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THE FUNDAMENTAL IMPACT OF THE CONSTITUTION ON ADMINISTRATIVE LAW - SOME CONSIDERATIONS IN THE LIGHT OF GERMAN LAW

Rainer ARNOLD[1]

Abstract:
There are three types of constitutional law that are relevant to administrative law: (1) the constitutional provisions directly related to the field of administration, in particular the organizational norms (art. 83 et seq. BL) or the provisions relating to the forms of action of the administration, such as the enactment of regulations (art. 80 BL), (2) the provisions that are particularly relevant to the field of administration, in particular the rule of law (art. 20.3, 28.1 BL) and (3) the general provisions of the Basic Law, which are of great importance in general including the area of administration, such as the fundamental rights (Art. 1 et seq. BL).

Key words: *constitution; administrative law; german law.*

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1. THE IMPACT OF CONSTITUTIONAL AND EUROPEAN UNION LAW ON NATIONAL ADMINISTRATIVE LAW

Administrative law regulates the complex relationship between state power and the individual, on the one hand in terms of content through the substantive administrative laws, and on the other hand

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through the instruments of administrative procedural law. It must be in harmony with the constitution, which requires the principle of the primacy of the constitution. In Germany, the constitution itself contains numerous provisions, in particular on the position of the executive power within the federal state, that are of great importance for the area of administration.[1] The administration must observe and implement them. In any case, what Fritz Werner, who was appointed President of the German Federal Administrative Court in 1958, expressed in an oft-quoted dictum is, at least in part, correct: Administrative law is “concretized constitutional law”.[2]

German law, like the law of every member state of the European Union, is strongly influenced by supranational EU law. This influence results, on the one hand, from the principle of the precedence of EU law over national law, and thus also over national administrative and constitutional law, and, on the other hand, from the fact that EU legislation is carried out to a large extent by the institutions of the member states applying their own instruments of administrative law, which in turn must be consistent with the requirements of supranational law.

The legal order of the European Union, which recognizes the autonomy of the national administrative procedure, nevertheless requires that the law of the member states be effectively implemented. The principle of effectiveness[3] and loyalty[4] to the Union are therefore the decisive guidelines for the implementation of EU law and also for the design of EU-relevant administrative law concepts. This has led to

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[1] See in particular art. 83 - 90 Basic Law (BL) (*Grundgesetz,*GG)
[2] DVBl. 1959, 527 et seq. Critically F. Wollenschläger, “Verfassung im Allgemeinen Verwaltungsrecht: Bedeutungsverlust durch Europäisierung und Emanzipation?“, In: *VVDStRL (Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer)* 75 (2016): 187, 194/195 and footnote 32.
[3] See M.Klamert, *EU-Recht*, 2nd ed. (2018), 53-54.
[4] M.Klamert, in: “The EU Treaties and the Charter of Fundamental Rights. A Commentary”, ed.by M.Kellerbauer and M.Klamert, J. Tomkin, *OUP 2019, Art. 4*, 46 – 60 (= paras. 26 – 79).

considerable changes in traditional administrative law doctrine.[1] The principle of equivalence should also be mentioned in this context, which requires that administrative law mechanisms that apply to national situations must also be available for EU situations.[2]

The Europeanisation of administrative law is not, however, the subject of the following considerations, but rather, using the example of German constitutional law as it has been shaped by the Federal Constitutional Court, they are intended to show the basic constitutional influences on administrative law.

There are three types of constitutional law that are relevant to administrative law: (1) the constitutional provisions directly related to the field of administration, in particular the organizational norms (art. 83 et seq. BL) or the provisions relating to the forms of action of the administration, such as the enactment of regulations (art. 80 BL), (2) the provisions that are particularly relevant to the field of administration, in particular the rule of law (art. 20.3, 28.1 BL) and (3) the general provisions of the Basic Law, which are of great importance in general including the area of administration, such as the fundamental rights (Art. 1 et seq. BL).

Type (2) and (3) are in the center of the following explanations.

2. THE ANTHROPOCENTRIC CONSTITUTIONAL VALUES AS CONCEPTUAL FUNDAMENTS OF ADMINISTRATIVE LAW

The core tenets of the constitution impact administrative law in a decisive way. These are the anthropocentric fundamental values of human dignity, freedom and equality. These basic values functionally form a unit, they are interdependent and can only exist constitutionally in this unit, not isolated as individual values.

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[1] M. Herdegen, *Europarecht*, 22nd ed. (2022), 286 et seq. See also R. Arnold, « Le droit administratif allemand dans le creuset européen », in : *Traité de droit administratif européen, sous la doirection de Jean-Bernard Auby et Jacqueline Dutheil de la Rochère*, 2e éd. (Bruxelles : Bruylant, 2014),785 – 794.

[2] Herdegen, *Europarecht*, 285, 286.

The rule of law is the link between these values and the institutions of the state. The latter must correspond to these values in their structure and function, and they must implement these values through their activity. The rule of law thus ensures freedom in institutional practice and is reflected in the instruments of administrative law.[1]

Human dignity, as the highest value, as the basic value of the legal order, is quite authoritative for administrative law. The basic statement is that the human being, when he/she is the person affected through the state institutions by the exercise of public authority, has to be seen as a subject, never as an object of administrative law. This idea permeates the entire structure of administrative procedural law and must always be observed as the most important maxim in the application of the law by the authorities.[2]

3. FREEDOM, DEMOCRACY AND SELF-DETERMINATION OF THE INDIVIDUAL: THE PRINCIPLE OF LEGALITY OF ADMINISTRATIVE LAW

Linked to human dignity is the principle of freedom, which is concretized by the fundamental rights of the constitutional order, whether written or unwritten. They play a very significant role in administrative law and administrative court actions are frequently based on fundamental rights in Germany and also in other countries. A central point is the nature and intensity of the restriction of freedom. Freedom as a principle is only given insofar as the freedom of other people is not unreasonably impeded by it. Interference with freedom must be clearly permitted by law, must comply in particular with the principle of proportionality[3] and

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[1] As to these core values and their functional unit see R. Arnold, « L'État de droit comme fondement du constitutionnalisme européen », *Revue française de droit constitutionnel, numéro spécial,25 ans de droit constitutionnel*, no 100 (Décembre 2014) :769 – 776.

[2] See O.Kopp and U.Ramsauer,*Vewaltungsverfahrensgesetz*, 19th ed. (2018), § 9/3.

[3] See FCC (Federal Constitutional Court) vol. 19,342,348/349; vol. 35, 382,400/401; vol.55, 28,30; vol. 76, 1, 50/51.

must not affect the essence of a fundamental right.[1] The postulate of human dignity is that human freedom is the exception that must be justified. Restrictions imposed due to common interests of the society are justified by the fact that they are made by the representatives of the people, i.e. the members of the Parliament, in a legislation adopted by a simple majority, the content of which corresponds to the fundamental rights and the conditions of their restriction. Common interests of the members of society as a basis for administrative intervention arises from the need for the state organization to properly delimit and reconcile the interests of all against another, and this in the form of the legislature, which allows transparency and parliamentary debate.

However, it is not just a matter of encroachment on civil liberties, but of shaping life as a whole. If essential issues are determined by the state, this must be done in the form of a formal law. Such essential decisions can also be made outside the area of restrictions on fundamental rights. The awarding of services and granting of benefits can also be essential in this sense and then, according to the modern view, requires a formal legal basis for authorization. The handling of essential issues by the parliament is a requirement of democracy as well. Public debate favors a proper decision in balancing various conflicting interests and balancing fundamental rights of different holders.

The question is therefore to what extent interventions under administrative law require a legal basis. The classic formulation that a legal basis is necessary for interventions in freedom and property is considered too narrow and a rule that corresponded to 19th-century state thinking but is no longer appropriate today. The Federal Constitutional Court is moving away from the concept of encroachment, which has in any case been extended more and more in case law[2], and has concluded that essential decisions that directly affect the individual must always be based on a law. Such essential decisions are therefore not only encroachments on freedom or the property, but the life determination itself, so the determination of essential issues, which can also be given in

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[1] See Art. 19.2 BL.

[2] See FCC vol. 105, 279,300/301,303; vol. 110, 177,191: vol. 116, 202,222.

the granting of benefits. This decision of the Federal Constitutional Court establishes the theory of essentiality[1], which is of particular importance for executive law-making through regulations[2]. However, it also applies to other administrative actions, whereby essential questions are decided.

The legislator has direct democratic legitimation, since the representatives of the people as legislators decide on the life organization of the individual: the individuals as members of the people thus exercise self-determination over themselves. This in democratic process lying self-determination applies not only to freedom restrictions, but also for essential questions of life design.

4. CONSTITUTIONALITY OF ADMINISTRATIVE LAW

The fundamental principle of the supremacy of the constitution requires that all state acts, legislation, administration and jurisprudence be in conformity with the Constitution. The laws to be applied by the executive must be in conformity with the Constitution and, in case of doubt, must be interpreted in the spirit of the constitution.[3] Administrative activity is based on these laws in accordance with the principle of legality. Constitutional conformity is thus transferred to the sphere of administration through laws that conform to the constitution. But even laws that conform to the constitution can be applied by the administration in a way that is not compatible with the constitution. Unconstitutional administrative action must be set aside by the administrative courts. For example, leeway can finally be exercised in an unconstitutional way, so in violation of the principle of equality, or indeterminate legal concepts can be interpreted in a way that is not in conformity with fundamental rights.[4]

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[1] See FCC vol. 49, 89, 126; vol. 61, 260, 275; vol. 88, 103, 116; vol. 108, 282, 311.
[2] See Art. 80 BL and FCC vol. 139, 19,47.
[3] FCC vol.75, 201, 218/219.
[4] See H. Maurer and Chr. Waldhoff, *Allgemeines Verwaltungsrecht*, 19th ed. (2017), 152 – 155 and 155 et seq.

5. NORMATIVE AND NON-NORMATIVE ACTIONS OF THE EXECUTIVE.

The principles of legality and constitutionality apply to all types of administrative action. The administration can make individual decisions (issue administrative acts), and can also act normatively by means of regulations ("*Verordnungen*") and statutes ("*Satzungen*"). German law refers to this as "sub-legislative law," i.e., law that stands below the formal law enacted by Parliament. Unlike in some countries, in Germany there is no autonomous normative power of the executive, but it is always derived from a formal parliamentary law. There are explicit provisions in this regard, for example Article 80 BL, which authorizes the executive to issue regulations under federal law, or provisions in the constitutions of the *Länder*, which authorize the executive to adopt regulations under *Land* law.

However, the underlying constitutional principles are the rule of law and the principle of democracy. The latter requires that the essential decisions are made by formal laws, they are to be made by the parliament, thus by the representatives of the people. Moreover, a delegation of legislative power to the executive can only concern the non-essential decisions and the formal legal authorization must be specific, i.e. the content, purpose and extent of the regulations must already be laid down in the parliamentary law.[1]

It should be mentioned here that statutes ("*Satzungen*") are enacted on the basis of the autonomy of an institution (municipality, university, legal entities under public law with autonomy). However, this is also usually provided for by formal laws, such as in a municipal code for the statute law of municipal institutions. In any case, a formal legal basis is necessary if interference with the freedom and property of the individuals concerned is made possible by the statutes.[2]

Furthermore, it should be emphasized that in addition to the normative activity of the executive and the issuance of individual

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[1] FCC vol. 7, 282, 301; vol. 38, 61,83.
[2] See for example Art. 23 and 24 Bavarian municipality code.

decisions on the grounds of a legal basis, there is also so-called simple administrative action[1], which does not have the characteristics of the two mentioned forms of administrative action. Examples are declarations of the municipality, establishment of programs, also factual actions such as road construction and so on. Sometimes, the formal law defines the legal form of, for example, executive planning, such as the establishment of a construction plan[2] or urban land-use plans[3], and so on. This cannot be further deepened here.

It should be repeated: Legality and constitutionality are binding constitutional requirements for all administrative actions.

In addition, there is the principle of the primacy of the legislation: If legislation exists, the administration cannot disregard it; the administration must always observe the law.

6. SPECIFIC REQUIREMENTS OF THE RULE OF LAW

The rule of law means that the state in all its institutions must be guided by the law in all its actions. Political decisions are not free, but must respect the constitutional law as the common basic order of society. Law means the entire legal order in its hierarchical structure: the constitution at the top, then the ordinary laws, then the sub-legislative law, in addition to the general principles of law and the (rare) customary law. In the German federal state, the division into federal and state law is an additional factor. The principle that federal law breaks state law applies, but has been relativized since the federal reform in 2006 by the (however, little used) deviation legislation as an exception.[4]

Today's rule of law is characterized by two elements in particular: It is value-oriented and based on the primacy of the constitution. This means that the basic constitutional values: human dignity, the principle of freedom and equality form the material core of the rule of law. Through

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[1] See Maurer and Waldhoff, *Allgemeines Verwaltungsrecht*, 462 et seq.
[2] §10.1 BauGB (Urban Code).
[3] See § 5 Urban Code.
[4] See Art. 72.3 BL.

the bridge of the rule of law, state institutions, and thus also the executive, are bound by these fundamental values. This means, on the one hand, that the design of these institutions must correspond to these values and, above all, that the activities of these institutions must implement these values. For the administrative sphere, this means that it must (only) apply laws that conform to the constitution and are thus oriented to these values, and that it must itself observe these values in its administrative actions.

The rule of law is thus oriented toward human dignity and the freedom of all. It has already been pointed out that the principle of freedom, in its essence linked to human dignity, is not unlimited. Unlike human dignity itself, the freedom of the individual is subject to limitations in favor of the other bearers of freedom, i.e. in favor of general legitimate interests. Of importance, however, is that freedom must always be the principle and the restriction of freedom the exception that must be legitimized. The means of demarcating freedom from the necessary restriction of freedom is the principle of proportionality, now a universally recognized central tool of the contemporary constitutional order. It applies to the laws that the administration must apply, but also to administrative action itself. It means that a restriction of freedom may only be carried out for a legitimate goal and then only if this intervention is necessary and the goal cannot be realized or promoted in another, milder way. This requirement of the minimum intervention is further supplemented by the necessity of the proportionality of the intervention and the objective of the intervention, i.e. by weighing the public interest against the individual, private interest.[1]

Law as a means of order serves the effective organization of the community for the preservation and progress of this community. The law secures and realizes the basic values of the community order. Genuine constitutionalism is therefore the path to freedom.

[1] See FCC vol.19, 342, 348/349; vol. 35, 382, 400/401; vol. 55, 28, 30; vol. 76, 1,50/51.

Law can fulfill this function only if it is efficient in its structure and application. The rule of law therefore necessarily includes the certainty and clarity of the law[1] as well as the security of the law[2].

This requirement applies to the legislature when it creates laws, but also to the administration, which must apply and thus implement such laws.

The certainty of the law is of essential importance for the rule of law and is particularly pronounced in criminal law.[3] It is freedom-securing if the legislator does not give the administration general, broad bases for intervention, for example, that the executive may take "all necessary measures," but if the law contains a precise list of the cases and conditions for interventions in freedom.

This is also very important for the legal protection[4] against public power acts, also an essential element of the rule of law. If the law is sufficiently defined and precise, the judicial assessment is clearer.

Certainty is important not only for norms, but also for administrative action. The legal basis for administrative action also needs to contain leeway for the administration, in particular discretionary norms and indeterminate legal concepts, which the administration must concretize in the specific case. On the one hand, such normative formulations offer flexibility for the authorities to take measures adapted to the individual case, which could not all be covered by the abstractly formulated law. Such leeway is necessary, but must be limited in accordance with the rule of law. In particular, judicial review must be made possible, according to German law within the framework of discretion in the case of overstepping and errors of discretion and in the case of undefined legal terms in the case of incorrect concretizations on the part of the administration.[5]

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[1] FCC vol. 65, 1,54; vol. 49, 89, 133; vol. 79, 174, 195; vol. 118, 168, 188; vol. 145, 20, 69/70.

[2] FCC vol. 30, 392, 403.

[3] FCC vol. 95,96,130 et seq.; vol.105, 135, 153.

[4] FCC vol. 33, 367, 383; vol. 53, 115, 127; vol. 55, 72, 93/94.

[5] See Th.Würtenberger and D.Heckmann, *Verwaltungsprozeßrecht,* 4th ed. (2018), 13, 14.

The law must be certain, it must have validity, so that the individual can rely on the law. The permanence of law is a fundamental requirement of freedom. Positions acquired in accordance with the law must endure, the individual must be able to rely on them. Thus, for example, an arbitrary withdrawal of a favorable administrative act is not compatible with the principle of legal certainty. The law must clearly specify the possible cases of withdrawal in accordance with these principles.

An important problem in practice is that of the retroactive effect of legislation.[1] German law distinguishes between genuine and non-genuine retroactivity, whereby genuine retroactivity, i.e. a new legal regulation of a matter already concluded in the past, is in principle possible only in narrowly defined exceptional cases. [2]The so-called non-genuine retroactivity is given if the factual situation continues to exist and a legal change is planned for the future. This is only possible if the concept of the protection of legitimate expectations does not prevent it. It is therefore necessary to weigh up the interests involved. [3]The case law, including that of the Constitutional Court, on questions of retroactivity is very rich, since this raises frequent questions in practice.

CONCLUSIONS

We thus see a close intertwining of constitutional and administrative law. It is of particular importance that the constitution protecting the fundamental rights is also realized in administrative law.

The requirements of the rule of law are added as guarantees and strengthen the protection of freedom.

Fundamental rights and the rule of law form a functional unit for the benefit of the individual.

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[1] FCC vol. 97, 67,78; vol. 127, 1,16; vol. 132, 302, 317.

[2] FCC vol. 11, 139, 145/146; vol. 122, 374,394; vol.

[3] FCC vol. 132, 302, 320, 323/324,327/328.

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HIGHLIGHTING SOME PRACTICAL DIFFICULTIES IN APPLYING THE NEW LEGISLATION AFFECTING THE SALE OF AGRICULTURAL LAND LOCATED IN THE UNINCORPORATED AREAS

Ilioara GENOIU[1]

Abstract:
The right of pre-emption is regulated in a unitary and principled manner by the Civil Code. However, there are several special regulations designed to regulate the right of pre-emption in the sale of various goods (forest fund, agricultural land located outside the town, historical monuments, movable property classified as part of the national cultural heritage, etc.). Of all these, in this study, we will insist on some aspects that we consider of interest for the issue of the right of pre-emption in the case of sale of agricultural land located outside the town, given that the legislation in this area has undergone substantial changes recently. In fact, we intend, preferably, to reveal some practical difficulties in the application of Law no. 17/2014, as amended, a normative act that has an impact in our field of interest.

Key words: *sale; unincorporated agricultural area; price; pre-emption right; pre-emptor; potential buyer; tax.*

INTRODUCTION

The amendment of Law no. 17/2014, with incidence in the matter of lands sale located in the unincorporated areas, by Law no. 175/2020,

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generated several practical difficulties, making it at least difficult for the notaries to authenticate the land alienation contracts having the mentioned category of use and location. First of all, a period of several months after the entry into force of Law no. 175/2020, there were no methodological norms for its application, so it was not possible to authenticate the sales contracts having such an object. Then, the adoption of these methodological norms did not solve, unfortunately, all the problems generated by the entry into force of Law no. 175/2020. As we will show in the following, there are, unfortunately, some texts of this law that are susceptible of interpretation, which seem to be in contradiction with other texts of the same normative act. What is most unfortunate, however, is the fact that there is an inconvenience in the application of this law, which proves to be insurmountable, at least at this time, as it is the ignorance of the entity that calculates and collects the tax due by the seller, if the extra-urban agricultural land was acquired by him, by purchasing, less than 8 years before the moment when the sale is desired. It is undeniable that the new amendments to the said normative act put to the test both the notaries public and, especially, the specialized apparatus of the mayor’s institution, which must carry out a very extensive procedure regarding the right of pre-emption.

THE RIGHT OF PRE-EMPTION. GENERAL CONSIDERATIONS

Through the provisions of art. 1730-1740, the Civil Code regulates in a unitary way the right of pre-emption, this representing the right conferred to the holder, the pre-emptor, by law or contract, to buy a good with priority. It is known that the Romanian legislator in 2009 wanted to draft a civil code, which would regulate the most important institutions of private law, thus embracing and consecrating the monistic theory. In fact, the result of this approach has materialized, rather, in a code of private law. In pursuit of this desideratum, the legislator regulated in the same way the right of pre-emption, ensuring him a general, principled legal framework. As a result, the Civil Code in force is a common law on the right of pre-emption. Therefore, in the case of the sale of agricultural land located in urban areas, for example, the

provisions of common law regarding the right of pre-emption must be observed, Law 17/2014 being of interest only for the sale of agricultural land located outside urban areas. Consequently, considering art. 1849 of the Civil Code, "The lessee has the right of pre-emption regarding the leased agricultural goods, which is exercised according to art. 1730-1739".

The above-mentioned legal texts refer both to the right of pre-emption regulated by law (for the hypothesis of selling agricultural lands located in the unincorporated area, selling forest lands, selling historical monuments, private property, selling agricultural lands located outside the built-up area, on classified archaeological sites, etc.), as well as the conventional one, effect of the agreement of wills of the contracting parties, in fact a pact of preference, which represents nothing but a form, a variant of the unilateral promise of sale[1]. In this regard, the provisions of article 1730 paragraph (2) of the Civil Code, according to which "The provisions of this code regarding the right of pre-emption are applicable only if it is not established otherwise by law or contract".

As a result, in the matter of the sale of agricultural lands located outside the built-up area, the provisions of the special law, namely of Law no. 17/2014 with subsequent amendments. And this normative act defines the pre-emptor in the same logic of the Civil Code, given above. Thus, within the meaning of Law no. 17/2014, the pre-emptor represents "the holder of the pre-emption right who can buy with priority an agricultural land located outside the built-up area, in the order established by law". However, we specify that Law no. 175/2020 made substantial changes regarding the categories of pre-emptors. Thus, this normative act establishes seven ranks of pre-emptors, as follows:

a) first-degree pre-emptors: co-owners, first-degree relatives, spouses, relatives and relatives up to and including the third rank;

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[1] See, in this regard, for example: Fl. Moțiu, *Contractele speciale* (Bucharest:Universul Juridic, 2015), 32; Gh. Gheorghiu, „Dreptul de preempțiune" in *Noul Cod civil. Comentariu pe articole,* edited by Fl. Baias, E. Chelaru, R. Constantinovici, I. Macovei (Bucharest: C.H. Beck, 2012), 1781-1784; L. Stănciulescu, *Curs de drept civil. Contracte* (Bucharest: Hamangiu, 2014), 124-130.

b) second-degree pre-emptors: owners of agricultural investments for crops of trees, vines, hops, exclusively private irrigation and / or tenants. If there are agricultural investments for the cultivation of trees, vines, hops and irrigation on the lands subject to sale, the owners of these investments have priority in the purchase of these lands;
c) third-degree pre-emptors: owners and / or lessees of agricultural land adjacent to the land subject to sale;
d) fourth-degree pre-emptors: young farmers;
e) fifth-degree pre-emptors: "Gheorghe Ionescu-Șișești" Academy of Agricultural and Forestry Sciences and research-development units in the fields of agriculture, forestry and food industry, organized and regulated by Law no. 45/2009 on the organization and functioning of the "Gheorghe Ionescu-Șișești" Academy of Agricultural and Forestry Sciences and of the research and development system in the fields of agriculture, forestry and food industry, with subsequent amendments and completions, as well as agricultural educational institutions, for the purpose of purchasing agricultural land located outside the built-up area with the destination strictly necessary for agricultural research, located in the vicinity of existing lots in their patrimony;
f) sixth-degree pre-emptors: natural persons with domicile / residence located in the administrative-territorial units where the land is located or in the neighbouring administrative-territorial units;
g) seventh-degree pre-emptors: the Romanian state, through the State Domains Agency, hereinafter referred to as A.D.S.

We limit ourselves, in this study, only to listing the categories of pre-emptors established by Law no. 175/2020, an undisputed novelty in this matter, and we will discuss, in the following, some legal texts of the normative acts indicated above, which are of particular interest for the matter of the right of pre-emption in case of sale of unincorporated agricultural areas, either because of their novelty or because they are susceptible to interpretation or are in fact deficient.

