstream, the households, the gardens and the institutions that are in the neighborhood of that bank:

- on the left side: the streets Peştera, Funicularului, George Enescu; institutions - School No. 3;
- on the right side: - Dealului Street no. 1 →33.



Picture no. 3 – Area no.1 Photo Area 1 - Point. no. 1

1.2.2. Area 2 - from Dărăneşti's bridge to Cărbunelui Street's bridge (picture no. 4)

The areas were are big solid domestic waste quantities are observed in the following points:

- point no. 1 - left bank, G. Enescu Street in the right of the house no. 71 garden;
- point no. 2 - right bank, Cârja Street;
- point no. 3 - left bank, between Matei Basarab Street and Vasile Lupu Street;
- point no. 4 - left bank, the bridge on the right of Gh. Şincai Street;
- point no. 5 - right bank, in the trafo station area.

The potential pollution sources with solid domestic waste of the Jiu River are all the pollution sources in the upstream, households, gardens and in the institutions that are in that bank's neighborhood:

- on the left side: G. Enescu Street no. 71, no. 35; Jiu bordering streets – Matei Basarab, V. Lupu, Gh. Şincai, Nedeii; industrial units - bread factory, deposit.
- on the right side: the streets - Cârjei, Digului no. 3, 5, 7, 15, 21, 23, 25, 31, 33, trafo station; Jiu bordering streets - Mureşului, Bucegi, Mândra, Botoni, Nouă.

Picture no. 4 – Area no. 2 Photo Area no. 2 – Point. no. 4

1.2.3. Area 3 - from the Cărbunelui Street's bridge to Dacia Street (picture no. 5)

The areas were are big solid domestic waste quantities are observed in the following points:

- point no. 1 - left bank, the intersection of Jiului Street with Circa de Pompieri Street in the right of the E.M. Dâlja home;
- point no. 2 - left bank, Mioriţa Street no. 14;
- point no. 3 - left bank, the intersection of Jiului Street with Aurel Vlaicu Street.

The potential pollution sources with solid domestic waste of the Jiu River are all the pollution sources in the upstream, households, gardens and in the institutions that are in that bank's neighborhood:

- on the left side: Jiu Street; Jiu bordering streets - Andrei Mureşan, Circa de Pompieri, Aurel Vlaicu;
- on the right side: the streets - ruins E.M. Dâlja; Jiu bordering streets - Izvorului Street.

Picture no. 5 – Area no. 3

Photo Area no. 3 –Point. no. 1

1.2.4. Area 4 - from Dacia Street to the stadium (picture no. 6)

The areas were are big solid domestic waste quantities are observed in the following points:

- point no. 1 - left bank, Dacia Street - blocks and kennels;
- point no. 2 - left bank, Dacia Street in the right of the military unit.

The potential pollution sources with solid domestic waste of the Jiu River are all the pollution sources in the upstream, households, gardens and in the institutions that are in that bank's neighborhood, the blocks on Dacia Street, the kennels for animals built on the Jiu's bank and belong to the tenants of the Dacia Street blocks, military unit.

Picture no. 6 – Area no. 4

Photo Area no. 4 –Point. no. 2

1.2.5.Area 5 - from the stadium to the Cucului Street bridge (picture no. 7)

The areas were are big solid domestic waste quantities are observed in the following points:

- point no. 1 - left bank, near the Jiu stadium receives as a tributary the Maleia River;
- point no. 2 - left bank, at the confluence of the Slătinioara River with Jiu;
- point no. 3 - left bank, near the exploitation unit, preparation - dump coal dust;
- point no. 4 - left bank, Jiu near the exploitation unit, preparation;
- point no. 5 - left bank, Cucului Street bridge.

The potential pollution sources with solid domestic waste of the Jiu River are all the pollution sources in the upstream, households, gardens and in the institutions (exploitation unit - preparation E.M. Livezeni) that are in that bank's neighborhood, Maleia and Slătinioara Rivers.

Picture no.7 – Area no. 5

Photo Area no.5 –Point. no. 1

1.2.6. Area 6 - from the bridge on the right of Cucului Street to the confluence of Sălătruc River with Jiu (picture no. 8)

- point no. 1 - the confluence of the Sălătruc River with Jiu - domestic waste especially bottles, textiles waste, used tires;

This area is in the most of parts inaccessible for observation because on the both banks are kennels for animals and gardens that belong to the private households.

The potential pollution sources with solid domestic waste of the Jiu River are all the pollution sources in the upstream, households, gardens and in the institutions that are in that bank's neighborhood, Sălătruc River.

Picture no.8 –Area no. 6

Photo Area no. 6 –Point. no. 1

1.3. Livezeni - Petrosani Section (Eastern Jiu) (picture no. 9)

The areas were are big solid domestic waste quantities are observed in the following points:

- point no. 1 - left bank, waste deposit near the containers deposit.

The potential pollution sources with solid domestic waste of the Jiu River are all the pollution sources in the upstream, the travelers in the trains that throw packages through the window, containers deposit, the households near the bridge of the intersection of the Păunilor Street with Saşa Street, and behind the bridge the commercial societies (auto service, mechanical workshop, furniture manufacturing workshop). Usually, the area observed is clean, with the exception exposed before.

Picture no. 9 - Section Petroşani – Livezeni

Photo Petroşani – Livezeni –Point. no. 1

2. Western Jiu pollution sources

2.1.Lupeni - Paroseni Section

Following the field observation of this section, the Jiu bank is affected by the presence of the domestic waste on whole its length, the both banks, domestic waste that were observed especially on the bank water's vegetation. Domestic waste in this area are represented especially by plastic recipients use only PET type, used textiles, used tires, branches.

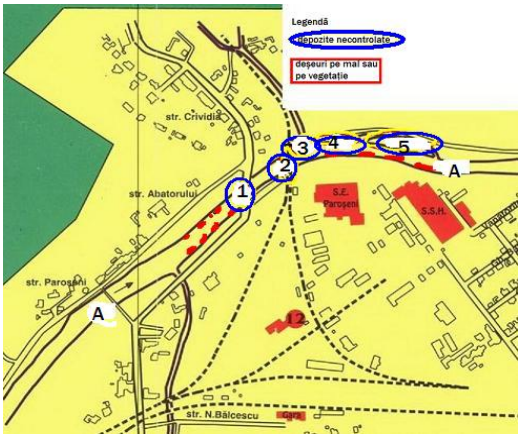
The potential pollution sources with solid domestic waste of the Jiu River are all the pollution sources in the upstream, households, gardens and pastures that are in that bank's neighborhood, stables and kennels that belong to the household.

Photos section Lupeni - Paroşeni

2.2. Paroseni - Vulcan Section

2.2.1. Area 1 - Section A - A (picture no. 10)

- point no. 1 - bridge auto traffic Crividia Street;
- point no. 2 - railroad bridge;
- point no. 3 - Jiu's tributary, Dâmboviţei Street;
- point no. 4 - near tributary area;
- point no. 5 - area with specific water banks vegetation.



Picture no. 10 – Area no. 1; section A-A

Photo section A-A -Point. no. 2

2.2.2. Area 2 - Section B - B (picture no. 11)

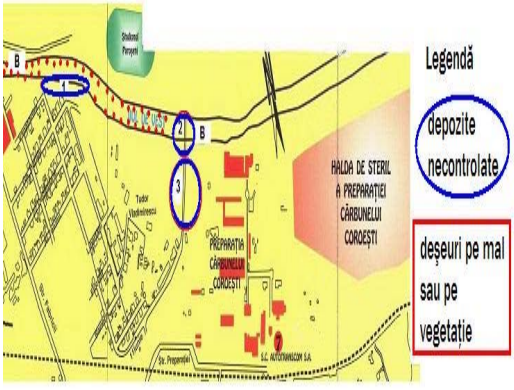
- point no. 1 - area next to the Jiu bordering streets: Vânătorilor Street; Gh. Barițiu, 22 Decembrie,

Aleea Teiului;

- point no. 2 - the bridge next to the 11Iunie Street;

- point no. 3 - uncontrolled deposit of domestic waste at the end of the 11Iunie Street, Jiu bordering street.

The potential pollution sources with solid domestic waste of the Jiu River are all the pollution sources in the upstream, households, gardens and pastures that are in that bank's neighborhood, stables and kennels that belong to the household, the blocks and the private houses in the area Jiu bordering streets.



Picture no. 11 – Area no. 2; section B-B

Photo section B-B -Point. no. 3

2.3. Iscroni (Aninoasa) – Livezeni (to the confluence point) Section

2.3.1. Area 1 - Aninoasa City

The area were are big solid domestic waste quantities is Aninoasa River, that crosses the city from one end to another, along which lies the greatest part of the town. The river is clean from the upstream to the first houses on the Libertății Street with the block no. 140.

The potential pollution sources with solid domestic waste of the Jiu River identified in Aninoasa are the households, collecting domestic waste containers located on the bank of the river, the people living river that throw the domestic waste in the river.

Photo the point of confluence

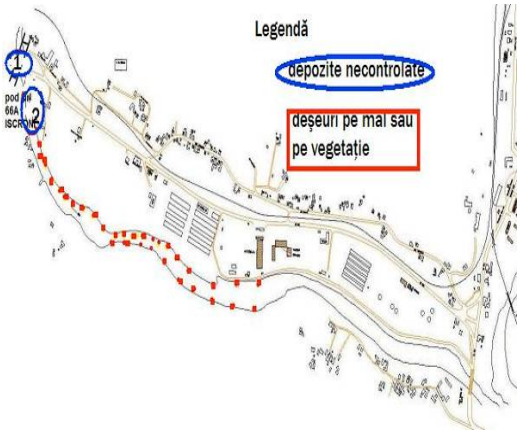
Photo Area no. 1 – Aninoasa city

2.3.2. Area 2 - from Iscroni to Livezeni - the confluence point of the Jiu Rivers (picture no. 12)

The areas were are big solid domestic waste quantities are observed in the following points:

- point no. 1 - Iscroni bridge DN 66A;
- point no. 2 - near bridge area in downstream.

The potential pollution sources with solid domestic waste of the Jiu River are all the pollution sources in the upstream, households, gardens and pastures that are in that bank's neighborhood, stables and kennels that belong to the household, the blocks and the private houses in the Jiu River area.



Picture no. 12 ;
Area no. 2 → Iscroni – Livezeni

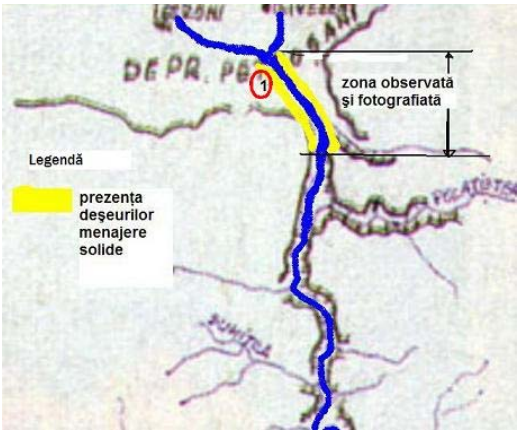
Photo Area no. 2 → Iscroni – Livezeni – Point. no. 2

2.4. Livezeni - Defileu (from the confluence point to the Hunedoara county limit) Section (picture no. 13)

This section includes the area where, the two rivers, Eastern Jiu and Western Jiu are meeting and form the Jiu River witch than flows into the Danube. Following the field observation of this section, the Jiu bank is affected by the presence of the domestic waste on whole the observed area, on the both banks. The domestic waste are piles on the banks and water.

An area where are big quantities of solid domestic waste is next to the bar Route 66 - point no. 1.

The potential pollution sources with solid domestic waste of the Jiu River are all the pollution sources in the upstream, the travelers which cross the defile and throw in unorganized way the packages, bar Route 66, auto service S.C. Unimat SRL, Hidroconstrucţia ditch.



Picture no. 13 Section Livezeni – Defileu

Photo section Livezeni – Defileu –Point. no.1

In terms of the nature of waste, this is similar for all the sections and are represented especially by use only plastic recipients type PET, used textiles, used tires, rests of furniture and metallic objects, branches, mentioning that in Cimpa was noted the discharge in the water of the waste waters, and also the zootechnic manure type came from the households on the bank's of the Jiu River and also on the defile appear wastes coming from the constructions as a debris.

These wastes are driven by the water and when they encounter obstacles in the way (branches, bridges or the bank's vegetation), are accumulating with a negative impact for the landscape and for the water quality.

3. The impact generated by the pollution

As a result for the lack of facilities and poor exploitation, wastes deposits are among on the objectives known as impact generators and risk for the environment and public health.

3.1. The main impact forms and risk determined by the wastes deposits, in the order they are perceived by the population, they are:

- landscape modifications and visual discomfort;
- air pollution;
- surface waters pollution;
- modifications of the ground fertilizing and the composition of the biocoenosis on the neighborhood fields.

3.2.The main impact forms and risk determined by the zootechnic manure type

The evacuation of used waters in the natural receivers may determinate de degradation or destroying the fauna and/or flora of the receiver, the decreasing of the oxygen quantity dissolved in receiver's water, having negative effects on the organisms of its ecosystem and/or on the natural purge phenomen (auto purge) that take place in the water of the receiver. This can favor the producing of the negative effects on the receiver and on the life forms it contains (intoxication, eutrophication etc).

The main diseases with hydric transmission are: microbial diseases (typhoid, dysentery, cholera), viral diseases (poliomyelitis, hepatitis A), and parasitic diseases.

3.3. The points where were taken water samples for analysis are situated this way: upstream confluence Rostoveanu, Lupeni - downstream confluence Braia and Iscroni; the measurements were made for a sample in the period 26.02.2007 - 27.02.2007.

Exceeding the maximum allowable concentration (CMA) were registered for the following indicators:

- ammonium NH4+ (CMA 0,4mgN/l) - has an oscillating concentration from 0,026mgN/l in Rostoveanu point, 0,015mgN/l in Braia point, 0,466mgN/l in Iscroni point;
- nitrites NO2-(CMA 0,01mgN/l) - have an oscillating concentration from 0,006mgN/l in Rostoveanu point, 0,005mgN/l in Braia point, 0,019mgN/l in Iscroni point;
- phosphorus (CMA 0,015 mgP/l) - has an increasing concentration from 0,003 mgN/l in Rostoveanu point, 0,013mgN/l in Braia point, 0,019mgN/l in Iscroni point.

The sources of nitrites and phosphorus in the water are coming from the natural sources from agricultural activities (chemical and natural fertilizer - stable garbage), and the human agglomeration that are not consistent in terms of collecting systems (sewerage) and purification stations (the lack of them, the lack of purification steps, faulty function) have an important contribution for the pollution with nitrites and nutrients.

4. Green solutions

4.1. Elimination of the pollution sources

Among the main causes of the pollution are counted the absence or the poor management of the wastes collecting system by the unit authorized, the lack of green education of the population, the application absence of the legislative measures about depositing the wastes, and in some areas the absence of the sewerage system.

For a good management of the solid wastes is necessary to purchase the next steps:

a. identification of the sustainable solutions in economic and ecologic terms;

b. planning in the wastes management: reduction, reuse, recycling and elimination;

c. public education about environment problems;

d. involvement of local communities in solving the environment problems;

e. delegation of authority to public local administration in managing environmental issues.

To start a coherent management of the wastes is required primarily an infrastructure planning the necessary equipment to access the collecting of domestic waste, achieving enough bins to be placed in the points where were identified the punctiform sources. By creating a coherent system, these bins are periodically drained by the institutional arrangement decided in each community.

For the elimination of the surface waters generated by the lack/used of the sewerage and purification systems of the used waters it requires a elaboration for the rehabilitation and extension of sewerage network and the realization of the execution works.

4.2. Elimination of the wastes from the major bank and river vegetation

Elimination of the wastes uncontrolled stored on the banks of the surface waters is realized by the ecological actions of the affected areas.

For the greening of the banks in the hydrographic basin of Superior Jiu I propose the realization of a project accessing the European funds. The accessing of community funds is conditioned by elaboration of some documents that indicate the domains to where will be oriented the financial assistance.

In this respect, I propose the following model:

- ***Objectives:***

- awareness and information for the river population;

- involving the river population, the local authorization, the IMMs in greening actions and delimitation of the protected areas;

- ***Main activities:***

- training where will be invited representative of local councils in Jiu Valley, IMMs, CNH, forestry, Romanian Waters Direction, education and nonguvernamentale associations for the environment protecting with the aim of informing about the field situation;

- informative panel on the waters courses that will offer information about the protected areas, fish species, prohibition periods, information about the touristic objectives;

- river population and tourists awareness campaign about the importance of respecting the nature, protecting waters and conserving the plant species, animals and landscape for developing the ecotourism;

- local and national mass-media campaign with audio-video spots, interviews, articles, reportages;

- labeled advertising materials: banners, flyers, posters will be edited and multiplied.

Conclusions

▪ The water represents the main vehicle for changing the substance and energy between different systems and subsystems. The waters were the first environment of the living material and they have a polarizing role in the territorial repartition of the human communities and habitats.

▪ The potential pollution sources with solid domestic waste of the Jiu River are all the pollution sources on the tributary, households, gardens, stables and kennels that belong to the household, private houses, institutions and commercial units of the river area of Jiu.

▪ In terms of the nature of waste, this is similar for all the sections and are represented especially by use only plastic recipients type PET, used textiles, used tires, rests of furniture and metallic objects, branches, mentioning that in Cimpa was noted the discharge in the water of the waste waters, and also the zootechnic manure type came from the households on the banks of the Jiu River and also on the defile appear wastes coming from the constructions as a debris.

▪ Among the main causes of the pollution are counted the absence or the poor management of the wastes collecting system by the unit authorized, the lack of green education of the population, the application absence of the legislative measures about depositing the wastes, and in some areas the absence of the sewerage system.

▪ For the greening of the banks in the hydrographic basin of Superior Jiu I propose the realization of a project accessing the European funds.

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▪ http //www. ngo. ro - database with environment legislation.

EVALUATION OF ENVIRONMENTAL IMPACT OF HYDRO POWER STATIONS OF THE RIVER JIU, LIVEZENI BUMBESTI-JIU THE SECTOR

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Abstract

This paper has studied the environmental impact assessment of hydro-technical works on the upper reaches of the river Jiu. To quantify the impact of using two distinct methods, namely,: the matrix method and global pollution index. The final conclusion is that the environment is subject to the effects of human activities within acceptable limits.

Keywords: *Water works, pollution, environmental factors, impact assessment, impact matrices.*

1. Introduction

In this years to reduce environmental impact, there are three main ways of replacing polluting power generation facilities with less pollution, introduction of modern technologies to reduce emissions of greenhouse gases and generating rainfall acid and ways to increase energy efficiency.

Hydropower - energy obtained using water as a primary source, representing about 6,7% of total energy and 20% of energy consumed worldwide. In most advanced countries in recent years found a preference for small hydropower (SHP), which have little impact on the environment.

