UNIVERSITY OF PITESTI
FACULTY OF ECONOMIC SCIENCES AND LAW
CENTER OF LEGAL AND ADMINISTRATIVE STUDIES
AMICII SCIENTIAE ASSOCIATION
ROMANIA

INTERNATIONAL SCIENTIFIC CONFERENCE EUROPEAN UNION'S HISTORY, CULTURE AND CITINZENSHIP

15 TH EDITION

IN MEMORIAM PROF. EUGEN CHELARU

C.H.BECK
PUBLISHING HOUSE
BUCHAREST
2023

Proceedings of the International Conference
EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP
In Memoriam Prof. Eugen CHELARU
15th edition

Resource continues with editions on two different media:
Online: ISSN 2360- 395X
CD-ROM: ISSN 2360 – 1841
ISSN-L 2360 – 1841

Indexed by SSRN and CEEOL

The Name of Issuing Institution
University of Piteşti
E-mail: iccu2008@yahoo.com
Web site: www.iccu.upit.ro

Publishing House C.H. Beck SRL
Str. Serg. Nutu, no. 2, Sector 5, Bucharest

Frequency - *annual*
Edition - *300 copies*
Language - *English*

Editorial Team

CONFERENCE COMMITTES

- **SCIENTIFIC COMMITTEE**

Professor Ph.D. Dr.h.c. Rainer ARNOLD-Universität Regensburg, GERMANY
Professor Ph.D. Cristina HERMIDA DEL LLANO-Universidad *Rey Juan Carlos*, SPANIA
Professor Ph.D. DDr.h.c., M.C.L. Heribert Franz KOECK-Universität *Johannes Kepler* Linz, AUSTRIA
Professor Ph.D. Dr. h.c. mult. Herbert SCHAMBECK-Universität *Johannes Kepler* Linz, AUSTRIA
Professor Ph.D. hab. Jakub STELINA-University of Gdańsk, POLAND
Professor Ph.D. hab. Andrzej SZMYT-University of Gdańsk, POLAND
Professor Ph.D. hab. Mariusz ZALUCKI – AFM Kraków University, Justice at the Supreme Court of Poland, POLAND
Professor Dr. Cauia ALEXANDR, Vice-Rector International Free University of Moldova, REPUBLIC OF MOLDOVA
Prof. Lika CHIGHLASHVILI, Deputy Rector of Tbilisi Humanitarian Teaching University, GEORGIA
Professor Ph.D. Laura MIRAUT MARTIN, Univesity of Las Palmas de Gran Canaria, SPAIN
Professor Ph.D. hab. Tomasz SZANCIŁO, European University of Law and Administration in Warsaw, Poland
Professor Ph.D. Alexandru ATHANASIU – University of Bucharest, President of Association "Society of the Labor and Social Security Law", ROMANIA
Professor Ph.D. Anton- Florin BOȚA-University of Pitești, ROMANIA
Professor Ph.D. hab. Sevastian CERCEL-University of Craiova, ROMANIA
Professor Ph.D. hab. Eugen CHELARU-University of Pitești, ROMANIA
Professor Ph.D. Ionel DIDEA-University of Pitești, ROMANIA
Professor Ph.D. Elena-Luminița DIMA – Faculty of Law, University of Bucharest, Vice-President of Association "Society of the Labor and Social Security Law", ROMANIA
Professor Ph.D. hab. Mircea DUȚU – Director, "Acad.Andrei Rădulescu" Institute of Legal Research of the Romanian Academy, Bucharest, ROMANIA
S.R. I, Professor Ph.D. hab., Mihai ȘANDRU – Coordinator of the Center for European Law Studies - "Acad.Andrei Rădulescu" Institute of Legal Research of the Romanian Academy, ROMANIA
S.R. II, Ph.D. Tudor AVRIGEANU, M.iur.comp. (Bonn) - Coordinator of the Public Law Department, "Acad.Andrei Rădulescu" Institute of Legal Research of the Romanian Academy, ROMANIA

Associate Professor Dr. Ayşegül SEZGIN HUYSAL, Istanbul Medipol University, TURKEY
Associate Professor Ph.D. Dhc Ioan GÂNFĂLEAN -*1 decembrie 1918* University of Alba Iulia, ROMANIA
Associate Professor Ph.D. Ilioara GENOIU-*Valahia* University of Târgovişte, ROMANIA
Associate Professor Ph.D. Constanța MĂTUȘESCU-*Valahia* University of Târgovişte, ROMANIA
Associate Professor Ph.D. Camelia MORĂREANU-DRAGNEA - University of Piteşti, ROMANIA
Associate Professor Ph.D. Carmen NENU-University of Piteşti, ROMANIA
Associate Professor Ph.D. Maria ORLOV-„Stefan cel Mare" Academy of the Ministry of Interior of the Republic of Moldova, President of the Institute of Administrative Sciences of the Republic of Moldova, REPUBLIC OF MOLDOVA
Associate Professor Ph.D. Doina POPESCU - LJUNGHOLM-University of Piteşti, ROMANIA
Associate Professor Ph.D. Andreea TABACU-University of Piteşti, ROMANIA
Associate Professor Ph.D. Lavinia Mihaela VLĂDILĂ-University *Valahia* of Târgovişte, ROMANIA
Associate Professor Ph.D. Elise VALCU - University of Piteşti, ROMANIA
Lecturer Ph.D.Dumitru VADUVA - University of Piteşti, ROMANIA

- **ORGANIZING COMMITTEE**

Professor Ph.D. Marioara ȚICHINDELEAN – Universitatea Lucian Blaga Sibiu, President Association "Society of the Labor and Social Security Law", ROMANIA
Associate Professor Ph.D. Bianca DABU-University of Piteşti, ROMANIA
Associate Professor Ph.D. Andreea DRĂGHICI-University of Piteşti, ROMANIA
Associate Professor Ph.D. Carmen NENU-University of Piteşti, ROMANIA
Associate Professor Ph.D. Andreea TABACU-University of Piteşti, ROMANIA
Associate Professor Ph.D. Elise VALCU - University of Piteşti, ROMANIA
Lecturer Ph.D. Marius ANDREESCU-University of Piteşti, ROMANIA
Lecturer Ph.D. Denisa BARBU-*Valahia* University of Târgovişte, ROMANIA
Lecturer Ph.D. Iulia BOGHIRNEA-University of Piteşti, ROMANIA
Lecturer Ph.D. Cătălin BUCUR-University of Piteşti, ROMANIA
Lecturer Ph.D. Emilian BULEA-*Valahia* University of Târgovişte, ROMANIA
Lecturer Ph.D. Ramona DUMINICĂ-University of Piteşti, ROMANIA
Lecturer Ph.D. Amelia-Veronica GHEOCULESCU -University of Piteşti, ROMANIA
Lecturer Ph.D. Dan GUNĂ-*Valahia* University of Târgovişte, ROMANIA
Lecturer Ph.D. Daniela IANCU-University of Piteşti, ROMANIA

Lecturer Ph.D. Sorina IONESCU-University of Piteşti, ROMANIA
Lecturer Ph.D. Florina MITROFAN-University of Piteşti, ROMANIA
Lecturer Ph.D. Lavinia OLAH-University of Piteşti, ROMANIA
Lecturer Ph.D. Adriana-Ioana PANTOIU-University of Piteşti, ROMANIA
Lecturer Ph.D. Andra PURAN -University of Piteşti, ROMANIA
Lecturer Ph.D. Andrei SOARE-University of Piteşti, ROMANIA
Lecturer Ph.D. Camelia SPASICI – Bucharest University, ROMANIA
Lecturer Ph.D. Viorica POPESCU-University of Piteşti, ROMANIA
Lecturer Ph.D. Dumitru VADUVA-University of Piteşti, ROMANIA
Lecturer Ph.D. Carmina TOLBARU-University of Piteşti, ROMANIA
Lecturer Ph.D. Gabriela ZOANA-University of Piteşti, ROMANIA
S.R. III, Ph.D. Versavia BRUTARU – Department of Public Law, "Acad.Andrei Rădulescu" Institute of Legal Research of the Romanian Academy, ROMANIA
S.R. III, Ph.D. Mihaela-Gabriela BERINDEI – Department of Privat Law, "Acad.Andrei Rădulescu" Institute of Legal Research of the Romanian Academy, ROMANIA
S.R. III, Ph.D. Radu STANCU – Department of Privat Law, "Acad.Andrei Rădulescu" Institute of Legal Research of the Romanian Academy, ROMANIA

TABLE OF CONTENTS

CONSTITUTION AND CIVIL LAW: SOME CONSIDERATIONS ON THE GERMAN APPROACH **Rainer ARNOLD**	**10**
RESTRICTIONS ON CONCLUDING FIXED-TIME EMPLOYMENT CONTRACTS, AS EXISTING IN POLISH LABOUR LAW - AN IMPROPER TRANSPOSITION OF DIRECTIVE 99/70/EC? **Jakub STELINA**	**26**
SOME CONSIDERATIONS REGARDING THE NEW LAW OF SOCIAL DIALOGUE **Marioara ȚICHINDELEAN**	**32**
ON THE CULTURE OF NEGOTIATION AND THE LATEST LEGAL REGULATIONS IN ROMANIA **Magda VOLONCIU**	**43**
HOLIDAY VOUCHERS – THEORETICAL AND PRACTICAL ASPECTS **Elena-Luminița DIMA**	**53**
NEW DEVELOPMENTS AND OLD DEBATES RELATED TO THE PROTECTION OF EMPLOYMENT IN THE EVENT OF TRANSFER OF UNDERTAKINGS **Ana VLĂSCEANU**	**62**
A LOOK INTO THE FUTURE: HOW PREPARED ARE WE FOR THE NIS2 DIRECTIVE? **Marius CHELARU**	**88**
TURN OF AN ERA **Heribert Franz KOECK**	**99**
THE DEVELOPING PROBLEMS OF DIGITAL WEALTH ON THE GROUNDS OF EUGEN CHELARU'S CONCEPT OF PERSONALITY RIGHTS **Mariusz ZAŁUCKI**	**103**
THE MARGIN OF APPRECIATION OF THE MEMBER STATES IN MATTERS OF FREE MOVEMENT-LIMITED BY THE SYSTEM OF PROTECTION OF FUNDAMENTAL RIGHTS? **Mihaela Adriana OPRESCU**	**114**
CAUSES OF MIGRATORY MOVEMENTS AND OBJECTIVES OF IMMIGRATION POLICIES: REFLECTIONS FOR A FAIRER AND MORE INCLUSIVE MANAGEMENT OF HUMAN MOBILITY **Laura MIRAUT MARTIN**	**126**
VIOLENCE AGAINST WOMEN WITHIN THE FRAMEWORK OF THE EUROPEAN UNION. PRESENT AND FUTURE OF EUROPEAN DIRECTIVE **Alina Elena RÂMARU, Laura MIRAUT MARTIN**	**147**

The Ombudsman and Ombudsman for children in the system for protecting the freedoms and rights of individuals in Poland **Rafał CZACHOR**	**163**
DRUGS HIDDEN UNDER THE EYES OF THE LAW **Ion IFRIM**	**170**
LOBBYING IN THE POLISH LEGAL SYSTEM **Beata STĘPIEŃ-ZAŁUCKA**	**177**
STATE POWER AND HUMAN RIGHTS IN A DEMOCRATIC SOCIETY **Marius ANDREESCU, Andra PURAN, Ramona DUMINICĂ**	**184**
HUMAN RIGHTS AND THE PANDEMICS. EXPERIENCES AND FAILURES **Versavia BRUTARU**	**198**
CASE C-872/19P *VENEZUELA V. COUNCIL*-A PANDORA'S BOX OPENED BY THE LUXEMBOURG COURT **Mihaela Adriana OPRESCU**	**212**
GENESIS OF THE EUROPEAN MONETARY UNION **Mariana-Alina ȘTEFĂNOAIA**	**225**
RESERVE OBLIGATION OF MAGISTRATES - INTERNAL AND INTERNATIONAL REGULATIONS **Viorica POPESCU**	**233**
REFLECTING THE PRINCIPLES OF JUDICIAL INDEPENDENCE AND IMPARTIALITY IN DOCTRINE AND JURISPRUDENCE **Florina MITROFAN**	**242**
REFLECTIONS ON THE PRINCIPLES OF JURIDICAL RESPONSIBILITY OF THE STATE IN INTERNAL RIGHT **Elena MORARU**	**250**
CONFLICT OF INTEREST IN PUBLIC ADMINISTRATION **Miruna TUDORAȘCU**	**256**
DEMOCRACY IN EUROPE-HISTORY AND EVOLUTION OF A CONCEPT **Alina-Gabriela MARINESCU**	**264**
FUNDAMENTAL PRINCIPLES OF INTERNATIONAL LAW IN TIME OF WAR **Andra PURAN, Lavinia OLAH**	**270**
OBSTACLES TO THE RECOGNITION OF FOREIGN JUDGMENTS IN POLISH CIVIL PROCEEDINGS **Tomasz SZANCIŁO**	**277**
TAKING OF EVIDENCE BY INTERNATIONAL ROGATORY COMMISSION BETWEEN THE COURTS OF THE MEMBER STATES OF THE EUROPEAN UNION	**291**

- REGULATION NO. 1783/2020 **Andreea TABACU**	
BUDGETARY EQUILIBRIUM AND PUBLIC NEEDS: WHERE IS THE CORRECT BALANCE? **Marius VĂCĂRELU**	**300**
BRIEF CONSIDERATIONS ON THE INTERPRETATION OF THE CRIMINAL LAW **Cătălin BUCUR**	**306**
THE MAGISTRATE – CRIMINAL PROCEDURAL SUBJECT AND THE CONSEQUENCES FOR HIS PROFESSION **Camelia MORĂREANU**	**311**
SIMPLIFYING CRIMINAL PROCEEDINGS: A LOCAL INTEREST OR A EUROPEAN IMPERATIVE? **Delia MAGHERESCU**	**318**
SOME OBSERVATIONS ON THE CAUSES OF DIFFERENTIATION OF PUNISHMENT **Mihai ȘTEFĂNOAIA**	**329**
ANTI-CORRUPTION POLICY AT EU LEVEL **Sorina IONESCU**	**337**
HUMAN TRAFFICKING CONSIDERATIONS. EXPLOITATION THROUGH LABOUR AT THE EUROPEAN UNION LEVEL **Carmina TOLBARU**	**342**
THE OBLIGATIONS TO INFORM AND CONSULT THE UNION/EMPLOYEE REPRESENTATIVES IN THE COLLECTIVE DISMISSAL PROCEDURE **Mădălina-Ani IORDACHE**	**352**
COOPERATION BETWEEN THE EUROPEAN UNION AND GEORGIA IN THE ASPECT OF LABOR MIGRATION **Irina BENIA, Tamara SAJAIA**	**367**
THE ACTIVITY OF THE DIGITAL NOMAD IN ROMANIA BETWEEN SOCIAL REALITY AND LEGAL REGULATION **Carmen Constantina NENU, Daniela IANCU**	**374**
THE RIGHT TO DISCONNECT, FUNDAMENTAL RIGHT OF THE EMPLOYEE **Livia-Florentina PASCU**	**383**
A NEW PROPOSAL FOR AN EU DIRECTIVE AND A NEW CHALLENGE TO HARMONISE INSOLVENCY LAW RULES. CREATING A SPECIAL INSOLVENCY REGIME FOR SMES - A "KEY" ITEM ON THE EU AND UNCITRAL AGENDA **Ionel DIDEA, Diana-Maria ILIE**	**391**
THE EFFECTS OF THE RESIGNATION OF THE ADMINISTRATOR'S MANDATE AND THE REPRESENTATION OF THE LEGAL ENTITY IN THE CONTEXT OF	**410**

DECISION HCCJ RIL NO. 24/2017 **Răzvan SCAFEȘ**	
HOTEL LIABILITY INSURANCE POLICY IN THE HORECA DOMAIN AND METHODS OF ALTERNATIVE DISPUTE RESOLUTION (ADR) HEREIN **Laura-Ramona NAE**	**419**
THE MINOR'S DOMICILE **Oana-Nicoleta RETEA**	**434**
MIGRATION AND FAMILY LIFE: THE INTERPLAY BETWEEN COUNCIL OF EUROPE AND EU LEGAL DOCTRINE **Giorgi CHACHKHIANI**	**439**
PRACTICE OF INTERNATIONAL ORGANIZATIONS IN ASSET TRACING AND RECOVERY **Lia CHIGLASHVILI, Kristine TSIREKIDZE**	**450**
THE OPPORTUNITY TO SWITCH TO THE EURO DIGITAL CURRENCY **Adriana PANȚOIU**	**456**
ASSESSMENTS ON ANTI-COMPETITIVE BEHAVIORS THROUGH "NO-POACH" PRACTICES. CONSEQUENCES **Manuela NIȚĂ**	**463**
HUMAN RIGHTS – PURPOSE OR FINAL FOR LAW NO. 165/2013? **Andrei SOARE**	**474**
SUPERFICIES AS A MEANS TO EXPLOIT LAND IN THE PRIVATE DOMAIN OF THE STATE OR OF ADMINISTRATIVE-TERRITORIAL UNITS **Raluca CHELARU**	**485**
THE RELATIVE AND PERSONAL CHARACTER OF THE OBLIGATION **Dumitru VĂDUVA**	**502**
THE CONTRACT AND CONVENTION **Dumitru VĂDUVA, Amelia GHEOCULESCU**	**514**
THE NEGATIVE EFFECTS OF TRANSPORT ON THE ENVIRONMENT AND MEASURES AGAINST THEM **Amelia GHEOCULESCU, Andreea DRĂGHICI**	**525**
THE IMPLICATIONS OF ARTIFICIAL INTELLIGENCE FOR LEGAL DECISION MAKING **Antonio Tirso ESTER SÁNCHEZ**	**532**

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

CONSTITUTION AND CIVIL LAW: SOME CONSIDERATIONS ON THE GERMAN APPROACH

Arnold RAINER[1]

Abstract

The influence of constitutional law and especially of fundamental rights on civil law is a development that characterizes the dynamics of a constitution and shows with clarity the special orientation of the German Basic Law to the triad of fundamental values human dignity, freedom and equality. Fundamental rights are qualified not only as subjective rights of defense against state intervention, but also as objective values that radiate throughout the legal order.

Originally, based on the text of the Constitution, direct third-party effect, i.e. the direct influence of the Constitution and fundamental rights on civil-law relationships, was seen only in the exceptional case of Article 9 (3) sentence 2 of the Basic Law. At the same time, the so-called indirect third-party effect was found to be decisive for German law. This means that civil laws, in particular their so-called general clauses such as good faith or the prohibition of immoral damage, must be interpreted and applied in the light of fundamental rights. In addition, there is the further development step, namely that due to the value character of the fundamental rights, the so-called duty of the state to protect is recognized, which means that the state must actively protect the values of the fundamental rights through its own laws. In this context, this means that the state must structure civil laws in such a way that they meet the requirements of fundamental rights. In more recent times, there has been an additional development, namely that private individuals as such must also directly observe fundamental rights if they perform special services for society, in particular provide a communication space and ensure society's participation in social life. All in all, the intensification of the protection of fundamental rights by including private individuals directly or indirectly is a sign that the central concern of the dynamically developing constitution is the efficiency of the fundamental order of values of the Basic Law, which centers on human dignity.

Key words: *Fundamental rights; civil law; direct and indirect third-party effect; duty to protect; triad of basic values.*

1. Introduction

Today we remember Professor Eugen Chelaru, for many years Dean of this Faculty, highly respected colleague and friend, a brilliant scholar with an international reputation. I have always felt very close to him and he was a

[1] **Professor Ph.D. Dres.h.c., University of Regensburg (Germany), email: jean.monnet@gmx.de.**

constant participant in my international congresses on European and Comparative Constitutional Law, just as I was almost always present at his International Conferences in Pitesti. I appreciated him as an excellent scholar and academic teacher for whom I always had high admiration.

His death has affected us all deeply and we mourn him very much. He will always remain in very close memory to us.

Dean Chelaru was a civil lawyer in his professional focus. This is the reason why I have chosen today my contribution from the topic of the connection of civil law and constitutional law and thereby I refer to the German example where this question has been intensively discussed. It is about the question to what extent constitutional law and especially fundamental rights have an influence on civil law. This is a current and ever-evolving issue. Before I go into detail on this issue, I would like to say briefly in general terms:

For a long time, the traditional view considered public law, which includes constitutional law, and civil law as two separate fields. This has become increasingly relative. Many important areas of today contain at the same time civil law, public law, and partly also criminal law provisions, without which the overall area cannot be adequately covered. Examples are environmental law, climate protection, consumer protection, technology law, etc.

Already due to this growing complexity and the interconnection of the subject areas of contemporary life, a distinction between the classical fields of law has become questionable. There are also legal systems, such as the English legal system (Harlow, 241 et seq.), which traditionally do not know these distinctions, at least in their strict form, although it seems that here, too, under the influence of continental law, a relativization has taken place in the opposite direction, so that today the terms public and private law are quite familiar. In any case, it can be seen in continental and English law that also and in a special way influences of inter- and supranational law have resulted in a convergence and, in some cases, overlapping of the classic areas of civil and public law, or even in a hybrid form of civil and public law norms in a single field of legislation.

In addition, a very important aspect is the increasing recognition of the constitution as the supreme norm of a legal order, which represents the basis for the entire legal sphere, i.e. for all individual areas of law. Modern legal development gives the rule of law, and thus also the constitution, comprehensive normative status. The constitution is understood as a set of values that is of fundamental importance for the entire legal edifice. It is evident that civil law cannot stand outside the constitutional law. The two are not separate spaces but interconnected.

2. The development of Fundamental Rights in German Constitutional Law

a. The basic value order of the Constitution

In order to characterize the influence of the Constitutional Court on civil law in Germany, one has to take a special look at the development of the value order of the constitution, i.e. the development of fundamental rights.

The supreme value of the Constitution is human dignity. This is laid down in Article 1 (1) of the German Basic Law; it is the starting point for the consideration of the entire constitutional order; the basic rights are specifications of the fundamental principle of human freedom, a principle that is inseparably linked to human dignity. The third principle that determines the constitutional order is equality, since the human dignity and freedom of all people are considered as a result of their humanity.

Human dignity, freedom and equality is the triad of basic values normatively existing in every constitution (in written or unwritten form). This anthropological order of basic values is axiomatic, connected with the human being as such, whose protection and promotion are the supreme objective of law and, in particular, of constitutional law.

This also applies to the German constitution, which even explicitly includes these basic values of order in the text: human dignity is recognized and guaranteed at the top of the constitution, in Article 1 (1), it is absolute, not restrictable and not weighable against other constitutional goods; the principle of freedom is expressed in Article 2 (1) of the Basic Law and is the so-called mother fundamental right, that also protects areas of freedom that are not explicitly enshrined in the text of the constitution. That freedom is restrictable and must be restricted for legitimate reasons of the common good is evident, but this restriction must remain limited. It is essential that human freedom be recognized as a principle - only the principled character of freedom is compatible with human dignity - and that the restriction be an exception that must be legitimized. The fact that this basic constitutional human condition is granted to all is expressed in the principle of equality, Article 3 (1) of the Basic Law. These three values are linked to each other; they form a functional unit and are always normatively existent only in their totality, even if they are not written in whole or in part (R. Arnold, Struttura, 41 et seq)

The fundamental rights are derivatives of the principle of freedom and are specified in the text. If they are not mentioned in the text, it is the task of the judge in particular to derive them from the principle of freedom. Freedom as a principle also presupposes that the protection of this freedom is comprehensive and may not have any gaps.

The restriction of freedom belongs to its essence and must always be legitimized as an exception to freedom. This is only possible if three conditions are met:

(1) The restriction of freedom must occur in fundamental consensus with the person, whose freedom is restricted. This consensus is conveyed by the fact that the restriction may succeed only on the basis of a law, since the law embodies the will of the people, i.e. the sum of the individuals (Rightly Haverkate, 330 et seq.) and thus also includes the will of the person affected by the restriction of freedom. The person affected gives this consensus by his willingness to join the community, in the words of J.-J. Rousseau by his/her participation in the „contrat social" (Rousseau, Livre premier, Chap.VI). In doing so, he/she agrees that laws, as necessary forms of organization of the exercise of community power, limit him/her in his/her freedom. For this reason, above all, restriction of freedom is possible only by law, but not by executive act alone.
(2) The second element for the justification of the restriction of freedom is that the restriction as such is indispensable for the achievement of the legitimate public goal. Only truly necessary and indispensable restrictions on freedom are also compatible with the concept that freedom is the principle and intervention is the exception. The intervention must therefore be compatible with the principle of freedom; this is only the case if the intervention is proportionate. The principle of proportionality is the measure of whether the intervention respects the limit drawn by the principle of freedom.

This principle, already formulated in German law in the 19th century, which was later functionally expanded and is now recognized by many states, consists of three parts ; the restriction of freedom in favor of a legitimate community goal must be suitable, necessary and reasonable.

This means that the intervention must be suitable in the first place to ensure or at least promote the achievement of the objective. Furthermore, the intervention must be really necessary; if there is a milder means that would lead to success in the same way, the milder means must be taken (principle of the minimum intervention). A third, also very important aspect is that the intervention must also be acceptable, reasonable for the person concerned. In order to recognize this, the weight of the public interest, which is to be achieved or promoted by the intervention, must be compared with the importance of the intervention for the individual interest of the person concerned, for his/her fundamental rights, and weighed against each other. The importance of the public interest on the one hand and the weight of the interference in the fundamental rights of the person concerned on the other hand must be in a balanced, acceptable relationship. A severe encroachment to promote a less significant public interest would be inadmissible according to the principle of proportionality (Arnoldet alii,, El principio, 65 et seq).[1]
(3) The third element is that the essential content of the fundamental right concerned is not affected. This is expressly laid down in the German Basic Law

[1] Federal Constitutional Court (FCC) vol.19, 342, 348-349; vol. 76, 1, 30-31; vol. 118, 168, 193 etc.

by Article 19 (2). This limit to freedom restriction is also found, often in different terminology, in other legal systems (Arnold, Ausgestatung, 215).

b. The evolving concept of fundamental rights in the German order

Fundamental rights are the rights enumerated in Articles 1-19 of the Basic Law. This definition is derived from Article 1 (3) of the Basic Law, which states that "the following fundamental rights" bind the legislature, executive and judiciary. From this it is derived that basic right character in the sense of the Basic Law possesses only the rights directly thereon specified. This catalog of fundamental rights is followed by Article 20 of the Basic Law, which has only an objective character, but is nevertheless extremely important because it lays down the principles of the structure of the state.

The judicial rights of Art. 101-104 of the Basic Law, which are designated as genuine fundamental rights in many other constitutions, are only called "fundamental-rights-like" or "fundamental-rights-equivalent," but are not fundamental rights in the German concept. Nevertheless, they are functionally largely equated with the "genuine" fundamental rights.

For example, the constitutional complaint, Germany's characteristic instrument of defense for the protection of fundamental rights by the individual at the constitutional court, can also be filed in favor of these rights (Art. 93 (1) no. 4a BL - Basic Law, GG, Grundgesetz).

Traditionally, fundamental rights in the German Basic Law are subjective rights that allow the bearer of a fundamental right to invoke these rights against encroachments on his freedom by public authority and, if necessary, to sue for them in court. There is therefore a direct relationship between the individual and the constitution, i.e. the fundamental right. They are therefore rights of defense against public power (See Arnold, La structure, 11).

This is reinforced by the fact that Article 1(3) of the Basic Law stipulates that fundamental rights have direct effect and, as already mentioned, are binding on all public authorities. This also means that in German law, fundamental rights are not designed as programmatic principles, the realization of which is left to politics, i.e. the legislature. For this reason, there are no social fundamental rights among the fundamental rights of the Basic Law; instead, the objective principle of the social state, which is expressed in Article 20 (1) of the Basic Law, assumes this function.

Fundamental rights as laid down in the Basic Law are therefore subjective rights in the sense that the bearer of fundamental rights can invoke them directly and, if necessary, sue for them in court. It also corresponds to this that they are directly applicable and do not first have to be implemented by the state, especially by the legislature.

This conception of fundamental rights as subjective rights of defense has been functionally extended by the Federal Constitutional Court (FCC), namely by the fact that fundamental rights have also been understood as objective values.

In the famous Lüth decision (FCC vol. 7, 198 et seq.)[1], the FCC states that the Basic Law has established an objective value system that applies to the entire legal system, including civil law.

The FCC emphasizes the particular importance of fundamental rights, which also express the conception of man that underlies the Basic Law. This conception is based on the idea of "the primacy of the individual and his or her dignity over the power of the state" (FCC note 1, para. 24). It is also stated that the Basic Law is not a "value-neutral system"[2]. It is rather an order („a system..") of values "which finds its center in the freely developing human personality and its dignity within the social community". It is "a basic constitutional decision" which "must apply… to all areas of law; legislation, administration and jurisprudence receive guidelines and impulses from it" (FCC note 1, para 25). The decisive statement for the area of civil law is: "Thus, of course, it also influences civil law; no provision of civil law may be in contradiction to it, each must be interpreted in its spirit" (FCC).

The understanding of fundamental rights as objective values that underlie the entire constitutional order and encompass all areas of law, in that no norms may contradict this value order and all norms in all areas must be interpreted in the light of this value order and receive "guidelines and impulses" from it, is an important further development of fundamental rights thinking in German constitutional law.

The principle of freedom, which has already been mentioned above, provides the individual with comprehensive protection. This protection must be substantial and functionally efficient (Arnold, Substanzielle und funktionelle Effizienz, 3 et seq.). This means, on the one hand, that this principle requires protection against all dangers to freedom, present and future, whether through written or unwritten fundamental rights to be determined by interpretation. This is the substantive protection dimension of the principle of freedom. The functional dimension of this protection includes, in addition to protection against the undermining of fundamental rights, especially through excessive restriction by the legislature, the obligation to make fundamental rights as effective as possible, so that they have the greatest possible impact in terms of their functional purpose.

The recognition of fundamental rights as objective values was a significant step in this direction. The subsequent further development of fundamental rights as the basis for objective duties of the state to protect actively the fundamental

[1] See http://www.bverfg.de/e/rs19580115_1bvr040051.html. Abstract in English by the FCC.
[2] What was expressed in FCC vol. 2,1, 12; vol. 5, 85, 134 et seq., 197 et seq.; vol. 6, 32, 40/41; jurisprudence that is referred to by FCC in *Lüth case* (link note 1) para 25.

rights values (FCC vol. 49,89,142; vol.53, 30, 57 etc) was another extremely important step.

This development corresponds to the dynamics inherent in a constitution. The constitution is a living instrument[1] that is constantly evolving. The written text is an expression of a particular historical moment, but it is destined to be the basic order of the state for an indefinite period of time. But this is only possible if the constitution, as a system of order, on the one hand has regulative power and preserves what needs to be preserved, but is also efficient over time, i.e. constantly adapts the normative goal to the changing normative objects. This can be done through constitutional reform, but also through constitutional interpretation. In the case of flexible, open constitutional norms, this process of further development is already inherent in the norm itself, whereas adaptation through interpretation is only made visible. But there can also be adaptation processes that affect a more closed constitutional norm. In this case, what is often referred to as "constitutional change" („Verfassungswandel"; v. Klaus Stern, § 5 III 1 b, p. 131 et seq.) occurs.

The development of the concept of the duty to protect has expanded the functional side of the protection of fundamental rights and today plays an extremely important role in German constitutional law. Thus, the FCC has stated that the principle of freedom includes not only the restraint of the state in relation to the individual, but also the obligation to prevent impairments of fundamental rights on the part of private actors. Freedom is threatened not only by public authority, but also-and this in a particular way in the present by powerful operators of social media-by private persons. The legislator is therefore obliged to enact adequate laws for protection against private persons, with rules of a substantial, procedural and organizational nature. Especially the environmental law and today also the personality rights have become main areas, for which the duty of protection is of particular importance. Procedural rules prevent violations of personal rights, permit-requiring and monitoring possibilities prevent impairment of the health of persons by environmentally damaging operations and so on. The examples could be listed in large numbers.

The duty to protect can be vertically and horizontally relevant. The state is also obliged to protect the individual, and this in many different ways. If the state protects too little, it violates the relevant fundamental right. The FCC has coined the term "Untermaßverbot" (prohibition not to protect sufficiently) (FCC vol. 88, 202, 254), which is otherwise not used in the German language.

If the state violates its duty to protect, the fundamental right is violated as a subjective norm.

It is possible for the individual to make constitutional complaints or otherwise to sue for this duty to protect. But there are narrow limits to this. Such a

[1] As the European Convention of Human Rights is named (see European Court of Human Rights, 2020) and what is transferable to the national constitution.

constitutional complaint will only be successful if the legislature has remained completely inactive in this matter or has indeed created a regulation, but this is completely inadequate in an obvious way (FCC vol. 77, 381,405).

The last step in the further development of the protection of fundamental rights was the FCC's finding, in the widely known March 2021 decision[1], that liberty rights have an " intertemporal dimension." Thus, it is unconstitutional to keep the restriction on freedom low in the present with the goal of reducing greenhouse gases to a certain level by a certain year and then have to disproportionately increase the restriction in the future. If the restriction of freedom is low in the present, but must be high, even disproportionate, in the future, in order to achieve the overall goal of reducing gases, there is a violation of the fundamental right of freedom already in the present. This also leads to the general consideration that the constitution bears responsibility for the future and political action in the present is only constitutional if it also adequately takes into account the future effects. The above-mentioned decision has also contributed to the realization that responsibility for future generations is already a present constitutional duty.

3. Direct and indirect impact of constitutional law on civil law

There are two ways of transferring constitutional law into the field of civil law: direct and indirect transfer.

The *direct effect* of constitutional law on civil law would mean that the constitutional norm, in the context of our topic the fundamental right, would *ipso iure* invalidate the civil law act that violates the constitution (e.g. the conclusion of a contract).

In contrast, the *indirect effe*ct of constitutional law on civil law means that the existing civil law norms must be interpreted in the light of the constitution, but that the civil law mechanism concerning the legal consequence remains in place.

In this context, mention must also be made of the *duty to protect* already mentioned above, which represents a functional extension of the protection of fundamental rights. According to this conception, the legislature is obliged to shape its laws in conformity with fundamental rights. This also applies to civil law statutes, so that constitutional law and thus fundamental rights also find their way into civil law from the perspective of the duty to protect.

The indirect way of transferring the constitutional order to the field of civil law just mentioned is also referred to by the term "*indirect third-party effect*". This specific term wants to express that the constitutional law has an effect on third parties, i.e. on private persons. The word "third party" is meant to imply that it concerns persons outside the basic vertical relationship of state - individual, i.e. it does not concern the normal vertical relationship of constitution and

[1] FCC http://www.bverfg.de/e/rs20210324_1bvr265618en.html (English translation by the Court).

constitutional addressee, but the horizontal relationship between private subjects of law, as is characteristic of civil law. Thus, "third-party effect" means the effect of the constitution, especially the fundamental rights, on private persons in the horizontal relationship between a private person and other private person(s).

The concept of indirect third-party effect was derived by the case law of the Federal Constitutional Court from the character of fundamental rights as objective values that apply to the entire legal order. This concept is thus a functional component of the fundamental rights obligation, which, according to Article 1(3) of the Basic Law, covers all public authority. For this reason, the legislature must shape the laws affecting civil law in accordance with the constitution and, in particular, with fundamental rights, an obligation that exists in the same way via the concept of the duty to protect. However, when interpreting already existing civil law statutes, judges must also interpret and apply them in conformity with the constitution.

Direct third-party effect exists only in exceptional cases that are expressly designated as such by the Basic Law - the classic case is Article 9 (3) Sentence 2 of the Basic Law, according to which contracts are null and void that impede or attempt to exclude the right of association guaranteed in Article 9 (3) Sentence 1 of the Basic Law. This right of association is a subcategory of freedom of association and concerns associations "for the protection and promotion of working and economic conditions", i.e. trade unions and employers' associations. Thus, if an employment contract restricts membership or activity in a trade union, specifically excluding, for example, participation in strikes, this contract is null and void without further ado.

Otherwise, no case of direct effect of private law is laid down in the fundamental rights section of the constitution. However, the central and highest value of the constitutional order, the guarantee of human dignity, Article 1 (1) of the Basic Law, will also have to be regarded as having direct effect in private-law relationships (Rightly Zippelius/Würtenberger, p. 191, para.18). A civil law transaction that violates human dignity must be regarded as void from the outset. The approach via the prohibition of immoral acts existing in German civil law (Art. 138 para.1 BGB), is therefore not relevant here. In addition, the concept of immorality in the sense of the BGB (civil code) is to be understood at least partially differently than the concept of human dignity used in the Basic Law.

It should also be added that the absolute prohibitions of discrimination in the Basic Law, as expressed in Article 3 (2) and (3) of the Basic Law, are a consequence of human dignity (Arnold, Human Dignity, ¾) and must therefore also have direct third-party effect (Classen, p.42, para. 4/65). The freedom of contract (Article 2 (1) of the Basic Law) is also restricted by these prohibitions of discrimination.

However, it must also be noted that the Federal Labor Court and other courts have, at least for some time, assumed the direct effect of fundamental rights

on private law relationships. However, labor jurisprudence later adopted the concept of indirect third-party effect (Hufen, p. 95).

4. Institutional v. functional approach

Article 1(3) of the Basic Law is the norm that establishes the fundamental rights addressee. This is conceived according to a traditional pattern, namely the three powers of the legislature, the executive and the judiciary are designated as the addressees of fundamental rights. These three powers, expressed in a more general way, are bound to the Constitution and the laws.

This is an institutional approach to constitutional binding. It is evident that the private individual is not bound by the constitution under written constitutional law. Nevertheless, this approach is too narrow and must be supplemented to satisfy the functional objective of constitutional norms, especially fundamental rights.

Fundamental rights are specifications of the principle of freedom, as explained above. The overarching constitutional goal is to protect freedom in a substantial and functionally efficient way. This also means that the scope of constitutional norms and thus of fundamental rights must be understood in terms of their functionality, i.e., their efficiency.

For the problem of the effect of the constitution on horizontal private-law relationships, this means that there may well be a need for protection in the latter context as well. On the one hand, the horizontal private-law relationship is characterized, at least in principle, by the equality of the private individuals involved and thus by their autonomy. The private autonomy is just so characteristic of this relationship. The freedom of contract, which is protected by the principle of general freedom, is precisely the expression of this autonomy; in it, the freedom and the possibility of self-determination of the individual is expressed in a special way. It is a very essential and special part of individual freedom (Dürig/Herzog/Scholz/Di Fabio, para.104).

However, freedom can be threatened not only by public power but also by other private powers. There are a large number of examples of this. When it comes to the acquisition of essential goods under private law, the contracting party offering these goods is not free to decide whether or not to conclude the contract for the supply. The contracting obligation (Busche, paras. 20 – 22) has been developed, so in the German civil law for the accomplishment of this emergency situation. This solution has arisen from private law itself, but in parallel with this, constitutional law also comes into effect here.

Already in the so-called commercial agent decision of the Federal Constitutional Court, imbalances in the horizontal relationship between the two parties involved in the private law relationship were considered relevant for the fact that the fundamental rights (in the specific case of the commercial agent, the freedom of occupation of Article 12 (1) of the Basic Law) and also the social state

principle of Article 20 (1) of the Basic Law must be used for the assessment of the contractual relationship under civil law.

"Such barriers are indispensable because private autonomy is based on the principle of self-determination, i.e. it presupposes that the conditions of free self-determination actually exist. If one of the parties to the contract has such a strong preponderance that it can in fact set contractual regulations unilaterally, this has the effect of external determination for the other party to the contract. Where there is no approximate balance of power between the parties, it is not possible to ensure a proper balance of interests by means of contract law alone. If, in such a situation, positions guaranteed by fundamental rights are at one's disposal, state regulations must intervene in a balancing manner in order to ensure the protection of fundamental rights … Statutory provisions that counteract social and economic imbalance realize here the objective basic decisions of the fundamental rights section and thus at the same time the constitutional principle of the social state (Article 20 (1), Article 28 (1) GG)."[1]

The fundamental right to conclude civil law contracts, i.e. the contractual autonomy of the individual, presupposes that the contracting parties are not in a relationship of so-called disturbed contractual parity. This means that, as explained by the Federal Constitutional Court in the case of guarantees (FCC vol. 88, 214), one of the contracting parties is in an intolerably dangerous situation. If a (still) asset-less relative issues a declaration of guarantee for the performance of a enterprise he/she may be in danger of having to pay off debts for the rest of his/her life. The judge must review the content of this contract (so-called content review) and consider this disturbed parity of the two contracting parties (the asset-less guarantor on the one hand and the bank on the other hand, which gives large loans to the enterprise in question) as a violation of the fundamental right of contractual autonomy (freedom of contract) of Article 2 (1) of the Basic Law. When reviewing the content of the contract, the judge must apply the general clauses of the German civil code (BGB), such as the requirement of good faith (Section 242 BGB) or the prohibition of immoral transactions (Section 138 BGB), and interpret these general clauses in the sense of fundamental rights, especially Article 2 (1) of the Basic Law. The FCC points out: The judges when examining the contract "must clarify whether the regulation is a consequence of structurally unequal bargaining power and, if necessary, take corrective action within the framework of the general clauses of the applicable civil law... However, the constitutional guarantee of private autonomy may be violated if the problem of impaired contractual parity is not recognized at all or if an attempt is made to solve it by unsuitable means"(FCC vol. 88, 214, 234).

It is, so to speak, an immanent limit to the contractual autonomy of Article 2 (1) of the Basic Law that there is contractual parity between the persons

[1] https://www.servat.unibe.ch/dfr/bv081242.html/para.47.

involved in the contract, but that this fundamental right is not complied with if this contractual parity is disturbed.

An additional aspect is also relevant here, which sheds light on the potential tension between institutional and functional approaches:

Article 1(3) of the Basic Law has already been mentioned, which expresses the fundamental rights obligation of public authority. Is the state also directly bound by fundamental rights when it acts under private law, whether it carries out activities under private law or uses private law forms for public tasks? (Zippelius/Würtenberger, p. 188 – 190). This is partly controversial and the case law is not yet fully established.

In summary, it can be said that so-called administrative private law, i.e. the execution of genuinely public-law tasks by state or municipal institutions in a private-law form, is bound by fundamental rights (Herdegen, Art. 1 (3) GG para. 122).

An important decision in this context is the Fraport decision of the Federal Constitutional Court.[1] The issue was whether Fraport, i.e. Frankfurt airport, operated by a stock corporation whose shares are predominantly publicly owned (by the Federal State of Hesse and the City of Frankfurt) is subject to the fundamental rights. This mixed-economy company, since it controls the company, is fully bound by fundamental rights, just like a company that is solely owned by the public sector. State power cannot evade fundamental rights, even if it is organized in forms of private law.[2] A violation of fundamental rights was found in the specific case involving the distribution of leaflets against the deportation of certain persons in the departure hall, i.e. on the premises of Frankfurt Airport.

In this case, the question was not only whether Fraport AG was bound by fundamental rights (which was affirmed by the FCC), but also whether there were facts relevant to fundamental rights. This was affirmed by the FCC, with reference to the fact that Fraport had opened a „public communication space" (*öffentlicher Kommunikationsraum*). This type of space is "…characterized by the fact that a variety of different activities and concerns can be pursued on it, thus creating a multifaceted and open communication network. This is to be distinguished from sites which, according to their external circumstances, are only available to the

[1] http://www.bverfg.de/e/rs20110222_1bvr069906en.html (English translation by the FCC).

[2] "Accordingly, every action by a state body or organisation is state authority bound by the fundamental rights within the meaning of Article 1.3 GG because the state authority performs such action in the exercise of its duty to act in the public interest", FCC Fraport (note 33), para.47.
However, as to economic activity of the state or state-controlled enterprises, the FCC puts forward:" Nor does the direct connection to fundamental rights prevent publicly controlled companies from participating in economic transactions on a commercial basis. In particular, Article 3 (1) of the Basic Law does not prohibit differentiations that are linked to market-relevant criteria such as product quality, reliability and solvency in order to enable the company to operate competitively".
https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2011/02/rs20110222_1bvr069906.html para.57.

general public for very specific purposes and are designed accordingly" (FCC note 33, para. 70).

With its concept of "public communication space", the Fraport decision has already prepared the next step, which is reflected in the FCC's stadium decision.

In the well-known, much-discussed stadium decision of the FCC[1], the owner of a soccer stadium excluded certain individuals who had already attracted attention as troublemakers from future game events. This dispute reached the FCC with the question of whether the stadium owner is bound by the fundamental right of equality or whether he, as a private person, is free to exclude people.

The FCC underlined: "However, under *specific circumstances*, equality requirements relating to relationships between private actors may arise from Art. 3(1) GG. The nationwide stadium ban in dispute constitutes such a circumstance. The indirect horizontal effect of the requirement of equal treatment comes into play here because the stadium ban imposes – based on the right to enforce house rules – a one-sided exclusion from events, which the organisers, of their own volition, *had opened up to a large audience without distinguishing between individual persons*, and this ban has a *considerable impact* on the ability of the persons concerned *to participate in social life*. By undertaking to organise such events, private actors also take on *a special legal responsibility under constitutional law*. They may not use their discretionary powers, which here result from the right to enforce house rules – in other cases they might potentially arise from a monopoly or a position of structural advantage –, to exclude specific persons from such events without factual reasons. In this case, the constitutional recognition of ownership as an absolute right *in rem* and the resulting one-sided discretionary powers of the owner to enforce house rules *must be balanced* – in light of the principle that property entails a social responsibility for the public good (*Sozialbindung des Eigentums*) (Art. 14(2) GG) – against the principle, which is binding upon the regular courts, that the guarantee of equal treatment permeates private law."[2]

The case means a continuation of the dogmatics on the influence of constitutional law on civil law. In this case, neither a public-law institution nor a private company controlled by the public sector is involved, but only a private individual. For the FCC the following criteria are sufficient: the availability of the stadium to the general public and the importance of stadium attendance for the social life of the people. The point of view that a possibility of use, which according to general opinion is of importance for social life, is treated as a matter of general interest, irrespective of whether the state is involved in it, appears to be decisive.

[1] http://www.bverfg.de/e/rs20180411_1bvr308009en.html (English translation).
[2] https://www.bverfg.de/e/rs20180411_1bvr308009en.html/para. 41(Italics in the above text by the author).

This seems to be a step away from an institutional approach to a functional approach. What is essential for society, what has social significance, is to be assigned to the public good, regardless of whether this is organized by the state or a private individual. This also applies if the private person provides offers for social life, even if he has not been commissioned by the state to do so.

At this point, it seems appropriate to turn to social networks. They are of considerable importance for social life. Are they therefore also subject to the fundamental rights of the German constitution, even if they are operated under private law? In the final analysis, this is certainly the case (Herdegen, Art. 1(3) GG, para129). In particular, this also triggers the state's duty to protect, which must enact adequate laws to regulate social networks in conformity with fundamental rights. This influence of constitutional law on civil law in these now extremely important areas is relevant not only at the state level, but also at the international and supranational level. Although the European Union's initiatives in this area are not prompted by national constitutional law, they certainly appear to be required by the EU Charter of Fundamental Rights (Szczekalla, p. 193/194, §8/paras.23-25).

5. Conclusions

German dogmatics on constitutional law has undergone an important development: fundamental rights are no longer regarded exclusively as subjective rights of defense against the state, but also as objective values that must be applied in all areas of the legal system, including civil law. In addition, the recognition of the character of fundamental rights as values has led to the development of the so-called duty to protect theory, according to which the state is obliged to protect these values through adequate laws and to enforce them in the various areas of the law. This further development of the idea of fundamental rights is due to the actual core of the constitutional order, namely the triad of values: human dignity, the principle of freedom and equality. This triad of fundamental values has a spillover effect both on the constitution and on the other areas of law. This reveals a constitutional dynamism that is inherent in a constitution as a living instrument. The core of the constitution is related to man, is anthropocentric. The dynamism of the constitution is expressed in the fact that the anthropocentric core of values is realized ever more. This happens by the fact that the protection of humans by basic rights thus the principle of the liberty, is arranged ever more efficiently. This also means that there is a further development from an overly institutional way of thinking to a functional perspective.

As far as the influence of constitutional law on civil law is concerned, the starting point is the written text of the Constitution, which establishes direct third-party effect as an exception in Article 9(3) of the Basic Law, but an extension flowing from the overall understanding of the value system already becomes

apparent: human dignity and the absolute prohibition of discrimination are seen as directly binding on private individuals as well.