FREE SALE OF AGRICULTURAL LAND LOCATED OUTSIDE THE VILLAGE

Undoubtedly, the task of carrying out the procedure provided by law for the sale of land located outside the built-up area lies with the specialized apparatus of the mayor's institution, in whose territorial area the land to be sold is located. This very extensive procedure, which, in the first months of application, put the officials responsible for carrying it out to the test, mainly involves the registration of the seller's application, accompanied by the offer to sell the agricultural land and the supporting documents, putting up the sale at the town hall and on its website, the notification of the seven categories of pre-emptors and conclusion of the minutes of the procedural stage on the exercise of the right of pre-emption, which records in detail the activities and actions carried out.

If, within 45 working days, notices of acceptance of the offer have been registered, and the seller has chosen a pre-emptor, in compliance with the law, the mayor's institution sends the decision to the central structure, respectively to the territorial structures, as the case may be the seller of choice of the pre-emptor within the same rank and concludes the minutes of the finding of the procedural stage regarding the exercise of the pre-emption right, in which the activities and actions carried out are recorded in detail. The Ministry of Agriculture and Rural Development, through the central structure or territorial structures, issues the final opinion, an administrative act attesting the observance of the procedure provided by law regarding the exercise of the right of pre-emption.

In the event that no notices of acceptance of the offer have been registered, the mayor's institution shall display, at the end of the 45 working days, the minutes of the conclusion of the procedural stage regarding the exercise of the right of pre-emption, stating that applications may be submitted by potential buyers, accompanied by the supporting documents provided by law, within 30 calendar days.

The potential buyer can be the natural person or the legal person who fulfils, cumulatively, certain conditions provided by law. Thus, as far as the natural person is concerned, he must:

a) have the domicile / residence located on the national territory for a period of at least 5 years prior to the registration of the sale offer;
b) carry out agricultural activities on the national territory for a period of at least 5 years, prior to the registration of this offer;
c) to be registered by the Romanian fiscal authorities at least 5 years prior to the registration of the offer for sale of the agricultural lands located in the unincorporated area.
Similarly, the legal person must:
a) have the registered office and / or the secondary office located on the national territory for a period of at least 5 years prior to the registration of the sale offer;
b) to carry out agricultural activities on the national territory for a period of at least 5 years prior to the registration of the offer for sale of the agricultural lands located in the unincorporated area;
c) to present the documents showing that, from the total income of the last 5 fiscal years, at least 75% represents income from agricultural activities, as provided by Law no. 227/2015 on the Fiscal Code, with subsequent amendments and completions, classified according to the CAEN code by order of the Minister of Agriculture and Rural Development;
d) the associate / shareholder who holds the control of the company to have the domicile located on the national territory for a period of at least 5 years prior to the registration of the offer for sale of the agricultural lands located outside the built-up area;
e) if in the structure of legal entities, the associates / shareholders who control the company are other legal entities, the associates / shareholders who control the company to prove the domicile located on the national territory for a period of at least 5 years prior to the registration of the offer sale of agricultural land located in the unincorporated area.

Thus, the intention of the legislator to prevent, as much as possible, the profit from the repeated sale, at short intervals, of the agricultural lands outside the town, in other words the speculation regarding these lands and their maintenance in the agricultural circuit. The interest of the legislator is, it seems, that the agricultural lands

outside the town are owned by people who carry out agricultural activities, who cultivate these lands, who keep them in the productive agricultural circuit.

In case of exercising the right of pre-emption by a potential buyer, the Ministry of Agriculture and Rural Development, through the central structure or territorial structures, issues an opinion, administrative act certifying compliance with the procedure provided by law on compliance with art. 41 of Law no. 17/2014.

On the other hand, in case of non-exercise of the pre-emption right, if none of the potential buyers, within 30 calendar days, does not meet the conditions to be able to buy the agricultural land located outside the built-up area, its alienation by sale can be made to any natural or legal person at a price that cannot be lower than the one set out in the sale offer[1].

As a result, the free sale of agricultural land located outside the built-up area can be reached only after completing the two stages of the pre-emption procedure, in which case the mayor's institution will issue a final report, an administrative act stating the completion of the procedure in the situation in which no purchase offer from the pre-emptors and potential buyers was registered within the term provided by law. In practice, we found that the town halls issue either a final report, after the entire procedure, showing that the land in question is free for sale, or two minutes, one intermediate, after the deadline of 45 working days, in which it is stated that no pre-emptor exercised the right of pre-emption and did not accept the seller's offer and a final one, after the deadline of 30 calendar days, which shows that no potential buyer accepted the seller's offer.

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[1] The sanction for the sale of the agricultural land located in the unincorporated area, at a lower price than the one established by the seller in the sale offer, is the absolute nullity of the sale contract concluded in disregard of this legal provision. For the issue of the absolute nullity of the civil legal act, see, for example: G. Boroi and C.A. Anghelescu, *Curs de drept civil. Partea generală* (Bucharest: Hamangiu, 2021), 289-293; E. Chelaru, *Teoria generală a dreptului civil* (Bucharest: C.H. Beck, 2014), 191-200; I. Genoiu, *Drept civil. Teoria generală. Persoanele* (Bucharest: C.H. Beck, 2022), 255-256.

During the beginning of the application of Law no. 175/2020, the public administration bodies with attributions in this field and some notaries public interpreted the provisions of art. 4^1 para. (5) of Law no. 17/2014 [according to which “In case of non-exercise of the right of pre-emption, if none of the potential buyers, within the legal term, does not meet the conditions to be able to buy the agricultural land located outside the town, its alienation by sale can be done to any natural or legal person, *under the conditions of the present law* (s.n .: I.G.)”], in the regard that the free sale of these lands cannot be reached in any way. In the same logic of the argument, it was argued that if, after completing the two stages of the procedure, in compliance with the two categories of deadlines, if no pre-emptor or potential buyer does not accept the seller’s offer, the procedure should be resumed indefinitely. We believe that such an interpretation of the text of the law set out above does not correspond to the purpose of the law in question. Moreover, in the meantime, notaries public have authenticated numerous sales contracts, concerning agricultural land located in the unincorporated area, in respect of which the pre-emption right procedure was carried out, without the seller’s offer being accepted by any pre-emptor or potential buyer, within the meaning of the law.

We also want to insist on the duration of the terms that Law no. 17/2014, as amended, establishes them for the two stages of the procedure in question. Thus, pre-emptors can accept the seller’s offer within 45 working days, and potential buyers can proceed in a similar way, within 30 calendar days. We find, therefore, that the calculation of the two terms is different. In the first case, we consider only the working days, excluding Saturdays and Sundays, as well as the days during the week declared free / non-working by law, and in the second case, we are talking only about calendar days. As a result, the 30 calendar days will be calculated according to the system of days off, enshrined in the Civil Code on extinctive prescription, namely art. 2553. Moreover, the Methodological Norms of Law no. 17/2014, in art. 2 let. n), provide that, if the term is calculated in days, “the day from which the term begins to run, nor the day when it expires, shall not be taken into account; if the last day of a period expressed in days is a public holiday, Sunday or

Saturday, the period shall end on the expiry of the last hour of the next working day ".

Undoubtedly, this is also the difficulty in carrying out the pre-emption right procedure. The mayor's institution, through its specialized apparatus, must pay close attention to the calculation of these deadlines. Cases were encountered during the first period of application of the new legislation in this area, when the deadlines for carrying out the pre-emption procedure were not correctly calculated, and the procedure in question was resumed.

EXCEPTIONS FROM THE OBLIGATION TO COMPLY WITH THE PROCEDURE ON THE RIGHT OF PRE-EMPTION

As an exception, art. 20 para. (2) of Law no. 17/2014 stipulates that: "The provisions of this law do not apply to alienations between co-owners, spouses, relatives and relatives up to and including the third degree". Also, according to the provisions of art. 20 para. (3) of the same normative act, "The provisions of this law do not apply in enforcement proceedings and sales contracts concluded as a result of the fulfilment of public tender formalities, such as those carried out in the insolvency prevention procedure and insolvency or as a result of the property belonging to the private domain of local or county interest of the administrative-territorial units ".

Among these exceptional situations, most often, in notarial practice, there is the case when the agricultural land outside the town is sold to the husband, a relative or a relative up to and including the third degree. As a result, we must consider relatives such as: children (first-degree), grandchildren of sons / daughters (second-degree), great-grandchildren of sons / daughters (third-degree), parents (first-degree), grandparents (second-degree), great-grandparents (third-degree), siblings (second-degree), siblings (third-degree), uncles and aunts (third-degree). We also specify that the relatives referred to in the text of the law indicated above are relatives of the seller's spouse, as follows: children (first-degree), grandchildren of sons / daughters (second-degree), great-grandchildren of sons / daughters (third-degree), parents (first-degree),

grandparents (second-degree), great-grandparents (third-degree), siblings (second-degree), siblings (third-degree), uncles and aunts (third-degree). Therefore, the relatives listed in this second case do not belong to the seller, but to the husband of the seller. [1]

In this exceptional case, the seller may choose between submitting an offer to sell and his spouse, relatives and relatives up to and including the third-degree or the co-owners may accept the offer under the pre-emption procedure as first-degree pre-emptors, or may sells directly to these categories of persons, without initiating the pre-emption right procedure, proving, by a certificate issued by the competent mayor's institution, that no offer to sell has been submitted.

Maintaining this text, in the amended form of Law no. 17/2014, raised certain difficulties of application, the notaries public having to agree on the text of art. 20 para. (2) with art. 4 para. (1) let. a) of Law no. 17/2014. We all wondered why the legislator felt the need to exempt co-owners, spouses, relatives and relatives up to the third-degree from the rule on the pre-emption procedure and, at the same time, to establish first -degree pre-emptives.

In the same order of ideas, we specify that art. 3 para. (1) of Law no. 17/2014 stipulates that "Agricultural lands located outside the town on a depth of 30 km from the state border and the Black Sea Coast, inland, as well as those located outside the town at a distance of up to 2,400 m from the special objectives may be alienated by sale only with the specific approval of the Ministry of National Defense, issued following the consultation with the state bodies with attributions in the field of national security, through the specialized internal structures mentioned in art. 6 para. 1 of Law no. 51/1991 regarding the national security of Romania, with the subsequent modifications and completions". In paragraph (2) of the same article, Law no. 17/2014

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[1] For the issue of kinship and affinity, see, for example: Fr. Deak and R. Popescu, *Tratat de drept succesoral.* Vol. I. (Bucharest: Universul Juridic, 2012), 134-136; D. Văduva, *Succesiuni. Devoluţiunea succesorală* (Bucharest: Universul Juridic, 2012), 29-33; I. Genoiu, *Dreptul la moștenire în Codul civil* (Bucharest: C.H. Beck, 2013), 42-43.

provides that “The provisions of paragraph (1) does not apply to pre-emptors ”.

The public notaries are, we consider, this time, in an even greater impasse than in the previous hypothesis, in case the sale of the agricultural land located in the unincorporated area, which meets one or another of the conditions provided by art. 3 para. (1) of Law no. 17/2014, is sold *directly* to co-owners, spouses, relatives and relatives up to and including the third degree, without a sale offer being submitted. Can we consider them “pre-emptors”, as long as they buy the land in question *directly*, based on the exceptional provision of art. 20 para. (2) of Law no. 17/2014, without carrying out the procedure regarding the pre-emption right and without thus exercising their pre-emption right? If necessary, the one identified by law in art. 4 para. (1) and who accepted the offer to sell?

THE SALE OF AGRICULTURAL LAND LOCATED IN UNINCORPORATED AREA WITHIN LESS THAN 8 YEARS, CALCULATED SINCE THEIR PURCHASE

According to art. 4^2 of Law no. 17/2014, „(1) The agricultural lands located outside the built-up area may be alienated, by sale, before the 8th year of the purchase, with the obligation to pay 80% tax on the amount representing the difference between the sale price and the purchase price, based on the grid of notaries from that period. (2) In case of direct or indirect alienation, before the 8th year of the purchase, of the control package of the companies that own agricultural lands located in the unincorporated area and which represent more than 25% of their assets, the seller will have the obligation to pay a tax of 80% of the difference in value of the respective lands calculated on the basis of the notaries’ grid between the moment of acquiring the lands and the moment of alienation of the control package. In this case, the profit tax on the difference in value of the shares or shares sold shall be applied on a reduced basis in proportion to the percentage of the share of the respective agricultural lands in the fixed assets, any double taxation being prohibited ”.

In our opinion, this text of law may make it impossible for the public notary to authenticate sales contracts regarding agricultural land located in the unincorporated area, which were purchased in less than 8 years from the time when the sale is intended, in the extent to which the intended price for the alienation is higher than that at which the land was purchased. This impasse is generated by the fact that Law no. 17/2014 did not stipulate which entity is in charge of calculating and withholding this tax. As a result, the lands that fall under the hypothesis regulated by this text of law cannot be sold, being stolen, without the direct intention of the legislator - we appreciate - the civil circuit. We do not believe that the legislator wished that these lands could not be the subject of sales contracts. On the contrary, we are convinced that the legislature wanted the state to collect the tax generated by such a sale and that the imperfection of the legislative work exclusively led us to this undesirable situation. As a result, it is necessary to wait until the relevant legislation is properly completed so that these lands can be alienated.

It should also be noted that the price at which the agricultural lands located in the unincorporated area is intended to be sold cannot be lower than the notary public grid for that period. It is clear that the legislator wanted to limit speculation to this land, but failed to nominate the competent entity to calculate and withhold this tax.

Obviously, these lands can be alienated at a price equal to the one with which they were bought, if this price is not lower than the valuation made by notaries public according to the specific grid or through other deeds of ownership than the sale (we can consider, for example, a donation, exchange or maintenance contract).

CONCLUSIONS

We consider that the aspects discussed in this paper are equally topical and of practical use. We have to reflect on them, we appreciate, not only the theorists and practitioners of law, but also the legislator himself. The latter will have to enact a much more flexible law on the sale of agricultural land located outside the built-up area, from which to eliminate contradictory or interpretable texts, which could make it

difficult for those who apply them and supplement these provisions accordingly, so as to ensure the civil circuit of the agricultural lands located in the unincorporated area, while also reducing the risk of speculation on them.

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THE NATIONAL OMBUDSMAN AND THE EUROPEAN OMBUDSMAN

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Abstract
The Ombudsman is an institution whose activity involves a democratic environment, a political and legal culture, established to defend the spirit of the law and to protect the rights and freedoms of the individual. It is not a substitute body for others, but it is a body alongside others for safeguarding fundamental human rights and freedoms.

Keywords: *Ombudsman; European Ombudsman; Fundamental Rights.*

THE CONCEPT OF THE NATIONAL OMBUDSMAN

The name[3] of the institution differs from one country to another, as follows: Mediateur de la Republique (France)[4], Difensore Civoco (Italy), Defensor del Pueblo (Spain), Provedor de Justica (Portugal), People's Advocate (Romania), Volksanwaltscheft (Austria),

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[3] In some states there is a specific name for the female holders of this position: Ombudswoman, Ombudsfrau, Mediatrice.
[4] A. Dinu, *Mediatorul republicii în Franța* (RDP 1/2008), 73.

Parliamentary Commissioner for Administration (UK)[1], Diwan el Mezalem (Egypt) and the European Ombudsman / Ombudsman (in the European Union system).

Conceived as an institution independent of any political party, political alliance or trade union, in most countries of the world, the main instrument of the ombudsman is his authority[2], the credibility he enjoys among public opinion, the respect and support of all public authorities[3].

The experience of the Scandinavian countries in general and Sweden has shown that the Ombudsman[4] is an independent institution, not subordinate to any political or administrative institution.

Taking the model of Denmark, which in 1955 set up an ombudsman who did not exercise jurisdiction over the judicial authority and did not have the power to prosecute government officials for misconduct or abusive behavior, Norway set up an Ombudsman with general responsibilities, after, in 1952, he had established the Military Ombudsman.

The appearance, in Romania, of the institution of the People's Advocate[5], enshrined in art. 58 of the Constitution, is the expression of the classicism and traditionalism of the Ombudsman, already established, in the European space. Seen as a complement to the system of jurisdictional guarantees in terms of administrative action, the People's Advocate has the role of guaranteeing the legality of the activity of

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[1] I. Moroianu Zlătescu, „*Instituţia Avocatul Poporului”* (Drepturile Omului Magazine nr. 1/1992), 3.

[2] C. C. Manda and O. Predescu, I. Popescu Slăniceanu, *Ombudsmanul. Instituţia fundamentală a statului de drept* (Ed. Lumina Lex, Bucharest, 1997), 135.

[3] I. Boghirnea, *Teoria generală a dreptului*, 2nd Edition, revised and added (Craiova: Sitech, 2013), 41.

[4] In the old Germanic language, man-buds-man meant the one who collected the fine [M. Vlad, The Ombudsman in Comparative Law (Arad: Servo-Sat, 1999), 8].

[5] I. Muraru, *Avocatul Poporului-instituţie de tip ombudsman* (Bucharest: Ch. Beck, 2004).

public administration, in order for citizens to benefit from another institutional way to defend their rights and interests[1].

The Romanian Constituent Assembly opted for the name People's Advocate, considering that it is the name that expresses most clearly and, especially, for everyone's understanding, the role and legal significance of this institution.[2]

Although there are differences between the national ombudsman's offices specific to the law of each state, however, a number of similar tasks and competencies can be retained, i.e. they can receive and investigate any written complaint, they can be notified ex officio to initiate investigations and inspections, without the existence of a prior complaint and may request official reports or files from state institutions.

At the same time, in most states, they are appointed by parliament, are independent of the government and present an annual report to Parliament on the work carried out during that year, identifying issues related to respect for human rights by public authorities.

THE EUROPEAN MEDIATOR

The role and obvious importance of the ombudsman in the countries that received this institution and its extremely rapid expansion in most European countries, especially in the second half of the twentieth century, led to the establishment of an equivalent institution in the European Union[3].

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[1] I. Boghirnea and L. Olah, *Aspecte constituționale privind instituția Avocatului Poporului*, Suceava International Symposium, „Romanian economy: present and perspectives", Suceava, 2002.

[2] Taking advantage of the practical experience of the states in which the ombudsman operates, it results that the efficiency of the institution consists in the qualities of the person who is appointed and in the way of working.

[3] I.-N. Militaru, *The role of the European Ombudsman in the European Union*, in Proceedings of the 14th International Conference Accounting and Management Information Systems AMIS-IAAER 5 – 6 June 2019 (organized Bucharest University of Economic Studies: ASE), 75-82.

The European Ombudsman Institution[1] was established by the Maastricht Treaty in 1995, with the role of overseeing the activities of the European Union institutions and ensuring that they respect the principles of good governance.

Thus, according to the provisions of art. 43 of the Charter of Fundamental Rights of the European Union: "*Every citizen of the Union and every natural or legal person domiciled in or established in one of the Member States has the right to address the European Union Ombudsman in cases of misconduct Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance in the exercise of their judicial functions*".[2]

As mentioned, since its inception, the European Ombudsman has been a mechanism for parliamentary control over the executive and an independent guarantor of the fundamental rights of citizens. Within the framework established by the European Union, through Articles 20, 24 and 228 of the Treaty on the Functioning of the European Union (TFEU) and Article 43 of the Charter of Fundamental Rights of the European Union, the European Ombudsman contributes to the detection of maladministration Union, with the exception of the Court of Justice and the Court of First Instance, when acting in a legal capacity, and making recommendations for their termination.

Concerns to demonstrate the importance[3] of the institution for guaranteeing and defending citizens' rights and freedoms have been constantly manifested in constitutional doctrine and practice, as the

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[1] The first incumbent was Jacob Söderman (1995-2003), who had previously held the same position in Finland.

[2] B. Stefanescu and C. Albescu, *Curtea de Justiţie a Uniunii Europene vs Ombudsmanul European* (European Studies, 1, 2014), 19-35.

[3] The European Ombudsman has received numerous awards and has been awarded numerous prizes for his achievements. Thus, the European Institute of Public Administration awarded him the "Alexis de Tocqueville" prize in 2001 for improving public administration in Europe and for his tireless work to increase transparency in the institutions of the European Union. In the same year, he was named one of the top "50 Europeans of the Year" for increasing transparency in administration and improving freedom of expression at an event organized by the Voice of Europe newspaper and was awarded the title of Knight of the French Legion of Honor.

European Ombudsman, throughout his work, has improved the way EU institutions work for European citizens. Thus, each petition resolved by him had a positive result, both for the petitioner directly concerned and for all European citizens.

The work of the European Ombudsman is usually public but may be confidential at the request of the injured party or when he or she decides on his or her own initiative the secrecy of his or her activity for a good cause.

In principle, the appointment[1] of the Ombudsman by the legislatures presupposes that they can also revoke him; this also implies that his term of office is affected by a certain period.

The European Ombudsman works in the following areas[2]:

- fundamental rights;
- legal norms and principles[3];
- principles of good administration.

The guarantee of fundamental rights is one of the basic objectives set by the European Union, with the meeting between the Presidents of the three fundamental institutions of the Union - the Commission, the Parliament and the Council - taking place in Nice in December 2000. with the proclamation of the Charter of Fundamental Rights of the European Union, the aim of which is to make citizens aware of all the fundamental rights that the EU institutions and bodies must respect, as well as to facilitate citizens' access to these rights.

From the right to good administration[4], included in the Charter of Fundamental Rights of the European Union, derives one of the most

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[1] The documents issued by the European Ombudsman, through which his activity is completed, can be decisions, requests, recommendations, summonses.

[2] https://www.europarl.europa.eu/factsheets/ro/sheet/18/ombudsmanul-european (accessed on the 6th of July 2022).

[3] For the notion of principle at the level of the European Union, see, A. Cobzaru, *Principiile dreptului european al mediului* (Bucharest: Universul Juridic, 2012), 25.

[4] This right was introduced at the proposal of the European Ombudsman, who argued for its introduction by the fact that citizens are empowered to benefit from open and efficient administration. In order to provide a solid basis for the expression good administration, the European Code of Good Administrative Behavior was drawn up and

important roles of the European Ombudsman, namely, to ensure an open and efficient administration.

At the same time, the European Ombudsman seeks, through his work, to ensure that the provisions of the Charter are complied with by the institutions which proclaimed it, constantly monitoring the promises made to EU citizens and providing support for their observance.

REGIONAL AND INTERNATIONAL OMBUDSMAN ASSOCIATIONS

At European level, the European Network of Ombudsmen (European Network of Ombudsmen)[1] has been set up, comprising 95 offices[2] in 36 European countries, including national and regional mediators and similar bodies, as well as the European Ombudsman and the European Parliament's Committee on Petitions[3]. The national ombudsmen and similar bodies within the Network shall each appoint a representative to act as a liaison for the other members of the Network.

Established in 1996, the Network establishes a link between the European Ombudsman, national and regional mediators, in order to

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adopted by Parliament in September 2001, which identifies citizens' expectations of the EU administration. The rationale for the drafting of the Code was based on the need for EU officials to comply with it in order to avoid possible cases of maladministration. Currently, the code is used by the ombudsman when investigating complaints from citizens regarding the administration [E. Balan, *Institutii administrative* (Bucharest: C.H. Beck, , 2008), 32-33].

[1] https://www.ombudsman.europa.eu/ro/european-network-of-ombudsmen/members/all-members (accessed on the 6th of July 2022).

[2] A common feature of most ombudsmen in the Network is the establishment of the National Mechanism for the Prevention of Torture, implemented following the ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly in New York. on December 18, 2002.

[3] The expansion of institutions concerned with the promotion and protection of human rights through non-contentious means and in the administrative structures of non-EU Member States demonstrates that, in pursuing the ideal of good administration, public authorities acknowledge that respect for human and citizen rights is more important goal.

guarantee applicants adequate assistance, ensure the exchange of information on EU law and its impact in EU Member States, and facilitate cooperation between mediators, in with a view to protecting the rights of EU citizens and individuals under EU law[1].

In addition to the European Network of Ombudsmen, there are other associations of ombudsmen, depending on the specifics of the activities or the area where they come from.[2]

Thus, the Association of Francophone Ombudsmen and Mediators[3] is a non-profit association, which aims to promote knowledge of the role of the ombudsman and mediator in French-speaking countries and to encourage the development of independent mediation institutions in the French-speaking world.[4]

Also, at European level, the European Ombudsman Institute was set up, originally called the European Academy of Ombudsmen. This institute is, in fact, a scientific association whose aim is to address scientific issues related to human rights, the protection of citizens and ombudsman institutions.

The Network of Ombudsmen for Children in South-Eastern Europe (CRONSEE) is an informal network of independent children's rights institutions, which was set up in 2002 and operates at national, regional or local level in the countries of south-eastern Europe[5]. The purpose of CRONSEE is to contribute to the protection and promotion of children's rights at national and international level, by facilitating the

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[1] https://www.ombudsman.europa.eu/ro/european-network-of-ombudsmen/about/ro (accessed on the 6th of July 2022).