Hydroelectric power stations have a number of positive environmental influences, such as lack of clearance with a negative impact on the environment, regulating river flow, flood exclusion localities situated downstream plant, irrigation development.

However, there are a number of negative environmental influences such as exclusion from the agricultural system of fertile areas, change in flora and fauna, changing hydrological regime of rivers and reducing downstream flow.

2. Presentation of general area and employment in the environment

Making the hydropower sector Jiu, between Livezeni (confluence with Jiu Eastern Western) situated in Hunedoara County,and Jiu with Valley Sadului confluence, which is situated on the territory of the Gorj county, is intended to produce electricity renewable sources.

Sector Jiu River, between Livezeni and the confluence with Sadu River a length of 30 km, with an 52-MW hydropower potential.

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Jiu defile

Park area is 11,127 hectares, most of it being in the territory of the Gorj county (10,545 ha) and the remainder returning to the neighboring county of Hunedoara (582 ha). Impressive wildemess area and extraordinarz beautz of places.

The new national park was proposed in this category because the forest vegetation is mostly wild little touched by logging and it is an important migration corridor for many species of birds and animals.

Hydro power stations will cross two major morphological unit: mountainous area of the Southern Carpathians and lowland Gaetic belonging Depression.. From the geological point of view, the second unit had a very special structure: the mountain includes Danube formations composed of crystalline lens, passes through the large granite and granite, and the depression area contains deposits of conglomerates and marls. Soil types encountered in the study objectives are: brown soils, acid brown soil, brown clay soils. Local geomorphological processes and land degradation processes are specific to the area of the valley, erosion, transport of sediments and some landslides.

In terms of plant configurations studied within the floor area of deciduous forests of oak forests in which we mixed with hornbeam, beech and hornbeam and beech forests in small portions with pine and spruce forest.

The animal world is represented by: deer, roe deer, wild boar, marten, grouse, squirrels, lynx, wild cat, or insect. Jiu waters are developing crustacean fauna and in terms of area in the fall salmonid fishing.

IMPACT ASSESSMENT MATRIX METHOD

To identify the impact of hydro power stations on the environment, we are using the method of Leopold. The matrix is composed of an array of double input features include on-line actions affecting the environment, and the column are listed the categories of environmental impacts. At the intersection lines with the potential impacts of the columns are written.

Actions that have an effect on the environment:

- Water use;
- Types of works;
- Areas affected;
- Corrective action;
- Environmental effects;
- Impact on water;
- Impact on flora;
- Impact on wildlife;
- Economic and social impact;
- Impact of geophysical;

Impact on water: the positive control and flow levels during floods, the hydraulic system of surface waters. The negative impact on the quality of certainty and temporary water because of turbidity.

Impact on flora and fauna: the negative impact is determined by altering the land surface area motorway dam of the reservoir and power plants. Are positive aspects of the establishment which

allows for accumulation and development of new aquatic species. Impact on flora and fauna occurs during the execution, carrying out work in areas where large areas.

Geophysical Impact: The negative impact is the possibility of erosion in the slopes of the lake water level variation, a good appearance on the morphology and erosion control is done by water flows and levels by making the dam.

Economic and social impacts: It is a positive, clear and constant, satisfying the requirements of electricity for industry and population, which adds the creation of new jobs. The negative impact, certainly temporarily, is due to land use change in working areas.

Table 1. Impact Matrix

IMPACT MATRIX EFFECTS / ACTIONS		Water use			Types of works				Affected areas		Corective actions			
		Drinking water supply	Industrial water sullpy	Power generation	Dam construction	Lake area	Construction area	Deforestation	Works upstream areas	Works downstream areas	Afforestation	Erosion control	Fish design	Emergence of new industries
IMPACT ON WATER	Biological					- C R	- C R							
	Salinity													
	Turbidity					- C R	- C R							
	Temperature					+ C N								
	Hydraulic system				+ C N	- C R			+C R	- P N				
	Groundwater level				- P N					- P N				
IMPACT ON FLORA	Forest				- C N	- C N	- C R				+ C N			
	Vegetation growth					- C N					+ C N			

	Aquatic microflora					+ C N				- C N				
	Rare plants/protected													
IMPACT ON WILDLIFE	Wild animals					- P N	- C R				+ C N			
	Birds					+ P N					+ C N			
	Insects					- C N					+ C N			
	Reptiles and amphibian					+ P N	- C R		+P R					
	Rare species/protected													
GEOPHYSICAL IMPACT	Morphology				- C N	- C N								
	Erosion				- C N						+ P N			
	Transport silt				+ C N	+ C N								
	Slope stability					- C N		- C R			+ P N			
ECONOMIC AND SOCIAL IMPACT	Electrical industry		+ C N	+ C N			+ C N							+ C N
	Jobs		+ C R	+ C N	+ C N		+ C R							+ C N
	Landscape				- C R	+ C N	- C R	- C R			+ C N			+ C N

Legend:
C – certainly; **R** – reversible; + - positive;

P – probably; **N** – irreversibile; **-** - negative;
I – unlikely;

IMPACT ASSESSMENT WITH THE GLOBAL INDEX OF IMPACT METHOD

The method expresses the state of the environment based on a ratio between the ideal and value at a given time-specific quality indicators for environmental review, resulting in a state which is called the global index of impact.

In assessing the environmental status in both the ideal situation and where it is affected by human activities, use the stairs of creditworthiness for environmental factors and environmental components including notes 1 to 10, where 1 corresponds to the natural state, undisturbed by human activity and 10 corresponds to a situation particularly serious deterioration of the environment.

According to notes of worthiness to be granted both in the original environment and situation to accomplish a project, constructed two polygons, one showing the ideal and the other state affected by the impacts of the project.

Impact the overall index is calculated by comparing areas of the two polygons:

$I_G = S_I / S_R$, where: - S_I is the initial state,and S_R is affected by the project status.

$NB = 9 \times \frac{CMA}{C_m}$ - Where: CMA - the maximum amount allowed, C_m - value measured emissions exceed the CMA;

Global index method of impact assessment has several advantages, including: providing an overview on the environment, allows comparison of different areas by analyzing the same indicators, allows analysis of the temporal dynamics of an area.

Soil pollution index

It was established on the basis of physico-chemical properties of samples collected from polluted area.

*P.a. – Alert thresholds less sensitive;
**P.i. – Less sensitive action levels

Table 2. Soil analysis report. Sampling points: Livezeni Dam

	PARAMETERS	U.M.	SPECIFIED VALUE	NORMAL VALUE	CMA		Notes creditworthiness
					p.a.*	p.i.**	
0	**1**	**2**	**3**	**4**	**5**	**6**	**7**
1.	pH	Unit. pH	7,13				10
2.	Cadmium	ppm	0,543	1	5	10	9
3.	Copper	ppm	10,409	20	250	500	9

4.	Chromium	ppm	10,91	30	300	600	9
5.	Manganese	ppm	557,562	900	2000	4000	9
6.	Nikel	ppm	26,461	20	200	500	7
7.	Lead	ppm	0,125	20	250	1000	9
8.	Zinc	ppm	216.579	100	700	1500	4
9.	Petroleum products	ppm	115.7	100	1000	2000	8

$N_{B\ LIVEZENI} = 8,22$

Table 3. Soil analysis report. Sampling points: Bumbeşti

Nr. crt	**PARAMETERS**	**U.M.**	**SPECIFIED VALUE**	**NORMAL VALUE**	**CMA**		**Notes creditworthiness**
					p.a.*	**p i.****	
0	**1**	**2**	**3**	**4**	**5**	**6**	**7**
1.	pH	Unit. pH	7,52				10
2.	Cadmium	ppm	1.521	1	5	10	6
3.	Copper	ppm	53.519	20	250	500	3
4.	Chromium	ppm	10.856	30	300	600	9
5.	Manganese	ppm	83.636	900	2000	4000	9
6.	Nikel	ppm	64.163	20	200	500	3
7.	Lead	ppm	0.38	20	250	1000	9
8.	Zinc	ppm	119.203	100	700	1500	8
9.	Petroleum products	ppm	165.3	100	1000	2000	5

$N_{B\ Bumbesti} = 6,88$
$N_{B\ soil} = 7,55$

As soil contaminants were analyzed heavy metals and petroleum products, which are specific to both road and construction equipment business.

The dam area Livezeni exceed normal values for soil zinc and petroleum products. In the abnormal values Bumbesti: cadmium, copper, nickel, zinc and petroleum products. Compared Livezeni dam area, the soils appear Bumbesti loaded with heavy metals and petroleum products.

Index of water pollution

Analysis of water samples was done by classical chemical methods of analysis report was drafted.

Table 4. Water analysis report. Sampling points: Livezeni Dam

Nr. crt	PARAMETERS	U.M.	SPECIFIED VALUE	NORMAL VALUE	Notes creditworthiness
0	**1**	**2**			**5**
1	pH	unit. pH	7,14	8,5	9
2	Temperature	(^oC)	29	30	9
3	Calcium Ca^{2+}	(mg/dm^3)	18,24	150	9
4	Magnesium Mg^{2+}	(mg/dm^3)	2,19	50	9
5	Sodium Na^+	(mg/dm^3)	13,33	100	9
6	Ammonium NH_4^+	(mg/dm^3)	0,42	1	9
7	Iron Fe^{2+3}	(mg/dm^3)	0,263	0,3	9
8	Nitrogen NO_3^-	(mg/dm^3)	1,78	1	5
9	Nitrite NO_2^-	(mg/dm^3)	0,018	0,01	5
10	Sulfates SO_4^{2-}	(mg/dm^3)	22,5	200	9
11	Chlorides Cl^-	(mg/dm^3)	7,09	250	9
12	Fixed residue at 105 ^oC	(mg/dm^3)	116	750	9
13	CCO-Mn	(mgO_2/dm^3)	4,07	5	9

$N_{B\ Livezeni\ Dam}$= 8,38

Table 5. Water analysis report. Sampling points**:** Dumitra

Nr. crt	PARAMETERS	U.M.	SPECIFIED VALUE	NORMAL VALUE	Notes creditworthiness
0	**1**	**2**	**3**	**4**	**5**
1	pH	unit. pH	7,23	8,5	9
2	Temperature	(^oC)	20	30	9
3	Calcium Ca^{2+}	(mg/dm^3)	20,24	150	9
4	Magnesium Mg^{2+}	(mg/dm^3)	1,7	50	9
5	Sodium Na^+	(mg/dm^3)	12,64	100	9
6	Ammonium NH_4^+	(mg/dm^3)	0,41	1	9
7	Iron Fe^{2+3}	(mg/dm^3)	0,213	0,3	9
8	Nitrogen NO_3^-	(mg/dm^3)	2,04	1	4
9	Nitrite NO_2^-	(mg/dm^3)	0,016	0,01	9
10	Sulfates SO_4^{2-}	(mg/dm^3)	27,5	200	9
11	Chlorides Cl^-	(mg/dm^3)	6,38	250	9

12	Fixed residue at 105 ^oC	(mg/dm^3)	122	750	9
13	CCO-Mn	(mgO_2/dm^3)	3,95	5	9

$N_{B\ Dumitra} = 8,61$

Table 6. Water analysis report. Sampling points**:** Bumbeşti Jiu.

Nr. crt	**PARAMETERS**	**U.M.**	**SPECIFIED VALUE**	**NORMAL VALUE**	**Notes creditworthiness**
0	**1**	**2**	**3**	**4**	**5**
1	pH	unit. pH	7,15	8,5	9
2	Temperature	(^oC)	20	30	9
3	Calcium Ca^{2+}	(mg/dm^3)	15,63	150	9
4	Magnesium Mg^{2+}	(mg/dm^3)	2,19	50	9
5	Sodium Na^+	(mg/dm^3)	10,12	100	9
6	Ammonium NH_4^+	(mg/dm^3)	0,4	1	9
7	Iron Fe^{2+3}	(mg/dm^3)	0,235	0,3	9
8	Nitrogen NO_3^-	(mg/dm^3)	2,17	1	4
9	Nitrite NO_2^-	(mg/dm^3)	0,015	0,01	9
10	Sulfates SO_4^{2-}	(mg/dm^3)	18,25	200	9
11	Chlorides Cl^-	(mg/dm^3)	5,67	250	9
12	Fixed residue at 105 ^oC	(mg/dm^3)	97	750	9
13	CCO-Mn	(mgO_2/dm^3)	4,42	5	9

$N_{B\ Bumbeşti\ Jiu} = 8,61$
$N_{B\ Water} = 8,53$

Based anaIizelor made that the Jiu river section and in sections HPP dam designed and Bumbesti-Dumitra Jiu I fall into the category of quality.

From section to section CHE Bumbesti Livezeni is a tendency of decreasing concentration: sodium, nitrates, nitrites, sulphates, bicarbonates, chlorides. fosfaţiIor, total hardness, and pH of the suspension. CCO-Mn exchange increases and keeps constant ammonia and iron. Compared with sections in Section Livezeni and Bumbesti Dumitra HPP is an increase in the overall chemical load is explained by the contribution from the slopes overlapped with self-purification processes.

Air pollution index

The air is polluted areas of the site only because macropoluantilor.

Table 7. Air analysis report.

Sampling places	Duration	Parameter	U.M.	Short-term average concentration determined	CMA STAS 12574/87	Notes creditworthiness
1	2	3	4	5	6	7
Livezeni Dam	30 min.	Sulfur dioxide (SO_2)	mg/m^3	0,116	0,75	9
	30 min.	Nitrogen dioxide (NO_2)	mg/m^3	0,121	0,3	9
	30 min.	Ammonia (NH_3)	mg/m^3	0	0,3	9
	30 min.	Suspended	mg/m^3	0,136	0,5	9

$N_{B\ Livezeni\ Dam} = 9$

Table 8. Air analysis report.

Sampling places	Duration	Parameter	U.M.	Short-term average concentration determined	CMA STAS 12574/87	Notes creditworthiness
1	2	3	4	5	6	7
Dumitra	30 min.	Sulfur dioxide (SO_2)	mg/m^3	0,092	0,75	9
	30 min.	Nitrogen dioxide (NO_2)	mg/m^3	0,071	0,3	9
	30 min.	Ammonia (NH_3)	mg/m^3	0	0,3	9
	30 min.	Suspended	mg/m^3	0,086	0,5	9

$N_{B\ Dumitra} = 9$

Table 9. Air analysis report.

Sampling places	Duration	Parameter	U.M.	Short-term average concentration determined	CMA STAS 12574/87	Notes creditworthiness
1	2	3	4	5	6	7
Bumbeşti	30 min.	Sulfur dioxide (SO_2)	mg/m^3	0,102	0,75	9
	30 min.	Nitrogen dioxide (NO_2)	mg/m^3	0,079	0,3	9
	30 min.	Ammonia (NH_3)	mg/m^3	0	0,3	9
	30 min.	Suspended	mg/m^3	0,106	0,5	9

$N_{B\ Bumbesti}= 9$
$N_{B\ air}= 9$

Given the previously reported appearance, ICIM air samples taken near the dam Livezeni from the CHE Dumitra and the CHE Bumbesti, and laboratory analysis conducted to identify the main pollutants of the atmosphere, and specific road construction machinery: sulfur dioxide, nitrogen dioxide and ammonia, and particulate matter.

Landscape pollution index

The organization produces a pollution landscape yards as their location without action in a natural environment, especially as the mountainous area of National Reserve or diminish its original quality. N_B=8.

Calculation of global index of impact

Taking down notes creditworthiness of the four environmental factors: soil N_B = 7.55; N_B water = 8.53, N_B air = 9, N_B landscape = 8, we draw the polygon area initially and then a rectangular area inside the affected area to work on work sites:

-initial polygon 200 units of area;

-128 units affected area polygon;

$I_G= S_I / S_R = 200/128 = 1.5$

I_G = 1.5 subjected to an environment falls within acceptable limits human activity.

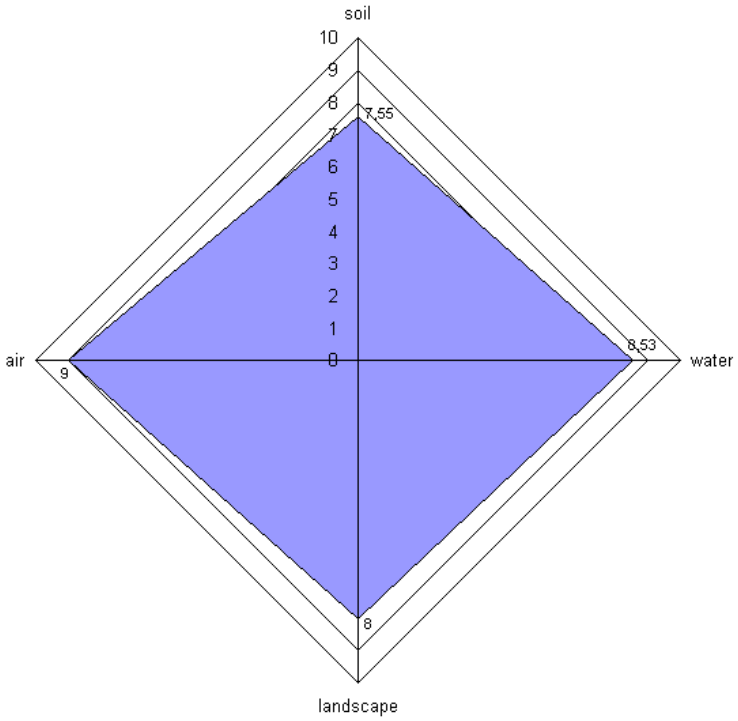

Fig 1. Determination of global impact

3. Conclusions. Environmental impacts during the construction

Water is a negative impact on performance during the execution of the works of the riverbed. To reduce the impact on water pollution with oil products should be avoided in earthmoving equipment and water pollution by waste oil from oil changes, the maintenance should be provided with "clean stations", and to reduce turbidity, excavation work must limited running time and space.

On air, the impact occurs only during implementation, it is negative and is due to air pollution by gases from burning engines and construction machinery movement of dust produced by vehicles used by the manufacturer and the excavations.

On soil and vegetation, the impact is manifested through temporary employment of land for the site and road technology organization. The impact is negative in the squad. To reduce the impact on soil will be achieved by limiting the use of land strictly necessary, this will influence both the form and vegetation of the area used

On wildlife, the impact is negative in the implementation and manifested by temporarily changing the drinking and breeding places.

The human environment, the impact is manifested by the opening of building sites, having a positive impact by creating jobs and developing trade temporary local earthmoving machinery and vehicles movement supervisors have a negative impact on the substance of the sound area, yard and

the evolution of construction, generates a temporary negative impact on the landscape, the socio-human tensions and conflicts may arise between newcomers and the local population.

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SPARE PARTS STOCK MANAGEMENT SYSTEM IN PRODUCTION UNITS

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Abstract
The work analyses the acquisition of spare parts over 3 years within the National Coal Company in order to achieve a system for the management and planning of the stock of spare parts. The statistic data analysis is made using Pareto type diagrams, a statistic technique which analyses the percentage of purchasing an element (spare part, flaw) from a whole set of elements.