In order to make the value system efficient, the institutional definition of the constitution is observed on the basis of Article 1 (3) of the Basic Law, namely that only holders of public authority are bound by the fundamental rights, but a functional further development is already taking place here, which sets in early through the jurisdiction of the Federal Constitutional Court in the famous Lüth decision. It is reaffirmed that the public authorities, the legislator and the judges, must exercise their function only under consideration of the constitution and the fundamental rights, evenly even if they issue civil law legislation or interpret these laws.

A further step is the assumption of a duty of the state to protect, to implement the fundamental rights and the constitution adequately, and this in particular through legislation. civil law legislation must therefore, as soon as this is not possible through interpretation, be reshaped. New laws under civil law must take fundamental rights as their yardstick.

It appears to be a further development that the state's commitment to fundamental rights is being recognized to an ever greater extent in administrative action under private law. Finally, even private individuals in special situations are directly held accountable by fundamental rights. This is particularly evident in the case law of the Federal Constitutional Court in the well-known stadium case. The complexity of modern life situations, in which services formerly performed by the state for society are also performed by society itself, i.e. by private individuals, necessitates the recognition of a direct fundamental rights obligation for such special situations. Overall, one can speak of progress in constitutional thinking in favor of the individual.

References

Arnold, Rainer. (2022). *Struttura ed interpretazione della Costituzione: alcune riflessioni, Scritti in onore di Fulco Lanchester,* a cura di Caravale, Giulia – Ceccanti, Stefano – Frosina, Laura – Piciacchia, Paola – Zei, Astrid, Volume primo, Jovene editore: Napoli, 41 – 56.

Arnold, Rainer. (2012). El principio de proporcionalidad en la jurisprudencia del Tribunal Constitucional, together with J.I.Martínez Estay, F. Zuniga Urbina, in: *Estudios Constitucionales*, Santiago de Chile, 65-116.

Arnold, Rainer. (1989). Ausgestaltung und Begrenzung von Grundrechten im französischen Verfassungsrecht. Rechtsvergleichende Überlegungen zur Rechtsprechung des Conseil constitutionnel, in *Jahrbuch des öffentlichen rechts der Gegenwart*, 38, 197 – 216.

Arnold, Rainer, dir. (2021). La Structure des droits fondamentaux-aspects choisis. La estructura des los Derechos Fundamentales – cuestiones seleccionadas, *Comparative Law Studies Vol. 12*.

Arnold, Rainer. (2015). Substanzielle und funktionelle Effizienz des Grundrechtsschutzes im europäischen Konstitutionalismus, in: Max-Emanuel Geis, Markus Winkler, Christian Bickenbach, Von der Kultur der Verfassung, *Festschrift für Friedhelm Hufen zum 70. Geburtstag*, C.H. Beck: München, 3 – 10.

Arnold, Rainer. (2017). Human Dignity and Minority Protection..Some Reflections on a Theory of Minority Rights, in Elósegui/Hermida Cristina (eds.), *Racial Justice, Policies and Courts' legal reasoning in Europe*, Springer International Publishing AG: Cham/Switzerland, 3 – 14.

Busche, Jan. (2021). *Münchener Kommentar zum BGB*, Säcker, Franz Jürgen/ Roxecker, Roland/Oetker, Hartmut/ Limperg, Bettina (eds.), C.H.Beck: München, vol. I, 9th ed., Vorbemerkung (vor §145) (Preliminary note before §145).

Classen, Claus Dieter. (2018). *Staatsrecht II. Grundrechte*, C.H.Beck: München.

Di Fabio, Udo. (2022). In Dürig, Günter/Herzog, Roman/Scholz, Rupert, *Grundgesetz. Kommentar, Art. 2 Abs. 1 Rn.(paras.) 101-104*, C.H.Beck: München, 99. EL (Supplement delivery)

European Court of Human Rights. (2020). *The European Convention on Human Rights: Living instrument at 70. Dialogue between judges,* Council of Europe, 2020. https://www.echr.coe.int/Documents/Dialogue_2020_ENG.pdf

Harlow, Carol. „Public" and „Private" Law: Definition without Distinction, in *The Modern Law Review. 43* (1080), 241 – 265.

Haverkate, Görg. (1992). *Verfassungslehre*, Verfassung als Gegenseitigkeitsordnung, C.H.Beck: München.

Herdegen, Matthias. (2022). In: Dürig/Günter/Herzog, Roman/Scholz, Rupert, *Grundgesetz.Kommentar*, Art. 1 Abs.3 GG, Rn (paras.) 121 – 131, C.H.Beck: München, 99. EL (Supplement delivery).

Hufen, Friedhelm. (2020). *Staatsrecht II.Grundrechte*. C.H. Beck: München, 8th ed.

Rousseau, Jean-Jacques. (1966). *Du Contrat Social ou Principes Du Droit Politique* (re-edited by Flammarion, Paris).

Szczekalla, Peter. (2020). *§8 Funktionen er Grundrechte*, in: Heselhaus, F.Sebastian M./ Nowak, Carsten, *Handbuch der Europäischen Grundrechte*, C.H.Beck: München, Helbing Lichtenhahn , LexisNexis, 2nd ed., p. 181 – 200.

Stern, Klaus. (1977). *Das Staatsrecht der Bundesrepublik Deutschland*, vol. I, C.H.Beck: München.

Zippelius, Reinhold and Würtenberger, Thomas. (2018). *Deutsches Staatsrecht*, C.H.Beck: München, 33rd ed.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

RESTRICTIONS ON CONCLUDING FIXED-TIME EMPLOYMENT CONTRACTS, AS EXISTING IN POLISH LABOUR LAW - AN IMPROPER TRANSPOSITION OF DIRECTIVE 99/70/EC?

Jakub STELINA[1]

Abstract

The author analyses the implementation of the provisions of a European Union directive concerning fixed-term employment contracts (Directive 99/70) into Polish labour law. The Polish legislator has introduced all the three mechanisms for limiting term employment provided for in this directive. However, the way it has done so leads to weakening, not strengthening, the workers' protection. This is due to the fact that the mechanism of "justified reasons" conditioning the conclusion of fixed-term contracts has been treated as a criterion for excluding other protective measures; such as solution, according to the author, undermines the very nature of Directive 99/70.

Key words: *fixed-time employment contracts; restrictions on the use of fixed-time contracts of employment; implementation of the European Union law; Directive 99/70.*

1. The freedom of the employee and the employer to choose the type of employment contract is limited. The preferred model of employment is hiring people for indefinite time, a solution which gives the employee a sense of stability and offers to him/her relative job security. Fixed-term contracts involve, as a rule, the feeling of temporariness and non-stability, as they are terminated when a specific date arrives. Considering that, labour law provides for certain restrictions as to the applicability of fixed-term contracts. As regards part of them, a natural limitation for their use is the purpose for which they are concluded or specific circumstances under which they are entered into. This applies, for example, to contracts for a trial period, which are used to check whether the job suits the employee and whether the employee himself/herself is suitable for the work to be done and how, in fact, he/she copes with it. For this reason, such contracts are concluded, in principle, only once as regards a specific position, when a given employee takes up employment for the first time. Under Polish labour law the

[1] **Professor, Ph.D., University of Gdansk, Faculty of Law and Administration (Poland), e-mail: jstelina@prawo.ug.edu.pl.**

maximum duration of the contract for a trial period is, as a rule, 3 months. Re-concluding a trial period contract with the same employee is possible if the employee is supposed to do a different type of work. However, when it comes to the most common type of contracts of limited duration, i.e. the fixed-term employment contract, the availability of the contract is subject to other types of restrictions established by the EU legal regulations. This hold true, primarily, as regards Council Directive 99/70/EC of 28 August 1999 concerning the Framework Agreement on fixed-term work concluded by the European Union of Industrial and Employers' Confederations (UNICE), the European Centre of Public Enterprises (CEEP) and the European Trade Union Confederation (ETUC). This directive, or rather the agreement of the European social partners incorporated into it, sets up mechanisms limiting the admissibility of concluding fixed-term contracts.

The Directive provides that in order to prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States shall introduce one or more of the following measures: (a) indication of objective reasons justifying the renewal of such contracts or relationships; (b) a maximum total duration of successive fixed-term employment contracts or relationships; (c) the allowed number of renewals of such contracts or relationships. The choice of the measure used, as well as the detailed shape of such a measure (e.g. the maximum length or the number of such contracts) is left to be decided by the legislation of an individual Member State of the European Union (Florek, 2007, p. 104 *et seq.*).

At this point, it is worth emphasising the rather unusual mechanism of the adoption of Directive 99/70, which consisted in making the so-called Framework Agreement, concluded by the European social partners, universally binding. By a decision of the Council, the Framework Agreement was incorporated, in its entirety, into the Directive in question. A similar solution has also been applied as regards matters of part-time work[1] and parental leaves[2]. Currently, however, after the originally rather intensive development of framework agreements in the 1990s, a slowdown in the process can be observed. The phenomenon marks a gradual reduction of the role of social dialogue as a source of EU law, which fact seems to have resulted from a number of factors, including a serious economic

[1] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by the European Union of Industrial and Employers' Confederations (UNICE), the European Center of Public Enterprises (CEEP) and the European Trade Union Confederation (ETUC) .

[2] Repealed Council Directives: 96/34/EC of 3 June 1996. on the framework agreement on parental leave concluded by UNICE, CEEP and ETUC and 2010/18/EU of 8 March 2010 on the implementation of the revised framework agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/ 34/EC.The directive being currently in force is Directive (EU) 2019/1158 of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU

turmoil of the first decade of the 21st century, but probably also a grave crisis of the idea of the European integration itself (Skupień, 2016, p. 337 *et seq.*).

2. In Polish labour law, the mechanisms that limit the freedom of concluding fixed-time employment contracts were established in Art. 25^1 of the Labour Code whereby Directive 99/70 (Stelina in: J. Stelina, M. Tomaszewska, M. Zbucka-Gargas, 2021, p. 51) was implemented. It is worthwhile to mention at that occasion that the first limitations on application of the fixed-time contracts had been introduced to Poland's labour law legislation as early as in 1996, i.e. eight years before the country became a EU Member State. In its original wording, Art. 25^1 of the Labour Code stated that entering into another fixed-term employment contract would be legally equivalent to concluding an employment contract for an indefinite period, if previously the parties had twice concluded a fixed-term employment contract for successive periods, while the gap between the termination of the previous contract of employment and the conclusion of the following one did not exceed one month. Actually, this regulation did not eliminate abuses related to the use of fixed-term employment, though, and the most common practices aimed at avoiding the effects of the above mentioned restrictions included concluding fixed-term contracts for very long periods (with the right to terminate them earlier) and the so-called annexing of contracts, which consisted in deadlines for their termination being repeatedly extended.

A certain improvement occurred with Poland's accession to the European Union on May 1, 2004, when Art. 25^1 of the Labour Code was given a new, more precise wording. First of all, the concept of "another contract" was clarified (to denote a situation where the interval between the termination of the previous fixed-time employment contract and the conclusion of the following does not exceed one month), and the so-called annexing of the contract (repeated extending the duration of a fixed-term employment contract by the parties by means of an annex to the agreement) was declared legally ineffective. Moreover, excluded from the mechanism provided for by Art. 25^1 § 1 LC were fixed-term employment contracts concluded in order to replace an employee during his or her justified absence from work and contracts for the purpose of performing casual or seasonal work or tasks carried out cyclically. However, this solution turned out to be ineffective, anyway, and, to make matters worse, it was questioned by the European Commission in October 2013. Allegations of the Commission concerned setting too short a gap between fixed-term contracts excluding a sequence of term contracts and the concept of "cyclical tasks" (enabling free conclusion of such contracts) found to be too vague. Hence, in 2016, the provision was amended again, this time to include all the mechanisms set forth by the EU directive for limiting the conclusion of fixed-term contracts.

In its current wording, Art. 25^1 of the Labour Code provides that the maximum period of employment under fixed-term employment contracts concluded between the same parties to the employment relationship may not

exceed 33 months while the total number of these contracts may not exceed three. An important safeguard of the effectiveness of the discussed restrictions is a sanction for their violation, provided for by Art. 25^1 § 3 of the Labour Code. It consists in transformation of a fixed-term employment contract, by virtue of law, into an employment contract for an indefinite period if the 33-month limit for the duration of fixed-term contracts has been exceeded or in the event of a fourth such contract having been concluded within that period. In addition, the annexing of the contracts, consisting in extending their duration, has been declared ineffective, which is supposed to prevent the circumvention of the statutory limit on the number of the allowed contracts. At the same time, excluded from the restrictions (which solution seems, by the way, to violate the provisions of Directive 99/70/EC) are employment contracts concluded for a definite period in order to replace the employee during the employee's justified absence from work, contracts concluded to perform casual or seasonal work, those concerning work for a period covering the term of office, and the contracts in case of which the employer can indicate the existence, on his side, of objective reasons for entering into the agreement (if conclusion of such a contract in a specific case serves to satisfy the actual periodic demand and is thus necessary in the light of all the circumstances of concluding the contract). In all such events, the employer is obliged to notify the competent district labour inspector of the conclusion of the contract within 5 working days (counting from the day following the date of the conclusion). The notification is to be made in writing or electronically, and the notice is supposed to indicate the reasons for concluding the contract. A failure to comply with the obligation entails payment of a fine.

3. There seems to be no doubt that Art. 25^1 of the Labour Code, in the wording being in force since 2016, better protects employees against abuses of the application of fixed-term employment contracts. *Prima facie* it thus appears that the objective sought by Directive 99/70 has been achieved. However, there are doubts as to the correctness of the implementation of that directive into Polish labour law. The purpose of the Directive, or rather the purpose of the Framework Agreement concluded between the European social partners to which instrument the Directive gives normative force, is continuous improvement of working conditions, also as regards the use of fixed-term contracts (items 3 and 14 of the preamble to Directive 99/70), by ensuring observance of the principle of non-discrimination and the establishment of a legal framework to prevent abuse arising from the application of successive fixed-term employment contracts or relationships (Clause 1 of the Framework Agreement). In this regard, Clause 5 of the Framework Agreement (Measures to prevent abuse) provides, as already mentioned, for three mechanisms to limit temporary employment: the existence of legitimate reasons for renewing a fixed-term contract, the maximum total length or the maximum number of such contracts. At the same time, the Directive has obliged Member States to include one or more of the listed protective measures in

their legal system. The doubts whether the new wording of Art. 25^1 of the Labour Code properly suits the objective of the Directive (to prevent abuses arising from the application of successive fixed-term contracts), concerns precisely the way in which those safeguards have been taken by the Code into account.

At first sight it seems that the scope of protection depends on how many measures provided for in Clause 5 of the Framework Agreement are introduced into national legislation. Logic dictates that the scope of protection increases with the number of protective measures taken into account (the more of those, the higher the protection). However, Art. 25^1 of Labour Code actually contradicts the rule. While the provision includes all protection measures taken against the abuse of temporary employment, it actually weakens the protection. A simple analysis of Art. 25^1 of the Labour Code reveals that better protection would be ensured if the provision omitted altogether, or left as the only applicable measure the requirement to justify the conclusion of a fixed-term contract. In the first case, fixed-term employment contracts could be concluded only in justified cases, while in the latter one, limits on the duration or number of such contracts would apply in each case of concluding a fixed-term contract.

It appears that the main problem results from the Polish legislator's misinterpretation of the nature of the "justified reasons" requirement. While in the Directive (Framework Agreement) it clearly bears a protective nature, under Art. 25^1 of the Labour Code it differentiates contracts into "ordinary" and "special" ones, and - worse still - is a premise excluding the application of the other two protective measures. Hardly was such an objective pursued by the EU legislator, hence doubts arise as to compatibility of Art. 25^1 of the Labour Code in its new wording with Directive 99/70.

4. In **conclusion**, I find the implementation of Directive 99/70 into Polish labour law to be defective. The method by which the Polish legislator has implemented mechanisms of protection against the abuse of temporary employment does not fully meet the objectives of EU Directive 99/70.

References

Florek, L. (2007). *Europejskie prawo pracy.* Warszawa.

Skupień, D. (2016). *Porozumienia europejskich partnerów społecznych*, Toruń.

Stelina, J. (in:) Stelina, J., Tomaszewska, M., & Zbucka-Gargas, M. (2021). *Introduction to Polish labour Law with Cross-Border Aspects*, Warszawa.

Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by the European Union of Industrial and Employers' Confederations (UNICE), the European Center of Public Enterprises (CEEP) and the European Trade Union Confederation (ETUC) .

Repealed Council Directives: 96/34/EC of 3 June 1996. on the framework agreement on parental leave concluded by UNICE, CEEP and ETUC and 2010/18/EU of 8 March 2010 on the implementation of the revised framework agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/ 34/EC.The directive being currently in force is Directive (EU) 2019/1158 of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

SOME CONSIDERATIONS REGARDING THE NEW LAW OF SOCIAL DIALOGUE

Marioara ȚICHINDELEAN[1]

Abstract

The theoretical approach aims to highlight the progress and/or regression of the new regulations in the field of social dialogue. The state, as an important social partner of the social dialogue, intervened with new regulations to remove the gaps of the previous regulation and to substantiate the dialogue between the social partners from the perspective of the profound changes that have occurred in the labor relationship due to information and communication technology, globalization, the development of new types of individual employment contracts, the need to ensure the employee's social protection, etc.

Key words: *social dialogue; collective bargaining; mutual recognition; strike committee; collective labor conflict.*

1. Introduction

The present study focuses on some institutions from the law of dialogue that were either newly regulated, or developed those existing in the previous regulation. The importance of social dialogue, which requires the existence of representatives of owners/employers and representatives of employees/workers, is determined by the need to ensure a balance in the labor relationship, the foundation of a productive economy, increasing stability and social protection in this field.

Social dialogue (Moarcă & Costea, 2012, pp.44-47) has been defined by the I.O.M., the Council of Europe, the E.U. as a component of a democratic system designed to ensure and guarantee the exercise of union rights.

2. Mutual recognition in the collective labor relationship between legitimacy and legality

According to art.1, point 15 of Law no. 367 of December 19, 2022 regarding social dialogue[2] ” mutual recognition" represents the voluntary

[1] **Professor Ph.D., Faculty of Law, "Lucian Blaga" University, Sibiu (Romania), email: marioara.tichindelean@ulbsibiu.ro**

[2] Published in M.O. no. 1238 of December 22, 2022.

agreement by which the social partners recognize each other's legitimacy in order to establish a common approach.

The current text does not repeat the previous text, but defines "mutual recognition" by considering several elements that are centered on two fundamental dimensions, namely: legitimacy and legality.

The normative definition of "mutual recognition" within the collective labor relationship determines a critical examination of the elements that make it up.

In this sense, we note that the social partners are unions/union organizations and employers/owner organizations, as well as public administration authorities, which interact in the social dialogue process[1]. By defining social partners only through unions or union organizations, the legislator eliminates from their category the representatives of employees/workers, a situation in which "mutual recognition" in the collective labor relationship excludes this last category of representatives.

The notion of *recognition* includes the declaration of admission, acceptance of the social partners as they are defined by law. As such, recognition does not imply a set of criteria that the social partners establish for their acceptance for a joint effort, but only refers to the elements that they must fulfill according to the law.

Reciprocity is the ability to involve the social partners equally, a characteristic which considers within the procedure for concluding an agreement, the desire and intention of the social partners to undertake a common approach within the collective labor relationship.

Voluntary agreement act represents the official consecration of a partnership.

Legitimacy is a concept specific for the sphere of power, of representative government (Trăsnea,1993, p.293 apud Bichicean, &Bichicean, 2002, p.200) and in the author's opinion, the justification of a representation (natural person or legislative body) is achieved either through a social contract or through elections. Within the doctrine (Carpinschi & Bocancea, 1995, p.278 apud Bichicean & Bichicean, 2002, p.200) it has been stated that "legitimacy denotes the reason why members of a community submit to political power", so it implies subordination achieved through the consent of the governed. The term legitimacy has a political-legal essence and can be defined as the right to rule or govern (Goudenhooft, 2014, p.19).

In specialized literature (Andreescu & Puran, 2023, p.11) it was considered that "legitimacy" is a complex category with multiple meanings such as the legitimacy of power, the legitimacy of the political regime, etc.

Thus, in terms of the collective labor relationship, the concept of "legitimate" from the definition of the institution of "mutual recognition"

[1] Art. 1, point 1 of Law no. 367 of December 19, 2022 regarding social dialogue

represents only the confirmation of the existence of a system of social partners, the specific subordination component of legitimacy being excluded because it is not ensured by an act that confers it,but it is the result of a voluntary agreement that is based on legal equality and comes from the quality recognized by the legislator to the representatives of employees/employees, therefore from legality.

Considering representativeness from the political sphere perspective, legitimacy can be confused with legality because "the legitimacy of the sovereign comes from the power to make laws and to put them into practice" (de Montesquieu). The content of the notion of "legitimacy" can also be viewed through the lens of Max Weber's theory (Weber, 1992, p.9) which shows that trust in legitimacy comes from a "constellation of interests", a theory that justifies the Romanian legislator's use of the notion of "legitimacy" in defining the institution of "mutual recognition", but by eliminating the notion's political connotations.

Regarding *legality* "as a law-abiding attitude in a society that leads to a state of order in the conduct of social relations, "mutual recognition" can only be found within social partners defined by law or can be extended by agreement to representatives of employees/workers? We find the answer right in the conjunction between legality and the legal order, the latter being a component of the social order and representing the way social life is carried out in accordance with legal rules, its existence being the result of the creation of these rules (Santai, 2005, p.147), or, social dialogue through its substantiality represents an important link in social life.

Beyond the legislator's vision regarding the institution of "mutual recognition", its essence derives from the two principles of the labor relationship, namely consensualism[1] (general principle of the law system) and collective negotiation[2] (Ștefănescu, 2014, p.76) (fundamental principle of labor law).

The principle of consensualism represents the manifestation of the will of the parties which was appreciated in the doctrine as "sufficient and decisive" in the birth of collective labor relations" (Țiclea, 2015, p.61).

Collective negotiation[3]represents all the forms of negotiation that take place between the employer/owners' organization, on the one hand, and the union/union organization or the elected representatives of the employees/workers, as the case may be, on the other hand, which seek to regulate labor or service relations between the parties, establishing working conditions, as well as any other agreements in matters of common interest. The legal text cited although lacking in wording rigor by defining a notion by the same notion[4], establishes that

[1]Art.8, Align.1 from Labour law states the consesualism principle which considers the freedom of initiating a labour relationship.
[2]Art.41, Align.5 from the Romanian ConstitutionArt.6, Align.2 andArt.39,Align.1, Lett.k from Labour Code.
[3]Art.1, Lett.cfrom LawNo.367/2022.
[4] Notion is a fundamental logical form of human thought that reflects the general, essential and necessary characters of a class of objects; https://dexonline.ro/definitie/no%C8%9Biune

through negotiation the representatives of employees/workers organized or not in unions can conclude any agreements on matters of common interest. This regulation has a general character and allows the conclusion of agreements or even "mutual recognition" between the employer/owners' organization, on the one hand, and the elected representatives of the employees/workers, who cannot be excluded from the area of representation, on the other hand. Although the legislator regulates the social partners with reference only to unions/union organizations, the content of the social dialogue should not be ignored[1] which can be promoted by employee/worker representatives regardless of whether they are unionized or not. Here, the "legal method" of interpretation (Popa, 1998, p.274) is definitory for the understanding of the norms but also to correct the slips of the legislator in the faulty use of notions and of correlating regulations.The systematic method of interpretation supported us in discerning the purpose of the norms by referring to the economy of the text but also to the normative framework of the social dialogue.

The *approach* represents the action undertaken in support of a cause or intervention in order to obtain a certain result[2].

The meaning of the notion "approach" cannot be reduced to the ways regulated by the legislator, nor overlapped with their content (Țiclea, 2015, p.253): social dialogue (information, consultation, collective negotiation), collective contract/agreement, collective labor conflict, conciliation, mediation, arbitration, strike, strike against the social and economic policy of the Government because aspects may intervene in the execution of collective labor relations that cause the representatives of employees/workers and of owners to undertake other types of actions for their management and which are not expressly regulated by the legislator. Society being in permanent change obviously influences labor relations and their dynamics requires the prompt intervention of the employees'/workers' and owners' representatives.

In the space of the debate on the possibility of extending "mutual recognition" also to the representatives of employees/workers, we note that the following principle is not applied: "everything that is not allowed is prohibited, specific to public law, because public authorities do not have the freedom to do what they want, they must do or not to do only what the law commands or forbids them to do" (Stoica, 2020, p.49).

In private law and considering the labor law, the principle that everything that is not prohibited is permitted is applied, and the application of the principles specific to the employment relationshipoutline a complete picture of "mutual recognition" within the social dialogue by including employees'/workers' representatives in the category of those who can conclude this type of agreement

[1]Art.1, Pt.2 from Law No.367/2022
[2]https://dexonline.ro/definitie/demers

and identify themselves alongside unions in the sphere of legitimacy (Volonciu, 2020, p.538).

3. The "worker" and "self-employed" institutions

Law no. 367/2022 introduced two new institutions into the social dialogue:

1."the worker" who is defined by the same characteristics as the employee, namely: natural person, part of an individual employment contract or a service relationship, as well as the one who performs work for and under the authority of an employer and benefits from the rights provided by law, as well as the provisions of applicable collective labor agreements or contracts[1].

The conceptual analysis of this notion starts from the provision contained in art. 45, paragraph 1 of the Treaty on the Functioning of the EU.[2]which enshrines the guarantee of freedom of movement of workers to which are attached social and labor rights such as the principle of non-discrimination on grounds of citizenship, employment, remuneration and working conditions. We note that the beneficiaries of social rights are migrant workers who are salaried or self-employed and the persons they care for (art. 48, paragraph 1 of the Treaty).

In the jurisprudence of the CJEU, it was considered that the community notion of worker must be interpreted in a broad sense, and the essential characteristic of the employment relationship is the fact that a person performs, for a certain period of time, in favor of another person and under his direction, certain services (and not real and effective economic activity), in exchange for which he receives remuneration[3].

In the national doctrine, opinions were expressed which, in essence, describe the course of the notion of worker in the normative and jurisprudential area of the EU and th0065 paradigm shifts in labor relations.

Thus, it was considered[4] (Athanasiu) that the notion of worker corresponds to the "concept of employment relationship", and that of employee is "attached to the institution of the individual employment contract".

It also stood out[5] (Dimitriu), that "the emphasis is shifted from the legal name of the contract, to the substantive aspect of subordination and dependence, which in fact constitutes the justification of the need for legal protection".

---

[1]Art.1, pct.5 from Law No.367/2022.

[2]Published in J. O. C 326 from 26 October 2012.

[3]Decision C.J.U.E.from 3 July 1986, Deborah Lawrie-Blum against Land Baden-Württemberg (demand for formulating a preliminary decision by the Bundesverwaltungsgericht) „Worker — Probation tutore" Cause 66/85, http://ier.gov.ro/wp-content/uploads/rezumate-cjue/61985J0066.pdf

[4] https://www.juridice.ro/647687/opinia-specialistilor-sursele-izvoarele-nationale-ale-altor-raporturi-de-munca.html

[5] https://www.juridice.ro/647687/opinia-specialistilor-sursele-izvoarele-nationale-ale-altor-raporturi-de-munca.html

The Romanian legislator includes in the content of the notion of worker persons who perform work on the basis of an employment contract, service relationship and a generic category of persons who perform work for and under the authority of employers, other than those who carry out their activity on the basis of an employment contract. This content reinforces the doctrinal opinion (Roșioru, 2017, p.116) according to which the notion "is approached functionally, depending on the field in which it is to be applied", respectively in the matter of social dialogue. The content of this notion is broader than that which defines the "employer" which refers only to the first two categories of persons, i.e. the workforce that carries out its activity on the basis of an employment contract and service relationship (art. 1, point .10 of Law no. 367/2022), which emphasizes the inconsistency of the legislator in the correlation of legal texts.

We consider that it was sufficient for the legislator to have limited himself to establishing the content of this notion by referring to the essential elements of the employment relationship: benefits, subordination relationship and remuneration which covers a wide area of employment relationships and allows the inclusion of other categories of labor relationships to which the provisions of the labor and social protection legislation are applicable.

2."The self-employed worker" is described by several features that can be found in two texts of the law, namely:

-According to art. 1, point 6 of Law no. 367/2022, the self-employed worker is "the person who carries out an independent activity, trade or profession, has the status of insured in the public social insurance system and/or who does not have the status of employer" .

- The provisions of art. 3, paragraph 1 of Law no. 367/2022 establish that "Persons with individual employment contracts or in a legal employment relationship, civil servants and civil servants with special status, cooperative members and farmers, independent workers, have the right, under the law, without any restriction or prior authorization, to establish and/or join a union".

Technical memorandum from January 2015 – technical comments regarding Law 62/2011 - O.I.M. drew attention to the fact that the definition of employee "could not capture the variety of emerging work organization models through which services or goods are produced in Romania", on the one hand, and on the other hand "at the European level and equally in Romania there is a "diversification of labor relations and a series of atypical labor relations that are regulated by special laws". Because of the previous, the recommendation aimed at completing the legal provisions in the matter for recognizing the right to union association of all categories of workers which are part of an employment relationship[1]. As such, the national normative act that underpins equal

[1]https://is.prefectura.mai.gov.ro/wp-content/uploads/sites/49/2018/10/CDS-oct-2018-amendament-BNS.pdf).

opportunities and treatment between women and men[1] was amended and supplemented by O.U.G. No. 83 of December 4, 2012[2]in the sense that "all workers benefit from equal opportunities and treatment between women and men in labor relations, including self-employed persons, as well as the wives/husbands of self-employed workers who are not employees or associates of the company , if they, under the conditions provided by domestic law, normally participate in the activity of the independent worker and perform either the same tasks or complementary tasks".

At EU level, beneficiaries of some social rights and other rights[3]are:
(a) self-employed workers, i.e. all persons who exercise a gainful activity on their own account, under the conditions provided by domestic law;
(b) the wives/husbands of self-employed workers or, when and to the extent recognized by domestic law, the life partners of self-employed workers who are not employees or associates of the enterprise, in case where they, under the conditions provided for by domestic law, normally participate in the activity of the self-employed person and perform either the same tasks or complementary tasks

The inclusion of these categories of people in the social protection system is one of the concerns of the EU bodies. which, understanding the fragmentation of independent activities, tries to identify legal instruments for the protection of those who carry out such activities. The topicality of this issue is determined by the erosion of the use of the individual employment contract in its classic form, the development of atypical forms of the individual employment contract that contain elements of precariousness and tend towards independent work lacking a real system of guarantees. Factors such as demographic changes, the aging of the population, the training of the workforce, economic crises, the professional insertion needs of vulnerable categories excluded from the labor market, the absorption in greater proportion of women and young people in the labor market, the change in the structure of jobs, the opportunities opened up in the employment relationship due to information and communication technology, etc. they necessarily require the strengthening of social protection in order to ensure a social and professional balance. Under this aspect, we exemplify the provisions of Directive 2002/15/EC regarding the organization of working time of people who perform mobile road transport activities[4]which regulates the rights and obligations specific to employment contracts that also apply to self-employed workers.

[1]LawNo. 202/2002 regarding chance and treatment equality between women and men published in M.O.No. 326/05.06.2013.
[2]Published in M.O. No. 240/25.04.2013.
[3]Directive 2010/41/UE of European Parliament and Council from 7 July 2010 regarding applying the principle of equal treatment for men and women which perform an independent activity and regarding the abrogation of Directive 86/613/CEE of the Council,Art.4 principal of equal treatment, Art 7, social protection, Art.8 maternity service
shttps://eurlex.europa.eu/legalcontent/RO/TXT/PDF/?uri=CELEX:32010L0041&from=EN
[4]https://eurlex.europa.eu/legalcontent/RO/TXT/?uri=celex%3A32002L5

At the national level, independent activity is regulated by O.U.G. No. 44 of April 16, 2008 regarding the performance of economic activities by authorized natural persons, individual businesses and family businesses[1]and is carried out in an individual enterprise, family enterprise, authorized natural person and the relationships that arise are governed by the provisions of the Civil Code. From a fiscal point of view, the qualification of work as self-employed is determined by cumulatively meeting 4 of the 7 conditions regulated by the Fiscal Code[2]. In the field of labor relations, there are various forms of independent activities that, through the lens of social and labor rights, give the people who perform them a transitional status between salaried and self-employed. The inclusion of the independent worker in the sphere of the legal employment relationship and implicitly the application of the provisions of the social dialogue law is determined by the imperative of the social policy of the EU. ensuring social protection in the sphere of work.

We note the content of the Opinion given by the European Economic and Social Committee on February 26, 2009[3] through which it was shown that "the general objective of the existing national legislation is to contribute to a better protection of certain categories of workers, without, however, assimilating them into the category of employees". Further examining the features of self-employment as a variant of independent work, the European Economic and Social Committee shows that although economically dependent people have some rights recognized that are not recognized for self-employed workers, even if these rights are inferior to those of employees. Thus, these rights may be related to social protection or may be inspired by the guarantees offered to employees through labor law, to the recognition of the right of economically dependent self-employed workers to organize and act collectively to defend and pursue their professional

[1]https://legislatialazi.ro/EurolexPhp/document?&d=380074&i=1#7303178

[2]LawNo.227/2015, Art. 74, Law No. 571/22 December 2003regarding the Fiscal Codehttps://legislatialazi.ro/EurolexPhp/document?&d=228531&i=1#4210301

Independent activity –every activity performed by a natural person with the purpose of obtaining incomes by respecting at least 4 of the following criteria:

- the natural person has the freedom to choose the place and way of performing the activity, as well as the working schedule;
- the natural person has the freedom to work for several clients;
- the adherent risks are taken by the natural person which performs the activity;
- the activity is performed by using the assets of the natural person which performs the activity;
- the activity is performed by the natural person by using the natural persons' intellectual capacity or his/her physical performance according to the activity's specific;

[3]Theme „New trends of independent activities: the particular case of autonomous, economically dependent work/ Noi tendințe ale activităților independente: cazul particular al munciiautonomedependente din punct de vedere economic" (aviz din proprieinițiativă),https://eurlex.europa.eu/legalcontent/RO/TXT/HTML/?uri=CELEX:52010IE0639&from=IT

interests. Within this Opinion, it is appreciated that beyond the risks it entails, the recognition of the status of economically dependent self-employed worker is, in all the states that have adopted it, the means of granting increased legal protection to workers who are not employees in the legal sense, but genuinely self-employed, who are nevertheless in a situation that does not allow them to benefit from the economic protection that the possibility of working would give them for more customers.

Analyzing the different dimensions of self-employment, the European Economic and Social Committee concludes that a more comprehensive approach to self-employment is needed as an ever-wider category of European workers risks being left without protection.

The jurisprudence of the CJEU is also relevant[1] (Panainte, 2021, p.10) which states that the status of "worker" in the sense of EU law cannot be affected by the fact that a person was employed as an independent service provider from the point of view of national law, for fiscal, administrative or bureaucratic reasons, to the extent in which such person under the direction of his employer in respect of his freedom to choose the time, place and content of his work, does not participate in the commercial risks of this employer[2] (Panainte, 2021, p.10).

The Commission's Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council on certain aspects of the organization of working time also falls within the overall concerns of the protection of those who carry out their work autonomously, a variant of the independent worker[3]. Article 17 paragraph (1) of the directive allows derogations "when, based on the specific characteristics of the activity exercised, the duration of the working time is not measured and predetermined or can be determined by the workers themselves" exemplifying the executive directors or other persons with autonomous decision-making powers, workers in family associations or workers who officiate religious ceremonies in churches and religious communities. The Commission's support for the application of these provisions to workers who are not part of the category of those who carry out dependent activity represents a more than obvious positioning of the Commission in the future of social policies that will be promoted within the EU.

---

[1]Case C-256/01Debra Allonbyversus Accrington & Rossendale College and Others (Reference for a preliminary ruling from the Court of Appeal (England and Wales) (Civil Division)) Principle of equal pay for men and women – Direct effect – Meaning of worker – Self-employed female lecturer undertaking work presumed to be of equal value to that which is undertaken in the same college by male lecturers who are employees, but under contract with a third company–Self-employed lecturers not eligible for membership of an occupational pension scheme)»https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A62001CJ0256
Case C-256/01Debra Allonby, Eu:C:2004:18, pct.71-72

[2]Case Agegate,C-3/87, EU:C:1989:650, pct.36.

[3] Information from the institutions, bodies and bodies of the European Union, the European Commission,
https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:52017XC0524(01)&from=FR

The arguments presented above justify the regulation of the "independent worker" in the new social dialogue law. ILO practice[1] reinforced the principle of freedom of association according to which all workers with the sole exception of members of the armed forces and the police should have the right to form and join organizations of their choice. It is further argued that for determining the persons covered by this right, the criterion should not be based on the existence of an employment relationship, which often does not exist, e.g. in the case of agricultural workers, self-employed workers in general, or those practicing professions liberal, and which should benefit from the right to organize.

Considering the international regulations in the field of social protection, the status of self-employed workers is complemented by the social dialogue law by the possibility granted to them to form and/or join a union[2], normative framework that will allow the development and consolidation of their position within the social dialogue, contributing to social cohesion and the national social and economic policy.

4. Conclusions

This study aimed to analyze some newly regulated institutions in the matter of social dialogue which reveal, however, the importance of state interventionism in creating a system of social protection for workers regardless of the form in which the work is carried out and the opening of new ways of conducting the dialogue social.

References

Andreescu, M., & Puran, A. (2023). *Constitutional law. Constitutional justice-guarantor of the supremacy of the Constitution. Doctrine and jurisprudence.* C.H.Beck.

Athanasiu, Al. *Specialist opinions regarding "other employment relationships" than those arising from the individual employment contract*. https://www.juridice.ro/647687/opinia-specialistilor-sursele-izvoarele-nationale-ale-altor-raporturi-de-munca.html.

Carpinschi, A., & Bocancea, C. (1995). *Openness and meaning in political thought, European Institute.* apud Bichicean, Gh., & Bichicean, A. (2002). *.About democracy.* Burg: Sibiu.

[1] Report 211, Case no.1053, par. 163; Report 241, Case no. 1285, par. 213, Report 241, Case no. 1293, par. 213 in Trade Union Freedom. Collection of decisions and principles of the Committee for Trade Union Freedom of the Board of Directors of the BIM, Geneva-International Labor Office, 4th edition (revised) 1996, p.61.

[2] Art. 3, paragraph 1 of Law no. 367/2022.

Dimitriu, R. *Specialist opinions regarding "other employment relationships" than those arising from the individual employment contract*. https://www.juridice.ro/647687/opinia-specialistilor-sursele-izvoarele-nationale-ale-altor-raporturi-de-munca.html.

Goudenhooft, G. (2014). *Legitimacy. Rituals of legality and discursive authority*. Adenium.

Moarcăș Costea, C.-A. (2012). *Collective labor law*. C.H.Beck.

Montesquieu. *The spirit of the laws*. Antet.

Panainte, S. (2021). *.Individual labor law. University course. 2nd edition, revised and added*. Hamangiu.

Popa, N. (1998). *General theory of law*. Actami.

Ștefănescu, I.T. (2014). *Theoretical and practical treatise on labor law, ed. III, revised and added*. Universul Juridic.

Santai, I. (2005). *General theory of law*. Risoprint.

Stoica,V. (2020). *Everything that is not forbidden is allowed or everything that is not allowed is forbidden*? In the *Hic et Nunc: Alexandru Athanasiu*. C.H.Beck.

Trăsnea, O. (1993). *The state and the transition*. apud Bichicean, Gh., & Bichicean, A. (2002). *Despre democrație*. Burg: Sibiu.

Țiclea, Al. (2015). *Treatise on labor law. Legislation. Doctrine. Jurisprudence. Ninth edition, updated*. Universul Juridic.

Volonciu, M. (2020). *Centralization and decentralization at the level of the social partners* in the *Hic et Nunc: Alexandru Athanasiu*. C.H.Beck.

Weber, M. (1992). *Politics, a vocation and a profession*. Anima.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

ON THE CULTURE OF NEGOTIATION AND THE LATEST LEGAL REGULATIONS IN ROMANIA

Magda VOLONCIU[1]

Abstract

In the field of collective negotiations, Romania has gone through successive stages, both in terms of the forms of conducting collective negotiations, and in terms of the intensity of such bargaining. On one hand, the new Law no. 367/2022, tried to create a legal framework to facilitate the relationship between the social partners. On the other hand, the new law aimed to developed, to grow the negotiations at each level, so that more and more the culture of dialogue removes the conflict. Has this been achieved? Equally, the amending regulations of the Labour Code aimed at a transparency of labour relations and a balancing of the worker's personal and professional interests. Such regulations, however, also have an effect on the dialogue, the negotiation at the individual level. Will these new legal provisions succeed in creating good practice in the field of individual dialogue in employment relations?

Key words: *collective negociations;transparency of labour relations; balancing of th worker's personal and professional interests.*

Negotiating as a principle means dealing with someone in order to conclude an agreement. This means that any negotiation implies, as a general technique used during the process, agreement between the negotiators. In order for a negotiation to be a success an agreement needs to be reached, but as a general rule, in order for the negotiation to succeed, negotiators should show agreement during the entire process of discussing the matter. Resorting once again to the linguistic definitions, we can observe that the agreement entails goodwill which is the reflection of the juridical concept of good faith in the social reports between the negotiators. Negotiation represents one of the most evident mechanisms that explains and transposes into practice the need for good faith.

The main reason that lead to the necessity of a new law on social dialogue was represented by the fact that the social practice has shown a reduction in negotiations an, something that is even more problematic, a reduction in successful negotiations that can lead to concluding solid collective employment agreements. For instance, it was observed that, after the enforcement of Law No. 62/2011, for the sector level only collective employment agreements for public

[1] **Professor Ph.D., Titu Maiorescu University, Lawyer, Bucharest Bar (Romania); email: magdavolonciu@volonciu.ro .**

sectors have been concluded and even in this area, only a few such agreements were registered and in any case they did not allow or did not raise the required interest in extending their effects under the provisions of Article 143 Paragraphs (3) and (5) of Law No. 62/2011[1].

It appears as evident the fact that the good faith that we referred to at the beginning did not exist, the employer *ut singuli*, or as part of employers organizations, being only interested in concluding a collective employment agreement for their own entity, at the most. Basically the positioning of employers and employers organizations after the enforcement of Law No. 62/2011 represented a strong recoil against previous legal provisions, provisions that allowed the existence outside the law of norms negotiated by certain employers and unions organizations that, even if they never represented the majority will of the social partners in Romania, have imposed their will above the law[2]. Taking into consideration either the applicability of the collective employment agreement at the national level for all the employees, or the fact that at the industry branch level the *erga omnes* applicability rule was also functional, or keeping in mind that at the unit level the solution of having an affiliation to a representative superior organization was enough to impose the will of an union, no matter the size of the union in the entity where negotiation took place, it is obvious that the law applicable prior to 2011 was diluting the rule of representatively, that was meant as a solution to impose the will of the majority.

Law No. 62/2011 positioned itself, under many aspects, at the opposite pole and, if before its enforcement there was a „overproduction" of collective employment agreements, once Law No. 62/2011 was enforced, this excess was not only weighted, but a reduction near to elimination of the collective employment agreements could be observed (especially with regards to negotiation at the sector level).

[1] For instance: The Collective Employment Agreement at the level of the budgetary health sector for the years 2019 – 2021, registered at the Labour Ministry on 04.11.2019, or the Collective Employment Agreement at the level of a group of entities from the higher education sector of activity, registered at the Labour Ministry on 11.10.2021, collective agreement that only applies to the higher education institutions expressly mentioned in Annex 2 of the Agreement, mainly public higher education institutions, or The Collective Employment Agreement at the level of pre-university education sector, registered at the Labour Ministry on 24.05.2021. It is interesting to note that this collective agreement was applicable to all entities in the activity sector and that were part of the signatory employers organizations of the collective employment agreement (mainly the education institutions or connex institutions that were subordinated to the Education Ministry). However, even in this case, at the time of concluding this agreement, the necessary measures needed to extend the applicability of the collective employment agreement for the entire education sector, no matter if the education institutions were private or public, subordinated to the Education Ministry or not, were not taken.

[2] For instance the general and absolute applicability of collective employment agreements in Romania for all employees, un until December 2010, including their automatic extension, when there was nor express denunciation made by one of the parties within a specific term.

Not lastly, the supporters of the legislation applicable prior to 2011 as much as the supporters of the principles of the new law – No. 367/2022, criticized, and within limits, with good reason, the restriction of union rights and favouring employees representatives, non-union entities meant to ensure the participation of the employees through their agents to the social dialogue. It should also be noted that Law No. 62/2011 that allowed and imposed the participation of employees representatives to the collective negotiation at any time when a representative union did not exist at the level of the unit[1] was also seriously criticised by the International Labour Organization, all 3 recommendation documents that were send to Romania by the international organism[2], referring to the fact that in this manner the union freedom and the principles imposed by Article 4 of The International Labour Organization Convention No. 98/1949 on the right to organize and collective bargaining[3] were violated. It is a new vision on the union freedom principle that transpires more and more at the European level but also within the International Labour Organization, the union freedom principle losing its negative meaning; if everyone agrees that any person has the right to associate in and to join an union not the same can be said at this time about the negative meaning of the freedom to unionize, because there is not the same unanimity in opinions is supporting the idea that nobody can be forced to associate in or to join an union. Obviously there is no direct process of "forcing" the unionizing, but, more and more solutions that use slogans and aim at affirming the need to unionize and to support the unionizing as an instrument that is absolutely necessary for maintaining a democratic society are found, and rules that guide the steps towards unionizing, without even putting into balance the individual freedom and the direct and effective consent of each person are set. It is also true that in this aspect the fight of contraries applies, the permanent conflict between the capital and social, each with its propagandistic and influence luggage and this fight most of the times translates to rules that are meant to create, based on the specific existing historical and politic moment a more favourable situation for one party of the social dialogue or another.

This is the reason why in Romania, after 11 years during which the provisions regarding the social dialogue were gathered in a legislation with

[1] Organizations being representative only if the number of employees that are members of that union represent at least half plus one of the total number of employees – meaning an absolute simple majority.

[2] *The Memorandum of technical comments on Law No. 62/2011 on social dialogue in Romania and on proposed amendments* from January 2015, *The Memorandum of technical comments on proposed amendments to Law No. 62/2011 on social dialogue of Romania* from April 2018 and *The Report of the ILO Technical counselling mission* from 2022.

[3] That states: "*Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.*"

obvious liberal notes, with enough obstacles for the full affirmation of the virulent unionism, the new legislation that followed, the current one Law No. 367/2022 brings into discussion, in opposition, provisions aiming at developing not only unionism in general, but to provide tools, more or less "balanced" for the union fight in general, through all the forms in which it manifests, either in a setting of social peace or especially in a conflict situation. If throughout the history such sinuous events happen and, taking into account the existing conjunctures and a certain periodicity, they have become normal in the landscape of the evolution of the legislation in this matter, we cannot stop from noting that they also always reach their declared scope. Obviously the general scope, meaning the change as a final result is achieved and on most occasions such a final achievement means progress (but unfortunately not always!).

If we were to analyse how such a result is reached, a technical analysis of the newly created institutions that are developed and put into action by the positive right, as interpreters of the law we could point out many times syncope, inadvertences, unjustified overlapping of rules, but also directions that looked at *ut singuli* could pose real problems.

A first observation regarding Law No. 367/2022 starts with the fact that, as it was also the case for Law No. 62/2011, the previous law on the social dialogue, the "rush" in which the legislature tried to issue the legal provisions is visible, with all clumsiness and failures that such an approach that lacks concept and conceptions can determine. It is of importance to note that within a period of less than 5 months after Law No. 367/2022 was enforced, it was modified By Government Ordinance (EGO No. 42/2023[1]). It is interesting the fact that a change in such an important law was made in such a short period of time. More so, even at the time of the enforcement of Law No. 367/2022 both doctrinaires but especially practitioners vehemently cruised the new law because by omitting the legal provisions regarding the employment jurisdiction they have created a legislative void in an area where ambiguities are not allowed. So, the intervention of a new normative act that regulates the aspects regarding courts proceedings was imperatively necessary. But legal provisions could have and should have been included in the Labour Code in a unitary and homogeneous manner. This is what eventually happened because EGO No. 42/2023 did not only modified Law. No. 367/2022, but also the Labour Code, Article II of the above mentioned Ordinance modifying the Labour Code specifically in the scope of maintaining a single procedural legislation, a fact that was needed in order to avoid the misunderstandings related to the previous law[2]. EGO No. 42/2023 as per Article I

[1] EGO was published in the Official Bulletin No. 459 of 25th of May 2023.