[2] In some European countries, in addition to ombudsmen with general competence, there are also ombudsmen specialized in various fields, such as: consumer protection; child rights; protection of persons with disabilities; the press; army; pensions.

[3] At the time of the establishment of the association, of the 52 French-speaking states and governments, only 15 had regulated such an institution, but currently more than 30 countries have adopted it.

[4] http://old.avpoporului.ro/index.php?option=com_content&view=article&id=65&Itemid=135&lang=ro-ro (accessed on the 6th of July 2022).

[5] http://old.avpoporului.ro/index.php?option=com_content&view=article&id=65&Itemid=135&lang=ro-ro (accessed on the 6th of July 2022).

exchange of experience and the dissemination of information, by collaborating and by adopting and publishing joint declarations on children's rights.

The International Institute of Ombudsman, established in 1978, is the only global organization for cooperation between more than 150 ombudsman-type institutions[1], arranged by region, namely Africa, Asia, Australasia and the Pacific, Europe, the Caribbean and Latin America, North America. The institute has 3 working languages, English, French and Spanish[2] and organizes regional and international exchanges of information, in addition to its regular conferences.

CONCLUSIONS

The Ombudsman is an independent institution for the supervision of the public administration, headed by a high-ranking public official with authority, which has become a feature and standard of the current rule of law.

Emerging in modern law in the early 19th century in Sweden, ombudsman institutions have spread to almost every state in the world, branching out into numerous forms of public oversight and corporate responsibility.

The development of Ombudsman-type institutions in Europe contributes to and is equally a result of the success of pluralist democracy on the European continent. In this sense, the effective realization of human rights depends, to a significant extent, on the quality of public administration, which is why the Charter of Fundamental Rights of the European Union also includes the right to good administration, as a fundamental right of citizens.

Therefore, the Ombudsman is an important and integrated component of the organization of states, which identifies delicate issues

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[1] The People's Advocate Institution has been an institutional member with the right to vote since 1998.

[2] Gr. Al. Jianu, *Institutia Ombudsmanului la nivel european* (Bucharest: I.R.D.O, 2013), 13-14.

in legal theory and ethics of administrative justice, fulfilling his duties under legal powers.

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ASPECTS CONCERNING THE LEGL NATURE OF THE PUBLIC PROCUREMENT CONTRACT IN ROMANIA

Daniela CÎMPEAN[1]

Abstract:
The concept of "public contract" represents the starting point in assessing the scope of application of the public procurement regime. Being in the presence of a legal definition of the public contract, set by EU regulation, the Romanian legislator has just translated the definition from the Directive and added one aspect, its assimilation to the administrative act.
This article aims to analyze the impact of the legal nature of the public procurement contract under Romanian legislation bearing the supremacy of the European Union law. The main conclusion is that a public procurement contract must respect the European legal framework irrespective of the legal regime (public or private) that governs its terms according to the national legislation.

Key words: *public procurement; public contract; administrative contract; administrative jurisdiction; Directive 24/2014.*

INTRODUCTION

Public procurement, the process by which public authorities purchase work, goods or services, makes up a substantial part of the

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economies of the European Union Member States.[1] A correct set of the range of bodies (ratione personae) and contracts (rationae materiae) to which the procurement regulation applies is crucial. This provides the initial starting point that defines the remit of the public procurement regulation. One of the most important factors for the applicability of the procurement regulation is the existence of a public contract.

Contractual agreements provide the legal basis for the provision of work, goods or services to the contracting authority. Value for money in public procurement contracts starts with an effective, transparent and competitive procurement process. Public procurement contracts must receive special attention from the contracting authorities, considering their importance in the process. Their relevance is determined by the value of the contracts, the complexity of the object of the contract, the risk of the unforeseen situations in the execution of the contract leading to the necessity of changing the contract, the long-term negative impact of the inadequate quality of the works, generated by the insufficient preparation of the awarding documentation.

Based on the interpretation provided by CJEU, especially in *Aroux*[2] and *Scala*[3] in is clear that the public contract is a EU concept, which must be interpreted in a functional way. There are several aspects that support the approach taken by CJEU, as a different interpretation would allow the Member States to create different forms of public contracts and this would result in a distinct application of the rules on EU public procurement in practice.

This article aims to analyze the impact of the legal nature of the public procurement contract under Romanian law bearing the supremacy of the European law.

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[1] According to the European Commission it accounts for more than 14% of EU's GDP. For more upon this topic see https://ec.europa.eu/growth/single-market/public-procurement_en, last accessed 09.04.2022

[2] C-220/05, *Jean Auroux and Others v Commune de Roanne*, ECLI:EU:C:2007:31.

[3] C-399/98, *Scala,* ECLI:EU:C:2001:401.

THE CONCEPT OF PUBLIC CONTRACT UNDER EU DIRECTIVE ON PUBLIC PROCUREMENT

The concept of the “public contract” represents the starting point in assessing the scope of application of the public procurement regime. The public contracts are defined in Article 2(1), (5) of 2014/24 Directive as being “contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services”. The Directive goes further and provides specific definitions for works, services and supply contracts. According to the definition from the Procurement Directive, the understanding of an agreement as a public contract can sometimes be a difficult task. Defining the scope of an application of the procurement legislation, a distinction has to be made between public procurement contracts and other types of measures that may seem similar to them, such as concession contracts, in-house procurement, exclusive rights or authorization schemes[1]. It is essential to classify an arrangement between a contracting authority and a private entity (sometimes even a public entity), because the public procurement rules only apply to public contracts.

Important indications about how this definition should be interpreted has been provided by the CJEU[2]. It must be stated from the beginning that the public contract is a EU concept that must be interpreted in a functional way at EU level. The European Court has

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[1] For an extensive evaluation of the way the concept of public contract is defined in different Member States and the criteria used in order to separate them from other types of legislative measures, administrative decisions, or other arrangements, see Ulla Neergaard and Catherine Jacqueson, Grith Skovgaard Ølykke (Eds.), *Public Procurement Law. Limitations, Opportunities and Paradoxes,* The XXVI FIDE Congress in Copenhagen 2014, Congress Publications, Vol. 3 (Copenhagen: DJØF Publishing, 2014).

[2] For a research upon the developments in the Court’s case law related to the concept of public contracts, see C. Bovis, “Public Procurement in the EU: Jurisprudence and Conceptual Directions*”, Common Market law Review* No. 49 (2012): 247-289.

emphasized this in Aroux Case (in paragraph 40 of the judgement), holding that "the definition of the public works contract is a matter of the Community Law". The Court went further and pointed out that the legal classification of the contract from the Member State (in this case France) is irrelevant[1], in order to determine the scope of the Directive. Any other interpretation that would allow the Member States to bring their own definition and classification of the public contract would lead to different applications of the procurement regulation in practice. We are here in the presence of the use of a systemic argument based on the consistent use of a concept throughout the legal system of the EU public procurement law[2].

THE CONCEPT OF PUBLIC CONTRACT UNDER ROMANIAN LEGISLATION

Being in the presence of a legal definition of the public contract, set by EU regulation, the Romanian legislator has just translated the definition from the Directive and added one issue, its assimilation to the administrative act. Public procurement contract is a contract for pecuniary interest, assimilated, according to the law, to the administrative act, concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services[3].

Romania was influenced by the French view of the public procurement contract. Within the EU there are different theories related to the public/private nature of a public procurement contract. It is a debate about the existence of a third autonomous model regarding the legal nature of the contract[4], but the dualism between the French and the British model is obvious.

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[1] See also *Scala*, C-399/98, ECLI:EU:C:2001:401.

[2] M. Ukkola, *Systemic Interpretation in EU Public Procurement Law* (Helsinki: Unigrafia, 2018), 141.

[3] Art. 3 par. 1 let. L from Law No. 98/2016.

[4] J. B. Auby, "Comparative approaches to the rise of the contract in public sphere", *Public Law*, I. (2007): 40-57. M. Fromont considers in *Droit administratif des Etats*

In general, in common law jurisdiction, there is no formal divide between public and private contracts[1]. The public procurement contract is considered as a civil law contract and does not have an independent status. Quite the opposite, there is another category of jurisdictions that recognizes the public procurement contracts as a disctinct category, as administrative contracts. This category has been developed in France and includes jurisdictions such as Belgium, Spain, Finland, Portugal, Romania. In other countries such as Austria, Denmark, Estonia, Poland, Sweden, Germany, Italy there are no specific set of rules for all public procurement contracts. In these countries the public contracts are governed by the general principles of contract law, but are also subject to certain principles drawn from administrative law.

This classification of the public procurement contracts into three different models takes into consideration the execution phase and not the awarding procedure for which there is only one possible model: the public one. It is in fact undisputable that, in the European Union the award of public procurement contracts are governed by public law, which is stemming from EU Directives on Public procurement[2] . However, even for the execution phase of the contract, the models are quite similar. They all include rules that allow the contracting authority to modify or unilateraly terminate the contract, which are much wider than the powers normally awarded to private parties, even if they are however limited in order to obide the competition rules[3]. With the new directives from 2014

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europeens (Themis Droit, 2006) that this is not a third model, but rather an evolution of the French

[1] In USA, England and Wales there are specific statutory rules that govern public procurement contracts. However, there are different standard terms elaborated by the government. For a research about government contracts and their regulation, see A.C. L. Davis, *Accountability. A Public Law Analysis of Government by Contract* (Oxford: Oxford University Press, 2001).

[2] M. E. Comba, "*Contract Execution in Europe: Different Legal Models with a Common Core", EPPPL*, Vol. 04 (2013): 305.

[3] M. Comba, "Retendering of Sale of Contract in Case of Bankruptcy of the Contractor? Different Solutions in an EU and Comparative Perspective", in G. Piga and S. Treumer (Eds.), *The Applied Law and Economics of Public Procurement* (London, New York: Routledge), 204.

that include special provisions regarding the possibility of amending the contract and terminating it the differences between the models have become even less proeminant.

From the definition found in the Law 98/2016 it is obvious that the legislator decided to keep the legal provision according to which the public procurement contract[1] is assimilated to the administrative[2] act.

The concept of the *administrative contract* has French origins. It represents a creation of the jurisprudence of the Conseil d'État that has been further developed and systematized by the doctrine, especially through the works of Gaston Jèze [3]. In France, in order to give the private persons the possibility to redress in case they were affected by the exercise of public powers a system of administrative courts was created, separate from the regular judicial ones. As a consequence, the Conseil d'État, [4] which was originally an advisory body[5] within the

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[1] See also P. Craig, "Specific Powers of Public Contractors", in R. Noguellou, U. Stelkens (Eds.), *Droit comparé des contracts publics*, 173 et seq.

[2] For a paper that seeks to reframe the comparative administrative law as an accountability network of rules and procedures designed to embed public administration and civil servants in their liberal democratic societies, see F Bignami, "From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law" (2011): 59 Am. J. Comp. L. 859.

[3] See G. Jèze, *Les principes généraux du droit administrative* (Paris: Berger-Levrault, 1904) and G. Jèze, *Cours de Droit Public, Theorie Generale des Contrats de l'administration* (Paris: Edition Marcel Girard, 1933).

[4] Nowadays the Conseil d'État has a dual function, both jurisdictional and consultative: it is the ultimate judge of the actions of the executive, of local government, of independent authorities or of any other public administration establishment which possesses prerogatives of public power and also the Government's advisor in matters concerning the preparation of draft legislation, ordinances and certain decrees. For further details, see the Conseil d'État, Complete Guide, available at http://english.conseil-etat.fr/content/download/67555/616460/version/1/file/Pdf_complet_versionanglaise-18p.pdf, last accessed 13.03.2022.

[5] It was created in 1799, after the French Revolution, as an advisory body for the Government with no judicial functions. In 1870's the Conseil d'État became a true administrative court without giving up its advisory role. The process is detailed in S.-R. Ackerman, "Policy Making and Public Law in France: Public Participation, Agency

administration, evolved into an administrative court. As for the competence of the Conseil d'État, it was admitted that the said court had competence not only over matters for which specific statutes attribute explicitly this competence to this court, but also that, by virtue of the 1790 Act, it enjoyed jurisdiction over all administrative matters[1].

Due to the appearance of a separate administrative jurisdiction there was the need to set criteria in order to establish the nature of a *contrat administratif* entered into by the Administration. There are two contractual concepts according to French law: *contrat de droit civil* (droit prive or droit commun) and *contrat administratif*. The contract that is of special interest from a public procurement point of view is the *contrat administratif*. It is a contract for the performance of a public service, in which the parties have intended that all rights and liabilities should be governed by the special applicable rules[2]. The differences between the two concepts would require more space, because it is considered one of the most intricate issues of French administrative law. In addition to the contracts that are considered administrative by a statute, in order to qualify an agreement as administrative contract it must meet two requirements: the existence of exorbitant terms[3] in the tender book and the inclusion of one of the parties in the category of administrative authorities[4].

Independence and Impact Assesment", Faculty Scholarship Series, Paper 4946. http://digitalcommons.law.yale.edu/fss_papers/4946, last accessed 13.03.2021.

[1] E. Piccard, "The Public-Private Divide in French Law Through the History and Destiny of French Administrative Law", in M. Ruffert (Ed.), *The Public Private Law Divide: Potential for Transformation?* (London: British Institute of International and Cooperative Law), 50.

[2] A. W. Mewett, „The Theory of Government Contracts", *McGill Law Journal*, Vol. 5, Issue 4 (1959): 222-246.

[3] Clauses in a contract are exorbitant if "their object is to confer rights or impose obligations upon the parties quite unlike in their nature compared to those which anyone would freely agree to in the context of civil or commercial law" (CE 20 October 1950, STEIN). For further details see L. N. Brown and J. S. Bell, *French Administrative Law*, 142 et seq.

[4] G. Pequignot, *Theorie generale cu contrat administratif* (Université de Montpellier, 1945), 169-175. *Apud* L.-T. Pascariu, "The Distinction of the Administrative Contract

Regarding the existence of administrative contracts, in Romania, until the adjustment of the Constitution from 1948, our literature has expressed three major opinions: acceptance of the theory of administrative contracts in a narrow sense, rejection of any theory related to administrative contracts (it starts from the theory of the division of the acts of the public administration in acts of authority and act of a managerial nature) and acceptance of the theory in a broad sense[1]. The first opinion was promoted by E. D. Tarangul[2] and I. Vantu. The theory of administrative contracts appeared in some decisions of the Court of Cassation, section III[3] that found that the administration can conclude with individuals, for the purpose of public service either private law contracts governed by civil common law or administrative contracts, governed by public law. The contrary opinion, that denies the existence of the administrative contract starts from the thesis of L. Duguit, respectively from the theory of the division of the acts of the public

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from other Types of Contracts", The Annals of the "Ștefan cel Mare" University of Suceava, Fascicle of The Faculty of Economics and Public Administration, 408. The fact that the administration is a party in a contract does not necessarily transform the contract into an administrative one. The particular characteristics of each contract transform it in either an administrative, or a private contract.

[1] See A. Iorgovan, *Tratat de drept administrativ* (Bucharest: All, 2005), 108. See also M. B. Petrișor and A. Badia, "Analysis of Public Procurement Contracts in the EU Member States and their Implications", *Journal of Public Administration, Finance and Law*, Issue 3 (2013): 115.

[2] E. D. Tarangul, *Tratat de drept administrativ roman* (Cernauti: Tipografia Glasul Bucovinei, 1944), 480-482.

[3] Decision No.279/1929 V. Roata: the court held that in order for the contract to be considered as an administrative one, the parties must agree to be governed by the special regime of public law, Decision No.1917/1934 I. Aron: the court held that as long as the parties have set the competence of the ordinary court, Ilfov Tribunal, to solve the disputes that may appear during the execution of the contract, the contract cannot be considered as an administrative one, but a civil one. For more on these decisions, see Constantin G. Rarincescu, *Contenciosul administrativ roman* (Bucharest: Universul Juridic, 2019), 198. According to the rulings of the Court of Cassation in order for the contract to be considered as an administrative, one the parties must agree for it to be governed by the special regime of public law and also upon the competence of the administrative courts to solve the disputes that might arise during its performance.

administration in acts of authority and act of a managerial nature[1]. In the light of this theory the concession contract was a mere civil-law contract subject to ordinary courts[2]. The third theory considers as administrative contracts all contracts concluded by the public administration.

During the communist era, as Iorgovan points out, it was difficult to support the theory of administrative contracts as long as the distinction between the public and the private property of the state did not exist any more and the order of the day were the "economic contracts"[3]. The period after 1989 can be considered as a new phase in the evolution of the theory of administrative contract, starting with the provisions of the Constitution form 1991 that recognizes its existence and expressly qualifies it as administrative contract[4]. However, there are rules for special administrative contracts without a developed general framework representing the ordinary law in the field[5].

The contracts considered of an administrative nature[6] have a series of characteristics that differentiate them form contracts that are governed by private law:

– At least one of the contracting parties is an administrative authority;
– Mandatory written format;
– It is governed by specific public law regulations;

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[1] Iorgovan, *Tratat de drept administrativ,* 110.

[2] I. Lazar, "Contractul administrativ in activitatea administratiei publice (The Admnistrative Contract in the Activity of Public Administration)", *Revista Transilvana de Stiinte Administrative*, No.1 (25)/(2010): 98.

[3] Iorgovan, *Tratat de drept administrativ,* 102.

[4] V. Vedinas, *Drept administrativ* (Bucharest: Universul Juridic, 2015), 139.

[5] For more details on this, see A. Tabacu, „Scurte consideratii asupra contractului administrativ si asupra procedurilor de control jurisdictional in materia achizitiilor publice", *Revista Transilvană de Ştiinte Administrative*, 1(23)/(2009): 67-88.

[6] For an overview of the administrative contracts in Romania, see N. Gamenţ-Antoniu and C. G. Zaharie, "The Field of Administrative Contracts in the Romanian Positive Law Related to the Provisions of art. 2 item (1) let. C)" from Law No.554/ 2004, Regarding the Administrative Legal dispute, Contemporary Legal Institutions, 2(1), 40-46.

– The parties must accept some special clauses established by law or according to the law, by means of government decision[1];
– The contract has a special regime which confers certain powers of control to the public administration[2];
– The contracting authority has the right to unilateral modification or cancellation when it deems to be in the public interest or the contractor breaches the contract or it becomes unreasonable or impossible[3] for him to execute the contract;
– The state in its transactions is not in an equal bargaining power with other private entities[4]. There is a juridical inequality (subordination of the private entity towards the public authority);
– The *intuitu* character of the contract, as cessation is only allowed with the permission of the public authority[5];
– There are special tribunal entrusted with deciding matters related to an administrative contract, i.e Contentious Courts.

Regarding the legal nature of the public procurement contract, we may speak about an ongoing controversy, i.e civil/commercial or administrative[6]. One of the reasons for this non-consistent qualification of the procurement contract was the continuous alteration of the legal framework related to public procurement specially regarding the

[1] M. A. Rațiu, *Dreptul achizițiilor publice*, Vol. 1 (Bucharest: Universul Juridic, 2017), 58.
[2] C. Ionaș, "The Administrative Agreement as a Legal Form for Public Services in Comparative and Roman Law", *Bulletin of the Transilvania University of Brașov*, Vol. 5 (54), No. 1 (2010): 104.
[3] M. P. Singh, "German Administrative Law", in *Common Law Perspective* (Berlin, Heidelberg: Springer Verlag, 1985), 53.
[4] M. Ismail, *Globalisation and New International Public Works Agreements in Developing Countries* (New York: Routledge, 2016), 9.
[5] Pascariu, "The Distinction of the Administrative Contract from other Types of Contracts", 409.
[6] For a paper that discusses the problems that may appear due to the qualification of a FIDIC contract (used in major infrastructure projects) as an administrative contract see Z. A Bamberger, „Statute of Limitation in FIDIC Contracts Concluded in the Public Procurement Procedures", *Romanian Construction Law Review* (2016): 49-54.

competent courts[1] on solving the complaints against the acts/actions taken by the contracting authority. The Romanian Courts were very helpful, because there were many contradictory decisions upon this matter[2].

Government Ordinance 12/1993 and EGO 60/2001 with the subsequent amendments as the Romanian public procurement legal framework did not include any express mention related to the legal nature of the public procurement contract. Nevertheless, the doctrine considered this contract as an administrative one[3]. This perception continued after the adoption of EGO 34/2006. If one analyzed the evolution of the legal framework starting from 2006, the Romanian legislator was not constant regarding the legal nature of the public procurement contract. The legislator was pending between an administrative and a commercial nature of the public procurement contract. These constant changes were not doing any good to the Romanian public procurement system. Quite on the contrary, in long term, this legal uncertainty and the resulting arbitrariness of the procurement process may permanently discourage some economic operators from participating in expensive tendering procedures, which could provoke further efficiency losses[4].

The strangest situation appeared in 2010[5], when from the legal provision resulted a mixed character of the discussed contract: an administrative contract for the pre-contractual phase and a commercial

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[1] For a research regarding the competence of the contentious administrative courts for direct actions or the illegality plea, and remedies in administrative litigations, see E. M. Fodor, "The Current Form of Law 554/2004 of the Administrative Contentious", An. Inst. de Ist. „G. Bariţiu" din Cluj-Napoca, Series Humanistica, vol. XII (2014): 279–290.

[2] See the Decision of the Bucharest Court of Appeal 18/18.01.2010: the Court considered the public procurement contract and the subcontrancting agreement as administrative contracts.

[3] For a study that considers the contract as administrative, see D.C. Dragoș and D. Buda, "Considerații teoretice privind noul cadru juridic al încheierii contractelor de achiziție publică", *Revista Transilvană de Științe Administrative*, nr. 1(7)/(2002): 201-221.

[4] C. Bovis, *EU Public Procurement Law* (Cheltenham: Edward Elgar, 2012): 466.

[5] EGO 34/2006 was changed through EGO 76/2010 and Law No. 278/2010 (published in the Official Gazette of Romania No. 898 from 31.12.2010).

one for the execution phase of the contract. The said bill adopted a new definition of the public procurement contract. The only element of novelty was represented by the qualification of the contract as a commercial one[1]. The legislator explained this change as a need for an improved matching of the legislative framework[2]. It could be considered anything, but for sure not a correlation with the legislation in force. According to article 2, par. 1, letter c form Law no. 554/2004 on administrative litigation[3] the administrative decision is *a unilateral decision issued for specific purposes or for regulatory purposes by a public authority with a view to enforcing or ensuring the enforcement of the law, thereby generating, modifying or extinguishing legal relationships; for the purposes hereof, on a par with administrative decisions shall be those contracts entered into by public authorities and having for an object: to capitalize on public property items; to perform works of public interest; to provide public services; public procurement. Special laws may establish other categories of administrative contracts that come under the jurisdiction of Administrative Litigations courts.* As Law no. 554/2004 (organic law) considers the public procurement contract as administrative we cannot help wondering where is the correlation with the legal framework. As for a correlation with the European regulation[4] on public procurement contract again it is not a solid argument. Directive 2004/18/EC considered public contracts as *contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or*

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[1] See Decision No. 1402/01.06.2012 of Bucharest Court of Appeal.

[2] The commercial character of the public procurement contract was an amendment brought by the Deputies Chamber as the decisional chamber. The legislative process is available at http://m.cdep.ro/pls/proiecte/upl_pck.proiect?idp=11427, last accessed 07.10.2020.

[3] Law No.554/ 2004 on administrative litigation published in Official Gazette No. 1154 from 07.12.2004.

[4] When detecting a failure to comply with Community law, the Commission may initiate the infringement procedure against a member state for failing to implement EU legislation.

the provision of services within the meaning of this Directive[1]. It is clear from the wording of the Directive that the European legislation did not impose the legal nature of the public procurement contract. It is the member states' duty to transpose the Directive at a national level and they have the possibility to consider the public procurement contract as either a private one or an administrative one[2]. The only correlation that the legislator was possibly considering was the one with the regulation from EGO 76/2010[3] which stated the competence of the commercial tribunal as a first instance court regarding public procurement contract litigations. According EGO 34/2006 as modified by EGO 76/2010: "The trials and applications for granting compensations for reparation of damages caused in the awarding procedure, as well as those concerning the execution, the nullity, cancellation, resolution, termination or unilateral termination of public contracts are settled in the first instance by the commercial department of the tribunal in the jurisdiction of which the contracting authority is headquartered"[4]. The Romanian legislator started somehow with the end: first awarded the commercial courts the competence to solve the disputes related to public procurement contracts. Perhaps it has proceeded in such a way for the exact reason to justify the "legislative correlation" when it qualified the public procurement contract as a commercial one.