Keywords*: spare parts, Pareto diagram, stock management, coal mining, ERP systems*

Introduction

In the companies where we can find a large number of low value parts, they may accept the admeasurements of spare parts stock to be made, according to the afferent calculus formula of the small value or short-term inventory items, other computing processes appeared in our financial practice. In the first place, we mention that parts can be classified in two categories, depending on the nature of machinery construction, equipment and facilities for which they are intended, as follows:

- spare parts inteded for machinery, equipments and facilities for mass production (excavators, tractors, combines, etc.);
- spare parts intended for other machinery, equipments or facilities (technological equipment for chemical industry, etc.).

For the first category of spare parts, the stock can be determined in the same way as determining the raw materials, while for the second category, the calculation takes into account the length of production (Do), length of service (DS), the number of identical machines in function (Ui), the number of spare parts mounted on the same machine (Pi) and the correction coefficient (K). Thus, the physical inventory (Sf) for the second category of spare parts can be determined by the following relationship:

$$S_f = \frac{Do}{Ds} \cdot U_i \cdot P_i \cdot K \tag{1}$$

K can be calulated as well ussing the following relationship:

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$$K = \frac{\overline{S}}{U_i \cdot P_i} \frac{D_s}{D_0} \quad (2)$$ where:

S - the average spare parts stock calculated over a period of several years.

The value stock S_v can be determined like this:

$S_v = S_f P_a$ (3) , where S_f-physical stock si P_a- supply price.

In the current conditions of business globalization, the organizational environment of a company must adapt to the competitive market. The economical growth of a company depends crucially on its ability to update and integrate, to customize and extend computer applications in a flexible and fast manner, offering all its users instant, interactive and consistent access to its data model. Also, to ensure the efficiency of their activities, companies must standardize the management of economic processes.

It is stated that complete integration is a major objective of informational resources management, which are becoming more and more complex and numerous and that is why it is necessary to undertake and implement integrated informatics systems.

From a development point of view, the implementation of an ERP system begins with data modeling inside organization and identifying the core and its main modules (subsystems), together with an indication of how they use the data model (in CRUD operation terms - Create, Read, Update and Delete). The following steps establish an implementation order of the modules by their priority. Then the ERP system is built using the paradigm of incremental development, each increment adding a new module to the already existing system.

It is widely accepted the idea that although technology is essential in the building of an ERP system, its definition must point out the functional areas based on the main activities of a company, such as accounting, production, sales, supply, stocks, staff, etc. The conceptual diagram of an ERP system is presented in Figure 1.

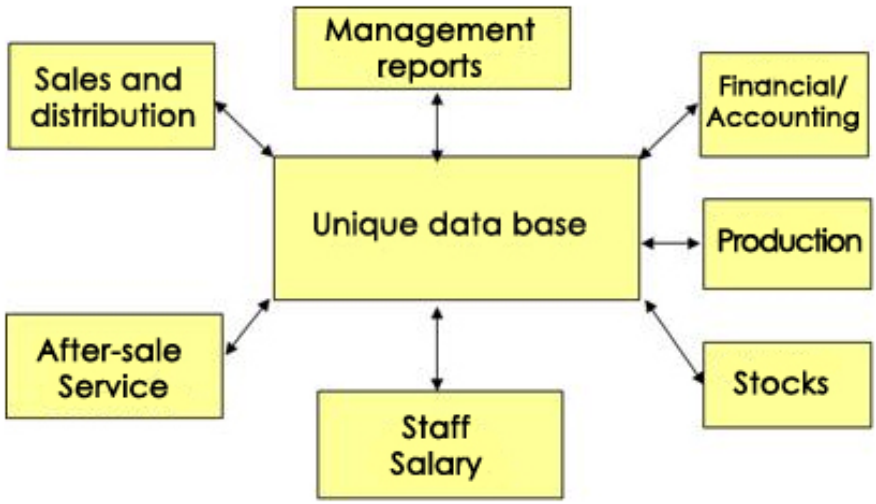

Figure 1. The conceptual diagram of an ERP system

Table 1. ERP Systems Advantages

ADVANTAGES	
Advantage	**Materialization mode**
Quality information	Unique database (consistent and correct data, improved reports)
Avoiding data and operations duplication	The unique database eliminates the repetitve data actualization operations (input and editing).
Lowering response time	Instant reports and information, provided by the system
Adaptability	Changes in the economic processes can be easily reconfigured in ERP.
Scalability	The modular structure of the system facilitates the adding of new components.
An improved maintenance system	Long term maintenance contract with the ERP supplier is not optional.
Collaborative dimension	The system expands and opens, with CRM and SCM type of modules, for its suppliers and customers.
E-business friendly	The ERP system architecture allows integration of new types of e-business applications.

SIVECO Applications 2007 EAS (Enterprise Application Suite) is the integrated software package designed for organizations which activate on the EU market - international companies that are already part of this market or are preparing to meet the European Community standards. The integrated nature of the components inside the package is given by the unitary conception considered during their development, by the (Client / Server) architecture, n-tier, development environment and the used database server (Oracle).

Communication between components is inherently solved by using a common database.

The user benefits from the same graphical interface, all components using the same standard when it comes to windows, work modes, computing objects.

Data security is handled in a uniform manner, as the user access rights can be set up at the most detailed level possible: the operations (view, add, change, delete) exist within each component module, and even in the database. The development of components from the integrated package was based on requests made by users without computer knowledge, but experts in their activity fields - this made possible the solving of problems specific to the covered domains by the assembly of components.

Modularity and scalability

Regarded as a current tool by the enterprise, the Integrated Computing System contribues significantly to:

- ❖ arranging and optimizing the activity, imposed by application integration;;
- ❖ intrinsic verification of each activity, at the level of data integrated flow from which he belongs to;

- ❖ increasing the consistency and accuracy of received, processed and transmitted data;
- ❖ speeding up the processing of documents, removing the waiting times and the need to manually process documents;
- ❖ controlling activities and decision substantiation at a managerial level based on analysis indicators;
- ❖ strict control of data access;
- ❖ keeping the data in full safety, using them only there where their use is fully justified and in their appropriate form thanks to the security procedures implemented at the departments, user and registration level.

DATA ANALYSIS USING PARETO DIAGRAMS

Tabulated statistical data can be graphically represented using different geometric figures. The Pareto diagram represents the ordering of the frequencies of falls, as well as the defects (or other markers, such as the frequencies of repairing durations or the frequencies of repairing costs)

Pareto is a statistical technique for analyzing the proportion of an object across a multitude of elements that could be interrelated. It represents the proportion of a factor (problem, cause) within a factor composed of interrelated factors (a problem with multiple causes, multiple problems that lead to an effect).

The method is applicable in all areas of daily life, where it is necessary to establish an hierarchy, such as:

- ▪ the representation of technological equipment failures in a manufacturing process;
- ▪ the analysis of losses in the transport activities of a company (the weight of the causes generating such losses)
- ▪ the analysis of guest complaints at a hotel (for example: what are the causes with the highest weight that generated a 20% loss of clients in year X)

The stages of development of a Pareto chart are as follows: setting the category of data which will be processed, creating forms for data collection, the duration and size of the measured sample, the use and implementation of databases (relational database management systems such as SQL Server or open source MySQL, Microsoft Access, etc., any system that allows interrogation of the relational databases).

Data collection speed and accuracy are far superior to the traditional writing on paper or classic tabular files such as Microsoft Excel or other programs files, where there is no verification of the entered data.

ANALYSIS OF SOME SPARE PARTS PURCHASED IN NATIONAL COMPANY OF COAL MINING, PETROSANI

The most important spare parts necessary in the production process in the year 2009 have been analysed and graphically presented.

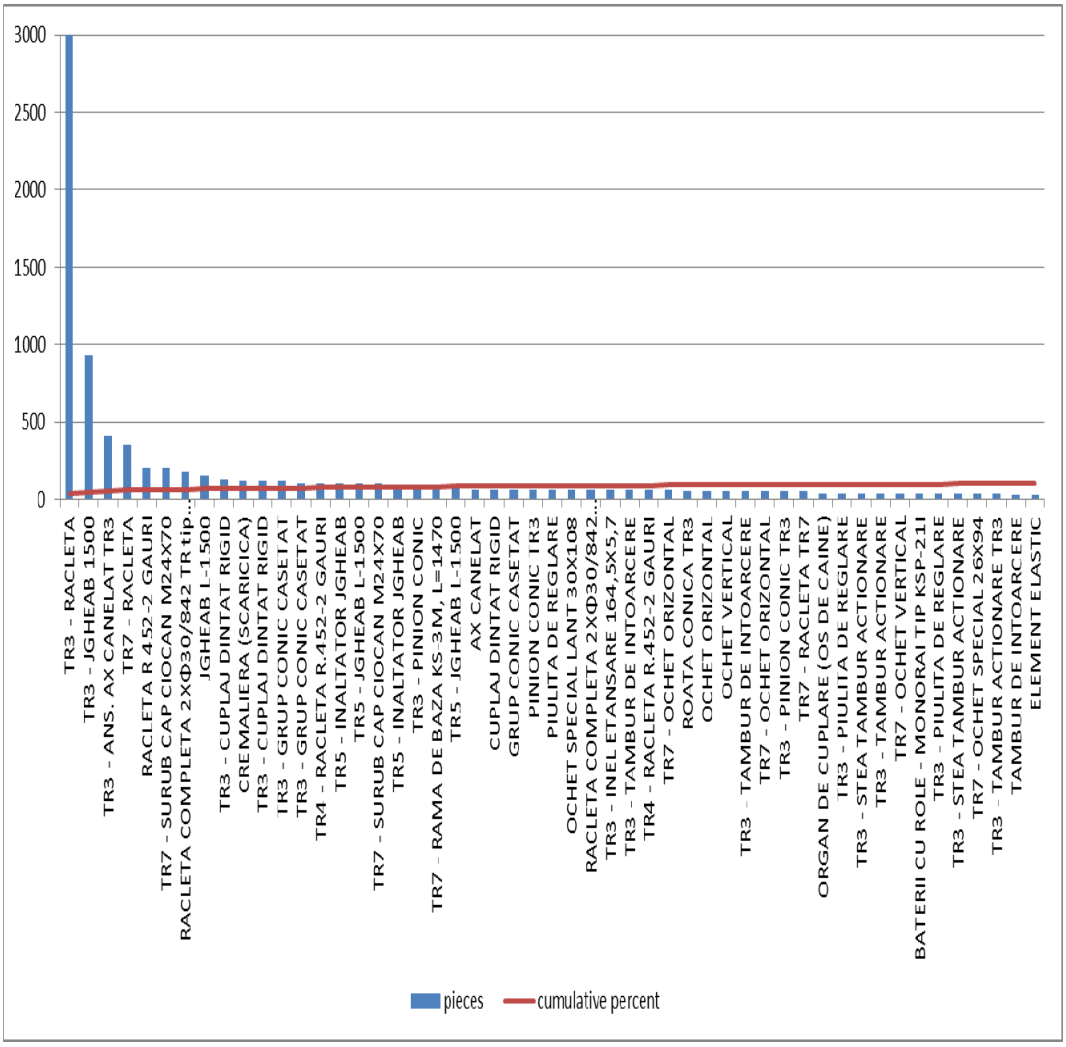

Figure 2. Pareto Diagram of spare parts purchased in 2009 in C.N.H. Petrosani

Pareto Diagram from figure 2 highlights large differences between acquisitions weights for different spare parts like conveyor scrapers from TR3, unlike gutters, gears etc.

Preliminary comparative analysis of the most significants weights, on year 2009, allowed knowledge of their evolution (table 2). In this way weights analysis can be limited to a small number of parts, those with higher incindece respectively (figure 3).

Obvious conclusion is that spare parts acquisitions must be linked with number of equipments in operation during analyzed period.

Table 2.Weights of some spare parts purchased in 2009

PRODUCT	QUANTITY	PERCENT OF TOTAL	CUMULATIVE PERCENT
RACLETA TR3	3000	57%	57%
JGHEAB 1500 TR3	930	18%	75%
ANSAMBLU AX CANELAT TR3	410	8%	83%
RACLETA TR7	350	7%	90%
RACLETA R 452 TR4	200	4%	94%
SURUB CAP CIOCAN M24X70 TR7	200	4%	98%
CUPLAJ DINTAT RIGID TR3	130	2%	100%
TOTAL	**5220**		

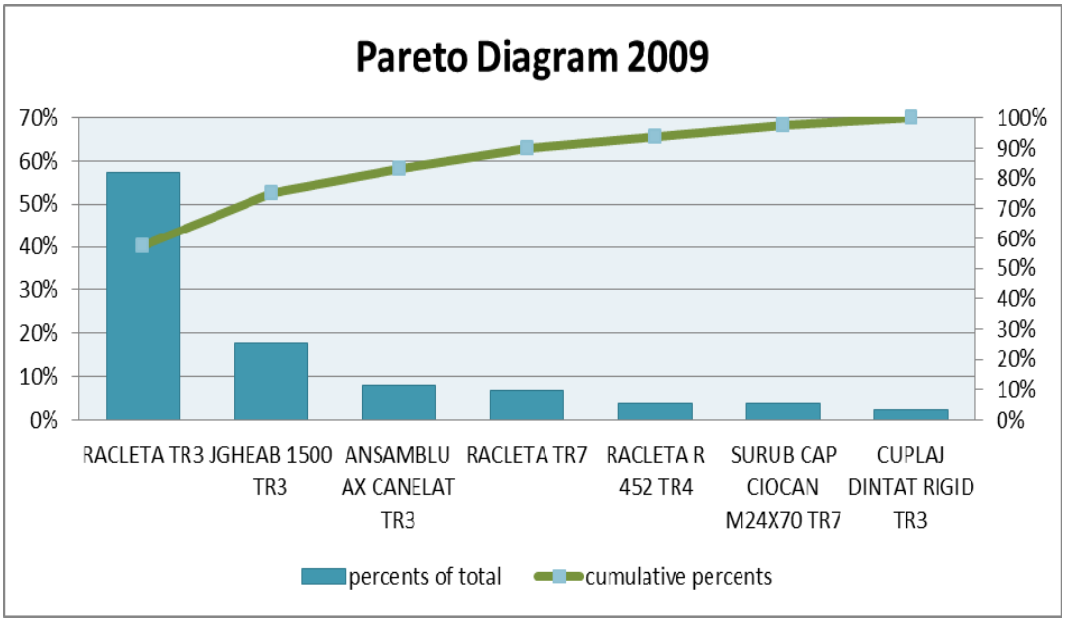

Figure 3. Pareto Diagram for TR3 and TR4 spare parts purchased at CNH Petrosani in 2009

Conclusions

Purchases of parts and assemblies depend on the number of machines in operation, but also on the characteristics of the materials with which they get in contact with.

Creation of centralized data systems with practical utility in ensuring continuity of production processes and in correct development of equipment maintenance, requires preliminary analysis of evolution of spare parts acquisitions weights, over of several years.

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PARTICULAR ISSUES ON DYNAMICS OF FLEXIBLE STRUCTURES

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Silviu NASTAC,
Mariana STANCIU

Abstract
This study treats one basic problem of flexible structures subjected to seismic waves or various vibratory actions. Dynamic behavior of this kind of structures depends on the base isolation solution adopted in strength linkage with self characteristics in terms of structural configuration and material properties. In the paper is presented a computational model developed for a four level structure with and without base isolation system. The base isolation with uniform distribution of visco-elastic elements between structure and superstructure performs a natural frequency shifting to the lower values. Hereby it is assure a uniform post-resonance working state for low frequency dynamic loads such as the most known types of structural charges. The analysis was performed for a set of values of the essential parameters. Comparative analysis with experimental tests put into the evidence a proper evolution of the model taking into account the initial hypothesis of this research. Final concluding remarks show an effective level of global isolation performances of proposed model comparative with the known approaches in the area.

Keywords*: flexible structures, seismic energy dissipation, vibration, base isolation*

1. Introduction

The main area of this research framed the more or less complex methods and techniques dedicated to seismic risk reduction for civil and industrial constructions. Basically, it means the isolation of superstructure relative to the base structure by using of special devices. Large scale utilization of the principle of base isolation supposes a very good understanding both of the insertion devices, and of the superstructure behaviour under the dynamic loads.

This paper presents some relevant aspects regarding exclusive the superstructure behaviour under the dynamic intensive and various loads or seismic shocks. Stiffness and damping was evaluated and analyzed. It was insisted about the energy dissipation availability. Both the base isolators and the structure have their own damping capacity.

The dynamic tests performed for base isolation elements provide the visco-elastic characteristics of its. Also, dynamics tests applied to superstructures leads to visco-elastic characteristics full evaluation. Hereby, one of the main purpose bring together four types of dynamic

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charging of structures, and try to evaluate if all of these are acceptable, or it have to select the method with respect in practical case configuration.

2. Basic Setup for Experimental Analysis and Virtual Simulation

Experimental analysis was performed on a reduce scale structure, which simulate a slender civil building, with ground and four additional floors. In Figure 1 is depicted a general view of the experimental stand setup.

