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THE TAX ON THE POLLUTION GENERATED BY MOTOR VEHICLES IN ROMANIA AND COMPATIBILITY WITH THE LAW OF THE EUROPEAN UNION

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Andreea DRĂGHICI [2]

Abstract:

The autonomy of the European Union member states in the fiscal field must observe the provisions of the article 110 TFUE, which provide the equality of treatment between the national goods and those from the others member states.

With the declared aim to protect the environment, the Romanian state has adopted a series of regulations declared, one by one, incompatibles with the European law because, in an indirect manner, they were protecting the national production of vehicles and creating discriminations between the vehicles imported from the others member states and those existing already on the national market.

Key words: *fiscal autonomy, equality of treatment, European law, environment, pollution.*

INTRODUCTION

The national sovereignty allows a high degree of autonomy in the field of taxation. Nonetheless, as a Member State of the European Union, Romania should observe, with regard to the fiscal measures imposed by

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it, the applicable European regulations, which try to eliminate the restrictions of the fundamental European freedoms.

The relevant provisions regarding the restrictions of the fiscal autonomy of the Member States is represented by Art.110 of TFEU (formerly Art. 90 of ECT) aiming at the elimination of discriminating and protectionist taxes. This article protects the unique European market, by prohibiting certain taxes and duties which could disadvantage the products imported from other Member States. The fundamental principle governing Art.110 of TFEU is the principle regarding the observance of the equality treatment applied to the goods manufactured at the national level and the goods manufactured in the other Member States of the European Union. In other words, a State cannot impose any taxes for a good from another Member State which are higher than the taxes applied to a similar domestic good.

1. THE SUCCESSION OF THE REGULATIONS CONCERNING TAX VEHICLES BEFORE THE ENVIRONMENTAL STAMP WAS ENTERING INTO FORCE

The environmental stamp for motor vehicles, regulated under EGO No. 9/2013 is part of a long series of regulations which succeeded each other in the fiscal field, having as their purpose the environmental protection, a current priority of mankind, and the prevention of the import of second-hand motor vehicles from the European Union, practically favoring the domestic production in an indirect manner.

Thus, the Romanian Fiscal Code (Art.214 -214) regulated, in 2007, the first registration tax under the name of "special tax for motor cars and motor vehicles"[1] representing one of the internal taxes which formed a source of the State budget[2], as a consequence of the fiscal

[1] The tax is known under this name for the fact that it was charged only upon the first registration of the motor vehicles in Romania.

[2] The European Court of Justice (ECJ) indicated that Arts. 23 and 25 of CE do not apply to the first registration tax, because it is not a customs duty.

policy of the Romanian state, a policy which constitutes one of the attributes of the national sovereignty.

At the time when this tax was initially regulated, according to the Fiscal Code, it was charged to all the motor vehicles registered in Romania for the first time, regardless of the State of provenience or of the age of the motor vehicle. The reason and motivation that determined the Romanian State to adopt such a regulation was to protect the environment. However, the European Commission warned Romania that it breaches the Community law and requested the amendment of the applicable national legislation. The endeavor of the Commission did not envisage the sanctioning of imposing a first registration tax for second-hand motor vehicles, but the differentiation of taxes between the motor vehicles imported from the Member States and the similar motor vehicles manufactured on the domestic market. Otherwise, the same opinion was also supported by the Luxembourg Court, which repeatedly stated in its jurisprudence that taxes similar in kind to those imposed by the Romanian Fiscal Code, whether or not they aim at environmental protection, are allowed as long as they do not create any discrimination between native and imported products.

In its jurisprudence, the European Court of Justice indicated that a first registration tax, which is imposed on second-hand motor vehicles imported from a Member State, should not exceed the quantum of the residual value of the first registration tax already incorporated in the value of the similar motor vehicles registered in the respective State[1]. Therefore, the first registration tax should decrease on a *pro rata* basis with its wear and tear, which is to be calculated by means of an individual expert appraisal or according to a fixed taxation grid complying with the factual situation. The Court also specified that such modality can guarantee the absolute neutrality of the tax, if it meets three requirements: to not create any discrimination between domestic goods and goods imported from Member States; the calculation system for

[1] Mihai Iulian Gâlcă and Laurenţiu Sorescu, „Consideraţii generale cu privire la compatibilitatea taxei de primă înmatriculare cu dreptul comunitar”, *Revista Română de Drept Comunitar* 3 (2008): 111-130.

depreciation should be accurate enough, so that a calculation as close to the factual situation as possible could be made; the person on which such tax is imposed should have at its disposal a way of appealing against the national courts in case s/he considers with reason that the tax calculation method does not comply with the factual situation.

With respect to these requirements of the ECJ, the compatibility of the tax imposed by the Romanian Fiscal Code with the provisions of Art. 90 of ECT can be analyzed.

Thus, according to the Romanian Fiscal Code, the first registration tax was calculated according to the age of the motor vehicle and the cylinder capacity, and it increased according to the calculation formula along with the age of the motor vehicle, which was in conflict with the jurisprudence of ECJ. With regard to the second requirement, namely the imposition of a fixed calculation grid for the depreciation that is sufficiently accurate, the Fiscal Code considered the age of the motor vehicle as a unique criterion, which was not breaching Art.90 of ECT; however, the establishment of a maximum value for the depreciation of the motor vehicle below the limit of 67% imposed by ECJ was in breach of Art.90 of the Treaty. There were differences also with respect to the time when the depreciation of a motor vehicle begins. Although the Court stated that it coincided with the time when the motor vehicle was set into circulation, the Romanian Fiscal Code established another time, namely that of its manufacturing, which fact determines in certain situations the impossibility of a correct evaluation of the motor vehicle, for the fact that it includes in its age also the period in which the motor vehicle is not used and is not subject to depreciation.

The third requirement of the ECJ refers to the possibility that the person on which the tax is imposed should have at its disposal a way of appealing against the national courts in case that s/he considers with reason that the tax calculation method does not comply with the factual situation. To objectively use such a way of appeal, the payer was supposed to know the criteria and the tax calculation method; however, the Romanian lawmaker did not provide such a way of appeal, nor did it

make public the factors that are taken into consideration for depreciation[1].

For the considerations mentioned above, the first registration tax regulated by the Romanian Fiscal Code for the creation of a discriminating situation between domestic and imported motor vehicles was in breach of both Art.90 of ECT, and of the Treaty of Accession of Bulgaria and Romania into the European Union[2] which indicated that, since the date of Romania's accession into EU, the original treaties are mandatory and apply under the conditions established under treaties and under the deed of accession. Consequently, the lawful nature of this tax could be contested by means of the action regulated by Arts.226-228 EC.

The Arad Tribunal was the first national court of law which, noticing that the first registration tax was in breach of both EC Treaty, and of the Treaty of Accession of Bulgaria and Romania into the European Union, decided that the tax should be refunded to the owner of the motor vehicle purchased from Austria[3]. Therefore, the Arad Tribunal reached the conclusion that such tax is unlawful, as it is discriminatory and breaches Art.90 of ECT. The Romanian State was liable for the caused prejudices, according to the provisions of the applicable national law.

The difference of applying the tax in a discriminatory manner to the motor vehicles brought in Romania from the European Community for the purpose of their registration on the territory of the Romanian State, even if they had already been registered in their country of origin, constituted a fiscal measure which was in breach of Art. 90 of the Treaty.

Subsequently, GEO No. 50/2008 instituted the pollution tax for motor vehicles, the obligation to pay this tax being born on the occasion of the first registration of a motor vehicle in Romania. This ordinance suffered numerous amendments, being repealed by Law No. 9/2012 regarding the tax for polluting emissions generated by motor vehicles, the

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[1] In this respect, Gâlcă and Sorescu, "Considerații generale...": 119.
[2] Ratified by Romania under Law No. 157/2005.
[3]Decision issued by the Arad Tribunal, the commercial section, fiscal and administrative dispute section No. 2563/7.11.2007.

payment obligation being born not just on the occasion of the first registration of a motor vehicle in Romania, but also, under certain conditions, on the occasion of the first recording in Romania of the ownership right over a second-hand motor vehicle. The application of this law is suspended by mean of the effect of GEO No. 1/2012, and, in 2013, it was repealed by the enforcement of GEO No. 9/2013 regarding the environmental stamp for motor vehicles.

The text of the GEO No. 50/2008 was considered by the European Union Court of Justice as incompatible with the European regulations both in its original version[1], as in its modified versions[2].

2. THE ENVIRONMENTAL STAMP

According to Art. 4 of GEO No. 9/2013, the obligation to pay the stamp occurs once, as follows:

a) on the occasion of entering into the records of the competent authority, according to the law, the obtainment of the ownership right over a motor vehicle by the first owner from Romania and the assignment of a registration certificate and of the registration number;

b) upon the reintroduction of a motor vehicle in the national car fleet, in case that, at the time when it was taken out from the national

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[1] Case C-402/09, Ioan Tatu vs Statul Român prin Ministerul Economiei şi Finanţelor, Direcţia Generală a Finanţelor Publice Sibiu, Administraţia Finanţelor Publice Sibiu, Administraţia Fondului pentru Mediu şi Ministerul Mediului, http://curia.europa.eu/juris/document/document.jsf?text=&docid=81056&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=3278.

[2] Case C-263/10, Iulian Nisipeanu vs Direcția Generala a Finanțelor Publice Gorj, Administrația Finanțelor Publice Târgu Cărbunești, Administrația Fondului pentru Mediu,http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d530cc4aa9a7dd4b24b39af734e347cc4f.e34KaxiLc3qMb40Rch0SaxyKaNn0?text=&docid=114741&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=3278, see also Costaş, Cosmin Flavius, *Drept fiscal* (București: Universul Juridic, 2016), 33-35.

fleet, the residual value of the stamp was refunded to the owner, in accordance with the provisions of Art. 7[1];

c) on the occasion of transcribing the ownership right over the used motor vehicle for which the special tax for motor cars and motor vehicles, the pollution tax for motor vehicles or the tax for polluting emissions generated by motor vehicles were not paid, according to the legal regulations in force at the time of registration;

d) on the occasion of transcribing the ownership right over the used motor vehicle in case of the motor vehicles for which the courts of law ordered the refund or the registration without the payment of the special tax for motor cars and motor vehicles, of the pollution tax for motor vehicles or of the tax for polluting emissions caused by motor vehicles.

Numerous applications for the refund of the pollution taxes were filed on the dockets of the courts from Romania, and such applications received favorable solutions. At the time when GEO No. 9/2013 was enforced, causes regarding the refund of the pollution tax were still on the dockets of the courts of law. Or, according to Art. 12, paragraph 1 of GEO No. 9/2013: *In case that the special tax for motor cars and motor vehicles, the pollution tax for motor vehicles or the tax for polluting emissions generated by motor vehicles, paid, is higher than the stamp resulting from the application of these provisions regarding the environmental stamp, calculated in lei at the foreign exchange rate applicable at the registration time or at the time when the ownership*

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[1](1) In case that the pollution tax for motor vehicles, the tax for polluting emissions generated by motor vehicles or the stamp provided by this ordinance were paid for a motor vehicle, for which the courts of law did not order the refund of such taxes, the motor vehicle shall be subsequently taken out from the national car fleet and the residual value of the stamp shall be refunded to the last owner.
(2) The residual value of the stamp represents the amount that would be paid for the respective motor vehicle if such motor vehicle were registered at the time when it is taken out from the national car fleet, calculated on the basis of the legislation according to which the quantum of the tax owed at the registration time was established, in lei, at the foreign exchange rate applicable at the registration time or at the time when the ownership right over a used motor vehicle is transcribed, using the age of the motor vehicle at the time when it is taken out from the national car fleet.

right over a used motor vehicle is transcribed, the amounts representing the difference of the paid amount may only be refunded to the titular of the payment obligation, based on the procedure established by the methodological norms for applying this emergency ordinance. The difference to be refunded shall be calculated on the basis of the calculation formula from this emergency ordinance, in which the elements taken into account at the registration time or at the time when the ownership right over a used motor vehicle is transcribed.

Thus, the following issue was raised: if such provision can be considered as breaching the provisions of Article 6 of the Treaty regarding the European Union, of Articles 17, 20 and 21 of the Charter of Fundamental Rights of the European Union, of Article 110 of TFEU, of the legal security principle and of the *non reformatio in peius* principle[1].

The criticism filed by litigants was that Art. 12 of GEO No. 9/2013 perpetuates the discrimination established by the pollution tax between the second-hand motor vehicles imported in Romania and the motor vehicles which were already present on the Romanian market and which were, in this capacity, exempt from the pollution tax.

In its turn, the European Commission considered that the regime instituted under GEO No. 9/2013 is in conflict with Article 110 of TFEU, because it applies retroactively to certain taxable events which occurred before its enforcement and, at the same time, it perpetuates a discriminatory practice. Member States may impose new taxes on motor vehicles for arguments pertaining to the environmental policy; however, it is necessary that such taxes should not be liable to discourage the import of the goods originating in other Member States in favor of the national goods. Therefore, Romanian authorities had the obligation to choose between two options in order to observe the previously stated principle, namely: either the cancellation of the pollution tax and the repayment of the amounts charged on such basis, or the maintenance of

[1] Case C – 331/13 Ilie Nicolae Nicula versus Administratia Finantelor Publice a Municipiului Sibiu, Administratia Fondului Pentru Mediu, a request for a preliminary decision filed by the Sibiu Tribunal http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A62013CJ0331.

the pollution tax, regardless of the name, and requesting it, without delay, also from the owners of second-hand motor vehicles which have already been registered in Romania.

The Court stated that the repayment provided by Art. 12 of GEO No. 9/2013 does not allow the actual exercise of litigants' right to the repayment of the pollution tax, which was charged in breach of the law of the European Union.

In a request of a preliminary ruling, according to the article 267 TFUE, formulated by the Court of Appeal Cluj, the issue of the compatibility of the environmental stamp with the provisions of the article 110 TFUE must be analyzed regarding 2 aspects:

- concerning the provisions of GEO no. 9/2013 stipulating that the vehicles for which has already paid one of the taxes provided by the previous regulations in this matter are exempt from the environmental stamp, since the residual amount of those taxes is inferior and the price of a such vehicle will become lower comparing to the prices of vehicles from another member state in respect of which the environmental tax is due;

- regarding the modalities of levying the environmental stamp tax, which creates discriminatory situations for the owners of similar vehicles.

The Court stated that *"Article 110 TFEU must be interpreted as:*

- not precluding a Member State from introducing a tax on motor vehicles which is levied on imported second-hand vehicles at the time of their first registration in that Member State and on vehicles already registered in that Member State at the time of the first transfer, within that Member State, of the ownership of those vehicles;

- precluding that Member State from exempting from that tax vehicles already registered and in respect of which a tax previously in force but found to be incompatible with EU law has been paid and not repaid.[1].

[1] Case C-586/14, Vasile Budișan vs Administratia Judeteana a Finanțelor Publice Cluj, http://curia.europa.eu/juris/document/document.jsf?text=&docid=179781&pageIndex=0&doclang=ro&mode=lst&dir=&occ=first&part=1&cid=864142.

CONCLUSION

Given the environmental stamp incompatibility with the European regulations, it will be repealed starting with January 1 2017. It remains to be seen if a new tax, in accordance with European regulations, will be established and to what extent the polluter pays principle will be respected, given that the declared reason was the introduction and maintenance of environmental protection tax.

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SOME ASPECTS OF THE RELATION BETWEEN THE INTERNET AND THE LAW IN THE 21st CENTURY

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Abstract:

Human society can be described as the product of "homo faber" (the man who works). In fact, working instruments describe very well our civilization and separate the human ages: stone, bronze, iron, etc. The creation of train changed the speed of commerce and it had influenced a good part of legislation in a one-way direction, which is never go back. Aircrafts and telephones transformed also state legislation. The last human invention is internet: after its creation, the whole human life was changed, and basically – law, legislation and the way how we see the legal relations on public and private law. Our text will try to describe briefly those changes, trying to make some predictions too.

Key words: *Internet, law, legislation, modernization, changes, regulations, public and private law.*

INTRODUCTION

We cannot yet fully assess the impact Internet social networks and virtual worlds will have both on society and the manner in which individuals share information and communicate. However, we can find some moments which was strongly influenced by internet, basically to transparence of procedures and goods, but also on political events.

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It is clear that the Internet's evolution at each phase of development is always far in advance of the market of potential adopters. This pattern has been the career of the commercial Internet from the outset. In 2000, those who recognized the medium's perfect application to retail business were correct in their analysis but sadly too far ahead of the actual consumer market to yield proper commercial return. Most failed but had they been introduced three to four years later they would undoubtedly have succeeded[1].

Next, the development of the medium for distributing media content: first music; then film and television. The Internet is developing broadcast property away from television screens but once again, the ability to render digital music and movies online existed long before the disruptive transition was appreciated by rights holders and the media industry. However, once established, music and film downloads changed the consumption of media content for all time[2]. Since that moment, intellectual property was completely changed and its change is still unstoppable.