The qualification of the public procurement contract as commercial raised serious problems as the rules of civil law were applicable instead of special regime of administrative contracts[5] i.e there

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[1] Art. 1, par. 2, letter a.

[2] Another state that considers the contract as administrative is France. The relevant legislation in France is Ordinance no 2015-899/23.07.2015 on public contracts and Implementation Decree no 2016-360/25.03.2016 on public contracts that transpose the European directives on public procurement and entered into force on April 1st, 2016.

[3] Government's Emergency Ordinance 76/2010 for amending and supplementing Government's Emergency Ordinance No. 34/2006 regarding the award of public procurement contracts works concession contracts and services concession contracts, published in the Official Gazette of Romania No. 453 from 02.07.2010.

[4] Art. 286 from GEO 34/2006 amended by GEO 76/2010.

[5] See decision 3553/10.10.2012 of the Vâlcea Tribunal. According to the said decision, as the public procurement contract is a commercial contract the parties are equal and the

is no subordination towards the public authority, but a equality of the contract parties, the contracting authority does not have the right to invoke the public interest in order to adapt the terms of the existing contract to the actual needs[1], the applicability of the exception *non adimpleti contractus*[2] and the list may go on.

By means of the same amendment the action regarding the review of decision taken in the pre-contractual stage of a public procurement contract before the Council became mandatory[3]. It was an odd solution adopted by the Romanian legislator who claimed that otherwise access to EU funds will be blocked by lengthy court proceedings[4]. Depending on the stage in the award of the public procurement contract the legal actions regarding the review of decisions had to be brought before different review bodies: the National Council for Solving Complaints for the pre-contractual stage and courts of law (commercial department of the tribunal in the jurisdiction of which the contracting authority is headquartered) for actions related to decisions after the conclusion of the contract. Before this moment the complainant had the possibility to choose between the National Council for Solving Complaints[5], a body

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economic operator has the possibility to ask the commercial tribunal for delay penalties as in any other private commercial contract, by using the simplified procedure provide by Emergency Government Ordinance 119/2007 concerning measures to combat late payments in commercial transactions.

[1] According to the principle of Fait du prince, the unilateral and unpredictable power of the public authority to modify the existing contract is mitigated by the requirement that the contractual equilibrium should be maintained and that any changes imposed by the administration should be compensated appropriately. See J. Bell and S. Boyron, S. Wittaker, *Principles of French Law* (Oxford: Oxford University Press, 2008), 197.

[2] One party (in this case the economic operator) has the possibility to invoke this exception and to withhold his or her own performance until the other party duly performed his or her obligations under the contract.

[3] This procedure became mandatory through Law No. 278/2010 the approval law of EGO 76/2010.

[4] D. Dragoș, "Alternative Dispute Resolution Mechanism in the Field of Public Procurement: Between Effectiveness and Constitutionality", *Transylvanian Review of Administrative Sciences*, No. 34 E (2011): 101.

[5] In case the economic operators decided to lodge their initial complaint with the Council and was not satisfied with the decision, they had the possibility to introduce an

with administrative-jurisdictional activity and the court of law, the Administrative and Fiscal Section of the tribunal being competent in the first instance. The Constitutional Court Decision no. 284/2012[1] was the decision that put an end to the doctrinal debates and the difficulties from a practical point of view related to the mandatory character of the review before The National Council for Solving Complaints[2].

As of 1 January 2013, by means of Government Emergency Ordinance no. 77/2012[3], the public procurement contract was re-qualified as an administrative contract, as opposed to a commercial one. Starting from that moment the legal provisions applicable to administrative contracts were applicable (again) to public procurement contract. The administrative courts gained back the competence for handling complaints against public procurement contract that were already concluded.

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appeal against the decision to the Appellate Court as the recourse instance. There were several pleas of unconstitutionality against this legal provisions related to the limitation of free access to justice and the absence of the first court instance. The Constitutional Court ruled that the administrative procedure before the Council is constitutional and it does not represent a limitation to the free access to justice since it is elective and free of charge (Constitutional Court of Romania, Decision No. 230/4.08.2008, published in the Official Monitor of Romania No. 300 from 17.04.2008). For a detailed presentation of the decision of the Constitutional Court see D. Dragoș, „Alternative Dispute Resolution Mechanism in the Field of Public Procurement: Between Effectiveness and Constitutionality“, 108 et seq.

[1] Constitutional Court of Romania, Decision No.284/27.03.2012 published in the Official Gazette of Romania No.344 from 21.05.2012

[2] The Court held that the person who intends to introduce a complaint against the act/action taken by the contracting authority within the award procedure of a public procurement contract has the possibility to choose between a review before the Council or going straight to court. By this decision it became clear (again) that the complainant is allowed to resort either to the discussed administrative body or choose the judicial way according to their own choice. The Constitutional Court explained the reason that the legislator had introduced this administrative procedure was the fact that it is seen as an efficient and fast procedure for preventing the possible abuse of the contracting authority within the public procurement procedure.

[3] Government Emergency Ordinance No.77/2012 published in the Official Gazette, Part I, No. 827/10.12.2012 amended Government Emergency Ordinance No. 34/2006.

From the definition found in Law no. 98/2016, it is obvious that the legislator decided to keep the legal provision according to which the public procurement contract is assimilated to the administrative act.

However, with the amendments brought in 2018[1] to the Remedies Law that shifted once again the competence to solve the legal disputes regarding the performance of the contract from the divisions for administrative and fiscal litigations of the tribunals to the civil ordinary courts in whose jurisdiction the contracting authority is headquartered the controversy about a change in the legal nature of the public procurement contract was again raised. Was it in the intention of the legislator to consider again the public procurement contract as a civil one?

We are of the opinion that the choice of the legislator to select the jurisdiction of the civil ordinary courts for actions concerning the performance of the public procurement contract does not represent a change of the legal nature of the contract, from an administrative into a civil one[2]. The dissociation between the courts that are competent to solve disputes related to breaches to public procurement legislation regarding the valid conclusion of the contract - annulment or nullity of the contract (purely public law issues) and the ones competent to solve issues related to the execution of the contract may be justified by the fact that after the valid conclusion of the contract the court has to analyze the way the contract is being implemented which is closer to civil legal mechanism[3].

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[1] Law 101/2016 was amended by Law 212/2018 Published in the Official Gazette no. 658/30.07.2018.

[2] In the substantiation of grounds for Law 212/2018, the lawmaker has declared that the intention for resorting to such a solution was to balance the volume of activity among the various departments of the court.

[3] See also O. Puie, "Consideration Regarding the Jurisdiction of the Courts That Settle Disputes Regarding the Execution of Public Procurement Contracts, Sectoral Procurement Contracts, Concession Contracts as Well as the Procedure for the Execution of These Judgments", *Universul Juridic*, No.11 (2018).

CONCLUSIONS

Bearing the supremacy of the European law, the CJUE has stated on several occasions the fact that a public procurement contract must respect the European legal framework irrespective of the legal regime (public or private) that governs its terms according to a national legislation[1].

Taking into consideration the present Romanian law system, we join the authors that consider appropriate to qualify the public procurement contract as an administrative contract. Special attention must be given to principle of public interest[2] in public procurement contracts. In is true that the provisions of the Article 8(3) of Law No. 554/2004 on administrative litigation enshrines the principle that contractual freedom in administrative contract is subordinated to the principle of priority in the public interest[3], but as can be seen in different ares of the Procurement Directive there are many circumstances where the European legislation seems to favor the prevention of distortion of competition and a general protection of economic operators, rather than looking exclusively over the „imediat" public interest[4]. The contracting authority does not have the right to justify its actions on administrative contract theory when they are contrary to the European regulation.

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[1] C-264/03, ECLI:EU:C:2005:62.

[2] See C.S. Sararu, "The Interpretation of Administrative Contracts*", Juridical Tribune*, Vol. 4, Issue 1 (2014): 153.

[3] See O.Puie, *Contractele administrative în contextul noului Cod civil şi al noului Cod de procedură civilă* (Bucharest: Univers Juridic, 2014) 7.

[4] This may be seen in certain areas of contract modification; e.g the right to change the contractual partner, which is allowed only under certain precise conditions, even if continuing the contract would be in the best interest of the contracting authority, or in the cases of the unilateral termination of the contract as seen by Article 73 of the Directive (the need to terminate a contract where material amendments have been brought to a public contract, where the contract should not have been awarded to the said economic operator due to the existence of ground/s of exclusion in its concern).

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THE CURRENT ACCOUNT CONTRACT

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Abstract:
The current account contract is a creation of commercial practice, initially used by banks and then taken over by traders in their relations. The Commercial Code 1887 regulated this contract and from it was enshrined in the Civil Code 2009 with some non-essential amendments. The current account is used by traders as a tool to simplify the payment of mutual claims. Instead of multiple reciprocal payments for reciprocal remittances, the Parties agree to keep the accounts of the submitted remittances for a certain period of time and that, for the period of time the account remains open, the mutual claims will be cleared. At the closing of the account, the amount that remained uncompensated represents the final debt respectively the debt of the party that made remittances of a value lower than that of the other party. Until the deadline set for the liquidation of the account, each of the discharges shall appear in the current account in the form of the respective debit credit and not the debt or debt.

Keywords: *current account; current account contract; mutual remissions; compensation; credit and debit.*

INTRODUCTION

In Chapter XIV (Art 2171-2183), Title IX of the Civil Code is regulated the current account contract. It is by these rules that the current account and its effects are defined.

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The notion of current account contract. The current account contract is the agreement of wills by which two persons, accountants, agree to account for each other all the mutual remittances carried out between them and to consider them not eligible and unavailable until the account is closed (Art 2171 C. civ.)[1].

Utility of the current account contract. From the above rule it is inferred that it is only under a current account contract that each mutual claim arising between the parties of one or more businesses carried out over a long period of time cannot be the subject of the enforcement claim until the moment of closing the account.

The current account contract is used by professionals in their mutual economic relations but also by banks in its relations with professionals or non-professionals, with a partially changed regime, the current bank account contract.

The utility of the current account. The current account is a creation of the commercial contractual practice, which was enshrined in the Commercial Code of 1887 and then in the Civil Code of 2009. The origin of the current account is found in the practice of banks. In contractual practice the current account is used as a tool to simplify the payment of mutual claims. Instead of multiple reciprocal payments for reciprocal remittances, the parties agree to keep the accounts of the submitted remittances for a certain period of time and that, for the period of time the account remains open, the mutual claims will be cleared. At the closing of the account, the amount that remained uncompensated represents the final debt respectively the debt of the party that made remittances of a value lower than that of the other party. Until the deadline set for the liquidation of the account, each of the discharges shall appear in the current account in the form of the respective debit credit and not the bond or debt[2].

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[1] Stanciu Cărpenaru, *Tratat de drept comercial român* (Bucharest: Universul Juridic, 2012), 593

[2] Gheorghe Piperea, *Contracte și obligații comerciale* (Bucharest: C.H. Beck, 2019), 667-668

As can be deduced from the explanation above, the current account also has the function of a credit instrument because during the execution of the current account contract, remittances by which one performs services in the patrimony of the other does not entitle to claim its value, but only its registration in the account as a debit.

We must not confuse the current account, intended for the use of professionals among themselves, as well as between banks with them or with non-professionals, with the current bank account. The bank keeps, in addition to the current account in its relations with clients, professionals or non-professionals, other accounts: deposit account, credit account, cheque account, etc. In the current legislation, the current bank account is subordinated to the legal regime of the current account, but the specificity of the banking activity has printed some additional legal rules, added to those of the current account for professionals (Art 2184-2190 Civil Code).

Parties to the current account contract. According to the legal definition, the parties to the current account contract, called accountants, are the subjects of a series of mutual remittances of an economic nature.

They are called accountants because they keep each other's accounting for a series of unpaid mutual remittances over a period of time, scriptural they are when the creditor when the debtor to each other.

The account has the significance of granting credit.

Regardless of whether the parties are professional or not, they must have legal capacity given that by the effect of the current account agreed by contract they are required to make payment deeds, a legal act of disposition by definition.

Formation of the contract. In the silence of the law, the current account contract is consensual, and the proof can be done with any means of proof. Keeping the current account is a proof of the contract[1].

Characters of the current account contract. From the rules of the current account contract results its specific characters:

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[1] Andreea Teodora-Stănescu, *Drept comercial. Contracte profesionale* (Bucharest: Hamangiu, 2021), 257

- The *intuitu personae attenuated* features of the contract. If one of the accountants dies or is declared incapable or insolvent, the other party may terminate the contract (Art 2183 Para 1 of the Civil Code), hence the *intuituu personae* feature of the contract. However, this character is mitigated because if the accountant shown does not denounce the contract, the heirs, respectively the representatives of the incapable or the judicial administrator have the power to denounce or not, in the latter case the contract being continued either by the heirs or, as the case may be, by the representatives of the incapable or of the insolvent.
- *Reciprocity of the registration of remittances in the account*. This feature is a defining element results from the definition of the current account contract (Art 2171 of the Civil Code). Only by entering in the account the mutual remittances can they be compensated for each other, an operation specific to the current account.
- *Generality of the account*. In addition to claims which cannot be the subject of compensation, all reciprocal remittances derived from the economic relations of the parties to the current account contract may be subject to entry in the account (*a contrario* Art 2172 corroborated with Art 2173 of the Civil Code). By way of exception, in current account contracts concluded by professionals, only claims arising from the exercise of professional activity may be entered.
- *The translational feature of the entries in the current account of the remittances made by the parties*. The mention in the current account of the remittances transfers the ownership of the goods that were the object of the remittance in favor of the recipient (Art 2173 of the Civil Code).
- *The innovative feature*. Remittances made under various contracts, regardless of their nature, a right in rem, an obligation to do, etc., are novated in claims, which are extinguished by offsetting.
- *Indivisibility of the account*. Neither party may request payment of the provisional creditor balance[1].

Implementation of the contract.

Registration of remittances in the current account. Under the current account contract, mutual remittances made by the parties, in the

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[1] Smaranda Angheni, *Drept comercial, Tratat* (Bucharest: C.H. Beck, 2019), 650

execution of their contractual relations agreed to fall within the scope of the current account contract, will be mentioned in the current account, each mention representing a game in the account.

As a matter of law, the number of commissions and expenses incurred for the operations that have been the subject of the remittance are entered in the account, a rule that is only of the nature of the current account and can therefore be removed (Art 2174 of the Civil Code).

The parties may agree that the remittances prior to the conclusion of the contract shall also be entered in the current account and shall be subordinated to its effects (Art 2173, second thesis of the Civil Code).

The term remittance used by the legislator in the regulation of the current account contract has the meaning of tradition, with a translative effect.

The term has a general meaning such that any transfer of value from one accountant to another, for example, assignment of a claim, as intangible (Art 2178 of the Civil Code) or the performance of an obligation to do, such as an operation performed under a mandate contract, will be entered in the current account, even if in this case there may be situations in which there is no actual remission.

The remittance is recorded in the current account as representing the remittance's claim to the recipient of the remittance.

The account is a specific bank instrument so that regardless of whether it is used by the bank or by other categories of professionals or non-professionals, the entry of the claim in the current account must be made in monetary expression.

Basis for the submission. The remission may be based on the different relationships existing between the accountants. For example, deliveries of products by a supplier under their framework contract for a long period and respectively the payment of the price by the wholesaler or retailer.

Reciprocity and alternation of remittances. The current account is applicable in the relations in which each of the parties makes submissions to each other, because only in this way the compensatory effect of the mutual claims is achieved. There is no current account if its replenishment is made only by one of the parties.

The characters of the debts entered in the current account. The registered claims, representing the monetary value of the mutual remittances, must be certain and liquid.

The claim subject to a period or a suspensive condition may also be entered in the account under the condition that the term or condition is met on the date of the account conclusion.

Also, debt securities or assignments of debt may be entered, subject to their collection, unless otherwise provided in the current account contract (Art 2177-2178 of the Civil Code).

Effects of the current account contract and effects of the current account.

The effect of the current account contract is the opening of the current account between the current staff, which means the acceptance also of the effects of the operation and execution of the current account.

Effects of the current account. As mentioned in the introductory part, the current account is a financial-banking instrument that has its own mechanism of operation expressed by law in its regime.

The law provides for two categories of effects: main and accessory.

Main effects

A. *The translational effect of the remittance entered in the current account*. The registration of remittances in the current account has the effect of transmitting the property from the remittance to the recipient over the remitted goods (Art 2173 first sentence of the Civil Code).

This effect is specific to the current account, overlapping with the effect regulated by the Civil Code for each legal operation that was the cause of the remittance, prevailing on it. For example, under the supply contract referred to above, the products transmitted to the distributor have a translative effect specific to the contract shown. However, if the parties have concluded a current account contract, the registration in the account produces the translation effect.

The reason why the specific civil effect of the legal operation that constituted the cause of the remittance is without consequences in relation to the current account is the novation of the effect of each legal

transaction by entering in the current account the remittance made on its basis.

The *a pari* argument is Art 2173 the second sentence of the Civil Code, which provides the innovative effect for remittances made before the opening of the current account. If those remittances are novated by entering them in the current account, the same effect must occur for the entries of remittances made after the opening of the current account[1].

B. *The extinctive effect of the claims registered as a party in the current account by compensating them in law*. As a result of the current account, the reciprocal claims entered in the alternation are extinguished by offsetting (Art 2173 second sentence of the Civil Code).

Accessory effects

A. *The rightful flow of interests*. From the date of registration of the claim representing the amount of the remittance, the related interest flows until the conclusion of the account and is counted on days, unless the parties provide otherwise (Art 2173 third sentence of the Civil Code).

B. *The right to an action for annulment of the legal act that constituted the legal cause of the remittance*. The registration of the claim in the account and its extinguishment by offsetting does not extinguish the subjective right to bring the action for the nullity of the act that constituted the cause of the remittance (Art 2175 of the Civil Code).

C. *Debt settlement does not extinguish the guarantees related to them*. Extinguishment of claims entered in the current account, by offsetting, has the effect of extinguishing their guarantees under the terms of civil law. Specific to the current account is that, as a matter of law, these guarantees are not extinguished, surviving until the payment of the claim resulting from the balance of the current account (Art 2176 Para 1-2 of the Civil Code).

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[1] Sorana Popa, *Drept comercial, Obligații, Contracte, Titlurile de valoare, involvența* (Bucharest: Universul Juridic, 2014), 133.

Closing the current account and approving its payment by the parties

Closing the current account. At the due date fixed by the parties or at the termination of the current account contract, the current account is closed.

By closing the current account, the debt remaining in the charge of one of the parties, following successive compensations represents the liquid and due claim in the patrimony of the other party, called the creditor balance.

If it is not entered in a new account, the amount representing the creditor balance shall be calculated the conventional interest, or in default, the legal interest, from the date of closing the account (Art 2179 Para 2 of the Civil Code).

Before closing the current account, the parties may agree to carry out an interim closure. In the latter case, the creditor balance shall be entered as the first entry in the new account (Art 2179 Para 1 of the Civil Code).

Approval of the current account statement reflecting its situation at the date of its closure. The statement of current account or of the current account report issued by one party and transmitted to the other one is considered approved if it is not contested by the latter within the period stipulated in the contract or, in its absence, within a reasonable time (Art 2180 Para 1 of the Civil Code).

Appeal of the interested party after the approval of the creditor balance. Under penalty of revocation, within one month of approval, the interested party has the right to question and request the recalculation of the balance if he proves that there were errors of registration or calculation, omissions or double registration.

The law provides for the written form of the appeal, which must be sent to the other party by post, within one month, with a receipt (Art 2180 Para 2 of the Civil Code).

Legal action for rectification of errors in the creditor balance. The prescription period. If the parties do not settle the dispute amicably, the interested party may bring an action to rectify calculation errors,

omissions, double entries or other causes of distortion of the real value of the credit balance.

The right of action shall be time-barred within one year from the date of communication of the current account statement.

Enforcement of the creditor balance. If the debtor does not voluntarily execute the payment of the creditor balance, it constitutes an executor title, and the creditor may apply for enforcement of the debtor on the basis of the creditor balance (Art 2181 Para 1 of the Civil Code).

Closing the current account at the request of the creditors of the accountants. The creditors of any of the accountants, whether they are unsecured or have a right of guarantee, can forcibly execute the balance of the current account. If the current account is in progress, they may request from the court, including by request for a presidential order, the early closing of the current account so that in this way the creditor balance is established (Art 2181 Para 2 Civil Code).

In my opinion, the applicant will have to prove the interest of the action in the early closure of the current account, proving in this respect that his debtor will be the creditor of the current account balance, otherwise the legal action is of no interest.

Termination of the current account contract. Being a contract with successive performance, it can be of fixed or indefinite duration.

In the first case, the contract is terminated at the time stipulated by the parties or in advance, if after the conclusion of the contract through a modification contract they agree to modify the initial term and thus to terminate the contract before the deadline (Art 2183 Para 1 of the Civil Code).

In the second case, if the parties have not provided for a term of termination of the contract, according to the common law regime of termination of contracts of indefinite duration (Art 1277 of the Civil Code), each of the parties may declare its termination by notifying the other party with a notice. Specific to the current account contract of indefinite duration, the parties may unilaterally decide to terminate it on the date of the interim closure of the current account, with a notice of 15 days before termination. In the absence of provisions to the contrary, the current account contract of indefinite duration has an intermediate

closing term for the last day of each month (Art 2183 Para 2 of the Civil Code).

CONCLUSIONS

In conclusion, the current account contract is an original instrument that is concluded by professionals-traders who have mutual benefit relationships, regardless of their nature. By this contract, each keeps records of mutual remittances, which they novate by entering them in the account, in the respective amount of debt, and by closing the account, after the compensation, they become a claim in favor of the party whose remittances had a higher value.

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CITIZENS, DIGNITARIES AND PUBLIC LAW DURING 21ST CENTURY'S WARS. BRIEF CONSIDERATIONS

Marius VACARELU[1]

Abstract:

Our lives are normally spent in peace – at least in a peaceful time related to other countries – and most of daily problems appear as bad quality of government expression. Every nation history contain cases where some leaders act with dictatorial tendencies and more cases about lack of quality in some public areas as fiscal policies, public servants selection, embezzlement, etc. create continuous social anger. The quality of government is the source of power and also the main reason to political elite changing, meaning that social sciences must study much more this area rather than other situations like wars, political intrigues, political doctrines and ideologies.

Citizens are conscious in an intuitive mode about the relation between quality of governance and political ruling, expressed by huge number of revolts met in almost every country. The reasons for protest are not specific only to central governance, but also to local rulers. However, during war times the good governance necessities become more important and many of them can be too hard to solve by politicians and public administration. In any case, it is necessary to analyse a little more the relation between citizens, their needs and pretentions, related to dignitaries and instruments used to solve complicate problems. Public law is the main place for governmental intervention and our text tries to investigate the basic points of such action, because ignoring its principles can bring bad governance and social tensions, able to provoke great loses to any country.

Key words: *Public Law; Standards for Good Governance; War; Citizens; Dignitaries; Public Administration.*

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INTRODUCTION

In a world where the abundance of electronic resources overwhelms the human mind, it is necessary for science to adapt, especially in the social sciences area. Thus, it is a better solution to write clear, shorter, focused texts, in order to reach more easily not only academia, but also any other internet user.

Practically, if today anyone has access to the Internet, it turns out that he – regardless of the level of his studies – can be educated in several directions, and science must keep in mind that a very technical text in terms of language is possible to not bring enough social utility. From this perspective, writing an article that is too far-reaching is not useful for educating society – we repeat and emphasize – precisely in the paradigm of this very wide access of the public to scientific information.

If until the advent of the Internet most scientific publications existed rather in a closed framework – namely that of universities – the emergence of this communication framework of over 5 billion users has changed the perception of science, and the social sciences are most affected by this phenomenon. Thus, the proposed text is not a large one – over 20 pages – but tries to concentrate in clear language the main aspects of the relationship between the leaders of a country / local communities and public administration, on the one hand, relative to desires citizens. This (short, clear text, describing the relationship between the demands of citizens, related to the political and administrative leaders' action) is more necessary now, during a war. The average person wants simple and clear issues, and the rulers – regardless of their level – must achieve these goals, in addition to the strategic ones, which are more difficult to understand by the population of a country. The legal means that governments will use will be the most visible, and their effect will attract more reactions both in the long run, but especially in the short term.