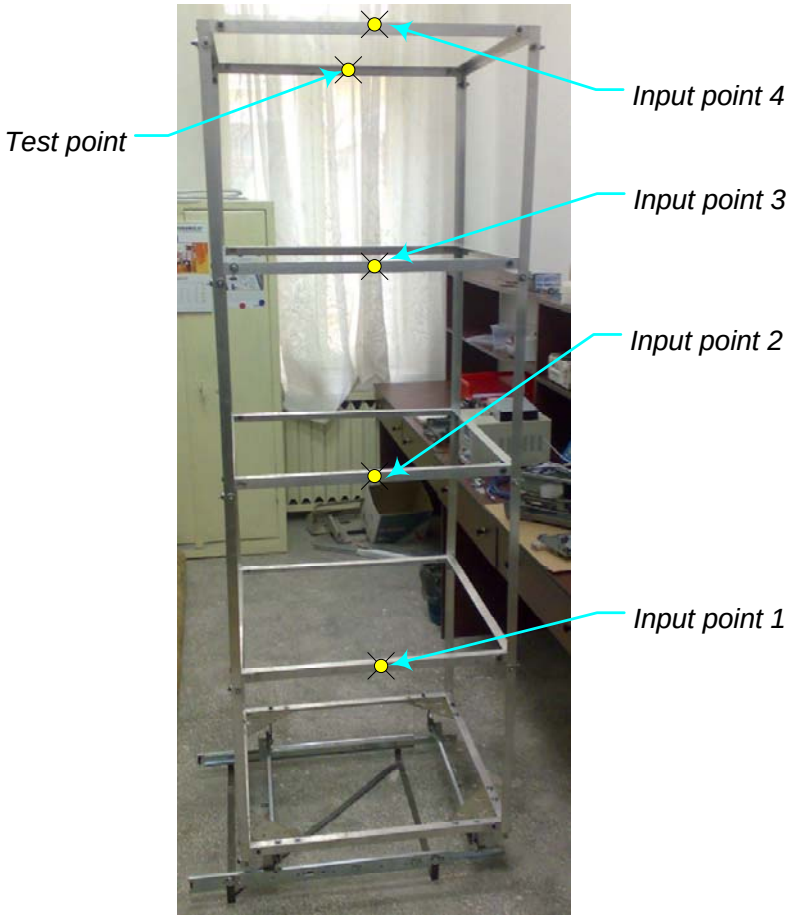

Figure 1. Experimental setup of the flexible structure

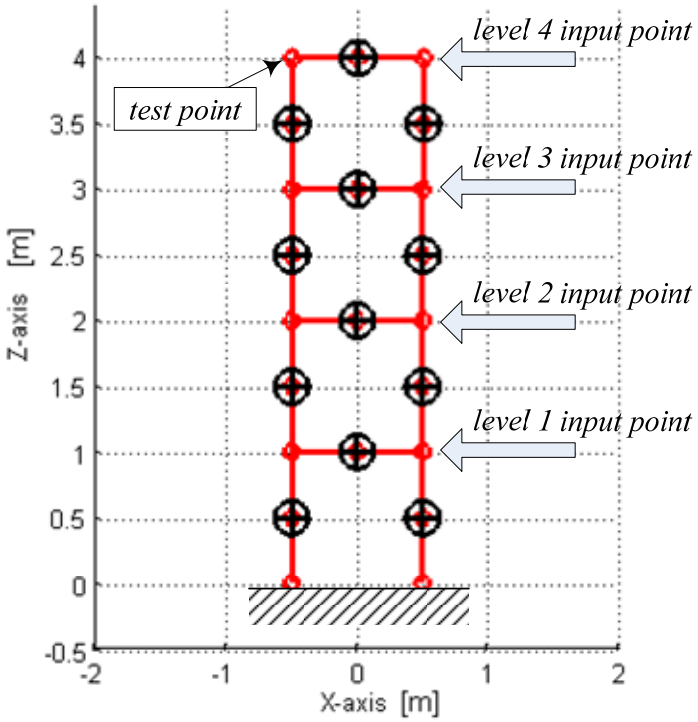

Figure 2. Basic model and virtual tests planning of the flexible structure

The evaluation of the energy dissipation availability of the superstructure can be performed on the physical model (see Figure 1) with some practical restrictions. The evaluation and analysis for the entire system on the whole requires a computer simulation model.

Taking into account the main advantages of the Matlab technical computing software package, and the SimScape / SimMechanics advanced modeling tools in Matlab/Simulink, the final version of the virtual model was developed with the help of these software modules.

In Figure 2 was depicted the basic model of the superstructure and the four tests planning. Whatever the charging case, the output signal was evaluated in the same point and the same direction each time (see Figures 1 and 2).

According with coordinates system in Figure 2, the direction of test input signal is along the Ox axis. The test signal is a short pulse acting only when starting analysis. Afterwards, the system acquires a free movement, until stop the analysis or dissipates the entire energy.

As an output signal was adopted the horizontal direction displacement, measured on the upper frame of the structure. This signal was acquired in the same point of the structure for each test.

The superstructure model have the lower frame fixed on the ground. According to the model configuration each test input shock applied on each level separately excites the natural modes of the structure and determine the general free movement of the system as a sum of certain part from every natural mode.

3. Results and Discussions

Evaluation of displacements for each test provides a superposition of the four acquired signals which was depicted in Figure 3. Analysis of the diagram in Figure 3 reveal the influence of the disturbance input point on the structure timed evolution, and especially the influence on actual self dissipative capacity.

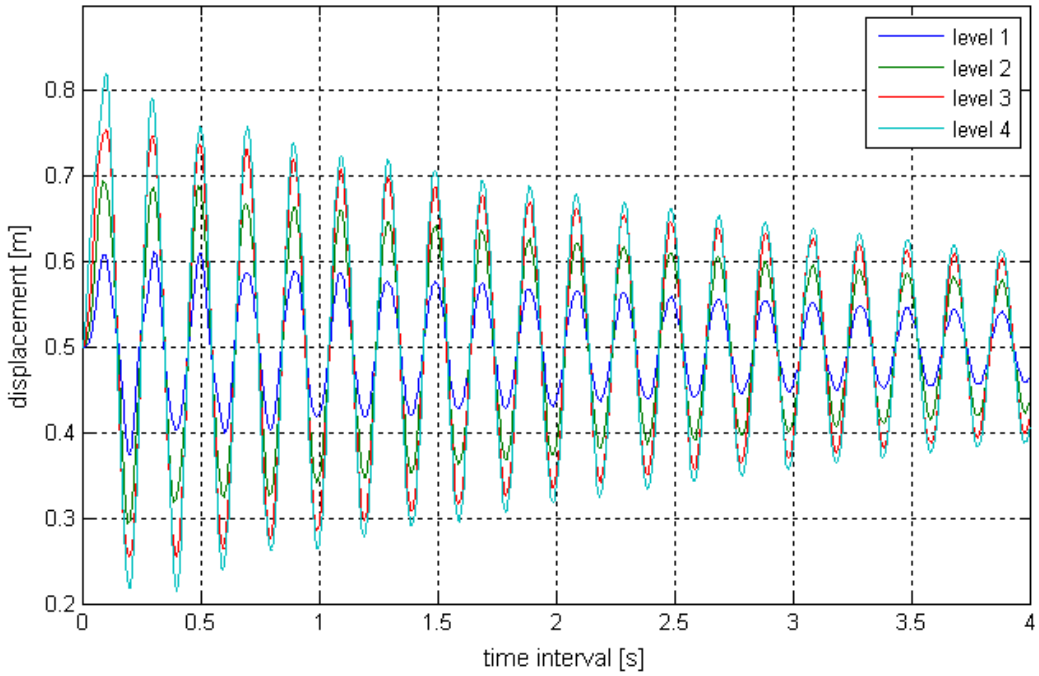

Figure 3. Timed displacement signals

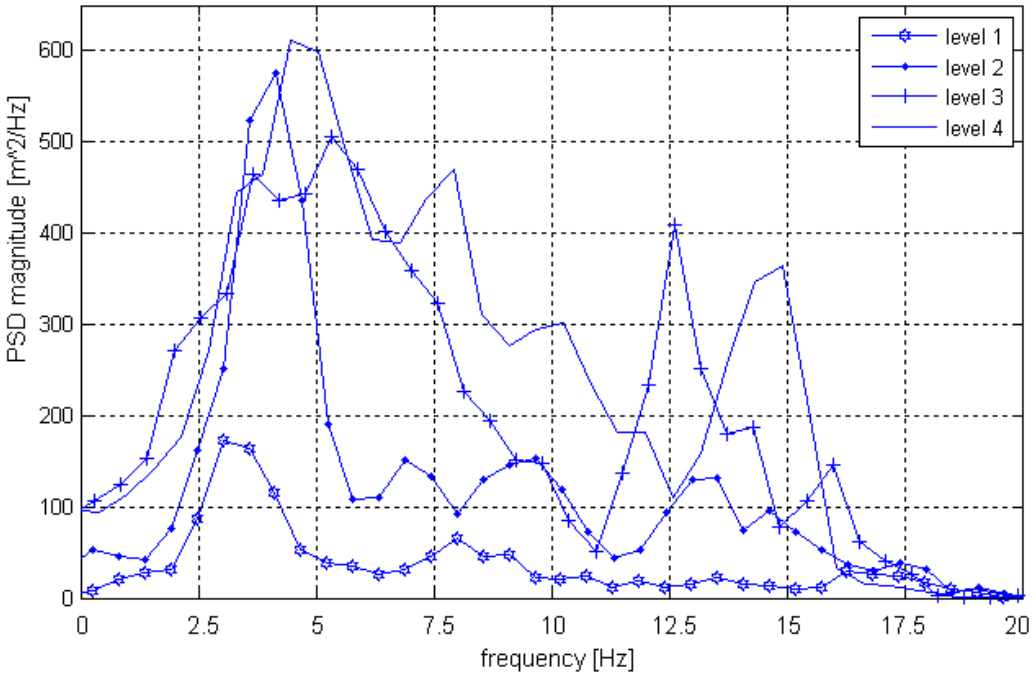

Figure 4. Displacement signals spectrum

Hereby, the excitation applied on the same frame with the output test point (level 4) dignifies the biggest percent of energy damping. In the same time, when the excitation was applied on the farther frame comparative with the output test point (e.g. level 1) results a lowest percent of energy damping provided by the superstructure. Other two cases indicate a proper evolution between the two extremely cases.

Besides the dissipative characteristics it is useful to evaluate also the movement spectral composition for each test. This analysis put into the evidence the way which the stiffness capacity of the superstructure collaborate to the general dynamic behavior. The magnitude of Power Spectral Density (PSD) for each displacement signal was depicted in Figure 4.

Comparative analysis between the spectral distributions reveals a slow shifting in the range of the first natural frequency. Also, it dignifies an amplification of the other natural mode sharing on the general movement.

One explanation of differentiate participation percent of damping in global energy dissipation, according with the tests planning, can be offer by the differentiate sharing of the natural modes in global dynamic behavior of the structure.

Analysis of each test both on the diagrams in Figure 3, and in Figure 4, shows a proper correlation between the dynamic evolution and the spectral composition. This means that in the same time with dissipation percent increasing, the spectral distributions acquire new relative peaks and the general shape of spectrum become more plentiful.

Another interesting result of this study deals with the way of proper testing plan for dignify the natural modes of a structure like the one in Figure 1. It is evident that a synchronous acquisition of each level output can provide the best way to dignify the natural modes. But when this fact is improper or impossible the acquisition of a single signal but farther then the input point can assure enough accuracy for a global evaluation of structure dynamics.

4. Conclusions

Correct testing and evaluation of structures, taking into account the entire ensemble of collaborative factors which help dynamic isolation, leads by cumulative effects through a good behaviour under the real intensive and various charges.

The case of particular charging, especially for testing setup, has a great significance in evaluating of essential parameters for elastic and viscous characteristics. An optimum ratio between the outputs and the number of supervised parameters can maintain a proper accuracy of the final results.

Permanently dissipative capacity supplied by the superstructure gives the natural background damping. In the same time, the base isolation solutions provide some additional capacity of energy dissipation. The mixture between them provides the global damping capacity of the structure. The right evaluation of this essential parameter leads to the proper exploitation regime during the whole cycle of life, without potential dangerous damages in the case of intensive and various dynamic charges.

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THE DYNAMIC BEHAVIOR OF SOUND BARRIER IN CASE OF ACCIDENTAL IMPACT WITH STONES FROM ROAD TRAFFIC

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Ioan CURTU [*],
Calin ITU [*],
Silviu NASTAC [**]
and Adriana SAVIN[***]

Abstract
In accordance with Directive 2002/49 relating to the assessment and management of environmental noise adopted by the European Parliament and Council, it is necessary to perform the noise map of the main cities of our country and to develop national strategies to reduce the traffic noise. One of the solutions for reduction of noise traffic is to build acoustic screen. In this sense, the structure of sound barriers must fulfill numerous requirements in accordance with European Normative (EN 1794, 1793, 14388).
In this paper are presented the results of dynamical behaviour of panels from structure of sound barriers. The simulation of an accidental impacts with stones from road traffic was performed. The material of panel in terms of physical and mechanical properties was varied. The FEM analysis revealed the variation of displacements, the strain energy and the stresses Von Mises from each type of panel.

Keywords*: sound barriers, impact, traffic, dynamic*

1. Introduction

The sound barriers play an important role in reduction of traffic noise. The constructive elements of soundproofing devices are: the structural elements – with support and resistance role and the acoustic elements –for reduction of traffic noise. The jointing of both elements must assure a good insulation, otherwise the acoustic efficiency decreases drastically. There are variety of acoustic elements in terms of geometric configuration, materials used (combinations of materials), the acoustic performance and method of joint. The traffic noise barriers are stressed by different types of forces: the force due to the wind, the dynamic pressure of air due to road traffic and the own weight, shocks caused by stones or other solid particles thrown from car wheels (SR EN 1794-1). So there are two types of phenomena in analyzing the sound barriers: acoustic and structural.

The purpose of the impact analyzing is to emphasize the structural behavior of the panels under the action of accidental impact with a stone coming from road traffic.

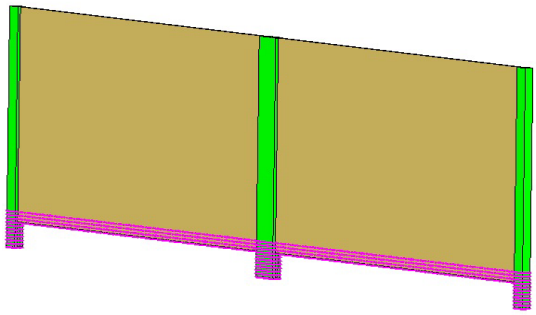
2. Geometrical Model

To simulate the dynamic behavior of noise barriers, the structure with geometry as Figure 1 was designed, with dimensions scale 1:1 (length L = 3m, H = 2 m high).

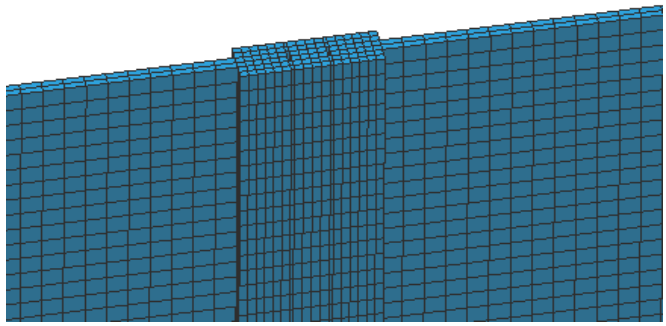
The hypothesis of simulation:

- The direction of stone trajectory is perpendicular to the outer surface of the panel.
- The stone is considered as infinitely rigid (non-deformable).
- Stone speed is adopted as equal to 30 km/h.
- Stone movement starts at 300 mm distance from the panel, with an initial speed at the start of analysis.
- Duration of impact analysis for capturing the phenomenon is considered equal to 0.5 seconds.
- The diameter of stone is 30 mm.
- The stone hit in the center of panel.

The structure was modeled with Nastran program, being meshed into hexahedrons finite elements, and the lower part of structure made from beams and panels was rigid fixed in order to simulate the real boundary conditions (Fig. 1).



a)



b)

Fig. 1. *The noise barriers structure. a) The boundary condition. b) The mesh*

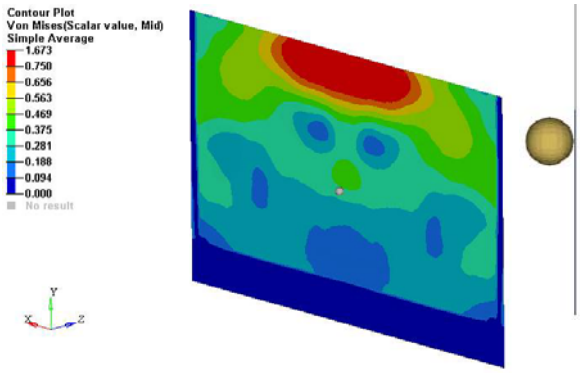
Were analyzed three different types of structures in terms of Young's Modulus and density. The input data are presented in Table 1. Further, the analyzed structures will be coded as S1, S2 and S3.

Table 1. *The input data*

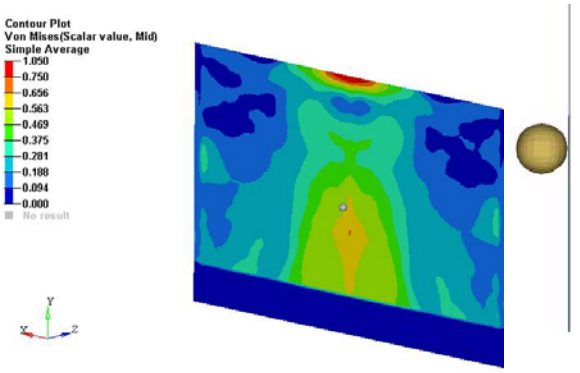
Characteristics	*Structure 1 (S1)*	*Structure 2 (S2)*	*Structure 3 (S3)*
Young's Modulus [MPa]	14000	70000	140000
Density [Kg/m^3]	500	1000	1500
Poisson's Coefficient	0.3	0.3	0.3
Wind Pressure [N/m^2]	1000	1000	1000
Dynamic pressure of air	650	650	650

3. The results

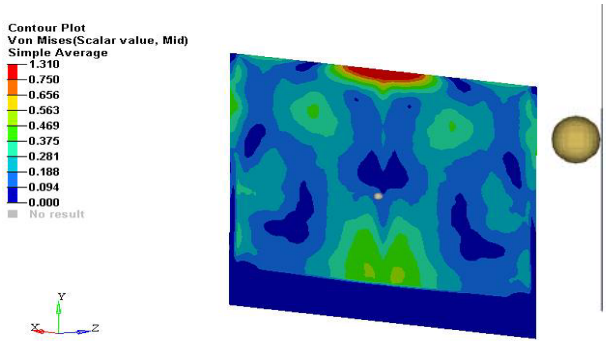
In Figure 2 are shown the distribution of stress field in the panel structure at t = 0.042 and considered throughout the period of analysis (0.5 seconds). In Figure 2 are presented the three types of panel – S1, S2, S3. Based on the result of impact analysis, it can be seen that the overall effect recorded by panels in terms of stress is within admissible limits, the values of stresses being quite small compared with the yield stress of the material.



S1



S2



S3

Fig. 2. *The Distribution of stressdue to the impact, for each type of panel*

In Figure 3, are presented the displacement variations of panel in the impact area with stone. It can be noticed that the global displacements recorded in the panel are small (about 7 mm) and can not be considered dangerous related to the global dimensions of the panel.

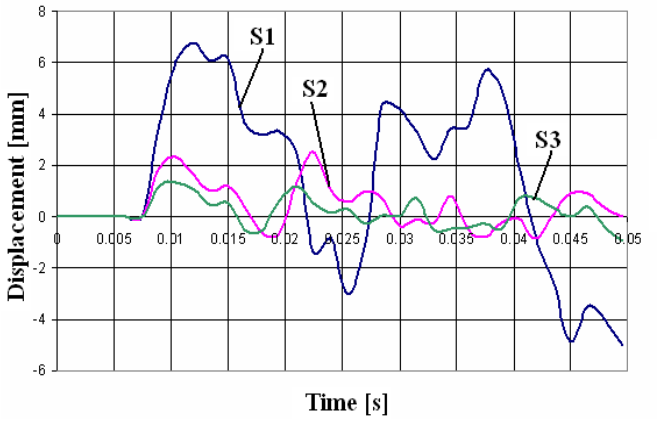


Fig. 3. *The Displacement variation of panels in the impact area during of 0.05s time period*

The features of materials used in sound barriers structures plays an important role in quality of acoustic insulations and in structural behavior of them. So, the higher elasticity modulus of the material is, the smaller is the internal strain energy. This aspect can be noticed in variation of strain energy presented in Fig. 4.