Of course, the public law was very strong influenced by this new technology, because the transparency had a good argument to grow.

1. Policies and regulations are an important vehicle for any institution or organization to establish rules and norms that people can live by. Moreover, such norms and rules facilitate the interaction and exchange of communication or data between various parties.

Regulation and deregulation of markets result in new rules, norms, and behaviors by users to communicate with each other. Regulation and deregulation in telecommunication may affect the Internet and, most importantly, may limit social actors or may raise their capacities to protect vital information. Laws may both create new realities and affect social reality for parties using the Internet. However, several divergent regulatory developments in the United States and the EU indicate that

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[1] Andrew Sparrow, *The law of virtual worlds and Internet social networks*, (London: Gower Publishing Limited, 2010), 2.
[2] Ibidem.

various actions and behaviors are interpreted differently by politicians and regulators, thereby resulting in different outcomes for Internet users, which could hamper globalization of electronic commerce (e-commerce) and the Internet's growth into an institution[1].

In an industrialized country, deregulation of telecommunication markets may have been implemented for some time (e.g., England started with deregulation in 1982). In a developing country, however, the main issue for the government and its people may still be to provide drinking water and electricity to most neighborhoods. Hence, deregulation of either telephone or cable services may not be an item on the government's agenda or in the public's mind until more important infrastructure issues have been taken care of[2].

It is necessary to adopt a clear attitude to the problem of regulations, because the Internet can has its own life and its own rules; in this case, we should accept that this great invention can be free in a higher proportion we can accept to other economic domains.

2. The difficulty in applying old principles to new circumstances results directly from the specific nature of global network, the limitlessness of which cannot be easily adapted to the present, mainly territorial models of distributing state competence: the Internet, in virtue of its limitless nature, may not be described using principles mainly based on the criterion of territorial sovereignty[3].

The Internet is often mistakenly identified with its most common application – the World Wide Web. The Web is then defined as a set of electronic documents placed on the hard drives of computers (servers) designed for this purpose in .html format, available when using the global computer network. As the World Wide Web Consortium describes it, the

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[1] Urs E. Gattiker, *The Internet as a diverse community: cultural, organizational, and political issues*, (New Jersey: Taylor & Francis, 2009), 25.
[2] Urs E. Gattiker, *The Internet as a diverse community: cultural, organizational, and political issues*, (New Jersey: Taylor & Francis, 2009), 26.
[3] Joanna Kulesza, *International internet law*, (New York: Routledge, 2012), 33.

"World Wide Web (WWW) is the universe of network-accessible information, an embodiment of human knowledge"[1].

3. The international legal copyright protection regime is one of the best-regulated areas of international activity. Its pillar is the 1886 Berne Convention. The purpose thereof is "*to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works*". Nevertheless, neither this document nor any accompanying agreements establish any tool of international protection of copyright, which would automatically protect the rights of each author in every part of the world. Authors are entitled to national protection, the basic shape of which results from the Convention; the detailed scope of protection is clarified and implemented exclusively by the states[2].

The Berne Convention is based on two fundamental principles:

• the minimum protection principle – signatories shall provide at least such protection under national law as the Convention provides for; and

• the assimilation principle – an author from another state shall be treated equally with nationals of a given member state.

The developed international copyright system, apart from the Berne Convention, consists of a number of other instruments, for instance the 1952 Universal Copyright Convention, the 1961 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention) or the World Intellectual Property Organization whose 1996 "Internet Treaties" and WIPO Performances and Phonograms Treaty adapted to the challenges of a modern world.

4. Before now, the success of numerous international organizations and national governments in regulating the World Wide Web through law has been moderate. The reasons for their failure are twofold and they both originate from the nature of the network, designed as a decentralized

[1] http://www.w3.org/MarkUp/html-test/cern/TheProject.html, accessed at 06.11.2016.
[2] Joanna Kulesza, *International internet law*, (New York: Routledge, 2012), 33 – 34.

one, resilient to a direct attack. First, it is the very architecture of the network, composed of three interrelated but dissimilar layers, that makes it impossible to efficiently render it subject to any unilateral regulation. The second reason is a consequence of the first one – since the network is decentralized, all of its actors hold an equally strong position in defining its character. The key to regulating the Internet lies in a comprehensive, coherent co-operation of all stakeholders, achievable solely through international multi-stakeholder collaboration.

In the last years, however, it was some other aspects that create a special pressure to not totally regulate the Internet area. Snowden case, Wikileaks case, Panama Papers and the last cases of e-mails of some politicians was not appreciated by the governments, because some of their maneuvers were shown to whole world. A special control of the Internet liberty – regulated before those cases – could stop the presentation of those cases. In the same time, in many states national governments introduced projects who were considered by the press and population like "Big Brother"[1] laws.

Meanwhile, the projects of intellectual property protection against Internet have a stronger support on the entertainment industry, which lose billions of dollars because of this. Despite the special blocking IP (from some countries, mainly), is necessary that one person who paid for the access to record for its own use the entertainment product. After this, that person can release contain with a false name and the prejudice is created. In the last years some sites who represent a platform for sharing was deleted from the Web, but contain was re-uploaded to some new sites, just created.

5. Another very important aspect of the Internet transformation is related to the public administration's decisions transparency.

In November 2002, Severe Acute Respiratory Syndrome (SARS) broke out in the Guangdong Province of China. The virus ultimately killed nearly 800 people, and infected approximately ten times that number around the world. The Chinese government initially ignored the

[1] This concept was created by George Orwell, in *Animal Farm*.

disease. However, though the government issued no official reports during the first months of the epidemic, news spread quickly via mobile phone text messages, E-mail, and Internet chat rooms. A regional Chinese newspaper broke the story, reporting that word of a "fatal flu in Guangdong" had reached 120 million people through mobile phone text messages. With the news so widely known, Chinese authorities were forced to acknowledge and respond to the outbreak. Officials were reluctant to report the full number of SARS cases at first, but the World Health Organization (WHO) began reporting its own data, which pressured Beijing to bring its figures in-line. When the government announced that the number of SARS cases was ten times higher than reported earlier, one Chinese student expressed no surprise. "We already knew it was much worse from reading about it on the Internet," she said. "I don't think they can continue to cover up the truth"[1].

Analyzing the transparency, we can see two faces of it, because of Internet. The first depicts the conventional view: authoritarian governments losing control over information thanks to technology, the media, and international organizations – China is the best example for this. The second shows the darker side of global transparency, in which some of the same forces spread hatred, conflict, and lies – the whole world saw in the last months the hackers and trolls war on elections and on some military conflict of today.

Transparency is a condition in which information about the priorities, intentions, capabilities, and behavior of powerful organizations is widely available to the global public. It is a condition of openness enhanced by any mechanism that discloses and disseminates information such as a free press, open government hearings, mobile phones, commercial satellite imagery, or reporting requirements in international regimes.

Transparency is not synonymous with truth. It may reveal actual or perceived facts, actual or perceived falsehoods, behavior, intentions,

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[1] Kristin M. Lord, *The perils and promise of global transparency: why the information revolution may not lead to security, democracy, or peace*, (New York: State University of New York Press, 2006), 1.

ideas, values, and opinions. It may reveal neutral, empirically verifiable information or propaganda specifically designed to advance a particular cause or view. The term *transparency* does not necessarily require premeditated acts of disclosure by organizations, nor does it imply anything about the nature of the information revealed or what types of actors will gain from that information[1].

Transparency increases due to major initiatives by governments to open up but it also increases through the cumulative effects of small acts. Much transparency occurs due to the aggregate, often unintended, acts of individuals or small organizations that spread information. In an age of transparency that dissemination of information is magnified and multiplied by information technologies, the media, and human networks. Transparency, in sum, describes the relative availability of information, without respect to content.

6. "People tend not to trust what is hidden. Transparency is a powerful tool to demonstrate to the public that the government is spending our money wisely, that politicians are not in the pocket of lobbyists and special-interest groups, that government is operating in an accountable manner, and that decisions are made to ensure the safety and protection of all Americans"[2].

On January 21, 2009, his first full day in office, Barack Obama issued a presidential memorandum on "transparency and open government."

On this text, we can find these phrases: "Public engagement enhances the Government's effectiveness and improves the quality of its decisions. Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge. Executive departments and agencies should offer Americans increased opportunities

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[1] Kristin M. Lord, *The perils and promise of global transparency: why the information revolution may not lead to security, democracy, or peace*, (New York: State University of New York Press, 2006), 5.

[2] Moving Toward a 21st Century Right-to-Know Agenda," Recommendations from the Right-to-Know Community to the Obama – Biden Transition, November 2008.

to participate in policymaking and to provide their Government with the benefits of their collective expertise and information… . Executive departments and agencies should use innovative tools, methods, and systems to cooperate among themselves, across all levels of Government, and with nonprofit organizations, businesses, and individuals in the private sector".

As we can see, the public administration of the 21st century is necessary to find a way to deal with the transparency standards, because this need of showing documents and laws is not only a legal one, but also a social one and a reason for strengthen the mutual trust between politicians, public institutions and citizens.

For this transparence, we should note three ideas:

a) Transparence means before Internet global spreading just publishing on papers! In this case, the costs were not always acceptable to any public institution, despite the legal obligations;

b) Publishing of internet should be in a visible position on the site of public institution, because this criterion cannot be fulfilled if only initiated people know where to find them;

c) If we can speak about the right to internet (accepted in Finland, Estonia and other state legislation), the main consequence is a new debate-opening about the principle of knowing the law, summarized by the Latin expression "nemo censetur ignorarem legem". If the **a)** had spoken about public transparency based by printed papers, which means costs and spaces to share it, Internet offers now the possibility to fulfill in a better way the whole characteristics of this principle. From these years, citizens has almost no excuse for their legal ignorance.

About this principle, we should observe the disposition of the Administrative Code of Romania (the project)[1], who consider transparency as a general principle for the public administration – article 9. This recognition (the word "transparency" is presented more than ten times in the Code) means that technology now really helps the public

[1] http://www.mdrap.ro/lege-privind-codul-administrativ-al-romaniei, accessed on 09.11.2016.

administration to achieve an evolution, with profit for public institutions and citizens too.

CONCLUSION

Internet is the most important creation of humanity, because it transformed totally not only our lives (many inventions change our life), but also our way of thinking and pretending something from states and societies.

One of the most important consequences is on intellectual property area, because the fast and very cheap spreading of contain of texts, music, films, etc. can create a strong conflict between owners of content and consumers.

On public life and public law, we should underline that greater transparency is a boon for democracy and good governance, according to most observers. The trend toward greater transparency diffuses control over information and, in so doing, takes power from the strong and gives it to the weak and disenfranchised. This reallocation of power occurs within states, allowing citizens even to challenge authoritarian regimes.

This change on the relation state – public administration – citizens has important consequences on Romanian legislation, too. Changing (even) some old principles of law is one the most important way to understand that our society is on the process of a great and fundamental change, which is not also clear how will be finished.

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TOURISM LEGISLATION. IMPLICATIONS IN ORGANIZING NON-FORMAL ACTIVITIES IN ROMANIAN SCHOOL

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Lavinia OLAH [2]

Abstract:

Nowadays tourism through its role represents an extremely important area of the national economy. As a priority area of the national economy, it should benefit from a similar legislation. The tourism activity cannot be conceived outside the legal and ethical framework. Unfortunately, the current regulation is not a solution to the development, organization and growth of tourism in Romania.

The paper analyses the legal regulation in the tourism area in direct relation to the Government Ordinance no. 58/1998, but also through a comparative analysis with the Bill concerning the Tourism Law.

Therefore, both the domestic and international regulations take into consideration three factors to qualify tourism: a geographical factor (the usual environment refers to the tourist's domicile or residence, by case), a temporal factor (it refers to the travelling period) and a factor aimed at the purpose, the reason of conducting specific activities (it refers to any non-pecuniary activity within the visited location, which obviously excludes from this sphere any activity that would be carried out under legal labor relations, without including volunteering service in this category, for example visiting cities, attending scientific conferences or various cultural and sporting events and festivals, visits to relatives and friends, trips, business, etc.).

The Romanian school system is confronting with difficulties in organizations of extracurricular activities and the percentage of the teachers and institutions who use

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this form of education is low represented. In this paper we analyze, also, legislative aspects of the organization of extracurricular activities - tourism (as a form of non-formal education) in the pedagogical process who is not finished at the end of the scholar day or at the end of the scholar year. The tourism is one way of practice the extracurricular activities, a way of non-formal learning. Non-formal education coming to complement, support or as a source of valorization of the learning experiences formally acquired.

Key words: *tourism, legislation, ethics, legal liability, tourist heritage, non-formal activities.*

INTRODUCTION. THE CONCEPT OF TOURISM IN LEGISLATION AND THE SPECIALIST DOCTRINE

For an accurate and correct approach to the concept of tourism in the national legislation, it is necessary to establish the role and importance of tourism in the national economy as a whole, as well as to perform an incursion on this subject in specialist doctrine.

We cannot commence such an approach without stressing the role which the Romanian legislator, in its legislative approach, embodied in Ordinance No. 58 of August 1998[1] concerning the organization and conduct of the tourism activity in Romania, established in the first article, namely that of priority area of the national economy. Detailing, the above mentioned normative act establishes, as it was natural, the contents of the tourism concept, the topics the contents address as well as the period and purpose for which these goods and services which are part of its contents are used.

Thus, as a branch of the national economy, tourism brings together a set of goods and services provided for consumption to the individuals travelling outside their usual environment for a period less than a year and whose main reason is other than exercising a remunerated activity within the visited location (Article 2, letter a) of the Government

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[1] Published in the Official Gazette no. 309 of 26 August 1998, approved with amendments through Law no.755/2001.

Ordinance no.58 / 1998). We can state that the definition contained in the internal normative act is in accordance with the resolutions and recommendations of the World Tourism Organization (UNWTO), which defines tourism as "the activity of people traveling to and who remain in places outside their common environment (usual) for a period of time of at most one year for leisure, business or other purposes"[1].

Therefore, both the domestic and international regulations take into consideration three factors to qualify tourism: a geographical factor (the usual environment refers to the tourist's domicile or residence, by case), a temporal factor (it refers to the travelling period) and a factor aimed at the purpose, the reason of conducting specific activities (it refers to any non-pecuniary activity within the visited location, which obviously excludes from this sphere any activity that would be carried out under legal labor relations, without including volunteering service in this category, for example visiting cities, attending scientific conferences or various cultural and sporting events and festivals, visits to relatives and friends, trips, business, etc.)

This set of goods and services the national legislator makes reference to implicitly determine by their nature, the interference of tourism as a branch of the national economy with other important areas of the economy such as agriculture, food industry, transports, culture and art, commerce or construction industry. It is these interferences which prove the extremely important position of tourism in the national economy as a whole, as well as its active role in the continuous development and modernization of the society. The tourism interference with other branches of the national economy can give birth to new activities, such as the entertainment industry, manufacturing production etc.

In other words, through its contents and in conjunction with the national economy as a whole, tourism acts as a stimulating factor of the global economic system.[2] It is therefore the main role that tourism --

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[1] International Tourism: A Global Perspective, OMT, Madrid, 1997, 5 text taken from A. Băltăreţu, *International Tourism from theory to practice* (Sylvi, 2004): 13.
[2] R. Minciu, *Tourism Economy* (Uranus, 2004): 25.

displays in all other branches of the national economy, being as outlined in the doctrine "a priority area in the modern economy characterized by most experts as a service economy"[1].

As the importance of this field is already proven, it is necessary to be aware by the society, using both formal and non-formal education[2]. The tourism legislation can form the object of study in high school and, also, in faculty, as part of the curriculum or in organised extracurricular activities. But the Romanian school system is confronting with difficulties in organizations of extracurricular activities and the percentage of the teachers and institutions that use this form of education is low represented.

1. TOURISM APPROACH THROUGH THE INTERNAL LEGAL FRAMEWORK IN FORCE

Tourism also has the great advantage of being an important resource capitalization means, whether we speak of natural resources, as they were listed by the Government Ordinance no. 58/1998, Article 2, letter b), namely: geological, geomorphology, climate, flora and fauna elements, landscapes, deposits of minerals and other factors, or anthropogenic elements: archaeological monuments, archaeological sites, monuments, memorial assemblies, technical and art monuments, museums, folklore and folk art elements. Obviously, both with regard to the first category of resources, and especially as regards the second category, the legislator does not provide limitative list, one may include in this sphere other resources that may be of interest to tourism and may contribute to the proper exercise of levers and its complex functions. A limitative enumeration would not have been possible given the diversity

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[1] G. Stănciulescu and C. Micu, *Tourism Economy* (Pitesti: Publishing House of the University of Piteşti, 2009): 5.