1. The term ‘governance’ is popular but imprecise. It has at least six uses, referring to: the minimal state; corporate governance; the new

public management; 'good governance'; socio-cybernetic systems; and self-organizing networks[1].

Governance describes the way countries and societies manage their affairs politically and the way power and authority are exercised. For the poorest and most vulnerable, the difference that good, or particularly bad, governance, makes to their lives is profound: the inability of government institutions to prevent conflict, provide basic security, or basic services can have life-or-death consequences; lack of opportunity can prevent generations of poor families from lifting themselves out of poverty; and the inability to grow economically and collect taxes can keep countries trapped in a cycle of aid-dependency. Understanding governance, therefore, is central to achieving development and ending conflict[2].

From the earliest years of conscious life, people have in mind in some form the truth of these government characteristics. They see from the first years of life that the limits of their actions are set first by their parents, then by the various educational institutions, and every year the number of organizations that interfere with their lives increases. As it evolves, they will understand the idea of state and the idea of organizing society, they will know that the public apparatus is financed by citizens and firms, they will see that at a certain moment political leaders are replaced, etc.

All these ideas are acquired gradually, but without setting an effective moment in this regard. Even if there are legal thresholds regarding the voting age, these are only issues decided by the legislator, in relation to various considerations.

The adult is presumed by law to be a person capable of understanding the complexity of life and the problems that affect a

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[1] R.A.W. Rhodes, "The New Governance: Governing without Government", in *From Government to Governance*, R. Bellamy and A. Palumbo (London: Routledge, 2010), 42.

[2] UkAid, *The Politics of Poverty: Elites, Citizens and States. A Synthesis. Paper Findings from ten years of DFID-funded research on Governance and Fragile States 2001–2010*, available at https://www.oecd.org/derec/unitedkingdom/48688822.pdf, 3, consulted on 29 of June 2022.

territory (a country or a local community), and his electoral decisions are again presumed to be in accordance with this mental capacity acquired before legal voting age fulfilment. However, it is a real problem that there is no education of the citizen in a more consistent proportion on the problems of government, because the complexity of the contemporary world is too big to believe that every man is able to understand all the subtleties of public problems. Although this statement opens a new debate – on the quality of the school and high school curriculum in each country – we will presume that the general level of society is one that understands at a reasonable level the issue of governance and its constraints.

2. The issue of government will soon reach that of political leaders. Without discussing the ways in which a person reaches the top of the local or national political hierarchy, it must be acknowledged that the citizen will always question their limits and capabilities. This is due to two major reasons, psychological and educational. First, the whole complex of educating children is based on the idea of a perfect hero, who defeats any opponent and at some point becomes a king who governs well, appreciated by the entire population. Second, all schools have a discipline called history, in which the cases of good governance – and military success – of the most important countries are presented. Thus, the education of children is always done taking into account the quality of government – as it can be presented to a young person, namely in relation to his age.

An objective aspect must be added to this perspective. Most public institutions – as well as political ones – have complex rules of organization, with subtleties difficult to know by a person with average knowledge. From this perspective, their most important attributions will define the entire institution in the public perception, and only major political controversies can lead to changes in this identification – usually by adding new attributes. To this perception is added, as a rule, the size of the buildings where these institutions are fixed, the popular consciousness associating their administrative force with the size of those buildings.

The objective aspect is doubled by another, rather subjective one: the people who fulfil management positions within these institutions. Often referred to as "dignitaries", these persons personify the legal will of public institutions, and their personal characteristics are combined with those specific to the institutions they lead. There is often a real symbiosis and the citizen perceives it as such, because the personality traits of the leader are also expressed by the way in which the administrative actions will take place during his term.

Of all the public institutions, however, the most important for the citizens are those with general attributions, and only in certain dimensions the sectorial ones. Thus, governments, parliaments and mayors have general powers, which influence the legally determined desires and demands of citizens, along with only a few institutions with specialized competence – usually those that are considered to fulfil the will of government leaders. Institutions with competence in the field of taxation, justice and public order will always be associated with the concrete and detailed will of the government – a more difficult aspect to observe in other ministries (for example, those of agriculture, tourism, environment), where citizens can more directly influence the activities of the whole field. If the court of justice procedures are clearly set by the legislator and the fiscal issues are not within the competence of the citizens' legislative initiatives – the way in which agricultural, tourism, environmental, etc. activities often depend on private agents, without express legal connection with government institution.

3. In perfect theory, public institutions function without errors, regardless of whether or not there is a supreme leader (prime minister, minister, primate, director, president, governor, etc.). Such an administrative success would allow the perfectly neutral functioning of the entire system of public administration, making the national or local political sphere something irrelevant, easy to replace. At the same time, such an administrative perfection would lead the whole society to the economic and social progress, because every day the action of the public institutions will be better, and the citizens would have nothing to reproach the civil servants.

However, history and everyday realities show us that countries are rather poorly run, and public administration institutions are rather behind the demands of citizens. Even if – as we pointed out at the beginning of this text – there is a huge library of good administrative practices on the Internet (practically free), most countries do not meet the basic criteria of good governance[1]. No matter how high is the quality of professional training of civil servants, the legal will – implicitly the behaviour of the institution – will be determined by the behaviour of the dignitary (its leader). The major differences in the quality of governance and the overall results of the world's economies show rather the failure to implement good governance; only 55 countries from 193 achieved 15,000 dollars per capita level[2]. From this perspective, citizens will not make a clear distinction between dignitaries and the quality of public institutions, the failure of some being automatically attributed to others.

4. The big problem of the relationship between dignitaries and citizens is the fact that the deficits of good governance have accumulated over time, decades and even centuries contributing to the deficiencies of a country. The fact that for hundreds of years the common man did not have the ability to change the political and administrative hierarchy except through revolts led in many countries to the efficient replacement of dignitaries mechanisms blocking, implicitly being reduced their sanctions in case of errors. The political transformations of the last decades have not changed that much the paradigm of power at the global level, in many countries dictatorial or authoritarian regimes being still very active: today more than half of the Earth's population is registered as

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[1] See for more details *The Chandler Good Government Index 2022*, available at https://chandlergovernmentindex.com/wp-content/uploads/CGGI-2022-Report.pdf?home_banner=1, consulted on 29 of June 2022.
[2] International Monetary Fund, *WORLD ECONOMIC OUTLOOK (APRIL 2022), GDP PER CAPITA, CURRENT PRICES*, available at https://www.imf.org/external/datamapper/NGDPDPC@WEO/OEMDC/ADVEC/WEO WORLD, consulted on 29 of June 2022.

living in areas governed by mechanisms that block the wide will of the peoples, with 59 countries living in authoritarian regimes[1].

As a result of this situation, we will find a decrease in public trust in politics – as an activity – but especially in all institutions with a political character, an aspect that will cause big problems in time in the complex relationship between the political environment, public administration and citizens[2].

5. If in times of peace the idea of good governance develops and is intensely demanded by the population, then we will have to observe what the citizens want when conflicts reach the national border. Obviously, in the situation where a country is at war, the mental and administrative-economic problems are simplified, the majority of resources being dedicated to the aggression rejection. Also, we will not analyze the entire concept of citizens' desires in times of war or peace, because for this we would have needed an entire opinion poll with dozens of items.

Thus, we will briefly present an outline of what the citizens would like in times of war, relative to the situation of dignitaries and the legal framework that they will promote in these difficult moments.

First of all, citizens will not want their civil and social rights diminished by legal norms with greater applicability than that of the actual conflict. Any restriction of them brings into discussion both the principle of proportionality of the administrative action, but also the specific component of psychological response to a government. Concretely, if the citizens will consider that the measures adopted through a normative framework of war are excessive, it is possible to reach either a revolt on their part, or a decrease in the level of loyalty towards the political elites, up to the level of dissociation from them. The old Latin saying "*patria ubi bene*" is also particularly relevant in times of

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[1] The Economist Intelligence Unit, *Democracy Index 2021: the China challenge*, available at https://www.eiu.com/n/campaigns/democracy-index-2021/, consulted on 29 of June 2022.

[2] For an extensive description see Edelman Data & Intelligence, *The 2022 Edelman Trust Barometer*, available at https://www.edelman.com/trust/2022-trust-barometer, consulted on 29 of June 2022.

war, because it is difficult to prevent emigration from a country that is badly governed, and the possibility of a war can often determine the haste to leave the country.

The second aspect that citizens have in mind is the providing goods and food during conflicts. As it is known that these periods cause shortages and increased prices of food and energy resources, citizens will follow very carefully how the political and administrative leadership will reduce supply problems. In this perspective, discussions will be reached about capping prices, but also about the diversion of various supply networks to organized crime groups. When the political and administrative elite will be considered ineffective in solving these problems – or even complicit in the various forms of disruption of the supply of resources of any type to the population, the way will be opened for riots. It should not be forgotten that every war brings with it both the appearance of new economic elites, but also the change of economic routes, which will be followed in time by a dispute within the political elite. The legal responsibility of those who will defraud or modify in their own interest the normal supply circuits of the population will be intensively requested by the citizens, and the effects of these criminal actions may change the criminal legislation and judicial practice in the field.

The third problem that the citizens will have in mind is the selection of their own political and administrative elites. Conflict situations reveal not only human character, but especially professional competence. As a result of these war situations, it is possible to change the legal framework regarding the promotion in positions, as well as that of the dignitaries' legal responsibility. If the promotion aspect will consider the elimination of some verification/testing thresholds of those who will be appointed to higher positions, the legal liability situation of dignitaries will rather attract the increase of punishments for them. It is relevant that in any conflict the public law legislation increases the sanctions against the dignitaries, but also against the public servants who have poor results in the exercise of their duties; the citizen pressure will force the sanctions increase, both during the period of the war, but also for the first years after its completion.

The big difference that the relationship between dignitaries and citizens is based on today is the limits of the public's tolerance for the political environment errors. For hundreds of years, a political leader could hold a higher administrative position only as an effect of the monarch's trust, an aspect that today is more difficult to achieve, because the number of applicants for honours is much bigger, and the position of citizens is superior. Therefore, political leaders will more easily sacrifice the subordinate administrative hierarchy, in order to maintain their own position, which would otherwise be threatened by public protests. In the situation where the major political leaders of some countries do not want to apply the various forms of responsibility for the errors encountered in the resolution of a war, it will either lead to popular uprisings or to the establishment/strengthening of a dictatorship.

In fact, the relationship between dignitaries and citizens in times of war can be considered subject to the conditioning of the outcome of the war, but much more clearly regulated by the legal norms of public law, attracting responsibility with superior force. Just as heroes always win – remembering the way children are educated – the state must have its heroes, and they must usually be people from the public administration. In the situation where the public administration does not perform in time of war, and the heroes appear from the ranks of ordinary people, the prestige of dignitaries and public officials decreases to the level where the whole society will demand both the change of the normative framework, as well as the creation and application of the harshest forms of legal responsibility.

CONCLUSIONS

The relationship between citizens and the political and administrative elite of a country during war is a complex one, in which neither side trusts the other. The major costs entailed by the war effort lead to the quality of life decreasing, but also to the appearance of various informal networks of supply of goods, often tolerated by the administrative authorities. If in this direction the citizens can show tolerance towards the elites, the situation changes profoundly if the

dignitaries end up being the main beneficiaries of the new supply routes, because the public perception will be that of some people without morals, who, however, have attributions to regulate everyone's life.

Public law norms in times of war are required to be firmer, but also more coherent than in times of peace, precisely to prevent possible abuses. This need to increase the quality of legislative acts is largely due to the fact that the courts do not have time to examine the cases brought before them with the same procedures as in peacetime. Thus, the judicial power must contribute from its own position both to increasing the quality of the legislative act, but especially to protecting citizens against abuses that will come from the direction of the public administration mostly. That is why the position of dignitaries in wartime in the century of digital technologies is much different from the traditional one, and their own legal responsibility can be many times more difficult to evade.

For hundreds of years, citizens endured the war efforts of their countries without having the possibility of being effectively protected by legislation. In the age of the Internet, it is easier to identify examples of good practice from any country, and from here to make changes in the legislation of others (countries). Thus, the citizens' position relative to the entire legal framework, as well as the activity of the political-administrative elites, becomes fundamental. If these norms are considered to have errors, the effect can be very dangerous for a country, because it can lead either to riots or to the approach to political paths unfavourable in the long term to countries. Practically, the political-administrative elites must consider good governance more than they would like it to exist, because wars bring with them both strong emotions in society, as well as the manifest desire to give them a defined form, without this must being the optimal one.

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GUARANTEEING THE FUNCTIONAL INDEPENDENCE AND THE ROLE OF THE SUPERIOR COUNCIL OF MAGISTRACY

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Abstract:
This study analyzes the framework and conditions for ensuring the guarantee of the independence of the Superior Council of Magistracy, in order to outline an overview, as complete as possible on it.
Starting from the decisive influence it has on the initial and continuous training of magistrates, the Superior Council of Magistracy, by coordinating the activity of the National Institute of Magistracy and the National School of Clerks, reaches the role given to it by the Constitution, that of guarantor of the administration of justice.

Key words: *independence; judges; Superior Council of Magistracy; guarantee; role.*

THEORETICAL ASPECTS

Through the special legislation in the field of justice, after the adoption of the 1991 Constitution, the Superior Council of Magistracy was established, a body with decisive responsibilities regarding the career of magistrates, thus achieving a continuous judicial reform characterized by a legislative and jurisprudential process.

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This created a new structure, placed within the judicial authority, a body that is interposed between the executive and the judiciary, in order to ensure and guarantee the independence of the judiciary.

In exercising its role, the judiciary must be independent, in the sense of carrying out its activity outside any interference by the other powers of the State.

No other public authority has the right to intervene in the process of achieving justice, as this would be tantamount to breaking the constitutional balance between public authorities.

The Superior Council of Magistracy is a fundamental authority of the state regulated by the Constitution, and its composition reflects the structure of the judicial authority and ensures the connection with the civil society, a conclusion that emerges from the provisions of Art 3 of the Law no 317/2004[1].

The constitutional status of the Superior Council of Magistracy is enshrined at constitutional level by Art 133 Para 4 Let a) and Para 4 of the Fundamental Law, and at the legal level by the provisions of Art 51 Para 1 first sentence of the Law no 317/2004.

Thus, it can be stated that the Fundamental Law provides an adequate legal framework for the achievement of an independent justice, its provisions being completed with those of Law no 303/2004[2], Law no 304/2004[3], Law no 317/2004, with the Regulation for the organization and functioning of the Superior Council of Magistracy[4], documents that outline the image of justice thus guaranteeing independence, impartiality, efficiency and probity, contributing to highlighting the role of the judicial authority in building the rule of law.

According to the provisions of Art 134 of the Constitution, the Superior Council of Magistracy has two constitutional attributions, namely: it proposes to the President of Romania the appointment of

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[1] Published in the Official Gazette of Romania, Part I, no 599 of July 2, 2004

[2] Published in the Official Gazette of Romania, Part I, no 576 of June 29, 2004

[3] Published in the Official Gazette of Romania, Part I, no 576 of June 29, 2004

[4] Decision of the Superior Council of Magistracy no 1073 of December 3, 2018, published in the Official Gazette of Romania, Part I, no 1044 of December 10, 2018

judges and prosecutors, except for trainees, under the law; acts as a court of law in disciplinary matters.

It also follows from the provisions of Art 134 of the Constitution that the Superior Council of Magistracy performs other duties established by its organic law, in the performance of its role as guarantor of the independence of justice, which leads to the conclusion that its duties can be classified into constitutional and legal duties.

A significant aspect to mention is that, by amending Law no 317/2004, in 2005, it was aimed at streamlining the activity of the Superior Council of Magistracy.

The implementation of the constitutional and legal reform in the practical activity of the Superior Council of Magistracy, under conditions of independence and which conferred extensive competences in favor of a democratic body, led to the consolidation of the position of the judiciary in relation to the legislative and executive powers.

Between the Superior Council of Magistracy and the Ministry of Justice there is no subordination, but collaboration, as provided by the provisions of Government Decision no 652/2009 on the organization and functioning of the Ministry of Justice and Citizens' Freedoms[1], and the Minister of Justice, although a member of the Council by law, does not exercise other duties than those conferred to him by Law no 317/2004.

A collaboration carried out in accordance with the law and carried out in good faith contributes to the effective administration of justice and the quality of justice.

It can be said, with full reason, that an independent judiciary is the guarantee of the rule of law, not only the necessary condition for the proper functioning and achievement of justice, but also the guarantee of the protection of the fundamental rights and freedoms of citizens.

JURISPRUDENTIAL ASPECTS

The contribution of the Constitutional Court to highlighting the role of the Council materialized in the decisions pronounced within the

[1] Published in the Official Gazette of Romania, Part I, no 443 of June 29, 2009

exercise of the powers conferred by the Constitution and Law no 47/1992, regarding the issues of justice and guaranteeing the independence of the judiciary, but also the guarantee of the independence of the judiciary.

With regard to the legal nature of the Superior Council of Magistracy, in its case-law, the Constitutional Court has shown that it is a fundamental authority of the State and that, in its composition, it reflects the structure of the judicial authority and ensures the link with civil society[1].

Regarding the composition of the Superior Council of Magistracy, by Decision no 799/17 June 2011, published in the Official Gazette of Romania, Part I, no 440/23 June 2011, the Court noted that the original constituent legislator opted for the inclusion in the composition of the Council of some members who are not professional magistrates, but who are specialists in the field of law and enjoy high professional and moral reputation. The Court found that the fulfillment of the constitutional role of the Superior Council of Magistracy, that of guarantor of the independence of justice, as well as of the main attributions concerning the career and disciplinary liability of magistrates, imply that judges and prosecutors have a weight corresponding to the constitutional imperative enshrined in Art133 Para 1. Thus, by virtue of the powers of the Superior Council of Magistracy, the composition of this body must reflect the specificity of this activity, the quality of magistrates of the members – as provided by the very title of this supreme representative body – who are directly aware of the implications of the activity carried out by this professional category, being defining for the decisions adopted by the Council.

With regard to the alleged lack of independence and impartiality of the members of the Superior Council of Magistracy, the Court has held in its case-law that it is the guarantor of the independence of the judiciary only if, in the performance of that competence, it performs independently

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[1] Decision no 53 of January 25, 2011, published in the Official Gazette of Romania, Part I, no 90 of February 3, 2011 and Decision no 54 of January 25, 2011, published in the Official Gazette of Romania, Part I, no 90 of February 3, 2011

and impartially the duties established by law. And the factors that ensure the independence and impartiality of this body of jurisdiction are the way in which its members are appointed, the duration of the mandate and the immovability of the members during their term of office, as well as the existence of adequate protection against external pressures. [...] Regarding this last condition, the Constitutional Court ruled that, in individual activity, the member of the Council must enjoy a real freedom of thought, expression and action, so as to exercise his mandate effectively. The magistrate cannot be exposed to pressure, affecting the independence, freedom and security in exercising the rights and obligations incumbent on him under the Constitution and the laws (Decision no 196/24 April 2013, published in the Official Gazette of Romania, Part I, no 231/22 April 2013)[1].

The duration of the constitutional and legal mandate of the Council concerns the public authority as a whole, while the elected persons acquire the status of member and exercise it until the 6-year term has been reached.

Therefore, given the feature of the Superior Council of Magistracy as a collegial body, the mandate of its members expires at the end of the 6-year term, so on the same date for all members. In other words, persons who acquire membership of the Council during the 6-year term, occupying a vacancy in the collegiate body, will carry out their legal and constitutional duties from the date of validation or election to office, as the case may be, for the remaining term of office until the expiry of this term[2].

By introducing the prohibition of re-investiture, the organic law did not regulate contrary to the constitutional provisions, but developed the constitutional norm, providing for the prohibition of the re-investiture of the elected members of the Superior Council of Magistracy, a regulation allowed by Art 73 Para 3 Let l) of the Constitution, according

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[1] Marian Enache and Ștefan Deaconu, *Autoritatea judecătorească în jurisprudența Curții Constituționale a României* (Bucharest: All Beck, 2021), 259-260.

[2] Decision no 374 of 2 June 2016, published in the Official Gazette of Romania, Part I, no 504 of July 5, 2016

to which: "Organic laws shall regulate: [...] l) the organization and functioning of the Superior Council of Magistracy, the courts of law, the Public Ministry, and the Court of Audit [...]".

The uniqueness of the mandate of the elected members of the Superior Council of Magistracy is a guarantee of their independence, in the absence of which its role would be affected.

Also, the establishment of the one-year period in the exercise of the president's mandate, as the will of the constituent legislature, is a guarantee of independence in its exercise.

It follows from the case-law of the Constitutional Court of Romania that the difference in legal treatment – in terms of mandate – between elected members and *de jure* members is objectively and reasonably justified by the different method of accession to the position of member of the Council.

At the same time, it was noted that it cannot be argued that, in terms of the duration of the mandate, the two distinct categories of members of the Superior Council of Magistracy must have an identical regulation, especially since the legislator cannot provide for the period of time during which a person exercises the function as Minister of Justice"[1].

The Superior Council of Magistracy is independent and submits in its activity only to the law, and its members are accountable to the judges and prosecutors for the activity carried out in the exercise of their mandate. [...] the failure to perform or improper performance of duties entails the sanction of revocation according to Art 55 Para 4 of the Law no 317/2004, but the entrusted attributions are not expressly defined and do not result from the provisions of Law no 317/2004. In such circumstances, it remains unclear how a member of the Superior Council of Magistracy could be charged with improper performance of duties which were not entrusted to him by the general assemblies of the courts

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[1] Decision no 22 of January 17, 2012, published in the Official Gazette of Romania, Part I, no 160 of March 9, 2012

which elected him to the Council, and which could not be entrusted by them[1].

CONCLUSIONS

The function of guarantor of the independence of the judiciary can be achieved, on the one hand, by the way of formation and organization, and, on the other hand, by the activity of this body.

The composition of the Superior Council of Magistracy was established in such a way as to reflect the very structure of the judicial authority as a whole, but also to make the connection with the civil society, and, in order to ensure a real basis, independence and impartiality of the two sections, the Constitution does not grant the right to vote, in certain situations, to the Minister of Justice, the President of the High Court of Cassation and Justice, the General Prosecutor, although they are members of the Council by right.

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3. Decision no 22 of January 17, 2012, published in the Official Gazette of Romania, Part I, no 160 of March 9, 2012.

[1] Decision no 196 of April 4, 2013, published in the Official Gazette of Romania, Part I, no 231 of April 22, 2013

4. Decision no 196 of April 4, 2013, published in the Official Gazette of Romania, Part I, no 231 of April 22, 2013.
5. Decision no 374 of 2 June 2016, published in the Official Gazette of Romania, Part I, no 504 of July 5, 2016.
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THE EU ENLARGEMENT PROCESS. CAN THERE BE A FAST-TRACK PROCEDURE TO OBTAIN MEMBERSHIP?

Sorina IONESCU[1]

Abstract:

The verification of an application for membership by the European Commission usually takes up to 18 months. The respective states then receive the status of candidates. This means that the EU is seriously considering accepting those countries into its ranks. But then many years can pass before the actual start of accession negotiations.

The paper aims to analyze the possibility of implementing, under the current situation, of a fast-track procedure to obtain EU membership.

Key words: *EU; enlargement, fast-track, procedure.*

INTRODUCTION

The EU enlargement process finds its regulation in The Treaty on the European Union which states that any European country may apply for membership if it respects the democratic values of the EU and is committed to promoting them.

As mentioned in the Treaty, the country that requests accession needs to meet the criteria set by the EU rules, defined at the European

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Council in Copenhagen in 1993. So, states wishing to join EU are set to have:

- stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- a functioning market economy and the capacity to cope with competition and market forces in the EU;
- the ability to take on and implement effectively the obligations of membership, including adherence to the aims of political, economic and monetary union.

The procedure set by the Treaty mentions that the country wishing to join the EU has to submit a membership application to the Council, which asks the Commission to verify if the applicant’s ability to comply the Copenhagen criteria is met. After the Commission's opinion is communicated, the Council can decide if the negotiation mandate is given. If so, negotiations are formally opened on a subject-by-subject basis.

It is well known the fact that the negotiations take a lot of time to complete because there is a great volume of EU rules and regulations that needs to be adopted by each state as national law and that during this period, the candidate countries are financially, administratively and technically supported.

1. THE PRESENT CONTEXT

As we have mentioned above, the EU enlargement process takes a lot of time and effort for the candidate countries and also for the EU institutions, sometimes during decades.

In the present context, in February 2022, after the Russian invasion began, the issue of an urgent change in the usual procedure of accession to the EU was aroused.