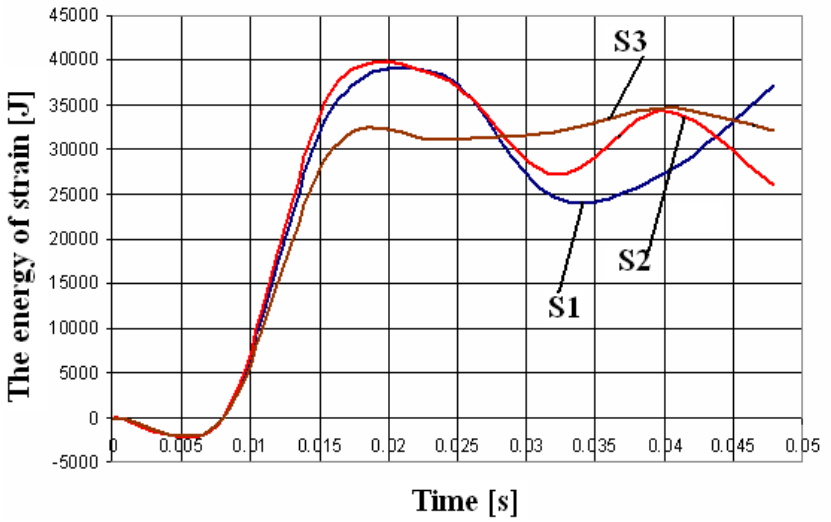


Fig. 4. The energy variation of the deformation of the panel

4. Conclusions

Sound barrier structures are subjected to cumulative action of several forces (static, dynamic, aggressive environmental factors). In the paper were presented results of modeling the dynamic behavior of the panels to impact with a stone. They showed that the impact effects are reduced, but in reality the several factors act simultaneously on these types of structures, which involve either complex modeling or the use of safety factor in design and building structures.

Acknowledgments This paper is supported by the Sectoral Operational Programme Human Resources Development (SOP HRD), financed from the European Social Fund and by the Romanian Government under the contract number POSDRU POSTDOC-DD, ID59323.

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THE TOPICALITY OF NOICA'S THINKING AND THE REVERBERATIONS OF THE SCHOOL OF PĂLTINIŞ

Aniela Ioana BERTICI (CORLĂȚEANU)[*]

"Play with the cards you are dealt in life, thinking that you must be unique, that you must find your way out of statistics, out of the flock, that you must be the exception!"
Constantin NOICA

Abstract
Constantin Noica, one of the leading yet most disconcerting figures of the 20th century Romanian philosophy, is very much alive today and present in the posthumous continuation of his spirit's achievement. Evidence in this respect is given both by the well-structured ideas in the works he bequeathed us (and which, despite all frequent references to them, hardly remain familiar to us in their essence) and by the cultural climate he generated, by means of a fascinating pedagogic vocation, amongst a still self-searching generation. Noica founded his thinking on an exemplary hermeneutics of the Romanian spirituality, exploring our true inner self only to find ontological virtualities which the world today, exclusively concerned with its becoming within and towards being, seems to ignore. Thus, he delineated what in philosophical hermeneutics, following Plato's theory of reminiscence, has been referred to as the already-known knowledge.

Keywords*: Constantin Noica, the School of Păltiniş, the non-limiting limitation, hermeneutics, Romanian spirituality, Noica's outlook on paradox, Alexandra Laignel-Lavastine, catholitis, acatholitis.*

Introduction

As with December 1989, we have been living in an allegedly historical time, wallowing in hopes, anxieties and dramas, and waiting for something historical to occur. We have been waiting for a providential man of culture or politician, for a Messiah who could point toward the direction we have to follow and who could tell us there is a plan of national development. Unfortunately, however, no one has attempted to dream for the country or the Romanian people, except only for himself, for his family and his party fellows (even in this case, one may raise questions). It is due to the "culprits," whom we make no effort to single out, that over the past 21 years, Romania has hardly managed to find its place in history (the Schengen issue). Few of us, and their voice has remained silent, have had the curiosity to unravel the past in order to find a sort of "handbook" or a guide book. Neither did we want to follow Noica's advice and, thus, no one has visibly stepped out of the flock. Romania seems to be cursed in lacking continuity from one historical moment to another. Too easily do we throw into history's dustbin everything we have gathered throughout centuries, having the feeling that

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whatever is built from scratch, extremely fast, may be better. Nevertheless, "one cannot escape history" [1]. Thus, we wonder, to what an extent was Noica prophetic and what happened in fact to the School of Păltiniş? Will we ultimately learn what Noica taught his disciples, the guests of – perhaps the latest – public television programme: "50 minutes with Pleşu and Liiceanu"? "A programme of "mental hygiene" which "aims to stimulate the capacity of all of us to think on our own"[2]. A public statement given by the Romanian Television station (TVR) mentioned that the programme "is based on the idea that Romanians are increasingly less attracted to the programs broadcast by television channels" and that "the two men of culture will discuss topics related to the human condition, the Romanian people and its complexes, our relationship with the unseen and the unknown". Gabriel Liiceanu explains: "We are referring to things which we all worry about, some of them because we withstand them daily, others for being constant elements in our life. What we do with our life, why we do or speak nonsensical things, why we hate or envy someone, what the meaning of reading is, what democracy is good for or whether it is a good thing to do politics – are issues concerning all of us and around which, more or less consciously, we build our life"[3].

Paper content

The publication of "The Păltiniş Diary" in 1983 has turned Noica into an emblematic, legendary figure; yet, what was tragic was that people have not started reading Noica's works, instead they have started visiting Păltiniş. Too few of us have begun analyzing his works; this process has been quickly replaced or even substituted for discussions over the philosopher's life. ("We want to see Noica's overshoes!") Liiceanu would have wished this Diary to be a humble foreword to the Păltiniş philosopher's entire works, which have been often referred to and, nevertheless, have remained hardly known; he would also have wished it to reveal the master's fascinating pedagogic vocation amongst some youth craving for knowledge. Noica's great dream came into being in Păltiniş: laying the foundations of a "school of wisdom". "The school. This school. I don't know if I will ever lay its foundations. However, I would like, at the end of my life, to be able to say: there is no other thing I have done."[4] His pedagogic method of stirring his students' interest, method in which one could sense his professor's, Nae Ionescu, strong influence, was essentially rooted in the Romanian common sense: "Do not give any piece of advice to the one who does not ask for it. First, have him feel thirsty for it. Get him in the position of asking for it. Then, tell him – if you have anything to say."[5] Noica would have wished to impose attitude, to lead a cultural "crusade" of the youth whom he did not scruple to tell several times a day: "Go back to your book!" It is for these youth "whom one may still "pervert"" that Noica wrote the pages of his *Philosophical Diary*: "I dream of a culture-oriented perversion; a perversion in the etymological sense."[6]

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[1] *Apud*, Dur, Ion, *Noica – portretul gazetarului la tinereţe,* Saeculum Publishing House, Sibiu, 1999, p. 42.

[2] http://www.ecomunicate ro/comunicate-de-presa/arta-cultura-religie/3/tvr-1-lanseaza-emisiunea-50-de-minute-cu-plesu-si-liiceanu-10997 html.

[3] *Ibidem.*

[4] Noica Constantin, *Jurnal filozofic,* Humanitas Publishing House, Bucharest, 1990.

[5] Noica, Constantin, *Jurnal filozofic,* Humanitas Publishing House, Bucharest, 1990, *apud* Dur, Ion, *Noica – portretul gazetarului la tinereţe,* Saeculum Publishing House, Sibiu, 1999, p. 248.

[6] *Apud*, Dur, Ion, *Noica: vămile gazetăriei*, The European Institute Publishing House, Iassy, 2009, p. 351 (see letter adressed to Ş. Cioculescu, in *Dilema*, Year V, no. 256, 19-25 Dec. 1997).

The Treatise of Ontology, a book which Noica himself considered the most representative one in terms of the essence and style of his thinking, includes notions which could revive the contemporary Romanian thinking now found in an identity crisis. *The non-limiting limitation* is the expression of *the closing that opens up*. Thus, the valuation of *the possibility* becomes detrimental to the thoughtless *effectiveness*. It is in the horizontal relationship between *the individual*, *the general* and *determinations* that the six *maladies* of the contemporary spirit are rooted. Noica founded his thinking on the hermeneutics of the Romanian spirituality. He explored our true inner self for (potential) ontological virtualities. Thus, he delineated what, in philosophical hermeneutics, following Plato's theory of reminiscence, has been referred to as the already-known knowledge, namely the adherence to a tradition according to which "our perception of the world is a never-ending task".[7]

According to Noica's outlook, the Romanian space is "a space in which one may die," the philosopher adding up that "the European culture might end up here".[8] To die or to end up, what is the meaning of it? "When things perish, they return to what they once used to be, to the reality in which they existed, respectively in the spirit of which they have developed. (...) Things and people perish in the world they belong to. But, this does not mean that they vanish into the dust in which they are originated, rather that they breathe their last or return to their essence, that is they reveal their element."[9]

Nowadays, we have still been going through a period of feverish searches within "the world's enlarged self" which appears to be able to do brutally without the being's commitment model advanced by Noica (Bariţiu stated that great personalities have no role to play in times of "servitude and general blindness"). However, we still do not knwow if a return to the inner self could be possible without its appeal for the ideas and principles it has supported nearing utopia. According to Noica, between passeism and activism, detachment and involvement, indifference and pathetism, there is a circular relationship which – if it is well managed dialectically – reduces the dissonances and energizes the lethargies. What is really important for someone to know is what to relate to: *the time flying by* or *the Archeii* staying hidden, like specks of light, within every single thing. Here we refer to "Noica's outlook on paradox", which Alexandra Laignel-Lavastine refers to as the paradox of the circular condition of thinking. In an attempt to whip himself "to his origins", Cioran flagellated the community in which he was born and reproached Noica that he had not become aggressively involved in history. To Cioran's despair, Noica replied with the typical old man's wisdom: "A wrong commitment in life, a mistaken step in mankind's civilizational progress, a seeming victory which crushes man yet, all these are affronts to a knwon or unknown Archeus. Man's commitment in life must be a voluntary and not an accidental act, based on his deep needs and not on an arbitrary decision; the progress of our civilization must be achieved under man's control, so as to avoid its reverse against man; and man's victories must raise him to a level characterized by order and not by the profanity of historical disorder."[10] Therefore, accusing Noica of not jumping head first against the Communist killing machine or of not being an active dissident is similar to accusing the apple trees of refusing to bear fruit under "comrade" Ceauşescu's regime. Adrian Marino would have preferred a

[7] Gadamer, H.G., *La philosophie herméneutique,* PUF, 1996, p.48.

[8] Noica, Constantin, *Jurnal de idei*, Humanistas Publishing House, Bucharest, 1990, p. 254.

[9] Noica, Constantin, volume 2: *Tratat de ontologie*, The Scientific and Encyclopedic Publishing House, Bucharest, 1981, p. 326 – 327.

[10] Noica, Constantin, *Sentimentul românesc al fiinţei,* Eminescu Publishing House, Bucharest, 1978, p.161.

more "Cioran-like" Noica and wonders "how it is possible for a creative spirit to survive culturally and, implicitly, socially right under a totalitarian regime from which he is completely separated by everything: the past, the cultural-ideological formation, not to mention the years he spent in prison".[11] Marino launches an inquiry, attempting to find out why the Communist regime "tolerated" Noica and what the price paid for such a service was. Andrei Pleşu is the first to offer an answer in this respect: "If a surgeon operates under a Communist regime and, thus, "supports" this regime and makes concessions, then one may conclude that Noica in his turn made concessions. And that's because he understood he had to operate under the given circumstances and, in this way, to render culture, dialogue, or the publication of a book possible at a time when such things were prohibited".[12]

However, Adrian Marino identifies three "points of immediate convergence" between Noica and the regime: first of all, the nationalist orientation of his texts on "the Romanian identity"; then, his projects of cultural cooperation with the exiles, cooperation which which, in the context of the existing dictatorship, could only result in legitimizing him; finally, his will to break away from political history as well as his seeking refuge in a "cultural surreality".[13] Here Andrei Pleşu defends his master again: "In fact, who are Noica's judges? Imposing moral figures? Great figures of the resistance? (...) None of these. And then, to what an extent is the severity of these people ethically legitimate? Isn't it cynical to reproach someone who was assigned forced domicile for ten years and who spent five years in prison that he was not combative enough with the Communist regime?"[14]

Constantin Noica has also been reproached for not being enough anchored to the current reality even when defining the Romanian spirituality, just as his philosophy and his philosophical attitude in general are not. Nevertheless, it is the very fact that, to his mind, the space within the being is not transcendent, but involved in things (a general providing determinations and manifesting itself in general) that proves the contrary, namely the extent to which his personality is anchored to the concrete and real world. However, in this way, he declines – as his own Romanian spirit actually does, according to his outlook – the blind act, the rush to use active forms which lack the conversion towards the general, the haphazard and gratuitous creation, the lack of balance. The simple act of gathering facts does not give meaning to life unless they are related to the general, and "the desperate need for action" (the catholitis, to use Noica's terms) is "the tyrants' malady, whose symptoms are exacerbated due to a lack of meanings. Intoxicated with action, the person suffering from catholitis may go as far as to shatter history with his chills".[15]

If the conversion towards the general ("the one which gives birth to the individual and its free determinations") does not occur, then "the being is rejected, as with the protenoids which do not become proteins, or with the varieties which do not become species, or with the words which do not become language".[16] As Noica exemplifies at a social level, this is what happened to peoples such as the Celts (who "persisted in undermining every existent state, yet couldn't attain the general idea or consistency of any of them") or to nations which have assumed a "historical role", but, "like the adrift vessels of history", only sailed under a flag which they were actually devoid of.

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[11] Dur, Ion, *Noica – portretul gazetarului la tinereţe,* Saeculum Publishing House, Sibiu, 1999, p. 37.

[12] *Ibidem,* (see „Despre Constantin Noica", in Euphorion, no. 6-8/1992.), p. 37.

[13] Laignel – Lavastine, Alexandra, *Filozofie şi naţionalism. Paradoxul Noica*, Humanitas Publishing House, Bucharest, 1998, p. 39.

[14] "Andrei Pleşu. Interviu", *Apostrof*, May 1992, *apud* Laignel – Lavastine, Alexandra, *Filozofie şi naţionalism. Paradoxul Noica*, Humanitas Publishing House, Bucharest, 1998, p. 73.

[15] Noica, Constantin, *Şase maladii ale spiritului contemporan*, Univers Publishing House, Bucharest, 1978.

[16] *Transilvania,* no. 1/1990, Year XIX (XCVI), p. 42 – 44 [Mişcarea literară].

This is what has not happened (yet) either to the Romanian people – constant in their non-limiting limitation and aware of the ephemeral nature of meaningless things – or to Constantin Noica, as a person. Should he use his own words with reference to the essence of a genius, the master would define himself as "the one who helped him understand there is something more profound than ourselves, namely the ego that has found its self". According to Noica's outlook, the coming into being (of an individual, of a collectivity, or of an act of creation) as well as their preservation within meaningful boundaries must occur *within and towards something* (which *something*, in philosophical terms, suppresses the nothingness); they must assume their becoming within and towards their self and not the selfless becoming, as with the spirits which waste their existence on blind actions and gratuitous sensory satisfactions.

Constantin Noica proves this truth in force, by analyzing three masterpieces of the Romanian spirituality: Mihai Eminescu's *The Evening Star*, the fairy tale *Youth Without Age and Life Without Death* (or "the fairy tale of the being", as he refers to it) and Brâncuşi's sculpture. His interpretation of *The Evening Star* overthrows the existent romantic interpretations (the idea of genius who cannot find his happiness on earth), turning the poem into a creation with profound philosophical meanings, illustrating the general which fails to encompass the being by embodying it into the individual. This is an original suggestion – even if it does not manage to exceed the limits of a rich tradition of ethical-psychological interpretations – an integration of Eminescu's genius into the being-oriented philosophy (according to Noica's outlook, Eminescu himself oscillates between "the ultimate issues, where is only room for the great elegiac poetry" and the concrete nature of the real world, thereby uniting the two poles of a philosophical tendency) and, at the same time, into the Romanian outlook on life by which his poetic creation was inspired.

According to Noica's interpretation, the fairy tale *Youth Without Age and Life Without Death* is the epic transposition of the process of becoming of the ontological individual. "As he admits, there are no other prose works of the Romanian genius to have so much consistence, from the beginning to the end, and such a rigorous style of writing or an expression".[17] If we analyze it line by line, like one of Plato's dialogues, it becomes evident that it expresses, "not in the indirect manner characteristic of the fairy tale, but directly, the entire meaning, the limitations and the truth related to whatever may be called being". If in *The Evening Star* there are described the vicissitudes of the general which fails to become integrated into the individual, in the case of the fairy tale we refer to the impossibility of uniting the individual with the general, in the absence of some good determinations, as well as to the acceptance of the ultimate meaning of the being, namely that "there is no being without financing". We are characterized not by "a forever nothing", but rather by our achievements in and by means of the world, as hyposthases of the being's efforts to reveal itself: "trees do not grow up to the sky and people's lives acquire inner boundaries, deciding for themselves, even when they protrude into and decide to remain in the eternal hesitation".[18]

Noica accomplishes a description of the ever-changing specific character of the Romanian nation, sketching the extensive spiral of our becomings within and towards being that is typical of our way of existence. According to him, this specific character manifests itself not only through the folk works of art, as with Blaga, or as a result of one's becoming aware of his historical destiny, as with Rădulescu Motru, but also, by encompassing these two tendencies, by assuming a continuity in

[17] http://www humanitas ro/humanitas-multimedia/tinerete-fara-batranete-si-viata-fara-de-moarte.

[18] *Constantin Noica şi Sibiul,* edited and prefaced by Mircea Braga, Sibiu, Imago Publishing House, 2007, p. 98.

terms of both language and origins, by means of an ontological identity with a great creative force and a clear "vision of the future" embodied both by the anonymous genius and the great personalities having an Archeus-like vocation of teaching others. Fortunately, as Noica remarks, the Romanian spirit is not familiar with "the curse of the world devoid of its significant practices, when the latter, through their representatives, cannot be adapted according to its limitations" and, consequently, "it remains a world of the selfless becoming, which is the mere becoming within and towards becoming". Neither is this spirit familiar with the obsession of the cheap, immediate and undifferentiated happiness, or with the rigidly determined external purpose. It is aware that the true achievement of a goal often resides in simply seeking it, "simply waiting for it and opening oneself for it", under which circumstances "it may already have come to mould, like an unseen hand, the image of your being and of the things around".