[2] The formal education is provided by the institutionalized education system. The non-formal education – the opposite of the formal education – is placed outside the system. For more informations about the subject, see Sofia Loredana Tudor, "Formal – Non-formal – Informal in Education" in *Procedia – Social and Behavioral Sciences* 76 (2013): 822.

and specificity of these resources as well as the geographical areas where they are located; some of these resources are possibly undiscovered yet. However, the multitude of these resources is subjected to the same legal protection regulations. Moreover, article 3 in the above mentioned normative act expressly provides that the tourist heritage is formed of public assets and private assets and it is capitalized on and protected under the law.

With regard to these goods which form the object of the tourist heritage, whether we talk about natural or anthropic tourist resources, we can note a significant shortage of legal regulations concerning the correlation between exploitation through tourism and the compliance with the right to a healthy environment, which is a fundamental right recognized both by the Romanian Constitution (Article 35)[1], and article 5 of the framework normative act in the area of environment protection, Government Emergency Ordinance no. 195/2005. Likewise, this right benefits from a frequent European protection, even if the European Convention on Human Rights does not expressly make reference to it therein, being established in the jurisprudence of the European Court of Human Rights through the fact that any damage to the environment, with negative consequences on individuals, may constitute a violation of other rights expressly regulated by the Convention, such as for example the right to life or the right to property[2].

Also, through Government Emergency Ordinance no. 195/2005 on environmental protection, the environment is defined from a global perspective, covering all the non-biotic, biotic elements, material and

[1] Article 35 paragraph 3 stipulates that "the natural and legal persons have the responsibility to protect and improve the environment". Also see: M. Andreescu and A. Puran, *Constitutional right. General Theory* (Craiova: Sitech, 2014): 239.

[2] See in this regard, P. Truşcă and A. Truşcă Trandafir, "Human's fundamental right to a healthy environment in the European Court on Human Rights (ECHR) jurisprudence", *Transylvanian Journal of Administrative Sciences*, 1(23) (2009), pp.97-120, www.rtsa.ro, as well as L. Dogaru, "Protection of the right to healthy environment in the European Court on Human Rights (ECHR) jurisprudence*",* www.revcurentjur.ro

spiritual values, quality of life and any other element which influences humans' health and welfare[1].

Apart from the juridical jurisprudence and doctrine, it was stated inclusively in the economic doctrine the fact that between tourism and the environment there is a mutual interdependence as the environment through what it represents is the purpose for which tourism activities are carried out[2]. In other words, quality in tourism also means quality of the natural environment in which the individual carries out his/ her activity; respectively an environment of poor quality implicitly determines the provision of similar tourism activities[3].

In order to achieve the environmental protection it is necessary to have a close collaboration with all the other sector policies which actually represents one of the fundamental principles in the area. More exactly, the environmental protection has to be taken into account in the agriculture, industrial, energetic, transport policy, but also in all the other sector policies, including in the field of tourism.

The foundation of all the legislation in the field of environmental protection is represented by a number of principles that have a constructive role and a capitalizing role, these two features comprising the objective requirements of the environmental protection. The constructive role is manifested by the contribution of principles in the creation and permanent modernization of the specific rules, and the capitalizing role lies in their ability to highlight and

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[1]Article 1 paragraph 2 of the Government Emergency Ordinance no. 195/2005 on environmental protection provides that the environment is "the set of conditions and natural elements of the Earth: air, water, soil, subsoil, landscape-related aspects, all layers of the atmosphere, all organic and inorganic matters as well as the living beings, natural systems in interaction, comprising the elements listed above, including some material and spiritual values, quality of life and the conditions that can influence humans' health and welfare".

[2] Mihai Liviu Băloiu, A. Angelescu and I. Ponoran, *Protection of the ambient environment* (Bucharest: ASE, 1995): 3.

[3] A. Băltăreţu, *International tourism from theory to practice* (Sylvi, 2004): 75.

regulate in the form of juridical regulations, new issues important for the environmental protection[1].

Apart from the principle of integrating the environmental requirements into the other sector policies, we mention: the precautionary principle in decision making; principle of preventive action; principle of retaining pollutants at source; the "polluter pays" principle; the principle of preserving biodiversity and the ecosystems specific to the natural biogeography environment. The regulations in tourism should also be founded on these principles, which are expressly enumerated in the Government emergency Ordinance no. 195/2005. At the same time, the sustainable use of natural resources, public information and participation in decision making, the access to justice in environmental issues and the development of international cooperation for environmental protection are considered strategic elements in the area[2].

In other words, the current legal regulation in the area, within which the organization, coordination and development of tourism in Romania take place, does not make reference to the environment protection in any article as a principle which must govern tourism activity and must effectively contribute to the conservation of these extremely important resources. Also, continuing the same idea of environmental protection, one has to note the fact that, therein, this normative act does not refer to liability and sanction in this extremely important domain. In other words, it does not enumerate those actions which prejudice the tourist resources and implicitly the tourist heritage thus holding liable the guilty. It is a major shortage of this normative act which is supposed to be the general legal framework in terms of organizing and conducting the tourism activity in Romania.

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[1] R. Duminică, *Introduction in the law of the environment* (Bucharest: University Publishing House, 2015): 48.

[2] R. Duminică, *Introduction in the law of the environment* (Bucharest: University Publishing House, 2015): 50.

We must point out that at present we know of the existence of a bill in the field of tourism [1], which has not materialized from the legislative point of view, but which from the perspective of ensuring environmental protection and conservation of tourist resources and natural and anthropogenic resources specifically refers to the rights and obligations of participants in tourism activities establishing their obligation to ensure environmental protection and conservation of tourist resources in all the activities carried out. Moreover, there are provided facts which may constitute criminal offenses and contraventions, appropriate punishments being established, beginning from fines to freedom depriving punishments. Therefore, from this perspective we are talking about a future higher legal regulation, both in terms of legal force as well as in terms of legal liability.

It was also stated that, related to tourist resources, tourism compared to other branches of the national economy can also develop through the exploitation of small-sized resources, thus manifesting itself as an important component of local economies[2]. However, the current legislation does not include provisions in this respect, failing to even enumerate the existing forms of tourism which naturally should have a legal organization and operation framework. Maybe we can emphasize once again the merit of the bill on tourism which includes among the main types of tourism in Romania: cultural tourism, balneal tourism, rural tourism (agro-tourism), eco-tourism, adventure tourism, tourism for sports, events and business tourism, mountain tourism, seaside tourism and tourist parks. A separate legislative highlight was absolutely normal, given the specific nature of each typology and its different mode of organization and utilization of tourist resources [3].

When we talk about the role and importance of tourism in all branches of the national economy, we cannot omit the following aspects, namely: ensuring a balanced monetary circulation, a way of mitigating

[1] www.fptr.ro.
[2] R. Minciu, *Tourism Economy* (Uranus, 2004): 27.
[3] See the bill on Tourism Law, chapter III – Main types of tourism in Romania.

the inter-regional imbalances[1], opportunity aimed at creating new jobs and implicitly reducing employment[2]. The purpose for which we do not omit to mention these beneficial effects which tourism propagate on the economy as a whole is to emphasize once again the importance of tourism as a strategic branch of the national economy and to sound the alarm on the necessity for a coherent, clear and comprehensive legal framework which provides the legal modalities and levers in the organization, coordination and development of tourism at national and international level.

Moreover it is inconceivable to have a national strategy for tourism development outside the existence of a coherent legal framework which clearly defines the attributions and obligations of the public central administration and public local administration in the area of tourism; types of tourism in Romania and the specific measures applicable to each form; regulation and protection of tourist heritage, set up of institutions with responsibilities in the field of authorization and control in tourism (essential aspects for the good functioning of the specific activities as well as an important guarantee to protect tourist resources). Also one cannot conceive of the lack of regulation of any form of legal liability; the lack of express regulation of the rights and obligations of participants in the tourism activities and implicitly the qualification of facts that violate the legal norms and the express regulation of applicable sanctions. On the same note, regarding the staff working in tourism this legal framework should establish restrictive selection criteria so that the activities carried out and the specific tasks to be performed at the highest level.

With regard to this latter aspect which is extremely important because the achievement of tourism complex functions depends on the quality of the human resources, we must mention that article 26 of the Government Ordinance no. 58/1998 states "professional training in the field of tourism takes place in state or private education institutions authorized by the Ministry of Education and Research and the resolution

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[1] In this respect see R. Minciu, *Tourism Economy* (Uranus, 2004): 27.
[2] Gianina Buruiană, *Macroenonomic policies in tourism* (Bucharest: Uranus, 2008): 34.

of the Ministry of Tourism". We believe that such regulation can only bring benefits because the skills and knowledge gained in this institutional framework are guarantees for the good management of tourism-related activities. On the other hand, the normative act mentioned above regards the initial training only, without taking into account the principles stipulated at present by Law No.1/2011 on national education,[1] lifelong professional training[2]. This is another reason to support the necessity of a new legal framework in the area of tourism.

Regarding the financing and promotion of tourism, article 36 of the Government Ordinance 58/1998 stipulates that this obligation rests with the state which "supports the tourism activity by economic and financial policies and mechanisms and actions for the arrangement and protection of the tourist heritage". Also, the state is responsible for promoting and developing the tourism activities through various methods so as to support free initiative and to attract foreign tourists in Romania[3].

On the same note, apart from this legal framework it is necessary that the strategy of tourism development in medium and long term, the Marketing and Tourist Promotion Multiannual Programme and the Multiannual Programme for the Development of Destinations, Tourist Forms and Products drawn up by the competent ministry to be conceived both complying with the law as well as in the spirit of well-founded and fairly implemented policies, so as to avoid the negative economic impact of tourism. The economic doctrine discusses the disadvantages concerning the staff employed in tourism, the enclave, the economic dependence on tourism etc[4].

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[1] Published in the Official Gazette no. 18 of 10 January 2011.

[2] In Chapter X, the bill on tourism details more but not enough the professional training stipulating that the professional competences in tourism can be achieved formally, non-formally and informally.

[3] The promotion of tourism in Romania is much wider developed in the bill of Tourism Law, an institution is to be set up through which this activity is promoted, both domestically and internationally, respectively the Romanian Tourism Organization (ORT).

[4] Gianina Buruiană, *Macroeconomic policies in tourism* (Bucharest: Uranus, 2008): 35-42.

2. ETHICS AND DEONTOLOGY IN TOURISM

Ethics and deontology[1] should be found in each domain of the social life. Therefore, they exceed the framework of tourism activities, being closely related to the human nature and the way of being, it was worth stating that they should be reflected in all forms of expression of the individual[2]. Since deontology comprises norms outlining the professional and private behavior, it was stated in the specialist legal literature that it lies at the boundary between law and morality [3].

As previously stated, tourism is "a set of goods and services provided for consumption to individuals travelling outside their usual environment...", reason for which all these relationships arising between the person providing tourism activities and the beneficiaries of these services should be circumscribed by conduct and ethics norms. The need for ethics in tourism was also noticed by the World Tourism Organization which in 1999 adopted a Code of Ethics in Tourism. The need for ethics in tourism required the adoption of other ethical codes at macroeconomic level, such as: the Code of Ethics of the Association of Ecotourism Professionals in Quebec; the Code of Ethics of the Tourism Institute in New Zealand; Code of Ethics for sustainable activity in Costa Rica; Code of Ethics of the American Association of Travel Agencies; Code of Ethics of the Casino Development Authority; Codes of ethics of tourism companies[4].

Without insisting on their content, we must mention that these codes include norms based on promoting the same common values of

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[1] Etymologically, the term *deontology* comes from the Greek words *deon, deontos*, which mean *what is right* and *logos* meaning *science*. See for further development: Andreea Drăghici and Doina Popescu, *Deontology of the public clerk*, (Pitesti: Paralela 45, 2005): 25.

[2] Nicolae Cochinescu, "Introduction in the Legal Deontology", *Journal The Law* 4(1995): 42.

[3] Nicolae Cochinescu, "Introduction in the Legal Deontology", *Journal The Law* 4(1995): 25.

[4] On the contents of these ethics codes, see Gabriela Ţigu, *Ethics of business in tourism* (Bucharest: Uranus, 2003): 100-121.

humanity, whether they relate to the beneficiary of tourism services, the service provider or the host community.

It is worth noting that at present the Government Ordinance no. 58/1998 on the organization and development of the tourism activity in Romania, does not include at least tangentially norms of ethics in tourism, and it does not even make reference or develop, as it was natural, the rights and obligations of the participants in the tourism activities. In this context we can mention the Ordinance no. 21/1992 on consumer protection as being helpful.[1]

CONCLUSIONS

Tourism as a strategic branch of the national economy, whose importance in the socio-economic development was previously presented, is one of the most dynamic sectors. In this context determined by the complexity of its functions, it is mandatory that the tourism activity should be carried out within a coherent legal framework. Nowadays, the normative act which regards the organization and development of the tourism activity in Romania is given by the Government Ordinance no.58 /1998. Therefore it is about a normative act which is legally inferior to the law. We believe that, beyond its contents and the mode in which the regulation of the tourism activity was understood at that time and subsequently, it would be necessary that from the point of view of the role and importance of this strategic area, the organization and development of tourism activities in Romania to be carried out through a normative act issued by the Parliament.

In terms of contents, we believe that a number of important issues that should have been regulated were not taken into account. Thus, starting from general to particular, we cannot overlook the fact that the current regulation does not make any references of the principles under which the tourism activity should be carried out[2].

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[1] Published in the Official Gazette no.212 of 28 August 1992.

[2] The bill on Tourism Law mentions from the first article the principle of competitiveness, sustainability and sustainable development.

Also, as already mentioned, it does not make reference in any article to the environmental protection as a principle that should govern the tourism activity and should contribute effectively to the conservation of these tourist resources.

Also, one cannot conceive the lack of legal regulation regarding liabilities; the lack of express regulation of the rights and obligations of the participants in the tourism activities and implicitly classification of the actions that violate the legal norms and the express regulation of the applicable sanctions.

Therefore we consider it is necessary to have a new law to regulate the organization and development of the tourism activities in Romania and, also, related to the awareness of the importance of this field, the educational system must find the necessary resources in order to include the study of the new legislation in the curriculum or to organise extracurricular activities in this purpose.

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CANCELLATION OF DISCIPLINARY SANCTIONS APPLICABLE FOR EMPLOYEES

Andra PURAN[1]

Abstract:

Through the amendments brought to the Labor Code in 2011, it was removed a legislative gap notified by many theorists. It was absurd that rehabilitation be regulated in penal area and in the case of disciplinary misconduct to be inexistent. Thus, now it is stated that the disciplinary sanctions are rightfully canceled within 12 month from application if certain conditions stipulated by law are met.

By the present study we propose a short analysis of the institution of disciplinary sanctions cancellation.

Key words: *employees, disciplinary sanctions, cancellation, effects, term.*

INTRODUCTION

The discipline of labor is an objective, necessary and indispensable condition for every employer's activity.

The disciplinary liability is a form of the specific legal liability, which is seen only in labor relations[2], and consists in sanctioning the violation with guilt by any employee of the legal norms, internal

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[2] Magda Volonciu in Al. Athanasiu *et al*., *Codul muncii. Comentariu pe articole. Vol. II. Articolele 108-298* (Bucharest: C.H. Beck, 2011), 362.

regulation, collective labor agreement, individual labor agreement, orders and legal provisions of the hierarchical leaders[1].

For the commission of disciplinary deviances, for the employees are applicable the disciplinary sanctions mentioned by the Labor Code, in relation to the seriousness of the disciplinary deviation committed by the employee, but also with other criteria for individualizing the disciplinary sanctions.

Disciplinary sanctions shall be canceled according to the provisions of the Labor Code, under the conditions presented by the Labor Code and analyzed in this paper.

1. NOTION AND EFFECTS

The modification of the Labor Code by the Law No 40/2011 has satisfied the proposals for *lege ferenda* of some authors[2], otherwise relevant, regarding the "rehabilitation of the employees", removing the gap of the Labor Code, which did not took this institution from the old regulation[3].

It is absurd that such institution be stated in the penal area, and in the case of less serious actions than the penal ones, to not be stated; moreover, to be regulated for civil servants[4], and in the case of other labor relations to be inexistent.

Thus, Art 248 has received a new paragraph which states that "*the disciplinary sanction shall be rightfully canceled within 12 months from*

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[1] Al. Ţiclea, *Tratat de dreptul muncii*, 7th edition revised and amended (Bucharest: Hamangiu, 2013), 803-804.

[2] I. T. Ştefănescu, *Tratat teoretic şi practic de drept al muncii*, 2nd edition revised and amended (Bucharest: Universul Juridic, 2012), 733.

[3] According to Law No 1/1970, the disciplinary sanction (except the termination of the individual labor agreement) was considered as not ordered if for one year after it has been served, the employee did not committed a new one. Even if before the expiration of the term of 1 year, but no sooner than 6 months from the application of the disciplinary sanction, the manager of the unit could have ordered, if the employee did not committed another offence that the applied sanction be considered as not ordered.