So, Ukraine applied for EU membership four days after Russia’s February invasion and Georgia and Moldova quickly followed it and this started the examination from the European Commission of these applications followed by the recommendation that Ukraine and Moldova be granted candidate status, subject to certain conditions. In what

Georgia is concerned, it is needed a process to strengthen its democratic credentials before taking this important step.

For Ukraine this process stared earlier. In January 2016, Ukraine signed an association agreement (AA) with the EU that entered into force in September 2017. Also, since January 2016, it has been part of a deep comprehensive free trade area (DCFTA) with the EU.

The DCFTA is about[1]:

- Mutual abolition of import duties on the majority of goods imported into each other's markets.
- Introduction of rules of origin of goods, to facilitate trade preferences.
- Bringing Ukraine's technical regulations, procedures, sanitary and phytosanitary measures, and food safety measures in line with EU rules, so that Ukrainian industrial goods, agricultural and food products do not require additional certification in the EU.
- Establishment of the most favourable conditions of access to the services markets of both Ukraine and the EU.
- Introduction of EU rules into public procurement by Ukraine, which will allow gradual opening of the EU public procurement market for Ukrainian businesses.
- Simplification of customs procedures and prevention of fraud, smuggling and other offences in cross-border movement of goods.
- Strengthening protection of intellectual property rights in Ukraine.

The importance of these agreements is given by the economic and political aims of the AA and DCFTA to divert trade from Russia towards the EU. This can happen if Ukraine's laws are aligned with the EU's *acquis communautaire* and also if it's financial and political institutions are modernized and developed. The agreement represents an important political connection between Ukraine and EU that implies organizing regular summits between the president of the European Council and the president of Ukraine.

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[1] https://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155103.pdf, accesed on 21.06.2022.

The AA has a political dimension to encourage dialogue between Ukraine and the EU. It requires regular summits between the president of the European Council and the president of Ukraine. Members of the Council of the EU and the cabinet of ministers of Ukraine must meet regularly, as well as members of the European Parliament and the Ukrainian parliament, and other officials and experts.

Also, we have to mention that there are training programmes in EU law funded by EU institutions and that efforts are made to lent officials for capacity-building.

2. A NEW APPROACH OF THE EU ENLARGEMENT PROCCESS GENERATED BY THE RECENT EVENTS IN UKRAINE?

The European Parliament recommended that Ukraine be made an official candidate for EU on 1 March 2022[1] and soon after, throught the Versailles Declaration[2] there was a first try to reunite EU member states in order to initiate the accession process.

And this is the first step for any country to become member, although this might take years. In order to obtain membership, the candidate country has to have a competitive market economy, to prove that democracy, the rule of law and human rights are respected and that the institutions are able to implement EU laws and rules[3].

So, according to the current applying rules, Ukraine and also Moldova have to comply to all conditions that all Member states had to met before and this can take several years.

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[1] European Parliament resolution of 1 March 2022 on the Russian aggression against Ukraine (2022/2564(RSP)) (2022/C 125/01).

[2]https://www.consilium.europa.eu/media/54773/20220311-versailles-declaration-en.pdf, accesed on 23.06.2022.

[3] Amelia Singh (Gheoculescu), "Adapting the National and Union Rules on Copyright in the Digital Era", *Law Review* vol. X, issue 2 (July-Decembre 2019).

This is the normal approach of the EU enlargement process, but considering the present crisis, at EU level are presented other approaches that can lead to a fast-track accession procedure. This approach to enlargement is the one that force the candidate states towards reform and to obtain the results set for them by the EU regulations, having as major disadvantage the fact that it may take decades to obtain membership.

The fact that this current accession procedure may take decades can create some risks and uncertainties that lead to considering new approaches of the procedure, taking into consideration a graduated approach that can bring faster benefits for the candidate states.

So this graduated approach can help the candidate countries governments by having a good perspective towards accession and also by having limited rights and representation within the EU institutions[1].

Also is taken into consideration the scenario in which an applicant country gradually assumes membership rights and duties during all the period of accession. Obviously, the question of equality between Member States and the conditions that they had to meet before obtaining these rights will be raised. Also, another issue has to be taken into consideration: this innovative approach surely would require treaty changes.

These are the major challenges for this courageous approach, impossible to obtain for the moment. In this context, the current approach to enlargement represents the best choice. We also believe that the EU has the duty to promote a credible approach regarding enlargement in order to keep the confidence of applicant states and to face Russian aggression.

CONCLUSION

The accession process represents an important part in the EU architecture and in the same time, the enlargement process has to sustain

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[1] Amelia Singh (Gheoculescu), "Conditions for access to road transport activity in the light of recent legislative changes", *International Scientific Conference HISTORY, CULTURE, CITIZENSHIP IN THE EUROPEAN UNION 14th Edition (*May 06, 2022): 487, https://www.upit.ro/_document/223231/e-book_iccu2022.pdf

its own governability. As many times before the accession of new Member States, we believe a new treaty is necessary to be adopted in order to regulate the current realities before further enlargement.

Regarding the possibility of regulating a fast-track accession procedure, we believe that under the current Ukrainian situation it will be an easy short term solution that will generate multiple unwanted effects within the EU construction.

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THE PATENTING OF ROMANIAN INVENTIONS ABROAD

Amelia-Veronica GHEOCULESCU[1]

Abstract:
The inventor's right is a complex subjective right whose content includes both personal non-patrimonial rights and patrimonial rights, without some of them having primacy over the others. The patent represents the property title that can be obtained for any invention, whose object is a product or a process, in all technological fields, provided that it is new, involves an inventive activity and is susceptible to industrial application. This title is issued by a public authority that gives the owner an exclusive right to exploit the invention for a certain period of time and for a certain territory.

Key words: *Romanian inventions; abroad; patent.*

Industrial property law includes patents, utility models, industrial designs or models, trademarks, service marks, trade names and indications of provenance or designations of origin, as well as the suppression of unfair competition.

The inventor's right is a complex subjective right whose content includes both personal non-patrimonial rights and patrimonial rights, without some of them having primacy over the others[2]. By industrial

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[2] St. Cărpenaru, *Drept civil. Drepturile de creație intelectuală. Succesiunile* (Bucharest: Editura Didactică și Pedagogică, 1971), 62.

property right, in the objective sense, is understood the set of legal rules that regulate the social relations that arise as a result of the creation, use, transmission or acquisition of scientific or technical creations, signs or other distinctive elements of the products, goods or services. There is no legal definition of invention in the Law on Patents no. 64/1991[1] republished in 2007[2] which, together with the Implementing Regulation[3], constitute the basic domestic legal act regarding the patentable invention. In Law no. 62/1974 repealed by Law no. 64/1991 the invention was defined in art. 10, in a non-unitary and ambiguous terminology, the invention being considered either a scientific or technical creation, or a technical solution. The definition has been criticized in the legal literature stating precisely that a scientific creation without indicating a concrete application cannot be qualified as an invention. The invention can be defined as the intellectual creation that represents the concrete solution of a technical problem applicable in the industry. The notion of "industry" is used lato sensu and includes both industry and agriculture, the provision of services as well as commercial activity[4].

The patent is defined in art. 3 paragraph 1 point 7 of Law no. 344/2005 and represents the property title that can be obtained for any invention, whose object is a product or a process, in all technological fields[5], provided that it is new, involves an inventive activity and is susceptible to industrial application. This title is issued by a public authority that gives the owner an exclusive right to exploit the invention for a certain period of time and for a certain territory. For the issuance of the patent, the fulfillment of three conditions is verified: novelty, inventive activity and industrial applicability. The invention must also be

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[1] T.Bodoasca and L.I. Tarnu, *Dreptul proprietății intelectuale,* V Editon (Bucharest: Universul Juridic, 2021), 352.

[2] Republished in the Official Gazette no. 541 of August 8, 2007

[3] Published in the Official Gazette no. 348 of May 22, 2003

[4] O. Calmuschi and V. Slavu, *Dreptul proprietății intelectuale*, III Ed (Bucharest: Ed. Universității „Titu Maiorescu”, 2011), 18.

[5] https://europa.eu/youreurope/business/running-business/intellectual-property/patents/index_ro.htm , accessed on June 12, 2022

placed outside the scope of inventions excluded from patenting[1]. According to art. 41, para. (1) from Law no. 64/1991 republished in 2007, the patenting abroad of inventions created by Romanian natural persons on the territory of Romania is done only after the registration of the patent application at the State Office for Inventions and Trademarks. From the wording of the text, the idea emerges that the patent application must be registered in the country, at O.S.I.M.[2] , with the fulfillment of the following conditions: the author of the invention must be a Romanian citizen, foreigner or stateless, provided that he is domiciled on the territory of Romania[3]; the invention was made on the territory of our country.

Patenting abroad of inventions declared secret is done with the approval of the institutions that assigned them the character of state secret, according to art. 41, para. (2) of this law. The holder may renounce, in whole or in part, to the patent, based on a written declaration registered at O.S.I.M. in the National Register of Invention Patents and produces effects starting from the date of its publication in the Official Bulletin of Industrial Property, according to art. 38, para. (1) and para. (6) of the aforementioned law.

Law no. 64/1991 regarding invention patents, republished, provides in art. 39 para. (3) that, for the patenting abroad of inventions created by Romanian natural persons on the territory of Romania, Romanian patent applicants or holders may benefit from financial support[4], according to the provisions in force.

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[1] V. Roş, *Dreptul proprietății intelectuale* (Bucharest: Editura Universității „Nicolae Titulescu", 2017), 179.

[2] Alin Speriuși-Vlad, *Ptrotecția creațiilor intelectuale. Mecanisme de drept privat* (Bucuresti: C.H. Beck, 2015), 366.

[3] Bodoasca and Tarnu, *Dreptul proprietății intelectuale*, 356.

[4] M. Tudor, D. Iancu and A. Drăghici, *Drept financiar II* (Pitești: Ed. Universității din Pitești, 2010); A. Pirvu, D. Iancu, „The principle of priority of the European Union Law compared to the national law in the tax field", *The International Conference „European Union's History, Culture and Citizenship"* (Bucharest: C.H. Beck, 2019).

Government Decision no. 573/1998[1] regarding the organization and operation of the State Office for Inventions and Trademarks, with subsequent amendments and additions, which in art. 3 paragraph (3) provides that "to support the patenting of Romanian inventions abroad, the State Office for Inventions and Trademarks can allocate a part of the revenues collected, according to the criteria established by instructions issued by the general director and published in the Official Gazette of Romania, Part I" .

Any Romanian natural person can benefit from the granting of financial support in order to patent an invention abroad, if he has an average gross monthly income for the last 12 months lower than 10 times the gross income established as the monthly average for the economy for the last 12 months. Any Romanian legal entity in the category of small or medium-sized enterprises[2] also benefits from these provisions and fulfills the conditions of art. 6 para. (1), lit. b) from Order no. 117 of July 26, 2017 of the General Director of the State Office for Inventions and Trademarks for the approval of the Instructions regarding the support of the patenting of Romanian inventions abroad[3].

Universities and Research Institutions are not eligible for financial support. According to the provisions of Order no. 117 of July 26, 2017 of the General Director of the State Office for Inventions and Trademarks for the approval of the Instructions on supporting the patenting of Romanian inventions abroad, hereinafter referred to as the Instructions on financial support for patenting abroad, is granted to applicants within the limits of the established fund. In concrete terms, the financial support consists of a non-refundable amount representing the equivalent of the legal fees related to the patenting procedures in each country mentioned in the application for granting the financial support[4].

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[1] Republished in the Official Gazette no. 476 of June 4, 2020.

[2] D.Iancu and A. Draghici, “Consideration regarding the regulation of direct taxes in Romania pursuant to the provisions of european directives”, *in RSJA* (2012).

[3] Published in the Official Gazette no. 675 of August 18, 2017.

[4] I. Macovei, *Dreptul proprietății intelectuale* (Bucharest: All Beck, 2005), 76.

The amount is established by the Decision of the Commission for the approval of financial support, based on the documentation submitted by the applicant, this amount does not include translation fees, fees for services in the field of industrial property and fees of mandatories.

O.S.I.M. transfers to the applicant's account the amount established by the Commission's Decision to the account of the Patent Offices. The applicant submits to O.S.I.M., within 10 days, a copy of the payment document. O.S.I.M. orders the recovery of the financial support granted in the event of failure to submit the copy after the payment document.

The applicant's steps before requesting financial support are as follows: submitting the application for an invention patent in Romania; paying the legal fees for registration, publication and making an extended documentation report with a written opinion on patentability; analysis of the documentation report and opinion drawn up by OSIM; establishing the strategy for patenting procedures abroad[1]; elaboration of the presentation of the application stage of the invention (at laboratory level, project, prototype, functional model); presentation of the expected production and marketing possibilities (letters of intent from potential beneficiaries, contracts already concluded); presentation of how it is expected to bear the costs that are not covered by O.S.I.M..

Protection abroad of Romanian inventions can be obtained in several ways. Under the conditions provided by national legislation and international conventions, Romanian inventors can use a national way – the patenting procedure takes place entirely at the national authority according to the national legislation in force; a regional way – the patenting procedure takes place entirely at the regional authority, in accordance with the provisions of the protocol or convention on invention patents to which member countries of the Organization have

[1] Sorina Şerban-Barbu, *Reforma în domeniul reglementării la nivelul Uniunii Europene, Reforma Statului. Institutii, Proceduri, Resurse ale Administratiei Publice* SNSPA (Bucharest: Wolters Kluwer, 2016).

joined (the European patent[1] and the Eurasian patent) or an international way – the patenting procedure takes place in accordance with the provisions of the Patent Cooperation Treaty (P.C.T.)[2].

The request for granting financial support meets two defining aspects - the request for the approval of financial support is submitted before the filing of the foreign patent application(s) or the request for the approval of financial support is submitted after the filing of the foreign patent application(s), as it follows: The request for approval of financial support is submitted before the filing of the patent application or applications abroad. This will contain the number and filing date of the patent application submitted to O.S.I.M. It will be submitted at the latest in the 10th month from the date of deposit of the application in Romania. In this application, the countries where patent protection is desired will be indicated, if the national way is chosen, or the type of regional patent (European or Eurasian) will be indicated. If there is no firm decision on the countries for which it is desired to obtain protection, it will be indicated that it is desired to register an international application, according to the Patent Cooperation Treaty. And last but not least, a copy of the document showing that the applicant for financial support is a person entitled to the grant of the patent in the states where protection is sought is required.[3]

The application for the approval of financial support is submitted after the submission of the patent application or applications abroad. Thus, it will be considered that the application will contain the number,

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[1] https://europa.eu/youreurope/business/running-business/intellectual-property/patents/index_ro.htm; Sorina Şerban-Barbu, "Short considerations on better regulation in the European Union", *The Conference Solidarity- dialogue – cooperation in contemporary European constitutionalism*, Faculty of Law and Administration, Gdansk University, Poland, 2016.

[2] A. Aldescu, „Susţinerea financiară pentru sprijinirea brevetării în străinătate a invenţiilor româneşti" prezentare realizată în cadrul proiectului *Promovarea protecţiei proprietăţii industriale în România*- Implicarea Centrelor Regionale, PATLIB, 15 mai 2018, 3.

[3] Aldescu, „Susţinerea financiară pentru sprijinirea brevetării în străinătate a invenţiilor româneşti", 4.

filing date and country of the patent application filed abroad, as well as copies of the application form (or the national phase opening form) filed abroad. This must be submitted to O.S.I.M. three months before the next payment due date for the first of the procedures for which financial support is requested. If the application for which the financial support is requested is an international application, its number and the countries in which it is desired to open national or regional phases will be indicated. It will contain all the documents mentioned in art. 8, para. (1) of the Instructions. The extended documentation report with written opinion on patentability may be prepared by a national patent authority or by an international documentation authority. And last but not least, a copy of the document showing that the applicant for financial support is a person entitled to the grant of the patent in the states where protection is sought is required[1].

The patenting of Romanian inventions abroad is brought to the attention of the State Office for Inventions and Trademarks by the Romanian inventors or their successor in rights, according to art. 41, para. (4) from Law no. 64/1991. This provision does not apply to Romanian citizens who made an invention abroad.[2]

CONCLUSIONS

The patenting abroad of Romanian inventions is carried out according to a clear procedure provided by the legislator, the steps to be followed being mandatory. In certain situations, regulated by the legislator, financial support is also granted for the patenting of Romanian inventions.

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[1] Aldescu, „Susţinerea financiară pentru sprijinirea brevetării în străinătate a invenţiilor româneşti", 5.
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DO WE HAVE THE RIGHT TO DIE? CASE STUDY ON THE POTENTIAL LEGISLATION OF PHYSICIAN-ASSISTED SUICIDE AND EUTHANASIA IN ROMANIA

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Abstract:

Romania is an eminently orthodox country, with beliefs strongly inoculated in time, which is why a fear such as euthanasia, or physician-assisted death, can be a sufficient cause for concern on the part of those used to believe and not to investigate.

Human euthanasia is a method of causing a painless death to an incurably ill person in order to end their long and difficult suffering.

Physician-assisted suicide is the self-induced death of a patient with the help of a physician, with the applicant having their own reasons for making this decision.

The adoption of such a draft would require a lasting collaboration between the legislator, physicians, intellectuals, theologians, sociologists, but also the people, and its will must be respected. Regardless of the state's position on such a change, the phenomena based on the interruption of the course of life will continue to represent a longstanding controversy, a contradiction between supporters and critics, but not least, the object of successful scientific research.

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Key words: *physician-assisted suicide; euthanasia; orthodox country; incurable disease; suffering; Convention on Human Rights.*

INTRODUCTION

Romania is an eminently orthodox country, with beliefs strongly inoculated in time, which is why a fear such as euthanasia, or physician-assisted death, can be a sufficient cause for concern on the part of those used to believe and not to investigate. However, God provided us with reason; reason that says, according to René Descartes "*Dubito ergo sum, cogito ergo sum*" ("I doubt, therefore I exist/ I think, therefore I exist").

Suppose we follow the path of science that says there is no God, there is no right and wrong, there is no religion, and man can make his own destiny. Basically, human being, by every act he/she performs, does nothing but exercise unto godliness.

Indeed, we cannot choose when and where to be born. But what if we could decide when and how to die, especially if all that has been given to us is continual suffering, at the end of which we see absolutely no divine reward?

Suppose a young family gives birth to a child with hydrocephalus. Everyone knows that such a disease has no cure and all one has to do is wait for that being to lay down his arms in battle with life. The suffering is on both sides: of the being who was born this way and does not understand why and of the family who sees their first sick child and they are unable to do anything to alleviate his/her suffering.

Or, suppose you are a terminally ill patient of an incurable disease, and the terrible pain can no longer be alleviated even with the strongest painkiller. Until the passing over is just a matter of time and suffering, by several parties: the sick and the relatives, even the doctors. Instead of them focusing their attention and understanding on those who can recover, considerable resources are spent in the service of causes whose end will be unchanged, sooner or later. Basically, what's the point of suffering, if you consider it beyond winning the Kingdom of Heaven?

We are human beings and all we know is what we feel, taste, hear, materially, in this life. The rest is an illusion. The quality of life here is a phrase that should concern us more than the hypothetical divine reward from Beyond. Despite the opposition from the Romanian authorities, there is a very high demand among patients who ask for the right to decide not to suffer anymore.

The question remains: why in the case of animals are we willing to euthanize, but in the case of humans, not? We often love pets more than some family members. Doesn't a false sense of conscience or Christian morality prevent us from seeing things objectively about our fellow men? Life is no longer a gift if it is only suffering.

The right to life is enshrined both at international level, by Article 2 of the Convention on Human Rights, and at national level, by Article 22 of the Romanian Constitution, but also by Article 58 of the Civil Code. Also, Article 6 of the International Covenant on Civil and Political Rights states that "every human being has the inherent right to life".

The right to life is recognized as the supreme value on the scale of human rights, its regulation by legal documents of such great importance aiming to ensure protection against death. However, in recent years, there has been an exacerbated demand for control over the time and manner in which people want to die. This trend has been, not infrequently, the main topic in the debates of legal, medical, theological and sociological specialists.

In this context, from a legal point of view, the priority of the right to liberty over the right to life is called into question.

Although initially it may seem an absurd or sensitive subject especially regarding the emotional side, some people choose the end of life for personal reasons. Most of the applications, which were the subject of the case law of the European Court of Human Rights, concerned people in advanced stages of incurable diseases who wanted to put an end to their suffering.

In this sense, certain states, from different geographical areas of the world, decided to adopt two procedures, which would give the holder of the right to life the possibility to make their own decision regarding the end of their existence: physician-assisted suicide and human

euthanasia. Among these states we can mention: Belgium, Holland, Luxembourg, Argentina, etc.[1]

I In Romania, the right to life is strongly protected by the legislator, and no harm can be done to it. However, this situation, which is so normal for some citizens, may represent a real injustice for others.

According to the normative acts enacted by the competent bodies, the right to life is only mentioned, without being assigned an article delimiting its content, but, according to art. 64 (1) Civil Code, human life is intangible, euthanasia or physician-assisted suicide, being implicitly deduced as forbidden. [2]

Taking into account the legislative aspects mentioned, the medical, theological and demographic implications, the legislator's decision is absolutely correct. However, law is a method of maintaining the social order, which is why legal norms should also reflect less accepted realities from the standpoint of morality or religion, as far as the will to live of a human being is concerned.

1. NOTIONS AND DEFINITIONS

Although the purpose of the two methods is the same, there are significant differences between human euthanasia and physician-assisted suicide.

1.1.Euthanasia

Human euthanasia is a method of causing a painless death to an incurably ill person in order to end their long and difficult suffering. The countries that have already regulated this process have taken into account the best interests of the sufferer.

Of course, the specialized literature classifies euthanasia according to several criteria, among which we can recall:

1. euthanasia performed with the consent of the patient:

- voluntary - this decision belongs to the patient who is lucid

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[1] https://drept.uvt.ro/administrare/files/1481047525-lect.-univ.-dr.-laura-sta--nila--.pdf

[2] E. Chelaru, *Civil Law. Persons* (Bucharest: C. H. Beck, 2020), 27 – 28.

- non-voluntary - the decision belongs to a person different from the patient, the latter being able to express his/her will, in which case the interest of the patient will always be taken into account
- involuntary - involves acting against one's will, which could include the death penalty

2. considering both the means and the manner of performing:

- active euthanasia - involves a directly induced death in order to relieve the patient of unnecessary suffering
- passive euthanasia - referring to death caused by inactions or omissions in the use of all medical means to have an outcome similar to natural death.

From an etymological point of view, the word "euthanasia" originates in Greek - euthanasia - and can be translated as "easy death" or "beautiful death".

Although it may seem like a topic only addressed in the last decades, there has been evidence or ideas on this practice since ancient times.

The philosopher Plato confesses in his work, the Republic, the custom by which, in Sparta, people suffering from a disability were left to die. This process was even taken up by the Romans, until the influence that Christians had in society stopped this practice.

In ancient times the practice of euthanasia was justified by the principle of "liberum mortis arbitrum".

1.2.Physician-assisted suicide

Physician-assisted suicide is the self-induced death of a patient with the help of a physician, with the applicant having their own reasons for making this decision.

In many cultures that were not Christian, suicide was considered a heroic death. Greek, Hindu, Japanese, and Norwegian culture were among those who worshipped honorable suicide, unlike those who were especially prone to Christianity.

Although, from a demographic point of view, physician-assisted suicide would be a real impediment, some people want to live their last moments in dignity.

2. JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

One of the best-known cases dealt with in the judgments of the European Court of Human Rights is "Pretty v. United Kingdom". The plaintiff, in the terminal phase of an incurable disease, initially addressed, through her lawyer, the Prosecutor's Office, with the request not to initiate the criminal investigation of her husband, if he will help her to end her life. The Prosecutor's Office has not undertaken such a commitment, and through the applicant's dissatisfaction, an appeal has been lodged before the House of Lords, invoking Article 2 of the European Convention on Human Rights.[1]

By Decision of the House of Lords, the appeal was dismissed and the case was brought before the European Court of Justice, on the ground that the refusal to grant her spouse immunity in criminal matters was a breach of Article 2 of the Convention.

The European Court found that the judgment of the English State was correct because the text of the article relied on by the applicant prohibits conduct likely to cause the death of a human being, but does not enshrine the right diametrically opposed to the right to life, namely the right to death.[2]

The European Court of Justice, in 2008, published another judgment "Ada Rossi and Others v. Italy" whose main subject of analysis was the process of human euthanasia.