According to Noica, the expression of the existential fulfilment or of the being's inner joy is the works of Brâncuşi, "that sculptor rendering the flight and the esences", the true embodiment of the Romanian spirituality, in its turn best expressed by means of the concept of *within and towards*. In the case of his sculptures, things are *within and towards* (such as the flight), reflecting both one's integration into the order of things and their finding the way (Tao), their becoming within and towards their self and, therefore, the existence of self (and not the mere existence of things). Brâncuşi "causes Motionlessness to shatter"; to him, "Heraclites is Parmenides"; he rendered "the infinite within finite boundaries, the flight as a fixed expression, the identity in its plurality", his *Cock* "has an inside out", and his *Wisdom of the Earth* could represent "the first thought or something from the first day the Earth began to think".[19]

To what an extent are Noica's definitions topical and how much do they retain their significance? Is the specific national character still of any importance and topicality? Communism turned out to be a form of dictatorship which stifles any manifestation of the individual spirit; it dampened the constructive enthusiasm and reversed the axiological hierarchy. Nevertheless, whenever someone reminded Noica of the years he had spent in prison, the latter would launch a paradox, saying he had led a boyar's life there – he had been guarded, nourished, looked after, served. He had no concern for subsistence; nevertheless, beyond appearances, he had one of man's most precious liberties, the one to think. In fact, Noica's paradox is only apparent – if we balance the criteria on which good and bad are founded, if we perceive the essence of things from the perspective of the infinite, or, at least, of a life's eternity. That is because, according to the ethnic teachings existent as with Spinoza, a present sufferance triggers a future one which is more intense in terms of its existential value than the negative meaning behind it, if the clock measuring the lethargy of desires also has on its face the scale of quantity accumulation so as to measure an axiological outburst. As a result, the one who is guarded (deprived of his freedom to move) becomes the guardian, and the one who guards becomes a mere spectator of creation. The revolution of December 1989 seemed to have unchained the spirits, to have given the people back the freedom and dignity of thinking, of the true and right expression of the individual and collective personality; but most of all, it seemed to have established a new background for taking action so as to fulfill a historical destiny. Unfortunately, we are still struggling with our own incapability and, personally, I wonder once again: What happened, in fact, to the School of Păltiniş? If those brilliant youth at the time had all emigrated west, would perhaps each of them have become a great figure like Eliade, Ionescu or Cioran?

[19] *Transilvania,* no. 1/1990, Year XIX (XCVI), p. 42 – 44 [Mişcarea literară].

Constantin Noica would have wished "the seeds thrown by him to grow in his spiritual followers. In that individual which he wanted to rehabilitate from an onto-logical point of view, individual which he named *Christophor*, that is "Christ-bearer"."[20] A follower whom "you should let approach you, or whom you should approach. You should take his soul in your hands and weigh it, like a handful of wheat grains: how heavy is it? Is it good for seeding? And you should be, if you can, not the one who keeps trying to gather something: but the rain, that autumn rain which knows nothing about gathering …"[21] Noica would take care that "you are sent further away, that you are placed by the source", that you understand the truth, its life as a process and not at all as a product.

Conclusions

Noica's physical and spiritual existence would constantly oscillate among the myth of the School and the gentle insurrection of the Savior. The revolt of the philosopher in Păltiniş was, in its own way, a form of heresy. It struggled between what it should be and what it should not be. Noica wanted to point out "exactly" the difference between the soul and the spirit, to show why the priority of the "way" or that of its common technique, changes into a spiritual tyranny that separates us from our scholarly destiny.

One may thereby assert that Noica was a "Protestant" of Romanian thinking, its "reactionary innovator". "As if summarizing a morality of the spirit and of its improvement, he wanted -in keeping with the tradition of ancient Greece- to change the young men selected for a performance culture into "Cathars", without a thought of establishing a school characterized by neo-Manicheism or a hostility towards Christianity. For his young men, a crusade of the "cathars" was to be, first and foremost, a crusade into culture, a goal reflected in his many-times-a-day command to them, „Back to your books!"."[22]

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[22] Dur, Ion, *Noica: vămile gazetăriei*, The European Institute Publishing House, Iassy, 2009, p. 351.

MIHAIL SEBASTIAN AND THE RIGHT-WING IDEOLOGY TEMPTATION

Alina Costea DORLE*

Abstract
The post World War I social and political realities have lead to the emergence and emphasis in the Romanian politics of some political directions, in order to counteract the corrupt political and economical pattern and to suppress the domination of allogeneic forces, acutely felt as a threat, especially in the intellectual society. In this context, a good part of the well-known intellectuals of the interwar period – in this regard we mention the 30s Generation, a large scale cultural and ideological movement of great influence in that era – would join the right-wing political movements, harboring high ideals of fervent nationalism and aiming, from mystical and spiritual positions, at an overall change and renewal of the Romanian Society. Among the generation's remarkable spirits, with ideological right-wing orientation, we must also mention Mihail Sebastian alongside other famous names like Mircea Eliade, Nae Ionescu, Constantin Noica, Emil Cioran, a paradox for such an option, because of his Jewish origin. His journalistic activity, his incorruptible position and his unequivocal position – at least until the issuing of his novel For Two Thousand Years – on the line of his mentor's, Nae Ionescu's, ideas, make Mihail Sebastian a significant case for the dilemmas of the Romanian intellectual in the hectic environment of the 30s.

***Keywords**: 30s Generation, right-wing ideology, jewish, assimilation, nationalism*

Introduction

After World War I, the realities of the new Romanian state proved to be totally different compared to what the majority of the public opinion expected after the sanctioning of the Union's ideal and the reconfiguration of the country's borders. The frequent sideslips in politics and parliament, the disproportion in ethnic elements, especially the Jewish element, regarded as an economic as well as ethnic risk, led to experiencing social frustrations on a large scale and, implicitly, to generating a radical reaction of the young generation of intellectuals, who went, fully armed, against the corrupt political patterns and against the allogene element, especially the Jewish domination, which is mainly overwhelming among the intellectuals (in universities, bar associations, journalism).

The new generation elite are therefore set around Romanian nationalist directions (sometimes accompanied by anti-Semitic overtones) and around programs meant to promote ethnic nationalism and to stimulate the native spirit. Being a sympathizer of equity ideals, of equalitarianism and moral reclamation of the political and economic life, a large part of the well-known Romanian intellectuals would join the right-wing movements, which also include the Legionnaire Movement.

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Paper content

Thus, the famous *30s Generation*, structured on the intellectual core of the ***Criterion*** magazine, is born, as a large scale and influent cultural and ideological movement. A significant segment of the Criterionists becomes exponential for the ideological and right-wing political orientation of the young intellectuals. Thus we must mention philosopher Nae Ionescu, Mircea Eliade, Constatin Noica, Mihail Polihroniade, Petru Comarnescu, Haig Acterian and, to some extend, even Mihail Sebastian, a paradox for such an option because of him being Jewish. The association is founded in 1927 to Mircea Eliade's signal, who, through ***Itinerariu spiritual (The Spiritual Itinerary)***, a series of 12 feuilletons in the ***Cuvantul*** (***Word***) magazine, set up, in a way, the spiritual and action program of this generation.

Eliade pleads for a rediscovery on a mental and ethical level, *a spiritual revolution* understood as a historic mission of changing *Romania's soul*, subordinating all the ethnic perception values of the supreme imperative. The primacy of the spiritual inevitably leads to revelation, mystical feeling and to a new religious approach of the existence, with deep roots in the ascetic Christianity, able of shirking the human being of selfishness or intellectual impulses; hence, the extensively circulated concept of *new man*, a man who eminently knows and accepts the dimension of suffering, of the permanent battle with himself and of the voluntary sacrifice. All these behaviors are, in fact, the corollary of a solemn acceptance of the tragic. "*The renunciation of earthly pleasures* – says Mircea Eliade in an article from ***Vremea***[1] (***The Time***) – *is not an imputation of the human being, a sterilization of the substance – but rather a frantic growth of the spiritual being, a victory of the real against the evanescent, the illusive, against the desperate human joys.*" The spiritual values offer a new meaning to life and to inner freedom: *"When the new man's center of gravity falls on salvation and on spiritual perfection – the man becomes free. Free to contemplate and to judge a work of art or a technique, to research a philosophy, to cherish an artwork – without feeling his being completely engaged in this activity."*

This soteriological vision of *the new man* reflects upon the social, in terms of a nationalist revolution which can restore moral order and replace the structures of a worn-out political life with new frames of civil life, constituted under the Christian sign of mystical feeling. The excessive politization of the western intellectual class can be counteracted, in Eliade's mentality, only through predominance of the spiritual and of the Christian values, since "Romania's mission is to make history and not politics. And to make history is to create a new man with a new sense of existence." Starting from this *new man*, free and accomplished spiritually, a new Romania can be created, a "*rebirth of the People, hoped by the wonder of Christianity and by the most sincere living in the Christian spirit*", capable to change the Romanian history and to enforce a new "*nationalist mysticism in Europe*[2]." If – Eliade concludes – "*narcissism is based on the People and fascism on the State – then the Legionnaire Movement has the right to reclaim itself as the only Christian mystique able to lead human settlements. A movement, upon which such an oath sits, is, above all, a Christian revolution, a spiritual, ascetic and male revolution, that has never yet been known in Europe.*" Basically, in these very radical texts, it is about marking a national destiny, a historic destiny through

[1] Mircea Eliade, *"Texte Legionare" si despre "Romanism"("Legionnaire Texts" and about "Romanism),* Ed. Dacia, Cluj-Napoca, 2001,pg. 76

[2] Idem, pg. 46

"*super historical values*", spiritually Orthodox, and the right-wing movement is raised to the rank of national revolution, exactly though its ascetic mystical value.

The psycho-temperamental spheres that urged young writers to embrace the doctrine of the right-wing were, thus, the aspirations towards moral purification and towards removal of dishonest politicking, as well as leaning towards spirituality and towards revival of the Romanian religious pattern. The young used to cherish missionary, political and cultural ideals, capable of building up the country and of directing it towards a major national destiny. This idealistic background is also nourished by the emotion of living the incorporated destiny of belonging to a small country, which only on rare occasions proved to be makers of history. The idea is strongly emphasized by Emil Cioran in ***Schimbarea la fata a Romaniei (Romania's Transfiguration)***[3]: "*The obsession with the West was our grate happiness (...) the western forms and not the oriental backgrounds were our salvation.*"

This generation's conversion to the right-wing ideology was however achieved gradually, in a slow process; starting in 1933 when Nae Ionescu, the Generation's mentor joined the Iron Guard, drawn by the national revolution militants and he confessed his complete trust in the Legionnaire Movement's ideals.

Indeed, the charismatic philosopher Nae Ionescu, called the Professor during that era, was considered a major influence during that time's intellectuality, and the fascination that wielded upon his students often exceeded the ideational debates of the classes or of the positions taken in the newspaper's pages. He becomes *the mentor* or *"the principal of consciousness"* for some first class well-known intellectuals like Mircea Eliade, Mircea Vulcanescu, Mihail Sebastian, Emil Cioran, Constantin Noica, inspiring them with a philosophical and political vision that implicitly contained the seeds of the right-wing ideology: contempt for the parliamentary political life, moral of action, passionate nationalism and intense metaphysical feeling.

Among the unconditional followers of Nae Ionescu, in a completely particular ideological context, is Mihail Sebastian, one of the intellectual peaks of his generation. "The Sebastian Case", unique in fact in this socio-political context, has numerous controversial sides. His right-wing political attitude, considered a paradox for a Jewish inter-war intellectual, caused discrepancies in the era, amplified by the issuing of the novel ***For Two Thousand Years*** and by the scandal caused by Nae Ionescu's foreword. The polemical disputes continue nowadays through the reactions to the recent study by Marta Petreu, ***Diavolul si ucenicul sau: Nae Ionescu-Mihail Sebastian (The Devil and his Helper: Nae Ionescu-Mihail Sebastian),*** issued by Polirom in 2010.

Recent studies about Mihail Sebastian, the era's notorious writer and publicist, unequivocally highlights the massive direct influence of Nae Ionescu on the ideological concept of the young follower.

Moreover, the attitudinal and ideological route of Mihail Sebastian transpires in his articles written in different newspapers and magazines of that era (as an editor of the newspaper ***Cuvantul*** (***The Word)***, owned by Nae Ionescu, or in ***Rampa*** (***The Ramp)***, for example), for a period of approximately 7 years, and during this period, being under the philosopher's hypnotic influence, Mihail Sebastian becomes a devout commentator and political analyst in the line of the right-wing ideology concepts.

[3] Emil Cioran, *Schimbarea la fata a Romaniei (Romania's Transfiguration),* Ed. Humanitas, 1990

Sebastian's political opinions are, however, to a certain level, in the fervid spirit of the young intellectual generation of the 30s. Drawn by the idea of "the legionnaire revolution", especially after the accession of Nae Ionescu in 1933 to the Iron Guard, their implication would reach its climax in 1937-1938, a period during which some of the Criterionists got arrested. In the first years of the fourth decade, when the novel ***De doua mii de ani (For Two Thousand Years)*** was issued, his talent as a writer, his sharp intelligence and great stores of knowledge perfectly integrated Sebastian in the intellectual and spiritual emulation of his generation.

Sebastian's sinuous path stays undeniably under the destiny meeting with Nae Ionescu. The writer himself confesses in ***Cum am devenit huligan (How I Became a Hooligan)***[4] that his first contact with his spiritual mentor took place during his final high-school exam, when he is appreciatively noted by the famous Professor. A year later, in August 1927, Sebastian hands in a feuilleton to be published in ***Cuvantul (The Word)***. Intimidated by the philosopher's legendary aura, by his force and intangibility, he doesn't have great expectations: "*For a moment I was tempted to send it to Nae Ionescu. But the man was intimidating. The thought of him reading them made my pages childish, without interest, all of a sudden. I remembered his stare and I was afraid.*" In spite of his apprehension, Nae Ionescu is delighted and accepts him without restraint and, apparently, without the surprise of discovering in Mihail Sebastian his former student, Iosef Hechter.

Thus, Sebastian becomes a collaborator al ***Cuvantul*** (***The Word)***, where he stays until the last moment of the newspaper's existence (1st of January 1934 when the newspaper is dissolved), and earning, in a very short period, the place of first page journalist. ***Cuvantul (The Word)*** was becoming his new family and was opening the way towards a friendship with Mircea Eliade and other colleagues of his generation, but above all it was highlighting his creative potential and assuring a first rank place among that moment's intellectual elite.

The meeting with Nae Ionescu is seen by Sebastian as absolute luck, even miracle, since, as he confesses with impressive admiration for the mentioned well-known figure in ***Cum am devenit hooligan (How I became a Hooligan)***: "*I weep for the young who haven't met, in due time in their lives, such a man who they can believe in, a man capable to make them passionate until he changes their lives. It is a chance that is worth paying for with all enthusiasm, as excessive, rash or ridiculous they may seem in a stranger's eyes*[5]."

Even Leon Volovici[6], in his work ***Ideologia nationalista si problema evreiasca (Nationalist Ideology and the Jewish Matter)***, mentions, in his turn, the fundamental influence Nae Ionescu had on the 30s Generation: "*Mircea Eliade considered him to be my teacher and my generation's teacher, and in a foreword of the volume* ***Rosa Vanturilor (The Winds' Rose)*** *(1937) where he selectively gathered the master's publishing, Eliade discovers in this <<great teacher of his people>> the source of his main ideas, that left a mark among the young intellectuals of 1922: everything that that period's young generation debated - <<experience>>, <<adventure>>, <<Orthodoxy>>, <<authenticity>>, <<feeling>> - finds its roots in Nae Ionescu's ideas."*

For seven years, Sebastian followed relentlessly the imposed direction and he structurally assumed the influence of his principal of conscience. Through his comments and his topical political

[4] Mihail Sebastian – *Cum am devenit huligan (How I Became a Hooligan),* ed. Humanitas, Bucureşti, 1990, pg. 268.

[5] Mihail Sebastian, *Cum am devenit huligan (How I became a Hooligan)*, ...pg.80

[6] Leon Volovici, *Ideologia nationalista si problema evreiasca (Nationalist Ideology and the Jewish Matter),* ed. Humanitas, pg. 92

and cultural articles, he imposed himself in the literary world of Bucharest as one of the most intelligent and powerful writers of the era. The taste for polemic sometimes reveals his choleric temper and his uncompromising attitude. The vehement attacks, carried out from strict doctrinal positions, for instance the ideological polemics of E. Lovinescu and G. Ibraileanu, are conclusive examples. Serban Cioculescu observes in an article in ***Revista Fundatiilor Regale (Royal Foundations Review)*** the sharp intelligence distinctive of Sebastian's writing: "*HE shows, in a seductive contrast, one of the most lucid intelligence of the moment*[7]."

In ***Cuvantul (The Word's)*** editorial, the young critic enjoys complete freedom, being able to freely choose cultural and political topics and to firmly express his beliefs.

The existence in the Romanian reality of two different philosophical-political orientations that Basil Munteanu calls *liberalism and rationalism*, respectively *constructive nationalism*, constitutes as a favorable field to debate violent and aggressive ideas, in which Sebastian enthusiastically engages himself, in the ideological spirit of the right-wing nationalism. He heavily attacks the era's political realities, the education system, he condemns liberalism, "*the gallery of our political officials*" or "*the traditional imbecility of the Romanian politician*[8]."

Even after his return from his studies in France, in 1931 – a period in which ***Cuvantul (The Word)*** becomes "the King's newspaper" and Nae Ionescu, now the king's political advisor, emphasizes his theory of monarchical absolutism, promoting the absolute ruler's figure, the Mussolini type – Sebastian stands in the same frames of ideological thinking, following the imperatives of the right-wing, which brings him even more conflicts with opponents of ideas, for instance Petre Pandrea, a mind with left-wing beliefs or with the former liberal minister – future head of government – I.G. Duca, considered "*our immortal muse and favored humorist*[9]." In the well-known line, his own and his mentor's, Sebastian condemns and mocks the era's parliamentary democracy and the almighty Romanian politicking: "*I have never believed in the democracy of out parties*", since they are only "*political fractions, without ideas of their own, inefficient and old*", and the perpetual moving from one party to another causes "*political craziness".* Another deficit of the Romanian democracy is also the poor state of education that generates an overproduction of bachelors. Sebastian advocates in this respect for a controlled limitation of the number of students, but without conditioning this matter to an ethnic criteria (as other right-wing minds did, which pleaded for *numerus clausurus*): "*Nobody can dispute the necessity of blocking the way to the university (...) There are too many Baccalaureates, there are too many students, there is an extreme number of free professionals. The danger was understood tardily, since five-six years ago we used to live in a cultural immorality*[10]."

The solution comes as an intuition to Sebastian too, as well as to Eliade, finding it in a "*new morality, sincere, young, freed of obsessions, freed of dark cautions, courageous and vital, so that, from this great vortex we have been living in for a decade, one day (...) human kind will find itself in*

[7] Serban Cioculescu – "Aspecte epice contemporane" (Contemporary epic aspects) in Revista Fundatiilor Regale (The Royal Foundations Review), year I, no.10, Oct.1934, p.159

[8] Mihail Sebastian, Cuvantul (The Word), according to Petreu, pg. 62

[9] Mihail Sebastian, "Templul national-liberal" (The national-liberal Temple) in Cuvantul (The Word), year VIII, no.2510, 16th of April, 1932., according to Petreu, pg. 62

[10] Mihail Sebastian – Selectia fiscala in scoala (Fiscal Selection in Schools), in Cuvantul (The Word), 13th Oct. 1932, acc. Petreu, pg. 67

a new creative era[11].” The author of ***De doua mii de ani*** (***For Two Thousand Years)*** is aware of the necessity of a spiritual and social revolution, of “*a spiritual rummage started from within, a fertile and sudden break out, an inner awakening to faith and beyond facts*[12].”