[4] Art 92 of the Law No 188/1999 on the statute of civil servants.

application, if the employer does not receive another disciplinary sanction during this term. The cancellation of the disciplinary sanctions shall be ascertained by a written decision of the employer".

The cancellation of the disciplinary sanction shall assume its radiation both from the employer's registers, as well as from the personal record of the employee, as he was never sanctioned.

It is mentioned that the disciplinary cancellation has a similar role with the penal rehabilitation[1] because it has an educative function, of moral recovery of the persons who have disobeyed at some point the legal provisions[2].

Regarding the cancellation of the most serious disciplinary sanction, the disciplinary termination of the employment contract, the doctrine is divided into two.

According to an opinion[3], the cancellation may occur for all disciplinary sanctions, except the disciplinary dismissal.

It is supported the idea that, though the Labor Code does not state this aspect, the interpretation of Art 248 Para 3 is logical, given the fact that the employee must not commit a deviation for 12 months for which he could be disciplinary sanctioned.

Since the employee is disciplinary dismissed, the subordination between him and the employer shall cease, the latter one not having the possibility to apply sanctions.

Thus, it is considered that "*the only rational, logical and possible solution consists in that it (A/N: the cancellation) does not refer to the disciplinary termination of the individual labor agreement (disciplinary dismissal), but only the other sanctions*".

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[1] According to Art 133 of the Penal Code (Art 169 of the new Penal Code in force since 1st February 2014), "Rehabilitation terminates loss of rights and prohibitions, as well as incapacitation resulting from conviction".

[2] Al. Țiclea, *Tratat de dreptul muncii*, 855.

[3] Ibidem; V. Barbu and Șt.-A. Dumitrache,"Considerații privind reabilitarea disciplinară în contextul legislativ actual", in *Romanian Labor Law Magazine* 5 (2012): 63-70. See also, Al. Țiclea, "Discuții privind interpretarea unor dispoziții contradictorii sau neclare din legislația muncii*"*, in *Dreptul* 9 (2012): 126.

A second opinion[1] supports and motivates that the disciplinary cancellation is incident including in the case of the disciplinary termination of the individual labor agreement, considering the wording *ubi lex non distinguit nec nos distringuere debemus*[2].

In our view, we share this last opinion, detailed and logically argued[3]. Indeed, by applying the principle *ubi lex non distinguit nec nos distringuere debemus*, we cannot state that the disciplinary sanction of the termination of the individual labor agreement is excluded from cancellation, especially that the previous regulation expressly stated the exception of this disciplinary sanction from cancellation. It would be discriminative that this sanction be exempted from cancellation, especially for the persons who aim in the future to occupy a position which required that its occupant did not have received such disciplinary sanction.

The effects of the cancellation shall be effective for the future (*ex nunc*), not generating the reinstatement of the parties in the previous of the parties and of the employee's rights (*restitution in integrum*).

Due to the *ex nunc* effects generated by the cancellation, it is considered[4] that it is received by the annulment of an illegal disciplinary sanction by the competent jurisdictional organ. The cancellation represents an advantage granted by the law, consisting of the time limitation of certain unfavorable effects of the sanctioned legally and/or justifiable applied, and the annulment of such sanction

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[1] B. Vartolomei, "Radierea de drept a sancțiunilor disciplinare", in *Romanian Labor Law Magazine* 8 (2011): 50; I.T. Ștefănescu and Ș. Beligrădeanu, "Principalele aspecte teoretice si practice rezultate din cuprinsul Legii nr. 40/2011 pentru modificarea si completarea Legii nr. 53/2003 – Codul muncii", in *Dreptul* 7 (2011): 11-53; I. T. Ștefănescu, *Tratat teoretic şi practic de drept al muncii*, 757.

[2] For the same opinion, see also E. Lipcanu, "Discuții cu privire la unele controverse doctrinare recente, cu implicații practice, în domeniul dreptului muncii", in *Dreptul* 4 (2012): 124-125.

[3] Ș. Beligrădeanu, "Discuții cu privire la incidența radierii sancțiunii disciplinare și în cazul aplicării sancțiunii desfacerii disciplinare a contractului individual de muncă", in *Dreptul* 12 (2012): 136-144.

[4] Al. Țiclea, *Tratat de dreptul muncii*, 856.

(illegal/unjustified) shall lead to its retroactive cancellation, with all the effects it entails (by applying the principle *restitutio in integrum*).

If the employer commits deviations within the term of 12 months, the disciplinary sanction could be harsher, given the repetitive feature of the offence. Unlike cancellation, for the establishment of the relapse in penal matters, "shall not be taken into consideration the convictions for which rehabilitation has occurred or regarding which the term for rehabilitation has been satisfied", according to Art 38 Para 2 of the Penal Code (in the same meaning, sell Art 41 of the new Penal Code in force since 1st February 2014).

The doctrine[1] has mentioned that it would have been preferable for the legislator to take into consideration the different terms for cancellation of each category of disciplinary sanctions (as it is stated by the legislation of other states analyzed by this paper) and to state the optional cancellation, leaving it at the employer's wish.

2. CONDITIONS FOR CANCELLATION

From the legal regulation, two conditions for the cancellation of disciplinary sanctions are identified.

One of the substantive conditions regards the behavior of the employee for the past 12 months. There must be 12 months from the last disciplinary deviance for the cancelation to be possible. If within this term the employee commits a disciplinary offence for which he is disciplinary sanctioned, the cancellation becomes impossible. From this regulation, it is concluded that the person who is disciplinary sanctioned must be an employee, namely to perform a remunerated activity based on an individual labor agreement.

It has been mentioned[2] that the period of 12 months must be continuous for the same employer, not calculating the periods less than 12 months worked for another employer. We consider that since the

[1] I.T. Ștefănescu, *Tratat teoretic şi practic de drept al muncii,* 758.

[2] Ș. Beligrădeanu, "Discuții cu privire la incidența radierii sancțiunii disciplinare și în cazul aplicării sancțiunii desfacerii disciplinare a contractului individual de muncă", p.143.

Labor Code does not refer to the continuous feature of the period after which the cancellation becomes possible and to the fact that the employee must be hired by the same employer, the 12 months period must be formed by smaller periods for different employers.

The formal condition consists in the issuance of a written decision of the employer by which he ascertains the cancellation as an effect of the fulfilment of the substantive condition. The law states that the cancellation legitimately occurs, *ope legis*, and not as a prerogative of the employer. Under these conditions, we consider that the decision of the employer has the role to ascertain the legitimate occurrence of the cancellation, being necessary for his registers. If he does not comply with this legal obligation, the employee may address the competent court to ascertain the cancellation.

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BRIEF ANALYSIS OF THE COMMUNITARIAN AND INTERNATIONAL LEGISLATIVE FRAMEWORK IN THE AREA OF SOIL PROTECTION

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Abstract:

The phenomenon of soil pollution is not specific to a single state, to a continent or another, but it is a generalized phenomenon. This is why, in the context of diversification and multiplication of its sources of pollution, it has become necessary the finding of certain efficient legal means for their national, regional and international combating. Thus, having as starting point all these reasons, the current study presents some of the actions performed by the European Union and on the international level in the area of soil pollution prevention.

Key words: *pollution, legal protection of the soil, European regulations, international regulations.*

INTRODUCTION

Together with air and water, the soil, namely the superior layer, loose and alive of the earth crust, is an integrant part of the system supporting life, representing the base for 90% of human food, animal food, fiber and fuel.

The soil plays an important part in climatic changes, being a giant natural storehouse of carbon, being the reason why José Luis

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Rubio, the president of the European Society for Soil Conservation considers it as "an essential liaison between the environmental global issues, such as climatic changes, water management and loss of biodiversity"[1]. Also, it is also mentioned that the process of "desertification – whereby viable, healthy soil is drained of nutrition to the extent that it cannot support life and may even blow away – is a very dramatic illustration of one of the issues facing soil across Europe"[2]. "The natural conditions: aridity, variability and torrential nature of rainfall, vulnerable soils, together with the long record of past and present human pressure, mean that large parts of Southern Europe are being affected by desertification"[3].

Studies have proven that 8% of the territories, about 14 million hectares of Southern, Central and Eastern Europe currently show high sensitivity to desertification, the countries most affected are Spain, Portugal, southern France, Greece and southern Italy[4].

1. THE COMMUNITARIAN LEGISLATIVE FRAMEWORK IN THE AREA OF SOIL PROTECTION

Though among the major problems in Europe, are found desertification and soil degradation either because of erosion, construction activities or pollution, the European legislation does not cover all these threats, some of the Member States missing the specific legislation in the area of soil protection.

The European Commission has attempted to develop proposals for soil policy, but many of the Member States still considers them as controversial, thus blocking the development of the policy. This lack of attention is clear both from the lack of certain European directives or

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[1] José Luis Rubio in "*Soil – the forgotten resource*", available at http://www.eea.europa.eu/signals/signals-2010/soil .

[2] José Luis Rubio in "*Soil – the forgotten resource*", available at http://www.eea.europa.eu/signals/signals-2010/soil.

[3] José Luis Rubio in "*Soil – the forgotten resource*", available at http://www.eea.europa.eu/signals/signals-2010/soil.

[4] Ibidem.

objectives in the area of soil protection, and also from the absence of information in this area[1].

Though, European policies regarding the adaptation to climatic changes are relevant for the actual and future practices for land-use, planning and management for their use being essential for the reconciliation of the use of land with environmental concerns. This is a challenge that involves different levels of policies and areas of activity. Even if, usually, the decisions regarding planning and management of land-use are taken locally or regionally, the European Commission holds an important role in insuring the fact that all Member States consider within their preoccupations in the area of environment protection also the rational use of lands and apply the integrated management of land practices. In this regard, the activities of the European Environment Agency (EEA) are focused specifically on assessments of changes in spatial and landscape levels in Europe through the use of assessment tools and land and ecosystem analysis provided by the Geographic Information Systems (GIS).

Global Monitoring for Environment and Security (GMES) Services of land-use is part of the operations initiated during 2011-2013 coordinating the update and improvement of the activity monitoring the continental land-use and for assessments of future trends has been developed the Prospective Environmental analysis of Land Use Development in Europe (PRELUDE), an interactive tool presenting a set of five different scenarios for land-use in Europe[2].

Also, the EEA is entitled to develop a database center regarding the environment for land-use as a contribution to the Shared Environmental Information System (SEIS). The main source of information for the EEA is the Corine Land Cover databases, based on cooperation established with the Member States, on the EEA and on the Global Monitoring for Environment and Security Services (GMES). Nowadays, are in the process of drafting sets of GMES supplementary

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[1] R. Duminică, *Introducere în dreptul mediului* (Bucharest: Universitary Press, 2015), 183-184.

[2] http://www.eea.europa.eu/themes/landuse/intro.

data, such as the Urban Atlas with the purpose of completing the information on land occupation from the Corine database. In cooperation with the European Topic Centre on Spatial Information and Analysis, the EEA is developing pan-European reference systems for spatial analyses: the Land and Ecosystem Accounting (LEAC) applications contribute to thematic analysis (e.g. landscape fragmentation) and relevant indicators[1]. Thus, part of the environment and regional policies, for instance, the Thematic Strategy for Soil Protection is based on conclusive information offered by these systems. The strategy promotes the establishment of a legislative framework that will allow the protection and durable use of soils, the integration of their protection into the national and communitarian policies, strengthening the knowledge base and enhancing public awareness.

We need to mention that this strategy has been accompanied by the Recommendation of the Commission in the meaning of adopting a framework directive regarding the soil which, in 2007, received the approval of the European Parliament and of the Council of European Municipalities and Regions, but a common point with the Council of Ministers has not been reached yet[2], thus we are currently in the phase of a proposal for a directive in this area.

The proposal for directive above mentioned states measures for problems identification, for preventing soil degradation and the restoration of polluted or damaged soils. One of the measures included in the proposal for directive aims the obligation for Member States to identify the areas in which there is a risk of erosion, of lowering the organic matter content, of subsidence, salinization or landslide or in which one of these degradation processes already occurred, the obligation to adopt measures appropriate for reducing and combating their consequences. Therewith, they shall establish measures allowing the limitation of soil sealing, especially through the rehabilitation of disused

[1] http://www.eea.europa.eu/themes/landuse/intro.
[2] See also:
http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:l28181&from=RO.

industrial sites or, when the sealing is necessary, to mitigate its effects. Supplementary, the proposal for directive states that Member States must adopt appropriate measures to avoid soil contamination with dangerous substances and that they shall draft an inventory of the polluted sites every time the concentration of the substances generates an important risk for human health or environment, as well as of the sites on which certain human activities have been performed (waste repositories, airports, military sites, activities stated by the IPPC Directive etc.). After that, the Member States must initiate the decontamination of the polluted sites, based on a national strategy establishing the priorities.

Synthetizing, it can be noticed that, until the present days, the soils have not been the object of special measures at the level of the European Union, their protection being achieved by different provisions regarding either the environment protection, or related to other areas of activity, such as agriculture or rural development. Giving that these provisions do not ensure sufficient protection for soils, we consider necessary a sustained action at European level, taking into account the influence of land condition on other environmental issues and food security, given the risks of distortion of the internal market for rebuilding polluted sites, as well as the transboundary impact of this eventual issue[1].

2. SOIL PROTECTION IN INTERNATIONAL LAW

No international attention is not given to soil protection, the UN Conference on desertification (1977, Nairobi), establishing only an Action Plan, with limited effects; the World Soil Charter (1981) states only a declaration of principles in this area; the World Charter for Nature (1982) mentions the measures for preservation of long term fertility, and the Agenda 21 of the World Conference held in Rio in 1992 offers a simple base for the fight against desertification[2].

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[1] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:l28181&from=RO .

[2] In this regard, see also A. I. Duşcă, *Dreptul mediului* (Bucharest: Universul Juridic, 2014), 142.

A wider regulation is to be found in the UN Convention for combating desertification in countries seriously affected by drought and/or desertification, especially in Africa (Paris, 17 June 1994)[1], based on the idea that desertification and drought are global problems, affecting all regions of the planet, reason for which it is necessary the joint action of the international community for their combating.

Therefore, the declared purpose of the Convention is the combating of desertification and the reduction of the effects of drought in countries facing serious drought and/or desertification, especially in Africa, through efficient actions, according to Agenda 21. Achieving this purpose involves long term integrated strategies, which will simultaneously focus on the improvement of land productivity and on the restoration, preservation and durable management of land and water resources, as it results from Art 2 of the Convention[2].

Therefore, Art 3 states the principles grounding the achievement of this objective, namely:

a) the parties should ensure that decisions on the design and implementation of programs to combat desertification and/or mitigate the effects of drought are taken with the participation of populations and local communities and that an enabling environment is created at higher levels to facilitate action at national and local levels;

b) the parties should, in a spirit of international solidarity and partnership, improve cooperation and coordination at sub-regional, regional and international levels, and better focus the financial, human, organizational and technical resources where they are needed;

c) the parties should develop, in a spirit of partnership, cooperation among all levels of government, communities, non-governmental organizations and landholders to establish a better understanding of the nature and value of land and scarce water resources in affected areas and to work towards their sustainable use;

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[1] Romania has adhered to this Convention by Law No 111/1998 (Official Gazette, No 222/17 June 1998).

[2] R. Duminică, *Introducere în dreptul mediului* (Bucharest: Universitary Press, 2015), 185.

d) the Parties should take into full consideration the special needs and circumstances of affected developing country parties, particularly the least developed among them.

Finally, for the achievement of the Convention's objective, the country parties have the following general obligations stated by Art 4 Para 2: a) adopt an integrated approach addressing the physical, biological and socio-economic aspects of the processes of desertification and drought; b) give due attention, within the relevant international and regional bodies, to the situation of affected developing country Parties with regard to international trade, marketing arrangements and debt with a view to establishing an enabling international economic environment conducive to the promotion of sustainable development; c) integrate strategies for poverty eradication into efforts to combat desertification and mitigate the effects of drought; d) promote cooperation among affected country Parties in the fields of environmental protection and the conservation of land and water resources, as they relate to desertification and drought; e) strengthen subregional, regional and international cooperation; f) cooperate within relevant intergovernmental organizations; g) determine institutional mechanisms, if appropriate, keeping in mind the need to avoid duplication; and h) promote the use of existing bilateral and multilateral financial mechanisms and arrangements that mobilize and channel substantial financial resources to affected developing country Parties in combating desertification and mitigating the effects of drought.

CONCLUSIONS

Considering that soil degradation generates negative consequences for the other environment factors, for water and air quality, for biodiversity and human health, it is necessary the identification of more efficient methods to combat the pollution in this area. Unfortunately, at communitarian level, as already shown before, though the Framework Decision for Soil could be a basic legislative instrument

for the protection of this environmental element[1], however, because of the of different political interests of the Member States, as well as of the influences exerted by various groups of interest, it remained momentarily at the stage of proposal.