[2] Under the previous legislation when certain aspects related to employment jurisdiction were found, as a general rule only they were only included as principles in the Labour Code, while being detailed in The social dialogue Law No. 62/2011, which lead to serious problems regarding the interpretation and applicability of the law. For instance, there were inadvertencies between the text of the Labour Code that established certain procedural rules for challenging disciplinary

modifies Law No. 367/2022, solving some of the issues the law had in its initial form, but also creating other new discussions.

So, starting with the main idea that the negotiation in Romania suffered during the functioning of Law No. 62/2011 because the possibility of unions to intervene was drastically limited by the manner in which representative unions were regulated and by the fact that only a representative union could participate in negotiations and only directly, without the possibility of transferring the attribute of representativeness from the superior levels towards the base levels, this is how it could be explained why one of the texts that are lively debated was Article 102 of Law. No. 367/2022, text that wished to facilitate the participation to negotiations and thus allowing a development of negotiations at all levels. In its first form, applicable in the period December 2022 – May 2023, the Romanian legislator opted for a solution in this case that was not only extremely convoluted and hard to put in practice, but created also obvious inequities in some cases. By wanting to allow at any time and to anyone to participate in the collective negotiation at the unit level, so that unionized employees could always be represented, Article 102 Paragraph (1) Point B letter a) allowed the cumulative participation to the collective negotiation at the unit level of: representative unions from the unit, but also being entitled to participate the union federations that have affiliated unions in the unit and the total number of union members of these affiliate unions totalled at least 35% of the total number of employees in this unit[1], and also non-representative unions that are legally constituted in the unit, with the condition of them not being affiliated to any superior level union organization. Only if at the level of the unit in case there were no representative union, no non-representative unions but affiliated to the same union federation or non-representative unions that were not affiliated, employees representatives that were

sanctioning decisions and the general rules regarding challenging the unilateral decisions of the employer. Or the fact that according to the Labour Code the term for challenging some unilateral decisions started to run at the date of communication (being applicable as a general rule the provisions on coming into effect for distance communications), while according to Law No. 62/2011 the term started to run at the moment when the person that was subject to the measure became effectively aware of the employer's decision, meaning that the term could also run even before a distance communication took place, if the employer could prove that the employee effectively became aware of the measure taken against them. It should also be noted the fact that even before EGO No. 42/2023 intervened; Article 268 of the Labour Code wad modified by Law 269/2021 and borrowed the solutions from Article 211 of Law No. 62/2011. What is positive for the individuals that interpret the law remains the fact that at this time the employment jurisdiction is regulated in a single frame law, the Labour Code.

[1] ATENTION, the legislator initially did not imposed the union federation to be at its turn representative at the level of the sector to which the employer belongs to, but only that at least 2 unions from that unit are affiliated to the federation in case and that the number of union members of these unions should represent at least 35% of the total number of employees from the unit, because the threshold for being representative established by Law No. 367/2022 before or after it was modified by EGO No. 42/2023 was reduced from 50% as it was established under Law No. 62/2011 to 35%.

elected under the conditions established in the new law No. 367/2022 could intervene[1].

It can be noted from the initial solution that the legislator opted for, the fact that some absolutely odd hypothesis could have been encountered. For instance, if at the level of a certain unit a big union existed, but did not met the conditions to be representative and is affiliated to an union federation, or there were a number of unions that were affiliated to different federations and a small union that was not affiliated, the negotiation for all the employees of the unit was made with the small unaffiliated union. What is the consequence of such a solution? The strengthening of the principles of the freedom of the unions, of the freedom to associate? On the contrary! In order to be able to participate to the negotiations any non-representative union would be interested in un-affiliating themselves from the superior organization that it was previously associated to, in order to be entitled to negotiate. It should also be noted that the law, in the previous form of Article 102, did not create an order of priority, meaning that for instance, the existence of a representative union at the unit level did not prevent the possibility of other entitled organizations to participate. So at the collective negotiation could have participated the representative union and together with this union an union federation that was mandated by more other small unions from the unit, that together have as members at least 35% of the total number of the employees in the unit, but also any other legally constituted unions, no matter how small they were, as long as they were not affiliated to an union federation at a superior level. It can be noted that, at first sight such a solution extended a lot the

[1] We note that according to Article 57 final paragraph of Law No. 367/2022 "*For initiating and unfolding the elections of employees/workers representatives, the initiative group can ask for consultancy from a union federation that is legally constituted in the collective negotiation sector in case. In the event the union federation accepts to offer consultancy, its representative has acces within the unit for the unfolding of the process regarding the election fo the employees/workers representatives, observing the provisions of the internal regulations of the unit*". On the other hand, Paragraph 3 establishes, this time in an expressly manner that "*Any intervention from public authorities, employers and their organizations in electing the employees/workers representatives or preventing the unfolding of these elections is prohibited*." So the employees are free and no external immixture should take place in determining their own representatives, but the only consultants allowed by the law, and in a certain degree recommended by the law to support the election of employees representatives are the union federations that are representative at the sector level. We question if an union federation from the sector of activity of the employer does not have any interest in the employees representatives elections? Isn't that federation directly interested in indirectly determining the creation of an union at the level of that unit, union that subsequently will affiliate to the federation? It should also be noted the fact that the intervention of the union federation needs to be strictly limited to the election process and not extended to the subsequent activity of the employees representatives, but even in such conditions, maybe in order to ensure the equal treatment of the traditional social partners, as long as the intervention of the employer is expressly prohibited in the process of electing the employees representatives, an intervention of a union organization at a superior level could be admitted, but not as "consultants", but as "observers", that together with the employer should observe the good progress of the election mechanisms and procedures and to offer the necessary logistic.

possibility of the employees participating in the negotiation through their agents, the union organizations they were members of, thus being respected at the base level the union freedom and the principle of union pluralism. From an operational point of view however the solution is open to discussions. The idea of representativeness as a central point that is at the base of collective negotiations, starts with the need to have a concentrated negotiation, so that the partners could touch the essential subjects that are crucial and, in a direct dialogue, to solve them and to transpose them in a normative negotiated instrument that is agreed upon and that the parties consent to, the collective employment agreement. The existence of more voices within a negotiation will dilute the negotiations and will delay the results. The social practice has also made this demonstration. It is also true that the union pluralism and that the possibility that each employee that is associated in an union, any union to be represented in negotiations is a beautiful idea, even if it is less functional. An essence question still remains: if the idea of representativeness, as majority meant to impose a certain normative framework at a micro-social level (at the level of that unit) is more and more diluted by different ways, either by lowering the threshold for becoming representative, or by permitting the participation to negotiations of small dimensions organizations, isn't it time to revise the *erga omnes* applicability of the collective employment agreement? How is the freedom of expression of a majority of employees that are subject to the applicability of a collective employment agreement negotiated and concluded by a minority union from the unit (for instance a professional union that represents the interests of the drivers from an unit that produces food products) being respected when the interests of the majority were not in any case represented in the negotiation? Isn't it this an indirect manner in which the majority that was not interested in unionizing is being forced to unionize so that their interests could also be represented at the negotiation table and be included in the final form of the collective employment agreement? More so, what would have happen if at the level of one unit there is no representative union, there is no non-representative union that is not affiliated, but there are two non-representative unions with members that represent 30% of the total number of the employees in the unit, both affiliated to an union federation that is representative at the level of the sector of activity? Who would be entitled to negotiate in these units> The affiliated unions are not, because together they do not ensure the representativeness required by law, meaning the minimum 35% of the total number of employees in the unit. Neither the employees representatives could intervene in such a negotiation because, as per the provisions of Article 102 Paragraph (1) Point B letter a) thesis 4) of the Law No. 367/2022 in the initial form, the employees representatives could intervene in the negotiation of a collective employment agreement only if at the employer's lever there is no legally constituted union[1]. In such an hypothesis it can be observed that there is no

[1] Besides, this principle requirement also rezides in the provisions of Article 57 Paragraph (1) of

solution and a negotiation cannot take place, the right to negotiate that was meant to be strengthened by the new law being violated.

The current solution provide by the Law No. 367/2022, after the change that intervened through EGO No. 42/2023, removes some of the problems found in the previous text, but it raises at its turn a series of new discussions. It can be noted that this time the legislator ensures an order of priority between the ones that are entitled to represent the interests of the employees and to participate to the negotiation. As it was to be expected, if there is a representative union, it and only it is entitled to participate in the negotiation[1]. It should also be kept in mind the fact that Article 54 Paragraph (1) Point C letter c) of Law No. 367/2022 talks about the representativeness at the unit level of an union but also of an union federation, with the condition that the members of the member unions represent more than 35% of the total number of employees. This means that if at the level of an unit there are 3 unions, of which one is representative, being recognised as representative union, and the other two unions belong to the same union federation and together represent more than 35% of the total number of employees, both organizations, the union and the union federation would be entitled to participate in the negotiation of the collective employment agreement. This also means that further on we can no longer talk about an union that is representative at the unit level, but about an union organization, no matter the levet at which it is constituted that obtains its representativeness, if directly or indirectly represents the interests of at least 35% of the total number of employees in that unit. If such an organization does not exist at the level of that unit, the union federation from the sector of activity is entitled to negotiate based on the mandate they received from the non-representative unions from the unit that are affiliated to this federation, unions that together do not reach the representativeness threshold, together or separately, of 35% of the total number of employees of that unit. The union federation from the sector of activity level is entitled to participate to the negotiation of the collective employment agreement only if it is a representative federation at the sector level[2]. The union federation representative at the sector of activity level is entitled to participate to the negotiation based on the mandate received from the affiliated unions from the unit that are not representative, no matter the number of employees that they represent,

---

Law No. 367/2022, that establishes that the election of employees representatives is possible in unit with less than 10 employees and in units where there is no union legally constituted. It should also be noted that, as was mentioned above, one of the essential requirements of the International Labour Organization regarding the new social dialogue law in Romania was to not allow the election of employees representatives where there are legally constituted unions, in order to be fully secured the right to unionize and to remove any form of restriction of the union freedom and rights.

[1] The representative threshold remained 35% of the total number of employees in the unit – as per Article 54 Paragraph (1) Point C letter c) of Law No. 367/2022.

[2] So there is a new element: we can talk about representative federations at the unit level and of representative federations at the sector level.

but cannot come to the negotiation together with the representative organizations, so it cannot intervene in a negotiation as long as at the unit level there is a representative union organization[1]. If at the unit level there are no representative union organizations and the unions from the unit are not affiliated to representative union federations at the sector of activity level, a non-representative union federation at the level of the sector of activity or even a non-representative union confederation based on the mandate given by the non-representative union/s from the unit that are affiliated to them. Such a solution represents a clear invitation/recommendation to affiliate that is poorly disguised. As long as the unit organization is affiliated, no matter to which union organization at a superior level, no matter its size and no matter the sector of activity where is operates, that union will be entitled to negotiate before other non-representative unions from the unit, that did not have the desire and the interest to affiliate. On the manner in which the will to affiliate is let free to manifest itself everyone can judge for himself! What can also be observed in such an hypothesis is the fact that transposing the legal provisions in the social practice will be extremely complicated and will bring a lot of syncope in the mechanism of the effective negotiation. The solution that is currently regulated by Article 102 Paragraph (1) Point B Letter a) thesis 3 of Law No. 367/2022 can bring difficulties to a negotiation, being easily to presume that, beyond the fight of the egos, obtaining the desired result meaning concluding a functional collective employment agreement, will be difficult to obtain, as long as at the negotiation table the ones that are on the same side of the barricade, belong to groups that have different professional interests. Finding the median line of common interest, meant to best respond to the actual situation of the unit that is negotiating will require an accentuated need of good faith, understanding and maturity, but however it is to be presumed that it will lead to longer negotiations. Or, the purpose of the negotiations at the unit level is for them to best respond to the needs and the realities at the base level. It is the reason why the "closer" the negotiators are to the people they negotiate for, the more chances there are for the negotiation to succeed.

If there are no requests from the non-representative unions from the unit towards the superior organizations, either representative or not, any and all non-representative non-affiliated unions that exist in the unit. This hypothesis can also create malfunctions and difficulties in operating when implementing this provision into practice, but at least it has the merit of bringing the negotiation closer to the level of the persons in the interest of whom the negotiation takes place and for whom the collective employment agreement is concluded, the employee.

[1] It can be noted a dilution of the transfer of representativeness from the superior union organizations to the inferior ones, comparing to the previous solution that existed in Law No. 130/1996, the old law in the collective employment agreement.

Finally if at the unit level there is no union, the elected employees' representatives under the conditions of Article 57 and the following of Law No. 367/2022 are entitled to negotiate.

It can be noted that the Romanian legislator completely modified the conception regarding who is entitled to participate to the negotiation, the representativeness and majority rule that imposes a normative framework that was negotiated at the unit level being completely eliminated under the conception of the new law, a conception that introduces in the foreground the union rights and strengthens the role or the union organizations as main participants to collective negotiations.

It remains to be seen if this solution that the Romanian legislator favoured can strengthen the negotiations in Romania, but especially there is interest in observing negotiations that have substance, that are real, that are made in good faith and that have as scope solving problems that the participants to the negotiations face. So it is necessary not only to quantitatively develop the negotiations, but also to increase and develop the quality of negotiations in our opinion, since both the content of the negotiations and the manner in which they enfold, the techniques used, the agreement of the negotiators and at the end the good faith with which the social partners that sit at the negotiation table on opposite positions understand to use is important. Also the progress at the negotiation level can only be obtained if both the social interests and the interests of the capital are conciliated with as few compromises as possible and with as many gains as possible for both parties. Or, such a negotiation needs a certain culture, a culture that the negotiators, any negotiators, no matter the position they have, need to acquire, develop, maintain and practice: a negotiation culture!

References

Law no. 53/2003 - Labor Code

Law No. 367/2022 regarding social dialogue

Emergency Government Ordinance No. 42/2023 for the amendment and completion of Law no. 367/2022 regarding social dialogue and Law no. 53/2003 — Labor Code

The Memorandum of technical comments on Law No. 62/2011 on social dialogue in Romania and on proposed amendments from January 2015

The Memorandum of technical comments on proposed amendments to Law No. 62/2011 on social dialogue of Romania from April 2018 and The Report of the ILO Technical counselling mission from 2022

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

HOLIDAY VOUCHERS – THEORETICAL AND PRACTICAL ASPECTS

Elena-Luminița DIMA[1]

Abstract

Holiday vouchers are considered a benefit granted by employers to employees and represent in many situations a component of the salary package that can attract new employees or retain existing employees. By granting holiday vouchers in addition to other salary rights, the employee's income increases, but the measure is also likely to satisfy the interests of employers, who are stimulated to grant such benefits due to the specific tax regime thereof. However, it is necessary to know and understand the conditions for granting holiday vouchers, the limits established by the applicable legislation, as well as the risks that may occur in the event of non-compliance with them, so that the potential benefit considered does not turn against the employers by attracting their legal liability. The analysis of the granting conditions is topical not only from the perspective of the numerous questions and problems that have arisen in the practice of employers who are looking for increasingly varied solutions to motivate employees, but also in the context of the new regulations incident to this matter following the adoption of the new Social Dialogue Law no. 367/2022.

Key words: *benefits; employees; salary package; holiday; social dialogue.*

1. Introduction

At present, granting holiday vouchers both in the public and private sector is governed by the provisions of Emergency Government Ordinance 8/2009 (GEO 8/2009) on granting holiday vouchers[2], and by the Methodological Norm regarding its enforcement (approved by Government Decision 215/2009 (GD 215/2009)[3], with further amendments and supplements).

Although in 2018 Law no. 165/2018 on granting value tickets[4] was adopted, which regulates granting holiday vouchers (for the presentation of the legal regime of holiday vouchers as regulated by this normative act, Țop, 2018, www.idrept.ro) together with meal tickets, gift tickets, nursery tickets and cultural tickets, the provisions of this law are not applicable at present for the holiday

[1] **Professor Ph.D., University of Bucharest (Romania), email: luminita.dima@drept.unibuc.ro.**

[2] Published in O. J. no. 110 of February 24, 2009.

[3] Published in O. J. no. 145 of March 9, 2009.

[4] Published in O. J. no. 599 of July 13, 2018.

vouchers, the enforcement of the provisions regarding holiday vouchers being postponed until 01st.01.2027.

Therefore, we refer to the regulation from GEO 8/2009, although it was drafted and adopted during the economic crisis started in 2008, amended and supplemented many times up to now, in the well-known style of the Romanian legislator, non-complying with the rules of legislative techniques, with problems of non-correlation between the different provisions included in the Ordinance and, respectively, in the Methodological Norm of its application, and even with non-correlations between the texts mentioned in the contents of the same legislative act. The consequence? Already known: a large number of issues of interpretation and application.

2. Notion and terminology - What are holiday vouchers?

Holiday vouchers are defined as being value vouchers that can be granted by the employers who employ personnel by concluding an individual labour agreement for the recovery and maintenance of the work capacity of the employees.

The term of ”holiday voucher” designates both the hard-copy holiday voucher and the electronic one.

Holiday vouchers represent value vouchers with a special judicial regime, being issued, granted and used only by complying with the special legal provisions.

The legislator is not consistent though, because, even if it defines the term of ”holiday voucher”, in all applicable legislative acts they use both the term of ”holiday voucher” and the term of ”holiday ticket”. We have got used to this lack of accuracy in drafting legal texts for a long time, so that the use of alternative terminology did not create problems of interpretation[1].

3. Conditions for granting holiday vouchers

In the public sector, the conditions for granting holiday vouchers are more restrictive, with regard to both the rules applicable pursuant to the general legislative acts mentioned above, and the special regulations on granting holiday vouchers in certain public institutions or in the public institutions from a certain area.

Also in the private sector, certain restrictive rules are applicable, but the regulation is a bit more flexible. So, there are certain differences between the two regulation areas.

[1] By Law no. 94/2014 for the approval of GEO 8/2009 (published in O. J. no. 496 of July 3, 2024), however, an attempt was made to standardize the terminology by using the phrase "vacation voucher”.

a. Amount

For *public institutions*, the amount of holiday vouchers that can be granted is *1450 lei* for an employee.

For the *other employers, the maximum level* of the amount that can be granted to employees as holiday vouchers is the value of *maximum six gross national minimum wages* guaranteed for payment for an employee during a tax year.

As an exception, the amount of holiday vouchers granted by *economic operators in which the state or the administrative-territorial units are sole or majority shareholders or own, directly or indirectly, a majority participation, is equal to the value of a gross minimum national wage, guaranteed for payment for an employee.*

Although the modality of the verbs used and the character of legal rules are different in each of the above cases, (”*respectively*”, ”*shall grant*”, ”*may grant*” and ”*will grant*”), granting holiday vouchers can be made only within the limits of the amounts provided for this purpose in the state budget or in local budgets, for the institutions from the budgetary sector, as the case may be, and within the limits provided for this purpose in the approved income and expense budget, pursuant to the law, for the other categories of employers (for a detailed analysis of the legal nature of holiday vouchers, by referring to the High Court of Casation and Justice's Decision no. 23/2021 – Preliminary Ruling, published in O. J. no. 534 of May 24, 2021, Marcu-Șiman & Dima, 2023, www.idrept.ro). Therefore, employers from the private sector have a wider range of appreciation because they approve the income and expense budgets themselves, but they have to comply with the rule of the maximum value of holiday vouchers per employee.

On the other hand, to grant holiday vouchers, although in some cases the wording is imperative, the legislation in force also establishes other additional conditions, so the imperative loses some of its force under the influence of such additional conditions.

b. Cumulation of holiday vouchers with holiday bonuses

Pursuant to the regulations in force, the employee who benefits from holiday vouchers no longer benefits from the holiday bonus (”*prima de vacanță*”) during the tax year or from rest tickets (”*bilete de odihnă*”), granted according to the law. The text does not make a distinction between the public sector employees and the private sector ones. Therefore, as a rule, *cumulation is forbidden.*

The holiday bonus should not be mistaken with the holiday allowance (”indemnizația de vacanță”), or the annual leave allowance (”indemnizația de concediu de odihnă”), whose legal regime is established by art. 150 of Labour Code, so that holiday vouchers cannot replace (or represent a payment mode of) the annual leave allowance (Ștefănescu, 2017, p. 711; Popescu, 2014, p. 268). For

that matter, for local and central public institutions, GEO 8/2009 expressly provides that the modality to grant holiday allowances is established by a government decision, without diminishing the annual amount granted to the employees of the local and central public administration, for holiday vouchers or equivalent rights.

In order to avoid any doubts in this regard, a more thorough approach of the legislator would have been appropriate, in terms of clarification of the terminology used, especially that, pursuant to art. 3 para.2 of the Norm, for the employees of public institutions and authorities, only one holiday allowance is granted, as vouchers, in amount of 1450 lei for an employee, within the limits of the amounts established in the budget for such destination. Considering the latter provision, if the holiday allowance would be an annual leave allowance, this would mean that during the leave, employees receive only holiday vouchers, which would be against the provisions of art. 50 of Labour Code.

c. Condition of getting the agreement or consultation of social partners

For the case of granting holiday vouchers by the budgetary sector employers, GEO 8/2009 expressly provides that, *they establish by mutual agreement with the legally established union organisations or with the employees` representatives, as the case may be, the moment when they grant holiday vouchers*. For the other employers, there is no similar text.

Within a previous version of GEO 8/2009, there was a text (repealed at present) which stated that establishing the issuer of holiday tickets with whom the rendering of corresponding services would be contracted, would be made by the employer by mutual agreement with the legally established union organisations that are representational at the unit level or, where there was no union established, with the employees` representatives.

Other similar texts regarding the agreement or consultation of social partners are no longer found in GEO 8/2009. Therefore, this GEO provides only for the obligation of the budgetary sector employers to establish by mutual agreement with the legally established union organisations or with the employees` representatives, as the case may be, if and when they grant holiday vouchers.

However, we find in the Methodological Norm on granting holiday vouchers, a few regulations completing the provisions of GEO 8/2009 mentioned above.

a) Pursuant to these provisions, *all employers to whom GEO 8/2009 is applied, establish by mutual agreement with the legally established union organisations that representational at the unit level or, where there is no union established, with the beneficiaries` representatives, contracting the purchase of holiday vouchers with the issuing units, as well as the form of their material support, i.e. electronic and/or hard copy support*.

Therefore, besides the provisions of GEO 8/2009:

(i) not only the public institutions, but all employers establish the granting of holiday vouchers by mutual agreement with the legally established union organisations that are representational at the unit level, or with the employees` representatives, where there is no union established;
(ii) unlike the provision mentioned in GEO 8/2009, the text from the Methodological Norm expressly provides when it is necessary to obtain the agreement of the employees` representatives, but, however, leaves out the case where there is a union established at the level of the employer, but this union is not representational;
(iii) the agreement of the legally established union organisations that are representational at the unit level, or of the employees` representatives, where there is no union established, is necessary not only to establish the granting of holiday vouchers, but also to establish the form of their material support. The wording is not clear though with regard to establishing the issuing institution, especially under the conditions of repealing of the text that regulated this aspect in GEO 8/2009.

Considering the fact that the Methodological Norm includes additional regulations compared to the ones provided in GEO 8/2009, part of them contradictory to those included in the higher legislative act, as well as the provisions of Law no. 24/2000 on rules of legislative techniques, according to which the legislative acts given to enforce laws, ordinances or government decisions, are issued within the limits and pursuant to the rules ordering them (art. 4 para.3), the issues of interpretation occurred in practice are justified.

Thus, for example, should a private sector employer, where there is a union established, but the union is not representational, while there are representatives of the employees elected, obtain the agreement of the union or of the corresponding representatives in order to grant holiday vouchers? If yes, whose agreement should be obtained? The case is not covered by the provisions of GEO 8/2009 or by those of the Methodological Norm.

On the other hand, the obligation to include such elements in the collective labour agreement is not provided. Therefore, a separate arrangement can be concluded regarding such general aspects, under the conditions agreed by the parties (for ex., the duration of such arrangement, the possibility to extend it and the way in which the extension may take place etc.).

b) However, *the Methodological Norm regulates the establishment of some aspects with regard to granting holiday vouchers in the collective labour agreement.* Pursuant to art. 3 para.1 of the Norm, *employers, together with the legally established union organisations or the beneficiaries` representatives, will establish, by the collective labour agreements, respectively by internal regulations, rules regarding the way of granting the holiday bonus in the form of holiday vouchers that should provide:*

a) the number of the beneficiaries from the institution who can receive holiday vouchers and the level of the amounts to be granted to beneficiaries in the form of holiday vouchers, taking into account the employers` own financial possibilities;
b) the categories of beneficiaries who receive holiday vouchers;
c) the form of the material support on which holiday vouchers are issued, respectively electronic and/or hard-copy support.

From this regulation, it results that it is possible to include such rules in the internal regulation. The text does not establish in what cases these rules should be included in the collective labour agreement and in what cases, in the internal regulation.

Logically, including them in the internal regulation would be possible only in absence of a collective labour agreement at the level of the employer, especially that the establishment of such rules should be made "together" with the union/employees` representatives, which may represent an argument, in the sense of the need to reach an agreement (specific to negotiating the collective labour agreement), to sustain that consultation is enough (procedure specific to drafting the internal regulation) only in the absence of a collective labour agreement.

From the consolidated interpretation of the provisions of the Methodological Norm above-mentioned, the result is that:
- In the contents of the collective labour agreement, are to be included rules regarding the way of granting holiday vouchers regarding: the categories of beneficiaries who receive them, the number of beneficiaries and the level of the amounts to be granted to beneficiaries in the form of holiday vouchers, the form of the material support on which the holiday vouchers are issued, respectively electronic and/or hard-copy support. If there is no collective labour agreement concluded at the level of the respective entity, these rules are included in the internal regulation.
- Therefore, in case there is a collective labour agreement concluded, regardless of the wording of the texts of GEO 8/2009, and from the Methodological Norm, the rules of the special law with regard to negotiation and conclusion of collective labour agreements (Law of social dialogue no. 367/20220) are applicable, the agreement being made between employer and employees, represented pursuant to the rules provided by this law, otherwise the mentioned rules regarding the way of granting holiday vouchers are not able to be included in the collective labour agreement. On the other hand, in case there is no collective labour agreement concluded, the rules are included in the internal regulation by consulting with the union/unions or with the employees` representatives in case there is no union, pursuant to the provisions of art. 241 of Labour Code.
- As for contracting the purchase of holiday vouchers (implicitly if holiday vouchers are granted or not), it is established – pursuant to the provisions above mentioned from the Methodological Norm – by the employer, by mutual agreement with the lawfully established union organisations that are representational at the unit level, while where is no *representational* union

established (*our note*, as this is the logic of regulation of the rule), as such is defined by the legislation in force at that moment, the agreement shall be negotiated and made with the beneficiaries` representatives. The legislation in force does not impose that such arrangement be included in the collective labour agreement, so a separate arrangement can be made, and in such case, the rules included in the collective labour agreement or in the internal regulation with regard to granting holiday vouchers will become applicable. If such rules were not already included in the collective labour agreement, the appropriate procedure should be started in this respect, and in absence of a collective labour agreement, the internal regulation should be supplemented.

- However, pursuant to GEO 8/2009, the budgetary sector employers establish when they grant holiday vouchers, by mutual agreement "with the lawfully established union organisations or with the employees` representatives, as the case may be". Being an express text included in this legislative act, the Methodological Norm cannot modify this provision, so, for these employers, the arrangement is made with the union organisations, regardless of the fact they are representational or not, while only in case there is no union organisation established at the level of such employer, the arrangement will be negotiated with the employees` representatives.
- Finally, with regard to the establishment of the issuing institution, as a result of repealing of the text regulating this aspect from GEO 8/2009, it is no longer the object of the agreement between the employer and union organisations or the employees` representatives.

In case of non-compliance with the above-mentioned rules, the employer may be sanctioned by administrative sanctions, pursuant to art. 24 (1) "a" of the Methodological Norm. The distribution by employer to the beneficiaries of holiday vouchers or the transfer by the issuing institutions to beneficiaries of the nominal value of holiday vouchers on electronic support, without the strict compliance with the legal provisions, is considered an administrative offence ("*contravenție*") and is sanctioned by 3-6 fine-points. Pursuant to art. 28, para.8 of the same normative act, a fine-point is equal to the value of the gross national minimum wage.

4. Other aspects with regard to granting holiday vouchers

a. The amounts granted to employees as holiday vouchers are established proportionally with the duration of the labour agreement

Pursuant to art. 12 of the Norms, the amount granted to employees by private sector employees in the form of holiday vouchers is established according to the law by employers proportionally with the period of exercise of the work relationship or with the duration of the labour agreement, in a calendar year. Such a provision is justified, considering that the duration of the annual leave and the amount of the corresponding allowance are also established in a similar way.

The proportional granting of holiday vouchers is also confirmed by other provisions from the Norms, art. 14^1 paras 2 and 4: for the undue holiday vouchers granted by electronic support, as well as in case of termination of work relationships, the employer has the obligation to communicate in due time the relevant information to the issuing institution, so that it can make the refund of the values to the employer, while the use of the undue holiday vouchers by the beneficiary on hard-copy support or on electronic support, shall make the beneficiary pay the value of the vouchers to the employer.

b. Establishment of a different amount of holiday vouchers according to the employees` seniority

As shown above, according to the law, the amount granted to employees by private sector employers as holiday vouchers is established proportionally with the period of exercise of the work relationship or with the duration of the labour agreement, within a calendar year, therefore this amount is closely related to the period when such salaried employee rendered the work for the employer in the respective calendar year.

On the other hand, the law establishes only the maximum threshold of the amounts that can be granted to the employees as holiday vouchers, by the private sector employers, representing the equivalent of maximum six minimum gross national wages guaranteed for payment for an employee during a tax year. There are no provisions regarding a fixed amount or a minimum one. Furthermore, the categories of beneficiaries, their number and the level of the amounts granted to beneficiaries as holiday vouchers, are established together with the union organisations or with the employees` representatives, as the case may be.

Although with regard to holiday vouchers in a different amount according to certain criteria, the regulation in force is silent, the provisions invoked above can be considered arguments to support the possibility that, at the level of private sector employers, the amount of holiday vouchers be established differently on categories of beneficiaries.

In this process, though, we have to take into account the compliance with the principle of equal treatment and non-discrimination, being necessary that any differentiated treatment be based on thorough grounded reasons.

In the same regard, we emphasize the reasons that formed the basis of the regulation of granting holiday vouchers mentioned in the statement of reasons of GEO 8/2009, for example that it is a measure in favour of the employee, whose real incomes increase, and in favour of the employer, that has the possibility and is stimulated to grant to employees, besides the salary, holidays within the country, by means of holiday tickets, with the role to restore the work capacity, to increase the employee`s work performance and to motivate him to continue be employed as an employee in the respective company, which will generate increased stability and efficiency at the level of the private sector.

Also, in the same way, we can invoke the provision of GEO 8/2009 which forbids the beneficiaries of holiday vouchers to benefit from holiday bonuses or rest tickets in the respective tax year. Or, holiday bonuses that are replaced by holiday vouchers, could have been also granted in a different amount according to seniority.

On the other hand, it is obvious that in case of public institutions, a different amount of holiday vouchers cannot be established according to the employees` seniority, as it is expressly provided that during 1st January 2009 – 31st December 2026, they are granted in amount of 1450 lei for an employee.

5. Conclusions

Far from running out the issue of the rules with regard to granting holiday vouchers and to the problems of interpretation and application of the relevant legal provisions, this study has proposed to clarify a few particular aspects occurred in the practice of the private sector employers that had the initiative to grant this type of benefits to their employees. Although the puzzling legal provisions, vague, sometimes elliptical and often contradictory, are likely to discourage employers to grant this benefit to their employees, we have to appreciate those employers that lean over such legal provisions, try to decipher them, sometimes they take the risk of some contrary interpretations from the authorities and/or the courts of law, with the aim to grant holiday vouchers, in the interest of both parties of the employment relationship, and also to encourage and support the providers of services of accommodation and meals in Romania.

References

Marcu-Șiman, C. M., & Dima, L. M. (2023). Holiday vouchers - a challenge of law facing economic crises, in *Studies and Legal Research no. 1*, www.idrept.ro .

Popescu, R.R. (2014). *Labor law*, ed. IV. Universul Juridic: Bucharest.

Ștefănescu, I. T. (2017). *Theoretical and Practical Treaty on Labor Law*, ed. IV. Universul Juridic: Bucharest.

Țop, D. (2018). Legal regime regarding the granting of vouchers to employees. *Romanian Review of Labour Law no. 5*, www.idrept.ro.

Law no. 53/2003 - Labor Code.

Emergency Government Ordinance 8/2009 (GEO 8/2009) on granting holiday vouchers Methodological Norm regarding enforcement of GEO 8/2009, approved by Government Decision 215/2009.

High Court of Casation and Justice's Decision no. 23 (2021). Preliminary Ruling (published in O. J. no. 534 of May 24, 2021).

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

NEW DEVELOPMENTS AND OLD DEBATES RELATED TO THE PROTECTION OF EMPLOYMENT IN THE EVENT OF TRANSFER OF UNDERTAKINGS. THE ROMANIAN CASE

Ana-Maria VLĂSCEANU[1]

Abstract

In view of a specific Directive adopted by the EU with the aim of ensuring the safeguarding of employees in the event of a transfer of undertaking and considering the practice of transposing such EU legal provisions into the domestic legal system, this paper puts forward an analysis of the influence the well-established national legal culture bears on such legal transposition. For doing so the paper provides firstly an overview of Directive 2001/23/EC and of the process of its legal transposition into the domestic law of an ex-communist state, namely Romania. It thus proceeds to outline how the nationally existing legal culture influences the process of domestic transposition and further explores the European implications of the incomplete and, at times, distorting approach of the Romanian legislator. Some possible solutions for mitigating the European shortcomings of Romanian TUPE Law are put forward.

The study also aims to perform an analysis of recent CJEU case-law developments regarding protection of employment in the event of transfer of undertakings, business or parts thereof. Particularly, the paper focuses on the possibility to split employment agreements in the event of a transfer of undertaking to multiple assignees.

Key words: *Transfer of undertaking; worker; employee; safeguarding of workers' rights; case-law developments.*

1. Introduction

The European convergence of national legal systems is widely recognized as a key policy area for the further development of the European Union ("EU"). It aims for a high degree of legal harmonisation in all EU Member States. One way of achieving and preserving the European legal harmonization consists in the transposition of the EU Directives, including the case law delivered Court of Justice of the EU ("CJEU") into the legal systems of the EU Member States. While this legal practice is rather well established within EU, the influence of historically varying national legal cultures on the process of European legal harmonisation may need further exploration. Particularly so when considering that

[1] **Lecturer Ph.D., University of Bucharest, Faculty of Law (Romania), email: ana-maria.vlasceanu@drept.unibuc.ro.**

the study of legal cultures, that is of historically established legal traditions and of their associated values, attitudes, mentalities and behaviours, may facilitate a better understanding of the operating national context of legal transfers and of the conditions under which some transfers may succeed while others fail (Grødeland Åse and Miller, 2015). In order to highlight how national legal culture, including the context of its historically established political and economic institutions, may bear on the European legal transfers, in what follows a case at hand is considered, namely the transposition of Directive 2001/23/EC (the Acquired Rights Directive – "ARD") regarding the safeguarding of employees' rights in the event of a transfer of undertaking into the Romanian legal system.

The transfer of undertaking ('TUPE') is a young legal institution in comparison with other institutions, as it has not yet turned half a century. However, since it was first regulated in European Union ("EU") law, in 1977[1], and until now, it has constantly expanded, in order to cope with the economic and labour market dynamics at national, regional and global level. Moreover, the legal provisions regulating the transfer of undertaking are related to some of the most important demands of labour market and economic activity, as they strive to ensure an adequate equilibrium between the freedom of enterprise and the protection of employees' rights.

At EU level, attaining this equilibrium (Prassl, 2013, pp. 434-446)[2] has proven to be a difficult, if not an impossible task. Albeit Directive 77/187/EEC was amended in 1998[3] and codified in 2001[4], the EU legislator failed to address several controversial legal issues previously raised in connection with the interpretation and application of provisions governing the safeguarding of employees' rights in the event of transfer of undertakings, businesses or parts thereof (Sargeant, 1999, pp. 70-75). Consequently, legal practitioners and scholars were left with the difficult task of finding answers to their current problems in the vast and sometimes divergent case law delivered by the Court of Justice of the European Union ("CJEU").

A case at hand is Romania (Dima, 2010, pp.152-169), which transposed Directive 2001/23/EC (the Acquired Rights Directive – "ARD") through Law no. 67/2006 regarding the protection of employees' in the event of transfers of

[1] Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ L 61, 5.3.1977, pp. 26–28

[2] For the view that the purpose of ARD is not to seek an equilibrium between the protection of employees' rights and freedom of enterprise but to safeguard employees' rights.

[3] Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses OJ L 201, 17.7.1998, p. 88–92

[4] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.3.2001, p. 16–20.

undertakings, businesses or parts thereof[1] ("Romanian TUPE Law") that came into force in 2007 (upon the accession of Romania to the European Union).

Prior to analysing the transposition of ARD into the domestic legal order, it should be borne in mind that at the core of EU labour market policy lays the Community method of legislation that usually takes the form of Directives (Barret, 2009, pp. 198-223) (an instrument binding only as to the result to be achieved, upon each Member State to which it is addressed, leaving to the national authorities the choice of form and methods[2] - Prechal, 2005; Schutze, 2012), such as ARD (For reading further over the relative value of hard and soft law in EU social policy, please see Trubeck D.M. and Trubek L. G., 2005, pp.343-364).

The transposition of directives into national legal orders poses additional problems to former communist countries, now EU members, which are still characterized by the long-lasting transition from a communist regime to a democratic one.

Their legal systems and practices have been designed and operated in that totalitarian regime which abolished the independence of the judiciary and left little room for the judges' legal interpretation. The former system of the legal culture was of a restricted type, stemming mostly from the authoritarian roots of the ruling party.

Consequently, one may hardly expect such a legacy to disappear overnight.

Furthermore, ex-communist countries joined EU rather recently (Sedelmeier, 2008, pp. 818-822) [3] and did not participate at the construction of EU. However, as a condition for membership, they were compelled to implement the complex EU acquis, without having participated at the consultation and negotiation procedures that preceded its adoption and, consequently, without always fully grasping the context in which it was adopted or its aim[4].

For instance, on one hand, the transposition of ARD into the Romanian domestic legal order, namely its scope, was bound to be contextual, due to the need of adapting the normative content of the directive to the institutional, economic and social national framework, which is historically constituted.

On the other hand, with respect to provisions instituted in view of

[1] Published in the Official Gazette of Romania no. 276 of March 28, 2006

[2] Art. 288 of the Treaty on the Functioning of the European Union OJ C 326, 26.10.2012, 47–390.

[3] Initial studies on new member states compliance with EU law revealed that "the formal compliance record of the new member states, as conveyed in the Commission's infringement statistics, is on average better rather than worse than that of the old member states even though such a conclusion could be the result of "acquired habits and routines of the accession process (…) or because of undetected noncompliance" Sedelmeier U. (2008) After conditionality: post-accession compliance with EU law in East Central Europe. ***Journal of European Public Policy***, 15 (6) 818-822.

.

safeguarding employees' rights, the Romanian legislator performed a *legal transplant* (For references regarding the legal transplants, see Legrand, 1977, p. 111; Friedman, 1985, Simon and Schuster, p. 595; Chen-Wishart, 2013, 1-30; Van Laer and Xanthaki, 2013, pp. 128-137; Jozon, 2006, 80-95), choosing to demonstrate its compliance with the Acquired Rights Directive by implementing almost *tale quale* the norms contained therein, instead of using them as a referential.

This paper aims to (i) offer a brief overview of provisions adopted by the EU in view of ensuring the safeguarding of employees in the event of a transfer of undertaking, which should have been used as referential for the process of their national transposition; (ii) analyse their transposition into the domestic law; (iii) further explore the implications of the incomplete and, at times, inadequate approach towards the transposition of ARD by the Romanian legislator and (iv) explore recent CJEU case-law developments regarding protection of employment in the event of transfer of undertakings, business or parts thereof.

2. A short overview of the Acquired Rights Directive (ARD)

2.1. The concept of transfer of undertaking

In order to better explore certain issues emerging in the process of adoption, transposition and operation of ARD into the domestic legal order, a closer look at the contents of the legal institution of transfer of undertakings and protection of employees proves beneficial.

As mentioned, Directive 77/187/EEC was the first legal act to regulate the safeguarding of employees' rights in the event of transfers of undertakings. *Illo tempore*, the Council[1] considered that the adoption of a directive in this field was necessary in order to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded.

With regard to the scope of Directive 77/187/EEC, Article 1 provided that "*it shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger."* Whereas the directive did not define concepts such as "*transfer*" or "*undertaking*", both CJEU and legal literature focused on developing a number of principles pursuant to which its *ratione materiae* scope could be outlined. *Exempli gratia*, in practice questions were raised in relation to (i) the sense that should be attributed to the concept of transfer; (ii) the sense that should be attributed to the concept of undertaking; (iii) the components of a transfer of an undertaking; (iv) the application of the Directive to the transfer of labor-intensive activities – service provision change etc.

The institutional mission of providing answers to the above-mentioned questions belonged to CJEU, which ruled that in order for a legal transaction to

[1] Council Resolution of 21 January 1974 concerning a social action programme ([1974] OJ C13/1.

fall within the concept of *"transfer of undertaking"* multiple conditions have to be met, namely (i) there must be a transfer of an undertaking, business, or part thereof; (ii) the transfer must be to another employer; (iii) there must be a transfer of an "*economic entity*"; (iv) the economic entity transferred must retain its identity (Wynn-Evans, 2012, p. 21). Also, CJEU stated that for the purpose of identifying a transfer of an undertaking, an economic entity should be construed as "*an organized grouping of persons and assets enabling an economic activity which pursues a specific objective to be exercised*[1]."

Unfortunately, a number of contradictory solutions delivered by CJEU came to the fore. *Inter alia*, they regarded areas like: (i) the application of Directive 77/187/EEC in the service sector[2], particularly when no assets are transferred from the transferor to the transferee; or (ii) the automatic transfer of employment contracts in this case (For further reading on this subject, please see McMullen, 2001, p. 397)[3].

The contradictory solutions that emerged in such areas have led to a state of uncertainty with respect to situations in which Directive 77/187/EEC applied, which the EU legislator failed to clarify when adopting Directive 98/50/EC and, subsequently, Directive 2001/23/EC.

---

[1] Francisca Sánchez Hidalgo and others v Asociación de Servicios Aser and Sociedad Cooperativa Minerva and Horst Ziemann v Ziemann Sicherheit GmbH and Horst Bohn Sicherheitsdienst. Joined cases c-173/96 and c-247/96, EU:C:1998:595.

[2] E.g.: Christel Schmidt v. Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen, Case c-392/92, EU:C:1994:134; Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice, Case c-13/95, EU:C:1997:141.

For further reading on this subject, please see McMullen J. (1996) Atypical Transfers, Atypical Workers and Atypical Employment Structures—A Case for Greater Transparency in Transfer of Employment Issues *Industrial Law Journal* (25) 4 286-307; McMullen J. (1999) Recent case. Note. TUPE - sidestepping Süzen'. *Industrial Law Journal,* (28) 4. 360-364; McMullen J. (2012) Service Provision Change Under TUPE: Not Quite What We Thought 41 *Industrial Law Journal,* (41) 4 471-478.

[3] Francisco Hernández Vidal SA v Prudencia Gómez Pérez, María Gómez Pérez and Contratas y Limpiezas SL Friedrich Santner v Hoechst AG (C-229/96), and Mercedes Gómez Montaña v Claro Sol SA and Red Nacional de Ferrocarriles Españoles (Renfe) (C-74/97), Joined cases 127/96, 229/96 and 74/97, EU:C:1998:594; Francisca Sánchez Hidalgo and Others v Asociación de Servicios Aser and Sociedad Cooperativa Minerva and Horst Ziemann v Ziemann Sicherheit GmbH and Horst Bohn Sicherheitsdienst (C-247/96), Joined cases 173/96 and 247/96, EU:C:1998:595; CLECE SA v María Socorro Martín Valor and Ayuntamiento de Cobisa, Case 463/09, EU:C:2011:24; Harry Berg and Johannes Theodorus Maria Busschers v Ivo Martin Besselsen, Joined cases c-144/87 and c-145/87 EU:C:1988:236.

In case 463/09, the ECJ held that in cases where a group of workers engaged in a joint activity on a permanent basis constitutes an economic entity, "*such an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to that task*". In our opinion, the judgment of the Court flagrantly collides with provisions contained in Directive 2001/23/EC, which regulate the automatic transfer of employment contract, and establishes a difference in treatment of employees, without pursuing a legitimate aim.

Despite all this, it is generally admitted that Directive 2001/23/EC arrived at outlining its scope with more precision, as it establishes (Article 1) that it shall apply "*to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger".* Furthermore, due to codification of CJEU's settled case law, ARD defines the concept of "transfer" [1] and provides that it shall apply *"to public and private undertakings engaged in economic activities whether or not they are operating for gain. An administrative reorganization of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive".*

Such a conclusion further derives from both **(i)** the Commission Report on Council Directive 2001/23/EC issued in 2007[2], according to which only Estonia (namely the Estonian Employers' Confederation) and Ireland argued that Article 1 of ARD should be revised because it creates legal uncertainty and court actions and (ii) the quantitative analysis of CJEU case-law concerning the scope of ARD – which revealed that out of 20 decision delivered by the CJEU (the majority referring to preliminary rulings), only eight of them concerned the scope of ARD. However, since Directive 2001/23/EC codified only some of the solutions previously rendered by CJEU, a number of problems raised in practice were not solved. This is particularly demonstrated by the considerable differences existing between those provisions comprised in domestic laws (Barrett, pp. 198-223), which implemented Directive 2001/23/EC.

2.2. The Principle of Safeguarding employees' rights

The principle of safeguarding employees' rights is enshrined in Article 3 paragraph 1 of ARD as follows: *"the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee."* Pursuant to Article 3 paragraph 3 of ARD "*the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement*". Member States may limit the period

[1] According to Article 1 para. 2 of Directive 2001/23 EC, "there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organized grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary."

[2] Commission Report on Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [SEC(2007) 812] /* COM/2007/0334 final */

for observing such terms and conditions provided that it shall not be less than one year.

Furthermore, ARD (i) provides that the transfer of the undertaking, business or parts thereof shall not in itself constitute grounds for dismissal by the transferor or the transferee (however, dismissals that may take place for economic, technical or organizational reasons entailing changes in the workforce are permitted) and (ii) it expressly states that if the contract of employment or the employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship.

Despite it constituting the primary objective of the EU provisions in the area, the principle of safeguarding employees' rights has been the least addressed by the legal scholars and CJEU, especially prior to the entry into force of Directive 98/50/EC.

For instance, it is noteworthy that since 1985, when CJEU rendered the first decision[1] in the interpretation of Directive 77/187/EEC and hitherto, the case law sintered new meanings relating to its *ratione materiae* scope, determining a continuous improvement of the concept of "transfer" [2] and a constant expansion of its scope[3], while matters concerning the safeguarding of employees' rights have been dealt with only incidentally and, usually, in a rather marginal or reductive approach. However, CJEU brought a series of useful clarifications in this field, among which we make reference to the following:

- The employment agreements transfer *ope legis*. As such, the transfer of the employment contracts cannot be subject to a potential agreement between the transferor and the transferee[4];
- The objective of ARD is to safeguard the rights and obligations of employees in force on the day of the transfer and not to protect mere expectations to rights and,

[1] Knud Wendelboe and Others v L.J. Music ApS, in liquidation, Case 19/83, EU:C:1985:54.
[2] Jozef Maria Antonius Spijkers v Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV, Case 24/85, EU:C:1986:127; Christel Schmidt v Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen, Case 392/92, previously cited; Francisca Sánchez Hidalgo and Others v. Asociación de Servicios Aser and Sociedad Cooperativa Minerva (Case 173/96), and Horst Ziemann v. Ziemann Sicherheit GmbH and Horst Bohn Sicherheitsdienst (Case 247/96), previously cited.
[3] In this respect, please see Allen v. Amalgamated Constructions Ltd, Case 234/98, EU:C:1999:594; P. Bork International A/S, in liquidation, v. Foreningen af Arbejdsledere I Danmark, acting on behalf of Birger E. Petersen, Jens E. Olsen and others v. Junckers Industrier A/S, Case 101/87, EU:C:1988:308; Landsorganisationen i Danmark for Tjenerforbundet i Danmark v. Ny Mølle Kro, Case 287/86 , EU:C:1987:573; Sophie Redmond Stichting v. Hendrikus Bartol and others, Case 29/91, EU:C:1992:220.
[4] Harry Berg and Johannes Theodorus Maria Busschers v Ivo Martin Besselsen, Joined cases 144/87 and 145/87, previously cited.

therefore, hypothetical advantages flowing from future changes to collective agreements[1];

• Given the general objective of safeguarding the rights of employees in the event of transfers of undertakings pursued by ARD, that provides for transfer to the transferee of the transferor's rights and obligations arising from a contract of employment, an employment relationship or collective agreement, the exceptions to that rule must be interpreted strictly[2].