The Mussolini model and the relative victories of the Italian fascism are likely to excite the young journalist, who expresses, without limitation, his adherence to the realities and the system of Italian politics: “*What I admire about the young history of Italy is the sudden screening classification it went through. The fascist revolution passed through lines and borders, has differentiated and set distinctive life relationships for distinctive people. Obviously, such a collective and healthy order is not without risks and injustice. But when the people's life resources themselves are at risk, these risks and injustices are negligible*[13].” It must be, however, indicated that until 1938 fascism didn't have an anti-Semitic nature, unlike the German national-socialist ideology, against which Sebastian shows from the very beginning skepticism and uses a mocking tone, slightly playful. The emergence of the new ideology is ridiculed, but without anticipating the true severity of the situation and the imminence of the danger. For the moment, not having an adherence to the phenomenon and even deeply disliking the new German reality, Sebastian places Nazism amongst “*the fatal and inconstant phenomena*” On the other hand, Nae Ionescu sees this phenomenon as a revolution that will give birth to a new world. Starting with 1933, when Nae Ionescu completely changes his position to a unconditional pro-Nazi attitude, because “*we are not Jews as far as I know*”, any ironic remark about the phenomenon stops in the editorial office of ***Cuvantul (The Word).***

In time, Sebastian also put a visible distance between him and the primacy of the religious element in structuring the ethnic background, character that, in Nae Ionescu's vision, constituted the defining element of a nation's distinctiveness, and that could be seen, in the same time, as a main obstacle to the controversial issues of ***assimilation***: “*Our Orthodoxism (...)* – declares Nae Ionescu in an article in 1920 – *corresponds to a organic necessity of our national soul*”, therefore “*we must keep it in its primary and authentic form*”[14]. The Orthodox mysticism was fervently propagated; on the other hand it becomes a precondition for the Romanian ethnicity, interweaving the two existential spheres (religion and ethnicity) in an autonomous body that defines a Romanian's status and takes into consideration his specificity. Ionescu virtually cancels Titu Maiorescu's vision, according to which “*religion the nationality's accessory note*[15]”.

If Orthodoxism becomes a mandatory condition to “be a Romanian”, it goes without saying that the mentor of ***Cuvantul (The Word)*** fought against assimilation and excluded from affiliation any person who had a different ethnicity or religion that wasn't Orthodox. And assimilation is not possible, writes Nae Ionescu, because every culture has a “core”, an “*essential element and generating character*” that “*cannot be transmitted*” and “*cannot be transformed*” and, thus, “*cannot be assimilated*”[16].

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[11] Mihail Sebastian, “Un Kronprinz cu idei” (A Kronprinz with Ideas), in Cuvantul (The Word), year VIII, no.2504, 10 Apr.1932, acc. Petreu, pg.66

[12] Mihail Sebastian, Revolutie (Revolution), in Cuvantul (The Word), 30 Oct. 1929, acc. Petreu, pg. 102

[13] Mihail Sebastian, Povestea vorbii (The Word's Story), nota Fascisme (note Fascisms), year VII, 27 Oct.1929, pg.3, acc. Petreu, pg. 36

[14] Nae Ionenscu – *Reforma bisericească. Problema autonomiei* (Church Reform. The Matter of Autonomy), 7-15 Febr.1920,

[15] Titu Maiorescu – *Discursuri parlamentare (*Parliamentary Speeches), II, p.170

[16] Marta Petreu…, pg 18

In her recent book, ***Diavolul si ucenicul sau: Nae Ionescu-Mihail Sebastian (The Devil and His Helper: Nae Ionescu – Mihail Sebastian)***, Marta Petreu[17] places Sebastian within the borders of a ***moderate*** extremism, because of his opinions, brought up in his principal of conscience's general conception, expressing a cruel criticism towards democratic life and revealing extreme revolutionary impulses in the line of the right-wing ideology: "*The reading of his articles, within the pages of* ***Cuvantul* (The Word)***, and always correlating the follower's text with his magistrate's text, and both with Romania's political chronology, shows without any doubt that Sebastian, deeply influenced by Nae Ionescu's personality and ideology, became an anti-democrat and revolutionary, falling into the right wing. And since extremism itself has different levels and intensities, Sebastian was a moderate right-wing extremist – the phrase sounds abnormal, but it reflects the reality of his articles – not an enraged one. Often his ideas are a tone lower than the ones of Nae Ionescu or, in the future, the ones of the colleagues of his generation, like Eliade, Cioran, Noica, and others. Sebastian was protocrone, living the experience of extremism earlier than other colleagues of his.*"

The scandal sparked by the issuing of the novel ***De doua mii de ani (For Two Thousand Years)***, in 1934, represents, for the writer, the fatal tear and the dissipation of all his illusions. In 1931, returning from Paris, Mihail Sebastian informs Nae Ionescu about the writing of a book with Jewish topic and, knowing his attitude and conceptions about the Jewish people, supported in mess media or different conferences, he asks him with all his confidence to write a foreword for his future volume. Still, in 1934, Ionescu's attitude towards the Jewish matter had suffered radical changes. Disgraced and locked up in Sinaia, after the assassination of I.G. Duca, Nae Ionescu confesses to himself, uncompromisingly and unequivocally, his anti-Semitic options and, in consequence, writes a foreword that attacks Jewishness directly on the basis of a theological argumentation, according to which Jews don't have access to salvation because they don't know Christ, and their ancestral suffering is immanent and indispensable: "*Judas suffers and struggles and it cannot be otherwise.*"

In his novel, Mihail Sebastian approaches the Jewish matter from ontological, sociological and cultural point of view and highlights, in a distinctive, refined, rhetorical and introspective way, the drama of Jewish suffering in inter-war Romania. The cynical reply that came from Nae Ionescu regards especially the author as exponential element of his ethnicity, and he addresses him on his real name and condemns him, almost demiurgically, to eternal suffering: "*Iosef Hechter struggles. But because Mihail Sebastian wants to solve a problem, in the sense that he wants to understand why he struggles and, if there is no other way, Iosef Hechter lives lucidly, that is duplicated, this drama of Judaism. (...) Iosef Hechter is not able to explain anything, instead, he observes. He observes that Judas suffers and struggles. And that it cannot be any other way. Only that this observation is useless. It's true that ever since there is world and ever since there are Jews – because, indeed, Jews exist ever since there is a world – these people suffer. (...) So, pretending, as Iosef Hechter does, that Judas will agonize until the end of world, I believe that I can prove that there cannot be any other way*[18]."

Even though he was warned that the context information had been changed and that, on the general basis of an era in which anti-Semitism was thriving, the foreword would be changed, Mihail

[17] Marta Petreu... , pg.128
[18] Mihail Sebastian, *De doua mii de ani (For Two Thousand Years...),* pg.18

Sebastian didn't give up. Mircea Eliade confesses in ***Memorii (Memoires)*** that "*He loved and admired Nae Ionescu too much to allow himself to be impressed by his current political orientation, however troubling and sad it would be*[19]." The foreword, which culminated in an escathological finish, represented, for Sebastian, "*the death sentence*", as he himself confesses to Mircea Eliade: "*He came one afternoon to see me, pale, almost disfigured. He gave me the foreword, he told me. It's a tragedy. It's a death sentence.*"

Sebastian's admiration and love for Nae Ionescu continued after the scandal. As proof we have the pages of the journal from the bleak period of 1939-1940, when Sebastian, worried about his master's and friend's fate Mircea Eliade, writes this in his journal: "*What could have happened to Nae? Rosetti asked and he was told that Nae was missing for two days. What does missing mean? Did he run away? Taken somewhere else and kept under guard? Was he shot? I phoned Mircea since I was worried about his fate. Nae answered the telephone and I talked with him about correcting one of his articles for the Magazine. But what I wanted to find out, I found out; he is alive*[20]."

The pages of the ***Jurnal (Journal)*** reveal, besides the love for his mentor, Sebastian's unique affection for his *first and last friend*, Mircea Eliade, friendship that, along with the right-wing's radicalization and with the magnitude of the Legionnaire Movement, would gradually dissolve: "*The long political discussion with Mircea, at his home. Impossible to resume. He was lyrical, mystic, and full of exclamations, interjections, apostrophes ... from all these I choose only his statement – real at last – that he loves the Guard, he has hope in it and he awaits its victory. (...) We are in full dissolution of our friendship. We don't see each other for days – and, when we do, we don't have anything to say to each other*[21]."

Conclusions

In spite of the political disagreements, that in time alienated the two friends, Eliade also keeps a warm and unconditional love for him. The mutual feelings and aspirations, the cultural values they believed in, the moments of authentic spiritual elevation, lived within the boiling climate of their generation, founded an intellectual and emotional relationship that was sometimes shaken by certain circumstances, but never destroyed. As proof stands the grieving attitude of the future historian of religions at the time of his friend's death: "*I have found out that Mihail Sebastian died yesterday. (...) Exactly during my legionnaire climax, I felt him close. I gained a lot from his friendship. I counted on this friendship, so that I can come back to the Romanian life and culture (...) I feel even more alone.*"

Mihail Sebastian's relationship with the Romanian right-wing represents a paradox and a case in point that proves the complexity of an era and a complicated intellectual and socio-cultural climax that cannot be reduced to terminological or categorical stereotyping.

[19] Mircea Eliade, *Memorii (Memoires)*, op. cit., p.286
[20] Mihail Sebastian, *Jurnal (Journal)*, ed. Humanitas, pg. 234
[21] idem, pg. 115-120

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HEIDEGGER ON THINKING, LOGIC AND CYBERNETICS

Sebastian BIG[1]

Abstract
The essence of technology is one of the most important topics in the thinking of Martin Heidegger. He asserts that technology is the ultimate embodiment of the metaphysics of subjectivity. Technology is the logical result of the movement that started with the Cartesian revolution; it is the sign of the triumph of modern subject, who proclaims his auto-sufficiency by the means of technology. There nothing more urgent for Heidegger (and "us, contemporaries", to use one of his expressions) than "thinking about technology"; this thinking makes possible the understanding of the "forgetting of being" produced by the modern age: "What makes us think in these times that make us think is that we're still not thinking".[2] The starting point of my essay is Martin Heidegger's assertion that cybernetics is the science that will replace philosophy. I will use Heidegger's technique of destruction of metaphysics applying it to Heidegger's thinking about technology.

Keywords*: Heidegger, thinking, logic, technology, cybernetics, information theory, destruction of metaphysics, historicity, language, sign systems.*

Der Spiegel: *And what takes the place of philosophy now?*
Heidegger*: Cybernetics.*[3]

Introduction. The essential tool of philosophy – thinking

The German philosopher answers the eradication of the thinking's inaccuracy by cybernetics by trying to reformulate the task of thinking. For Heidegger "the fundamental issue of human history"[4] is concentrated in this point, that of "thinking, whose range is universal".[5] From this point of view, thinking is that something that is not yet thought about by the era of the thinking machines; an era that is still metaphysical and based on a cliffhanger scenario, that states that everything can be programmed, commanded and planned.

The analysis of the cybernetic event reveals one more time the preeminence accorded almost exclusively to logics and mathematics, that, according to Heidegger, characterizes the Occident and constitutes the techno-logic condition of thinking. Cybernetics broke into Heidegger's thinking with

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[2] Martin Heidegger: *Was heisst Denken?***,** p. 148.

[3] Martin Heidegger – interview in Der Spiegel.

[4] Martin Heidegger: *Was heisst Denken?,* p. 156.

[5] Martin Heidegger: Der Satz vom Grund, in: Heidegger: *Der Satz vom Grund***,** p. 211.

such intenseness that Derrida comes to the conclusion that Heidegger "spoke about cybernetics all his life".[6]

The first course Heidegger held after his dismissal from the rectorate was named "What is called Thinking?" (Was heisst Denken? - 1951-1952) and was pretty clear about what had caused this questioning. Logistics (Heidegger draw off this concept from Louis Couturat and Gregorius Itelson, who used this term as another name for symbolical logic) started "in America and everywhere, to dominate the spirit, as the true philosophy of the future".[7] This has, says Heidegger, very recognizable causes in the history of philosophy: thinking was perceived from the beginning as *logos*, interpretation that has occulted the very thinking since then and that led to the current situation, in which "logistics [becomes] the universal organization form of every representation".[8] That means "we, contemporaries" "can learn thinking only if we radically unlearn her traditional essence".[9]

Logically impregnated thinking

Starting with his early writings, Heidegger approaches the issue of logics from the angle of his method of destruction of metaphysics. In a 1911 article, "Recent logical researches", he asks a question that he'll continue asking his entire life: "What is logic? We are facing a problem that only future will solve".[10] The question concerning logic grew out of the epistemic situation of the era. This was the fundamental question at the beginning of the XX-th century, dividing the spirits in two sides: those who assert the idea of an intuitive and concrete level of thinking and those who disagree, in tune with the recent developments of axiomatics and opt for the purely and simple computable character of thinking.

In "Being and Time", Heidegger differs from the traditional way of questioning principles, in an attempt to wake spirits to ontological and epistemic consciousness in an age of crisis, by adopting the existential analysis method. The reexamination of the judgment issue using the *dasein*'s hermeneutics, removing the primacy of the "pure intuition" in the favor of "thinking", as a fundamental tool for existential "understanding", stays well within the problematical frame of logic. The judgment analysis is of great importance in this context, occupying: a privileged place in the field of fundamental ontology, as a result of the fact that, at the decisive beginnings of Greek ontology, *logos* played the role of the sole guiding thread, leading to true existence and allowing us to determine the being of that existence.[11]

This very *logos* was to be replaced by logistics. The very base of knowledge is intensely changed by the sign systems and this leads to a dissolution of the judgment in a "system of coordinates", which takes the form of an "object to calculate" (or basis of computation in cybernetics), ceasing to be a theme for ontological interpretation. By transforming thinking into a

[6] Derrida made this remark in an interview with Dominique Janicaud, Cf. Dominique Janicaud: *Heidegger en France*, p. 122.

[7] Martin Heidegger: *Was heisst Denken?,* p. 10.

[8] *Ibid.*, p. 102.

[9] *Ibid.*, p. 5.

[10] Martin Heidegger: Neuere Forschungen über Logik, in: Heidegger: *Frühe Schriften, Gesamtausgabe, vol. 1*, p. 18.

[11] Martin Heidegger: *Sein und Zeit, Gesamtausgabe, vol. 2,* p.205.

calculus, logistics became the fundamental horizon of the forgetting of being. In the same movement, by developing a method for calculating the judgment, it forces us to the re-questioning of the meaning of "being". From the 3rd paragraph of "Being and Time", in the context of "exposing the question of the meaning of being", it is very clear that being owes it's unveiling to the epistemic kicks that rocked the foundations of logic and mathematics.

The importance of logics, the central place that it occupies in Heidegger's thought becomes more clear when we realize that Heidegger never stopped teaching logic courses, under various titles. We could call this ensemble the destruction of the metaphysics of formalization. Heidegger unveils the fundamental inclination of the occidental spirit, which lead, from the very start of the western civilization in the Greek antiquity to the mechanization of thinking and the progressive radicalization of it's techno-logical condition. Heidegger's thinking path starts from the integration of the foundations of western philosophy in his theoretical discourse and abuts against the destruction historically necessary of it's own field.

As early as 1927 Heidegger talks about "a critique of the traditional logic by unveiling its foundations".[12] The prejudice that "judgment is not attached to a concrete base, being self-sufficient"[13] - is one of the main objectives of the destruction of metaphysics. Thus, Heidegger undermines the autonomy of logic, preached by mathematicians and the founders of symbolic logic, undermining in the same movement that something that dwelt as transcendental signified of metaphysics and logic.

The being-thinking difference

The importance of the discussion about the logical prejudgment is the result of the realization of a difference that was to organize the history of being precisely as the history of the successive configurations of this difference: the difference between being and thinking. The radical modern thinking enables Heidegger to assert that if "being appears only after thinking" than "existence is such as it can always be defined by thinking".[14] Freeing logic of it's original Greek "link" with the being is the major task of modernity and its realization leads to the total disappearance of the being in pure formalisms.

In 1935 Heidegger moves on to a different thinking model of the destruction of metaphysics with the text "The Age of the World Picture": "the thinking of representation". This idea allows him to determinate the modern situation: "the normative sovereignty" of the difference between being and thinking is visible there were thinking opposes being, which is "pre-sented, as the ob-ject of thinking." Thinking becomes the foundation and the starting point "being itself acquires meaning from thinking".[15] This interpretation power constitutes a presupposition for elaborating logical calculus, not for the presentation or representation of the being but having as purpose generating being as an effect of the sign systems.

The modern configuration of the difference between thinking and being bears in itself, as a fundamental possibility, its own exceeding towards the un-presentable and the un-representable that

[12] Martin Heidegger: *Metaphysische Anfangsgründe der Logik im Ausgang von Leibniz***,** *Gesamtausgabe vol. 26***,** p. 27.
[13] *Ibid.* p. 127.
[14] *Ibid*., p. 59.
[15] Martin Heidegger: *Einführung in die Metaphysik,* p. 89.

tackle the sign systems, children of the same configuration. The age of the world picture finds in its representable character its definition and its limit. Heidegger's thinking is situated at the extreme margin of the conceptual horizon marked by modernity. The limits of traditional ontology (the disintegration of the object category and the apparition of the un-presentable and the un-representable) is re-interpreted and becomes the true place for the realization of truth and being.

The difference between being and thinking is posited as a possibility condition for what we are used to call logic. This difference had to be realized before the apparition of logic as an apparatus that interprets thinking as something that has the power to design being. We had to wait for the advent of the logistical radicalization of cybernetics for Heidegger to get to a real questioning of this difference. Interpreting *logos* as judgment gave philosophy its logical orientation without her realizing this fact.

Logic and language

Starting with "What is called Thinking?" Heidegger grasped the problem of logic as an issue concerning the language. Anyone who wants "to rock logic from its beginning and foundations"[16] has to attack in the first place the primacy of judgment and not only by the means of fundamental ontology but mainly by refusing the common idea (sheltered by this very primacy) that language is presentation and representation, expression and communication. The destruction of the idea of judgment allows the discarding of any transcendental signified of the formalization attempts. Questioning the language issues contributes to the answer to the question concerning logic.

The challenge of Heidegger's destruction of metaphysics is to unveil in the hidden being of language (conceived as a "simple attribution of signs") the possibility of its "technicisation by the means of the theory of information"[17] and of the theory of information itself and of its mechanization. At first glance, "redefining language as simple information" it's a mere indication of the "specificity of the modern technology".[18] But "the place and the possibility of the remake of language as technological language, as information" is coming from "the being of language" itself.