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[1] In this regard, see also: Petr Vaculik, "Protecţia solului în context european", *Annals of the "Constantin Brâncuşi"* University of Târgu Jiu, Legal Sciences Series 1: 87.

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THE HEREDITY PETITION – SUBSTANTIVE AND PROCEDURAL ISSUES

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Abstract:

Considering that the right to inheritance is an important matter for each individual, the heredity petition represents one of the most accessible means placed at the disposal of the universal heirs or at those with a universal title to receive the assets representing the estate, when the assets are in the patrimony of an apparent heir. The heredity petition has important practical effects related to the transmission of the assets because in case of approval, the apparent heir shall be compelled to restitution in nature or in equivalent.

The current study aims a brief analysis of the regulations stated by the Civil Code regarding the heredity petition and its effects, in relation to civil procedural law issues incident in this area.

Key words: *heredity petition, universal heirs, heirs with universal title, successional mass, Civil Code, Civil Procedure Code*

INTRODUCTION

The heredity petition is stated by Title V – Distribution and sharing of the inheritance, Chapter I, Section 5, Art 1130-1131 of the Civil Code.

The regulation of this legal institution has emerged as a necessity determined by the fact that quite often people who could not justify their

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quality as heirs were in the possession of assets representing the successional mass to the prejudice of the real heirs.

In relation to Art 1130 of the Civil Code[1], the literature defines the heredity petition as being the action "by which the plaintiff asks the court to recognize his quality as an heir or legatee, as well as the compelling of the person who is in the possession of the successional assets to hand it back"[2].

The active procedural quality (plaintiff) is owned only by the universal heir or the heir with an universal title, except the legatee with particular title, because the latter one is entitled to the use of other procedural means to regain possession of the legacy, as well as a personal action based on the will or a real action for recovery of possession or a confessor action[3]. Also, there can be plaintiffs the successors in title of those persons, such as the assignees of inheritance rights or their successional representatives in case of death.

The passive procedural quality (defendant) belongs to the apparent heir, namely the person pretending to be a universal heir or an heir with a universal title and who possess, totally or partially, the successional assets, based on this quality.

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[1] Art 1130 of the Civil Code states that "The universal heir or the heir with an universal title may, at any time, get the recognition of his quality as heir against any person who, claiming to be based on the title as heir, possess, totally or partially, the successional assets".

[2] See also, Gabriel Boroi and Liviu Stănciulescu, *Instituţii de drept civil în reglementarea noului Cod civil*, (Bucharest:, Hamangiu, 2012) 657; Fr. Deak, Romeo Popescu, *Tratat de drept succesoral*, 3rd Ed., 2nd Vol., (Bucharest:Universul Juridic, 2013) 352

[3] See also Mircea Mureșan and Ilie Urs, *Drept civil. Succesiuni* (Cluj-Napoca: Cordial Lex, 2006) 163

1. THE SEPARATION OF THE HEREDITY PETITION FROM OTHER CIVIL ACTIONS

a) The separation from the action for the recovery of possession. The action for recovery of possession is defined by Art 563 of the Civil Code, thus "The owner of an asset has the right to claim it from its possessor or from another person owning it without any right". This type of action is based on the quality as owner of the person to be inherited or of the heir, i.e. the plaintiff, while the heredity petition is based on the quality as universal heir of the plaintiff.

b) The heredity petition is different than the action for division by the fact using the latter one the plaintiff aims to receive his quota of the successional mass, while the defendant does not challenges neither his quality as heir nor his share.

c) The heredity petition delineates from the personal actions having as object the compelling of the defendant to pay a certain debt to the inheritance. Through this type of action the defendant challenges only the fact that he does not have a debt to the cujus, and thus to the inheritance, without challenging the quality as heir of the plaintiff.

2. LEGAL FEATURES OF THE HEREDITY PETITION

Starting from the legal definition and in relation to the differentiation above mentioned, the literature has identified the following legal features:

- It is a real action because the plaintiff who is the real heir seeks the dispossession of the defendant who is just an apparent heir;
- It is a split action because it can be submitted separately by any of the universal heirs proportional to their share of the inheritance;
- The establishment of their quality as heir is considered to be an imprescriptible because Art 1130 of the Civil Code expressly states that "the universal heir may, at any time, have his quality as heir recognized". In the old regulation, in the case in which it was requested

the refunding of the assets, in legal practice and in literature it has been considered that this action shall expire within 3 years, the general term for prescription starting from the date on which the plaintiff has concluded the documents as heir which were in contradiction with rights of the real heir[1].

3. PROCEDURAL ISSUES

The heredity petition falls under the competence of the court of first instance on whose territory is located the last domicile of the deceased in relation to Art 118 of the Code of Civil Procedure[2] and Art 94 Para 1 let. j) of the same code.

Considering that for the heredity petition, the plaintiff must prove his quality as universal heir, it is mainly considered that the means of evidence which has to be used is the one with writings, such as:

- The certificate of inheritance, stated by Art 114 of the Law No 36/1995 updated on the public notary and the notarial activity[3];
- Will;
- Acts of civil status.

Beside the documents other means of evidence may be introduced, such as the interrogation or testimonies, with the purpose of proving the quality as heir of the plaintif

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[1] See in this regard, Decision No 3583/19 December 2001 ruled by the Bucharest Court of Appeal – 3rd Civil Section, available at http://legeaz.net/spete-civil/succesiune-petitia-ereditate-caracter-prescriptibil-3583-2001,accessed on 19 October 2016

[2] Art 118 of the Code of Civil Procedure states that "(1) Regarding the inheritance, until the severance of the joint tenancy, are in the exclusive competence of the court from the last domicile of the deceased the following: 1. Requests regarding the validity or performance of the testament; 2. Requests regarding the inheritance and its burdens, as well as those regarding the claims the heirs might have one against another".

[3] Art 114 Para 2 and 3 of the Law No 36/1995 updated on the public notary and notarial activity state that "(2) The certificate of inheritance shall state mentions regarding the means establishing the extent of the successors' rights, as well as any mention justifying its issuance; (3) The certificate of inheritance proves the quality as heir, legal or testamentary, as well as the proof of the right to property of the accepting heirs for the assets of the successional mass, in the share due to each of them".

4. THE EFFECTS OF THE HEREDITARY PETITION

Admitting the hereditary petition has as main effect the recognition of the title as heir of the plaintiff, retroactively, from the date when the succession was initiated, regardless of the moment in which the action was registered or the decision was rendered. The decision of the court recognizing to the plaintiff the title as heir may be requested and rendered only after the initiation of the inheritance procedures[1].

The effects of the admission of the hereditary petition are stated by Art 1131 of the Civil Code: "(1) Recognizing the quality as heir compels the holder without right of the assets from the successional mass to return those assets with the application of the rules stated by Art 1635-1649; (2) Regarding the legal acts concluded between the holder without right of the successional assets and third parties, Art 960 Para 3 shall be properly applied".

These effects shall occur separately, namely shall aim either the relations between the real inheritor and the apparent one, or the relations between the real inheritor and third parties.

- ***Effects generated in the relations between the real inheritor and the apparent one***

Because through the admission of the hereditary petition, the court recognizes the quality as heir of the plaintiff, as a direct effect the apparent heir shall be compelled to return the successional assets.

As a rule, the return of the assets must be made in nature, but if the assets are lost or have been alienated, then the latter one shall be compelled to compensations[2].

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[1] Gabriel Boroi and Liviu Stănciulescu, *Instituții de drept civil în reglementarea noului Cod civil*, (Bucharest:Hamangiu, 2012), 658

[2] Art 1640 of the Civil Code states that "If the refunding cannot happen in nature because of the impossibility or a serious hindrance or if the refunding refers to the performance of services already performed, the refunding shall be operated by equivalent".

In the case of the total loss or alienation of the asset to be returned, the debtor of the obligation to return is compelled to pay the value of the asset, considered either at the moment when he first received it, or at the moment of the loss or alienation, according to the lowest of these values. If the debtor is of bad faith, or the obligation to refund originates from his guilt, then the refunding shall be made according to the highest value (Art 1641 of the Civil Code).

If the asset to be returned has fortuitously perished, the debtor of the obligation to return is liberated of this obligation, but he shall give to the creditor, if necessary, the indemnity received for this loss, or, if he did not received it, the right to receive such indemnity. If the debtor is of bad faith or the obligation to return originates from his guilt, he shall be liberated of this obligation at the moment in which is proven that the asset would have been lost and, in the case in which, at the moment of the loss, it would have already been returned to the creditor (Art 1642 of the Civil Code).

If the defendant was of good faith, he shall receive the fruits generated by the asset subjected to refunding and shall bear the expenses caused with their production. He does not owe any indemnity for the use of the asset, except the case in which this use has been the main object of the service and for the case in which the asset was, by its nature, subjected to a fast depreciation (Art 1645 Para 1 of the Civil Code).

If the defendant was of bad faith or when the refunding is imputable to him, it is compelled, after the compensation of the expenses made with their production, to refund the fruits which he obtained or could have obtained and to compensate the creditor for the use of the asset (Art 1645 Para 2 of the Civil Code).

- ***Effects generated in the relations between the real inheritor and third parties***

Given the fact that during his possession of the successional assets, namely during the period between the moment when he entered into possession of the inheritance and until the moment when the action submitted by the real inheritor was solved, the owner without right would

have concluded legal acts with third parties, acts regarding the assets, emerges the problem of maintaining them or not. The faith of these legal acts depends on their nature: the acts for administration or preservation and the acts of disposal that the owner without right has concluded with third parties[1].

Because the acts for preservation and administration have as effect the maintenance of the assets within the patrimony of the person performing them, the provisions of Art 960 Para 3, first line of the Civil Code shall be applied, namely shall remain valid, because are prosperous for the inheritance.

Regarding the acts of disposal concluded by the apparent heir and third parties, these shall be maintained if the conditions stated by Art 960 Para 3, second line of the Civil Code are fulfilled, namely:

- Are acts of disposal with onerous title;
- The third party who has concluded the act with the apparent heir was of good faith;
- There was a common error;
- The error of the third party to be invincible (the third party could not have known that the apparent heir is not the real successor).

If the act of disposal concluded by the apparent heir with third parties does not fulfil the above mentioned conditions, it shall be dissolved retroactively based on the principle of *resoluto iure dantis, resolvitur ius accipientis*, the apparent heir being compelled to refund the asset in nature, and the third party having the possibility to go against him by an action in eviction.

[1] See in this regard, Flavius Baias and Eugen Chelaru and Rodica Constatinovici and Ioan Macovei (coord.), *Noul Cod civil. Comentariu pe articole*, (Bucharest: C.H. Beck, 2012): 332-333; Liviu Stănciulescu, *Curs de drept civil. Succesiuni*, (Bucharest: Hamangiu, 2012): 222

CONCLUSIONS

Stated both by the Civil Code of 1864, as well as the New Civil Code, the institution of the heredity petition has a special practical importance, given the fact that its purpose is to establish through a legal action the quality as heir of the plaintiff. The action of the heredity petition can be submitted both separately, but it can also be analyzed by the court as a prejudicial matter, in the larger framework of an action for partition.

The admission of this action shall determine mainly the retroactive recognition of plaintiff as the real heir, and in subsidiary shall determine a series of effects of patrimonial nature both regarding the defendant – apparent heir, but also the third parties with whom he has concluded legal acts related to the successional assets.

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MEASURES TO ENSURE A HIGH LEVEL OF SECURITY AT THE EUROPEAN UNION EXTERNAL BORDERS

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Abstract:

The paper aims to highlight the importance of a new European security strategy, emphasizing the need for new measures to ensure a high level of security at European Union external borders.

The European Commission understands to make this its number one priority for the next period and in this regards we can observe the proposals made to realize its objectives in this area.

Key words: *European Union, Security, Measures, Borders*

INTRODUCTION

Nowadays, Europe has to continue to be a safe area for those who want to escape persecution and also to be attractive for the talent and entrepreneurship of students, researchers and workers. To achieve this, we can see that is very difficult to balance the need to respect the international commitments and European values and the need to secure the borders.

So, the need for a set of measures and a clear and consistent common policy appears. In this context, Member States need to establish

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a common policy together with the EU institutions, the International Organisations, the civil society, the local authorities and the third countries.

The European Union`s objectives are to create an area of freedom, security and justice, without internal frontiers, in compliance with the rule of law and fundamental rights. But recently many security threats are becoming more varied and have as source instability, violence and terrorism and that requires a coordinated policy at European level.

1. STRATEGIES TO ENSURE A HIGH LEVEL OF SECURITY WITHIN THE EUROPEAN UNION

By the Communication COM (2015) 185 final from 28.4.2015 the European Commission established The European Agenda on Security. The European Commission tries to set a long term strategy that can ensure a secure area for its citizens and for the Member States.

So, the strategies meant to ensure a high level of security within the European Union have to be regulated in a coordinated and smart way. At EU level important strategic objectives were set within the Strategy of 2010-2014 regarding the internal security[1] and we strongly believe that these objectives should continue to be followed within the next period of time.

The European Commission`s Communication from 28.4.2015, that we have mentioned above set the most important elements of the security strategy and they are:

- *Better information exchange*. The European Commission established various ways to facilitate the exchange of information between national law enforcement authorities. In this context, we can observe that the Schengen Information System (SIS) is the most important tool that the

[1] The Internal Security Strategy for the European Union: "Towards a European Security Model" (Internal Security Strategy) was adopted by the Council on 25-26 February 2010 and endorsed by the European Council on 25-26 of March 2010

national and European authorities can use[1]. Thus, Member States can be responsible for the security of the entire European Union when they have to control the external borders. On 6 April 2016, the European Commission adopted the legislative proposal for Smart Borders that contains: a Regulation for the establishment of an Entry/Exit System and a proposed amendment to the Schengen Borders Code to integrate the technical changes needed for the Entry/Exit System. This proposal aims to improve the management of the external borders of the Schengen Member States, and also to facilitate border crossings for pre-vetted frequent third country national (TCN) travelers[2].

- *Increased operational cooperation.* The cooperation between authorities of the Member States[3] represents a field regulated by the Lisbon Treaty that provides legal ground to make operational this kind of cooperation. So, it is important to mention that the EU agencies play a crucial role in supporting operational cooperation because they contribute to the assessment of common security threats, they help to define common priorities and they facilitate cross-border cooperation and prosecution and Member States should use the support of the agencies to have a common action.

- *Supporting action: training, funding, research and innovation*. Though, the first and the second element mentioned above are the most important ones, the effectiveness of cooperation tools relies on law enforcement officers in Member States knowing how to use them. So, the EU provides support to security-related actions through training, funding and the promotion of security-related research and innovation. For 2018, the mid-term review of the Internal Security Fund is scheduled and that will reprioritise if necessary. Also, research and innovation is very important

[1]Competent national authorities can use it to consult alerts on wanted or missing persons and objects, both inside the Union and at the external border.
[2]http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/smart-borders/index_en.htm, accesed on 1.11.2016
[3] Dana Alexandru, *Comparative study of local authority competences in Europe, Local electoral system in Romania: a case study*, (Bucharest: Wolters Kluwer, 2015), 78

because in this way security threats and their impacts on European societies can be identified.

2. RECENT DEVELOPMETS REGARDING THE SECURITY MEASURES AT THE EUROPEAN UNION EXTERNAL BOARDERS

In April 2016 was launched the Communication on Stronger and Smarter Information Systems and along with the idea of establishing an EU Travel Information and Authorisation System (ETIAS)[1]. This system will bring together information in order to assess and manage the potential irregular migration and security risks represented by third country nationals visiting the EU.

Very soon, on 16th November 2016 the Commission published the Proposal for a Regulation of the European Parliament and of the Council establishing a European Travel Information and Authorisation System (ETIAS).

By article 4 of the Proposal for a Regulation of the European Parliament and of the Council establishing a European Travel Information and Authorisation System (ETIAS)[2] are set the most important objectives of the European Commission regarding the security policy which can be obtained by the European Travel Information and Authorisation System:

- to contribute to a high level of security by providing for a thorough security risk assessment of applicants;
- to contribute to the prevention of irregular migration by providing for an irregular migration risk assessment of applicants prior to their arrival at the external borders crossing points;

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[1] See also Communication from the Commission to the European Parliament, the European Council and the Council. Enhancing security in a world of mobility: improved information exchange in the fight against terrorism and stronger external borders, Brussels, 14.9.2016 COM(2016) 602 final

[2]The Regulation also will amend Regulations (EU) No 515/2014, (EU) 2016/399, (EU) 2016/794 and (EU) 2016/1624

- to contribute to the protection of public health by providing for an assessment of whether the applicant poses a public health risk prior to their arrival at the external borders crossing points;
- to enhance the effectiveness of border checks;
- to support the objectives of the Schengen Information System (SIS) related to the alerts in respect of persons wanted for arrest or for surrender or extradition purposes, on missing persons, on persons sought to assist with a judicial procedure and on persons for discreet checks or specific checks;
- to contribute to the prevention, detection and investigation of terrorist offences or of other serious criminal offences.