In fact, the father and guardian of a young woman who had been in a vegetative state for several years, filed an action in court requesting approval to stop the feeding, artificial hydration of his daughter, invoking

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[1] C. Bîrsan, *European Convention on Human Rights - Comments on articles, Vol. I Rights and Freedoms* (Bucharest: All Beck, 2005), 174.

[2] ECHR jurisprudence, *Pretty v. United Kingdom.*

her personality and her ideas about life and dignity, which she would have expressed. The Italian Court of Cassation, by a judgment taken in 2007, declared that the judicial authority could grant the applicant's request if the person's vegetative state was persistent and if there was evidence that, if she had been of sound mind, she would have opposed medical treatment. The Court of Appeal approved the request based on the two criteria.

Following the approval, a group of persons with disabilities and the representatives of associations representing their interests complained about the negative effects that the implementation of the decision of the Italian State could have on them, invoking Articles 2 and 3 of the European Convention on Human Rights.

The Court reiterated that it was not sufficient for the petitioners to claim that the mere existence of a law violated their Convention rights, but that the law had to have been applied to their detriment. The request was dismissed as inadmissible, in view of the heads of claim put forward by the petitioners, who could not claim that they were victims of the Italian State's failure to protect their Convention rights. [1]

3. CASE STUDY

In order to outline an overview on this subject, we conducted a questionnaire, consisting of 11 questions, both related to the respondents' agreement to the processing of personal data, following questions that had the role of framing citizens in different categories (gender, age, ongoing or graduated studies and religious confession), and then the emphasis should be on questions in order to establish their opinion on the two procedures.

Following the distribution of the questionnaire, carried out using the Google Forms platform, we received a number of 168 answers.

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[1] ECHR jurisprudence, *Ada Rossi and Others v. Italy*.

All 168 persons have given their consent to the processing of personal data in accordance with the requirements of European Regulation 2016/679.

Of the total answers, we found a majority of 73.2% female respondents, an average of predominantly between 18 and 25 years old (60.1%), mostly coming from urban areas with ongoing university studies.

To the question "In the context of a legislative amendment that would entail the adoption of the procedures of "human euthanasia" and "physician-assisted suicide", your position towards this amendment would be", the percentage of responses was as follows:

- 44.6% of the 168 total voted "pro", supporting their choice by reasons such as: "*I believe that as people have the right to life so they have the right to death. But these things must be done with certain limitations and conditions that prevent any person from committing them". "Everyone has the right to make choices regarding his own life*".
- 32.1% of the 168 total voted "against", motivating the choice mainly through the prism of religion
- the last option "I don't know" being 23.2% chosen, some participants even considering the fact that we are not ready for such a change '*(...)and the Romanian state is not ready for something like this (...)'*

In order to better understand the connection between the social factors and the reasons that determined these answers, through the Google Data Studio platform, we realized the correlation between the options chosen by the respondents, activity that resulted in the following conclusions:

- the involvement of religion in this whole process has an overwhelming impact:

◦ out of the total of 75 answers that were "pro" to amend the legislation in order to adopt the procedures of "human euthanasia" and "physician-assisted suicide", a percentage of 90.48% was represented by the Orthodox Christian confession, followed by the followers of other religious denominations that were not mentioned in the proposed answers.

◦ the only representative of the Catholic cult voted against these procedures, supporting his/her choice by the following opinion: "*I believe that life has been given to us as a gift from God and only HE can decide when it ends*".

• of course, knowing the procedures or even their implications was a decisional factor, some of the persons who responded to the invitation motivating their choice of answer "I don't know" by not knowing this subject

• regarding the medical considerations, they were the basis for the choice of the "pro" answer, the respondents justifying the fact that, if they were put in a situation where they would end the suffering of a person in a terminal stage of the disease, they would opt for euthanasia *"I finished post-secondary nursing school - general nurse. (...) Yes, in a critical situation of the patient with discernment, in a terminal phase (supported by medical expertise), I consider that it is an option".* At the opposite pole, of course, there were answers such as: '*(...) I could not agree even in a case where a person would suffer a serious illness and in order to escape the torments of death, he/she would opt for such an act. (..) It is possible to judge so at the moment and because I have not suffered such situations".*

• the socio-cultural environment to which people belong is also an important decision maker:

◦ persons who are part of the urban environment, represented a majority of 60.32% of the total answers "pro", 61.7% of the total answers for the variant "against" and 66.67% of the total answers for the variant "I don't know" ;

◦ regarding the studies already completed, the persons who have completed their pre university studies agreed or disagreed, in equal proportions (42.11%), the remaining percentages choosing the variant "I don't know", the persons who have already graduated from the university or postgraduate studies opting for "pro", and those with post-secondary studies completed, having equal percentages for the variants "pro" and "I don't know" ;

◦ taking into account the ongoing studies, we can notice that the persons attending university or postgraduate studies have responded equally for

all 3 variants (33.33%), the persons studying in post-secondary education have opted, half “pro”, the other half not knowing what to choose, being followed by those who are employed in a form of pre-university education, where 50% opted for the adoption of procedures.

CONCLUSIONS

The dynamics of society, especially in the age of speed, produce immeasurable effects. One of these is the demand for regulation of less ordinary situations, such as passing legislation on how and when people wish to die.

Addressing such a subject can produce an amalgam of feelings, both among scientists and among ordinary citizens.

Taking into account the functions of law, the regulation of social relations in a state, and the actuality of the topic of euthanasia and physician-assisted suicide, the Romanian legal system should reconsider its position towards these procedures.

The legalisation of euthanasia is aimed at an essential change in life, while cultivating new moral behaviors of society.

The adoption of such a draft would require a lasting collaboration between the legislator, physicians, intellectuals, theologians, sociologists, but also the people, and its will must be respected.

Although the results of the survey revealed a demand, but also a rejection of the idea in statistically balanced percentages, the participation of citizens in the case study has rather given us an overview of potential hypotheses that the legislator will have to consider if it is in the situation of debating such a draft law.

Regardless of the state’s position on such a change, the phenomena based on the interruption of the course of life will continue to represent a longstanding controversy, a contradiction between supporters and critics, but not least, the object of successful scientific research.

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RESPECT FOR THE RIGHT OF DEFENCE IN ACCORDANCE WITH THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS[*]

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Abstract:

The right of defence is the cornerstone of a fair trial in which the parties enjoy certain procedural guarantees in order to find out the truth in the case and to protect the accused person from abuse by the authorities.

The case law of the European Court of Human Rights provides numerous solutions regarding the application and interpretation of Article 6, paragraph 3 of the European Convention on Human Rights on the right of defence, which grants the accused the right to receive detailed information on the accusation, to have adequate time and facilities necessary for the preparation of his defence, to defend himself in person or through legal assistance, to hear the prosecution's witnesses and to obtain the attendance of defence witnesses, as well as the right to free assistance of an interpreter.

Key words: *right of defence; access to file; time; information; lawyer;, facilities; free assistance; interpreter.*

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INTRODUCTION

The right to a defence is a fundamental value in any state governed by the rule of law, its observance constitutes a guarantee in finding out the truth in question. Among the most important and most discussed articles of the ECHR is undoubtedly Article 6, which deals with the issue of fair trial, reasonable time (Article 6(1)), the presumption of innocence (Article 6(2)) and procedural guarantees for the accused in relation to the adversarial principle (Article 6, paragraph 3). Article 6 establishes the right to a fair trial and respect for the rights of the defence is one of the essential aspects of the right to a fair trial.

In European case law, the right to a fair trial is a fundamental right because it is a condition for the effective exercise of other substantive rights. The right to an effective defence is the cornerstone of the right to a fair trial. The Convention, in Article 6, stipulates the minimum guarantees necessary to ensure the right to a fair trial for all persons charged with a criminal offence. These include timely and confidential access to a lawyer and adequate time and facilities for the preparation of the defence.

Most of the rights enshrined in the text of Article 6 are also found in the Romanian Code of Criminal Procedure, in Article 10. National case-law has attached particular importance to the right of defense provided for in Article 6(3) of the European Convention on Human Rights, taking into account the fairness of the process, the right to be informed, the manner in which legal assistance is provided, the right to have the time necessary to prepare a defence, to ask questions to the prosecution's witnesses and to be assisted free of charge by an interpreter[1] .

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[1]Victor Duculescu, *Legal Protection of Human Rights* (Bucharest: Lumina Lex, 1998), 62; Corneliu Bîrsan, *European Convention on Human Rights. Commentary on Articles*, Volume I, *Rights and Freedoms* (Bucharest: C.H. Beck, 2005), 556; Mihail Udroiu and Ovidiu Predescu, *European Protection of Human Rights and the Romanian Criminal Procedure* (Bucharest: C.H. Beck, 2008), 719; Raluca Miga-Beșteliu and Catrinel Brumar, *International Protection of Human Rights* (Bucharest: Universul Juridic, 2008), 142; Laura Magdalena Trocan, „The guarantee of the right to defence in the light of the

In this article we will examine the guarantees granted to persons suspected or accused of having committed a criminal offence under Article 6(3) in the light of the case law of the European Court of Human Rights.

Vintilă Dongoroz stated that the right to defence is a complex right, which includes all the prerogatives, faculties and possibilities attributed by law to litigants for the defense of their rights[1] .

The European Convention on Human Rights sets out the criteria by which signatory states are bound to respect the right of defence of the accused in internal proceedings. Thus, under Article 6 para. 3 sets out the rights and guarantees to which the parties are entitled:

”a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.” [2].

The European Court of Human Rights has repeatedly ruled that respect for the right to a defence laid down in Article 6 paragraph 3 of the

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provisions of international human rights treaties and ECHR case law”, in *Annals of the University "Constantin Brâncuşi" of Targu Jiu, Legal Sciences series*, no. 4 (2010): 111-123; Cristinel Ghigheci, *Principles of criminal procedure in the new Code of Criminal Procedure* (Bucharest: Universul Juridic, 2014): 173- ff.

[1]Vintilă Dongoroz, *Theoretical explanations of the Romanian Criminal Procedure Code. General Part*, Volume V, 2nd edition (Bucharest: Romanian Academy & All Beck, 2003), 349.

[2] *Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms*, published in the Official Journal No 135 of 31 May 1994, available at: http://legislatie.resurse-pentru-democratie.org/legea/conventia-pentru-apararea-drepturilor-omului-si-a-libertatilor-fundamentale.php, accessed on: 12 January 2022.

European Convention on Human Rights constitutes a particular aspect of the right to a fair trial laid down in Article 6(1) of that Convention (F.C.B. v. Italy[1], Poitrimol v. France[2], Van Geyseghem v. Belgium[3]).

THE RIGHT TO BE INFORMED OF THE ACCUSATION

The European Court of Human Rights, in the case Pélissier and Sassi v. France, ruled that "in criminal matters, the provision of complete and detailed information concerning the charges against the defendant and, consequently, the legal qualification that the court may adopt in the case, is an essential prerequisite for ensuring the fairness of the process"[4].

Therefore, Article 6 paragraph 3(a) recognises the right of the accused to be informed not only of the reasons of the accusation, but also, in detail[5] , of the "nature" of the accusation, namely the legal classification given to the facts and the aggravating circumstances of the case (De Salvador Torres v. Spain[6], Chichlian and Ekindjian v France[1],

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[1]ECtHR, judgment of 28 August 1991- 12151/86, in F.C.B. v. Italy, para. 28-36, available at: https://www.doctrine.fr/d/CEDH/HFJUD/CHAMBER/1991/CEDH001-62237, accessed on: 4 January 2022.

[2] ECtHR, judgment of 23 November 1993 - 14032/88, in Poitrimol v. France, para. 29, available at:https://juricaf.org/arret/CONSEILDELEUROPE-COUREUROPEENNEDESDROITSDELHOMME-19931123-1403288 , accessed on: 7 January 2022.

[3]ECtHR, judgment of 21 January 1999 - 26103/95, in Van Geyseghem v. Belgium, para. 27, available at: https://www.doctrine.fr/d/CEDH/HFJUD/GRANDCHAMBER/1999/CEDH001-63458, accessed on: 12 January 2022.

[4]ECtHR, Judgment of 25 March 1999 - 25444/94, in Pélissier and Sassi v. France, para. 50-56, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58226%22]}, accessed on: 27 January 2022.

[5]ECtHR, judgment of 19 December 1989 - 25444/94, in Kamasinski v. Austria, para. 52, available at: https://www.legal-tools.org/doc/7c96e4/pdf/ , accessed on: 2 February 2022. The ECtHR has held that the details of the offence play an important role in the criminal proceedings with regard to showing the factual and legal grounds for the charge against him.

[6]ECtHR, judgment of 24 October 1996 - 50/1995/556/642, in De Salvador Torres v. Spain, paragraphs 19-33, available at:

Pélissier and Sassi v France[2], Mattoccia v Italy[3], Sipavicius v Lithuania[4], Drassich v Italy[5], Penev v Bulgaria[6]). The information on the legal classification of the act also includes the duty of the prosecution to inform the accused of any change in the legal classification of the offence in the course of the proceedings (Mattei v France[7]).

The accused person must receive the information promptly, in order to have an opportunity to prepare his or her defence, even before the first statement made to the investigating authorities under Article 6, paragraph 3 (a) (Mattoccia v. Italy)[8]. Access to information must be

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https://www.refworld.org/cases,ECHR,3ae6b69e10.html, accessed on: 11 February 2022.

[1] EtCHR, Judgment of 29 November 1989 - 10959/84, in Chichlian and Ekindjian v. France, paragraph71, available at: https://juricaf.org/arret/CONSEILDELEUROPE-COUREUROPEENNEDESDROITSDELHOMME-19880708-1095984 , accessed on: 15 February 2022.

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[3]ECtHR, judgment of 25 July 2000 - 23969/94, Mattoccia v. Italy, paragraph 59, available at: https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-58764&filename=CASE%20OF%20MATTOCCIA%20v.%20ITALY.docx&logEvent=False, accessed on: 24 February 2022.

[4]ECtHR, Judgment of 21 February 2002 - 49093/99, in Sipavicius v. Lithuania, paragraph 28, available at: http://hudoc.echr.coe.int/webservices/content/pdf/001-60158, accessed on: 24 February 2022.

[5]ECtHR, judgment of 11 December 2007- 25575/04, in Drassich v. Italy, paragraph 32, available at: https://www.bailii.org/eu/cases/ECHR/2009/1678.html , accessed on: 25 February 2022.

[6]ECHR, judgment of 7 January 2010 - 20494/04, in Penev v. Bulgaria, paragraph 33 and 42, available at: http://hrlibrary.umn.edu/research/bulgaria/PENEV.pdf, accessed on: 26 February 2022.

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[8]ECtHR, Judgment of 25 July 2000 - 23969/94, Mattoccia v. Italy, paragraph 59, available at: https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-58764&filename=CASE%20OF%20MATTOCCIA%20v.%20ITALY.docx&logEvent=False, accessed on: 24 February 2022.

provided in a language that the accused understands, not necessarily their mother tongue (Brozicek v Italy[1]).

Particular attention must be paid by the authorities to persons with mental difficulties, as additional measures are needed to ensure that the person is aware of the information concerning the nature and cause of the charge against him/her (Vaudelle v France[2]).

In Brozicek v. Italy, the European Court of Human Rights established the basic principles of the right to be informed. All informations given to the accused must be prompt, comprehensible and present the case in fact and in law[3] .

The procedural rights and guarantees referred to in Article 6 paragraph 3 of the European Convention on Human Rights are found in the Romanian Criminal procedure Code, Article 10. Paragraph 3 of this article stipulates the right of the suspect to be informed immediately and before being heard of "the act for which criminal proceedings are being carried out and its legal classification". It also specifies the right of the defendant to be informed immediately about the act for which the criminal action against him has been initiated and its legal classification, as well as the right to be informed at the time of ordering the referral to court. Article 307 of the Code of Criminal Procedure provides that the criminal investigation authorities have the obligation to inform the suspect before the first hearing about the act for which is suspected, its legal classification and the procedural rights provided for in Article 83, and a report is drawn up.

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[1]ECtHR, judgment of 19 December 1989 - 10964/84, in Brozicek v. Italy, paragraphs 38-46, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57612%22]}, accessed on: 16 March 2022.

[2]ECtHR, judgment of 30 January 2001 - 35683/97, in Vaudelle v. France, paragraph 65, available at: https://www.bailii.org/cgi-bin/format.cgi?doc=/eu/cases/ECHR/2001/76.html&query=(Vaudelle) , accessed on: 24 February 2022.

[3]ECtHR, judgment of 19 December 1989 - 10964/84, in Brozicek v. Italy, paragraph 38-46, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57612%22]}, accessed on: 16 March 2022.

Article 108 paragraphs 1 and 3 of the Code of Criminal Procedure stipulate that before the first hearing of the suspect or defendant, he or she shall be informed in writing, under signature, of the act for which he or she is suspected of committing, its legal classification and his or her procedural rights and obligations.

In Article 344, the legislature extends the right to information by communicating the indictment to all defendants at their place of detention or at the address of domicile.

THE RIGHT TO HAVE ADEQUATE TIME AND FACILITIES FOR THE PREPARATION OF THE DEFENCE

The European Court, in Galstyan v Armenia[1], ruled that the time and facilities necessary for the preparation of the defence provide for the possibility for the accused to organize his defense in an appropriate and unrestricted manner in order to prove his innocence effectively (also in Elvan Can v Austria[2], Mayzit v Russia[3]).

In Kamasinsky v. Austria[4], the European Court of Human Rights stated that the right of access to the prosecution file may be restricted in certain circumstances, with only the defendant's lawyer having access to the file. The European Court has stated that limitations are only allowed in a justified manner.

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[1]ECtHR, Judgment of 15 November 2007 - 26986/03, in Galstyan v. Armenia, para. 84-92, available at: http://hrlibrary.umn.edu/research/armenia/armenia_26986-03.html, accessed on: 24 February 2022.

[2]ECtHR, Judgment of 12 July 1984 - 9300/81, in Elvan Can v. Austria, para. 53, available at:https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=001-73476&filename=CAN%20v.%20AUSTRIA.pdf, accessed on: 24 February 2022.

[3] ECtHR, judgment of 20 January 2005 - 63378/00, in Mayzit v. Russia, para. 78, available at: http://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-71906&filename=MAYZIT%20v.%20RUSSIA.docx&logEvent=False, accessed on: 24 February 2022.

[4]ECtHR, Judgment of 19 December 1989 - 25444/94, Kamasinski v. Austria, para. 52, available at: https://www.legal-tools.org/doc/7c96e4/pdf/ , accessed on: 2 February 2022.

Changing the lawyer before the court hearing and without being at the fault of the accused obliges the court to give the time needed for the new defender to prepare the defense (Goddi v Italy[1]).

The time required for defense preparation is assessed according to the charges brought, the nature of the offence and the complexity of the case (Albert and Le Compte v Belgium[2]). If the defendant did not request a postponement of the case in order to have sufficient time to prepare his defence, there is no fault on the part of the state (Campbell and Fell v. the United Kingdom[3]).

The facilities necessary for the preparation of the defence also include access to the results of investigations carried out in the course of the proceedings (CGP v Netherlands[4]). The right of access to the case file is not an absolute right and the authorities may restrict this right to protect the identity of the plaintiff, witness, etc.

The time allowed for the preparation of the defence must be reasonable in order to avoid a trial in which the accused is unable to defend himself (Öcalan v Turkey[5]). In straightforward cases, such as disciplinary proceedings, a shorter period of time may be considered reasonable (Campbell and Fell v UK[6]).

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[1]ECtHR, judgment of 9 April 1984 - 8966/80, in Goddi v. Italy, par. 30-36, available at: https://www.bailii.org/eu/cases/ECHR/1984/4.html , accessed on: 3 March 2022.

[2] ECtHR, judgment of 28 January 1983 - 7299/75; 7496/76, in Albert and Le Compte v. Belgium, para. 41, available at: https://www.refworld.org/cases,ECHR,3ae6b6f510.html, accessed on: 5 March 2022.

[3]ECtHR, judgment of 28 June 1984 - 7819/77; 7878/77, in Campbell and Fell v. United Kingdom, para. 98-99, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57456%22]}, accessed on: 12 March 2022.

[4]ECtHR, Judgment of 15 January 1997 - 29835/96, in CGP v. The Netherlands, available at: http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-3469&filename=001-3469.pdf, accessed on: 24 February 2022.

[5] ECtHR, judgment of 12 May 2005 - 46221/99, in Öcalan v. Turkey, para. 130-149, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-69022%22]}, accessed on: 24 February 2022.

[6] ECtHR, judgment of 28 June 1984 - 7819/77; 7878/77, in Campbell and Fell v. United Kingdom, para. 98-99, available at:

The Court found a violation of Article 6 para. 3(b) in Foucher v. France when the authorities refused the defendant, who had chosen to represent himself, access to the case file in the pre-trial phase and to obtain copies of the file on the grounds that access to the study of the file is only allowed to lawyers under national law[1].

In national law, Article 10 para. 2 of the Code of Criminal Procedure provides for the right of the parties and their lawyers to be given the time and facilities necessary to prepare their defence from the moment the criminal proceedings begin.

Article 94 of the Code of Criminal Procedure gives parties and lawyers the right to consult the file throughout the criminal trial and prosecution (during which the suspect's access can only be restricted for reasons given by the prosecutor), with the date and duration set within a reasonable time.

RIGHT TO DEFEND ONESELF IN PERSON OR TO BE ASSISTED BY A DEFENDER

Article 6, para. (3) (c) contains four components of the right to defend oneself in person or through legal assistance: a) the right to defend oneself in person (Foucher v. France), b) the right to choose a lawyer (Campbell and Fell v. the United Kingdom[2]), c) the right to free legal assistance where there are insufficient means and where the

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https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57456%22]} , accessed on: 12 March 2022.

[1]ECtHR, Judgment of 18 March 1997 - 22209/93, Foucher v. France, para. 35-38, available at: http://cambodia.ohchr.org/sites/default/files/echrsource/Foucher%20v.%20France%20[18%20Mar%201997]%20[EN].pdf, accessed on: 14 March 2022.

[2]ECtHR, Judgment of 15 November 2007 - 26986/03, in Campbell and Fell v. United Kingdom, para. 84-92, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57456%22]} , accessed on: 12 March 2022.

interests of justice so require (John Murray v. the United Kingdom[1]) and d) the right to practical and effective legal assistance (Bogumil v. Portugal[2]).

The right to represent oneself is not absolute, and the authorities can deny that right to an accused person when serious alleged crimes are at stake (Kamasinsky v. Austria[3]). In the case of the exercise of the right to self-defence, the authorities may impose restrictions on access to the file at the pre-trial stage (Foucher v France[4]).

In Artico v Italy[5] the Court ruled that the defence must be effective and not formal. The Court held in Daud v Portugal[6] that the lawyer must be given the time necessary to prepare the defence in view of the complexity of the case.

The defendant has the right to a lawyer at all stages of the hearing (Ezeh and Connors v. the United Kingdom[7]) and if he is in police

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[1]ECtHR, Judgment of 8 February 1996 - 18731/91, in John Murray v. United Kingdom, para. 59-70, available at: https://www.bailii.org/eu/cases/ECHR/1996/3.html, accessed on: 24 February 2022.

[2]ECtHR, Judgment of 7 October 2008 - 35228/03, Bogumil v Portugal, para. 47-50, available at: http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-88742&filename=001-88742.pdf, accessed on: 14 March 2022.

[3]ECtHR, Judgment of 19 December 1989 - 25444/94, Kamasinski v. Austria, para. 52, available at: https://www.legal-tools.org/doc/7c96e4/pdf/ , accessed on: 2 February 2022.

[4] ECtHR, Judgment of 18 March 1997 - 22209/93, Foucher v. France, para. 35-38, available at: http://cambodia.ohchr.org/sites/default/files/echrsource/Foucher%20v.%20France%20[18%20Mar%201997]%20[EN].pdf, accessed on: 14 March 2022.

[5]ECtHR, Judgment of 13 May 1980 - 6694/74, in Artico v. Italy, para. 31-38, available at: https://www.dipublico.org/1887/case-of-artico-v-italy-european-court-of-human-rights/, accessed on: 24 February 2022.

[6]ECtHR, Judgment of 21 April 1998 - 11/1997/795/997, in Daud v. Portugal, para. 39, available at: http://hudoc.echr.coe.int/webservices/content/pdf/001-58154?TID=thkbhnilzk, accessed on: 24 February 2022.