An overview of the content of ideas promoted in legal literature (Barrett, 2005, pp. 1053-1105) also illustrates that, in what concerns the scope of the Acquired Rights Directive, the approaches are nuanced, often generating innovative solutions. However, with regard to safeguarding the employees' rights, scholars focused mostly on a literal interpretation of provisions contained in ARD, and thus proved reluctant to assume the risk of leaving the arena of uniform interpretations for embarking on those which would have been more related to concrete developments in the field and which would transcend the reference to the exact wording of ARD.

For example, legal scholars argued that (i) TUPE has a "Worzel Gummidge" effect, whereby "*the head is swapped but the body continues*"(i.e. the rights and obligations of contracting parties) (Pollard, 2005, 127); (ii) following TUPE, „*the transferor effectively sits in the shoes of the transferor, as regards the employment of the employees, including responsibilities for the past acts and omissions of the transferor*"[3].

In my opinion, the unconditional adhesion to the specified approach is not acceptable, since it overlooks both the *intuitu personae* character of employment individual agreements and the specifics of each undertaking, which stem, *inter alia*, from the way in which they are organized and function (for an investigation regarding the way in which terms and conditions of employment were altered following transfers of undertakings, please see Fang Lee and Earnshaw, Marchington, Rubery, 2004, pp. 276-294). Looking at things from this perspective, the transferee's duty to create, in relation with the transferred employees, a legal and organizational framework identical to the one existing in

[1] Hans Werhof v Freeway Traffic Systems GmbH & Co. KG, Case 499/04, EU:C:2006:168. Likewise, in a similar case (Mark Alemo-Herron and Others v Parkwood Leisure Ldt., Case 426/11, EU:C:2013:521) CJEU stated that, by virtue of the freedom to conduct a business, the transferee must be able to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity. For these reasons, ARD must be interpreted as precluding a Member State from providing, in the event of a transfer of an undertaking, that dynamic clauses referring to collective agreements negotiated and adopted after the date of transfer are enforceable against the transferee, where that transferee does not have the possibility of participating in the negotiation process of such collective agreements concluded after the date of the transfer.

[2] Serene Martin, Rohit Daby and Brian Willis v South Bank University, Case 4/01, EU:C:2003:594.

[3] Charles Wynn-Evans, 'Blackstone's Guide 81.

the transferor's undertaking resembles to an obligation which is impossible to be performed.

When considering successive EU directives in our field of concern, one may not overlook certain constant improvements. However, when compared with the vested interests of the European Commission's legislative ambitions, one may hardly ignore what Gavin Barret (Barret, p. 199) used to call lacunae in the normative content, restrictions in the scope and failures in addressing ambiguities incorporated in the text of the directive or the contradictory solutions put forward by the CJUE. Due to such shortcomings, the transposition and also the operation of such a European legislative document into the national legal systems of the EU member states have been bound to be faced with difficulties in arriving at the much hoped legal harmonization. The Romanian case is highly illustrative in this respect.

3. Reflections on the Romanian Implementation of the Acquired Rights Directive

Let us now turn to the Romanian experience regarding the transposition and implementation of the Acquired Rights Directive, in hope that at least some of the lessons learned are useful to other Member States.

The protection of employees' rights in the event of transfers of an undertaking, business or parts thereof was for the first time regulated in the Labour Code adopted in 2003, four years prior to the accession of Romania to the European Union.

The Labour Code implemented the Acquired Rights Directive only partially, providing that: (i) employees enjoy protection of their rights in the event of transfers of an undertaking, business or parts thereof to another employer; (ii) the transferor's rights and obligations arising from a contract of employment or an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee; (iii) the transfer of the undertakings, businesses or parts thereof shall not in itself constitute grounds for dismissal by the transferor or the transferee; (iv) both the transferor and the transferee are under the obligation to inform and consult the representatives of their employees with regard to the legal, economic and social implications resulting from the transfer of ownership.

The key characteristic of such legal provisions was their lacunar character, which rendered them virtually inapplicable in practice. Moreover, even though the Labour Code did not define the concept of "transfer of undertaking", it indirectly induced the idea that the principle of safeguarding employees' rights applied only in cases where a transfer of ownership had taken place from the transferor to the transferee, thus further restricting the scope of law (Duca, 2022, pp. 9-24).

In view of accurately transposing the Acquired Rights Directive, the Romanian legislator adopted Law no. 67/2006 regarding the protection of

employees' in the event of transfers of undertakings, businesses or parts thereof, a few months prior to the accession of Romania to the European Union.

Even though Romanian TUPE Law endeavored to meet the developments in the economic and labour market, the comparative analysis of provisions contained in the Acquired Rights Directive and Law no. 67/2006 reveals that the contextual effects of the adaptive transposition were much more powerful than the anticipatory ones.

3.1. The Concept of Transfer of Undertaking

Pursuant to Romanian TUPE Law (Article 4 pct. d), "*the term transfer shall be understood as transfer of ownership over an undertaking, unit or parts thereof from the transferor to the transferee, with the objective of continuing its main or ancillary activity, whether or not they are operating for gain".*

As can be noticed, Romanian Law continues to make the application of employment protection measures conditional upon the transfer of ownership over an undertaking from the transferor to the transferee, thus infringing both ARD and CJEU case law even if CJEU stated *expressis verbis*[1] that the Acquired Rights Directive shall apply wherever, in the context of contractual relations, there is a change in the legal or natural person who is responsible for carrying on the business and who incurs the obligations of an employer towards employees of the undertaking, irrespective of a change of ownership.

Furthermore, other inaccuracies in implementing the Acquired Rights Directive have led to the exclusion of numerous legal transactions from the scope of the law, that have been qualified by both Directive 2001/23/EC and the ECJ as transfers of undertaking, businesses or parts of undertakings or businesses.

Amidst these inconsistencies, I mention the following:

- The exclusion from the scope of Romanian TUPE Law the case in which the transferor is subject of insolvency proceedings which have not been instituted in view of liquidating the transferors' assets;
- Usage of concepts which have not been defined by law, such as "undertaking*";*
- Failure to expressly provide that Romanian TUPE Law is applicable in the public sector with the exception of administrative reorganization of public administrative authorities, or the transfer of administrative functions between public administrative authorities.

The incomplete transposition of the Acquired Rights Directive shows not just the lack of experience of the Romanian legislator in implementing EU legislation and assessing the implications of CJEU case law, but it affected the legal status of thousands of workers. After all, the long lasting transition to a market economy kept alive many of the values, believes and norms of the

[1] P. Bork International A/S, Case 101/87, previsouly cited.

communist past in the minds of economic operators and in the ruling institutions that regulate the governing and implementing bodies.

In such a context, legal scholars (Ținca, p. 66) ventured the idea that national judges should apply the principle of consistent interpretation, developed by the CJEU in its case law[1], and construe the national regulations in light of the Acquired Rights Directive.

Undoubtedly, interpreting Romanian TUPE Law in conformity with Directive 2001/23/EC would contribute to the accomplishment of the objective pursued by adopting the legal norms in question, i.e. ensuring adequate protection for workers. Nevertheless, in my opinion, such a legal technique cannot be applied without amounting to the delivery of *contra legem* decisions.

In this context, it seems to me worth remembering that CJEU, without offering a persuasive explanation, refused to recognize the horizontal direct effect of directives[2].

As known, this approach led to chaos in practice and controversy in the legal literature (Paul C De Búrca, 2008; Betlem, 2002, pp. 397-418; Dickson, 2011, p. 2; Edward, 1998, pp. 423-443; Craig, 2009, pp. 349-377; Prechal, 2005, pp. 481-494; Dougan, 2000, pp. 586-612; Dougan, 2007, pp. 931-963; Groussot & Minssen, 2007, pp. 385-417; Pescatore, 1983, pp. 155-177; Winter, 1972, pp. 425-438; Syrpis, 2015, pp. 461-487). For instance, it is well established that any failure to correctly transpose the Acquired Rights Directive into domestic law (i) triggers negative effects for employees; (ii) creates discriminations among them and, ultimately (iii) challenges the fundamental imperative of uniformity in the application of EU law and undermines the successful realization of the Single Market.

Even though the CJEU sought to identify suitable methods in order to mitigate some of the above-mentioned consequences[3], it did not solve the problem of incorrect transposition of directives and lead to the fragmentation of the national case law.

For instance, in the matter of safeguarding employees' rights in the event of transfers of undertakings, some domestic courts, by applying the doctrine of consistent interpretation, have expanded the scope of Romanian TUPE Law, while others have made a strict application of its provisions.

To the end of putting a stop to the above-mentioned controversies, the CJEU should recognize the direct applicability of directives and, provided their

[1] Sabine von Colson and Elisabeth Kamann vs. Land Nordrhein-Westfalen, Judgement of the Court of 10 April 1984, Case C-14/83, EU:C:1984:153.
[2] M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching), Case 152/84, EU:C:1986:84; Paola Faccini Dori v. Recreb Ltd., Case 91/92, EU:C:1994:292.
[3] Such as: (i) recognizing the direct vertical effect of directives; (ii) recognizing, in some cases, their incidental horizontal direct effect; (iii) establishing the national authorities' duty to interpret national law in accordance with EU law; (iv) the usage of general principles of law as a mean of circumventing the "*legal limits*" of the directives,

norms are precise, clear and unconditional – their direct effect – both vertical and horizontal, in cases where Member States fail to transpose or to correctly transpose a directive.

Such a solution takes into account the fact that, as a general rule, at least in European social law, directives contain provisions that require Member States to observe minimal conditions, granting them at the same time the possibility of adopting laws or regulations which are more favourable to employees or to promote or permit collective agreements or agreements between social partners more favourable to employees. Consequently, provided that mandatory provisions contained in directives are observed, Member States could benefit from a margin of appreciation when transposing them (i.e. the directives) into the national legal order. Furthermore, both the principles of subsidiarity and proportionality set out in art. 5 Para. (3) and (4) of the Treaty on the European Union (Prechal, 2005, p. 483)[1] would be observed.

However, given that the CJEU has proven reluctant to following such an approach, Romanian TUPE Law is left only with the alternative of necessarily being widely amended in order to ensure its compliance with the Acquired Rights Directive and the judgments rendered by the CJEU in this field.

3.2. The Principle of Safeguarding employees' rights

As previously mentioned, in matters related to the safeguarding of employees' rights, the Romanian legislator, with few exceptions, performed a *legal transplant* and implemented almost *tale quale* the norms contained in ARD.

Thus, it appears that the Romanian legislator forgot that the Acquired Rights Directive seeks only partial harmonization of the legislations of Member States[2].

The principle of safeguarding employees' rights is consecrated into art. 3 of Romanian TUPE Law, which provides that rights and obligations of the transferor, arising from individual or collective employment agreements in force at the date of the transfer shall be entirely transferred to the transferor *ope legis* (Article 5 of Law no. 67/2006).

3.2.1. Transfer of Rights and Obligations Arising from Collective Employment Agreements

Article 9 of the same Law regulates *expressis verbis* the obligation of the transferee to continue to observe and apply terms comprised in a collective

[1] European Union, Consolidated version of the Treaty on European Union published in the Official Journal C 326 of 26 October 2012.

[2] Grigorios Katsikas v Angelos Konstantinidis and Uwe Skreb and Günter Schroll v PCO Stauereibetrieb Paetz & Co. Nachfolger GmbH. Joined cases C-132/91, C-138/91 and C-139/91 EU:C:1992:517.

agreement in force at the date of transfer until its termination or expiry. By way of exception, the terms of such a collective agreement may only be renegotiated after one year as of the transfer date (Article 9 Para.(2) of Legea no. 67/2006).

Additionally, Romanian TUPE Law states that if, following TUPE, the undertaking does not preserve its autonomy and the collective agreement applicable at the level of the transferee is more favourable, the transferred employees shall benefit from the terms enclosed in the latter. *Per a contrario*, the collective agreement in force at the level of the transferor shall not apply, even if it contains more favourable terms, in cases where the transferred undertaking preserves its autonomy following the transfer.

Seemingly, in this case, the Romanian legislator applied the principle enshrined in Article 8 of ARD, pursuant to which Member States are entitled to introduce laws, regulations or administrative provisions which are more favourable to employees or to promote or permit collective agreements or agreements between social partners more favourable to employees. However, the EU Directive in question does not condition the applicability of the collective agreement concluded at the level of the transferor upon the preservation of autonomy by the transferred undertaking.

However, such an option is not just partially different from the directive provisions, but also gives rise to discrimination between employees transferred, as (i) some employees shall benefit only of terms contained in collective agreements concluded at the level of the transferor (provided that the undertaking preserved its autonomy), while (ii) others will be entitled to avail themselves of the more favourable terms comprised in collective agreements concluded at the level of the transferee (in cases where the undertaking does not preserve its autonomy).

3.2.2. Prohibition of Dismissals for Reasons Pertaining to the Transfer of Undertaking

Romanian TUPE Law provides that the transfer of the undertaking, business or parts thereof shall not in itself constitute grounds for dismissal by the transferor or the transferee (Article 7 of Romanian TUPE Law).

Unlike Directive 2001/23/EC, Romanian TUPE Law has refrained itself from explicitly stating that dismissals based on economic, technical or organizational reasons entailing changes in the workforce are permitted. However, the legislature's lack of diligence should not be construed as meaning that, *de lege lata*, in the event of TUPE, dismissal of employees is prohibited irrespective of the reason such a decision is founded upon. On the contrary, the employer may perform dismissals for reasons both related and not related to the employee[1].

[1]According to Article 61 of the Romanian Labour Code, *An employer may decide the dismissal for reasons related to the person of the employee in the following cases:*
a) In case of disciplinary misconduct committed by the employee;
b) When the employee has been taken into preventive custody or is under house arrest for more

3.2.3. What transfers?

According to Romanian TUPE Law (Art. 8), in cases where a contract of employment is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment. Such a provision is stipulated without offering further guidance with respect to the sense that should be attributed to the concept of "substantial change in working conditions to the detriment of the employee".

Notwithstanding that the aim of both ARD and Romanian TUPE Law is to protect employees' rights, by consecrating automatic transfer of all rights and obligations arising from individual and collective employment agreements, the above-mentioned legal provisions should not be construed in the sense that any alterations made to employment relation following the transfer of an undertaking, business or parts thereof trigger the liability of the transferee. Consequently, the key assumption is that, following the transfer of undertaking, working conditions of transferred employees cannot be identical to those which applied in the transferor's undertaking. It then comes natural that the Romanian legislator should establish criteria in view of determining *in concreto* the categories of rights and obligations that shall be transferred under TUPE.

For instance, in order to identify the rights subject to transfers, a distinction has to be drawn, depending on their content and source, which may be:
(i) The law: all statutory rights transfer to the transferee under TUPE, as they are part of the public social order[1];
(ii) Collective agreements: as a general rule, the transferor is bound to grant the rights arising from a collective agreement. However, certain rights, which are intrinsically linked to working conditions in the transferors' undertaking, should not be granted. For instance, the transferee should not be required to replicate bonus schemes and other benefit arrangements, such as profit-sharing arrangements, applicable in the transferors' undertaking, taking into account that

---

than 30 days;
c) When, by decision of the competent medical examination bodies, a physical and/or mental unfitness of the employee is found, not allowing him/her to fulfill the duties corresponding to the position held;
d) When the employee is professionally inadequate to perform its duties.
Article 65 and the following of the Romanian Labour Code regulate dismissals for reasons not related to the employee. Accordingly, Article 65 of the Labour Code provides that the employer may terminate the individual employment agreement for reasons non-incumbent to the employee (i.e. for redundancy reasons), determined by the suppression of the position held by the employee. In this case, the suppression of the position held by the employee must be effective and have a real and serious cause.

[1] For example, right to daily and weekly rest; right to annual leave; right to dignity at work; right to health and safety at work; right to access vocational training; right to information and consultation; right to participate to the establishment and improvement of the working conditions and environment; right to protection in case of dismissal etc.

certain benefits are related strictly to the activity carried out by the transferor and the criteria operated by the transferor may be irrelevant to the business of the transferee.

In such circumstances, the rights contained in collective agreements should be evaluated globally and not *ut singuli,* so that transferred employees are not placed in a worse position.

By contrast, other rights, relating to (a) period of notice; (b) minimum wage levels; (d) seniority increment; (e) time off for family emergencies etc., should be awarded.

If no collective agreement is applicable in the transferors' undertaking, the transferee shall continue to observe only the rights and obligations arising from individual employment agreements.

(iii) Individual employment agreements: as a general rule, the transferee should be required to observe terms comprised in individual employment agreements, especially those concerning essential aspects, such as the place of work, the title, grade, nature or category of work performed by employees, the length of the employees' normal working day or week, the basic amount, other component elements and the frequency of payment of the remuneration to which the employees' are entitled.

In this legal framework, several distinctions should be made in respect to optional clauses that may transfer under TUPE, depending on their content. Thus, in our opinion, some clauses (a) cannot be transferred *tale quale,* amendments being required in order for them to function properly, meanwhile others (b) cannot bind the transferee to observe their terms. For instance, restrictive covenants, such as non-competition covenants[1], which, under Romanian law, prohibit the former employee from competing with his ex-employer for a period of maximum two years, non-solicitation or non-poaching covenants, confidentiality clauses[2] or

[1] Article 21 of the Romanian Labour Code provides that upon conclusion of the individual employment agreement or during its performance, the parties may negotiate and include a non-compete clause in the contract requiring the employee, after the termination of the contract, not to perform, in his/her own interest or for a third party, an activity competing with that performed for the employer, in exchange of a monthly non-compete benefit, the employer undertakes to pay during the entire non-compete period. The non-compete clause shall produce effects only if it contains provisions regarding the activities the employee is forbidden to perform following the termination of the contract, the amount of the monthly non-compete benefit, the length of the non-compete clause, the third parties competitors of the employer, and limitations as to the geographical area. The monthly non-compete benefit owed to the employee shall be negotiated and shall amount to at least 50% of the average gross wage of the employee during the previous 6 months before the termination of the individual employment agreement or, if the duration of the individual employment agreement was less than 6 months, of the average gross wage paid to him/her during the duration of the agreement.

[2] According to Article 26 of the Romanian Labour Code, under the confidentiality clause, the parties shall agree not to disclose information they took knowlegde of during the performance of the contract, with the observance of terms laid down in rules of procedure, collective agreements or individual employment agreements.

training agreements, should be amended, with a view of tailoring them to the specifics of the business carried out by the transferee.

(iv) Internal rules of procedure: the transferee is not required to observe the internal rules of procedure existing in the transferor's undertaking, as both ARD and Romanian TUPE Law expressly provide that only rights and obligations of the transferor arising from individual and collective employment agreements are subject to transfer. The same rules apply in respect to other internal employment policies.

In a nutshell, I contend that rights and obligations subject to transfer in the event of transfer of undertakings ought to be considered globally and not *ut singuli* and that the transferee should be able to modify certain entitlements, which cannot be *cloned*, provided essential elements that shape the legal status of employees are not altered (for a similar standpoint, Wynn-Evans, 2012, pp. 87-88).

Consequently, only in cases where essential elements that shape the legal status of employees are altered to the detriment of employees, the employer should be regarded as having been responsible for termination of the contract of employment or of the employment relationship.

In the latter case, the employees shall benefit from measures of protection regulated in favour of employees dismissed for reasons based on operational requirements of the undertaking, irrespective of the legal ground upon which the termination of the employment agreement is founded.

According to legal scholars (Dima, 2010, p.9), the following situations may be circumscribed to the concept of substantial change in working conditions to the detriment of the employee: (i) employees cannot be assigned to the same job held prior to the transfer; (ii) the working conditions endanger the health or integrity of the employees; (iii) the employees are required to relocate; (iv) the level of remuneration awarded to the employee is diminished.

In this conceptual framework, it is noteworthy that substantial changes in working conditions occur particularly in cases where an undertaking, business or part thereof is transferred from the private sector to the public sector, taking into account that, as a general rule, in the public sector the legal status of employees is regulated through mandatory provisions.

Exempli gratia, pursuant to Romanian law (i.e. Article 138 of Law concerning the social dialogue), collective agreements concluded in the public sector cannot contain terms that grant employees' rights in cash and in kind, other than those provided by law. Also, in the public sector, the law sets wages in precise limits that cannot be subject of negotiations and cannot be modified by collective agreements. However, provided the law establishes wages between minimum and maximum limits, the concrete amount of the remuneration the employees are entitled to may be subject to collective bargaining, within the limits prescribed by law. *Mutatis mutandis*, the same observations can be made in respect to individual bargaining in the public sector.

Hence, in cases where an undertaking, business or part thereof is transferred from the private sector to the public sector, the principle of safeguarding employees' rights is likely to be deprived of substance in many respects, especially taking into consideration the fact the CJEU stated that "*Directive 77/187/EEC must be interpreted as not precluding in principle, in the event of a transfer of an undertaking from a legal person governed by private law to the State, the latter, as new employer, from reducing the amount of the remuneration of the employees concerned for the purpose of complying with the national rules in force for public employees."*

Last, but not least, in view of ensuring an adequate protection of employees' rights in the event of transfers of undertakings businesses or parts thereof, the Romanian legislator did not consider issues referring to:

1. Establishing criterions that enable the identification of employees who shall be transferred to the transferee, such as:

(i) The type of activity performed by the employees;
(ii) Responsibilities of employees, as mentioned in the job description;
(iii)The relative amounts of time spent in different classes of business;
(iv)The part of undertaking in which the employees perform the majority of their activities.

2. Regulating the employees' right to object to the transfer; providing that where an employee objects to his employment transferring to the transferee, the transfer operates to terminate the worker's employment agreement, lest, following the objection expressed by the worker, the transferor and the worker in question agree otherwise;
3. Determining with a high degree of accuracy the content of the transferors' notification duty, in relation to the rights and obligations that shall be transferred to the transferee.

4. Recent CJEU case-law developments regarding protection of employment in the event of transfer of undertakings, business or parts thereof.

The last of part of this study focuses on recent CJEU case law developments related to the protection of employment in the event of TUPE, as the CJEU has brought, in some cases, useful clarifications, and, in other, has taken a debatable approach in tis aim to ensure safeguarding of employees' rights (for further analysis see McMullen, 2021, 130-157*).*

4.1.Transactions falling under the scope of TUPE Rules

In case c-194/19,[1] the European Court was essentially asked to decide if a transfer related to financial instruments and transferable securities to the accounts relating to clients' intangible debt securities and other financial and ancillary services, as well as to the records, falls under the scope of TUPE rules, considering that the decision whether provision of such services was to be entrusted to the assignee rested with the clients.

The states of the case can be summarized as follows (points 11-26 of CJEU ruling in case c-194/18):

- Banka Koper entered into a transfer agreement with Alta Invest pursuant providing that the former would transfer to the latter the financial instruments and other assets that it managed for its clients, the accounts relating to its clients' intangible debt securities, other investment services and ancillary services within the all the documentation relating to investment services and activities that the former was required to keep for its clients. In addition, it was agreed that Banka Hoper would work for Alta Invest as a dependent stock-exchange intermediary.
- Banka Koper notified the clients to whom it had provided services that it would discontinue providing these services and informed them about the possibility to transfer to Alta Invest, as well as associated benefits. Also, the bank informed that failure to respond to the notification would be construed as having consented to the transfer. In addition, it appears that 91% of Banka Koper's clients actually transferred to Alta Invest.
- Later on Banka Koper adopted new rules of procedure for job planning, by which it abolished its Office for Investment Services, including its stockbroker jobs and made redundant the employees working within the Office. However, the bank offered them new positions to all these employees, but one of them decided to challenge the termination decision, arguing that TUPE rules applied to the case at hand.

The decisive criterion for establishing the existence of a transfer of an undertaking or of part of an undertaking within the meaning of that provision is the fact that the economic entity retains its identity, as indicated inter alia by the fact that its operation is actually continued or resumed and also reiterated its previous case law pertaining to the factors to be taken into account when assessing if a transactions falls under TUPE rules, as well as the degree of importance to be attached to each criterion[2]. the activity carried out in the case at hand is based essentially on manpower, and, consequently, the business envisaged to be transferred RO can function without any significant tangible or intangible assets.

[1] Jadran Dodič v Banka Koper and Alta Invest, case c-194/18, EU:C:2019:385
[2] Judgment of 9 September 2015, Ferreira da Silva e Brito and Others, C-160/14, EU:C:2015:565, paragraph 26 and the case-law cited).

Then, the CJEU argued it appears that the economic entity subject to the transfer retained its identity, considering the categories of intangible assests transferred, namely clients, the keeping of their accounts, the other financial and ancillary services, as well as the maintenance of records, namely the documentation relating to the investment services provided to clients and the investment activities carried out for them.

In relation to the transfer of clients, the Court stated that the mere fact that the clients were free to choose their service provider is not enought to exclude the transfer from the scope of TUPE rules. Thus, it is relevant that the bank offered incentives to the clients in order to persuade them to transfer their business to Alta Invest, as well as that 91% of the clients did decide to transfer to Alta Invest.

As such, CJEU decided that such a transfer could come under the scope of TUPE rules.

In my view, the CJUE decision is of paramount importance, as it bring more clarity rergaring the conditions under which TUPE can apply in similar cases, especially taking into account the number of transactions involving transfer of non-performing loans.

4.2. Concept of worker

In the case Cátia Correia Moreira[1], CJEU was called to intepret the concept of „worker", specifically if a person who has a contract for a position of trust with the transferor be regarded as an "employee".

Such a question was raised in the context where art. 2 of ARD provides that the employment protection measures enshrined therein apply to employees, as defined under the domestic legislation of Member States, wihout attributing an EU meaning to the concept of worker in this field.

The CJUE noted that pursuant to the domestic legislation, the protection affored to persons who conclude a contract for a position of trust is different rom that afforded to other employees, because in the formers' case, the law allows for the termination of employment solely through a written notification, with a short notice period.

However, CJUE stressed that art. 2 (1) (d) of ARD only requires for a person to be protected under national legislation as an employee, without considering the content of a particular type of contract.

Thus, the Court went on and concluded that, „making differences between employees relevant, depending on the content or quality of their protection under national legislation, would deprive Directive 2001/23 of part of its effectiveness."

Therefore, CJUE decided under point 51 of the Judgement that "in the light of the foregoing considerations, the answer to the first question is that Directive 2001/23, in particular Article 2(1)(d), must be interpreted as meaning

[1] Cátia Correia Moreira v Municipio de Portimao, Case c-317/18, EU:C:2019:499.

that a person who has entered into a contract for a position of trust, within the meaning of the national legislation at issue in the main proceedings, with the transferor may be regarded as an 'employee' and thus benefit from the protection which that directive affords, provided, however, that that person is protected".

4.3. Transfer of the employment agreement in the event of multiples transferees

The case concerns an employee, Mr. Govaerts, who was employed by a company, ISS, for providing cleaning and maintenance of several buildings for the city of Ghent divided into three lots. This employee was a project manager, coordinating the areas of work for the three lots.

Later on, the city of Ghent issued a call for tenders in relation to all the abovementioned lots and the tender submitted by ISS was unsuccessful. Therefore, two of the three lots were awarded to other companies, namely and Atalian Cleaning Masters NV.

ISS considered that the employment of Mr. Govaerts has automatically transferred to Atalian, given that 85% of the activity carried out by the employee were executed in relation to the lot attributed to Atalian.

In this context, CJUE was asked to rule[1] if ARD should be interpreted in the sense "that in the event of a simultaneous transfer of various parts of an undertaking, to various transferees, the rights and obligations arising from the contract of employment, as it existed at the time of transfer of a worker who was employed in each of the parts transferred, are to be transferred to each of the transferees, albeit in proportion to the extent of employment of the worker in question in the part of the undertaking acquired by each of the transferees, or is Article 3(1) to be interpreted as meaning that the aforementioned rights and obligations are to be transferred in their entirety to the transferee that acquired the part of the undertaking in which the worker in question was principally employed.

Also the Court was asked „if the provisions of the directive cannot be interpreted in any of the aforementioned ways, there is no transfer to any transferee of the rights and obligations arising from the employment contract of the aforementioned worker, which is also the case if it is not possible to determine separately the extent of the worker's employment in each of the transferred parts of the undertaking?'"

CJEU rendered in this case an interesting decision, which is expected to create much debate and difficulties in application.

Thus, CJUE, after referring to the purpose of the TUPE rules, namely safeguarding employees' right, went on to state that, despite this objective, the employers' interests cannot be completely disregarded and, as such, they cannot

[1] ISS Facility Services NV v Sonia Govaerts, Atalian NV, case C-344/18, EU:C:2020:239.

not be forced to take over a full time employment agreement even if a worker is to perform their task with that employer only part time.

In relation to the option of transferring to each of the transferees the rights and obligations arising from the contract of employment entered into with the transferor, in proportion to the tasks performed by the worker, CJEU mentioned that it is up to the national laws and courts to establish how any distribution of the contract of employment might take place, by considering aspects such as the economic value of the lots to which the worker is assigned or the time that the worker actually devotes to each lot.

Thus, CJEU ruled that "such a transfer of the rights and obligations arising from a contract of employment to each of the transferees, in proportion to the tasks performed by the worker, makes it possible, in principle, to ensure a fair balance between protection of interests of workers and protection of the interests of transferees, since the worker obtains the safeguarding of the rights arising from his or her contract of employment, while the transferees do not have imposed on them obligations that are greater than those entailed by the transfer to them of the undertaking concerned"(see point 34 of the CJEU ruling in case c-344/18).

However, CJUE ruled that "if the division of the contract of employment proves to be impossible or entails a deterioration in the working conditions and rights of the worker guaranteed by Directive 2001/23, that contract may be terminated, and the termination must be regarded, under Article 4(2) of Directive 2001/23, as the responsibility of the transferee(s), even when that termination has been initiated by the worker" (see point 37 .of judgement in case 344/18).

In our view, this ruling cannot be applied in Romania, taking into account the current normative background. Thus, the possibility to split employment following the operation of TUPE must be expressly regulated under the law, alongside the criteria based on which such a split can be made.

5. Conclusions

The legal provisions regulating the transfer of undertaking are related to some of the most important demands of an economic activity, as they aim to reconcile the freedom of enterprise and protection of employees' rights.

At EU level, achieving this goal proved to be a challenge, mainly due to divergent interests at stake and to the EU practice of legislating.

Thus, Directive 77/187/EEC and the successive ones were mostly worded in the form of a general law, a result that even though reconciled various national views and stakeholders' interests, generated chaos in practice.

Due to their level of generality, the directives in question arrived at being loaded, as Gavin Barret and others demonstrated, with ambiguities, lacunae and even failures in addressing important issues of a market economy which then and mostly now have been growingly faced with transfers of undertakings. They also failed to address controversial legal issues raised in various Member States in

connection with the safeguarding of employees' rights in the event of transfer of undertakings, businesses or parts thereof.

The problem of harmonizing the legislation of EU Member States has become a constantly lasting concern and left much room for unifying interpretation, which has been primarily entrusted to the CJEU.

In this context, the CJEU is expected to cope with the difficult task of formulating a number of guiding principles that would enable the determination of legal transactions likely to fall within the concept of "*transfer of business"* and outlined the content and limits of the protection measures set out initially by Directive 77/187/ EEC.

Notwithstanding the undeniable contribution of the successive directives in the field of interest, both the relativity of the principles and criteria used in the case law and the existence of conflicting decisions delivered by the CJEU, have led to a state of uncertainty with respect to cases in which they applied.

The EU and its member states legislation have thus arrived at being confronted, more than ever before, due to the variety of transactions parties envisage to conclude in practice, by the need of adopting a new Directive in the area of concern, in order to settle down long lasting controversies and better cope with the constant increase in the transfers of undertakings generated by the expanding market. Such a new directive may also offer national legislators and legal practitioners better chances to cope with the difficult task of finding answers to their problems in the vast and, at times, divergent case law delivered so far by the CJEU, especially in relation to labour intensive activities. This is all the more important when bearing in mind the mere fact that such an endeavour previously proved to be a challenge for many EU Member States and in particular for the Central and Eastern European countries.

The Romanian case may be regarded as a convincing proof that when history is interrupted by a long lasting dictatorship, which distorts the legal culture, the return to the core trajectory of the EU legal system needs adequate adjustments.

The transposition of the ARD into the Romanian legal system failed to consider all the directive's provisions and more often than not worded some key provisions by relying on the old legal terminology or tradition, failing to anticipate the impact such an approach would generate in practice.

Consequently, Romanian TUPE Law was presented as something either alien to the dominant traditional economic relations or not yet practical, assurance of stakeholders' legal compliance in relation to ARD being left entirely to the process of negotiation between transferors or transferees.

However, not all is lost. Given that in the past years the Romanian market economy matured, the number of transactions likely to fall under ARD increased dramatically and, in practice, efforts are made in order to ensure compliance with both its provisions and the CJEU case law.

Against this background, it is expected for the legislator to catch up with the practical developments and make the appropriate amendments to Romanian TUPE Law in view of ensuring adequate protection of employees' rights and offering solutions that meet the demands of both labour market and economic activity, especially considering the recent CJEU developments in this field, which continue to contribute to the clarification of the scope of TUPE rules.

References

Barret, G. (2009). Deploying the Classic "Community Method" in Social Policy Field: The Example of the Acquired Rights Directive. 15 *European Law Journal*, Issue 2, pp.198-223;

Barrett, G. (2005). Light acquired on acquired rights: Examining developments in employment rights on transfers of undertakings' *Common Market Law Review*, (42) 4, 1053-1105;

Betlem, G. 2002. The Doctrine of Consistent Interpretation—Managing Legal Uncertainty, 22 *Oxford Journal Of Legal Studies.* (22) 3 397-418;

Chen-Wishart, M. (2013). Legal transplant and undue influence: lost in translation or a working misunderstanding 62 *The International and Comparative Law Quarterly,* Issue 1, pp. 1-30;

Craig, P. (2009). The Legal Effect of Directives: Policy, Rules and Exceptions *European Law Review.* (34) 3. 349-377;

Dickson, J. (2011). Directives in EU Legal Systems: Whose Norms Are They Anyway? *European Law Journal* (17). 2. 190-212;

Dima, L. (2010). Protection of the employees' rights in case of transfer of undertakings, businesses or parts thereof, *The Annals of the University of Bucharest, Law Series,* 1;

Dima, L. (2010). '*'Protection of the employees' rights in case of transfer of undertaking, business or parts of undertaking or business – few issues occured when transposing and implementing the European legislation*" in conference volume The role of the European legislation in the development of the social law in Romania, 21 september 2009, C.H. Beck Press. 152-169;

Dougan, M. (2007). When worlds collide! Competing visions of the relationship between direct effect and supremacy'. *Common Market Law Review,* (44) 4. 931-963;

Dougan, M. (2000). The "disguised" Vertical Direct Effect of Directives?. *The Cambridge Law Journal* (59). 3 586-612;

Duca, V.M. (2022). Noțiunea de transfer de întreprindere în dreptul intern și în dreptul Uniunii Europene. *Law Journal* 5. 9-24;

Edward, D. (1998). *Direct Effect, the Separation of Powers and the Judicial Enforcement of Obligations'* în Scritti in onore di Guiseppe Federico

Mancini (Essays in honour of Guiseppe Federico Mancini), Dott. A. Giuffrè Editore. Volume II. 423-443;

Fang Lee, C., Earnshaw, Marchington J. M., & Rubery, J. (2004). For better and for worse: transfer of undertakings and the reshaping of employment relations' 15 *The International Journal of Human Resource Management.* (15) 2 276-294;

Friedman, L. (1985). *A History of American Law*, 2nd edn, Simon and Schuster;

Ghosheh Jr., N. S., & Gill G. (2002). Transfer of Undertakings Directive: The History of a European Union Social Policy Directive *International Journal Of Employment Studies* (10) 1 45-73

Grødeland Åse, B. & Miller, W. L. (2015). *European Legal Cultures in Transition*. Cambridge University Press;

Groussot, X., & Minssen, T. (2007). Res Judicata in the Court of Justice Case-Law,' *European Constitutional Law Review* (3) 3 385-417;

Hardy, S., & Adnett, N. (1999). Entrepreneurial Freedom versus Employee Rights-the Acquired Rights Directive and EU Social Policy Post Amsterdam 9 *Journal of European Social Policy*. (9) 2. 127-137;

Jozon, M. (2006). Why legal transplants instead of more adaptation within the process of legal approximation in the Central – Eastern European Member States of the EU and the Candidate Countries' *Romanian Journal of European Affairs*, (6) 1 80-95;

Legrand, P. (1977). The Impossibility of "Legal Transplants *Maastricht Journal of European Comparative Law.* 4. 111-124;

McMullen, J. (2001). TUPE Transfers: The Cracks Still Show. *Industrial Law Journal* (30) 4 396-400;

McMullen, J. (1996). Atypical Transfers Atypical Workers and Atypical Employment Structures—A Case for Greater Transparency in Transfer of Employment. *Industrial Law Journal.* (25) 4 286-307;

McMullen, J. (1999). Recent case. Note. TUPE - sidestepping Süzen', 28 *Industrial Law Journal. (28)* 4 360-364;

McMullen, J. (2012). Service Provision Change Under TUPE: Not Quite What We Thought 41 *Industrial Law Journal* (41) 4 471-478.

McMullen, J. (2021). Leaving a legacy: recent jurisprudence of the European Court on Transfer of Undertakings, *Industrial Law Journal*. (50) 1. 130-157*;*

Paul, C. De Búrca, G. (2008). *EU Law: Text, Cases and Materials',* Oxford University Press, Fourth Edition;

Pescatore, P. (1983). The doctrine of "Direct Effect": an Infant Disease of Community Law. *European Law Review*. (8) 3 155-177;

Pollard, P. (2005). Pensions and Tupe'. *Industrial Law Journal.* (34) 2. 127-157;

Prassl, J. (2013). Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU

Labour Law: Case C-426/11 Alemo-Herron and others v Parkwood Leisure Ltd' *Industrial Law Journal*, (42) 4 434-446;

Prechal, S. (2005). *Directives in EC law'*, Oxford University Press, 2nd edn;

Prechal, S. (2005). Adieu à la directive? **.** *European Constitutional Law Review* (1) 3 481-494;

Sargeant, M. (1999). Transfers of undertakings a new meaning. 25 *Local Government Studies.* (25) 3 70-75.

Schutze, S. (2012). *Dreptul constituțional al Uniunii Europene*. Ed. Universitară, Bucharest;

Sedelmeier, U. (2008). After conditionality: post-accession compliance with EU law in East Central Europe**.** *Journal of European Public Policy* 15. 806-825.

Syrpis, P. (2015). The Relationship between Primary and Secondary Law in the EU', *Common Market Law Review* (52) 2. 461-487;

Ştefănescu, I.T. (2006). Protecţia drepturilor salariaţilor în cazul transferului întreprinderii, al unităţii sau al unor părţi ale acestora în lumina legii nr. 67/2006, *Dreptul* 9. 9-21;

Trubeck, D.M., & Trubek, L. G. (2005). Hard and soft law in the Construction of Social Europe: the Role of the Open Method of Coordination 11 *European Law Journal.* (11) 3 343-364.

Ținca, O. **(**2013). Comentarii referitoare la încetarea contractului individual de muncă în cazul transferului întreprinderii. *Dreptul* 3 185-2011;

Ținca, O. (2013). Considerații despre contractul individual de muncă în cazul transferului întreprinderii. *Revista Română de Dreptul Muncii*. 6. 33-47;

Van Laer, C. J. P., & Xanthaki, H. (2013). Legal Transplants and Comparative Concepts: Eclecticism Defeated 34 *Statute Law Review* (34) 2 128-137;

Winter, J. A. (1972). Direct Applicability and Direct Effect. Two Distinct and Different Concepts in Community Law'. *Common Market Law Review***.** 4 425-438.

Wynn-Evans, C. (2012). *Blackstone's Guide to The New Transfer of Undertaking Legislation,* Oxford University Press.

Treaty on the Functioning of the European Union OJ C 326, 26.10.2012, 47–390

Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ L 61, 5.3.1977, pp. 26–28

Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses OJ L 201, 17.7.1998, p. 88–92

Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.3.2001, p. 16–20;

Law no. 67/2006 regarding the protection of employees' in the event of transfers of undertakings, businesses or parts thereof, published in the Official Gazette of Romania no. 276 of March 28, 2006

Francisca Sánchez Hidalgo and others v Asociación de Servicios Aser and Sociedad Cooperativa Minerva and Horst Ziemann v Ziemann Sicherheit GmbH and Horst Bohn Sicherheitsdienst. Joined cases c-173/96 and c-247/96, EU:C:1998:595.

Christel Schmidt v. Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen, Case c-392/92, EU:C:1994:134;

Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice, Case c-13/95, EU:C:1997:141

Francisco Hernández Vidal SA v Prudencia Gómez Pérez, María Gómez Pérez and Contratas y Limpiezas SL Friedrich Santner v Hoechst AG (C-229/96), and Mercedes Gómez Montaña v Claro Sol SA and Red Nacional de Ferrocarriles Españoles (Renfe) (C-74/97), Joined cases 127/96, 229/96 and 74/97, EU:C:1998:594;

Harry Berg and Johannes Theodorus Maria Busschers v Ivo Martin Besselsen, Joined cases c-144/87 and c-145/87 EU:C:1988:236

Jozef Maria Antonius Spijkers v Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV, Case 24/85, EU:C:1986:127;

Grigorios Katsikas v Angelos Konstantinidis and Uwe Skreb and Günter Schroll v PCO Stauereibetrieb Paetz & Co. Nachfolger GmbH. Joined cases C-132/91, C-138/91 and C-139/91 EU:C:1992:517

Allen v. Amalgamated Constructions Ltd, Case 234/98, EU:C:1999:594; P. Bork International A/S, in liquidation, v. Foreningen af Arbejdsledere I Danmark, acting on behalf of Birger E. Petersen, Jens E. Olsen and others v. Junckers Industrier A/S, Case 101/87, EU:C:1988:308;

Landsorganisationen i Danmark for Tjenerforbundet i Danmark v. Ny Mølle Kro, Case 287/86 , EU:C:1987:573;

Sophie Redmond Stichting v. Hendrikus Bartol and others, Case 29/91, EU:C:1992:220

Hans Werhof v Freeway Traffic Systems GmbH & Co. KG, Case 499/04, EU:C:2006:168.

Serene Martin, Rohit Daby and Brian Willis v South Bank University, Case 4/01, EU:C:2003:594

Sabine von Colson and Elisabeth Kamann vs. Land Nordrhein-Westfalen, Judgement of the Court of 10 April 1984, Case C-14/83, EU:C:1984:153.

M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching), Case 152/84, EU:C:1986:84; Paola Faccini Dori v. Recreb Ltd., Case 91/92, EU:C:1994:292

Cátia Correia Moreira v Municipio de Portimao, Case c-317/18, EU:C:2019:499

Jadran Dodič v Banka Koper and Alta Invest, case c-194/18, EU:C:2019:385

ISS Facility Services NV v Sonia Govaerts, Atalian NV, case C-344/18, EU:C:2020:239.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

A LOOK INTO THE FUTURE: HOW PREPARED ARE WE FOR THE NIS2 DIRECTIVE?

Marius CHELARU[1]

Abstract

The European Union General Data Protection Regulation had a huge impact on companies worldwide and on how companies and other processors use data. A new compliance standard that will have at least just as big of on impact is on the way, as the European Union NIS 2 Directive is set to be transposed into national legislation no later than October 2024. The aim of this directive is to establish a high common level of cybersecurity across the Union. This paper is aimed at analyzing the current status of cybersecurity law and what to expect from the NIS 2 Directive.

Key words: *cyberlaw; cybersecurity; NIS 2.*

1. Introduction

Directive 2016/1148 of the European Parliament and the Council concerning measures for a high common level of security of network and information systems across the Union (the "NIS Directive") was adopted in August 2016 with the aim to achieve a high common level of security of NIS within the European Union.

Its main provisions refer to improved cybersecurity capabilities at national level, increased cooperation at EU level and obligations for operators of essential services and digital service providers.

After review and analysis of the implementation of the NIS Directive, the European Commission proposed a new directive, which was adopted in December 2022: Directive 2022/2555 of the European Parliament and the Council on measures for a high common level of cybersecurity across the Union (the "NIS2 Directive").

NIS2 modernises the existing legal framework to keep up with increased digitisation and an evolving cybersecurity threat landscape and expands the scope of the cybersecurity rules to new sectors and entities, improving the resilience and incident response capacities of public and private entities, competent authorities and the EU as a whole.

[1] Lawyer, Managing Associate at Stoica & Asociații – Attorneys at law, Bucharest Bar (Romania), email: chelaru.marius@gmail.com.

This paper aims to ascertain how prepared public and private entities are for the changes which NIS2 brings, with a spotlight on Romania and how it transposed the initial NIS Directive.

2. Where we are

As it stands, the NIS Directive applies to two major domains (Kulesza, 2016): (i) operators of essential services and (ii) digital service providers.

2.1.Operators of essential services

Operators of essential services are public or private entities that activate in 7 specific sectors, namely energy, transport, banking, financial markets, health, drinking water and digital infrastructure, and which at the same time meets some essential criteria that qualify it as an entity of such type.

Each member state is required to identify its operators of essential services, namely the entities who operate the services in the identified critical sectors and is free to decide how the identify them based on national criteria.

Consequently, not all operators of essential services fall within the scope of the NIS Directive.

In Romania, the list of essential services was approved by Government Decision no. 963/2020[1] and the essential criteria that qualify them as an entity of such type were approved by Order of the Ministry of Communication and Informational Society no. 599/2019[2].

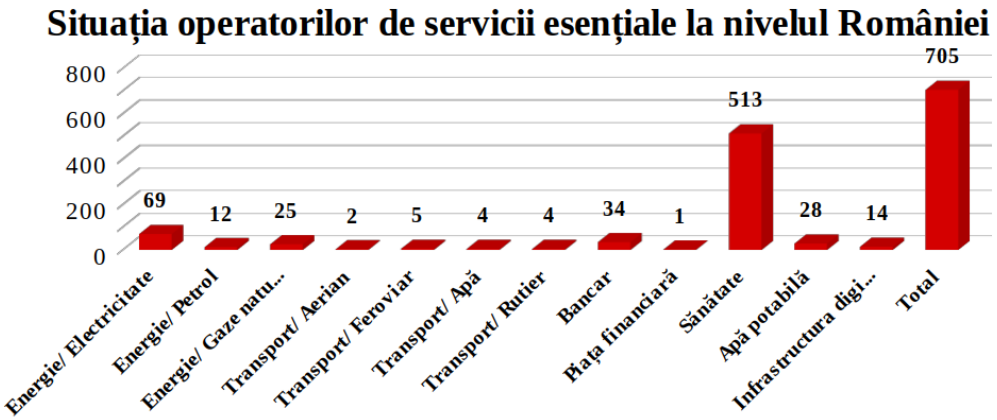
Based on such national criteria, member states must determine which individual companies meet the criteria to be operators of essential services.

In Romania, operators of essential services were required to notify CERT-RO for registration in the Registry of operators of essential services no latter than 17 December 2020. This meant that operators of essential services were required to make a self-assessment and to notify CERT-RO accordingly.

Taking into account the minimum harmonization requirement in article 3 of the NIS Directive, member states are free to adopt legislation ensuring a higher level of security or to expand the applicable domain.

As per official statistics[3], 705 operators of Essential Services were registered in Romania, based on Law no. 362/2018, most of them in healthcare, followed with a big margin by electricity and banking.

[1] Published in the Official Journal no. 1086/16.11.2020.
[2] Published in the Official Journal no. 584 din 17 iulie 2019.
[3] https://dnsc.ro/pagini/operatori-de-servicii-esentiale



According to the European Commission[1], the number of identified operators of essential services varies widely between member states, which further makes the case for the need for better harmonization of national legislation in the field of cybersecurity.