The being of language is expressed by Heidegger by the expression "word as pointing-out" ("monstration", *Zeigen*); it can be "presented and realized in a manner in which to point-out means 'to give sign'". Redefining language as a binary sequence of signs, as "logical calculus formulas" is inscribed as possibility in the very being of language. The history of language can be decoded as the long history of its de-formation in sign calculus – deformation inscribed in the very being of language. Once connected to the "flux of electricity and electrical impulses" this evolution heads straight to the huge computers of that age:

The construction and efficacy of the calculating machines is based on the techno-calculatory principles of this transformation of language as Saying into language as simple production of signs.

The question "What is called Thinking" came to its realization by means of an historical clarification (result of a certain thinking model applied to the history of philosophy) of the process of formalization, the same process that lead to the birth of cybernetics. The clarifying encounter of these

[16] Martin Heidegger: Logik als die Frage nach dem Wesen der Sprache**,** *Gesamtausgabe* vol. 38, p. 8.
[17] Martin Heidegger: Zeichen, in: Heidegger: *Aus der Erfahrung des Denkens,* p. 211.
[18] Martin Heidegger: *Überlieferte Sprache und technische Sprache,* pp. 22.

two theories was unavoidable. It testifies about an era on the threshold on an epistemic cut marked by the advent of a new universal science (cybernetics) and by a new philosophical approach (the destruction of metaphysics).

Philosophy and cybernetics

Not coincidentally Heidegger writes to Hannah Arendt in 1951: "I've came close to things worthy of thinking".[19] It's a time when "the completion of modern times just started"[20], a process during which occidental logic is changing into logistics and realizes its "irresistible development" on the road to "the electronic brain".[21] The advent of the problem of thinking constitutes the major event of this transition period, being the "historical question" of our times.[22]

The continuous dissemination of the information theory constitutes the most visible symptom of the fact that the issues of being and thinking are more and more present and that they constitute the most important issue of the future. This said, anyone who tries thinking without starting from the origin, without performing the work of destruction of metaphysics, the analysis of the origin of the calculating machines and of the cybernetic modeling of reality, cannot think the modification of thinking that take place.

For the contemporary thinking, logic became more logic, taking the derivate name of logistic. Under this name, logic is deploying its last form of domination, which is now universal, planetary. This domination form takes the shape of a machine in the era of technology. It's obvious that the calculating machines used in economy, industry, research and state aren't just tools used for fast calculus. The calculating machine is the result of a modification of thinking, that makes thinking a mere calculus, demanding thus its translation in the language of the machine. That's why we missed out the transformations of thinking and we don't perceive the fact that thinking was bound to become logistic, taking into consideration its origin as logic.[23]

In a conference held in 1966, a year after the famous quote stating that cybernetics is going to replace philosophy, Heidegger says: "at the end of philosophy, that is the last chance for the world to think what is its proper".[24] He was talking about cybernetics as a "new alliance" between the contemporary sciences and the sciences of the past, that would replace the disintegrating philosophy. Philosophy's "common trait" from the Greek philosophy was that of creating the horizon in which new sciences could claim their self-sufficiency; we are now witnesses to a evolution, that of sciences liberating themselves from philosophy

From the moment when categories abdicate in favor of "operating models" and the era of modeling and simulation is born, philosophy reaches the limits of what can be thought, when using the tools offered until now by thinking. After Heidegger, we don't think only what there is, only presences, we also think their historicity and their technological determinations, their techno-logical field, being by that the creatures of the history of cybernetics.

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[19] (18) Hannah Arendt / Martin Heidegger:*Briefe 1925-1975 und andere Zeugnisse,* p. 132.
[20] Heidegger: *Was heisst denken?,* p. 161.
[21] *Ibid*., p. 145.
[22] *Ibid*., p. 103.
[23] Martin Heidegger: «Grundsätze des Denkens», *Gesamtausgabe* vol. 79, p. 161.
[24] Martin Heidegger: Zur Frage nach der Bestimmung der Sache des Denkens (1965), in: Heidegger: *Reden und andere Zeugnisse eines Lebensweges (1910-1976),* p. 621.

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COMPUTER PROCESSING RETROALVEOLAR, ISOMETRIC AND ORTHORADIAL X-RAYS

Eugenia Diana RADULESCU*

Abstract

Current nursing is facing up-to-date paraclinical investigating means that aim at establishing a therapeutic conduct as correct, fast and efficient as possible. Most of the times, medical diagnosis is based on images taken in order to view the inner human body.The most widespread devices to obtain X-rays, even if up to present there have appeared some others: endoscopy, ecography, scientigraphy, thermography, tomography, magnetic resonance imaging (MRI) and nuclean magnetic resonance (NMR). Reconstruction of image projections, either based on röntgen rays, gamma radiations, ultrasounds or magnetic resonance imaging (MRI) and nuclean magnetic resonance (NMR), has proved to be one of the most outstanding applications in image processing in medicine and was possible due to computer. Computed Tomography (CT) supposes obtaining human body images on sections, in either direction, without interfereing with the patient's condition and, in case of röntgen rays, using small doses of iradiation. Furthermore, it is possible to obtain tridimensional images of the organ or interest area having the option of calculating the volume and accurately establishing the adjacency relationships so that, subsequently, to institute the appropiate treatment. The obtained images can be interpreted as such or can be processed in different systems among which computer processing offers wide possibilities, some of which still unexplored, in order to complete and establish as precisely as possible the normal and pathological aimed conditions. In the present paper, radiological images have been processed with the help of the computer, the most used in dentistry practice being the endo-oral and isometric retro-alveolar and orthoradial x-rays which emphasise periodontal tissues in order to establish, as much as possible, a precise diagnosis with direct implications on subsequent therapeutic behaviour.This paper does not require complex and expensive devises such as CT and it is simpler and less invasive. Using functional computer parameters has made possible, after "reading" radiological images, to distinguish the interest areas, to process them, pseudo-coloration and their change into Current nursing is facing up-to-date paraclinical investigating means that aim at establishing a therapeutic conduct as correct, fast and efficient as possible. Most of the times, medical diagnosis is based on images taken in order to view the inner human body. The most widespread devices to obtain X-rays, even if up to present there have appeared some others: endoscopy, ecography, scientigraphy, thermography, tomography, magnetic resonance imaging (MRI) and nuclean magnetic resonance (NMR). Reconstruction of image projections, either based on röntgen rays, gamma radiations, ultrasounds or magnetic resonance imaging (MRI) and nuclean magnetic resonance (NMR), has proved to be one of the most outstanding applications in image processing in medicine and was possible due to computer. Computed Tomography (CT) supposes obtaining human body images on sections, in either direction, without interfereing with the patient's condition and, in case of röntgen rays, using small doses of iradiation. Furthermore, it is possible to obtain tridimensional images of the organ or interest area having the option of calculating the volume and accurately establishing the adjacency relationships so that, subsequently, to institute the appropiate treatment. The obtained images can be interpreted as such or can be processed in different systems among which computer processing offers wide possibilities,

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some of which still unexplored, in order to complete and establish as precisely as possible the normal and pathological aimed conditions.

***Keywords**: Computed Tomography (CT), magnetic resonance imaging (MRI), isometric retro-alveolar and orthoradial x-rays*

1. Introduction

In the present paper, radiological images have been processed with the help of the computer, the most used in dentistry practice being the endo-oral and isometric retro-alveolar and orthoradial x-rays which emphasise periodontal tissues in order to establish, as much as possible, a precise diagnosis with direct implications on subsequent therapeutic behaviour.

This paper does not require complex and expensive devises such as CT and it is simpler and less invasive. Using functional computer parameters has made possible, after "reading" radiological images, to distinguish the interest areas, to process them, pseudo-coloration and their change into histograms (sections through the images at the interest level) having as final purpose establishing physiopathological state of the periodontal tissues on the x-rays.

2. Paper content

Image processing:

Image processing-in our case refers to recognition, reading and analysing radiological images obtained by röntgen rays scanners. Image processing has sub-domains such as:

- intensifying image contrast;
- shapes detection and recognition
- their analysis

With the help of these sub-domains improved images can be achieved by

- excluding non-information details;
- detecting and clarifying standard shapes;
- tridimensional pattern recognition based on more images obtained bidimensionally

Image classification:

In order to understand and define the changes operated in images numeric processing one needs a classification of images according to their complexity:

- black and white images; we can view trhe number of shades and semitones between black and white resembling photography and we say that the image has a better contrast than another if in the former we have fewer shades, if changing from one shade to another is made clearly, that is, if elements of the image detach obviously from its background. If an image has only two shades, it shall be called binary image (black and white)

Image codification:

Introducing the image in the computer supposes numeric image codification into two phases:

- one regarding the image surface
- another one regarding the level of luminosity and the colour of the image to be processed

The surface of the image is covered in a network and the colour or luminosity are taken into consideration into each loop (varying from white to grey and different shades of black) and they can be quantified.

By processing self-coloured radiological image, the physician can operate on it a sequence of changes, intensifications, filtrations in order to better emphasise the interest areas.

Hued self-coloured image can be changed into a colour one by replacing the luminosity level in pseudocolouring, by combining red, green, blue in order to observe in a better manner certain details or structures within the image.

The image can be segmented by cancelling the rest of insignificant details and quantitative determinations can be made (area, diameters, reports).

Radiological images processing has been performed through "radiography reading by a laser helium-neon beam".

On both black and white and colour images by programming histograms have been drawn in order to gain further data regarding periodontal structures.

Casuistry

No. 1 Radiography in isometric retroalveolar-intrabucal incidence of teeth 14,15 and 16.

Radiologically: - it is observed the crown in 16 (slightly enlarged comparing to the tooth 15-occluso distal amalgam obturation; in 14 distal amalgam obturation-both obturation are excessive; a demineralisation of the alveolar limbus between 15-16 and more marked at the level of the alveolar limbus between 15-14.

Fig. 1

Because the radiography does not offer enough data regarding the demineralisation process of the alveolar limbi, the image has been processed on computer getting through successive phases.

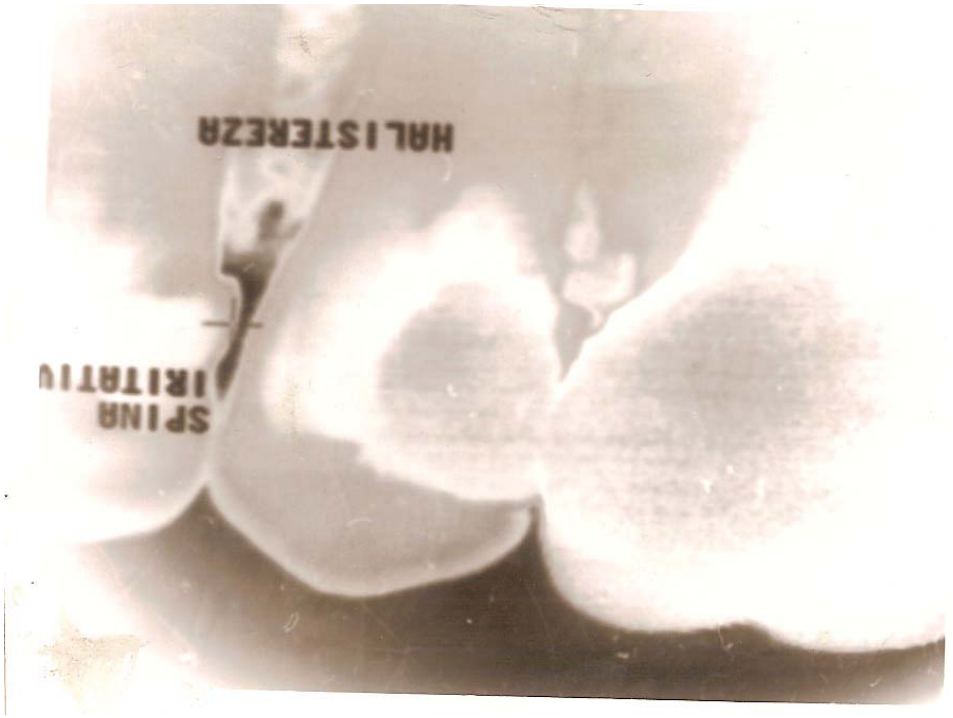

Fig. 2

The halisteresis area between 14 and 15 is better observed in Fig. 2 due to contrast processing.

Along the central alveolar area which appears interrupted, with a "string of beads" aspect.

In order to obtain certain details regarding the demineralisation process at the alveolar limbus level, the computer was imposed the task of obtaining the image coloration through successive phases (by histograms execution).

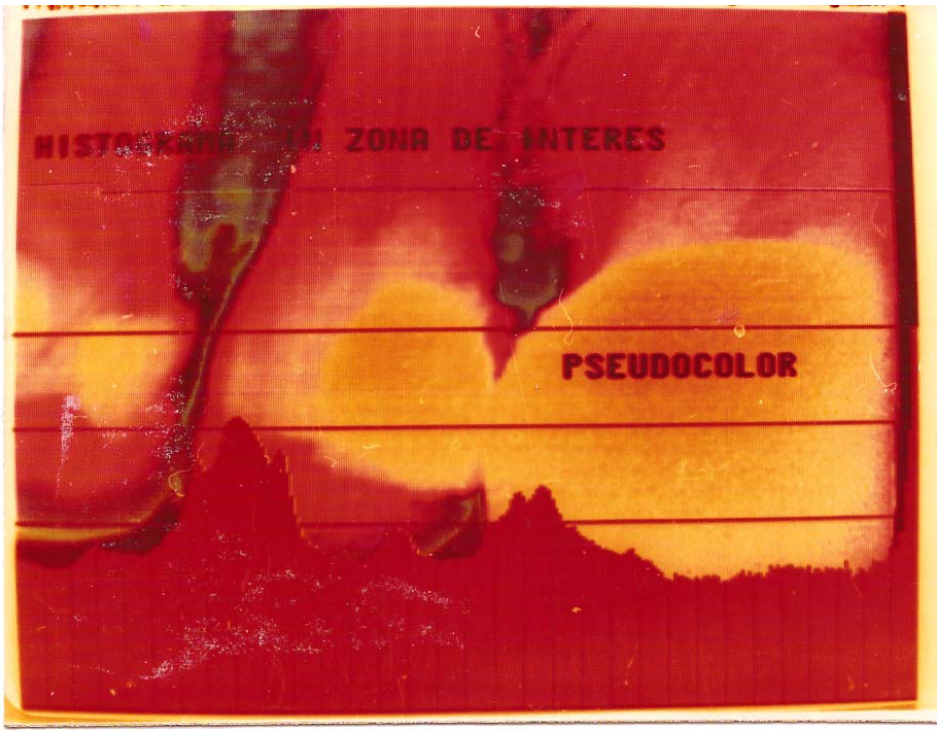

Fig. 3

In the histogram, from left to right, a first area in flat is observed to reflect the tooth structure; after that a double ancosa reflecting the demineralisation area, respectively the difference in colour intensity between the tooth structure and the alveolar bone between 14 and 15. It follows the flat image of tooth 15 with a slight increase of the histogram in the middle area of the tray, representing the root canal of 15, the histogram shows a less intense demineralisation area between 15 and16, characterised by a less emphasised but wider curve representing a deflection in the upper area showing a more intense demineralisation to the mesial root of 16. We consider that the histogram, at this level, offers additional details compared to a radiography, emphasising a more severe demineralisation of the alveolar limbus between 14 and 15 compared with the one between 15 and 16 where the demineralisation process is stronger towards the mesial root of the molar.

Case 2

Retroalveolar radiography- isometric-intraoral- orthoradial of 45, 46, 47 (Fig 7)

Fig. 4

MOD obturation better adjusted in the distal area than in the mesial area; amalgam obturation in 47; dystrophic bone lysis of the alveolar limbi between 47-45; 46-47. we were interested in relationships of amalgam obturations with interdental space due to the accepted idea that a badly-adjusted obturation constitutes the irritative spine leading to demineralisation of the alveolar limbi.

Demineralisation is observed on the radiography, radiological expression of periodontal affliction more increased mesially where the obturation is excessive and unadjusted to the crown and the distal obturated area is better adjusted. Due to the fact that, on the radiography, we doubted about the distal root, we programmed the computer to show black and white details (Fig. 5) and then colour details of the area concerned (Fig. 9).

Fig. 5

In the detailed images, both in the black and white and in the colour image we observe distal root demineralisation (aspect of cervix decay) but as far as alveolar limbi are concerned, both mesially and distally, we observe the demineralisation process in tray in the mesial area with a funnel shape at the distal root of tooth 46.

Fig. 6

At the maximum horizontal atrohpy level of the alveolar bone, we asked the computer to perform a black and white histogram (Fig. 10).

In this first histogram the tray aspect at the level of tough tooth tissues level is noticed (in our case roots of 45, 46 and 47) with characteristic aspect according to the type of osseous demineralisation. At the level of the alveolar limbus between 46 and 47, the aspect is of crenel ancosa reducing the height slightly towards the distal root of 46 which translates a lack of tough dental substance (cementum) whereas the aspect of the alveolar limbus between 46-45 is of tray showing the dystrophic type of atrophy at the level of the alveolar bone. On the colour image (Fig. 11), in the distal area of tooth 46, we can observe a cervix decay under the amalgam obturation, probably with pulp chamber opening and granulation tissue.

Fig. 7

The histogram performed at this level as well as on the black and white image preserves the same characteristics.

What is worth remembering is the fact that the mesial area of the six-year molar, where, due to excessive amalgam obturation, we expected to have a larger area of demineralisation, proportional with the irritative spine, we observe a tray demineralisation, wider, creneled, accounting for the transition area from the demineralised alveolar bone to the normally mineralised alveolar bone.

3. Conclusions

- Radiological examination, which in its turn revolutionalised medical sciences through accuracy opportunities in diagnosis, offers limited data because the human eye perceives less than 100 shades of grey, therefore interpreting radio transparency and radio opacity is limited due to our biological abilities;

- Computer image processing showed that it is possible to detect over 500 shades of grey which, obviously, increases 5 times the precision and acuteness of radiography interpretation;

- Changing black and white images into colour ones further increases the differentiation of areas with different radio transparency, offering new clues in fine diagnosis;

- Radiological computer analysis can promt us with useful information regarding the alveolar bone condition (demineraluisation through halisteresis, atrophy), information regarding the apical periodontium and its lesions in restricted and diffused form;
- It can offer data regarding root canal therapy, level of root canal obturation and relationship with apical delta, presence or absence of foreign bodies, radicular decays, radicular recession, presence or absence of aberrant canals, etc;
- Histogram execution represent a real gain because, by its interpretation, special data are obtained regarding the normal or pathological condition assessment of the periodontal tissues existing along the section;
- Using histogram can have a special value in appreciating the pathological processes evolution in time as well as in emphasising the effects of certain therapeutical means on affected areas.

CONTENTS

Contents **709**

Contents **711**