[7] ECtHR, judgment of 15 July 2002 - 39665/98 and 40086/98, in Ezeh and Connors v. the United Kingdom, paras. 84-92, available at: https://www.bailii.org/eu/cases/ECHR/2002/595.html, accessed on: 24 February 2022.

custody as a suspect (Dayanan v. Turkey[1]), and if he is tried in absentia he must be represented by a lawyer (Karatas and Sari v. France[2]).

The Court held that there was a violation of Article 6 paragraph 3 lit. (c) when the authorities impose restrictions on the accused's right to a defender at an early stage of the proceedings, such as immediately after arrest, because at this stage the accused is considered to be the most vulnerable to pressure from the authorities (John Murray v. the United Kingdom[3] ; Salduz v. Turkey[4]), unless the accused expressly waives his right to a defender (Yoldas v. Turkey[5]). Thus, the ECtHR found in Salduz v. Turkey that: "The right of defence will, in principle, be irreparably prejudiced where incriminating statements made during police questioning without access to a lawyer are used for a conviction"[6] . This new interpretation of Article 6, para. 3 lit. (c) of the ECtHR has also been discussed in other cases: Böke and Kandemirv. Turkey[7] , Öztürkv. Turkey[1] , Aslan and Demir v. Turkey[2] .

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[1]ECtHR, judgment of 13 October 2009 - 7377/03, in Dayanan v. Turkey, para. 29-34, available at: https://www.bailii.org/eu/cases/ECHR/2009/2278.html, accessed on: 24 March 2022.

[2]ECtHR, Judgment of 16 May 2002 - 38396/97, in Karatas and Sari v. France, para. 52-62, available at: https://www.doctrine.fr/d/CEDH/HFJUD/CHAMBER/2002/CEDH001-65019, accessed on: 26 February 2022.

[3]ECtHR, Judgment of 8 February 1996 - 18731/91, in John Murray v. United Kingdom, para. 59-70, available at: https://www.bailii.org/eu/cases/ECHR/1996/3.html, accessed on: 24 February 2022.

[4]ECtHR, Judgment of 27 November 2008 - 36391/02, in Salduz v. Turkey, para. 56-62, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-89893%22]}, accessed on: 14 March 2022.

[5]ECtHR, judgment of 23 February 2010 - 27503/04, in Yoldaş v. Turkey, para. 46-55, available at: https://www.bailii.org/eu/cases/EUECJ/2010/1620.html, accessed on: 15 March 2022.

[6]ECHR, Judgment of 27 November 2008 - 36391/02, in Salduz v. Turkey, para. 55, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-89893%22]}, accessed on: 14 March 2022.

[7] ECtHR, judgment of 10 March 2009 - 71912/01, 26968/02 and 36397/03, in Böke and Kandemir v. Turkey, paras. 69-71, available at:

The Court ruled that once a person has been granted the status of suspect, that person must be granted the right to legal assistance. Therefore, in Simeonovi v. Bulgaria, the ECtHR held that the right to legal counsel is granted: (a) to a person arrested on suspicion of having committed a criminal offence; (b) to a suspect questioned about his involvement in certain offences; or (c) to a person who has been formally charged under a procedure established under national law with having committed a criminal offence[3].

In Dayanan v. Turkey, the ECtHR found that an accused must be allowed: "to be able to obtain the full range of services specifically associated with legal assistance. In this regard, the lawyer must be able to provide without restriction the fundamental aspects of the person's defence: the discussion of the case, the organisation of the defence, the gathering of evidence favourable to the accused, the preparation for cross-examination ... and the verification of the conditions of detention"[4].

In the case of the need for free legal assistance, account must be taken of the financial situation, the nature and complexity of the case, the severity of the penalty, the ability of the accused to defend himself

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http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-91636&filename=001-91636.pdf, accessed on: 27 February 2022.

[1]ECtHR, judgment of 28 September 1999 - 22479/93, in Öztürk v. Turkey, para. 84-92, available at: http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-58305&filename=001-58305.pdf, accessed on: 27 February 2022.

[2] ECtHR, judgment of 17 February 2009 - 38940/02 and 5197/03, in Aslan and Demir v. Turkey, paras. 4-16, available at: https://www.bailii.org/eu/cases/ECHR/2009/295.html, accessed on: 28 February 2022.

[3]ECtHR, judgment of 12 May 2017 - 21980/04, in Simeonovi v. Bulgaria, para. 111, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-172963%22]}, accessed on: 27 February 2022.

[4] ECtHR, judgment of 13 October 2009 - 7377/03, in Dayanan v. Turkey, para. 32, available at: https://www.legal-tools.org/doc/2c35fa/pdf/, accessed on: 24 March 2022.

(Timergaliyev v Russia[1]) and the interests of justice (Quaranta v Switzerland[2]).

In national law, Article 10 para. 1 provides for the right of the parties and main procedural subjects to defend themselves or to be assisted by a lawyer. In contrast to the provisions of Art. 6 para. 3 lit. (c) of the Convention, which refers only to the accused person having a lawyer, the new Code of Criminal Procedure extends the right to the defender to all parties and main procedural subjects.

Conversations between a lawyer and the person he represents cannot be supervised by technical means, unless the lawyer prepares or commits an offense (Article 139, paragraph 4).

The person making his own defense shall have the opportunity to have access to the case file for the preparation of the defense. This right may be restricted under certain conditions laid down by law.

The legislator, in Article 88, paragraphs 2 and 4 limits the right of the parties and main procedural subjects to the choice of a lawyer if the lawyer is: a spouse or relative up to the fourth degree of the prosecutor or the judge, a witness cited in the case, a person who participated in the same case as a judge or a prosecutor and another party or another procedural subject, and the parties or trial subjects with opposing interests cannot be represented or assisted by the same lawyer.

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[1]ECtHR, judgment of 14 October 2008 - 40631/02, in Timergaliyev v. Russia, para. 59, available at: http://ip-centre.ru/assets/files/cases/CASE-OF-TIMERGALIYEV-v.-RUSSIA.pdf, accessed on: 14 February 2022

[2]ECtHR, judgment of 24 May 1991 - 12744/87, in Quaranta v. Switzerland, para. 32-38, available at: https://www.hr-dp.org/files/2013/09/11/CASE_OF_QUARANTA_v._SWITZERLAND_.pdf, accessed on: 15 February 2022.

THE RIGHT TO HEAR OR REQUEST THE HEARING OF WITNESSES FOR THE PROSECUTION AND TO OBTAIN THE SUMMONING AND HEARING OF WITNESSES OF THE DEFENSE

Article 6 para. 3 (d) consists of three distinct elements, namely: a) the right to challenge prosecution witnesses (or to challenge other evidence presented by the prosecution in support of their case); b) the right, in certain circumstances, to call a witness of one's choice (Vidal v. Belgium[1]); and c) the right to hear prosecution witnesses on the same conditions as defence witnesses. The right to call witnesses for the defence may also consist of summoning experts (Cottin v Belgium[2] , Mantovanelli v France[3]).

The Court has ruled that the testimony of co-defendants cannot be used in judgments given by the courts against the one who did not admit his act (Vladimir Romanov v. Russia[4]).

The accused's right to call a witness is also extended on appeal if the first instance judgment has been annulled (Vidal v Belgium[5], García Hernández v Spain[1]).

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[1]ECtHR, judgment of 28 October 1992 - 12351/86, in Vidal v. Belgium, para. 2-9, available at:http://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=00157798&filename=CASE%20OF%20VIDAL%20v.%20BELGIUM%20 , accessed on: 2 March 2022.

[2]ECtHR, judgment of 2 June 2005 - 48386/99, in Cottin v. Belgium, para. 31-33, available at: https://www.doctrine.fr/d/CEDH/HFJUD/CHAMBER/2005/CEDH001-69232, accessed on: 25 February 2022

[3]ECtHR, Judgment of 18 March 1997 - 21497/93, Mantovanelli v. France, para. 31-36, available at: https://www.bailii.org/eu/cases/ECHR/1997/14.html, accessed on: 26 February 2022.

[4]ECtHR, judgment of 24 July 2008 - 41461/02, in Vladimir Romanov v. Russia, para. 97-106, available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-87836%22]} , accessed on: 2 March 2022

[5]ECtHR, judgment of 28 October 1992 - 12351/86, in Vidal v. Belgium, para. 2-9, available at:http://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-57798&filename=CASE%20OF%20VIDAL%20v.%20BELGIUM%20 , accessed on: 2 March 2022.

FREE ASSISTANCE TO AN INTERPRETER

Article 6 para. 3 (e) of the Convention guarantees the right to free interpretation if the accused does not understand the language of the court. If this right is refused, the authorities are obliged to prove that the defendant has sufficient knowledge of the language of the court (Brozicek v Italy[2]).

In addition to appointing an interpreter, the authorities have a duty to check the quality of the interpretation (Cuscani v UK[3] ; Kamasinski v Austria[4]).

In accordance with the case law of the ECtHR, the new Code of Criminal Procedure, in Art. 12, par. 3 and 4 stipulates the right of parties and procedural subjects who do not speak or understand Romanian to have access to an interpreter free of charge. Although the language in which the criminal proceedings are conducted according to Art. 12 para. 1, is the Romanian language, Romanian citizens belonging to national minorities, if they do not speak, do not know or cannot express themselves in Romanian, have the right to use their mother tongue in criminal proceedings, in which case an interpreter is required. All procedural acts are carried out in Romanian.

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[1] ECtHR, judgment of 16 November 2010 - 15256/07, in García Hernández v Spain, para. 26-36, available at: https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-3336346-3731755&filename=003-3336346-3731755.pdf , accessed on: 4 March 2022

[2]ECtHR, judgment of 19 December 1989 - 10964/84, in Brozicek v. Italy, para. 38-46, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57612%22]}, accessed on: 16 March 2022.

[3] ECtHR, Judgment of 24 September 2002 - 32771/96, Cuscani v. United Kingdom, para. 34-40, available at: https://www.bailii.org/cgi-bin/format.cgi?doc=/eu/cases/ECHR/2002/630.html&query=(title:(+cuscani+)), accessed on: 24 February 2022.

[4]ECtHR, Judgment of 19 December 1989 - 25444/94, Kamasinski v. Austria, para. 52, available at: https://www.legal-tools.org/doc/7c96e4/pdf/, accessed on: 2 February 2022..

CONCLUSIONS

The right to a defence is closely linked to the right to a fair trial, with the accused having a number of guarantees and procedural rights such as: the right to be informed of the accusation, to have the time and facilities necessary for preparing his defence, to defend himself in person or to be assisted by a lawyer, the right to hear or request the hearing of witnesses of the prosecution and to obtain the summoning and hearing of witnesses for the defence, the right to free assistance of an interpreter.

In the practice of the European Court of Human Rights, there has been a concern to respect the right to a defence in accordance with the right to a fair trial.

In national law, respect for the right of defence, provided for in Article 10 of the Code of Criminal Procedure, contains more favorable provisions than those laid down in Article 6 para. 3 of the European Convention on Human Rights, extending these rights also during criminal prosecution, as at this stage the criminal investigation collect the most important evidence in favor of or against the suspect.

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AIR CARRIER LIABILITY IN CASE OF LOSS / DAMAGE OF LUGGAGE AND IN CASE OF DELAY IN BOARDING OR TAKE-OFF

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Abstract
Air transport is the branch of civil or military aviation that deals with the transport of people or goods by air. The national airspace represents the column of air located above the territory in which Romania exercises its sovereignty, up to the lower limit of extraatmospheric space. Air operator is the natural or legal person authorized and/or licensed, engaged in the operation of aircraft. In order to achieve flight safety, civil aeronautical agencies are subject to control, evaluation and authorization, as well as permanent supervision by the Ministry of Transport, directly or through specialized technical bodies, public institutions or authorized commercial companies. The carrier is liable for damage in the event of destruction, loss or damage to checked baggage, provided that the event causing the destruction, loss or damage occurred on board the aircraft or during any period during which the carrier had custody of the checked baggage. However, the carrier is not liable if and to the extent that the damage occurred due to a defect in the baggage, its quality or defect. In the case of unregistered baggage, especially personal items, the carrier is liable if the damage results from his fault or that of his servants or agents.

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AIR TRANSPORT REGULATIONS OF GOODS AND PERSONS

Air transport is the branch of civil or military aviation that deals with the transport of people or goods by air. The national airspace represents the column of air located above the territory in which Romania exercises its sovereignty, up to the lower limit of the extraatmospheric space.

The advantages of air transport

The most important advantage is the speed with which it is done. It is also worth noting the high reliability of such a mode of transport of goods, as the risk of theft of goods in the air is as close to zero as possible. The transferred goods can only be damaged during loading or during customs control. An important plus is the ability to track the location of goods. Aviation trolleys offer the ability to carry various products, regardless of size and weight, in greater safety because everything is weighed and placed so that the safety of the flight is not endangered.

The aircraft is a device that can be kept in the atmosphere by other reactions of the air than those on the surface of the earth.

International Airport - the airport designated as the airport of entry and departure, intended for international aircraft traffic, and where the control facilities for the state border crossing, for customs control, for public health, for veterinary and phytosanitary control, as well as for other similar facilities.

An air operator is an authorized and / or licensed natural or legal person engaged in the operation of aircraft. In order to achieve flight safety, civil aviation agencies shall be subject to control, assessment and authorization, as well as permanent supervision by the Ministry of Transport, directly or through specialized technical bodies, public institutions or authorized companies.

The categories of civil aeronautical personnel, the mandatory certification documents for the exercise by civil aeronautical personnel of civil aeronautical activities, as well as the requirements for obtaining certification documents are established by specific regulations issued by the Ministry of Transport, Infrastructure and Communications and / or European regulations.

The mandatory certification documents for the exercise by the military aeronautical personnel of the military aeronautical activities, as well as the requirements for obtaining the certification documents are established by specific regulations issued by the Ministry of National Defense. Air navigation services shall be provided to air traffic only by certified aeronautical agents and, as appropriate, designated for this purpose, in accordance with applicable specific regulations. Certified and designated aeronautical agents to provide air traffic control services in the region of flight information - FIR Bucharest have the obligation to ensure the design, publication, maintenance and periodic review, in accordance with the applicable specific European and / or national regulations, of the for areas of airspace where they are designated to control air traffic, including performance-based navigation procedures necessary for the safe conduct of flight activities in that area of airspace. Aerodrome administrators, aircraft operators or general government authorities may require an air traffic control service provider, in duly justified circumstances and under conditions that do not affect the safety and performance of air traffic, to change the system of published flight procedures for the space area. where the latter provides the air traffic control service.

CARRIERS' LIABILITY FOR LUGGAGE

The carrier is liable for damage caused in the event of destruction, loss or damage to checked baggage, provided that the damage, loss or damage to the aircraft occurred during or during any period during which the carrier took care of the checked baggage. However, the carrier is not liable if and to the extent that the damage occurred due to a defect in the luggage, its quality or defect. In the case of unchecked baggage, in

particular personal belongings, the carrier is liable if the damage is due to his fault or that of his agents or agents. "[1]

For the transport of luggage, other than small personal items that keep the passenger in his custody, the carrier is required to release a luggage card.

The luggage ticket is made in two copies, one for the passenger, the other for the carrier.

It must contain the following entries:

a) place and date of issue;
b) points of departure and destination;
c) the name and address of the carrier or carriers;
d) travel ticket number;
e) the indication that the luggage is handed over to the bearer of the bulletin;
f) number and weight of packages;
g) the sum of the declared value according to article 22, paragraph 2;
h) an indication that the carriage is subject to the liability regime established by this Convention.

The absence, irregularity or loss of the ticket shall not affect the existence or validity of the contract of carriage, which shall also be subject to the rules of this Convention. However, if the carrier receives the luggage without having issued a ticket or if the ticket does not contain the particulars indicated in points d), f), h), the carrier shall not have the right to invoke the provisions of this Convention which exclude or limit its liability.[2]

If baggage handed over at check-in has been lost, damaged or arrived late, the airline is responsible and passengers are entitled to compensation of up to approximately EUR 1 300. However, if the

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[1] Convention of 28 May 1999, Chapter 3 Liability of the carrier and limits of compensation for damage, Article 18 Damage caused to the goods

[2] Convention of 12 October 1929 for the unification of rules concerning international carriage by air, signed at Warsaw on 12 October 1929, Chapter 2 Transport Documents, Section I Travel ticket, Article 3

damage was caused by a defect in the luggage, he is not entitled to compensation.

Goods

An air waybill will be issued for the carriage of goods.[1] Contents of the air waybill or receipt The air waybill or receipt will contain:
a) indication of points of departure and destination;
b) if the points of departure and destination are situated in the territory of a single State Party and if one or more points of call are located in the territory of another State, an indication of at least one of those points of call; and
c) indication of the weight of the shipment. [2]

The air waybill is drawn up by the sender in 3 originals. The first copy shall bear the words "for the carrier" and shall be signed by the consignor. The second copy bears the words "for the consignee" and is signed by the consignor and the carrier. The third copy is signed by the carrier and handed over to the consignor after acceptance of the goods.[3]

Travel insurance

In order to have sufficient coverage during a trip with expensive items, it is recommended to take out a private travel insurance. If you do not wish to do so, you may pay a surcharge to get more compensation (over EUR 1 300) from the airline with which you are traveling. This must be done in advance or at the latest at check-in. In order to file a complaint, the airline must be notified in writing within 7 days of the loss or damage of the luggage or within 21 days of receipt of the luggage, if they arrive late. [4]

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[1] Convention of 28 May 1999, Article 4 Goods
2 Article 5 Content of the consignment note
3 Article 7 Description of the air waybill
4 Article 31 Deadline for registration of complaints

Passenger rights

The rights of air passengers under the provisions of the European Union shall apply:

- if the flight takes place within the EU (whether the flight is operated by an EU or non-EU company)
- if you land at an EU airport outside the Union and the flight is operated by an EU company
- if taking off from an EU airport to a non-EU country, regardless of whether the flight is operated by an EU or non-EU airline
- if you have not already received certain compensation (compensation, redirection, airline assistance) for flight issues under the relevant legislation of a non-EU country Departure.

Flight and return flight are always considered separate flights, even if they are part of the same reservation. In some cases, the company operating the flight (airline) may not be the one from which the ticket was purchased. In this case, only the company operating the flight can be held liable. If an airline leases a fully manned aircraft from another airline (wet lease system), the operational responsibility for the flight lies with the airline leasing company because, under EU law (Regulation 261/2004) she is the one who operates the flight.

Flight Cancellation[1]

Occurs when:

- the initial flight schedule has been canceled
- the plane took off, but was forced to return to the airport of departure and the passengers will be transferred to another flight
- the aircraft lands at an airport other than the final destination indicated on the ticket, with two exceptions:

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[1] Regulation (EC) no. 261/2004 of the European Parliament and of the Council of 11 february 2004, article 5 cancellation

- redirection (under comparable transport conditions and as soon as possible) to the destination airport or to any other passenger-approved destination has been accepted. In this case, it is considered that it was a delay, not a cancellation.
- the airport of arrival and the airport of destination serve the same city or region. In this case, it is considered that it was a delay, not a cancellation.

If the flight is canceled, passengers have the right to choose between a refund, a return or return to their place of departure. They are also entitled to assistance at the airport. Passengers are entitled to compensation if they have been informed of the cancellation less than 14 days before the scheduled flight date.[1] The airline has the obligation to prove if and when it has personally informed in this regard. However, the operator does not have to pay compensation if he can prove that the cancellation is caused by extraordinary circumstances, which could not have been avoided despite all possible measures being taken.

The airline must prove this by providing, for example, excerpts from logbooks or incident reports. The company must provide this evidence to the competent national body[2] and to the passengers concerned, in accordance with national provisions on access to documents.

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[1] Decision C-561/2020 of the Court of Justice of the European Union Common rules on compensation and assistance to passengers in the event of denied boarding and cancellation or long delay of flights - Direct connecting flight comprising two flight segments - Prolonged delay at the final destination originating in the second segment of this flight, which connects two airports in a third country - Validity of this regulation in relation to international law

[2] Decision C-597/20 of the Court of Justice of the European Union - Article 5(1)(c) and Article 7 – Passenger compensation – Article 16 – Mission of the national enforcement body – National regulation empowering that body to compel an air carrier to pay compensation owed to a passenger

Delay

The carrier is liable for damage caused by delay in the carriage of passengers[1], baggage or cargo by air. However, the carrier shall not be liable for any damage caused by the delay if it proves that it, its agents and its representatives have taken all reasonable steps to avoid damage or that it has been impossible for them to take such measures.[2]

If your flight departs late[3], you are entitled to assistance, a refund, and a return flight (the latter if the delay prevented you from reaching the connecting flight), depending on the length of the delay and the distance of the flight. If you arrive at your final destination more than 3 hours late, you are entitled to compensation[4], unless the delay was caused by extraordinary circumstances[5]. The airline must prove this by providing, for example, excerpts from logbooks or incident reports. The company must provide this evidence to the competent national body and to the passengers concerned, in accordance with national provisions on access to documents[6].

Refusal to board

The airline may refuse[7] boarding:

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[1] Decision no. C-451/20 of the Court of Justice of the European Union: Air passenger rights – Right to compensation

2 Convention of 28 May 1999, Article 19 Delay

[3] Decision no. C-451/20 of the Court of Justice of the European Union: Article 7 – Delayed re-routing flight – Consideration of actual arrival time for compensation

[4] Decision no. C-172/21 of the Court of Justice of the European Union

[5] Decision no. C-308/21 of the Court of Justice of the European Union - Article 5 paragraph (3) EC Regulation no. 261/2004 – Exemption from the obligation to compensate – Exceptional circumstances – Generalized deficiency regarding the aircraft fueling system at the airport

[6] Decision no. C-263/20 of the Court of Justice of the European Union

[7] Regulation (EC) no. 261/2004 Of The European Parliament And Of The Council of 11 February 2004

- for safety, security or health reasons[1] (for example, if the airline has not been informed in advance of possible infectious diseases or severe allergies) or if the correct travel documents are not available
- if the departure ticket from a booking that included a return flight was not used
- if they have not boarded for the previous flight (s) included in a booking with consecutive flights
- if there is no necessary documentation for the pet with which the trip is made
- if the number of volunteers is insufficient to allow the boarding of other passengers with reservations, the air carrier may refuse to board the passengers against their will.[2]

If passengers arrive on time at check-in with a valid reservation and travel documents required, and the airline refuses boarding due to overbooking or operational reasons and do not wish to leave the reserved place voluntarily, they may be reimbursed, or refund. Amount in EUR Distance 250 Up to 1,500 km 400 Over 1,500 km in the EU and all other flights between 1,500 and 3,500 km 600 Over 3,500 km.

The airline must offer the possibility to choose one of the following options:

1. reimbursement of the ticket price and, if there is a connecting flight, a return flight, at the first opportunity, to the airport of departure
2. forwarding to the final destination at the first opportunity or
3. redirection at a later agreed date, under comparable transport conditions (new reservation), depending on available seats. "Once one of these three options has been chosen, there is no right in relation to the other two.

However, the airline may offer compensation depending on the flight distance and the delay in relation to the originally scheduled arrival time.

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[1] Decision of the High Court of Cassation and Justice no. 1094 of March 14, 2013 regarding the regarding the air operator's justified refusal to board a person. Exemption from liability

[2] Article 4 Refusal to embark

- If the airline does not fulfill its obligation to offer the possibility of a return or a return flight to the place of departure, at the first opportunity and under comparable conditions of transport, it must reimburse the cost of the ticket.
- If the airline does not choose between a refund and a redirect, but decides unilaterally to refund your original ticket price, you may be entitled to an additional refund of the difference between the new and the original ticket (in comparable transport conditions).
- If the departure flight and the return flight have been booked separately and are operated by different companies and the departure flight is canceled, the right to a refund only for the canceled flight.

Missing connecting flight

If a connecting flight is lost and the final destination is reached more than 3 hours late, there is a right to compensation[1]. The amount of compensation is calculated according to the duration of the delay and the distance to the final destination.

Passengers are entitled to compensation if:

- tickets were purchased in a single booking and
- EU air passenger rights apply and
- Late arrival was not caused by extraordinary circumstances

CONCLUSIONS

For situations in which passenger boarding is delayed or flights are cancelled, or passengers are refused boarding for unjustified reasons, passengers can hold the transport operator liable according to national, European and international provisions. Also, they can hold the transport operator responsible in case of loss or damage of luggage.

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[1] Decision nr. C-395/20 of the Court of Justice of the European Union: Article 5(1) – Changing the departure time of a flight – Departure delayed by approximately three hours – Informing passengers nine days before departure – Concepts of "cancellation" and "delay"

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