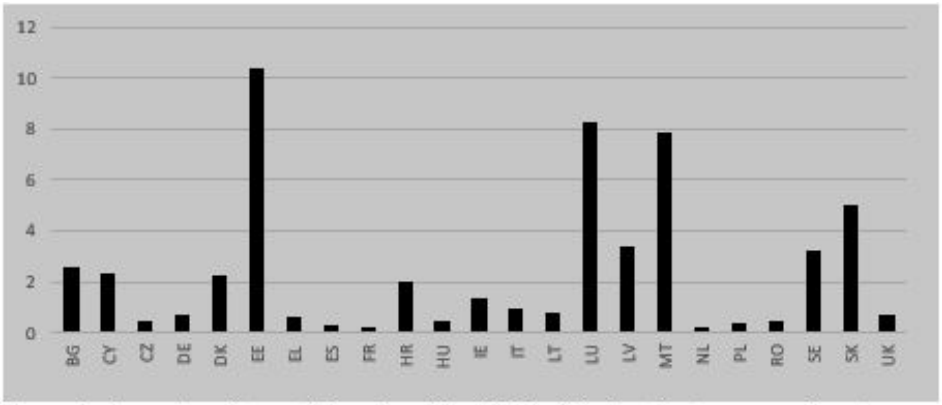


Figure 1: Operators of essential services identified by Member States across all sectors per 100 000 inhabitants[1]

2.1.1. Security requirements

The NIS Directive requires member states to ensure that operators of essential services take appropriate and proportionate technical and organizational measures to manage the risks posed to the security of network and information systems which they use in their operations. Apropriate measures shall prevent and minimise the impact of incidents affecting the security of the network and information systems used for the provision of such essential services. The goal is to ensure the continuity of those services [Article 14 paragraph (2)].

[1]https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/689333/EPRS_BRI%282021%2968 9333_EN.pdf

The security requirements themselves are deveeloped by each member state, which are, however, encouredged to follow the guidance document developed by the Cooperation Group[1].

Where a sector-specific EU legal act requires operators of essential services or digital service providers either to ensure the security of their network and information systems or to notify incidents, provided that such requirements are at least equivalent in effect to the obligations laid down in the NIS Directive, those provisions of that sector-specific Union legal act shall apply [Article 1 paragraph (7)].

It has been observed that this rule of prevalence is not without its issues, one of them being the lack of a uniform terminology in both legal instruments and the ensuing difficulty to identify what provisions have to be compared, with a focus on the scope of application (Ducuing, April 2021).

In Romania, the security requirements for operators of essential services were approved by Government Decision no. 1003/2020[2].

2.1.2. Notification of incidents

The NIS Directive requires member states to ensure that operators of essential services notify, without undue delay, incidents having a significant impact on the continuity of the essential services they provide [Article 14 paragraph (3)].

The directive also provides guidelines for determining the significance of the impact of an incident such as (i) the number of users affected by the disruption of the essential service, (ii) the duration of the incident, and (iii) the geographical spread with regard to the area affected by the incident [Article 14 paragraph (4)].

As in the case of security requirements, member states are encouredged to follow the guidance document developed by the Cooperation Group[3].

In Romania, the threshold values for establishing the significance of a disruptive effect of incidents at the level of networks and IT systems of operators of essential services were approved by Government Decision no. 976/2020[4]. This secondary legislation provisions both threshold values corresponding to intersectoral criteria (for example: incident duration and incident intensity), as well as specific sectoral criteria and threshold values corresponding to each sector and subsector of activity.

[1] https://ec.europa.eu/digital-single-market/en/nis-cooperation-group
[2] Published in the Official Journal no. 1223 din 14 decembrie 2020
[3] https://ec.europa.eu/digital-single-market/en/nis-cooperation-group
[4] Published in the Official Journal, Partea I, nr. 1089/17.11.2020.

2.1.3. Sharing of information

The objectives of the notification is for the competent authority or the CSIRT to inform the other affected member states of the incident and to provide the notifying operator of essential services with relevant information regarding the follow-up of its notification, such as information that could support the effective incident handling [Article 14 paragraph (5)] and/or to inform the public about individual incidents, where public awareness is necessary in order to prevent an incident or to deal with an ongoing incident [Article 14 paragraph (6)].

2.1.4. Case study

In June 2019, 4 Romanian Hospitals were the victims of 4 ransomware attacks within 24 hours of each other.

From a CERT-RO presentation of the attack[1], we learned how the alert chain worked in this instance:

- The alert was received through 1911 green line;
- The operator activated the chain of decision and logged the alert in the CERT-RO database;
- A cyber attack alert was issued, and the Ministry of Health was informed within 30 minutes from the alert in order to avoid the spreading of attacks;
- CERT-RO then issued a public alert, making the public, private institutions, and the population aware of the attack, with recommendations to avoid actions that could spread the infection;
- 2 hours form the first reporting of the attack, the alert became a news in Romania, being posted on all public and private mass media;
- The very next day, CERT-RO held a press conference, explaining the first conclusions;
- In parallel, CERT-RO cooperated with Cyberint (internal intelligence structure) and police, in order to asses possible influences of attack on national security. No such kind of influences were revealed.

2.2. Digital service providers

Digital service providers include any legal person that provides a digital service that is provisioned by the NIS Directive, namely (i) online marketplace, (ii) online search engine and (iii) cloud computing service.

Once again, given the minimum harmonization requirement in article 3 of the NIS Directive, member states are free to expand the applicable domain.

[1] https://rm.coe.int/ws3-1-cert-ro-prezentare-strasbourg/168098f69e

In Romania, the criteria to identify digital service providers were approved by the same Order of the Ministry of Communication and Informational Society no. 599/2019 which applies to operators of essential services.

Online marketplace is defined as a digital service that allows consumers and/or merchants to enter into online sales with merchants or to conclude service contracts, either on the website of the online market or on the website of a trader using IT services provided by the online market (for example Amazon, eBay, their Romanian equivalent - eMag, etc.).

Online search engines are defined as a digital service that allows users to search, in principle in all internet sites or in internet sites in a certain language on the basis of a query on any subject in the form of a word, phrase or other key information and that returns links where information related to the content can be found (for example Google, Bing, etc.).

Cloud computing services are defined as a digital service that allows access to a configurable system of IT resources or services that can be pooled (for example iCloud, Google Cloud, etc.).

In this instance, different form the essential services providers, the NIS Directive does not require member states to identify digital service providers.

Given the potentially global reach of a digital service provider, the NIS Directive provisions that jurisdiction is establsihed in the member state in which the digital service provider has its main establishment [Article 18 para(1)]. A digital service provider that is not established in the EU, but offers services within the EU, shall designate a representative in the EU against whom legal action can be initiated.

2.2.1. Security requirements

The NIS Directive requires member states to ensure that digital service providers identify and take appropriate and proportionate technical and organizational measures to manage the risks posed to the security of network and information systems which they use in the context of offering their services (online marketplace, online search engine or cloud computing service) [Article 16 paragraph (1)].

Such measures should take into account (i) the security of systems and facilities; (ii) incident handling; (iii) business continuity management; (iv) monitoring, auditing and testing; and (v) compliance with international standards.

As with essential services, the goals are to prevent and minimize the impact of incidents and to ensure the continuity of the services. [Article 16 paragraph (2)].

2.2.2. Notification of incidents

The NIS Directive requires member states to ensure that digital service providers notify the competent authority or the CSIRT without undue delay of any

incident having a substantial impact on the provision of their services (online marketplace, online search engine or cloud computing service).

Different from the case of essential services operators, the obligation to notify an incident by a digital service provider shall only apply where the digital service provider has access to the information needed to assess the impact of an incident against the provisioned parameters [Article 16 paragraph (4)].

It has been observed that the softer approach towards digital service providers is mainly based on the different nature of the infrastructures they use as well as of the services they provide (Markopoulou, Papakonstantinou, & de Hert, 2019).

2.2.3. Case study

In December 2020, an alert for a phishing fraud/scam attempt on marketplace platforms (OLX, Publi24, LaJumatate.ro) was issued by CERT-RO[1].

In this case, the attack did not regard the market platforms themselves, but the individual clients of such platforms so the main objective of CERT-RO was to inform the public about the fraud/scam and to make recommendations for avoiding scammers.

2.3. National Strategies

Each member state is required to adopt a national framework in order to comply with the provisions of the NIS Directive [Article 7 paragraph (1)].

The first issue the national strategy should tackle is to set out the objectives and priorities on the security of network and information systems. These objectives are different for each member state, depending on local requirements. In any case, member states may turn to ENISA for advice and assistance when developing their national strategies.

The second issue to tackle is to create a governance framework to achieve the objectives and priorities of the national strategy on the security of network and information systems, including roles and responsibilities of the government bodies and the other relevant actors.

The third issue required to be addressed by the national strategy is the identification of measures relating to preparedness, response and recovery, including cooperation between the public and private sectors.

The forth issue is an indication of the education, awareness-raising and training programs relating to the national strategy on the security of network and information systems.

[1] https://dnsc.ro/citeste/alerta-tentativa-de-frauda-olx

The fifth requirement is an indication of the research and development plans relating to the national strategy on the security of network and information systems.

The sixth issue to be taken into account is a risk assessment plan to identify risks.

And the seventh and last issue to be included in the national strategy is a list of the various actors involved in the implementation of the national strategy on the security of network and information systems.

Romania's national cybersecurity strategy was adopted by Government Decision no. 1321/2021[1] and sets out the following objectives: (i) Secure and resilient IT networks and systems; (ii) Strengthened regulatory and institutional framework; (iii) Pragmatic public-private partnership; (iv) Resilience through proactive approach and deterrence; and (v) Romania - relevant actor in the international cooperation architecture.

Notably, regarding the last objective of the national strategy, Romania won the bid to host the European Cybersecurity Competence Center – a EU research hub.

2.4. National Authorities

Member states are required to designate one or more national competent authorities on the security of network and information systems (competent authority) and to designate a national single point of contact on the security of network and information systems (single point of contact) to exercise a liaison function to ensure cross-border cooperation of member state authorities and with the relevant authorities in other member sates and with the Cooperation Group and the CSIRTs network. [Article 7 paragraphs (1) and (3)]

Member states are also required to designate one or more Computer security incident response teams (CSIRTs).

Romania has designated DNSC (Directoratul Național de Securitate Cibernetică) as the national cyber security and incident response team.

3. Where we are heading

Following an analysis by the European Commission of the impact and the deficiencies of the NIS Directive, it identified the following main issues[2]: (i) insufficient level of cyber resilience of businesses operating in the EU; (ii) inconsistent resilience across member states and sectors; (iii) insufficient common understanding of the main threats and challenges among member states and (iv) lack of joint crisis response.

[1] Published in Official Journal no. 2/3 January 2022.

[2]https://digital-strategy.ec.europa.eu/en/faqs/directive-measures-high-common-level-cybersecurity-across-union-nis2-directive

Therefore, the NIS2 Directive was adopted with the aim to boost the overall level of cybersecurity in the EU, in order to contribute to the overall functioning of the internal market.

3.1. Broader domain

We presented earlier that the NIS Directive applies to (i) operators of essential services (energy, transport, banking, financial markets, health, drinking water and digital infrastructure) and (ii) digital service providers (online marketplace, online search engine and cloud computing service).

NIS2 Directive significantly expands the scope of sectors and introduces a size threshold to define which entities fall in its scope and would be required to report significant cybersecurity incidents to the national competent authorities.

The result is that all medium and large-sized companies in selected sectors will be included in the scope.

Under NIS2, the scope will be divided into (i) essential entities (sectors of high criticality) and (ii) important entities (other critical sectors), which will be differentiated according to the criticality of the associated sectors, eliminating the distinction between operators of essential services and digital service providers.

Sectors of high criticality will be (i) energy, (ii) transport, (iii) banking, (iv) financial markets, (v) health, (vi) drinking water, (vii) wastewater, (viii) digital infrastructure, (ix) ICT service management, (x) public administration, (xi) space.

Less critical sectors will be (i) postal and courier services, (ii) waste management, (iii) manufacture, production, and distribution of chemicals, (iv) production, processing, and distribution of food, (v) manufacturing, (vi) digital providers and (vii) research.

Companies and operators will be responsible for designating themselves as essential entities or important entities.

3.2. Uniform security requirements

We presented earlier that security requirements are established by each member state.

NIS2 Directive more strictly provisions security and reporting requirements for companies by imposing a risk management approach and a minimum list of basic security elements that have to be applied.

More precisely, NIS2 includes a list of 10 key elements that all companies have to address or implement as part of the measures they take: (i) policies on risk analysis and information system security, (ii) incident handling, (iii) business continuity, such as backup management and disaster recovery, and crisis management, (iv) supply chain security, including security-related aspects concerning the relationships between each entity and its direct suppliers or service

providers, (v) security in network and information systems acquisition, development and maintenance, including vulnerability handling and disclosure, (vi) policies and procedures to assess the effectiveness of cybersecurity risk-management measures, (vii) basic cyber hygiene practices and cybersecurity training, (viii) policies and procedures regarding the use of cryptography and, where appropriate, encryption, (ix) human resources security, access control policies and asset management, and (x) the use of multi-factor authentication or continuous authentication solutions, secured voice, video and text communications and secured emergency communication systems within the entity, where appropriate.

3.3. Stricter incident reporting

We presented earlier that, under the NIS Directive, operators of essential services are required to only notify incidents of certain threshold and that digital service providers may be exempt from notifying incidents altogether if it does not have access to the information needed to assess the impact of an incident.

NIS2 Directive introduces more precise provisions on the process for incident reporting, content of the reports and timelines.

As a result, all incidents of cybersecurity breaches will have to be reported, whether or not the attack had any implications for the entity's operations or not.

Affected companies have 24 hours from when they first become aware of an incident to submit an early warning to the CSIRT or competent national authority which would also allow them to seek assistance (guidance or operational advice on the implementation of possible mitigation measures) if they request it. The early warning should be followed by an incident notification within the 72 hours of becoming aware of the incident and a final report no later than one month later.

3.4. Improved cooperation

We saw that under the NIS Directive, the goal for incident notification requirements is to inform the other member states of the incidents so as to build resilience to cybersecurity threats.

NIS2 takes it one step further, and allows allowing member states to act jointly and tackle emerging security risks posed by the ongoing digital transformation.

3.5. Stricter enforcement

For companies that fail to cooperate or contravene the regulations, the NIS2 Directive has also introduced revised sanctions. In the event of a security

incident and a refusal to cooperate with the authorities, NIS2 provides states with a right of injunction. Companies will therefore be forced to comply with the State's request, and may be subject to fines of between 1.4% and 2% of turnover.

Furthermore, there is personal and potential criminal liability for individuals at board level if they fail to comply with their obligations under the directive.

4. Conclusions

The NIS Directive was the first EU horizontal internal market instrument aimed at improving the resilience of network and information systems against cybersecurity risks and was aimed at operators of essential services and at major digital service providers.

The NIS Directive cultivated a culture of cybersecurity in these entities and assured that member states put into place cybersecurity legislation and authorities in order to create resilience against cybersecurity threats.

The NIS2 Directive greatly extends the scope of entities which are required to implement cybersecurity measures in their organization and introduces cybersecurity audit requirements.

It is safe to say that entities which were targeted by the NIS Directive should be prepared for NIS2, being already familiar with cybersecurity requirements.

For the other entities, which were not targeted under the NIS Directive, but fall under NIS2, the new requirements imposed upon them may prove problematic because of lack of awareness and of cybersecurity resources, which are rather scarce.

It falls on to the competent national authority to raise awareness of what's expected from them and to individual entities to prepare in advance for compliance.

References

Ducuing, Charlotte. (April 2021). Understanding the rule of prevalence in the NIS directive: C-ITS as a case study. *Computer Law & Security Review, Volume 40*. 105514.

Kulesza, Joanna. (2016). *Cybersecurity and human rights in the age of cyberveilance*, Rowman & Littlefield.

Markopoulou, Dimitra, Papakonstantinou, Vagelis, & de Hert, Paul. (November 2019). The new EU cybersecurity framework: The NIS Directive, ENISA's role and the General Data Protection Regulation, *Computer Law & Security Review, Volume 35, Issue 6*, 105336.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

TURN OF AN ERA

Heribert Franz KOECK[1]

Abstract

The present war in Europe caused by Russian aggression against Ukraine in early 2022 has turned out to become a fight between a totalitarian systemwith disregard of human rights and its sympathizers world-wide anda pluralistic system based on democracy and the respect for, comprising the protection of, human rights. Wladimir Putin has declared the latter system to be outdated and demands a new world order in which Russia should have a decisive say.

Since presently Russia is not ready to reverse its course and ambitions, no just peace for Ukraineis feasible. Ifthe aggressor does not step down, the conflict might lead to a Third World War.

Under these circumstances, not a few people would be ready to surrender to the unjust aggressor in order to preserve their naked lives. This, however, runs counter to the truth that the reason of life must not be sacrificed for a life without reason. Moreover, such a sacrifice cannot be imposed by the one upon the other; therefore, the (only!) justification of a state's existence is the preservation of the common good, including peace and freedom, according to the idea of individual or collective self-defense. If the state fails to live up to this obligation, everyone has the right to resistance, even in its active form. Resistance is justified even against decisions adopted by a democratically legitimized majority, because democracy is not an end in itself; it is but a tool for establishing and protecting the common good. If the tool turns useless, it has to be substituted by other more expedient means. Presently, it is not possible to predict the outcome of this epochal struggle with any certainty. We can only pray to God that the worst scenario will not materialize.

Key words: *aggression; common good; defaitism; democracy; free world; human rights; pluralism; right to resistance; Russia ; Third World War; totalitarianism ; Ukraine ; the West.*

Preliminary remarks

It is to my great dismay that my present state of health does not allow me to attend in person the Fifteenth International Scientific Conference on History, Culture and Citizenship in the European Union which is held in Piteşti on 26 May 2023, organized by the Center of Legal and Administrative Studies under its director Ph.D. Lecturer Amelia Gheoculescu. Since I have so far attended all of the former Conferences, I would have been happy to come toPiteştialso in this year. This all the truer for the fact that the Conference of 2023 is dedicated to the memory of Professor Eugen Chelaru who has for many years served the

[1] **Professor Ph.D. DDr.h.c., M.C.L., Universität Johannes Kepler Linz (Austria), email: heribert.koeck@gmx.at.**

University of Pitești as Dean of the Faculty of Economic Sciences and Law and has earned particular merits as the long-term organizer of the consecutive Conferences.

Not only has the decease of Eugen Chelaru been a great loss to the Romanian and international scientific community, with him there has passed away a dear friend cherished by all participants of the International Conference who have repeatedly come from many regions of Europe in order to take part is this academic forum. I would have loved to personally pay my respect to his memory by my presence at this year's Conference. Since I am unfortunately unable to do so, I hope that my small written contribution set out below will be kindly received into the transactions of this FifteenthInternational Scientific Conference as a sign of my high academic respect and personal attachment.Eugen Chelaru will always be included in my prayers, together with his family and his academic colleagues.

* * *

Turn of an Era

More recently the idea has been propounded, in many theological and also some secular publications, that we are on the verge of a turn of an era similar to those which former generations have experienced in times of the migration of peoples that brought about an end of antiquity and the dawn of the Middle Ages, later on in the decline of medieval universalism symbolized by the HolyRoman Emperor and the Roman Pope, than in reformation and the Thirty Years' War, in enlightenment and the French revolution, and in the twentieth century by the First World War and the Russian October revolution, by the Second World War, followed by the failure of the international community'endeavor to establish a just international peace and economic order as well as by the ensuing nuclear armament race.

Our hope for a peaceful world, nourished by the political turn in Eastern Europe in 1989 and the break-up of the Soviet Union in 1991, should have already turned out to be fallacious as early as in the very year of 1989 by the Tian'anmen massacre in Peking, because you cannot trust, on the international level, any state which on the national level suppresses its own people and has no respect for human rights.

Since then, the conflict between the two big ideological camps – the totalitarian great powers China and Russia with their satellites, on the one hand, and the pluralist states with their free and democratic order and the protection of human rights (often summarily called "the West"), on the other – has come to a dramatic political point of culmination and of military escalation. Russian leader Wladimir Putin has openly declared the liberal social order of the West to be outdated and has called for a new World order in which Russia shouldplay a leading role. What earlier might have mollifyingly been characterized as political

rhetoric for domestic use can only be regarded, after Russian aggression against Ukraine, a declaration of war against the free world.

As long as official Russia adheres to this policy of Putin, there is – as far as it is humanly possible to judge – no basis for a just peace in Ukraine. Quite the contrary, there is reason to fear that Putin will involve additional countries in the war, as he already has done with Byelorussia and threatened to do with Moldavia on the pretext to have to protect Russian people in Transnistria. In addition, he will be kindling fires in other parts of the world and/or in Europe, especially in the relationship between Serbia and the Kosovo or between Serbia and Montenegro.

Should, however, Ukraine or the West, for the sake of "dear peace and quiet", succumb to a foul peace, this would but offer a short shrift until the next war under conditions more favorable for the aggressor and more unfavorable for the free world.

From an unvarnished perspective of world politics, we are steering towards a Third World War; and if it should be fought out with weapons of mass destruction, there is no telling whatthe time after would be like. How will man – if he still exists – deal with his fellow men? The range extends from Rousseau's optimistic *l'hommeest bon* to Hobbes' pessimistic *homo homini lupus.*

It is understandable that people (some? many?) will tend to the view that such a war has to be avoided whatever the cost. Few of them, however, give an account to themselves of what these costs would really amount to.The only costs in their reckoning are those of the risen prices of petrol and gas in the wake of the war in the Ukraine. Therefore, many of them bewail the commitment of the West and its support for the victim of Russian aggression and are all too ready to bury their heads in the sand as regards the consequences of a Russian success. The answer to the question of whether they would rather live in a free Ukraine or in a totalitarian Russia is likely to be evasive, relying on the illusionary hope "that things won't get so bad after all". The nostalgic feelings of quite a few people for what has been the German Democratic Republic in present-day newly-formed states of the Federal Republic of Germany bear witness to the fact that many peoples are content with a mere living and do not aspire to higher values. It is more than doubtful that they would be willing to subscribe to the proposition *non opportet propter vitamrationemperdere vitae*– one should not, in order to save one's life, lose the very purpose of life.

This opens up the present dilemma between the demands of the common good and democracy. What, if the majority is not prepared to stand up for the three specific goods which make up the *bonum commune*, the common good in its entirety, namely peace, freedom, and welfare? As the common good is the *raison d'être* of each political entity, be it the state, a supranational organization or the international community as a whole, each of us, acting alone or together with others, has the residual right to resistance. On the political level, the government objectively has the right to make the decisions necessary for the preservation of the common good, defending, as the case will be, peace, freedom, and welfare

even in the face of an unwilling democratic majority. And should the government, on its part, fail to take the necessary measures, it may be overthrown by those, who subjectively are willing and able to rally the necessary support.

These considerations are not new but constitute the core of the traditional doctrine of the common good. What may be new, however, is the case that the common good is not endangered by the proverbial tyrant or a tyrannical groupbut by the (or a majority of the) people in whose favor the concept of the common good has been devised. In such a case, there is a right of the minority to resist the majority. Democracy is a valuable tool in political life, but if this tool is abused to the detriment of the common good we may stand up against such abuse.

Persons who decide to do somay run a risk similar to that dissenters had and have to face under oppressive regimes, as in the former communist states and in present-day Russia and China. But such a risk is inevitable, because a political majority gone wild will hardly recognize that it has done so. Of course, nobody can be urged to become a martyr; but the martyrs of today will sooner or later be the saints of tomorrow.

Conclusions

Let me conclude with a historical-philosophical post-script. While we perceive former turns of an era in intervals of millennia or at least of centuries, their makings of appearance seem to have accelerated in the meantime. This might have to do with the acceleration of the development since the beginning of the industrial revolution and with the increased perception of this process in the era of information. But it could also be the consequence of an overestimation of processes and phenomena which take place within – in historic comparison – relatively short spans of human live and which are subjectively attributed greater significance than they objectively deserve.

If I rest my perspective on this understanding than it is probably exaggerated to assume, for the twentieth century, two turns of an era each of which has been triggered by a World War and has been reflected in developments caused by it. From this perspective, one may be induced to say that the destiny of our time is – or at least seems to be – to bring this entire era, from the outbreak of World War I to the final outcome of Russia's aggression against Ukraine to its end. Under which heading this turn of an era will figure in the future will depend on this outcome which cannot be predicted with any certainty by the philosopher of history, because he is similar to the owl of Minerva which takes flight only when the day is far spent.

From Franz Grillparzer (classical Austrian poet who lived from 1791 to 1872) derives the following statement: "The path of modern education leads from humanity through nationality to bestiality". That it is possible for man to sink to such a level we are taught by recent history. *Quod Deus avertat… – which God forbid…*

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

THE DEVELOPING PROBLEMS OF SUCCESSION OF DIGITAL WEALTH ON THE GROUNDS OF EUGEN CHELARU'S CONCEPT OF PERSONALITY RIGHTS

Mariusz ZAŁUCKI [1]

Abstract

Issues related to the presence of the individual in the digital world appear to elude traditional legal concepts, especially in the area of civil law. However, the transformation from the analogue world to the digital world, for many products and services, has become a reality. We leave behind a "digital footprint", which often has an economic value, becoming a component of our wealth. Digital wealth is, however, a sphere that raises some questions. An example from the digital world, which is present in virtually every household, is, for example, the e-mail service, which has changed the way we correspond with the world. Given that e-mail often serves an individual's economic interest, there are increasing claims about the property nature of this type of our on-line presence (digital good). There are, in fact, many other examples of various digital goods which serve an economical interest. Taking the property nature of such goods as a starting point, one wonders whether it is possible to trade involving these goods, both inter vivos and mortis causa. Mechanisms known from civil law, in some aspects, interfere with free and unlimited circulation of these goods. Indeed, since e-mail serves the purpose of communication, it must be related to, among other things, the privacy of the author of the e-mail content and his communication partner, or the secrecy of correspondence. However, the potential conflict of values between property rights and personality rights, for the further development of private law, should find an appropriate solution. Such a possible solution is worth considering in the light of Professor Eugen Chelaru's concept of personality rights, who recognised the broad context in which legal constructions for the protection of these rights operate and the consequences of it. This will be the subject of the presentation, which will locate the benefits of new technologies in the traditional legal thought of which Prof. Chelaru was an author. In turn, the purpose of the presentation is to point out existing uncertainties relating primarily to mortis causa circulation and to seek further possible developments in the law within this field.

Key words: *digital assets; digital content; digital wealth; digital goods; digital services; products; inheritance; succession.*

[1] **Professor of Law and the Head of the Institute of Private Law at AFM Krakow University (Poland), mzalucki@afm.edu.pl, ORCID: 0000-0002-3338-3832.** **The article is part of a research project funded by the National Science Centre (Poland), agreement No. UMO-2018/31/B/HS5/01061.**

1. Introduction

Professor Eugen Chelaru was concerned with various aspects of civil law. His considerations were not only of a domestic nature. In his works he often used the legal-comparative method. He presented foreign legal systems and considered the possible implementation of certain solutions into Romanian law (Chelaru & Duminică, 2017, pp. 7-23), while thinking about the idea of legal uniformity on a European scale.[1] His activity was largely concerned with issues related to the recodification of civil law in Romania, including referring to proposed and implemented changes (Baias, Chelaru & Macovei (eds.), 2014).

One such area of his activity was personality rights issues, which he dealt with, among other things, in the context of the adequacy of the new solution adopted in Romania to the prevailing European standards in this regard. It was ten years ago when Professor Chelaru published the text "*The personality rights. The European regulation and the Romanian one*" (Chelaru, 2013, pp. 5–27). The issues raised there and the theses contained in his other contributions (Chelaru, 2014; Chelaru, 2011, pp. 30-62) seem to be interesting in the context of the technological changes that have taken place over the years (Naseh, 2016).

Indeed, the last decade has seen the intensive development of new technologies, a development that raises many interesting research issues (Yeung, 2019, pp. 207–239). One of these is the issue of the circulation of digital goods, our digital wealth, the digital footprint we leave on the Internet (Molins, [in:] Amayuelas & Lapuente (eds.), 2017). In this respect, the legal status of digital assets is the subject of debate, in the context of the possibility of exchange of such assets, both *inter vivos* and (perhaps above all) *mortis causa* (Załucki, in *Istorie, Cultura, Cetatenie in Uniunea Europeana,* 2021). The arguments raised in various countries against such trading are precisely those based on the concept of personality rights (Banta, 2016, pp. 928) as a starting point (obstacle) (Kubis & al., 2019). Thus, looking at the concept of personality rights, one may wonder whether it really stands in the way of the circulation of digital goods, especially *mortis causa* (Berti & Zanetti, 2016, pp. 1–25), i.e. when the subject of personality rights is no longer among the living.

These issues will be the purpose of my contribution, of course in the context of what Professor Eugen Chelaru has written. An examination of this Scholar's thoughts may prove relevant to the further search for a solution to the outlined problem of the circulation of digital goods, including as regards the answer to the question of succession of digital wealth. It is therefore worth looking into some of his thoughts.

[1] In this way, Professor Chelaru has built up legal sciences, organised international conferences at which foreign scientists made numerous presentations. A number of these presentations were published in the pages of *Istorie, Cultura, Cetatenie in Uniunea Europeana* (European Union's History, Culture and Citizenship).

2. Changes to the law over the last decade

Changes in the law over the last few years are something to which we have become accustomed (Tatar, Gokce & Nussbaum, 2020, p. 1). The instability of the law is, of course, a constitutional challenge, as are the standards of good legislation, where the constitutional courts of many states have repeatedly ruled on changes made by individual legislators. However, changes in the law are a fact of life, and the factors causing them are many (Hassan & De Filippi, 2017, p. 80).

Looking at the lives of individuals over the last decade, at least from the point of view of European countries, it is safe to say that a digital transformation has taken place (Merhi, 2022). Basically every household nowadays has a computer, the vast majority of the population uses the Internet, which is linked, among other things, to the fact that various kinds of goods and services are offered via this medium. While some time ago we were still shy with digital instruments, today this is already a standard. We are present in the virtual world on a large scale (Cámara Lapuente & Arroyo i Amayuelas (eds.), 2020).

The reality is, therefore, that part of human life has moved from the analogue world, to the digital world (Barfield, 2006, p. 649). We rarely use traditional cameras today, for example, because we usually take photos with our smartphones and at the same time we do not develop them in the traditional way, but save them in the cloud, sometimes also creating digital albums. The same is true of music, we buy CDs or DVDs less and less, and we also use music via on-line services, where we create our virtual collections (Szulewski, 2015, pp. 731–749). We communicate with the world through various types of instant messaging, not to mention the widely and extensively used social networks. We no longer write letters but send e-mails (Harbinja, 2016, pp. 227–255). A large part of our life activity also involves computer games, which we of course usually play on-line. Thereby, providers of all kinds of products and services have moved into the world of the Internet, becoming Internet service providers, offering services via the Internet (Savelyev, 2017, p. 116). In order to use most of these services, it is first necessary to register virtually and create an appropriate virtual account (Załucki, in print, *passim*). For many on-line services, universal accounts such as those provided by Google, Microsoft or Meta (formerly Facebook) are sufficient. It is therefore impossible to say that life and the needs associated with it are exactly the same today as they were without the Internet or when it was still in its infancy. Currently our daily activities leave a "digital footprint" (Varnado, 2014, pp. 719–775). We create, acquire, obtain the right to use or access digital goods or content, use digital services for various purposes, often also pursuing our economic interests in this way.

Significant changes in this area are also linked to the pandemic period (E.K. Johnson & P.F. Johnson, 2020, pp. 1–9). At that time, a number of services, including public services, were offered via the Internet. Even the courts and units of public administration began to use and offer on-line services on a large scale

(Klich, 2021). This will certainly remain the case (Engstrom, 2020, p. 246); we will increase our presence in the virtual world at the expense of the analogue world. We will multiply our digital wealth.

This area, however, raises a number of questions. Analysing the current legal solutions, one gets the impression that the law has not kept pace with the virtual world. For example, the vast majority of legislators, including Poland and Romania, do not have a specific regulation of these matters. Maybe it is because what we encounter on the Internet, the trail we leave behind, is a phenomenon that has not yet been uniformly defined (for legal purposes). If one looks at the various statements made against this background, one can see a number of divergent and heterogeneous elements, referred to as "digital goods" (Edwards & Harbinja, 2013, p. 2), "digital content" (Matanovac Vučković & Kanceljak, 2019, p. 724), "digital assets" (Banta, 2019, p. 1699), "digital services", "digital products", or otherwise (Herzog, 2018, pp. 471–481; Magnani, 2014, p. 1281). The conceptual scope of all these terms is not precise. In the current normative state of many countries, there is basically no definition of these terms (which, however, is not necessarily flawed). Significant divergences in their meaning also occur in practice. Legislators are not keeping up. Nevertheless, at least from the perspective of some legal orders, attempts are being made to regulate at least part of this area (Załucki, in print).

3. Regulatory problems of digital wealth

One of the most frequently discussed digital wealth issues is the problem of the legal status of the "digital footprint" left behind by a deceased individual on-line (Otero Crespo, 2019). There is no doubt that our entire on-line presence has economic consequences (Załucki, [in:] Veiga, de Brito, & Pierdoná (eds.), 2021). For this reason, according to many, in the case of, for example, the aforementioned e-mails (Janssen, 2017, p. 697), the use of Internet services realises not only personal interests, but also property (economical) interests (Załucki, 2020, p. 53).

Against this background, certain conflicts of values become apparent, particularly those between rights of a personal nature and rights of a property nature (Ginebra Molins, 2020, pp. 908-929). Indeed, an individual, when using the Internet, in his or her on-line account, has access to many goods and services in a digital form (Beyer, 2015). With his or her death, a dilemma arises as to the status of these digital goods, our digital wealth. Is it hereditary in nature, or is it closely linked to the deceased user? In this area so far - globally - no consensus has been reached (Ginebra Molins, 2020, pp. 908-929).

There are concepts that imply the hereditary and property nature of the wealth we leave behind on-line. It is also pointed out that the personal rights of the deceased user and his or her communication partners must be protected. Among the emerging concepts mention is made of the need to pay attention to the

right to privacy, the protection of correspondence secrecy or the protection of personal data.[1] The latest legislative trend is to leave the relevant decision in this regard to the user, who must express his or her will *ante mortem*.[2]

Generally speaking, at least two approaches can be seen here: patrimonial and personal (Ginebra Molins, 2020, p. 210). The former will imply the proprietary nature of digital assets, which will determine their succession status. The latter, on the other hand, is a concept that takes into account the personal link between the digital assets and the user of the virtual accounts, determining the need to look at the problem primarily from the perspective of personal data.

To date, there is no uniform view, if only on a European scale.[3] In turn, the national solutions adopted, which often contradict each other, are problematic. After all, the Internet does not know or recognise national borders. It seems, therefore, that the law concerning it should also be similar. However, this is not the case.

4. Romanian law and the concept of personal property as a possible solution

Against this background, it is worth looking at the views expressed by Prof. Eugen Chelaru, who reflected some ideas on the status of personal rights more than ten years ago (which was the case, among others, in the aforementioned

[1] The well-known judgments of the German courts on the inheritance of a Facebook account have contributed a great deal to the discussion in this regard. It has been ruled there that access to the deceased's user account and the content contained therein is hereditary and does not conflict with post-mortem personal rights, telecommunications secrecy, data protection regulations or the general personal rights of the deceased's communication partners. This does not mean, however, that this has ended the discussion, although in countries which have similar regulations to the one under German law, the hereditary status of virtual goods only appears to be a foregone conclusion. Cf. the following judgements: *Landgericht Berlin*, judgement of 17.12.2015, 20 O 172/15; *Kammergericht Berlin*, judgement of 31.05.2017, 21 U 9/16; *Bundesgerichtshof*, judgement of 12.07.2018, III ZR 183/17; *Landgericht Berlin*, judgement of 13.02.2019, 20 O 172/15; *Kammergericht* Berlin, judgement of 9.12.2019, 21 W 11/19; *Bundesgerichtshof*, judgement of 27.08.2020, III ZB 30/20.

[2] The recently enacted Portuguese or universal Spanish laws refer to the European General Data Protection Regulation. They imply, among other things, the possibility for the deceased to decide on the status of digital assets *ante mortem*, and the possible prohibition of access to data 'does not affect the rights of the heirs to access the data of the deceased's estate'. Cf. Portugese law implementing the GDPR: Lei n.º 58/2019 de 8 de Agosto - *Assegura a execução, na ordem jurídica nacional, do Regulamento (UE) 2016/679 do Parlamento e do Conselho, de 27 de abril de 2016, relativo à proteção das pessoas singulares no que diz respeito ao tratamento de dados pessoais e à livre circulação desses dados* and Spanish law implementing the GDPR: *Ley Orgánica 3/2018, de 5 de diciembre, de Protección de Datos Personales y garantía de los derechos digitales* [LOPD].

[3] In turn, such has been proposed in the USA and Canada: *Uniform Fiduciary Access to Digital Assets Act* (2015) [RUFADAA] and *Uniform Access To Digital Assets By Fiduciaries Act* (2016) [UADAFA].

text: Chelaru, 2013). Reading his statements, one gets the impression that he had foreseen a number of today's problems.

To begin with, it is worth mentioning that civil law in Central and Eastern European countries has undergone metamorphoses over the years, which was connected among other things with the transformation of the political system (Cserne, 2011, pp. 1–34). A relevant recodification of civil law was also carried out in Romania (Les, & Spinei, 2013, p. 37). The most important event was the adoption of the new Civil Code in 2009. After many attempts and three major unsuccessful drafts (1940, 1971 and 2004), a new Civil Code was introduced in Romania by Law No. 287/2009[1], which entered into force on 1 October 2011 by Law No. 71/2011.[2] The former Romanian Civil Code was adopted and issued in 1864, entering into force in 1865, being mostly inspired by the French Civil Code of 1804 (see on this process in the countries of Central and Eastern Europe, e.g.: Moreteau, [in:] Apathy & al. (eds.), 2010, p. 1139). The period of the recodification was a resourceful period of doctrinal pronouncements, which also concerned Professor Eugen Chelaru (Chelaru, pp. 30-62; Chelaru, [in] C. Munteanu (ed.), 2012, pp. 176-197).

Personal rights are protected in Romania at the constitutional level (Trocan, 2010, p. 1). The Romanian Constitution regulates the following rights: the right of persons to life, to physical and mental integrity, as well as the prohibition of torture and any inhuman or degrading punishment or treatment (art. 22); individual freedom (art. 23); intimate, family and private life (Art. 26); inviolability of one's home (Art. 27); secrecy of correspondence (Art. 28); freedom of conscience (Art. 29); freedom of expression (which includes freedom of the press) (Art. 30); and the right to a healthy environment (Art. 35). However, the national protection of personal rights in Romania is not limited to their inclusion in the Constitution (Duminică, 2019, p. 61). The new Romanian Civil Code recognises the civil rights and freedoms of individuals under Art. 26 (Baias, Chelaru, & Macovei eds., 2014). Civil law in Romania guarantees and protects personal non-property and property rights, regardless of whether they belong to natural or legal persons.

As Professor Eugen Chelaru pointed out, "*personality rights occupy the central position within the personal non-patrimonial rights that belong to the natural persons*" (Chelaru, 2013, 15). He has noticed that the new Civil Code regulates the right to life, the right to health, to physical and psychical integrity, the right to dignity, the right to respect for private life, the right to one's own image and also the non-patrimonial rights which are guaranteed by the scientific, the artistic, the literary or the technical creation (Chelaru, 2013, 16). According to him, the natural person's attributes of identification (Art. 59 of the new Romanian Civil Code) and other similar personal non-patrimonial rights (Art. 252 of the new

[1] OJ No. 511 of 24 July 2009.
[2] Law No. 71/2011 on the application of Law No. 287/2009 on the Civil Code.

Romanian Civil Code) are distinctly protected (Chelaru, 2013, 16). The new Romanian Civil Code also provides for the right to protection of personal data and the right to respect the memory of the deceased, as well as providing for the attributes of identification of the natural person and the right to self-determination" (Chelaru, 2013, 15-16). In this regard, Professor Chelaru noted the broad and, in principle, an open catalogue of such goods. These observations were universal in nature.

Professor Eugen Chelaru's classification of personal rights takes into account, inter alia, "*the moment when personal rights protect values which are indissolubly related to the natural person's humanity: during [his or] her life or after the human being's death*" (Chelaru, 2013, 17). This means that, despite the wide doubts raised in the doctrine of civil law in Europe over the years, the concept of the existence of personality rights after the death of a natural person was already considered by Professor Chlearu at least a decade ago, which may be of interesting relevance for today's reflections on the theoretical basis of personality rights. This is because there is a conviction found in many legal systems that these rights are intrinsically linked to the subject and therefore can only function until the subject's death (Mazurkiewicz, 2011). Professor Chelaru seemed to question this idea, which, against the background of today's considerations about the *post-mortem* effects of leaving digital traces, may add to the argument in favour of a position against the automatic succession of this kind of property.

Professor also noted that, from the point of view of the protection of personality rights, the right to protection of the data with personal character is important. He has explained that it is regulated in Romania by Art. 77 of the new Civil Code (Chelaru, 2013, 19), according to which: „Any processing of the data with personal character, by automatic or non-automatic means, it can be made only in the cases and under the conditions provided by the special law". He pointed out that "*the processing of the data with personal character can injury the right to intimate life, to family and private life and that is why this activity can only be developed in the cases and under the conditions stated by law*" (Chelaru, 2013, 19). This idea has proved to be extremely universal, if only because today it is the basis for many of the legislative solutions in individual countries in the area of digital wealth.

In this regard he also mentioned that the law at which the new Romanian Civil Code refers is the Romanian Law No. 677/2001 on the protection of the data with personal character.[1] The goal of this regulation, according to Professor Chelaru, is stated within art. 1 paragraph 1 and it consists „in the guarantee and the protection of the natural person's right and fundamental freedom, especially the right to intimate life, to family and private life, regarding the processing of the

[1] Law No. 677/2001 of 21 November 2001 for the person's protection regarding the processing of the data with personal character and the free circulation of these data.

data with personal character" (Chelaru, 2013, 19). He also explained that according to art. 3 paragraph 1, letter a) of the Law No. 677/2001, the data with personal character are „any information that refer to an identified or to an identifiable natural person; an identifiable person is that person who can be identified in a direct or in an indirect way, in a particular way by reference to an identification number or to one or to more factors that are specific to her physical, psychological, psychical, economic, cultural or social identity" (Chelaru, 2013, 20). It is this type of legislation that can and generally does have a bearing on the exercise of personality rights.

These are undoubtedly valuable observations, which in later years formed the basis for solutions to the issues raised, among other things, in the area of succession of digital wealth of some foreign countries. In fact, when looking for solutions for digital goods, some legislators referred to the provisions on personal data protection, basing certain solutions on this very matter. However, this has occurred mainly in the last few years, i.e. somewhat later than pointed out by Professor Eugen Chelaru.

One might therefore get the impression that at least some of the problems of the digital world can be solved by invoking the doctrine of Professor Eugen Chelaru. This doctrine has a very universal character and this is why it pretends to be a model or at least a starting point for further scientific inquiries, including the relationship between personality rights and the digital world. For this reason, too, Professor's Chelaru reflections on personality rights are worth noting and can inspire many generations of lawyers

5. Digital wealth in the spirit of Professor Chelaru's concept

Looking at today's legal solutions to the digital wealth issue through the prism of the above views, it is important to note the need to contrast personality rights with rights of a property nature. It is therefore necessary to resolve the potential conflict that may arise between such rights. At first sight, this conflict can be resolved by referring - as suggested by Professor Chelaru - to the data protection regulations. In the situation when a given good of an economic nature has at the same time a personal character (is strongly connected with a given individual), it is the regulations concerning the protection of personal data that may determine the further fate of this good, the possibility to use it in civil law transactions. These regulations, especially at present, leave the relevant decision to the discretion of the holder of this good. The assessment of whether the good will be able to circulate on the market, whether it will be heritable, is therefore left to the user of this good, his or her will expressed *ante mortem* (see, for example, Portuguese and Spanish regulations referred to).

It is precisely the thought that can be read in Professor's Chelaru reflections. Its appropriate application to the problems of new technologies, which - at the time the thought was uttered - was difficult to predict, seems possible. As

one may think, in this respect Professor Chelaru was ahead of the legislative trend that has emerged in recent years in some European countries (in the context of the succession of digital wealth). This is due to the fact that, until the time of the Professor's Chelaru contribution, there were no precise indications or signals that data protection regulations, a matter seemingly distant from civil law, might be relevant for the settlement of problems in this matter.

On the other hand this is also further evidence that personal rights is a complex matter. There are many indications today that in the doctrine of civil law there is an increasing likelihood of the widespread of the concept that such rights may continue to exist even after the death of the subject. Against the background of the discussed problem, this can be understood in the sense that the existence of personality rights may determine the *mortis causa* circulation of goods with an economic value.

6. Instead of conclusions

Scientific work has the value that its results are published and can serve generations. Concepts that are universal are also relevant to problems that arise in the future. This is how the Professor's Chelaru reflections on personality rights can be understood. Seemingly simple thoughts can provide a model for solutions that were not thought of when they were expressed. Since personality rights have been developed as a remedy for the inability of tort liability to be used comprehensively to sanction personal damages, perhaps their concept will become a remedy for another problem that individual legislators cannot cope with. This is why a solution to this problem can be based on the ideas presented by Professor Eugen Chelaru. This only shows what a great jurist we were dealing with, who non omnes mortuus est.

References

Baias, F.A, Chelaru, E., & Macovei, I. (eds.). (2014). *Noul Cod civil. Comentariu pe articole*. Bucharest: C.H.Beck.

Banta, N.M. (2019). Minors and Digital Asset Succession. *Iowa Law Review* vol. 104 no. 4.

Banta, N.M. (2016). Death and Privacy in the Digital Age, *North Carolina Law Review* vol. 94.

Barfield, W. (2006). Intellectual Property Rights in Virtual Environments: Considering the Rights of Owners, Programmers and Virtual Avatars". *Akron Law Review* no. 39.

Berti, R., & Zanetti, S. (2016). La trasmissione mortis causa del patrimonio e dell'identità digitale: strumenti giuridici, operativi e prospettive de iure condendo. *Law and Media Working Paper Series* no. 18.

Beyer, G.W. (2015). Estate Planning for Digital Assets. *Estate Planning Studies* no. 1.

Cámara Lapuente, S. & Arroyo i Amayuelas, E. (eds.) (2020). *El derecho privado en el nuevo paradigma digital*. Madrid-Barcelona-Buenos Aires-Sao Paulo.

Chelaru, E. (2013). The personality rights. The European regulation and the romanian one. *Legal and Administrative Studies* vol. 12 no. 1.

Chelaru, E. (2014). *Teoria generală a dreptului civil*. Bucharest: C.H.Beck.

Cserne, P. (2011). Drafting Civil Codes in Central and Eastern Europe. A Case Study on the Role of Legal Scholarship in Law-making, *Pro Publico Bono Online*.

Edwards, L., & Harbinja, E. (2013). What Happens to My Facebook Profile When I Die? Legal Issues Around Transmission of Digital Assets on Death. *CREATe Working Paper* no. 5.

Engstrom, D.F. (2020). Post COVID Courts. *UCLA Law Review Discourse* vol. 68.

Esperança Ginebra Molins, M. (2020). Voluntades digitales en caso de muerte. *Cuadernos de Derecho Transnacional* vol. 12 no. 1. DOI: 10.20318/cdt.2020.5229.

Harbinja, E. (2016). Legal Nature of e-mails: A Comparative Perspective. *Duke Law & Technology Review* vol. 14 no. 1. DOI: 10.1525/sp.2007.54.1.23.

Hassan, S., & Filippi, P. (2017). The Expansion of Algorithmic Governance: From Code is Law to Law is Code, *Field Actions Science Reports* no. Special Issue 17.

Herzog, S. "Der digitale Nachlass und das Erbrecht". *Anwaltsblatt Online* no. 6 (2018).

Janssen, A. (2017). Das digitale Erbe eines Menschen. *European Review of Private Law* no. 4 (2017).

Johnson, E.K., & Johnson, P.F. (2020). The Need for No-Contact Signing and Notarization of Essential Legal Documents in the Covid-19 World. *National Academy of Elder Law Attorneys Journal* vol. 16 no. 1.

Klich, A. (2021). Electronic communication with public administration in the time of COVID-19—Poland's experience. *International Journal of Environmental Research and Public Health* vol. 18 no. 2. DOI: 10.3390/ijerph18020685.

Kubis, M., Naczinsky, M., Selzer, A. & al. (2019). *Der digitale Nachlass. Eine Untersuchung aus rechtlicher und technischer Sicht*, Bremen-Regensburg.