The Member States have a very important role in implementing the ETIAS. So, each Member State shall designate a competent authority as the ETIAS National Unit that will ensure that the data stored in the applications files and in the ETIAS Central System is correct and up to date; will examine and decide on travel authorisations' applications rejected by the automated application process, and will carry out the manual risk assessment; will ensure coordination between ETIAS National Units and Europol concerning the consultation requests; provide applicants with information regarding the procedure to be followed in the event of an appeal; act as central access point for the consultation of the ETIAS Central System.

The ETIAS Information System has to ensure the interoperability with other information systems such as the Entry/Exit System (EES)[1], Europol Information System (EIS)[2], the Visa Information System (VIS)[1],

[1] The proposed Entry-Exit System will allow for the effective management of authorised short-stays, increased automation at border-controls, and improved detection of document and identity fraud. The system will apply to all non-EU citizens who are admitted for a short stay in the Schengen area (maximum 90 days in any 180 day period). For more information see http://europa.eu/rapid/press-release_IP-16-1247_en.htm

[2] Launched in 2005, the EIS contains information on serious international crimes, suspected and convicted persons, criminal structures, and offences and the means used to commit them.

the Schengen Information System (SIS)[2], the Eurodac[3], the European Criminal Records Information System (ECRIS)[4].

CONCLUSION

Nowadays, the migration, the refugee crises and also the terrorist attacks have put to a very hard test the EU security strategy.

Member States and also the European citizens wish to feel secure within the EU boarders. So the security strategy of the European Union needs to change in order to meet its citizens expectations. To continue to be a space of free movement, the European space have to be first a secure area for its citizens that can also facilitate the crossing of EU external borders in a world of mobility.

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[1] The Visa Information System (VIS) allows Schengen States to exchange visa data. It consists of a central IT system and of a communication infrastructure that links this central system to national systems.

[2] The Schengen Information System (SIS) is a highly efficient large-scale information system that supports external border control and law enforcement cooperation in the Schengen States.

[3] EURODAC, which stands for European Dactyloscopy, is the European fingerprint database for identifying asylum seekers and irregular border-crossers.

[4] The computerized system ECRIS was established in April 2012 to create an efficient exchange of information on criminal convictions between Member States.

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THE NONPERFORMANCE EXCEPTION OF THE CONTRACT - SPECIFIC EFFECTS OF THE SINALAGMATIC CONTRACTS

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Livia PASCU[2]

Abstract:

Simultaneity and interdependence rule of performances execution is the basic rule in sinalagmatic contracts, giving rise to specific effects.

A part is entitled to refuse the execution of their obligations until the other part fulfill its own obligation, except this possibility representing the exception of nonperformanceof the contract – exceptio non-contract adimpleti contractus.

The exception of nonperformance suspend the execution of benefit of it invokes, similar to the situation when he would benefited from a deadline.

The part entitled to refuse the execution of their obligations can not be liable to pay default damages on the grounds that would have delayed the execution of benefits they owe to another part.

The contract and its binding force does not cease, being only suspended its execution, so the contracting parties are not released from their obligations.

The nonperformance exception of the contract may be considered at the same time a defense of the party who invokes, but also a means of pressure on the other part to accomplish the obligation.

Key words: *The nonperformance exception of the contract and its effects regarding the binding force of the contract*

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INTRODUCTION

The essential characteristic of sinalagmatic contracts is the reciprocity and interdependence obligations of the parties, each part while being the creditor, respectiv debtor of the other part; the obligation incumbent to one of the parties it has legal cause in mutual obligations of the other part, both obligations being interdependent.

If it were admitted that a part is bound to execution, even if the other part does not execute its own obligation, it would lead to breaking the link of interdependence from the two obligations, bond which is the essence of the sinalagmatic contract.[1]

Simultaneity and interdependence rule of performances execution is the basic rule in sinalagmatic contracts from arising specific effects.

A part is entitled to refuse execution of their obligations until the other part fulfill its own obligation, this possibility representing the nonperformance exception of the contract – *exceptio non adimpleti contractus.*

1. A characteristic feature of the contracts, in general, is their obligatory force, legal conventions having the power of law between the contracting parts.

The nonperformance exception of the contract is based precisely on the binding nature of the contract, on the necessary fulfillment of all the correlative obligations deriving from sinalagmatic contract, representing a specific form of sanction of the breach the contract compulsoriness.[2]

From a historical perspective, the partial origin of the institution is found in roman law and is linked to the principle *pacta sunt servanta*. Nevertheless, the expression today of nonperformance exception is found only in medieval canonic law where was linked to the same principle of

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[1] Gabriel Boroi and Livu Stănciulescu, *Instituţii de drept civil în reglementarea Noului Cod Civil* (Bucharest: Hamangiu, 2012): 179

[2] Constantin Stătescu and Corneliu Bârsan, *Drept civil. Teoria generală a obligaţiilor, IX edition revised and added* (Bucharest: Hamangiu, 2008): 86

binding force and where it considers that its application is suspended for nonperformance contract by one part. Basis of this exception is one moral nature and is explained by imperative respect of the given word. Thus, the one who pretended performance of a contract which was not entitled to it, while he himself not honor given word (*fragenti fidem non est fides servanda*).[1]

Headquarters of nonperformance exception matter is represented the provisions of Article 1556 Civil Code.

By comparison, the Civil Code from 1864 regulate this law issue only in certain cases, in matters of sale (art. 1322 Civil Code), exchange (art. 1407 Civil Code), deposit (art. 1619 Civil Code), but the doctrine and jurisprudence were unanimous in asserting its general applicability to all sinalagmatic contracts. Thus, the task of providing a single legal regime to nonperformance exception it has returned to doctrine.[2]

The nonperformance exception of the contract was defined as a defense available to one part of the sinalagmatic contract, in case of it is seeking enforcement obligations as incumbent, without the part alleging this enforcement to execute its own obligations.[3]

To invoke the nonperformance exception of the contract is necessary that mutual obligations of the parts to be under the same sinlagmatic contract, issue expressly provided by article 1556 Civil Code.

So it is not enough that two persons to be both creditor and debtor to one another, but is necessary that this situation stems from the same legal situation.

They must distinguish between the nonperformance exception and right of retention.

Under the nonperformance exception, it can reach a situation where a part which owes a good refuses to hand over - what seems to be assimilated to the retention right. In reality the two concepts remain

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[1] Liviu Pop and Ionuț-Florin Popa and Stelian Ioan Vidu, *Tratat elementar de drept civil. Obligațiile conform noului Cod civil* (Bucharest: Universul Jurdic, 2012): 272

[2] Flavius-Antoniu Baias and Eugen Chelaru and Rodica Constantinovici and Ioan Macovei and co., *Noul Cod civil, Comentariu pe articole (*Bucharest: C.H. Beck, 2012): 1657

[3] Stătescu and Bârsan, *Drept civil. Teoria...*:86

different, even if their result can be the same: in the case of retension right, the link between debt and good is one of fact, while in the situation of nonperformance exception, the link is legal one and result even from interdependence of contractual obligations.[1]

Another condition for raising the exception of breach of contract concerns the need of a non-performance of the cocontractor, non-performance which may be even partial, but significant enough.

In principle, the non-performance cause does not interest. The cause of non-performance may be the fault of debtor or force majeure that prevents the debtor to perform the obligation. But if non-performance due to force majeure is final, we will be in the situation of contract termination for impossibility fortuitous of enforcement.

Who invoke the exception of non-performance must be prepared to perform its obligation and to adduce evidence of that.

Non-performance must be sufficiently important to give the right to this remedy.

If non-performance is insignificant and, according to the circumstances, the refusal of enforcement would be contrary to good faith, the other part may not invoke the exception of non-performance. Determining the importance of non-performance is a matter which will be decided by the court, taking into account the circumstances of each case. Also, except for non-performance, must be proportional to non-performance in accordance with article 1556 par. (1) Civil Code that talk of "appropriate measure".[2]

Non-performance do not due to the fact of the person who invoke the exception of non-performance, which prevented him from another to perform his obligation, reprezint other condition to invoke exception of non-performance.

Non-execution creditor attributable constitute an impediment to the application of any remedy for non-performance which the creditor

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[1] Pop and Popa and Vidu, *Tratat elementar de drept civil. Obligațiile... :* 274

[2]Baias and Chelaru and Constantinovici and Macovei and co., *Noul Cod Civil. Comentariu...:* 1658

himself prevented her (Article 1517 Civil Code). It is what is known as *mora creditoris.*[1]

In this respect, the jurisprudence has held that the promissory seller may not invoke in his favor the fact that the promissory buyer has not paid the price stated in the preliminary contract of sale, the date stipulated as such failure attributable to it even promissory seller, what has not fulfilled the obligation, to obtain all necessary certificates formalities to start selling until the date set in pre-contract, pay the price being subordinated to this formality.[2]

The mutual obligations must both be chargeable, the parties have not agreed that an execution time of one of the mutual obligations. If such a term has been agreed, it means that the parties have renounced the simultaneous execution obligations and therefore don't exist basis for invoking the exception of non-performance.

The lack of enforcement of simultaneity may also derive from the nature of the obligation or from an express provision of the law in these cases invoking the exception is not possible.[3]

It was also expressed the view thatin the case an obligation affected by the suspensive term may be invoked except for non-performance anticipated.

Thus, it is possible that under the stipulation of a suspensive term of enforcement one of the obligation to have executed before the other. However, is it possible to invoke the exception of non-performance if the one who is ready to execute has every reason to believe that the other part will not perform matured obligations? The answer, despite an express provision during exception non-performance, must be affirmative. The situation refers to remedy, very frequently found in comparative law, *the exception anticipated non-performance*. This remedy is fully permissible in the context of the current legislative: first,

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[1] Pop and Popa and Vidu, *Tratat elementar de drept civil. Obligaţiile...:* 276

[2] Appeal Court Bucharest, 3th Civile Section, Decision no. 2115/2007 in Viorel Terzea, *Noul cod civil adnotat cu doctrină şi jurisprudenţă* (Bucharest: Universul Juridic, 2014): 595

[3] Stătescu and Bârsan, *Drept civil. Teoria...:* 87

and in the case of the additional period of execution, if the debtor declares, before it expires, it will not perform its obligations, the creditor is entitled to invoke anticipate any remedies considers suitable (Article 1522 par. (4) Civil Code) - exactly the same reason subsists and in the case the standstill period of execution; but the primary argument that justifies the existence of this exception is given by the regulation of standstill period enforcement. Inter alia, Article 1417 Civil Code regulates very extensive manner deprived of the benefit the standstill period. Cases of revocation provided by this text clearly entitle the creditor to invoke an exception anticipated non-performance.[1]

2. Exception of non-performance is excluded by lack of simultaneity obligations. Thus exception can not be opposite of the part that by law, the parties intentions, habits or after circumstances is obliged to execute obligation before the other part. The exception can not be opposed to that of the contractors benefiting from a period to perform its obligations.

To the extent that they meet the conditions specified above, the entitled part may invoke the exception of non-performance of the contract directly against The other side, without requiring formal notice to the other party or referral to court, this operating exclusively in the power of the part invoke.

Exception of non- performance of a contract may be invoked before a court or if the invocation exception was made improperly, in which case the opposed by disputes fulfillment of specific conditions this exception, either as a defense by defendant to counter the applicant's complainant.[2]

The jurisprudence was retained: the fact that the courts lacked expressly reject exception of non-performance contract invoked by the defendant do not means a nonpronouncing thereof on a procedural exception or non-analysing of any appeal reason, because invoking the

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[1] Pop and Popa and Vidu, *Tratat elementar de drept civil. Obligațiile...:* 275

[2] Baias and Chelaru and Constantinovici and Macovei and co., *Noul Cod Civil. Comentariu...,* 1658

failure to apply the defendant into a dispute concerning the reciprocal obligations is not an procedural exception in the proper sense of the term and of the law, but only a defense which concerne and call into discussion the problem before the Court. As such, failure to enforce the contract, based on the principle of reciprocity and interdependence contractual obligations, is no procedural exception itself and also no background exception in the legal sense, but a defense that one part, usually the defendant, it may invoke and which the court pronounce on the evidence administrated in the case.[1]

The exception of non- performance suspend the enforcement of that invokes, similar to the situation when he would be benefited from a deadline. So provisional contract remains unfulfilled, but there are still parts being released from their obligations. In other words, the effect of the non-performance exception is to suspend the binding force of the contract.[2]

The effect of invoking the non-performance exception is produced immediately.

In judicial practice was established: by invoking this exception, the part invoking it only obtain a suspension of its obligations until the other part will fulfill the obligations incumbent. As such, as soon as these obligations will be met the suspensive effect of the exception of failure ceases.[3]

The entitled part to refuse the performance of its obligations can not be required to pay moratorium damages-interest on the ground that would have delayed the execution of benefits owed to another part.

If any of the necessary conditions invoking the exception is not met, the refusal of enforcement will entitle the other part to claim compensation on the basis of contractual liability.

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[1] The High Upper Bench, Commercial Section, Decision no. 3786/2008 in Buletinul Casaţiei nr. 2/2009 in Viorel Terzea, *Noul cod civil adnotat...*, 595

[2] Pop and Popa and Vidu, *Tratat elementar de drept civil. Obligaţiile...,* 277

[3] The High Upper Bench, Commercial Section, Decision no. 3865/2005, www.legalis.ro in Viorel Terzea, *Noul cod civil adnotat ...*, 598

The exception of non-performance may be opposed not only to another part, but to all persons whose claims are based on that contract. The exception of non-performance may be invoked against creditor's cocontractor or in the case they, by way on oblique action, exercise their debtor's rights, when they should be a good pursue which is on contractual basis in the hands of invoking the exception. But, except for non-performance can not be opposed to third parts who claim a personal right, absolutely distinct from the contract.[1]

It expressed the opinion that, subject to the possibility of completing the formalities advertising the exception for certain categories of goods (especially real estate), excipiensul bear the risk of contract in relation to the third part in the sense of having been engaged in a contractual relationship lacking through its execution. The solution is necessary for several reasons: from observation of restricted conception of the legislature in regulating the exception; of its specificity to be invoked, usually between parts without court intervention; Finally, if it would have followed its effects enforceability against third parts, the legal text would have contained express provisions relating to the need to fulfill publicity measures, similar to Article 1552 of the Civil Code concerning the declaration of rescission.[2]

CONCLUSION

Summarizing the exception of non-performance contract can be considered at the same time a defense of the part who invokes, but also a means of pressure on the other part to fulfill its obligation.

The exception of non- performance is a preventive remedy in the sense that prevents the situation where one part sees its own obligation enforced and can not obtain performance by the other part.

The contract and its binding force does not cease being only

[1] Pop and Popa and Vidu, *Tratat elementar de drept civil. Obligațiile...,* 277

[2] Baias and Chelaru and Constantinovici and Macovei and co., *Noul cod civil adnotat...,* 1658

suspended its execution, so the Contracting Parts are released from their obligations.

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JUSTIFICATORY CAUSES IN EUROPEAN PENAL LEGISLATIONS

Cătălin BUCUR [1]

Abstract:

In our penal legislation, Chapter 2 of the new Criminal Code is dedicated to the justificatory causes, circumstances removing the second of the essential features of the offence – its unjustified feature. We are talking about in rem circumstances, their effects being extended also for the participants.

We are in the presence of justificatory causes when the penal law exceptionally allows the commission of certain offences prohibited by it, and the author when committing them, might say "fecisediurefeci" (I did it, but based on a right).

The area of justificatory causes is mentioned also by other European legislations, such as the Italian, Spanish, French or German ones.

Key words: *justificatory causes, European states, self-defense, state of necessity, victim's consent, the performance of a right or the compliance with an obligation*

INTRODUCTION

The justificatory causes are the cases stated by the law, in the presence of which an offence according to a norm of incrimination (typical) ceases to be in contradiction with the entire state of law, become a premise (without anti-legality)[2].

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[2]G. Antoniu, "Cauzele justificative în Proiectul noului Cod Penal", *R.D.P*. 2 (2004), 11.

It assumes that a specific action be compared with the content of the incrimination norm in order to establish if it represents the typical features of the behavior described by the incrimination norm and, after that, if it is justified by a legal norm allowing its commission under certain circumstances.

Between the justificatory causes and the non-attributable causes there are significant differences, as long as the first ones remove the anti-legality of the offence, namely its non-compliance with the general order, while the last ones remove the guilt as element of the offence's typicality.

The concept of typicality expresses the compliance of the action with the rule of law stated by the incriminating norm, while the concept of anti-legality expresses the non-compliance of the action with the order of law's requirements, in its ensemble[1].