Les, I., & Spinei, S. (2013). Reflections on the New Romanian Codes. *Ius et Administratio* no. 1.

Magnani, A. (2014). L'eredità digitale. *Notariato* vol. 5 no. 5.

Matanovac Vučković, R., & Kanceljak, I. (2019). Does the Right To Use Digital Content Affect Our Digital Inheritance?. *Eu and Member States – Legal and Economic Issues* vol. 3 no. 3.

Mazurkiewicz, J. (2011). *Non omnis moriar : ochrona dóbr osobistych zmarłego w prawie polskim*. Wrocław.

Merhi, B.B. (2022). *L'émergence de l'identité numérique: l'influence de la révolution numérique sur l'environnement juridique*. Paris.

Moreteau, O. (2010). A Summary Reflection on the Future of Civil Codes in Europe - in P. Apathy, R. Bollenberger, P. Bydlinski, & al. (eds.), *Festschrift fur Helmut Koziol zum 70. Geburtstag*. Jan Sramek Verlag.

Naseh, M.V. (2016). Person and personality in cyber space: A legal analysis of virtual identity. *Masaryk University Journal of Law and Technology* vol. 10 no. 1. DOI: 10.5817/MUJLT2016-1-1.

Otero Crespo, M. (2019). La Sucesión En Los «Bienes Digitales». La Respuesta Plurilegislativa Española. *Revista de Derecho Civil* vol. 6 no. 4.

Savelyev, A. (2017). Contract law 2.0: 'Smart' contracts as the beginning of the end of classic contract law. *Information and Communications Technology Law* vol. 26 no. 2.

Szulewski, P. (2015). Śmierć 2.0 – problematyka dóbr cyfrowych in Gołaczyński, J., Mazurkiewicz, J., Turłukowski, J., & Karkut, D. (eds.). *Non omnis moriar. Osobiste i majątkowe aspekty prawne śmierci człowieka. Zagadnienia wybrane*. Wrocław.

Tatar, U., Gokce, Y., & Nussbaum, B. (2020). Law versus technology: Blockchain, GDPR, and tough tradeoffs. *Computer Law and Security Review* vol. 38. DOI: 10.1016/j.clsr.2020.105454.

Varnado, S.S. (2014). Your digital footprint left behind at death: An illustration of technology leaving the law behind. *Louisiana Law Review* vol. 74 no. 3.

Yeung, K. (2019). Regulation by blockchain: The emerging battle for supremacy between the code of law and code as law. Modern *Law Review* vol. 82 no. 2.

Załucki, M. (2021). Contractual Limitations in the mortis causa legal succession on the example of the Facebook contract. The German Facebook Case. *Istorie, Cultura, Cetatenie in Uniunea Europeana* vol. 13.

Załucki, M. (2021). Digital Inheritance: Key Issues and Doubts. The Challenges of Succession Law in the Face of New Technologies in Veiga, F. da S. De Brito, P. Pierdoná, Z. L. (eds.). *Future Law, Vol. II*. Porto.

Załucki, M. (2020). Digital content left on-line after death of a user. On the research that needs to be conducted. *Legal and Administrative Studies* vol. 19 no. 1.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

THE MARGIN OF APPRECIATION OF THE MEMBER STATES IN MATTERS OF FREE MOVEMENT-LIMITED BY THE SYSTEM OF PROTECTION OF FUNDAMENTAL RIGHTS?

Mihaela-Adriana OPRESCU [1]

Abstract

One of the aims of the European legislator regarding Directive 2004/38 concerning the right to free movement and residence on the territory of the member states for citizens of the Union and their family members was, in essence, to correct the fragmented approach to the aforementioned right, starting from the normative diversity specific to the 27 member states.

It cannot go unnoticed that the directive contains provisions that grant a certain margin for appreciation for the member states, which, through the interpretation of the Luxembourg court, can in specific situations be confined within the boundaries of the European system for the protection of fundamental rights.

Equally, the evolution of the CJEU jurisprudence illustrates that EU law operates, in terms of free movement, with two types of family circles: an extremely narrow one (composed of spouse, partner, descendants, ascendants) who automatically enjoys the right to free movement and another extended one, built around relationships of economic, emotional or physical dependence between members, and which do not enjoy such a right.

Key words: *kafala system; Directive 2004/38; dependence; margin of appreciation; right to free movement.*

1. Introduction

The right to free movement and residence on the territory of the member states of the European Union is one of the architectural pioneers of the concept of European citizenship. According to art. 20 of the Treaty on the Functioning of the European Union (TFEU), any person who has the citizenship of a member state is a citizen of the Union. Union citizenship does not replace national citizenship, but is in addition to it.

As for the beneficiaries of the right to free movement and residence on the territory of the member states, they are the European citizens and their family members, as defined by the provisions of Directive no. 2004/38/EC of the

[1] **PhD Lecturer, Babeș-Bolyai University, Faculty of European Studies, Cluj-Napoca (Romania), mihaela.oprescu@ubbcluj.ro, ORCID: 0000-0002-6005-281X.**

European Parliament and of the Council of 29 April 2004[1]. Brevitatis causa, to avoid repetition, references to this instrument of European law will be made by using the term "Directive".

In the sense of the provisions of art. 2 paragraph 2 of the Directive, the family members of the European citizen are: (a) the spouse; (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a member state, if the host state recognizes this model of conjugality; (c) the direct descendants who are under the age of 21 or are dependants, and those of the spouse or partner as defined at point (b); (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

According to art. 3 (2) of the Directive, the host member state shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition at point 2 of article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

As for facilitating the entry and stay of the above-mentioned persons, the Directive does not mention the concrete obligations of the member states in the implementation of the provisions of art. 3 paragraph 2.

It is necessary to specify that the right to free movement and stay on the European territory has a dual configuration (for more details about the conditions for exercising the right to free movement of European citizens and family members, see Craig, & De Búrca, 2017, pp. 956-967; Foster, 2016, pp. 355-361; Schütze, 2015, pp. 602-605): it is an autonomous right for European citizens, respectively a derived one for their family members. In other words, the exercise of the right to free movement by the family members of the European citizen is, in principle, grafted on the exercise by the European citizen of the same right, by leaving the territory of the country of origin and staying in the territory of another EU member state.

It cannot go unnoticed that the way in which the provisions of art. 2 para. 3 and art. 3 para. 2 of the Directive illustrate that EU law operates, in matters of free movement, with two types of families: one in the narrow sense (composed of spouse, partner, descendants, ascendants), which automatically enjoys the right to

[1] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, published in Of. J. no. L 158/ 2004.

free movement, and another extended, built around relationships of economic, emotional or physical dependence between members, and which do not enjoy such a right.

In the present study, starting from the provisions of art. 3 para. 2 letter a) of the Directive, we will examine certain trends in the jurisprudence of the CJEU to illustrate the fact that in the interpretation of EU law, the Luxembourg court grafts legal reasoning on certain close and stable relational ties that configure genuine family nodes which constitute the premise of innovative and even surprising legal solutions.

2. The obligation of member states to facilitate entry and stay for family members provided for in art. 3 para. 2 of the Directive.

Reading the provisions of the Directive, it can be observed that the provisions of art. 3 para. 2 must be analysed from the perspective of consideration 6 of the preamble of this normative act. The European legislator makes it clear that the provisions of art. 3 para. 2 of the Directive aim to preserve "the maintenance of the family unit in the broadest sense". Consequently, when analysing whether a person falls within the scope of art. 3 paragraph 2 of the Directive, the member states will apply the test regarding the legality of entry and stay from the perspective of domestic legislation, with the prevailing factor being the relationship of the person concerned with the citizen of the Union or any other circumstances, such as their financial or physical dependence on the citizen of the Union.

Apparently, the provisions of art. 3 para. 2 letter a) of the Directive would not pose problems of interpretation, as the argumentation of the solution to admit or reject the request for granting the right to enter or stay on the territory of a member state seems easy to build around three factual coordinates, as follows:

- whether the member of the extended family, in the country from which he came, is dependent on the European citizen;
- whether the same family member is a member of the household of the Union citizen who benefits from the right of residence as principal;
- whether, for serious health reasons, the personal care of the family member by the citizen of the Union is necessary.

It is evident that the analysis of the existence of any of the previously mentioned situations must be carried out exclusively when, on the one hand, the family member is a citizen of a third country, and on the other hand, it is not limited to family members as per art. 2 paragraph 2 of the Directive.

However, practice has revealed, surprisingly, that the stated provisions can pose serious problems of interpretation, since the facilitation of the entry and stay of the family member who is a citizen of a third country must be ensured effectively and, in no case, arbitrarily, precisely to be able to ensure the uniformity of the European norm. From this perspective, it is enough to think

about a few dilemmas that the national authorities could face: whether the country from which the family member came must be an EU member or not; if it is necessary that the relationship of financial, emotional or physical dependence has been constant over a considerable period of time or it can also be a recent situation; whether or not the dependency should continue in the host state; the way in which the dependency relationship must be proven; last but not least, what must be the conduct of a state in order to be able to consider that it has fulfilled its obligation to facilitate entry and stay for family members provided for in art. 3 para. 2 of the Directive.

Obviously, the answers to some of these questions were provided by the CJUE in the framework of preliminary proceedings with which it was entrusted.

Thus, the first reference to how to interpret art. 3 para. 2 letter a) of the Directive can be found in the *Rahman* case[1], where it was ruled that although the member states are not obliged to recognize the right to free movement of family members in a broad sense, they are obliged to confer "a certain advantage, compared with applications for entry and residence of other nationals of third States, on applications submitted by persons who have a relationship of particular dependence with a Union citizen" (para.21).

The facts (para. 11-16 of the judgment) highlight the situation of Mr Rahman, a national of Bangladesh, married to an Irish citizen who was working in the United Kingdom. Following this marriage, Mr Rahman's full brother, half-brother and nephew applied for EEA Family Permits in order to obtain the right of abode in the UK as dependents of the Rahmans. These applications were rejected by the Bangladesh Entry Clearance Officer on 27 July 2006 as Mr Rahman's brothers and nephew could not prove that they were dependents of the Rahmans in Bangladesh. Under these conditions, the defendants in the main action (Mr Rahman's relatives) appealed the decision rejecting their applications to the Immigration Judge of the Asylum and Immigration Tribunal. This court admitted the action on 19 June 2007, considering that they could benefit from the provisions of art. 3 para. 2 of Directive 2004/38 and that their entry into the United Kingdom should therefore be facilitated. As a result, Mr Rahman's siblings and nephew were issued EEA Family Permits and were able to join the Rahmans in the UK. In 2008, Mr Rahman's brothers and nephew applied for residence permits in order to confirm their right to stay in the UK, with the applications being rejected by a decision of 24 December 2008 issued by the Secretary of State, who found that the applicants had not proved either that they lived with Ms Rahman, the Union citizen concerned, in the same EEA member state before her arrival in the UK, or that they would continue to be dependent on her, or that they were part of her household in the UK.

[1] CJEU, Case C-83/11, *Secretary of State for the Home Department vs. Muhammad Sazzadur Rahman, Fazly Rabby Islam, Mohibullah Rahman*, Judgement of 5 september 2012, [ECLI:EU:C:2012:519]. Throughout this study, the synthetic expression "*Rahman Judgement*" will be used.

Dissatisfied with the decision issued by the Secretary of State, the aforementioned relatives of Mr Rahman challenged it before the Immigration Judge of the Asylum and Immigration Tribunal, who allowed the application and found that the defendants in the main action were indeed "dependants" of a European citizen. The Secretary of State asked the referring court, the Upper Tribunal (Immigration and Asylum Chamber), to review this decision.

Consequently, the Upper Tribunal (Immigration and Asylum Chamber) decided to use the preliminary procedure, addressing several preliminary questions to the CJEU (para. 17 of the judgment), as follows:

"(1) Does Article 3(2) of [Directive 2004/38] require a Member State to make legislative provision to facilitate entry to and/or residence in a Member State to the class of other family members who are not nationals of the European Union who can meet the requirements of Article 10(2) [of that directive]?

(2) Can such other family member referred to in Question 1 rely on the direct applicability of Article 3(2) of [Directive 2004/38] in the event that he cannot comply with any requirements imposed by national legislative provisions?

(3) Is the class of other family members referred to in Article 3(2) and Article 10(2) of [Directive 2004/38] limited to those who have resided in the same country as the Union national and his or her spouse, before the Union national came to the host State?

(4) Must any dependency referred to in Article 3(2) of [Directive 2004/38] on which the other family member relies to secure entry to the host State be dependency that existed shortly before the Union citizen moved to the host State?

(5) Can a Member State impose particular requirements as to the nature or duration of dependency referred to in Article 3(2) of [Directive 2004/38] by such other family member so as to prevent such dependency being contrived or unnecessary to enable a non-national to be admitted to or continue to reside in its territory?

(6) Must the dependency on which the other family member relies in order to be admitted to the Member State continue for a period or indefinitely in the host State for a residence card to be issued or renewed pursuant to Article 10 of [Directive 2004/38] and if so how should such dependency be demonstrated?"

The CJEU analysed the first two questions together, noting that member states are not obliged to admit any application for entry or residence made by family members of a citizen of the Union who do not fall within the definition contained in art. 2 point 2 of the said directive, even if they demonstrate that they are dependent on the respective citizen (see para. 26, sentence 1 of the *Rahman* judgment).

As for the substance of the request, the member states are granted a wide margin of appreciation as long as they are free, according to national legislation, to choose the factors deemed relevant, such as "the extent of economic or physical dependence" and "the degree of relationship between the family member and the

Union citizen whom he wishes to accompany or join"(see para. 23 of the *Rahman* judgment).

The aforementioned questions also gave the Luxembourg court the opportunity to carefully outline the procedural obligations of the member states under this aspect: to make a thorough check of the applicant's situation; to resolve the request within a procedure completed by issuing a reasoned decision; to recognize the applicant's right of access to a court to verify whether the national legislation and the way it was applied did not exceed the limits of the margin of appreciation (see para. 26 of the *Rahman* judgment).

Another issue before the CJEU in this case was whether it is necessary for the family member to have lived in the same state as the European citizen and to have been dependent on the latter shortly before or at the time when he settled in the host member state (third and fourth questions). For this, the court was charged with clarifying the expression "the country from which they came" used in the content of art. 3 para. 2 letter a) of the Directive. The natural question is the following: "country of origin" refers to (i) the member state where the Union citizen lived before settling in the host member state or (ii) the State where the extended family members lived at the time they applied to accompany or join the Union citizen? The CJEU notes that the expression "the country they came from" refers to this last hypothesis, namely the state where the family members lived on the date they requested the recognition of the right to free movement, obviously under the condition that in the respective state, the dependency relationship existed (see para. 33 of the *Rahman* judgment).

The rationale behind this argument is easy to discern: to prevent situations where persons (from third countries) who, at the time of establishment in the host member state, are independent, and could speculate on the provisions of the Directive due to the fact that, following a change in certain financial or health circumstances, they later become dependent on the citizen of the Union. In other words, the dependency relationship would be artificially created on the territory of the host state where the recognition of the right of residence is requested.

In addition, in the answer to question number five, it was noted that the member states can, in the exercise of their margin of appreciation, impose specific requirements regarding the nature and duration of the dependency, provided that these requirements do not hinder the useful effect of the provisions of art. 3 para.2 letter (a) of the Directive (see para. 40 of the *Rahman* judgment).

As regards question number six regarding the need for the dependency situation to have continued to exist in the host member state, the court refused to answer, considering that it did not fall within the scope of the Directive.

If in the *Rahman* case the relationship of economic dependence was called into question under the auspices of an extremely wide margin of appreciation

recognized by the host member state, in the *SM* case[1], the same margin of appreciation is corseted within the limits of the European system of protection of fundamental rights (for more details about the *SM* judgement, see Strumia, 2019, pp. 389-393; Peers, 2019; Peraro, 2020, pp. 26-52).

Thus, the *SM* case analyses the possibility of recognizing the right of entry and residence on the territory of a member state (in this case, the UK) for a minor (abandoned by the natural parents) entrusted - according to the Algerian system *al kafalah* - for raising and education to a French couple (spouses M) who lived in the UK.

This institution of family law, *al kafalah*, common to certain countries of Islamic tradition, provides for the assumption by one or more adults of the task of maintaining, educating and protecting a child and placing him under their permanent legal guardianship. It is necessary to specify that this protection system actually aims to establish a *sui-generis* mechanism, at the confluence between placement and adoption[2].

Thus, through *al kafalah*, the link of natural parentage is not extinguished, but, paradoxically, legal effects similar to adoption are produced, for example, regarding the name of the minor who acquires the name of the adult/adults under whose guardianship he was placed.

The application for recognition of the right of entry was rejected by the British authorities on the grounds that the guardianship of the *al kafalah* under the Algerian regime was not recognized as an adoption within the meaning of national law and that no application for international adoption had been made, so the minor did not have the status of a descendant of a European citizen and consequently did not fall under the scope of art. 2 para. 2 of the Directive (see para. 30 of *SM* judgement). The decision of the British authorities was challenged in court, which paved the way for preliminary proceedings to determine whether a child placed under the permanent legal guardianship of a citizen or citizens of the Union through *al kafalah* or an equivalent measure regulated by the legislative system of his country of origin is considered a "direct descendant" within the meaning of article 2 para. 2 letter (c) of the Directive.

The Luxembourg court held that given the configuration of the *al kafalah* system, the minor cannot be considered a descendant of the European citizen, in the sense of the previously mentioned legal provision, since: the system does not create a parent-child relationship to replace biological parentage (see para. 56 of

[1] CJEU, Case C-129/18, *SM vs. Entry Clearance Officer*, UK Visa Section, Judgement of 26 March 2019 [ECLI:EU:C:2019:248]. Throughout this study, the synthetic expression "*SM* judgement" will be used.

[2] Through the jurisdictional act establishing the mechanism *al kafalah*, the two spouses undertook "to give an Islamic education to the child ..., keep her fit morally and physically, supplying her needs, looking after her teaching, treating her like natural parents, protect her, defend her before judicial instances [and] assume civil liability for detrimental acts. That act authorises Mr and Ms M to obtain family allowances, subsidies and benefits, to sign any administrative and travel documents, and to travel with SM outside Algeria". See para. 27 of *SM* judgement.

SM judgement); placing a child under *al kafalah* does not give him the status of heir of the guardian (see para. 46 of *SM* judgement); *al kafalah* ends when the child attains the age of majority and is revocable at the request of the biological parents or the guardian (see para. 45 of *SM* judgement).

In addition, this case presented the CJEU with the opportunity to give a uniform interpretation to the term "direct descendant" of a citizen of the Union, used by art. 2 para. 2 letter (c) of Directive 2004/38, in the sense that it refers exclusively to the biological or adopted child of such a citizen.

Thus, the CJEU started the argumentation from the premise that the provisions of art. 2 para. 2 letter c) of the Directive do not make any reference to national law. Consequently, for the uniform application of Union law and related to the principle of equality, the term used by the directive, "direct descendant", should have an independent and uniform interpretation at Union level (see para. 50 of *SM* judgement).

On the other hand, the CJEU did not remain immune to the situation of the minor, so although it was not invested with a preliminary question in this regard, it ruled that a child under legal guardianship falls within the definition of "other family members" mentioned at art. 3 para. 2 lit. (a) of the Directive. At first glance, the legal reasoning is similar to that in Rahman, with the Court noting the following:

-the host member states must facilitate the entry and stay of this family member;

-the member states must resolve the request regarding the granting of the right of entry and stay by issuing a reasoned decision (see para. 62 of *SM* judgement);

-each member state has a margin of appreciation regarding the choice of factors to be taken into account, insofar as its legislation provides criteria that are in line with the usual meaning of the term "facilitates", contained in art. 3 para. (2) from the Directive (see para. 63 of *SM* judgement).

As for the state's margin of appreciation, it is not as wide as the one recognized in the *Rahman* case, but it is corseted by the mechanism of the fundamental rights protection system in the EU. Thus, the CJEU stated that the margin of appreciation must be exercised by reference to art. 7 of the Charter of Fundamental Rights of the EU (the right to respect for private and family life) and art. 24 para. 2 of the same normative act (the best interest of the child). Therefore, it is incumbent on the national authorities, when facilitating the entry and stay of such a family member, to carry out "a balanced and reasonable assessment of all the current and relevant circumstances of the case, taking account of all the interests in play and, in particular, of the best interests of the child concerned" (see para. 68 of *SM* judgement).

Thus, the SM case offered the CJEU the opportunity to configure the palette of elements that must be checked by the national authorities in order to establish the existence of the relationship of emotional, affective dependence

between the European citizen and his family member, as follows: "the age at which the child was placed under the Algerian kafala system", the existence of a common life that "the child has with his guardians since its placement under that system", "the closeness of the personal relationship which has developed between the child and its guardians and the extent to which the child is dependent on its guardians, inasmuch as they assume parental responsibility and legal and financial responsibility for the child" (see para. 69 of *SM* judgement). In addition, account must be taken of the possible concrete and individualized risks of the child in question being a victim of abuse, exploitation or trafficking, with the understanding that "such risks cannot, however, be assumed in the light of the fact that the procedure for placement under the Algerian kafala system is based on an assessment of the suitability of the adult and of the interests of the child which is less extensive than the procedure carried out in the host Member State for the purposes of an adoption or the placement of a child" (see para. 70 of *SM* judgement).

The CJEU concluded that, in the hypothesis that it would be established at the end of such an assessment that there is, on the one hand, an effective family life between a child and his guardian, and on the other hand, a relationship of dependency of the child towards his guardian, the imperatives related to the fundamental right to respect for family life combined with the obligation to take into account the best interests of the child require, in principle, granting a right of entry and residence to that child in order to allow him to live together with his guardian in the host Member State.

We cannot fail to notice the profoundly humane solution of the CJEU. In fact, the emotional connection and the link of dependence had to be protected because they constituted a social reality, even if the institution *al kafalah* did not produce effects in the field of filiation or kinship. In fact, when it comes to the minor, his best interest and the interests of his family must be the leitmotif in the perspective of approving the right of entry and residence of the child on the EU territory, which creates the premises for defining the family as a pragmatic concept, with a loose geometry. By recognizing the right of residence, the CJEU guaranteed that the child would be provided with opportunities for growth, care, education, and protection in the broadest sense of the term. In other words, his very fundamental rights.

In the case C-22/21[1], the reasoning of the CJEU went further. The facts described in paragraphs 8-14 of the judgment reveal the situation of the applicants, SRS and AA, who were born in Pakistan in 1978 and 1986 respectively, and who are first cousins. SRS moved to the UK with his family in 1997 and acquired British citizenship in 2013. AA moved to the UK in 2010 to

[1] CJEU, Case C-22/21, *SRS & AA vs. Minister for Justice and Equality*, Judgement of 15 September 2022, [ECLI:EU:C:2022:683]. Throughout this study, the synthetic expression "*SRS & AA* Judgement" will be used.

continue his university studies on a four-year study visa. During his studies, AA moved into the house where SRS lived. Thus, SRS and AA lived together until SRS left for Ireland in January 2015. In March 2015, AA, whose student visa had expired, joined SRS in Ireland, since the two cousins have been living together.

AA applied for a residence permit, relying on the one hand on his financial dependence on SRS and on the other on his status as a family member who is a member of SRS's household. This claim was rejected, *inter alia*, on the grounds that only the period after SRS's naturalization, which took place in February 2013, could be taken into account, so SRS and AA must be considered to have lived together for less than two years (see para. 24 of *SRS & AA* Judgement). AA's application for review was rejected by the Minister for Justice and Equality (2016) on the grounds that although SRS and AA lived at the same address, it had not been shown that SRS "was in fact the head of that household in the United Kingdom" (see para. 11 of *SRS & AA* Judgement).

Dissatisfied with the solution, SRS and AA brought an action for annulment in the High Court (Supreme Court, Ireland), which dismissed the action on the grounds that "in order to be classified as an 'other family member' who is a member of the household of the Union citizen', it had to be shown that that citizen was the 'head of the household' in his or her State of origin" (see para. 12 of *SRS & AA* Judgement).

SRS and AA appealed against this decision to the Court of Appeal (Ireland), which dismissed the appeal holding that "persons living under the same roof do not necessarily form part of the same household and that, in order to be regarded as family members who are part of the household of a Union citizen, those persons had to be an integral part of the family unit and remain so for the foreseeable future, living with the Union citizen not merely for reasons of convenience but also for reasons of emotional connection" (see para. 13 of *SRS & AA* Judgement).

SRS and AA then appealed to the Supreme Court (Ireland), the referring court, which raised two preliminary questions: the first concerns the existence of a uniform definition throughout the Union for the concept of "household member of the Union citizen"; the second question, assuming that the previously mentioned concept cannot be defined, concerns the criteria according to which the national court can determine who is or is not a member of the household of a Union citizen for the purpose of free movement.

To begin with, upon a careful reading of the considerations, it can be observed that the CJEU narrows the field of application of the provisions of art. 3 paragraph 2 of the Directive (Reynolds, 2022), to the extent that it decides that holding the quality of "member of the household" exceeds a simple division of the home or a simple temporary cohabitation for reasons of pure convenience (see para. 21 of *SRS & AA* Judgement).

Precisely in order to give as much consistency as possible to the concept of "member of the Union citizen's household", the CJEU grafts this quality on the

existence of a close and stable personal bond between the two persons, characterized by the reciprocity of feelings and the intensity of the emotional bond. In other words, the European judge appreciates that this concept of "household member" cannot be viewed exclusively from an economic perspective, although the text of art. 3 paragraph 2 of the Directive, when it tackles this type of family member, it does not even implicitly refer to any sentimental connection. Therefore, in the interpretation of the Luxembourg court, the common denominator of the two hypotheses of art. 3 paragraph 2 of the Directive - a family member dependent on the European citizen, respectively a member of the latter's household - constitutes the emotional bond.

The approach of the CJEU is, in this respect, a generous one, because it accredits the idea that personal ties can be affected not only when the EU citizen refrains from exercising his right to free movement to the extent that the right of entry and residence for his household member (third-country national) would not be recognized. Consequently, in the interpretation of art. 3 paragraph 2 of the Directive, the European judge introduces another measurement unit: the damage to the emotional bond.

If the piece of resistance in the case of the *Rahman* judgement is the careful drafting of the procedural obligations of the member states regarding the right of residence for the beneficiaries of art. 3 paragraph 2 of the Directive, instead, the *SRS & AA* judgement shifts the focus to the procedural obligations of the addressees themselves, who will have to prove the cumulative meeting of three elements: the existence of a close and stable personal connection with the European citizen; the existence of a real dependency situation between this family member and the EU citizen; the existence of a domestic cohabitation built naturally, and not speculatively, in order to obtain entry and residence in that member state.

The interpretation offered by the CJEU in this last case seems to open the horizon for the member states to operate with a simple presumption: the citizen of a third country, even in the situation of cohabitation in the same home, is not a "member of the household of the citizen of the Union" until the applicant proves the contrary.

3. Conclusions

As can be seen from reading the provisions of art. 2 para. 2 and art. 3 para. 2 of the Directive, the European legislator creates the premises of a crevasse regarding the treatment in terms of free movement of members of the restricted family (spouse, partner, descendants, ascendants) and those of the extended family. If the members of the restricted family enter the material field of application of European law, the members of the extended family are placed under the umbrella of the national immigration legislation, a situation in which the facilitation of entry and stay on the territory of the EU only wears the cloak of a

concession made by the state and grafted on the possibility offered by European law. Thus, in effect, the European legal order guarantees the members of the extended family only the right to a jurisdictional control whose object is the verification of the state's use of its margin of appreciation exclusively within the limits conferred by Directive 2004/38.

It is also necessary to specify that while the notions of spouse or descendant are interpreted by the CJEU in an extremely formalistic way, by reference to national legislation, the concept of "another member of the family" is a malleable one, as it includes those persons who are not related to the European citizen by ties of filiation or kinship. This is due to the implementation of the provisions of the EU Charter of Fundamental Rights. The *SM* case is the illustrative example under this aspect.

Emphasizing the role of fundamental rights in limiting the states' margin of appreciation, the CJEU actually rules that the obligation to protect individual rights guaranteed by the EU Charter of Fundamental Rights prevails over state discretionary power in the field of immigration policy.

References

Craig, P., & De Búrca, G. (2017). *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină*. Bucharest: Hamangiu.

Foster, N. (2016). *EU Law* 5th ed. Oxford: Oxford University Press.

Peers, S. (2019). *Guardianship, free movement and the rights of the child: the SM judgment*. http://eulawanalysis.blogspot.com/2019/03/guardianship-free-movement-and-rights.html.

Peraro, C. (2020). "Kafala in the SM judgment of the Court of Justice and the Italian perspective". *Papers di diritto europeo* no.2.

Reynolds, S. (2022). *Op-Ed: Giving with One Hand and Taking with the Other: The Court Provides (Some) Guidance on Who Counts as a 'Member of a Union Citizen's Household' under the Citizenship Directive (Case C-22/21, Minister for Justice and Equality)*. https://livrepository.liverpool.ac.uk/3165485/.

Schütze, R. (2015). *European Union Law*. Cambridge: Cambridge University Press.

Strumia, F. (2019). The Family in EU Law After the SM Ruling: Variable Geometry and Conditional Deference. *European Papers*, Vol. 4 (2019), No 1, *European Forum, Insight*.

CJEU, Case C-83/11, Secretary of State for the Home Department vs. Muhammad Sazzadur Rahman, Fazly Rabby Islam, Mohibullah Rahman, Judgement of 5 September 2012, [ECLI:EU:C:2012:519].

CJUE, Case C-129/18, SM vs. Entry Clearance Officer, UK Visa Section, Judgement of 26 March 2019, [ECLI:EU:C:2019:248].

CJUE, Case C-22/21, SRS & AA vs. Minister for Justice and Equality, Judgement of 15 September 2022, [ECLI:EU:C:2022:683].

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

CAUSES OF MIGRATORY MOVEMENTS AND OBJECTIVES OF IMMIGRATION POLICIES: REFLECTIONS FOR A FAIRER AND MORE INCLUSIVE MANAGEMENT OF HUMAN MOBILITY

Laura MIRAUT MARTÍN[1]

Abstract

The mass displacement of people takes on a particular significance today as a phenomenon linked to globalisation. Economic inequalities between different countries, armed conflicts, natural disasters, etc., explain to a large extent the tendency of individuals to settle in a place far from their family and emotional environment in search of a future that offers greater possibilities for life development. We can thus identify different causes (both external and internal) that are conducive to current migratory movements.

Receiving societies normally view the migratory phenomenon with a certain amount of mistrust, trying to respond to it in a way that does not negatively affect their interests or modify the initial situation too much. Immigration policies often move between attention to the interests of the host society, which it is understood may be violated, and the preservation of the conscience of individuals in the face of the need to provide a humanitarian response to the situation of helplessness experienced by immigrants.

Key words: *Globalisation; migrations; causes migratory movements; immigration policy goals; cultural identity.*

1. Introduction

Today's society has become somewhat aware of the problems generated by the phenomenon of migration, which is taking on a new dimension today because it is linked to the phenomenon of globalisation.

But it has done so to a greater extent from the perspective of realising the interests of the host society that may be affected by the arrival of migrants. What is lacking is greater attention to the point of view of the immigrant, who is in a weaker position, finding himself in an environment foreign to his usual environment, in a society different from his own, to which he has been forced to emigrate for very different reasons.

[1] **Professor of Philosophy of Law at the University of Las Palmas de Gran Canaria, Las Palmas de Gran Canaria (Spain), e-mail: laura.miraut@ulpgc.es, ORCID: 0000-0002-4397-4361**

The realisation of the rights of migrants, which may be overlooked by attention to the primary interests of the host society, takes on special significance in this respect. There is a need to analyse immigration policies from this particular perspective, taking into account the consequences they may have for the realisation of rights.

Taking into account the security problems that may arise from social conflicts and those that may derive from the coexistence of very different cultural identities in the same geographical area, as well as the satisfaction of immigrants' security requirements, which are violated by the risk to their lives posed by the use of certain means of access to the host society, we believe that consideration should be given to an interpretation of security in its most comprehensive sense, as a guarantee of the preservation of the lives, property and rights of the members of society. In particular, immigrants, as they are in a more vulnerable situation in this respect.

2. The impact of globalisation on migration dynamics

Migratory movements are nothing new in the history of our societies. On the contrary, many of the most important events that have marked the development of social life have their origin in massive population movements in search of new opportunities in life. The colonisation of America is a good example of this. Spain at the beginning of the 20th century was another example, in which the political and economic circumstances of the time explained the political and economic exile that took place. But Spanish emigration also manifested itself as an internal emigration of people who moved from the countryside to the city, from the interior to the coast, from the south to the north, in search of prosperity. The result was a new structure of the geographical population map in the same national territory, thus producing the coexistence in the same spatial area of citizens of very different origins. And also a certain uprooting of those who, even though they were well off in the same State, were forced to leave their immediate family and social environment.

Behind these tendencies of displacement there were always specific reasons behind them: political, ideological or religious persecution; knowledge of the existence of new horizons that could satisfy the entrepreneurial spirit of the population, the search for climatic conditions suitable for the better development of certain economic activities, etc....

It cannot therefore be said that migratory movements are a new phenomenon. What is specific to our times is the structural environment in which they occur, which in turn explains to a large extent their enormous density and the social relevance that their treatment and analysis has acquired. We refer to the consideration of migratory movements within the general framework represented by what is commonly referred to as globalisation or mundialisation. The great

population movements of our times cannot be separated from the meaning of this general phenomenon.

Globalisation is commonly known as the phenomenon that currently represents the progressive loss of the importance of borders as a limit that determined the action of States and their citizens. The spectacular development experienced by communication and information technologies has extraordinarily favoured the mobility of people, goods, information, ideas, opinions, etc., which flow unceasingly (Almiron Roig, 2002), freed from the action of state bodies that had been determining their position in the framework of social relations. The proliferation of transnational relations, the interdependence of certain events and decisions produced in distant geographical points, and the common feeling of the population that nothing that happens in the world is alien to them because it affects or can affect to a greater or lesser extent their own sphere of interests define the character of the new situation, defined by Dabat (2005, p. 19) as the "new spatial configuration of the world proper to the new historical phase of capitalism".

In this "global space that is, both, multiple and interdependent" (De Julios-Campuzano, 2015, p. 15), national sovereignty loses its regulatory power to assume a primarily symbolic function. The most important decisions are taken in spheres that exceed the framework of traditional political powers. In this situation, the rules of the free market are being pushed through in the most ruthless manner, without the traditional political powers being able to guarantee the protection of people's basic rights, or to preserve the minimum requirements imposed by the consideration of the dignity of the individual. Globalisation thus becomes an instrument of oppression of the strong against the weak, who lack the necessary resources to be competitive in the global market especially in the field of knowledge.

Globalisation, far from fulfilling the initial ideology of extending the democratic principle at a global level, has turned out to be a lethal weapon for democracy, bringing about the definitive condemnation of the most disadvantaged countries, which see the distance that separates them from the model of life shown to them day by day in the media widen more and more. The adaptation of the Third World individual to the Western way of life is reduced to his or her insignificant role as a consumer, never as a possible participant in the distribution of benefits that the internationalisation of social relations supposedly promotes.

Today, the system of international relations is governed by the logic of the market and the accumulation of capital, which prevails over all other considerations, including the universal realisation of human rights, which represent an economic cost and are not a priority in this framework. The dominance is above all ideological, cultural, and is reflected in the generalisation of the idea that there is no alternative to the prevailing system. The declarations of rights lose all their normative capacity and are reduced to a well-intentioned ideal that is continually contradicted by the observation of reality in the world.

At this juncture, the individual seeks to adapt to the system, which forces him, when circumstances leave him no other option, to emigrate in search of places more conducive to his personal fulfilment, despite the emotional and personal costs that this undoubtedly entails, sometimes even endangering his own life. It is a rational decision that assumes making certain sacrifices to try to obtain better opportunities and an improvement in their living conditions. A decision that, in short, plays with the logic of the lesser evil.

The analysis of the phenomenon of migration is nowadays closely linked to the general phenomenon of globalisation. A phenomenon that places migrants as victims, to a large extent, of the system, forced by events to take the hard decision to emigrate, leaving aside their most intimate desires and wishes, and assuming the feeling of uprooting that the very decision to emigrate provokes.

It is clear that immigrants and members of the receiving society find themselves in a very different situation, which often leads them to view the migration phenomenon through a different prism. The interests of both are also different, because the starting point and the objectives that each tries to achieve, or consolidate, within the social community are different. But both positions are to a large extent defined by globalisation.

It cannot be ignored that the most disadvantaged people also seek to improve their situation in life and escape from poverty. The fact is that the desire to better oneself is also a consequence of the logic of the system. A consequence that must be treated and assessed from the perspective offered by the criteria of justice and not those of maximising wealth and consolidating positions of privilege that could lead to discrimination between human beings, to whom, in principle, the same rights and obligations must be recognised. At least those rights and obligations that most immediately project the demands of their personal dignity.

3. Analysis of internal and external drivers of migration movements

The causes of migratory movements can be analysed both from the perspective of the receiving society and from the personal perspective of the immigrant himself. In this sense, we speak of external and internal causes of migratory movements.

In general, the receiving society does not usually approach the issue of immigration in terms of its own convenience. Rather, they try to argue against it, seeing it as a threat to the privileged status of their own nationals. This generalised sentiment contrasts, however, with the usefulness that the arrival of immigrants often has for the very realisation of the receiving society's ideal of life.

Immigrants normally occupy a subsidiary position with respect to the citizens of the receiving society, carrying out jobs that are generally not to the latter's liking. It is also a situation that the immigrant generally accepts quite

naturally. Their work demands are much lower than those of the nationals, and they are content to simply improve the situation they had in their place of origin. The receiving society is thus favoured by the arrival of a cheap labour force that allows it to enjoy its privileged situation while completely disregarding the less pleasant activities, but essential for the consolidation of that same privileged situation, which are carried out by the immigrants. This immigration is usually accepted by the receiving society, which concludes that it is useful for achieving the ultimate goal of consolidating the standard of living it desires. Suspicions arise when it suspects that the immigrant may occupy a situation that goes beyond his or her mere functionality for the realisation of this objective.

This *need for labour* that meets the expectations of the receiving society is a relevant external cause of migratory movements. In this sense, immigrants respond to an invitation from the receiving society, which is aware of the coincidence of interests reflected in the immigration phenomenon: the interests of immigrants in improving the standards of living they had in their society of origin and the interests of the members of the receiving society in consolidating their standard of living through the employment, generally reserved for certain spheres, of immigrants.

The consideration of highly educated immigrants who are expressly required by the receiving society to carry out work which, for different reasons, cannot be carried out by local nationals, thus making a powerful contribution to its development, is logically left out of the equation. This same level of education means that, in general, the receiving society accepts the arrival of this type of immigration, which is, so to speak, of an elitist nature, with a better disposition. Acceptance which, in cases where the immigrant provides essential services to the community, may even take the form of the adoption of special measures to support their full integration into the host society. Thus, for example, the granting of nationality by means of a discretionary decision of the executive power, without the need to comply with the material requirements and formal procedures regularly foreseen for its acquisition (Article 21.1 of the Spanish Civil Code).

On the other hand, we are faced with a situation in which first world countries have a low birth rate, sometimes alarmingly low, which normally contrasts with the birth rate in third world countries, where a large proportion of immigrants come from. The *fall in the birth rate* has even seriously threatened the forecasts for income from social security contributions to guarantee future pension payments. The system can only be rebalanced by incorporating new workers who can contribute to the costs of paying pensions in a society in which the life expectancy of its members is increasingly being extended. This combination of a falling birth rate and rising life expectancy in the economically more developed countries is an important cause external to the interests of the immigrant himself, which effectively contributes to making the arrival of immigrants more digestible for the members of the receiving society.

Consideration of the interests of the immigrant leads, on the other hand, to distinguish different internal causes of immigration. The immigrant may, in fact, try to gain access to the receiving society for very different reasons. We can distinguish between *economic, political or ideological motives, leisure-health and family reunification*. These are briefly outlined below.

Economic necessity is the most important determinant of the migration phenomenon today. The immigrant considers leaving his place of origin to enter a society that promises him a desirable standard of living, higher than that reserved for him by the logic of the market that governs the current process of globalisation of social relations. This improvement in the standard of living may be an improvement controlled by the receiving society through the offer of work contracts with perfectly regulated remuneration, rights and obligations of the contracting parties and conditions of performance, or it may simply be due to a desire to access goods that are not available in the society of origin outside of the provisions established in the receiving society. In the latter case, there is a risk that the immigrant, moved by the state of need that urges him or her, ends up illegally gaining access to the enjoyment of these goods, or exploited by those who, aware of their special situation of social weakness, subject them, in an equally illegal manner, to undignified working conditions, discriminatory with respect to those of the nationals of the society of origin and those of immigrants accepted by the receiving society, in any case in violation of the established legal order.

Political or ideological persecution is the order of the day in the international sphere. The consolidation of formally democratic political systems in advanced countries should not make us lose sight of the fact that many of today's societies are governed by principles alien to representative democracy and the rule of law. They continue to persecute dissidents who are often forced to leave their place of origin and settle in other countries in order to have a decent standard of living, in the worst cases in order to preserve their physical freedom and even their own lives.

The complacency of the first world citizen with his or her own political system usually guarantees a certain receptiveness of the receiving society towards the political exile. The very logic of the democratic system generally incorporates the idea of protection for those who suffer persecution for ideological reasons, because they do not have the guarantee mechanisms of democratic regimes.

It is generally forgotten that the political exile is as much an exile as the economic one, that both leave their place of origin for reasons of necessity and that the subsistence needs that often mark the economic parameters can be much more pressing than ideological freedom.

On the other hand, the standard of living achieved in certain particularly developed countries has enabled their nationals to enjoy a comfortable economic situation when they retire. It is not surprising in these circumstances that the individual, freed from the need to work and the corresponding obligation to reside

in the place where he has been working, seeks to settle in a geographical environment that provides him with the most suitable climate and environmental conditions to develop his life in the best possible way. This is even more evident in those cases where there is a health indication to avoid the extreme climatic conditions of their country of origin.

This type of immigration is usually accepted without major problems by the receiving society. It is an immigration that does not enter into direct competition with local nationals for jobs, nor does it generate major problems from the point of view of the distribution of social benefits. Their level of purchasing power and the essentially idle motive behind the change of residence in this type of case ensures a certain economic return on the situation created for the host society.

The identity-based misgivings that can sometimes be aroused by the occupation of large areas of coexistence by immigrants for *leisure and health reasons* tend to be substantially dampened by the evidence of the aforementioned economic benefit.

Finally, there is the case of *family reunification* migrants. Family reunification is an inherent consequence of the uprooting that migratory movements generally cause. In general, the decision to emigrate is a calculated decision, assuming the emotional and sentimental cost of distancing oneself geographically from one's most intimate emotional environment. The assumption of this cost is not, however, desired by the emigrant.

The emotional cost of the decision also has a double effect. It affects both the immigrant who decides to take a new direction in his or her life and his or her family and friends who lose the presence of the affective reference point represented by the person of the immigrant. Family reunification comes to resolve, albeit partially, this affective void. Immigration for the purpose of family reunification thus has an obvious justification, it responds to a reason of necessity. It is a cause that must be addressed for what it represents in terms of recovering the emotional balance of those who are involved in it. It is not, however, a cause that is viewed with particular complacency by the receiving society.

The autochthonous population represents this type of immigrant as unproductive beings who have arrived in the warmth of the immigrant already settled in the host society, who will often find it difficult to meet their most basic needs, with the consequent negative repercussions this phenomenon has on the distribution of social benefits. The consolidation of the cultural core of the family union adds a factor of suspicion and mistrust for those who see the confluence of different cultures in the same geographical area as a threat to the survival of the same cultural idiosyncrasies of the host society. These are the fundamental reasons why family reunification is usually accepted only to a very limited extent by the host society.

In this context, the countries around us will adopt their immigration policies according to the different objectives they intend to pursue.

4. The objectives of immigration policies. A critical analysis

The different visions of the immigration problem give rise to different regulations depending on the objectives to be achieved and the values to be realised. But these visions are always taken from the point of view of the host country. This means that they generally favour the interests of their nationals to the detriment of the interests and expectations of immigrants, who are seen as foreign subjects who do not have the legitimacy to decide on the issues that most affect them. It is also possible that there may be a convergence of interests between the two subjects, but this does not prevent the interests of the nationals of the host country from being taken into account more often than not, and they must be satisfied with the legal regulations on immigration.

This situation clashes with the fact that immigration policies encounter problems that affect human rights which, as rights common to the human species without distinction of borders or race, are understood to be universal. By affecting these rights, immigration policies sometimes go beyond the restrictive and closed vision of the national interest to come closer to the general interest. But this is always a limited approach.

Host country nationals thus aspire not to feel that their security, standard of living and the basic foundations of their civilisation are affected. This means that immigration policies are primarily aimed at minimising the impact on these priority objectives of the host society. They also aspire to ensure that the arrival of the immigrant population does not create an uncomfortable situation for them in their role as people who are sensitive to the needs and basic rights of the newcomers. It is, however, a situation that takes as a rule only the adoption of the point of view of the national of the host country. This means that immigration policies are conditioned by the objective of eliminating the bad conscience of the national of the host country, for which they often rely on the imposition of a certain model of life and personal fulfilment of those who intend to join the new country. However, this model does not necessarily have to be considered superior to others.

Security, standard of living, the basic foundations of one's own civilisation and the preservation of personal awareness of the situation of others are the fundamental objectives taken into account in immigration policies.

The first three are, in general, objectives that have been declared by those who inspire the legal regulation of the immigration process. The last one usually takes the form of attention to the immigrants' basic rights and needs, but only insofar as their non-fulfilment significantly affects the consciences of the host country's nationals, causing them personal discomfort. The accentuation of one or other objectives marks important lines of distinction between immigration policies. This explains the need to identify the precise meaning and legitimacy of

each of these objectives and to decide whether or not they can justify measures that infringe on the priority interests of immigrants.

Security

One of the most common prejudices regarding immigration issues is that the arrival of immigrants brings with it a deterioration of the personal security of nationals (López, 2002, p. 15). This is explained by the fact that immigrants who leave their country of origin normally do so for economic reasons, in order to abandon a state of vital need - although there is no lack of those who point out the relative nature of this need - (Pajares Alonso, 1999, p. 237). Their arrival in the host country takes place in a situation of economic deprivation which, if not resolved by finding a job in satisfactory conditions, leads almost automatically to marginalisation and delinquency.

Restricting access to those who will have a job and decent pay removes the root cause of the situation that fosters marginalisation and delinquency, but sends the problem back to the country of origin. For in a situation of personal destitution, as is the widespread situation in the country of origin, it is only logical that individuals should be pitted against each other over the distribution of what little wealth there may be. In reality, peace and security are only restored when the situation is so precarious that there is nothing to fight over. But in such cases the restoration of peace merely symbolises the generalised extreme deterioration of the personal dignity of those affected.

We, the people of the first world, are also responsible for this deterioration. Because our wealth has often been produced through the exploitation of third world countries and through the unjust and unbalanced distribution of goods between different countries. It is therefore justified to propose a general duty of solidarity, the first step of which is the acceptance of immigrants in our communities and the provision of minimum services so that they can develop their lives there with dignity (Miraut Martín, 2004, p. 9). Immigrants already feel discriminated against because they have to leave their country of origin, largely losing their emotional, cultural and family ties in the search for a future that is uncertain. They find themselves in a situation of "economic refugees", which "is at least partly our responsibility" (Kymlicka, 1996, p. 141).

The realisation of this general duty of solidarity is the essential principle to avoid situations of injustice and insecurity that are thought to be caused by the arrival of immigrants, forgetting that often the ultimate origin lies in two combined causes: the economic situation that leads the immigrant to assume the heavy burden of leaving his country of origin as a necessity for his own personal development, and the treatment that the newcomer finds in the host country, with its inhabitants forgetting their responsibility in the very fact of immigration. In this sense, the restoration of security requires coordinated measures of various kinds:

- On the one hand, to provide immigrants with a minimum level of welfare that allows them to live in dignity. We must eliminate the situation of the immigrant as a situation of need, recognising the vital minimum that must always correspond to him/her as a human being.

- Secondly, to involve the immigrant in a common project in which he/she feels he/she can benefit. The newcomer will better accept the rules of the game that presuppose social peace and respect for the rules of the host country if he or she sees these rules as an effective platform for personal progress. It is a matter of creating the basis for them to feel that the legal system of the host country guarantees them vital opportunities that they cannot miss by placing themselves on the fringes of the system.