The justificatory causes stated by our current Penal Code have no correspondent in the old Penal Code; the legislator at that time did not state this institution separately.

The *Italian Penal Code* – Title 3 "Offences" states the justificatory causes together with the causes removing the guilt, using the formula "non è punibile…" (is not punishable).

The *French Penal Code* – the French have stated the justificatory causes in Title 2 "The penal responsibility", Chapter 3 "the causes of irresponsibility or mitigation of responsibility", using the same formula for approximatively all causes "n'est pas pénalementresponsable…" (is not criminally liable).

The *German Penal Code* – justificatory causes are stated differently than the cause removing the guilt; Chapter 2, Section 4 states the "Self-defense and state of necessity", using the phrase "against the law".

The *Spanish Penal Code* – also the Spanish legislator states the justificatory causes together with the ones removing guilt in Title 1 "Offences", Chapter 2 titled "Causes exonerating the penal liability", using the phrase "are relieved of criminal liability".

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[1]G. Antoniu, "Cauzele justificative în Proiectul noului Cod Penal", 12.

From the analysis of some foreign penal codes, we have noticed that two solutions regarding the justificatory causes emerged, namely that these are stated together with the causes removing responsibility, and in the second case these are stated differently from the causes relieving the guilt.

1. SELF DEFENSE

The new Criminal Code in relation to the old Code. The first distinction refers to the fact that in the new Criminal Code, the justificatory causes operate in rem in comparison to the old Code, where they operated in personam; in this way was replaced the wording "self-defense" with the one of "state of self-defense", and the "collective interest" with the one of "general interest". The last differentiation we shall mention refers to the regulation of the "presumed self-defense" in the new Code, but also the waiving of the "justified excess".

The *Italian Penal Code* – states the self-defense in its Art 52, mentioning that "It shall not be punished the one who has committed an offence due to the need to protect one of his assets, of another one against the real danger of an unjust offence, with the condition that the defense be proportional with the offence". A distinction from our Criminal Code must be noted, namely that the Italian legislator does not state for the offence to be material and direct.

The *German Penal Code* – states it in Art 32 "It is not an offence the action committed in self-defense by a person. Is in self-defense the person who defends himself in order to reject an imminent and illegal attack, directed against him or against another person".

The *French Penal Code* – Art 122-5 states that "Is not criminally liable the person who, in front of certain acts of unjustified violence directed against him or another person, fulfilling simultaneously an action of protection, imposed by the necessity to defend thyself or another person, excepting the disproportion between the means of protection used and the seriousness of the offence. Neither is criminally liable the person who, in order to interrupt the performance of an offence or of a crime against an asset, performs an action of defense, other than

voluntary homicide, when this action is strictly necessary for the purpose aimed since the means used are proportional with the seriousness of the offence".

The *Penal Code of the Republic of Moldova* – states in Chapter 3 the causes removing the criminal feature of the offence. Thus, Art 36 states the self-defense: "(1) Does not represent an offence the action, stated by the criminal law, committed in self-defense. (2) Is in self-defense the person who commits the offense in order to reject a direct, immediate, material and real attack, pointed against him, against another person or against a public interest and seriously endangers the physical person, the rights of the person aimed or the public interest. (3) Is in self-defense the person committing the offense, stated by Para 2, in order to prevent the violation, accompanied by the violence against the person or the person's health or by the threat with such violence, in a household or in another room".

2. STATE OF NECESSITY

The new Criminal Code in relation to the old Code. Though the texts are mainly similar, there are also certain differentiations between the two codes. The state of necessity is placed among the justificatory causes in the new Criminal Code, while in the old code it represented a cause which removed guilt. Several terms have been replaced, namely the "public interest" with the "general interest", "imminent" with "immediate", "other person" with "the person".

The *Italian Penal Code* – according to Art 54, the state of necessity represents a cause for non-punishment (non e punibile) of which beneficiates the person who has committed an offence being constrained by the necessity of saving thyself or others from a present danger, from a serious prejudice caused to the person, danger which has not been voluntarily generated by the person acting in state of necessity and which could not have been avoided in any other way and only if the perpetrator's action shall be proportionate with the danger.

The *German Penal Code* – states the state of necessity in two forms: as a justificatory cause and as an excuse.

Art 34 states that the necessity is justified when a person commits an offence in order to save the life, freedom, honor, property and other similar rights for himself or for another person.

The *French Penal Code* – refers to the state of necessity as being of state of irresponsibility or diminution of irresponsibility, thus, Art 122-7 states that "It shall not be criminally liable the person who in front of a present or imminent danger threatening his person, another individual or an asset, commits an action necessary to save the individual or the asset, except the case of a disproportion between the means used and the seriousness of the threats".

The *Penal Code of the Republic of Moldova* – the state of necessity is mentioned among the causes waiving the penal feature of the offence, mentioning that "(1) It does not represent an offence the action stated by the criminal law, committed in extreme case of necessity; (2) Is in extreme case of necessity the person who commits the offence in order to save the life, bodily integrity or health of himself or of another person or a public interest from an imminent danger which cannot be removed in any other way; (3) Is not in extreme case of necessity the person who, at the moment when the offence is committed, realizes that he may cause more serious effects than the ones which may have occurred if the danger would not have been removed.

3. THE PERFORMANCE OF A RIGHT OR THE FULFILMENT OF AN OBLIGATION

The new Penal Code in relation to the old Code. Art 21 of the new Penal Code does not have any correspondence in the old regulation, but were mentioned by the Codes of 1864 and 1936, in other words.

The *Italian Penal Code* – the performance of a right or the fulfilment of an obligation is an action waiving the penalty. According to Art 51, the performance of a right or the fulfilment of an obligation stated by the legal norm or by a legitimate order from a public authority, waives the penalty.

The *German Penal Code* – it includes within the category of justificatory causes only the self-defense and the state of necessity.

The *French Penal Code* – according to Art 222-4 "is not criminally liable the person who has performed an action ordered or authorized by the law or other regulations" and in the following paragraph it is stated that "is not criminally liable the person who performs an action ordered by a legitimate authority, except the case in which this action is truly legal".

4. THE CONSENT OF THE VICTIMIZED PERSON

The new Penal Code in relation to the old Code. Art 22 of the new Code does not have any correspondence in the old regulation. In the prior legislation, the consent had the value either as a constitutive element of an offence, or a cause for reducing the punishment.

The *Italian Penal Code* – states in Art 50 that "It cannot be punished the person to harms or endangers a right with the consent of the person who may order it", using as phrase "non e punibile" (is not punishable).

The *German Penal Code* – states in Art 227 that "the action by which a person causes a bodily harm to other individual with the latter one's consent is considered an offence only if it represents a violation of good morals".

The *Spanish Penal Code* – Art 155 states that "For bodily harm offences, if the action was committed with the valid, expressly given, free and spontaneous consent of the victim, the penalty inferior by one or two degrees shall be applied. It shall not be valid the consent given by a minor or a disabled person".

CONCLUSION

The justificatory causes are stated in the Spanish, French, Italian, German or Moldavian legislations in a similar manner to the Romanian one.

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GUIDELINES REGARDING THE BANK RECOVERY AND RESOLUTION DIRECTIVE AND RESPONSIBILITY IN THE BANKING ACTIVITY (I)

Adriana PÎRVU[1]

Abstract:

Although it has been almost 10 years since the 2008 economic crisis, its consequences are still being felt and it seems that all of us still have many lessons to learn from this phenomenon.

The financial crisis affected everyone. Its consequences were difficult to bear even by persons or entities that were considered almost invincible, at least at the time, as was the case of credit institutions.

Regardless of the "role" that the latter had the financial crisis, the fact of the matter is that credit institutions required financial support in order to survive.

The lack of appropriate instruments at EU level needed for the effective management of the situation of the credit institutions that were in difficulty led to the involvement of states in saving them by using taxpayers' money, measure that did not escaped more or less justified criticism.

Key words: *financial crisis, banks, resolution, internal recapitalization, resolution instruments*

INTRODUCTION

Directive 2014/59/UE to institute a framework for the recovery and resolution of credit institutions and of investment companies (Bank

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Recovery and Resolution Directive – BRRD)[1] emerged precisely with the purpose of placing at the disposal of the states the necessary instruments „in order to intervene early and quickly enough in the case of a nonviable institution or that was on a path to enter a difficult situation, in order to guarantee the continuity of its critical financial and economic functions, at the same time reducing to a minimum the impact of the difficult situation of the institution on the economy and the financial system"[2].

The state intervention to save credit institutions started to be felt especially after the Great Depression of 1929-1933. Thus, it is considered that up until that moment the bankruptcy of a bank lead, first of all, to the loss of the bankers' fortunes, the depositors also registering collateral losses. Subsequently, between the two world wars, and „in order to avoid entering a crisis spiral", the state began to intervene by awarding loans to the banks. This mechanism, though considered imperfect, was considered to be ensuring an economic balance, as well as financial- banking stability and social peace" [3].

The new regulations applicable for the distribution of assignments in the case of a banking resolution are determined by the Bank Recovery and Resolution Directive (BRRD), adopted by the Parliament in April of 2014. The Directive stipulates resolution modalities for banks in difficulty without the need of salvage actions financed by the tax payers, by applying the principle according to which the losses must be supported mainly by its shareholders and creditors, and not by using state funds[4].

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[1] http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A32014L0059, accessed on 29.09.2016, at 16.35.

[2] The exposition of motives of the Directive, available at http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A32014L0059, accessed on 29.09.2016, at 16.30.

[3] L.Rebegea, cit. by D.Străuț, "A dangerous precedent: seizing the money from the banks would be possible, after the decision of the Court of Justice of the European Union", article available on http://adevarulfinanciar.ro/articol/un-precedent-periculos-confiscarea-banilor-din-banci-ar-fi-posibila-dupa-o-decizie-a-curtii-de-justitie-a-uniunii-europene/, accessed on 28.09.2016, at 17.30.

[4] http://www.europarl.europa.eu/ftu/pdf/ro/FTU_4.2.4.pdf

At a first sight, the Directive found the optimum solution to such situations, without driving the responsibility of persons without fault in the production of the difficult situation of the credit institution. The ones that have to undergo such a risk are mostly the bank's private investors, its main shareholders. They are the ones that must ensure financial support in such situations, before the European states or the tax payers. By processing in this way, the Directive imposes the raise in discipline and responsibility of credit institutions, which will have to pay more attention to the risks they assume[1]. However, the Directive maintains the possibility of a public intervention to face the threats that the banking and financial markets experience.

The main responsibility for preventing and solving such problems is accrued to credit institutions. These must elaborate the recovery plans and update them regularly, determining the measures that need to be taken in order to reestablish their financial position. „These plans must be detailed and they must be based on realistic hypotheses, applicable to a series of solid and serious scenarios (...) The institutions should have the obligation to present their plans to the competent authorities for a complete evaluation, which would determine, among other things, if these plans are comprehensive enough and if they could restore in a timely manner the viability of the institution, even in times of grave financial difficulties" [2].

Normally, a credit institution that tends to reach a difficult state should be liquidated through the usual insolvency procedure. However, it is considered that by undergoing such a procedure the financial stability would be endangered, it would interrupt the course of critical functions and the protection of the depositors would be affected. These are circumstances that may be the object of public interest, situation in which

[1] "EU Bank Recovery and Resolution Directive 'Triumph or tragedy?'", available on https://www.pwc.com/im/en/publications/assets/pwc_eu_bank_recovery_and_resolution_directive_triumph_or_tragedy.pdf, accessed on 29.09.2016, at 17.30.

[2] Exposition of motives by the Directive, accessible at http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A32014L0059, accessed on 29.09.2016, at 16.30.

the resolution procedure may be triggered, and the resolution instruments can be applied[1].

The resolution is final as being „a process of reorganization of a credit institution, which follows the insurances of the continuity of its essential functions (payment options, deposits, etc.) offered to its clients, reestablishing its trust, totally or partially, and the liquidation of the residual part through the usual insolvency procedure". The entire process is managed by an authority designated by the legislator for this purpose, which disposes of a set of specific instruments and competences[2].

The resolution is a measure that has as main objectives (article 31 of the directive):

- Ensuring the continuity of the critical functions of the institutions that are subject to resolution;

- Avoiding significant negative effects on the financial stability, especially by preventing contagion, including on the infrastructures of the market and by maintaining the market discipline;

- Protecting public funds by reducing to a minimum the extraordinary public financial support;

- The protection of depositors that enter under the incidence of the legislation regarding the deposit assurance;

- Protecting the clients' funds and assets.

The Directive indicates four resolution instruments that can be applied to an institution (article 37 of the directive):

- Selling the business (article 38 paragraph (1) of the directive) – the resolution authority realizes the transfer of shares, of other property instruments issued by the institution in resolution or the transfer of any category of assets, rights or liabilities of the institution, to a buyer that is not a bridge institution;

- The bridge institution (article 40 of the directive) – the resolution authority ensures the transfer of shares, of other property instruments issued by the institution in resolution or the transfer of any category of

[1] Ibidem.

[2] http://www.bnr.ro/Intrebari-frecvente-13774-Mobile.aspx, accessed on 29.09.2016, at 15.30.

assets, rights or liabilities of the institution to a bridge institution, juridical person especially created with this purpose, which is totally or partially under the ownership of one or several public authorities and is managed by the resolution authority;

- The separation of assets, which is applied only in conjunction with another resolution instrument – the resolution authority ensures the transfer of shares, of other ownership instruments issued by the institution which is in resolution or the transfer of any category of assets, rights or liabilities of the institution to one or more juridical persons, called vehicles of asset management, and that are totally or partially under the ownership of one or more public authorities and under the control of the resolution authority, in order to maximize their value by means of a possible sale or by their orderly liquidation;

- Internal recapitalization (bail-in – article 43 of the directive) – is the instrument through which the resolution authority exercises its competence of reducing the value and/ or conversion into capital titles of certain debts of the credit company under resolution, in order to absorb the losses and to recapitalize the institution enough to be compliant with the authorization requirements and to continue the activities for which it was authorized, as well as maintaining the market's trust. This measure should always be preceded by the absorption of the losses by the shareholders and by the owners of other instruments of capital.

CONCLUSION

As a result of the information presented, we consider that baking resolution and, more specifically, internal recapitalization, are measures that needed to be regulated, especially in the current economic, social and political context. We disagree with the fact that these measures lead to the infringement of the depositor's right of property, as long as these measures, the conditions and means to apply them are public and the depositors are informed regarding the risk they are exposed to.

The Directive allows national authorities of the state in which a banking institution is in difficulty to tackle the crisis situation on three levels:

- Prevention – it imposes the realization of adjustment plans and their constant updating by banks and the constitution of a resolution fund which would be financed by the banking sector and that could be utilized when required. It is considered that the resolution fund could be used to:

● offer temporary support to the banks that require resolution (under the form of loans, guarantees, acquisition of assets or capital for the bridge banks);

● compensate shareholders and creditors, but only if their losses during the internal recapitalization procedure exceed the ones they would have experienced during the insolvency procedures;

● absorb the losses or recapitalize a bank in specific and exceptional cases.

- Early intervention – the resolution authorities can intervene before the irremediable decline of the bank's situation requesting the application of some urgent reforms, the drafting by the bank, together with its creditors, of a plan to restructure debt. Moreover, the resolution authorities have the possibility to make changes at the bank's management level, naming special or temporary administrators;

- Resolution – stage in which the resolution authorities can opt between:

● selling a part of the institution in difficulty;

● creating a bridge bank to continue the most important activities;

● separating the good assets from the toxic ones (so that the latter ones be transferred to an asset management entity)

● applying the measure of internal recapitalization[1].

The provisions of the Directive were translatable in our country through Law no. 312/2015 regarding the recovery and resolution of credit institutions and investment companies, as well as for the amendment and completion of some legislative documents in the financial field. According to this legislative document, in our country, the National Bank

[1]Recovery and banking resolution, article available on http://www.consilium.europa.eu/ro/policies/banking-union/single-rulebook/bank-recovery-resolution/, accessed on 30.09.2016, at 19.00.

of Romania and the Authority for Financial Supervision are resolution authorities.

We consider that at least under the aspect of its form, Law no. 312/2015 can be improved. As it could well be observed in the doctrine, the law contains over 100 definitions, extremely important terms and phrases[1]. Unfortunately, though, the majority of times, in order to define the terms, the law makes reference to numerous other legislative documents, both from internal legislation and from that of the European Union, which makes them difficult to follow and to understand. For this reason, we also consider that „in the situation in which almost 100 definitions and expressions of Law no. 312/ 2015 are not understood by the majority of the persons reading them (not even by a person with proper training in the respective field), neither will the provisions of this law be understood and applied correctly."

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FAMILY DWELLING PROTECTION IN TERMS OF EUROPEAN CONSUMER LAW

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Abstract:

The following paper deals with a topic of current interest-that of the family house protection within the consumer's legislative and case law framework. This type of study involves references to the European Court of Justice Jurisprudence and to the national remedies that can be used by the credit consumer who is interested to oppose to the enforcement procedures, mostly in the event of the unfair terms in the contract concluded with the credit institution.

Keywords: *consumer protection, family dwelling protection, effective judicial protection principle, proportionality principle*

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1. GENERAL CONSIDERATIONS REGARDING THE RIGHT TO A FAMILY DWELLING

The right to a home, dwelling, and specifically the right to a family dwelling is a fundamental right, recognised by the European Convention on Human Rights[2], and at the EU level through legal instruments such as the European Charter of Fundamental Rights.

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[2] Art. 8 of the European Convention on Human Rights, having the marginal name "The right to respect for private and family life" has the following content: „1. Everyone has the right to respect for his/her private life and family life, his/her home and his/her

Nationally, the provisions concerning family dwelling protection are one of the facets of the family protection principle, the principle enshrined both at constitutional level[1] and in the Civil Code, where we can invoke the provisions of article 258 of the Civil Code, mainly para. 2 and 3[2].

Under this regulatory context, a practical problem which rises more often lately is that of family dwelling protection of the credit consumer, in particular assuming that over the family home has been placed a real estate guarantee of mortgage type.

Therefore, starting from these prerequisites, we propose to emphasize, first, the Case-law of the Court of Justice of the European Union in matters of foreclosures covering family dwellings, judicial enforcements based on the mortgage bank loans in respect of which the borrower-consumer claims the existence of unfair terms in his contract. We address then the national legal instruments within the reach of the debtor consumer against which foreclosure of the family dwelling has been initiated, seeking to check up the correlation of these internal rules with the European law sources.

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correspondence. 2. Intrusion by a public authority in exercising this right is not admitted in so far as this is provided for by law and constitutes, in a democratic society, a measure for national security, public safety, economic well-being of the country, order and preventing criminal offences, protection of the health, morals, rights and freedoms of others ".

[1] Art. 6 of the Romanian Constitution, as amended and supplemented by the Law on the revision of the Romanian Constitution No. 429/2003, published in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003 stipulates in paragraph 1: "The public authorities respect and protect the intimate, family and the private life".

[2] Art. 258 of the Law no. 287/2009 concerning the adoption of the New Civil Code, law republished in the Official Gazette of Romania, Part I, no. 505/15.07.2011, as amended and supplemented, in paragraph 1, 2 and 3 reads as follows: "(2) The family is entitled to protection on the part of society and the State. (3) The State is obliged to support, through economic and social measures, the conclusion of the marriage, as well as the development and strengthening of the family".

2. PROTECTION OF THE FAMILY DWELLING OF THE CONSUMER IN THE LIGHT OF CJEU JURISPRUDENCE

References we make to the CJEU jurisprudence on this issue developed on our study starts from the need to give full effect to the practice outlined by the CJEU, considering the effects of judgments given by the Court of Justice in Luxembourg in the preliminary ruling procedure, decisions imposed on the national courts with "interpreted authority"[1].

Thus, in case C-415/11 (Aziz)[2], the Court of Justice of the European Union stated that the European Union law governing consumer protection is to be interpreted as it opposes the regulations of a Member State, such as that in question in the main litigation, which, while not in execution proceedings, opposition reasons mortgage based on the abusive nature of a contractual clause which constitutes the basis of enforcement, does not permit the appellate court procedure, competent to judge the abusive nature of such clause, to adopt interim measures, including in particular the suspension of the enforcement proceedings, when the adoption of such measures is necessary to guarantee full effectiveness of its final decision.

To rule as such, the Court took over the conclusions of the General Attorney [3]according to which, in the absence of the possibilities given to the courts to adopt provisional measures able to suspend or prevent real estate foreclosure, the enforcement occurs before the court on the merits ruling on the abusive nature of the contractual provision at the origin of

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[1] In this regard, Silvia Tăbușcă, *Efectele hotărârilor CEDO și CJUE în dreptul intern*, (Bucharest: C.H. Beck, 2012) The "interpreted authority" referred by the author is based on the ruling of the CJEU in historical causes *Da Costa* (Joined cases 28 up to 30-60, ECLI: UE:C:1963:6); *CILFIT* (Case 77/83, ECLI:UE:C:1984:91); *SpA International Chemical Corporation* (Case 66/80, ECLI:I:C:1981:102)

[2] ECLI:EU:C:2013:164: in this case pending with the Spanish courts was disputed the validity of the clauses of a mortgage loan contract; thus, the loan, which was the subject of the guarantee was the domicile of the family of Mr. Aziz, from which family members were discharged because as foreclosure formalities have been initiated.

[3] ECLI:EU:C:2012:700

the mortgage and, consequently, the decision of the court on merits would only secure the consumer an *a posteriori* protection, of financial nature, which would prove to be incomplete and insufficient and would not represent an adequate, efficient means for the consumer protection. These findings are all the more applicable where the subject of mortgage collateral is the home of the consumer whereas there is the risk that, in the course of enforcement, consumers lose the dwelling without possibility of recovery, although the clause in the contract which constituted the basis of foreclosure was abusive.

Also, while substantiating the above mentioned interpretation, the Court considered the principle of effectiveness, in relation to which the national legal orders of the Member States should not make excessively difficult or even impossible the exercise of rights conferred to consumers by the Union law. Moreover, the principle of effectiveness is enshrined in art. 47, the first subparagraph, of the European Charter of Fundamental Rights, which states: "Any person whose rights and freedoms guaranteed by the Union law are violated is entitled to an effective remedy before a court, in accordance with the conditions laid down in this article."

As regards enforcement of the principle of effectiveness, it is useful to invoke [1] the interpretation of the Court of Justice of the European Union, in the sense that "in every case in which the question of whether an internal procedural provision makes it impossible or excessively difficult the application of Union law should be taken into account the place on which the provision is occupied within the procedure as a whole, on the way it is carried out and its particulars in front of different national courts". Thus, the general rule of European law, of effectiveness, fulfils a remedial function, which enables the courts of the Member States to make use of its own remedies necessary for the effective protection of the Union rights[2].

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[1] In this regard see the judgments of the Court Decisions in cases C-618/10 Banco Espanol de Credito SA, ECLI:EU:C:2012:349 and C-40/08 Asturcom Telecomunicaciones SRL, ECLI:EU:C:2009:615

[2] To this refer the allegations in the dispute pending with Bistrița Court of First Instance, civil section, resolved through the Judgment in civil matters no. 7215/2015, accessed through iDrept database

In Kusionova case[1], the Court of Justice of the European Union reiterated the obligation of member states to take protection measures to prevent the further use of certain abusive clauses and it referred to the possibility of choosing the sanctions applicable for Union right violation, stating that member states should make sure that sanctions are effective and proportional. In respect of the proportional character of the sanction, the special destination of the good subject to the extra-judicial enforcement of the security in cause - consumer's family dwelling - must be considered, fact which may not only affect the consumer's rights, but also it may put consumer's family into an exceptionally fragile situation. Within its reasoning, the Court of Luxembourg referred also to the jurisprudence of the European Court of Human Rights[2] through which was determined that losing a home is one of the most critical violations of the right to respect for domicile and that any individual at risk of becoming a victim of such an interference must be able, in principle, to request for the examination of the proportionality of this measure.

Adopting the reasoning brought forward when answered the questions referred for preliminary ruling in Aziz case, the Court highlighted once again in the interpretations given in Kusionova case that it was important that the competent national court of law had available provisional measures allowing it to stay or block an unlawful procedure of mortgage enforcement when ordering such measures proves to be necessary in order to guarantee the effective protection intended by Directive 93/13.

Relevant for the topic under analysis is also the European Court's decision in Morcillo and Garcia case[3] through which it is reasserted the need for having the national mortgage enforcement procedures put under

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[1] Case C-34/13, ECLI:EU:C:2014:2189

[2] McCann decision against the United Kingdom and Rousk decision against Sweden

[3]In this case resulted that, according to the Spanish procedure dispositions, the mortgage enforcement of an immovable which satisfies an essential need of a consumer, i.e. that of having a home, may be initiated by a seller or a supplier based on a binding notarial instrument even without having this instrument, in terms of its content, subject to a jurisdictional examination intended to determine the potential unfairness of one or several of its clauses.

the exigency jurisprudentially developed by the CJEU, in order to ensure the effective protection of the consumer. Through the interpretation given in this case, the CJEU found that the procedural system of the main case endangered the achievement of purpose of the Directive 93/13[1], in question being an imbalance between the procedural means made available for the consumer, on one hand, and those for the seller or supplier, on the other hand, fact which is contrary to the principle of equality of arms or of the procedural equality, which is an integral part of the principle of effective judicial protection.

Based on these grounds, through the judgment in Morcillo and Garcia case was decided that Article 7(1) of Directive 93/13, in combination with Article 47 of the Charter, must be interpreted as precluding a system of enforcement, such as that in the main proceedings, which provides that mortgage enforcement proceedings may not be stayed by the first instance court, which, in its final decision, may at most award compensation in respect of the damage suffered by the consumer, in so far as the latter, as debtor against whom mortgage enforcement proceedings are brought, may not appeal against a decision dismissing his objection to that enforcement, whereas the seller or supplier, as creditor seeking enforcement, may bring an appeal against a decision terminating the proceedings or declaring an unfair term inapplicable.

3. NATIONAL LEGAL INSTRUMENTS USED BY THE CONSUMER AGAINST WHOM IS EXERCISED THE REAL ESTATE FORECLOSURE

In Romanian law, the special protection regime of the family house consists, firstly, in a set of legal binding rules-art. 321-324 Civil Code. Thus, it is legally enshrined the concept of family house (321)[2], the legal

[1] Council Directive 93/13/EEC on unfair terms in consumer contracts, OJ L 95, 21.4.1993

[2] The family house is legally defined by art 321 para 1 Civil Code as being „the common house of spouses or, in absence, the house of the spouse having the children"

status of some documents (art.322), the rights of spouses over the rented house (art.323) and the assignment of the lease agreement benefit (art.324).

Regarding the provisions that require the consent of the non-proprietary spouse, part of the doctrine[1] ruled that they determine a "relative unavailability of the family house" and not its immunity from seizure, the consequence being that the family house may be subject to foreclosure without being necessary the prior authorization in behalf of the non-proprietary spouse. According to other opinions expressed in literature[2], the family house is no longer subject to ordinary real estate transactions and therefore it cannot be sold or enforceably valued under the classical, legal forms of foreclosure. In what concerns us, we strive to subscribe to the first opinion expressed, given that also judicially[3] it was established that no legal provision prohibits the establishment of the mortgage right over the real estate representing the consumer's house, this aspect having relevance regarding the possibility for the court to assess a possible suspension of the foreclosure initiated by the creditor or even stopping such a procedure if the guarantee was made by the creditor for breach of a non-essential obligation, violated by the borrower.

Given the above, we will focus below on how to give effect, in national law, to European demands to suspend the foreclosure started over the family house. In this regard, we shall relate firstly to the provisions of art.719 Civil Procedure Code[4] which rule under paragraph 1 that until the settlement of the appeal to foreclosure or of other request on foreclosure, under the request of the interested party and only for

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[1]Florian Emese, "Protecția locuinței familiei pe durata căsătoriei în reglementarea Noului Cod civil", *Pandectele Române Magazine* 7 (2011), article examined within the iDrept databases

[2]Gheorghe Piperea, „Câteva reflecții și scurte comentarii asupra Legii insolvenței consumatorilor", in *Revista română de drept al afacerilor* 10 (2015), article examined within the iDrept databases

[3]Bucharest County Court, section VI civil, Civil Sentence no.2279/2016 within the iDrept databases

[4]Law no.134/2010, republished in the Official Gazzette of Romania, Part I, no.247/10.04.2015

motivated reasons, the competent court may suspend the foreclosure and under paragraph 2 it is mentioned the bail amount that must be paid in advance in order to rule the suspension. Regarding the obligation to pay the bail, the Romanian Constitutional Court ruled since 2004[1], mentioning that the establishment of the payment obligation of the bail as a condition to suspend the foreclosure, has a twofold purpose, namely, on the one hand, to establish a guarantee for the creditor, and regarding the coverage of the eventual damages suffered due to the delay of foreclosure by suspending its effect and, secondly, to prevent and limit potential abuses in asserting any right by the bad-payer debtors.

Thus, taking into account that the obligation to pay the bail, place, often, the consumer in a difficult situation in terms of financial matters and also related to the fact that the suspension of foreclosure is provided optionally, we consider that the Romanian legislation does not provide a proper and efficient procedural mechanism to protect the consumers' rights. Moreover, the national judge should verify the proportionality of the measure of foreclosure against the situation of the debtor's family and should be able to rule urgently measures to suspend the eviction of the consumer's family house.

Moreover, we believe that the foreclosure court, within the context of the foreclosure procedure may even reject the admission of the foreclosure request, relying in this respect, on the provisions of article 666, paragraph 5 point 7, Civil Procedure Code - "there are other impediments provided by law", the concept of law being able to be interpreted extensively, namely that considering the wording and purpose of Directive 93/13, as it was interpreted by the ECJ. Also, under the discretion margin provided by the wording of art 666 Civil Procedure Code, the foreclosure court can also rely on paragraph 5 point 4, in order to establish that such claim is not certain and liquid, this under the context that the amount of the claim is likely to decrease as a result of cancelling some abusive contractual terms under the ordinary law

[1] Decision of the Romanian Constitutional Court, no.56/17.02.2004, published in the Official Gazzette of Romania, Part I, no.215/11.03.2004

procedure. Given this latter reason, it was assessed[1] that one cannot determine, for example, if the procedure of selling the real asset within the public tender was necessary to cover the claim,being possible that depending on the amount owed to identify other detectable assets and to cover the debit.

CONCLUSION

The European law of consumer's protection includes a rich jurisprudence of the Court of Justice of the European Union that promotes the principle of effective judicial protection that the consumer must benefit, taking into account his position of triple inferiority (economic, legal and technical) towards the professional whom he entered into a legal relationship.

This study aimed, primarily, to examine the interpretation given by the Court of Luxembourg, in the respect that it is important that the national courts must be provided with interim measures to allow the suspension or prevention of some real-estate foreclosure proceedings when ruling such measures proves to be necessary and related to the fact that it is claimed the existence of some abusive terms within the agreement concluded by the consumer with the professional. In relation to European norms, we have related to the remedies used in national law in order to achieve a proper and efficient judicial protection.

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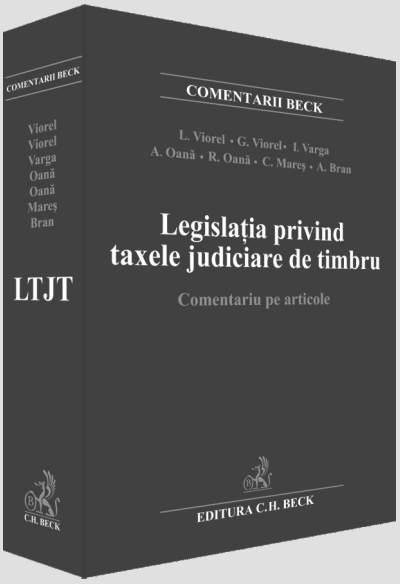

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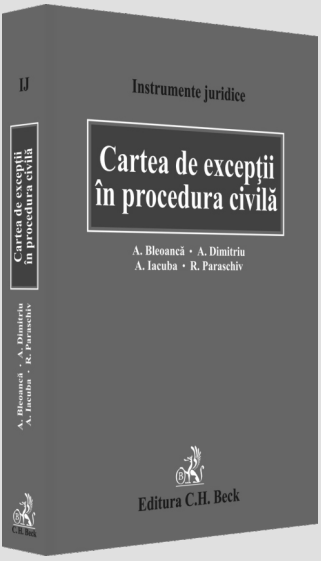

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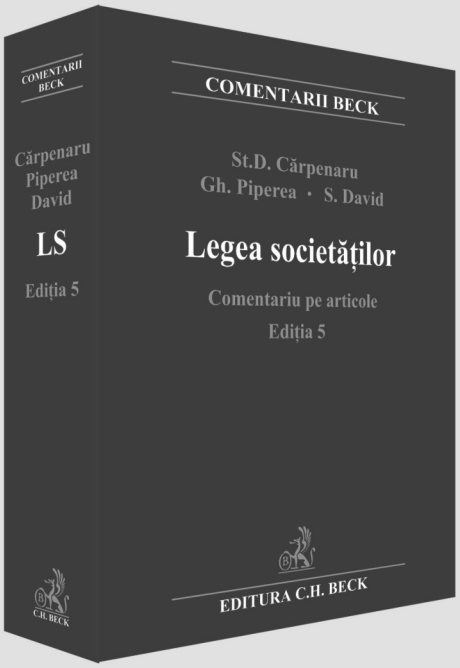

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