- Thirdly, to avoid the existence of ghettos of marginalisation. It is normal that migrants tend to cluster together; similar life problems explain this tendency to group together. It can also be explained by the fact of having a common matrix culture. Problems arise when this grouping manifests a form of defence against the outside, against the social group that does not admit them on equal terms with those who were born and have normally developed their lives there (Malgesini and Giménez, 2000, p. 143). This situation is unfortunately very common in first world countries.

The worst way to integrate immigrants is to make them aware of and continually remind them of their status as an addition to the original group, confining them to specific social sectors without any natural exchange with the rest of the population. Only when the immigrant is made to feel equal to the rest of the population, overcoming social fragmentation and the feeling of marginality that comes from assigning them specific areas for his or her vital development, will the full integration of immigrants in the host country have been achieved.

Natural coexistence in a social group, without being divided into closed and incommunicado areas, is the best way to guarantee the establishment of social peace and the commitment of all the country's inhabitants, nationals and newcomers, to respect the established order and the rules governing coexistence.

- Fourthly, inter-regional solidarity in the reception of the immigrant population. Distinct from the problem of avoiding immigrant ghettos is that of inter-regional solidarity at the moment of reception of the immigrant. Interregional solidarity in the reception of the immigrant population takes place at the very moment of their arrival, their reception, without any process of integration of the immigrant into the social group that accommodates them having yet taken place. In this sense, it is a solidarity prior to the duties that may correspond to the nationals of the host country with respect to the process of development and coexistence of the immigrant in the country to which he has decided to transfer his effective residence.

It is clear that the arrival of a large contingent of immigrants at a given time directly affects the population that receives them, firstly because it is a human group that is initially still unproductive, and yet has to benefit from the

social services established for the common good. Basic respect for human rights demands an openly generous and humanitarian stance towards the immigrant, but it is a stance that is held above all by the population of the specific territory in which the newcomers settle.

If the arrival of the immigrant is not shared in a reasonable way by the different territories and populations of the country, there is a risk of generating xenophobia, and xenophobia is the worst instrument for eradicating insecurity. On the contrary, it increases and exacerbates it. That is why we insist on the need for an adequate distribution of the reception of immigrants by the country concerned.

It is necessary to create a general awareness in the public authorities and in the decision-making spheres to place people, whether they are immigrants or not, in places where they can best progress and develop themselves and contribute to social development, without absurd prejudices and always respecting the right to freedom of establishment of each individual.

- Finally, with regard to the host population, a change of mentality is required, an education in values and in the knowledge of the different that will make us lose, once and for all, the fear of the newcomer. The newcomer may have different cultural traits from ours, because he or she has grown up in a different cultural environment. But their common human nature is sure to make them see the advantages of a peaceful and safe society when this society offers them real possibilities of guaranteeing greater well-being.

Often the insecurity that the arrival of the immigrant population supposedly provokes in the host country is more a feeling, unfortunately very widespread, than a real situation. As long as we are unable to eliminate this feeling with the different educational tools that we have today, we will continue to feel insecure, maintaining a position of rejection with respect to the immigration phenomenon in general, and in particular with respect to the immigrants who settle in our territory.

The standard of living

The arrival of migrants in the host country is often seen as a risk to the maintenance of the standard of living achieved by its inhabitants. In a double sense. Firstly, because it is understood that the arrival of immigrants means that there are more individuals to be served by public services, with the economic expense that this entails, and there are more who will be competing to obtain the goods at stake in the host society, especially jobs. Secondly, because the environmental balance may be threatened by a level of overpopulation that is dangerous for the preservation of the natural environment. The latter is particularly true for certain small and fragmented territories, as is the case, for example, of the Canary Islands. These are two different scenarios that we look at separately.

- The arrival of immigrants, especially when it is a massive arrival in a short space of time, always implies a redistribution. Existing social services have to meet the needs and requirements of those who join the local population. This

situation is usually seen as a problem by the established population in the host country. It is thought that if the state already has problems in providing welfare for its nationals, the problems will be much greater as the number of people to be socially cared for grows. The general awareness of the crisis of the welfare state has accentuated this negative view of the arrival of immigrants in terms of the distribution of social benefits.

This is a misleading approach because the demographic situation of our societies, with a considerable drop in the birth rate over the last two decades and a progressive ageing of the population, makes it increasingly necessary to have aggregate contributors to guarantee the level of our benefits, especially those for the non-productive period of our lives. Many advocates of an open-minded acceptance of immigrants' rights base their conclusions on such reasoning. Immigrants benefit from our benefits, but they also make a decisive contribution to them, because without their future contribution these are bound to disappear or to be drastically reduced in the years to come. Accepting immigration would be a profitable social investment in this respect.

The defence of the immigrant as a person and his or her corresponding social rights, however, does not need to resort to this type of argumentation. It is a defence to be upheld in all circumstances. Because if we recognise the universal value of human rights (Campoy Cervera, 2006), we must understand the very fact of immigration and the generalisation of social rights to immigrants as an indisputable fact to be respected in any situation (Añón Roig, 2004). To use the argument of the need for aggregate contributions to the social health of our societies is to hide part of the root of the problem. It is a matter of recognising the universal nature of respect for the dignity of immigrants and their social rights, especially when the reason for emigrating is that they cannot adequately satisfy their social rights in their country of origin, and not of providing utilitarian reasons for our own well-being.

What actually happens is that in the approach to the problem of immigration, the point of view of the benefit, or non-detriment, of the host society prevails over the universal recognition of human rights, with the consequent justification of the dominant position of the indigenous population in the treatment and solutions to the problem of immigration (De Lucas Martín, 2002, pp. 323-324).

The redistribution brought about by the arrival of immigrants affects not only benefits and the use of public services. It also affects the very occupation of jobs in the host society. It is often argued against the acceptance of the immigrant that by taking a job he or she is taking it away from a national of the host country. However, experience has shown that this argument is not generally valid, because immigrants in many cases take up jobs that are not wanted by the native population.

In this sense, immigrants come to complement the labour structure in advanced Western societies, filling positions that could not otherwise be filled.

This complementary function of migrant labour would be a utilitarian reason for their acceptance. But neither is it in itself satisfactory from the point of view of the general recognition of the dignity of the individual, because it is based on an instrumental vision of the figure of the immigrant. We accept them because we are interested in their presence, not because they have a right to it, which from a humanitarian point of view is an absolute absurdity that cannot leave indifferent those who have a minimum of sensitivity to the situation and needs of others.

On the other hand, on the rare occasions when the immigrant arrives at a desired job or one that is usually occupied by the native population, he or she does so under conditions that are inferior to those normally required by the host country's nationals. In view of this situation, the question must be asked whether the immigrant has the right to compete in the labour market with workers already established in the host society. The solution from the point of view of the universal recognition of human rights and the dignity of the immigrant must necessarily be positive, especially if we take into account that if the immigrant leaves his country of origin it is precisely because there is no future for a dignified existence there (Pajares Alonso, 1999, p. 251).

The general recognition of the right to compete in the labour market for the immigrant population also creates benefits for the working class in general, which sees how the employer loses one of its most effective weapons for the consolidation of its position of strength vis-à-vis the worker. But the recognition of the right to work in decent conditions for the immigrant population should not be based on this strategic reason either. After all, when it comes to defending the dignity of the individual who cannot access rights in his or her country of origin, strategies to favour or benefit the native population, while interesting from the point of view of maximising results, cannot replace the basic ethical reasons, nor the point of view of the dignity of the individual, which must always be at the heart of the solution to the problem.

- The standard of living is not only measured by the economic returns that citizens obtain, nor by the access they have to certain benefits and services. It is also measured by the quality of the environment around them. Economic comfort cannot produce the desired well-being if it does not take place in a suitable environment. The preservation of the natural environment and environmental balance are important elements in assessing the quality of life offered by different territories. There is no doubt that the massive settlement of an immigrant population in a territorial area can create a phenomenon of overpopulation with dangerous environmental consequences. The rejection of immigration is sometimes justified on environmental grounds of this kind, with the impossibility of maintaining the right balance when the territory has to withstand excessive demographic pressure.

The solution to the problem is relatively simple when the host country has areas of underdeveloped development that can accommodate population growth without serious risk to the environmental balance. In these cases, the arrival of

immigrants can be useful in filling a demographic gap that has obvious consequences for the economic development of the area. It would be a matter of promoting demographic policies that stimulate the settlement of the new population in the areas where they can contribute most to the balanced development of the country and to the preservation of the appropriate environmental quality.

- The standard of living is not only measured by the economic returns that citizens obtain, nor by the access they have to certain benefits and services. It is also measured by the quality of the environment around them. Economic comfort cannot produce the desired well-being if it does not take place in a suitable environment. The preservation of the natural environment and environmental balance are important elements in assessing the quality of life offered by different territories. There is no doubt that the massive settlement of an immigrant population in a territorial area can create a phenomenon of overpopulation with dangerous environmental consequences. The rejection of immigration is sometimes justified on environmental grounds of this kind, with the impossibility of maintaining the right balance when the territory has to withstand excessive demographic pressure.

The solution to the problem is relatively simple when the host country has areas of underdeveloped development that can accommodate population growth without serious risk to the environmental balance. In these cases, the arrival of immigrants can be useful in filling a demographic gap that has obvious consequences for the economic development of the area. It would be a matter of promoting demographic policies that stimulate the settlement of the new population in the areas where they can contribute most to the balanced development of the country and to the preservation of the appropriate environmental quality.

The problem is aggravated when the territory in which the foreign population settles is small and does not have an unlimited capacity to accept new residents. Here too, insularity is a differential factor. Immigrants can find possibilities for certain economic progress in a reduced territory that is nevertheless exposed to a development that is difficult to assimilate by the natural environment. Proposals for sustainable development in these territories seek to curb the population growth that is overflowing, even at the cost of reducing the possibilities for economic growth. This explains why the indigenous population is wary of the settlement of new residents when the natural environment is threatened by a continuous demographic progression that is impossible for territories with a precise and limited capacity to cope with. The Canary archipelago is a clear example of high demographic density concentrated on certain islands with a situation that the laws of the market alone cannot change. Its natural situation would allow for extreme economic growth leading to the creation of new jobs, with negative consequences, however, for the environmental balance.

Concerns about population growth are fully justified on this point, but they should not be expressed in a general rejection of immigration. It is not immigration that is at the root of the problem, but the failure to put in place adequate mechanisms to absorb the immigrant population in other areas of the country that are not closed territories and do not have any overpopulation problems. Immigration ceases to be a problem when it is taken on board in a spirit of solidarity by the different regions of the country, and the public authorities have the possibility of implementing effective policies for the territorial redistribution of the immigrant population in order to avoid overcrowding in areas that already have very limited capacity for population absorption. The public authorities have a clear responsibility here in the task of combining, in a balanced way, the future development of society in the different territories that make it up with respect for and guarantees of the rights of those who, motivated by economic necessity, have decided to settle in the country.

The basic foundations of one's own civilisation

The settlement of immigrants in the host country is often seen as a direct danger to the preservation of the basic foundations of one's own civilisation in two different ways. On the one hand, because the massive arrival of immigrants can damage or dissolve the signs of identity of the autochthonous population. On the other, because immigrants, as people brought up in a culture other than our own, may bring with them customs that are incompatible with our own cultural assumptions.

a) - The first question points to a closed approach to the idea of cultural identity. It is clear that we all feel comfortable in a certain way of being, characteristic of the place where we have been educated and with which we feel particularly identified. Respecting our signs of identity is an act of recognition of the cultural environment in which we have developed our personality. Maintaining that identity as a living, homogeneous identity makes us feel more secure and gives us a sense of personal pride. The dilution of our collective identity partly disconnects us from our deepest roots. This is why we tend to preserve our traditions, to root our way of being in that of our ancestors and to try to pass it on to new generations by forming culturally homogeneous groups.

This objective is, however, confronted by an unstoppable reality. The world is increasingly interconnected by the rapid development of the media and by the progressive spread of personal knowledge of cultures other than our own. Our collective identities cannot remain closed to the influence of other cultures when they appear with the utmost familiarity before our eyes. Collective identities lose their static character and become progressive entities that take on new forms with the passage of time and contact with other ways of being.

Of course, migratory movements also contribute to this dilution of collective identities. Bringing different cultures into contact with each other makes them permeable to mutual influence. The more or less homogeneous identity that existed in a given territory is gradually transformed by welcoming

different elements. The greater the presence of the foreign population on the territory, the more accentuated the process becomes. This situation cannot, however, be a reason for rejecting immigration, because, as we said, it is part of a general process of intercommunication in the world which also allows for the mutual enrichment of the different cultures. Trying to stop the process of collective identities is like trying to stop the passage of time, a futile effort. On the other hand, the perpetuation of a certain homogeneous way of being on a specific territorial basis cannot be a reason to prevent others from having the minimum access to the rights required by respect for their personal dignity. Collective identity cannot be an obstacle to the rights due to each individual.

b) - The installation of immigrants in a new social environment often creates problems of coexistence with the nationals of the host country, as they have to compete with them in the labour market and in access to public services and benefits. But it is also often the case that the problem of coexistence has an identity or cultural character, because the newcomers enter the new social environment with traditions that they do not want to get rid of and that may go against the moral sentiment of the native population. It is logical for immigrants to want to preserve their cultural practices because they have been brought up in them, which to a large extent define their characteristic way of being. But it is also logical that the nationals of the host country want to avoid performing certain acts that offend them morally.

This is one of the most common reasons given against the presence of immigrants in advanced Western societies. It is thought that their arrival will make us witnesses to situations that we find morally condemnable and repugnant to our sensibilities. In this type of argument, we must distinguish between two aspects, pointing out whether what offends us is the performance of such acts by the immigrant population or the risk of contagion that they may bring to the nationals of the country of origin, as if the latter could end up understanding as normal those actions that they now reject and even carry them out themselves.

The first possibility does not make sense as a reason for rejecting immigration, because from a material point of view it does not matter where the actions that we consider immoral are carried out. It makes no difference whether they are carried out in their country of origin or in ours. What is important is that they do not take place, and that is not achieved by confining them to their place of origin. On the contrary, their presence with us gives us a channel to convince them of the morally low value of their actions, teaching them different ways of thinking and interpreting reality. If it is their contemplation that bothers us, the argument does not make sense either, because even if we do not witness them, we will always be aware that they exist through other means of knowledge. It is absurd and cynical to think that what we do not see does not exist if we are certain of its existence. And that certainty is clear from the moment it serves as a basis for the positions of rejection of immigration.

As for the risk of contagion for the indigenous population, the argument makes more sense, because here a negative consequence can occur. But neither does it seem logical to support this type of argument when the host society has all the means to oppose and condemn actions that clash with social morals and the cultural foundations of our civilisation. On the contrary, this argument could turn against those who argue against immigration if it is understood that the foundations of our civilisation must not be very firm if they cannot withstand coexistence with other cultures of a different sign. In any case, the problem would be reduced to the intergenerational aspect of moral and cultural education, requiring the corresponding educational strategies. In short, there are two options: either we oppose actions that offend us morally wherever they are carried out on the understanding that their implementation in our cultural environment allows us to oppose them more firmly, or we accept them as an expression of a way of feeling different from ours that reflects cultural standards that in principle need not be inferior to our own.

A different problem arises when immigrants actively, and sometimes violently, demand the performance of acts that from our cultural background should not be allowed. The immigrant trained in a culture other than our own argues that the prohibition of such acts may violate his or her personality and even goes so far as to demand that specific and differentiated rights be recognised as a member of a cultural minority (Kymlicka, 1996, pp. 46 ff.). There is no doubt that this situation can lead to public order problems which, as such, are understandably of concern to the host society. On the other hand, however, it is also a possible solution to the problem of the personal fulfilment of individuals in their own culture. To the extent that society becomes more plural with the presence of immigrants who share cultures different from our own, it also makes possible the right not to see the free exercise of each individual's personality violated by forcing them to act in accordance with cultural norms that they do not share. In this sense, immigration facilitates the commitment of the host society to respect the freedom of thought and religion of all its members. These are much more affected in a homogeneous and closed society in which the different person has no choice but to act in accordance with the official culture, even if this deeply violates his or her way of being. Cultural difference cannot, therefore, be a reason to oppose immigration (Ara Pinilla, 2003, p. 304). In any case, it will require a considered and prudent legal treatment that makes the maximum exercise of freedom in its different manifestations compatible with the defence of the social order and of individual and collective goods that may be affected in the name of cultures different from our own.

Implicit objectives

The legal regulations that make the immigrant participate in some of our public benefits and services also serve the function of preserving personal awareness of the situation of others. However, this function is self-evident. Firstly, because on the issue of the human rights of immigrants, society often

shows a "double standard" in such a way that "at the level of discourse, there is a tendency to globally accept all the rights of the person; but in concrete practice, the application of these rights fails" (Malgesini and Giménez, 2000, p. 101).

This is demonstrated by the lack of interest in resolving the immigration problem at its root, promoting mechanisms of international solidarity that would allow the individual to lead a life in dignified conditions in his or her place of origin. And above all, the incredible insensitivity with which it is assumed that many immigrants die in the attempt to reach the shores of the first world. These deaths show us how desperate these people can be to risk their lives in this way in order to reach a society that accepts them only reluctantly. Desperation that should make us aware of the need to be open-minded in order to integrate immigrants into a society that has not been so difficult for us to reach.

The fact that sufficient means are not provided to avoid these dramatic situations and that society does not show the sensitivity that we might expect is because we focus our attention more on the immigrant human being who lives among us, whom we see every day in a situation that is often unbearable to us as citizens who do not want to contemplate the spectacle of unworthy and degraded lives next to him or her. At this point, we clothe our personal conscience with "the humanitarian disguise, of such good electoral returns, of those who are willing to solve the problem of those who are here" (De Lucas Martín, 2002, p. 37), and we forget instead about those who have no chance of reaching us and those who may lose their lives trying to reach us.

Only then do we show a modicum of sensitivity towards these individuals who have managed to overcome the legal problems and physical dangers that come with incorporation into our society. We insist on restricting access to first world societies to immigrants who are going to adapt to our real conveniences, even though we are aware of the "unreal pretence" (Silveira Gorski, 2001/2002, p. 538) of understanding the immigrant as a worker adjusted to a specific job, without being particularly concerned about the different situations that these people will go through in their attempt to have a more dignified existence, not even when these situations lead to the loss of life.

The failure to incorporate immigrants on an equal footing with nationals of the host country in terms of access to the labour market and full enjoyment of their rights is a stingy attitude in terms of the consideration they should deserve as human beings. In any case, attributing to immigrants some, but not all, of the rights that are understood to be universal and adopting attitudes of beneficence towards them, helping them to escape extreme situations of destitution, is positive for the interests of immigrants if we take into account the starting point of their not being considered as persons, although they can be euphemistically recognised as a "human part of the receiving state" (Olivan López, 2002, p. 91). But it is also in the interest of the indigenous population not to contemplate degrading situations while preserving their personal conscience. That this attribution of rights and this attitude to allow them to enjoy certain public services does not

correspond to a similar attitude when it comes to eliminating the risks to their lives that their arrival in the host country brings clearly indicates that, although we are improving in some cases the personal condition of immigrants, we are also in reality preserving above all our personal conscience by attenuating the unworthy situations that we contemplate on a daily basis and closing our eyes to what we do not contemplate, even if it occurs very close to us.

5. Conclusions

Even if there might sometimes be a confluence with the interests of the migrant himself, public policies generally presuppose a consideration of the migration phenomenon from the perspective of the interests of the host society. Security, maintenance of the standard of living and the basic foundations of one's own civilisation are the declared objectives, which are combined with the unstated objective of preserving one's own conscience with regard to the situation of others.

The prejudice of the insecurity generated by an immigrant-receiving society requires first and foremost addressing the causes that could possibly give rise to this insecurity. In this respect, it is proposed to prevent immigrants from finding themselves in situations of need that ultimately justify behaviour that transgresses the established order, providing them with a minimum level of welfare that allows them to live in dignity; to make them part of a common project that can bring them benefits and advantages; to avoid the existence of ghettos of marginalisation by promoting harmonious coexistence on equal terms with the original members of the receiving society; to establish mechanisms of interregional solidarity in the reception of the immigrant population, and educational measures that stress the value of the individual person and the recognition of those who are different.

The maintenance of the living standards is posed on the one hand in terms of competition for jobs and the enjoyment of public services, and on the other hand by the threat to the environmental balance that overpopulation in small spaces entails. The answer to the first question should avoid approaches that focus on the potential benefit to the host society itself of immigrants taking on subordinate jobs, or on the economic boost that this brings, and instead focus on respect for dignity and the right to compete in the world of work on equal terms. The second issue calls for the implementation of general territorial redistribution policies that do not only take into account the immigrant population.

The preservation of the basic foundations of one's own civilisation can be threatened in two ways: by the damage to the signs of one's own identity that could be caused by coexistence with other different cultures, and by the incompatibility of their customs with the cultural assumptions of the host society. To this, the reply is that collective identity cannot in any case be an obstacle to the realisation of the rights owed to each individual and that the recognition of the

right to cultural identity is not an absolute right, and its realisation must be weighed against that of the other rights and legally relevant assets with which it may conflict.

The preservation of personal conscience with respect to the situation of others is an unstated objective of immigration policies that generally translates into attitudes of beneficence that partially improve the subsistence conditions of the immigrant, without addressing the issue of the promotion of the free development of his or her personality on the triple plane represented by the very entry of the immigrant into the host country, the guarantee of their physical subsistence and the preservation of their decision-making capacity during the time they occupy their position as immigrants, which in turn translates singularly into the double demand for the recognition of political rights for immigrants and respect for their cultural difference and for acting in accordance with it, as long as it is ensured that their cultural choice is truly free and that their cultural conduct does not cause relevant harm to third parties.

Taking into account the security problems that may arise from social conflicts and those that may derive from the coexistence of very different identity cultures in the same geographical area, as well as the satisfaction of immigrants' security requirements, which are violated by the risk to their lives posed by the use of certain means of access to the host society, we believe that an interpretation of security in its most comprehensive sense must be taken into consideration, as a guarantee of the preservation of the lives, property and rights of the members of society. In particular, of immigrants, as they are in a more vulnerable situation in this respect.

References

Almiron Roig, N. (2002), *Los amos de la globalización, Internet y poder en la era de la información*, Barcelona, Plaza y Janés.

Añón Roig, M. J. (Ed.) (2004), *La universalidad de los derechos sociales: el reto de la inmigración*, Valencia, Tirant Lo Blanch.

Ara Pinilla, I. (2003), Los derechos de igualdad, in De Castro Cid, B. (directed and coordinated by), *Introducción al estudio de los derechos humanos*, Madrid, Editorial Universitas.

Campoy Cervera, I. (Ed.) (2006), *Una discusión sobre la universalidad de los derechos humanos y la inmigración*, Madrid, Dykinson.

Dabat, A. (2005), Globalización, neoliberalismo y hegemonía. La primera crisis de globalización y sus perspectivas, in Aragonés, A.M., Villalobos, A., Correa, M.T. (Coordinators), *Análisis y perspectivas de la globalización. Un debate teórico I*, México, Plaza y Valdés.

De Julios-Campuzano, A. (2015), Globalización, pluralismo jurídico y ciencia del Derecho, in De Julios-Campuzano, A. (Ed.), *Dimensiones jurídicas de la globalización*, Madrid, Dykinson.

De Lucas Martín, J. (2002), Derechos sociales de los inmigrantes: ciudadanía y exclusión, in Añón Roig, M.J.-García Añón, J., *Lecciones de derechos sociales*, Valencia, Tirant Lo Blanch.

De Lucas Martín, J. (2002), Algunas propuestas para comenzar a hablar en serio de política de inmigración, in De Lucas Martín, J.-Torres, F. (Eds.), *Inmigrantes: ¿cómo los tenemos?. Algunos desafíos y (malas) respuestas*, Madrid, Talasa Ediciones.

Kymlicka, W. (1996), *Ciudadanía multicultural*, traducción española de Carme Castells Auleda, Barcelona, Editorial Paidós.

Malgesini, G.-Giménez, C. (2000), *Guía de conceptos sobre migraciones, racismo e interculturalidad*, Madrid, Catarata-Dirección General de Juventud, Consejería de Educación de la Comunidad de Madrid.

Miraut Martín, L. (Ed.) (2004), *Justicia, Migración y Derecho*, Madrid, Dykinson.

Olivan López, F. (2002), Prólogo to Alarcón Mohedano, I.; Marañón Maroto, T.; De Martín Sanz, L.V., *Derecho de Extranjería*, Madrid, Dykinson.

Olivan López, F. (2002), Derecho y migraciones. Elementos para una aproximación metodológica (con un análisis de la elaboración de la mal llamada nueva Ley de Extranjería y de otras reformas), en Checa, F. (Ed.), *Las migraciones a debate. De las teorías a las prácticas sociales*, Barcelona, Icaria Editorial.

Pajares Alonso, M. (1999), *La inmigración en España. Retos y propuestas*, Barcelona, Icaria Editorial.

Silveira Gorski, H.C. (2001/2002), La Ley de Extranjería y la formación de un sistema dual de ciudadanía, in *El vuelo de Ícaro*, números 2 y 3.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

VIOLENCE AGAINST WOMEN WITHIN THE FRAMEWORK OF THE EUROPEAN UNION. PRESENT AND FUTURE OF EUROPEAN DIRECTIVE

Alina Elena RAMARU[1]
Laura MARTIN MIRAUT[2]

Abstract

Until now, the European Union does not have a common legislative framework on gender and domestic violence, despite the fact that 50 European women die each week as a result of this problem, that the pandemic and the internet have led to a proliferation of VAWS, and the legislative efforts and economic resources used to a lesser or greater extent by the member states. On March 8, 2022, the European Commission sent to the European Parliament and the Council the Proposal for a Directive on combating violence against women and domestic violence. The present article intends to analyse this proposal, starting from the need and opportunity of a joint effort, the European and international context with reference to the process of ratification by the EU of the Istanbul Convention, the legal basis that allows the intervention of EU, the content and the scope of the new directive. This should help understand the assumptions and challenges of the first common framework of the EU on this matter and the modifications that the text could undergo during the legislative process, to reach a more ambitious regulation within the limits of subsidiarity and proportionality specifics to the European construction.

Key words: *violence against women; domestic violence; Proposal for a Directive; European Union.*

1. Introduction

The one subject in the legal field on which it has been abundantly written, also having a great evolution and development in a relatively short period of time, is undoubtedly the subject of gender-based violence. Violence against women is understood as a violation of human rights and another form of discrimination against women, a violation of human dignity, constituting, in one of its worst variants, even a violation of the right to life. For this reason, for more than two decades it has been understood that gender-based violence cannot remain a private

[1] **PhD Student, Faculty of Law, Las Palmas de Gran Canaria University (Spain), alina.ramaru@ulpgc.es. ORCID: https://orcid.org/0000-0003-1115-1085**
[2] **Professor of Philosophy of Law at the University of Las Palmas de Gran Canaria, Las Palmas de Gran Canaria (Spain), e-mail: laura.miraut@ulpgc.es, ORCID: 0000-0002-4397-4361**

matter, being a primary legislative concern both in the national, European, and international framework. (De Faramiñán Gilbert, 2014, p.2).

As confirmed by the statistics, the amplification of marital violence can no longer be considered an epiphenomenon, but the visible tip of the iceberg (Manzur, 2020, p.16).

The data published in 2014 by the EU Agency for Fundamental Rights after interviewing 42,000 women from the 28 Member States is astonishing: one in three women in the EU has experienced physical and/or sexual violence in the last 12 months prior to the report, one in three women has experienced physical and/or sexual violence since the age of 15, one third said they had suffered psychological violence from their partner or ex-partner, one in ten women reported having been a victim of sexual violence and having been harassed by a partner or ex-partner, and one in twenty had been raped since the age of 15. Of the women who have suffered some form of violence from their partner or ex-partner, 20% state that they have suffered such violence even during pregnancy, and the figures continue in the same trend. (FRA, 2015)[1].

Since then, not only have the figures not decreased, but during the pandemic (a circumstance to which the proliferation of the internet should be added), the violence suffered by women has increased or broadened its spectrum, turning to new forms of violence, such as cyberbullying. In fact, it is estimated that the pandemic has led to an increase of around 60% in violence against women and girls, in addition to an exponential growth in cyberviolence. Likewise, and as the representation of Spain itself in the European Commission reported in the press release of March 22, 2022: „ *Cyberviolence is just as prevalent and a growing issue. In 2020, a survey carried out by the World Wide Web Foundation revealed that one in two young women had experienced gender-based cyber violence. According to the European Institute for Gender Equality, 51% of young women are reluctant to participate in online discussions because they have been harassed online. It is a phenomenon that disproportionately affects women who act in the public sphere. In fact, in a 2018 survey, 46.5% of women MPs reported death threats or threats of rape or physical violence against themselves or their family members, most of which were received online*" (European Commission, 2022a).

The impact and preponderance of violence against women and gender-based violence, at a personal level, as well as at a social and health level is undeniable, as it is also at an economic level. The European Institute for Gender Equality estimated in the report published in 2021 that the costs of violence based on inequality in the EU reach 365 billion euros, to which the cost of violence

[1] FRA, E. U. A. for F. R. (2015). *Violence against women: an Eu-wide survey. Main results*, p. 3. https://doi.org/10.2811/981927, https://eige.europa.eu/publications/costs-gender-based-violenceeuropean-union. According to the Fundamental Rights Agency of the EU (FRA), only 14 % of women reported their most serious incident of intimate partner violence to the police, and 13 % reported their most serious incident of non-partner violence to the police.

against women is added, that costs member States 289 billion euros, not to mention the 175 billion euros that domestic violence costs (out of which 87% is linked to violence against women). (EIGE, 2021)[1].

The concern of the European Union to tackle this problem is not new (De Hoyos Sancho, 2017). Likewise, and despite the fact that the European Union lacks a concrete and specific base in the framework of gender-based violence, this has not been an obstacle to approving certain regulations and promoting the area of Freedom, Security and Justice (Etxebarria Estankona, 2019).

Preventing and fighting violence against women, protecting the victims, and punishing the perpetrators had already been proclaimed as a priority for the Commission, and is part of the Gender Equality Strategy 2020-2025 (Communication from Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Union of Equality: Gender Equality Strategy 2020-2025, 2020). In addition to all this, there is the incessant struggle and petition by NGOs and the European Parliament for a unified, complete and equal legislation in the EU on gender-based violence and domestic violence.

The data collected both by NGOs and by the community and state institutions themselves coincide: despite the fact that all EU States legislate on gender-based violence and domestic violence and invest in gender policies (in 2022 alone, 30.5 million euros were invested in projects to prevent and fight gender violence), these initiatives are carried out in different sizes and speeds, creating in this way undesirable legal uncertainty and a disparity of criteria, incompatible with the principles of the EU. On the other hand, although it is true that the victims of the European Union enjoy a series of protection and reparation measures, these measures do not cover all the needs and specificities of the victims of domestic or gender-based violence (Arangüena Fanego, 2018).

Heterogeneity is the common denominator in this matter. As an example, the protection measures related to gender-based violence in the different Member States are of a criminal nature in some of them, while in others they are of an administrative or civil nature, probably because of the different legal, historical, geographical and political traditions that make up the European Union (Freixes Sanjuan et al., 2014).

The protection of victims in the Member States of the European Union and according to existing resources, is marked by differences in coverage, by different management models and different economic capacity. (Martínez García, 2019).

In the absence of a concept of gender-based violence victim in the EU until now, the proper use of existing general regulatory instruments for victims of

[1] EIGE. (2021). *The costs of gender-based violence in the European Union*. https://doi.org/doi:10.2839/063244. According to this study three main sources of costs: direct cost of services (to victims or to public providers); lost economic output; and physical and emotional impacts measured as a reduction in the quality of life.

violence against women, as occurs with the European protection order, is extremely difficult. (Borges Blázquez, 2021).

The fragile balance between security and guarantees, together with the disagreements between the different competent jurisdictions for the protection of supranational rights, have marked the victims' rights in general, victims of gender-based violence rights, and the harmonization of criminal justice. (Armenta Deu, 2010).

For all these reasons, it was high time the European Union gave a joint response to the problem and on March 8, 2022 on the occasion of International Women's Day, the European Commission published the Proposal for a Directive of the European Parliament and of the Council on the violence against women and domestic violence (European Commission, 2022b).

2. Context and current content of the proposal for the European Directive

Given the fact that on the date of writing this article we are dealing with a draft Directive, which can therefore undergo amendments and modifications, and it is even possible, although less likely, that it will not finally be adopted, we are going to briefly review the current content of the proposal, and afterwards analyze the possible modifications that the Directive could undergo during the legislative process until its final adoption and transposition by the Member States.

The proposal presented by the European Commission to Parliament is contained in an explanatory memorandum, a recital and 7 chapters with a total of 52 articles. In order to understand the content of the Directive and the unifying solution chosen, which, as we will see, is not as ambitious as desired, the explanatory memorandum reveals the entire previous process and its political, institutional and legislative drawbacks.

Before analyzing its content, and to better understand the content and scope of the regulation through this Directive, it is important to look at the context and the legal basis that allows the EU to regulate in this matter.

A) Context. The Directive itself begins its explanatory statement by presenting the context that imposed unified legislation on the matter, briefly reviewing alarming statistical data, recalling that one of the Commission's actions is precisely to protect the fundamental values of the EU and guarantee respect for the Charter of Fundamental Rights of the EU and that community standards are fragmented into different legal instruments and are more than ten years old, reviewing these standards to conclude that indeed "there is no specific legal instrument of the EU that addresses gender-based violence against women comprehensively. However, certain forms and aspects come within the scope of existing EU laws "[1]. Apart from the regulatory fragmentation, there is also a

[1] Directive 2012/29/EU on the victims' rights, Directive 2011/99/EU on the European protection order; Regulation (EU) No. 606/2013 on mutual recognition; Directive 2011/93/EU on sexual abuse of minors; Directive 2011/36/EU on the fight against trafficking; Council Directive

controversial effectiveness concerning many of these tools. (De Faramiñán Gilbert, 2014).

For example, regarding the Directive on the European Protection Order, and despite the ambition and the more than praiseworthy work previously carried out, the results have not been as expected, since it is an underused tool, as in Spain between the years 2015 and 2017 only 29 EPO were issued (Etxebarria Estankona, 2019).

As one would expect, in its preamble the Directive recalls the Istanbul Convention, a basic international standard on the matter (López de Zubiría Díaz, 2019), and the main point of reference for the drafting and purpose of the Directive. The Istanbul Convention is the international standard to eradicate gender-based violence, ratified by most, but not all, EU countries and anti-subdiscriminatory legal framework (Gil Ruiz, 2018, p. 16)[1]. The winding process of ratification or subsequent follow-up of the Istanbul Convention is referred to in the Directive only incidentally or by means of a footnote (see pages 3 and 8 of the Directive proposal), however, we consider that one of the main motives and impulses has been precisely this aspect. Also, let us remember that not all member countries of the European Union[2] have ratified it individually, sometimes invoking constitutional impediments, and, in others, obstacles of a purely ideological or political nature. As far as the EU is concerned, it already signed its accession to the Istanbul Convention on June 13, 2017, but without reaching unanimity for its ratification yet, a situation that can be deduced precisely from the non-ratification or intention to withdraw on the part of EU members. However, on October 6, 2021, the Court of Justice of the European Union issued a favorable legal opinion in the sense that the EU can ratify the Convention with a qualified majority (Court of Justice of the European Union, 2021). Although the

---

2004/80/CE of April 29, 2004, on compensation to crime victims; Council Directive 2004/113/CE, of December 13, 2004, by which the principle of equal treatment between men and women is applied to access to goods and services and their supply; Directive 2006/54/CE of the European Parliament and of the Council, of July 5, 2006, regarding the application of the principle of equal opportunities and equal treatment between men and women in matters of employment and occupation (recast); Directive 2010/41/EU of the European Parliament and of the Council, of July 7, 2010, on the application of the principle of equal treatment between men and women who carry out an autonomous activity, and by which Directive 86/613 is repealed /EEC of the Council; Proposal for a Regulation of the European Parliament and of the Council on a single market for digital services.

[1] The author conceives the right in a reactive way before an unjust phenomenon, the conceptualization of the anti-subdiscriminatory right being essential, having as a central element the Istanbul Convention.

[2] The Convention has been signed by all EU Member States, and ratified by 21 (Austria, Belgium, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovenia, Spain and Sweden). In July 2020, the Polish government announced its intention to withdraw from the Convention, but this has not yet been enacted. Bulgaria, Czechia, Hungary, Lithuania, Latvia Slovakia have not ratified it yet.

new interpretation given by the CJEU opens the door to an immediate ratification, even though not unanimously, until now and given the lack of political will of all the members, and probably in order not to shake the European construction, it seemed that the ratification by the EU would follow an independent and parallel course to the Directive and to the individual ratification of the convention by the other Member States. In other words, ratification by the EU without unanimity, but with a qualified majority, is possible from a legal point of view, but it is certainly not the desirable path, from a political point of view or, as rightly pointed out by Soraya Rodríguez Ramos, Spanish lawyer and member of the EU Parliament, "doing it without unanimity could become a dangerous precedent at Council level, in relation to other policies where there is no consensus among the 27" (Rodríguez Ramos, 2022). However, as the Commission itself announced a year ago in the explanatory memorandum of the proposal for a Directive, the completion of the accession process of the EU to the Istanbul Convention is a priority for the Commission. For this reason, at the beginning of 2023 the Commission once again urged the EU to complete its accession, with the European Parliament voting in the same vein on the provisional report in its plenary session on February 15, 2023, for which reason ratification is closer and closer (European Parliament, 2023).

B) Legal basis. One of the keys to understanding the scope of the Directive, although it is considered by the doctrine and NGOs as not very ambitious, lies precisely in the legal basis that serves as the basis for the EU to create a common framework for the eradication of gender-based violence. According to the text of the proposal, the legal basis is based on the Treaty on the Functioning of the European Union, and in particular its article 82, paragraph 2, and its article 83, paragraph 1, these articles being those that constitute the basis for the EU to establish "minimum standards" in this area.

Article 82, paragraph 2, of the TFEU provides the legal basis for establishing minimum standards on the rights of crime victims and areas covered by it to the extent necessary to facilitate mutual recognition of judgments and court decisions, as well as the police and judicial cooperation in criminal matters with a cross-border dimension. As for the Article 83, paragraph 1, of the TFEU, it establishes the legal basis for the minimum standards relating to the definition of criminal offenses and sanctions in relation to the sexual exploitation of women and children and computer crime.

A simple reading of the two cited articles suggests that this Directive cannot cover the entire subject of gender-based violence because it lacks a legal basis. To do so, a reform of the treaties would be necessary in order to include gender-based violence in the category of euro crimes, as terrorism and corruption already are.

Meanwhile, the Directive, with its legal basis, will establish minimum standards observing the principles of subsidiarity and proportionality, regarding sexual exploitation and cyberviolence linked to gender-based violence, the rights

of victims in terms of recognition mutual support, cooperation, and support in matters with a cross-border dimension.

Based precisely on the principle of subsidiarity, although the Directive establishes a minimum level of maximum penalties in relation to the offenses it defines, it leaves the Member States the freedom to legislate on the minimum penalties.

As far as proportionality is concerned, the European Commission starts from magnificent previous work by various bodies, such as the European Network of Legal Experts in the Field of Gender Equality and non-discrimination, which agree that only a comprehensive approach and a single European document with minimum standards applicable to all Member States, would make the eradication of gender-based violence effective. In order to achieve this, the Commission, as he explains, would have two strategic possibilities: the first would mean incorporating the rules of the Istanbul Convention, adapted to the areas of competence of the Union, or a second strategy that would mean going further and including in the new European regulations certain aspects that the Istanbul Convention does not deal with, such as cyber-violence. The chosen option was the second one, and within the levels of that second option, it ruled out a more far-reaching regulation, precisely with the purpose of respecting the principle of proportionality and taking into account previous work on the social and economic impact of the future standard. The new regulations intend to provide added value and support to existing national and international legislation, leaving a certain margin to the States for its execution.

C) Content of the Directive. The content of the European proposal could be summarized in five pillars (Toulieux, 2022): criminalization, protection, support, prevention, coordination, and cooperation. This being exactly the order in which they are developed in the regulations.

1.- Criminalization. The Directive, after a first chapter dedicated to definitions, gives way in the second chapter, to the criminal field, further proof that this is indeed the field to which most relevance is given. The second chapter is entitled "Crimes related to the sexual exploitation of women and children and to computer crime", that is, the exact two categories that constitute, according to article 83.1 TFEU, the legal basis of this proposal. Throughout eleven articles (articles 5 to 15), Chapter II defines various crimes with their respective penalties, establishes the degrees of authorship and the statute of limitations for the respective crimes. The crimes typified in European regulations are:

- Rape (art. 5) is defined as "performing with a woman" or "causing a woman to perform" any "non-consensual act of penetration through the vaginal, anal or oral route of a sexual nature, with any part of the body or with an object ". The reason and the need for a unified definition reside in the fact that, although rape is criminalized in all European criminal laws, some still require the use of force or threat as a prerequisite. That is why the proposal insists in the second paragraph of article 5 on what "non-consent" means, and that consent can be

withdrawn at any time during the sexual act. The active subject can be any person, while the passive subject can only be a woman.

- Female genital mutilation (article 6) defines what it consists of and punishes the action of forcing a woman or girl to do so or even providing the means to perform it. The inclusion of this crime, of mandatory application in all national legislations at the time of transposing the Directive, was considered necessary insofar as only a part of the member countries defined female genital mutilation as a sui generis crime, while others considered it part of other general crimes such as the crime of injuries. The active subject can be any person regardless of sex, while the perpetrator can be direct or indirect, since not only the person who performs this act is punished, but also the person who forces it or provides the means. The passive subject can be a woman or girl, and the protected legal right is physical integrity, health, and human dignity.

- The non-consensual dissemination of intimate images (article 7) includes all intentional conduct carried out through the use of information and communication technologies, to disclose, produce or manipulate videos or images of a person's sexual activities, without their consent or threaten or coerce to do so. Once again, it is a crime whose harmonized definition and typification was necessary insofar as only ten member countries include it up to this moment in their criminal legislation, as reported by the Commission in its press release of March 8, 2022 (European Commission, 2022b). It should be noted that in the case of this crime, both the active and passive subject can be any person, regardless of sex; and regarding the essential requirements of the crime, the intentionality on the part of the author, the lack of consent of the victim and the means of realization are stipulated: information and communication technologies, excluding therefore other types of disclosure, such as paper copies.

- Cyberstalking (article 8), includes all intentional behaviors, carried out using information and communication technologies for which a person is threatened or intimidated, or another person is subjected to continuous surveillance without their consent, or material containing another person's personal data is disclosed "for the purpose of inciting such end users to cause significant physical harm or psychological harm to that person." Once again, both the active and passive subject can be any person, and the means for carrying out the punishable conduct can only be information and communication technology. Indispensable requirements of the criminal type are, as in the previous crime: the lack of consent of the victim and the intention of the author. Regarding the variant of the crime through disclosure, it is also required that it involves a multitude of recipients and that the purpose is "to incite said end users to cause significant physical harm or psychological harm to that person".

- Cyberbullying in accordance with article 9 refers to those intentional conducts directed to „ a) initiate an attack together with third parties directed against another person, disseminating threatening or offensive material to a multitude of end users, using information and communication technologies, with

the effect of causing significant psychological damage to the person attacked; b) participate together with third parties in the type of attacks referred to in letter a). The active and passive subjects, once again, can be both male and female, but as for the active subject, it is required that it be a plurality "together with third parties". As additional requirements of the criminal type, intentionality and causing significant psychological damage to the passive subject are established.

It should be noted that both in terms of cyberstalking and cyberbullying, the data shows a proliferation in recent times, with an exponential rise in this type of action during the Covid-19 pandemic, as reflected in the exposure of reasons for the proposal and in the previous works that are at the base of its regulation. Although the passive subjects can be both women and men, the European Commission emphasizes in "recital 17" of the proposal that "cyberviolence is directed at and especially affects women politicians, journalists and human rights defenders. It can have the effect of silencing women and hindering their social participation on equal terms with men. Cyberviolence also disproportionately affects women and girls in educational settings, such as schools and universities, with detrimental consequences for the continuation of their education and for their mental health, which can, in extreme cases, lead to suicide."

The typification and definition of both cyberstalking and cyberbullying, the latter typified at present in only four member countries, are new and very necessary given that most member countries do not consider them as such, sometimes being persecuted only through interpretation or its assimilation to other crimes such as threats, coercion, harassment, written at a time when the internet was not a preponderant medium as it is now and therefore these past writings only refer to physical acts of surveillance and stalking.

- Incitement to violence or hatred by cyber means according to article 10 is intentional conduct "directed against a group of persons or a member of such a group defined by reference to sex or gender, by means of publication through the information and communication technologies of material containing such incitement". The passive and active subjects can be any person, regardless of sex. The legal rights protected are sexual freedom, gender equality and dignity. As in the previous crimes, the requirements are the intention and the means for the commission of the crime, and these may only be information and communication technologies. As an added requirement, the material in question must be suitable for inciting hatred or violence.

Further on, the Directive establishes norms regarding the forms of participation such as induction and complicity, considered punishable in relation to all the crimes previously defined, while the attempt is punishable only in terms of rape and genital mutilation.

Regarding sanctions, observing the nature of the "minimum standards" Directive, it has been decided to establish the requirement of a minimum of the maximum penalty, thus allowing States to go further and raise the maximum penalties even more. Regarding the wording "a prison sentence of a maximum

duration of at least…", it can lead to some confusion, so we consider the modality chosen in the case of the crime of terrorism much more appropriate: "a maximum penalty of not less than... " (European Parliament & Council, 2017)[1]. With the current wording, minimum sentences are not established for the crimes listed, but minimum sentences for the maximum sentence. We consider it important either to improve the wording of article 12 regarding sanctions, or that countries pay special care in the interpretation of said article when adapting national regulations regarding sanctions. By way of example, regarding the crime of rape, the Directive proposal establishes a maximum sentence of at least eight years for the violation of article 5 and a maximum sentence of at least ten years when any of the aggravating circumstances of article 13 occurs. Therefore, with a literal interpretation of articles 5, 12 and 13, compared with national legislation, we consider that the respective state regulations will not have to be reformed since they all establish a maximum penalty of at least ten years for rape. For that matter, article 179 of the Spanish Criminal Code establishes a prison sentence of four to twelve years for the crime of rape, and we understand that no modification will be made when transposing the Directive. However, this position is not unanimous, as evidenced in the study recently carried out and published in Spain by the European Women's Lobby (Freixes Sanjuan, 2022, pp. 56-62)[2], which reaches a precisely opposite conclusion after interpreting that the Directive establishes a minimum sentence of eight years and a maximum of ten years. Although we do not agree with this last consideration regarding the interpretation of Article 12 of the proposed Directive, we consider it a particularly useful study to improve the text of the Directive or to transpose it when the time comes. The same happens with other European Codes such as the Italian Code, which in its article 609 bis, establishes a maximum sentence of twelve years, the Romanian Penal Code, which in its article 208.1 establishes a maximum sentence of ten years, or the French Penal Code, which establishes a penalty of fifteen years in its article 222.

As for recidivism, in the crime of rape, the proposed Directive also establishes the participation of the convicted person in specific prevention programs, an aspect that is largely already reflected in national criminal regulations. The proposal also includes a series of classic aggravating factors such as the perpetrator's recidivism, the victim's underage status, the use of weapons to commit the crime, the consequence of death or suicide of the victim, etc...

[1] See article 15 of Directive (EU) 2017/541 of the European Parliament and of the Council on the fight against terrorism.

[2] This is a detailed legal study carried out by Teresa Freixes San Juan, coordinated by María Teresa Nevado Bueno, General Secretary of LEM Spain and developed by Juliana Jiménez Ledesma, feminist activist and jurist, edited by the European Women's Lobby in Spain, which is a Non-profit platform of women's associations created in 2016. The impact of the Directive on Spanish legislation and the indicators of its transposition are analyzed and proposals for improvement to the European text are provided.

2. The next pillar dedicated to support for victims is developed in Chapter 4 of the Directive and emphasizes that victims must receive support at all times, that is, before, during and after the process, as long as they need it for their full recovery.

Article 27 establishes the specific efforts of the support services for victims, their modalities and coverage with a special focus on victims of sexual violence, in which case the emphasis is placed on urgency and specialized care (article 28), specialized support also for victims of female genital mutilation (article 29). Despite the existence of European regulations, this proposal makes special reference to sexual harassment at work through the obligation of States to have advisory services outside the workplace, including advice to employers on how to adequately deal with these crimes (article 30). Article 31 obliges all Member States to create national victim helplines and to ensure that they operate with a harmonized number at EU level, specifically „116016". The creation of specialized shelters for victims and safe places where minor children can visit the parent who committed the crime is established, which in Spain exist already as meeting points (articles 32 to 35 of the proposal). And, of course, specific support is established for victims who are part of certain groups at risk, such as victims with disabilities (article 35). Most of the support resources referred to in this chapter already exist to a greater or lesser extent in the member countries, so the most innovative would be the references to specialized advice for victims of cyberviolence and resources to remove crime-related online content.

3. Chapter 5 focuses on the pillar of effective prevention that imposes on Member States the obligation to carry out awareness campaigns and research, education, and dissemination programs (article 36). On the other hand, the obligation to carry out training is established for the professionals who are most likely to be in contact with the victims, offering a list of possible professions, but without limiting it („and other relevant personnel "- article 37-). Article 38 provides for intervention programs open not only to the perpetrators of crimes, but also to the voluntary participation of people who fear committing these crimes.

4. Chapter 6 is devoted to the pillar of coordination and cooperation between Member States and the EU on violence against women and domestic violence. Coordination and cooperation actors are mentioned in the article 40 list, but as *numerus apertus* („and other relevant organizations and entities "). A specific mention and relevance are given to cooperation with non-governmental organizations, as key agents of support for victims (article 41). States will be compelled to create an official body to coordinate and supervise policies in this area (article 39). Once again, the novelty comes in terms of cyberviolence. Member States are bound to facilitate the adoption of self-regulation measures by intermediary service providers (article 42). Cooperation between Member States for the exchange of best practices and effective implementation of this Directive is provided for (Article 43). Data collection, surveys and research are essential and

the previous experience of EIGE, that will support States in the development of a common methodology and data collection, is recognized (article 44).

5. Chapter 7 contains the final provisions of this Directive, amending through article 45 the Directive on sexual abuse of minors, in order to ensure consistency with this proposal. Furthermore, it clarifies that this Directive applies in addition to the Victims' Rights Directive, the Anti-Trafficking Directive, the Child Sexual Abuse Directive, and the proposed Digital Services Law. This means that victims should benefit from the protection of all Directives that apply to them. Therefore, this Directive does not come to abrogate said texts or to unify them, but rather it has been an addition. This approach, on the other hand, means that this text will not solve the cross-border application problems of the previous Directives, but it is further proof that the EU does not give up in its efforts to build a true area of European justice, in which framework of the basic freedom of free movement and residence (Martín Martínez, 2011, p.440).

Regarding the transposition, a maximum term of 2 years is established (article 50) from its entry into force, which would be desirable not to be delayed.

3. Future of the proposal

Following the rules of the ordinary legislative procedure, the Commission, the only EU institution with the power of initiative for legal acts of the Union, transferred the text of the proposal to Parliament and the Council on March 8, 2022.

The proposal for a Directive is in the midst of the legislative process, already presented in the variant that we have commented on in this article, it is subject to negotiation and amendments that the European Parliament, considered the most transparent and accessible European legislative body, may introduce during the process. Therefore, during the processing, Parliament could reinforce the initial text in order to have a complete and effective final text of the Directive to combat gender-based violence.

The work of MEPs will be supported by specialized parliamentary committees, political groups, NGOs, and civil society in general.

By means of a series of readings, Parliament and Council will review and amend the text of the proposal. If both institutions reach an agreement, the proposal is adopted. If the Parliament and the Council do not reach an agreement, a second reading is carried out. If no agreement is reached at second reading, the proposal is submitted to a "conciliation committee" made up of an equal number of Council and Parliament representatives, assisted by Commission representatives. The committee text is sent to Parliament and Council for a third reading, so that they can finally adopt it as legislation. Therefore, the proposal for a Directive may be approved in its initial text, undergo amendments, or even not be approved, although it must be said that this last case is statistically highly

improbable. In fact, more than 90% of the texts are approved, usually at first reading.

The intention of the EU is to carry on with the adoption of this Directive and in parallel with the ratification process of the Istanbul Convention, and this makes sense, insofar as the Commission's proposal differs from the Convention, since it sets minimum standards for EU Member States in areas of EU competence, including the criminalization of cyber-violence offenses that are not specifically covered by the Istanbul Convention. In addition, Member States that already ratified the Istanbul Convention can maintain or adopt stricter rules.

There are several proposed amendments until the present moment, and they come from various organizations, committees or lobbies. The positions are very different, going from some who consider that the Directive cannot be adopted, alleging that it lacks a legal basis and invades the exclusive powers of the States, to amendments that are even more ambitious than the Directive itself. Among the latest, we would highlight the more than 1,600 amendments published on February 2, 2023, by the Civil Liberties Committee and by the Women's Rights and Gender Equality Committee, which mostly come to detail or strengthen some articles of the Directive. By way of example, it is requested that specialized support services for victims of violence be provided in several languages, that the location data of shelters or shelters be confidential or that a minimum number of shelters be established for a certain number of population, specifically the proposal speaks of at least one shelter for every 10,000 inhabitants (Committee on Civil Liberties & Committee on Women's Rights and Gender Equality, 2023).

Another notable report is the one published in September 2022 by The European Disability Forum (EDF), which proposes various amendments related to the legitimate interests of the group they defend: the criminalization of forced sterilization, adapted support services and adequately trained personnel to care for this group of especially vulnerable victims (EDF -The European Disability Forum-, 2022).

Among the possible modifications that the Directive could undergo, the proposals made by the European Women's Lobby-EWL in May 2022 should be highlighted: a greater gender perspective, the inclusion of violence against women and girls as a euro crime, the inclusion as crimes of all forms of violence against women, proposing, among others, the inclusion in article 6 of the Directive, forced marriages, forced abortions and forced sterilization, and, on the other hand, proposes the definition and inclusion as a crime of the sexual exploitation of women and girls, especially when it forms part of the legal basis of the Directive through the mentioned article 82 of the treaty.

Among the proposals for improvement evidenced in this last study, we would highlight: the definition of legal concepts dealt with by the Directive, such as "gender"; the inclusion in terms of cyberbullying, cyberstalking and incitement to violence of other means of committing the crime, not only electronic ones;

regarding legal assistance so that the victim can file a complaint, it is requested to expressly include that said assistance is free of charge; review the deontological rules of professional secrecy in order to guarantee professional confidentiality without detriment to effective assistance to victims, etc... And, of course, we agree with the demand of NGOs and the European doctrine of seeking a common concept or a better delimitation between the concepts of "gender-based violence", "violence against women", "domestic violence" and "family violence", which do not always overlap in national regulations.

4. Conclusions

Until now, there is no specific EU legal instrument addressing violence against women and domestic violence, EU rules are fragmented into various legal instruments constituting a complicated „legislative patchwork" (Manzur, H., 2020, p.3), and there are important legislative differences between Member States.

This Directive, when adopted, will be the first firm step and the first document to specifically and coordinately address gender-based and domestic violence in the EU. Its need is obvious, given the worrying figures, given the paralysis of the ratification process of the Istanbul Convention by the EU, and given the proliferation of cyber-violence which, on the other hand, was not specifically addressed in the Istanbul Convention.

Despite being considered unambitious, we understand that considering the legal basis, the context, the socio-economic impact studies and the budget forecasts, the Directive proposal is correct, or rather, balanced. During the negotiation process, without a doubt, and taking into account the number of amendments presented and the legislative precedents in the EU, the proposal will undergo changes, but we understand that they will not go much further than the initial text, if we want not only a prompt entry into force and transposition, but also efficiency in its execution and in all Member States equally, in order to take a forceful first step in combating this "meta-violence" (Freixes Sanjuan et al., 2014).

References

Arangüena Fanego, C. (2018). *Protección y reparación de la victima en la Unión Europea* . In Tirant Lo Blanch (Ed.), *Integración europea y justicia penal*.

Armenta Deu, T. (2010). Aproximación del proceso penal en Europa: proceso penal europeo o europeización del proceso penal. *Revista General de Derecho Procesal*, 22.

Borges Blazquez, R. (2021). La construcción de una Europa más igualitaria desde la protección de las victimas de violencia de género. *Revista Jurídica Universidad Autónoma de Madrid, 43*, p. 189–216.

Committee on Civil Liberties, J. and H. A., & Committee on Women's Rights and Gender Equality. (2023). *Amendments 1364 - 1660 Draft report*. https://www.europarl.europa.eu/doceo/document/CJ01-AM-742352_EN.pdf

Court of Justice of the European Union (2021). *Opinion (C-1/19) Istanbul Convention*. https://www.courthousenews.com/wp-content/uploads/2021/10/ecj-istanbul-convention.pdf

De Faramiñán Gilbert, J. M. (2014). *Del marco internacional al nacional: El derecho a la igualdad y a la no discriminación en la Unión Europea, la Orden de protección y las Medidas de protección integral conta la violencia de género en España*. Working Papers, 3, p.1-17.

De Hoyos Sancho, M. (2017). Principales avances en derechos, garantias y protección de victimas . *Diario La Ley*, *8955*.

EDF (The European Disability Forum). (2022). *Proposal for amendments to the Directive on combating violence against women and domestic violence*. https://www.edf-feph.org/content/uploads/2022/10/EDF-Amendment-proposed-directive-on-combating-violence-against-women-Sept-2022.pdf

EIGE. (2021). *The costs of gender-based violence in the European Union*. https://doi.org/doi:10.2839/063244

Etxebarria Estankona, K. (2019). The protection of victims of gender violence in the Europe Unión. Special reference to the mutual recognition of protection measures in civil mattersw . *Rev, Bras, de Direito Processual Penal* , *5*(2), p. 961–998. https://doi.org/https://doi.org/10.22197/rbdpp.v5i2.239

European Commission (2020). *Communication from Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Union of Equality: Gender Equality Strategy 2020-2025*, Pub. L. No. COM/2020/152 final (2020). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0152

European Commission. (2022a). *Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence*. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0105&from=ES

European Commission. (2022b, March 8). *Questions and answers: the Commission's proposal for new EU-wide rules to stop violence against women and domestic violence*. https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_1534

European Parliament. (2023). *Interime Report on the proposal for a Council decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence*. https://www.europarl.europa.eu/doceo/document/A-9-2023-0021_EN.html

European Parliament, & Council. (2017). *Directive 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA*. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L0541&from=ES

FRA, E. U. A. for F. R. (2015). *Violence against women: an Eu-wide survey. Main results*, p. 3. https://doi.org/10.2811/981927, https://eige.europa.eu/publications/costs-gender-based-violenceeuropean-union

Freixes Sanjuan, T. (2022). Estudio sobre el impacto de la propuesta de Directiva de la Comisión Europea sobre violencia contra las mujeres, edited by *Lobby Europeo de Mujeres* in Spain (LEM España), p. 56-62

Freixes Sanjuan, T., Cerrato, E., Merino, V., Olivera, N., Román, L., Sales, M., Steible, B., Torres, N., Vañó, R., & Visser, G. (2014). *Protección de las victimas de violencia de género en la Unión Europea* (L. Román Martin, Ed.). https://doi.org/https://doi.org/10.22197/rbdpp.v5i2.239

Gil Ruiz, J. M. (2018). *El convenio de Estambul: como marco de derecho antisubordiscriminatorio*, Madrid, Dykinson, p.16

López de Zubiría Díaz, S. (2019). *El Convenio de Estambul en la lucha contra la violencia de género: análisis crítico*. Letras Jurídicas: Revista de Los Investigadores Del Instituto de Investigaciones Jurídicas *U. V., ISSN 1665-1529, Nº. 39, 2019, Págs. 203-218*, *39*, p. 203–218. https://dialnet.unirioja.es/servlet/articulo?codigo=7344414&info=resumen&idioma=SPA

Manzur, H. (2020). *Vers une Europe sans violances faites aux femmes: le labyrinthe politique et institutionnel européen* (Fondation for European Progressive Studies & Fondation Jean Jaurés, Eds.).

Martín Martínez, M. (2011). Protección a las víctimas, violencia de género y cooperación judicial penal en la Unión Europea post Lisboa. *Revista de Derecho Comunitario Europeo, 39*, p. 407–442.

Martínez García, E. (2019). *La protección jurisdiccional contra la violencia de género en la Unión Europea* (Tirant Lo Blanch, Ed.).

Rodriguez Ramos, S. (2022, November 24). *Claves sobre la futura Directiva contra la Violencia de Género de la UE*. https://mujeresalfrente.org/claves-sobre-la-futura-Directiva-contra-la-violencia-de-genero-de-la-ue/

Toulieux, F. (2022). *Prévention et lutte contre les violences de genre en Europe : de la nuit à la lumière*, p.14 . https://www.ucly.fr/wp-content/uploads/2022/11/prevention-et-lutte-contre-les-violences-de-genre-en-europe.-de-la-nuit-a-la-lumiere.-fabrice-toulieux-ucly.pdf

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

THE OMBUDSMAN AND OMBUDSMANFOR CHILDREN IN THE SYSTEM FOR PROTECTING THE FREEDOMS AND RIGHTS OF INDIVIDUALS IN POLAND

Rafał CZACHOR[1]

Abstract

There are various bodies making up the system for protecting the rights of an individual in a democratic state. An example is the ombudsman. In Central and Eastern Europe ombudsmen were appointed during the late socialist era or during the period of democratic transformations. An example is Poland, where the first ombudswoman was appointed in 1987. Since 2006 Poland has had another institution with a similar, though more targeted profile – the Ombudsman for Children. The aim of this short study is to carry out a brief analysis of these two institutions.

Key words: *constitutional law of Poland; human rights in practice; the protection of individuals' freedoms and rights; ombudsman; ombudsman for children.*

1. Introduction

There are various bodies making up the system for protecting the rights of an individual in a democratic state. A leading role in the system is played by an independent judiciary and constitutional courts. Various countries also have other bodies that may be established constitutionally. An example is the ombudsman. The history of this institution goes back to the early eighteenth century, when in 1709 the first ombudsman, later referred to as the Chancellor of Justice, was appointed in the Kingdom of Sweden. Until the mid-twentieth century the ombudsman as an institution did not gain much popularity. After the Second World War the institution was introduced into the legal orders of many European and non-European states. It may be of a general or specialised nature (for example, Germany has a military ombudsman of the Bundestag), be a single person or collegiate body (for example in Austria). The purpose of appointing ombudsmen is to have an independent body to investigate the state administration's violations of the rights and freedoms of individuals. The reasons behind the increasing popularity of ombudsmen in a global perspective include their universal accessibility, the lack of a formalised procedure for lodging

[1] **Dr habil., Assoc. Prof. Andrzej Frycz Modrzewski Cracow Academy, Cracow (Poland), e-mail: rczachor@afm.edu.pl. ORCID: 0000-0002-5929-9719.**

applications, the fact that the issues they deal with encompass not only questions of legality but also of social justice and the efficiency of the administration (Balicki, 2002, p. 790).

In Central and Eastern Europe ombudsmen were appointed during the late socialist era or during the period of democratic transformations. An example is Poland, where the first ombudswoman was appointed in 1987. Since 2006 Poland has had another institution with a similar, though more targeted profile – the Ombudsman for Children. The aim of following article is to carry out a brief analysis of the two institutions.

2. The Ombudsman and Ombudsmanfor Children in the polish constitutional system

The Ombudsman Act was adopted in what was then Polish People's Republic in 1987[1] (Ustaw, 2021, p. 696). The adoption of the document was part of a series of reforms launched during a period of political and economic crisis, in which Poland found itself in the 1980s, especially after the martial law period. The year 1980 saw the establishment of the Supreme Administrative Court, 1982 – of the Tribunal of State and the Constitutional Tribunal (which began its operations in 1986), and 1987 a national referendum was held with a view to showing support for the political and economic reforms undertaken by the government at the time (Arcimowicz, 2009, pp. 453-465; Kowalska, 2014, pp. 167-181).

It has been claimed with regard to the 1987–1989 period that the Ombudsman was supposed to be just a facade imitating the democratisation of Poland. This is apparently confirmed by the fact that the Ombudsman was elected by the parliament, dominated by MPs representing the ruling communist party (Jarcimowicz, 2003, p.42; Serafin & Szmulik, p. 439).

The first important step towards the democratisation of Poland was the amendment of the Constitution of the Polish People's Republic of 7 April 1989. It guaranteed the existence, among others, of the institution of ombudsman. On 2 April 1997 the new, first post-socialist constitution of Poland was adopted, retaining the previous model of the ombudsman with the status as a constitutional body. The relevant provisions of the constitutions were included in Chapter IX, art. 208-212, among those concerning state control and law protection bodies (including the Supreme Audit Office).

The Polish constitution stipulates that the Ombudsman is a law enforcement body, independent of other state bodies, whose task is to uphold the human and civil rights and freedoms as defined in the constitution and other legal acts. Consequently, the protection of the Ombudsman, contrary to the institution's name, extends not only to Polish citizens but to all individuals within its territory,

[1] It has been amended numerous times since then.

and is not limited to the rights and freedomsenumerated in chapter II of the constitution (Winczorek, 2000, p. 265).

More specifically, the Ombudsman Act states that "the Ombudsman shall investigate whether there has been a violation of the law, as well as of the principles of co-existence and social justice, as a result of an action or omission of bodies, organisations and institutions obliged to safeguard human and civil rights and freedoms" (art. 1.3). This means that the Ombudsman can act not only with regard to government bodies, but also other entities obliged to safeguard individuals' rights and freedoms. However, the activity of the Ombudsman does not encompass protection against infringements on the part of other natural persons. In practice it concerns mainly various bodies of the executive branch of the government.

The work of the Ombudsman does not replace that other public bodies. It complements their law enforcement activities by representing the interest of private actors and, at the same time, the general interest of society. Requests for action by the Ombudsman can be made by citizens and community organisations, local government bodies, the Ombudsman for Children and the Ombudsman for Small and Medium-sized Enterprises. Such a broad catalogue of eligible entities stems from the fact that the constitution guarantees every person the right to seek assistance of the Ombudsman in protecting their freedoms or rights violated by public authorities (art. 80 of the constitution). In protecting freedoms and rights, the Ombudsman acts for the public good, which is why his activity does not require the consent of the persons whose freedoms and rights are affected by this activity (Naleziński, 2021).

The Ombudsman can act on his own initiative and operates on two planes. First of all, he intervenes in individual cases, in connection with specific complaints; secondly, he engages in more general activity in order to improve the law and practices relating to the application of the law (Garlicki, 1999, p. 360).

The appointment of the Ombudsman is within the domain of the Sejm, the lower chamber of the Polish parliament, which elects the Ombudsman with the consent of the upper chamber, the Senate. The election is by an absolute majority. If the Senate does not consent to a candidate, the Sejm is obliged to elect another person. The Ombudsman's term in office is five years and begins from the moment the Ombudsman is sworn in before the Sejm. The same person can serve as an Ombudsman for a maximum of two terms. If the Sejm is unable to appoint a new Ombudsman, the position remains vacant[1] (Ustaw, 2021, p. 696). The position cannot be combined with any other gainful employment with the exception of work in academia. The Ombudsman must remain politically neutral and cannot be a member of any political party. The activity of the Ombudsman is covered by the state budget. It would be difficult to claim that the independence of

[1] Until 2021, if the Sejm was unable to elect a new Ombudsman, the incumbent continued in office until a new Ombudsman was effectively elected. Judgment of the Constitutional Court, K 20/20.

the Ombudsman is complete, as he is elected by a political body, the Sejm, and is also accountable to it.

The Ombudsman enjoys formal and substantive immunity. The former means that the Ombudsman cannot be held criminally liable or deprived of liberty (for example, be arrested) except when apprehended at the moment of committing a crime, and the latter – that he is not liable for actions taken in his official capacity. The Ombudsman's immunity can be waived in connection with criminal prosecution with the consent of a majority of MPs. Thus, the Ombudsman's criminal liability is not impossible, but its enforcement is subject to approval of the Sejm.

The Ombudsman submits annual reports on his activity and on the state of the rule of lawin Poland. The submission of the report to both houses of parliament has no legal effect. The MPs acknowledge it without a vote. Thus the Ombudsman's responsibility is limited to procedural matters only and this responsibility is enforced by the Sejm. Generally, there is no provision for early dismissal of the Ombudsman. Early dismissal is possible, only if the Ombudsman resigns from office, is unable to remain in office for health-related reasons, has acted contrary to the oath of office or has made a false declaration concerning non-cooperation with the communist secret services. In such cases the Ombudsman is dismissed by the Sejm with a majority of at least three-fifths of the votes in the presence of at least half of the members of the chamber.

The Ombudsman carries out his functions through a body comprising deputy Ombudsmen, appointed by the Speaker of the Sejm on the Ombudsman's request and regional representatives. The Ombudsman is assisted by the Bureau, the legal position of which is defined by a statute granted to it by the Speaker of the Sejm. When the Ombudsman receives a request for action, he can act on it, reject it, inform the applicant of possible ways of dealing with the case or refer the case to the relevant administrative authority. When examining cases, the Ombudsman can investigate any question on site, request explanations, request access to case files and commission expert reports. A body or institution to which the Ombudsman applies is obliged to cooperate with and assist the Ombudsman. The Ombudsman Act contains a separate catalogue of the tasks of the Ombudsman concerning the principle of equality. It includes monitoring and promoting the principle of equal treatment of all persons, conducting studies on discrimination and producing reports and recommendations in this sphere. The Ombudsman Act stipulates that the Ombudsman cooperates with non-governmental organisations and international organisations in the protection of freedoms and rights of persons, and equal treatment.

Usually, the Ombudsman takes action when violations of the law are found in judgments of ordinary and administrative courts and unconstitutional provisions are found in legal acts. He can lodge an extraordinary appeal to the Supreme Court and take part in proceedings before the Constitutional Tribunal.

He can bring civil and criminal lawsuits (Sokolewicz, 2003; Trociuk, 2020; Świątkiewicz, 2001).

The Polish ombudsman model is similar in many respects to the historical Swedish model. The Ombudsman's functions, mode of appointment and tasks are defined in a similar manner. There is a clear link to the legislature – in the selection of the Ombudsman and in the Ombudsman's reporting, with the legislature ensuring independence of the Ombudsman's operations. However, the scope of the Polish Ombudsman's powers has no direct equivalent in Western European countries. The broad scope of his control powers is unique; above all, the Ombudsman has the right to challenge legal acts and decisions of public administration bodies before the courts and the Constitutional Tribunal.

In January 2000 the Polish parliament adopted an act establishing the office of the Ombudsman for Children (Ustaw, 2000). Such a possibility was provided for in Poland's Constitution of 1997, in the article guaranteeing the rights of the child (art. 72.4). The institution has a relatively short history and, like the ombudsman, originated in Scandinavia. The first ombudsman for children was appointed in Norway in 1981. The position of the Ombudsman for Children within the political system in Poland is similar to that of the Ombudsman, although the former's scope of powers is smaller (Jaros, 2013).

The Ombudsman for Children is appointed by the Sejm with the consent of the Senate for a five-year term and can be re-elected once. The office of the Ombudsman for Children cannot be combined with any other public office, including that of the Ombudsman. The Ombudsman for Children upholds the rights of the child as set out in Poland's Constitution and the 1989 Convention on the Rights of the Child. The intention of the legislators was to define the tasks of the Ombudsman for Children in such a way that they did not limit the powers of the Ombudsman (Sołtysiak, 2019, p. 142).

The two institutions have a statutory obligation to cooperate. The Ombudsman for Children Act stipulates that in exercising his powers, the Ombudsman for Children shall be guided by the best interests of the child and shall take into account the fact that the natural environment for the child's development is the family (Article 1.3). The act defines the child as "any human being from conception to the age of majority" (Article 2.1). The question of the beginning of the protection of unborn children has often been the subject of controversy, especially with regard to access to abortion. The upper limit of protection – age of majority – is not controversial and is set at eighteen years in Polish law. The Ombudsman for Children's goal is to take measures to ensure full and harmonious development for children, as well as respect for their dignity and subjectivity. In particular, that protection encompasses right to life and healthcare, right to being brought up in the family, right to decent living conditions and right to education (Article 3). Under a separate provision the Ombudsman for Children takes measures to protect children from violence, cruelty, exploitation, demoralisation, neglect and other ill-treatment. Under the Constitution the best

interests of the child are subject to constitutional protection analogous to that granted to the best interests of the family (Article 71). However, the notion of the "best interests of the child", unlike "best interests of the family", does not appear in any provision of the Constitution (Jabłoński & Jarosz-Żukowska, 2021, pp. 471-477; Florczak-Wątor, 2021)

The Ombudsman for Children enjoys immunity analogous to that of the Ombudsman and is subject to a similar ban on other political and gainful activity, with the exception of work in academia. Every year the Ombudsman for Children submits a report on his activity as well as the state of the protection of children's rights.

The Ombudsman for Children acts on his own initiative, taking into account in particular information from citizens or their organisations pointing to violations of the rights or best interests of children. This means that the Ombudsman for Children can act on information from individuals without full legal capacity, that is children. The scope of the Ombudsman for Children's remit is similar to that of the Ombudsman.

3. Conclusions

In conclusion, both institutions discussed above, are National Human Rights Institutions (NHRIs), that is they serve to protect the legal interests of individuals in their relations with public authorities. In the pan-European context the Polish model of the Ombudsman stands out on account of a rather broad scope of powers; the Polish Ombudsman is not just a control body. The purpose of the establishment of the Ombudsman for Children was to better protect the interests of minors. According to lawyers, the establishment of a separate ombudsman institution focusing on the protection of children's rights not only has not undermined the activity of the Ombudsman in the field of "upholding human rights and freedoms" – and thus also of the rights and freedoms of children – but has strengthened this activity (Blicharz & Zacharko, 2021, p. 49). In general, the Polish legal literature gives a positive opinion about the current Polish model for the protection of individual rights and freedoms and the role played in it by the Ombudsman and Ombudsman for Children (Zięba-Załucka, 2005).

References

Arcimowicz, J. (2009). Instytucja ombudsmana w Polsce. in: Koba, L. & Wacławczyk, W. (eds.). *Prawa człowieka. Wybrane zagadnienia i problemy*. Warszawa;

Arcimowicz, J. (2003). *Rzecznik Praw Obywatelskich. Aktor sceny publicznej*. Warszawa;

Balicki, R. (2002). Rzecznik Praw Obywatelskich, in: Banaszak, B. & Preisner, A. (ed.). *Prawa i wolności obywatelskie w Konstytucji RP*. Warszawa;

Blicharz, J. & Zacharko L. (2021). *Ochrona praw dziecka w działalności Rzecznika Praw Dziecka*. Wrocław;

Florczak-Wątor, M. (2021). *Art. 72*, in: Tuleja, P. (ed.), *Konstytucja Rzeczypospolitej Polskiej.Komentarz* (II wyd). LEX/el.;

Garlicki, L. (1999). *Polskie prawo konstytucyjne. Zarys wykładu*. Warszawa;

Jabłoński, M., Jarosz-Żukowska, S. (2021). *Rzecznik Praw Obywatelskich*. in: Balicki, et al., *Konstytucja i prawo konstytucyjne. Zarys wykładu*. Warszawa;

Jaros, P. (2013). *Rzecznik Praw Dziecka w Polsce. Ukształtowanie Rzecznika Praw Dziecka w Polsce jako organu państwowego. Komentarz do ustawy o Rzeczniku Praw Dziecka*. Warszawa;

Kowalska, M. (2014). Instytucja Ombudsmana jako czynnik demokratyzacji systemów państwowych w krajach Europy Środkowo-Wschodniej i Południowej. *Przegląd Politologiczny*, 2.

Naleziński, B. (2021). Art. 208, in: Tuleja P. (ed.) *Konstytucja Rzeczypospolitej Polskiej. Komentarz* (2nd ed). LEX/el;

Serafin, S. & Szmulik, B. (2010). *Organy ochrony prawnej RP*. Warszawa;

Sokolewicz, W. (2003). Rzecznik Praw Obywatelskich. in: Garlicki, L. (ed.) *Komentarz do Konstytucji Rzeczypospolitej Polskiej*, t. III. Warszawa;

Sołtysiak, P. (2019). *Rzecznik Praw Dziecka. Zagadnienia ustrojowo-prawne*. Warszawa;

Świątkiewicz, J. (2001). *Rzecznik Praw Obywatelskich w polskim systemie prawnym*. Warszawa;

Trociuk, S. (2020). *Ustawa o Rzeczniku Praw Obywatelskich. Komentarz* (wyd. II). Warszawa;

Zięba-Załucka, H. (2005). *Rzecznik Praw Obywatelskich. Rzecznik Praw Dziecka*. in: Zięba-Załucka, H. ed. *System organów państwowych w Konstytucji Rzeczypospolitej Polskiej*. Warszawa.

Winczorek, P. (2000). *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku*. Warszawa;

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

DRUGS HIDDEN UNDER THE EYES OF THE LAW

Ion IFRIM [1]

Abstract

In this communication, we will not scold young drug addicts, because they are victims, and doctors will work to cure them, not beat the patient for asking why he got sick. At present, young people who have been affected by drug addiction are not seen as sick people, but as anti-social elements, instead of victims. Thus, drug addiction is still seen as a particular or individual case, as an insignificant accident, as a side loss in the war of life, even though it is not just a tragedy in the life of a single individual, but a national tragedy of the Romanian people, a tragedy of millions of young Romanians, touched by the unhealable disease called drugs, and predestines them to inevitable death in physical and moral suffering and takes them out of the useful fluid of social life, and parents to mourn for a lifetime mourning their children who have been misled. These are the reasons why I am writing this scientific communication because I foresee the inevitable end of young drug addicts waiting their turn... Our only hope is that this communication will not be seen as a threat, but as a call to life, so that young people will understand the danger posed by drugs, which, once in, even experimentally, in their bodies, cannot be taken out, because of the deception that ultimately leads to death, and there is no such thing as a trial death.

Key words: *victims; drug; parents; friends; urge to live.*

1. Romanian and foreign legal (Antoniu & Toader coordinators, 2016, p. 667) and medical literature has shown that although criminality is not biologically determined, there are nevertheless some links between antisocial behaviour - including criminal behaviour - and certain psychological traits of the person, such as impulsivity, opposition and scepticism, which are present with much greater frequency among offenders(Conepa, 1970 apud Bogdan, 1983, p. 290). An offender whose psychophysical state is altered by illness or other causes may have a reduced mental ability to understand and control his actions. Illness will accentuate the dependence of the psyche on its conditioning factors, weakening the effectiveness of acts of control and self-control (Athanasiu, 1983, p. 14).

A complete vision of the person requires taking into account his psychological coordinates, without losing sight of the fact that psychological processes are "to a large extent also physiological", that "the psychic and the physiological are, in fact, two organically conjoined aspects", that "life is always

[1] **Ph.D., habilitated, CS II, Institute of Legal Research "Acad.Andrei Radulescu" of the Romanian Academy, ion.ifrim@icj.ro; ionut_ifrim24@yahoo.com.**

the life of an individual..., the manifestation of a person, taken as a psychophysiological unit (Athanasiu, 1983, p. 20)". This fact, which has medical and legal implications, could not go unnoticed by the court, the state of illness - whether physical or mental, we are of course considering those situations in which the responsibility of the perpetrators often constitutes an element of assessment in the individualisation of the punishment.

2. Based on these ideas, we would like to point out that, in this case, when the drug epidemic breaks out, we will not scold drug addicts who are ill with drugs, because they are victims, and doctors will work to cure them, not by asking why they got sick? As such, drug addicts are not seen as sick people, but as anti-social elements, instead of victims. Thus, drug addiction is still seen as a particular or individual case, as an insignificant accident, as a side loss in the war of life, even though it is not just a tragedy in the life of a single individual, but a national tragedy of the Romanian people, a tragedy of millions of young Romanians, touched by the unhealable disease called ***drugs,*** and predestines them to inevitable death in physical and moral suffering and takes them out of the useful fluid of social life, and parents to mourn for a lifetime mourning their children who have been misled.

3. Besides, to know the problem properly, we need to find out the *source of the drugs*, because there were no drugs in Romania before 1989, as we know. Young people, apart from doctors, did not even know what this product consisted of. However, the drug did not fall from the sky to young people, as mysterious planes, coded "*T 1" and "T 2",* secretly descended one night. I don't know what they had in their "bellies", but since then tons of drugs have successively appeared in the country, which was distributed in all the cities and towns of our country, about which today's policemen and informers pretended to know nothing. Only certain people were approved and took the quantities of drugs and became "*dealers*", i.e. those who sold them to millions of young people to poison their blood under the "*paternal*" supervision of the police, who "did not know" what the distributors were doing day and night. We recall that such *dealers* were placed in *Bucharest* everywhere, but more known were in *Colentina*, in *Berceni*, at "11 June", and the "*Militari*" district was full of drugs and drug addicts.

Drugs were also found in the provinces, especially in the centres with unemployed young people, who gradually stopped being young. There were drug addicts from all professions. Usually, these people from the provinces were looking for drug addicts in Bucharest, in order to get in contact with them, to obtain "merchandise" through them, because it was easier to get it in the capital. Sometimes, it happened that the one from the capital had a place to stay for a day or two, especially at night, and who "had an entrance", that is, who was trusted by the dealer. In this case, the host drug addict exploited the need of the provincial drug addict, because he was poor and did not have much money for a hotel and to

buy his "stuff". Thus, the one who came from the province would get his "stuff" without any risk, through the host in the capital. The reward for the host was "a line or two" of the ration he consumed, and he became a client of the host drug addict, whose house he messed up. Moreover, the "friend" comes to Bucharest from the provinces, feeling that it is very cheap, the host accepts the trouble and the mess, that the guest junkie ("*friend*") uses his kitchen, bathroom, etc. and he does not dare to leave until the day when the drug he inhaled wears off so that he can drive the car he came in.

4. Normally, the concept of "*friend*" means a soul ally, based on ideological commonality, a shared interest in achieving a moral, political, ideological or material goal, for the bilateral good or for the good of the community in which they live. With drug addicts, however, the concept is explained differently, according to the way they relate to each other. First, the two meet. They don't know each other but look into each other's eyes. Then from the first second, there is an infinitesimal vibration in the irises of the eyes and communication has taken place. Then one of them asks, "Cool, you got it?" Do you have money? Do you have... then, come on... And the bond of "friendship" was made. It can be done in other ways. When he doesn't have money but the other has "stuff", the following dialogue takes place: do you have stuff? I've got great stuff, do you have money? I do, but I have to bring it from home.

This is how 'friendships' are established, i.e. the association in the purchase of drugs and their sharing, according to how each contributed money.

Another consequence is the discovery of an incurable disease, AIDS, contracted only through blood, through sexual contact with another contaminated drug addict and by using the same syringe as another drug addict, contaminated with AIDS (HIV)[1] (Antoniu & Toader coordinators, 2016, pp. 805-809). Of the existing hospitals in the six districts of Bucharest, the most sought-after is the "Victor Babeș" Hospital, with numerous wards for all kinds of diseases, especially for hopeful drug addicts, until they move to the wards with incurable AIDS drug addicts and then to a special incineration place. These facilities don't starve... Drug addicts are mostly minors, and teenagers, of both sexes.

As for those drug addicts who are in the AIDS phase, able to move around, they come from home once a month to receive the boxes of pills, crowding the space at the reception door, because there are hundreds of AIDS patients, even elderly ones. Their deaths are frequent but are not popularized, or known by parents or relatives, and in their absence, the oven in the courtyard receives them.

The death of drug addicts (junkies) cannot be considered natural, but a death sooner or later caused by the drug. Medical treatment in hospitals is

[1] Criminal law regulates in Art. 354 - Transmission of acquired immunodeficiency syndrome. Thus, (1) The transmission, by any means, of acquired immunodeficiency syndrome - AIDS - by a person who knows that he or she suffers from this disease is punishable by imprisonment from 3 to 10 years....

ineffective. In this regard, we recall that in a communication from a chief doctor at Socola Hospital in Iasi, he sadly reported in a radio edition that all patients who were discharged were in a phase that had only improved and that they returned later relapsed in an even worse phase. The only medicine that is recommended as effective is the one we recommend: ***each person should avoid the temptation of drugs.***

5. In addition, we would like to point out that since drug use persists in the social environment, other people view drug addicts with disapproval, contempt and even hatred, as if they were plagues, or at best that drug addicts are ready to break into the houses of honest and peaceful people, that they rob banks, etc. and commit other crimes. In what follows, we will prove that this presumption is unfair because for such robberies, you need to have time, special tools, and special criminal dexterity that drug addicts do not have. Now, the junkie (drug addict) is a sick man, who confines himself to stealing (swiping) only occasionally and in a hurry, usually only from the one who takes him in even as a beggar. The drug addict always steals mostly from his family home. But if honest people see the junkie with no understanding of the causes as a presumptive thief, they limit themselves to that, hating him not for what has happened to him, but for what might happen to him. That is why if they happen to see him on public transport, people look at him fearfully and ostentatiously as he looks: skeletal, roughly dressed in dirty clothes, baggy, because he is weak from not eating, glassy-eyed, pale-faced and ascetic, smelling of unwashedness, glad to be left alone, Even the controllers leave him alone, walking away from him as quickly as possible.

Some drug addicts present themselves at different stages of their illness. For example, one day, on my way to the office, I met a young man who said with fear in his voice that he was hiding from the Securitate, who was watching him from the Cosmos... He's not the only junkie who would have an obsession with the fear that someone wants to kill him. You must speak to him gently in these cases, promising to "*protect*" him.

6. In this respect, we would point out that, according to the provisions of Article 77, lit. f of the Criminal Code, the aggravating circumstance established by this text exists if the offence is committed while voluntarily intoxicated with alcohol or other psychoactive substances[1] when it was provoked to commit the

[1] The concept of substances with psychoactive effects is regulated by Law no. 194/2011 on combating operations with products likely to have psychoactive effects, other than those provided for by the regulations in force. In this regard, see also DECISION No 48 of 9 June 2021 on the use of the term "psychoactive substances" in the incriminating provision of Article 336 para. (2) of the Criminal Code. Thus, it establishes that 'The use of the wording "psychoactive substances" in the incriminating provision of Article 336(2) of the Criminal Code is not a criminal offense. (2) of the Criminal Code includes, in addition to the category of substances referred to in Law No. 194/2011 on combating operations with products likely to have psychoactive effects, other than those provided for by the legislation in force, republished, and the substances provided for in the content

offence (Lucinescu in Vasiliu and others, 1972, p. 454). It follows from the content of the article cited that only voluntary intoxication with alcohol or other psychoactive substances, which is pre-ordained, i.e. caused specifically to commit the offence - not occasional intoxication, without a pre-established link with the offence committed subsequently - constitutes the legal aggravating circumstance in question. The introduction of the aggravating circumstance provided for in Article 77(2) of the EC Treaty is a legal aggravating circumstance. 1 lit. f of the Criminal Code is explained by the fact that the preordained drunkenness denotes greater social dangerousness of the offender, who consumes alcoholic beverages to commit the criminal act more easily and with more courage. At the same time, it shows persistence in carrying out the criminal decision and represents an objectification of premeditation, the act being committed following reflection and deliberation, during which the offender drew up a plan of action and organised its implementation. But sometimes the offender consumes alcohol or other psychoactive substances to invoke drunkenness as a mitigating circumstance, thereby seeking - if the offence is discovered - to obtain, by cunning, relief from criminal liability (Daneș, 1984, p. 24).

7. Thus, for the penalty to fulfil its dual function of coercion and re-education, it is necessary, as we have shown, that it be related not only to the social danger of the offence committed but also to the person of the suspect. To this end, the court is obliged to consider the offender's personal characteristics and ability to make amends when determining the penalty. In this respect, it is worth emphasising that a multilateral examination of the offender's person, knowledge of his psychophysical state, his conduct before and after committing the offence, his positive or negative traits of character or temperament, his habits or inclinations, and his criminal record, enables judges to make a correct assessment of these elements and to draw a fair conclusion as to the degree of the offender's social dangerousness.

8. From the point of view examined, the Supreme Court concluded that it is not possible to disregard convictions in respect of which amnesty, pardon or even rehabilitation has intervened. Decisions have been given that the courts should also take a firm stance towards other persons, even those with no criminal record, who have persisted in committing offences, towards offenders who are not in employment or who have committed offences out of a desire to enrich themselves or to lead a chaotic lifestyle, and towards those who have committed offences in conjunction with juvenile defendants, i.e. with the help of persons with no life experience.

---

of Law No. 143/2000 on preventing and combating trafficking and illegal consumption of drugs, republished, as amended and supplemented, and Law No. 339/2005 on the legal regime of narcotic and psychotropic plants, substances and preparations, as amended and supplemented".

Through the decisions it has adopted in the criminal cases it has dealt with, the Supreme Court has been concerned with determining the conduct of the guilty person after the crime has been committed. Thus, it has looked to see on the one hand the conduct of the accused during the trial and on the other hand his conduct toward the injured party. About his conduct during the trial, the account was taken of whether the defendant evaded prosecution or, on the contrary, whether he appeared before the authority; whether he admitted to the crime or not; the extent to which he cooperated with the prosecution to facilitate the complete discovery of the facts and the identification of the participants; whether he adopted an attitude of regret or indifference towards the crime committed and its consequences. Regarding the attitude towards the injured party, the Court was concerned to establish whether the defendant had repaired the damage caused and, in the case of personal injury, whether he had assisted the victim to remove the state of danger created for the victim.

A brief analysis of the relationship between the degree of social danger of the offence and the person of the perpetrator allows us to note that in the individualisation operation, each of the criteria in question has a special role and a distinct function, the full achievement of which, in conditions of efficiency, would not be possible if the two criteria lost their significance and identity.

The offence, because of its socially dangerous content, causes, independently of the perpetrator, a dangerous state for the violated social relations, which calls for their reparation. On the other hand, however, it cannot be overlooked that the punishment is imposed on the offender and is aimed at his re-education. This means that, when it is determined, an account must also be taken of the person of the offender and his or her suitability for re-education, since it is well known that the same punishment does not have the same educational effect on different people.

The fact that the two individualisation criteria are autonomous, each having its content, distinct from the other, also results from the fact that some aspects of the offender's personality are not objectified in the act, sometimes even contradicting its seriousness. When we say this, we have in mind the fact that a person who steals something of low value is a recidivist. However, we wish to emphasise that, although we are dealing with two independent individualisation criteria, in the process of individualising sentences, the judge must take them into account together, assess them together or, on a case-by-case basis, give them a different weighting, determined by their content, to determine the most appropriate sentence for the rehabilitation of the offender. The Supreme Court has held that the data characterising the offender's person, such as his good conduct before committing the offence, his honest conduct during the trial and his difficult family situation, must be examined in the light of the degree of social danger of the offence committed and all the data relating to the offender's person. Only in so far as the latter circumstances do not make the offence under trial more serious,

do the above circumstances have the significance of mitigating circumstances within the meaning of Article 75 of the Criminal Code.

9. From the above, it follows that our only hope is that this scientific communication will not be seen as a threat, but as a call to life, so that young people understand the danger of drugs, which, once in their body, even experimentally, can not be removed, because of the deception that ultimately leads to death, and there is no such thing as death by ordeal.

References

Antoniu, G., Toader, T. (coordinators), Brutaru, V., Daneș, S., Duvac, C., Griga, I., Ifrim, I., Ivan, Gh., Paraschiv, G., Pascu, I., Rusu, I., Safta, M., Tănăsescu, I, Toader, T., & Vasiu, I. (2016). *Explanations of the New Penal Code*, vol. IV, Universul Juridic.

Athanasiu, A. (1983). *Elemente de psihologia medica*, Medical Publishing House.

Conepa, G. (1970). Evolution de la personalité antisociale et délinquance, *Revue internationale de criminologie*, apud by Bogdan, T. (1983). Date privind psihologia devianței. *Psihologia educației și sviluppo*. Academy Publishing House.

Daneș, St. (1984). Considerations in relation to legal and judicial aggravating circumstances. *Revista Română de Drept*, 11.

Lucinescu, D. (1972). Commentary in Vasiliu, Th. and others, *Código penal al România*, commented and added, General part. Scientific Publishing House.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

LOBBYING IN THE POLISH LEGAL SYSTEM AND PRACTICE

Beata STĘPIEŃ-ZAŁUCKA [1]

Abstract

Dictionary of the Polish language, defines lobbying as exerting influence on state authorities in the interests of certain political, economic or social groups. With its genesis, this phenomenon, which has its origins in ancient times, it was already then that individual social groups sought to exert the greatest possible influence on legislative decisions, not shying away from lawlessness. However, conceptually, lobbying originated in the United Kingdom, where the word is used to describe activities undertaken in a place - a lobby. At the same time, the most developed is restively lobbying in the United States or the European Parliament. In Poland, lobbying was regulated by law in the Act of July 7, 2005 on lobbying activities in the lawmaking process (Kubiak, 2013, pp. 131-132).

Thus, since then, lobbying has been a legally regulated institution. Since then, however, the number of lobbyists in parliament has been declining, and this is to such a state that, if the current trend continues, lobbyists in the parliament of the Republic of Poland will disappear altogether in the coming years. This state of affairs forces one to ask whether it is the case that lobbyists in Poland have ceased their activities, or whether it is the case that their activities have taken a less transparent form. While the first of the above-mentioned situations is not dangerous - probably because its occurrence borders on the miraculous - the second situation raises many concerns, primarily because of the possible dangers associated with the activities of lobbies. Against this background, the reason for the successive decrease in the number of lobbyists in relation to the scope of their activities in Poland will be examined. The above findings will be examined on the basis of theoretical-legal and dogmatic-legal methods.

Key words: *Lobbying; legislative process in Poland; activities of lobbyists; interference in the legislative process.*

1. Legal definition of lobbying

The profound political and, behind them, socio-economic transformations that took place in the world and in Poland at the end of the 20th century started the process of transformation of national political and economic structures. At the heart of these changes was the abandonment of the centralised and autarkic socialist economy and the laying of the foundations for the institutions and mechanisms of a free market economy, followed by the opening up of the national

[1] Adv., Dr Hab. Prof. UR, University of Rzeszów (Poland), email: beata@kpmz.pl. ORCID: 0000-0003-1802-680X.

economy to the world market. Among a whole range of factors influencing the course of this process, lobbying played an important role (Deszczyński, 2005, p. 207).

A dictionary of the Polish language defines lobbying as 'exerting influence on state authorities in the interests of certain political, economic or social groups'.[1]

In Polish colloquial language, lobbying is often treated as a peculiar manifestation of pathology, is sometimes erroneously confused with corruption, nepotism or bribery and is sometimes pushed towards various types of abuse in the course of exerting influence on decision-makers. Hence, it is sometimes seen as an instrument for violating business ethics or as an opposition to sustainable development economics. As a result, it can be said with some conviction that lobbying is socially perceived as a negative or even extremely negative phenomenon. This situation may in turn be a brake on the evolution and promotion of this form of communication between businesses and legislative bodies. It should be borne in mind that in the practice of democratic countries, lobbying is a positive phenomenon, which is primarily conducive to strengthening the implementation of social consultation, in the process of lawmaking. In Poland, lobbying gained its bad name in the early 2000s, in connection with the famous affair, the so-called Rywin affair (Kubiak, 2013, p. 131 and next).

As a result of the aforementioned affair, lobbying activity was regulated in the legal system, resulting in the Act of 7 July 2005, On Lobbying Activities in the Lawmaking Process. According to Article 2(1) of the indicated Act, "lobbying activity is any activity carried out by means of legally permitted methods aimed at influencing public authorities in the process of lawmaking". Paragraph 2 of the aforementioned article indicates what the professional lobbying activity is, recognising that it is a profit-making lobbying activity carried out for the benefit of third parties for the specific purpose of taking into account, in the lawmaking process, the interests of these parties.This activity may be carried out by an entrepreneur or a natural person who is not an entrepreneur on the basis of a civil law contract (paragraph 3).

Since then, academics have made every effort to develop lobbying in its positive aspects, without ignoring the dangers of its possible abuse.

The doctrine explains the term of lobbying in question as a set of techniques consisting in influencing the decision-making process by persuading representatives of state authorities for specific legal, problematic or administrative solutions (Deszczyński, 2005, pp.207-208).

Marcin Rau, writing about lobbying as a set of lawful activities undertaken by registered entities - lobbyists acting for a fee and in the interest of a third party - the so-called lobbying principal, in order to exert a specific influence, favourable for the principal, on legislation or various types of decisions taken by state or local authorities, emphasises that lobbying may only be legal. However, it is not

[1] Słownik języka polskiego, https://sjp.pwn.pl/szukaj/lobbing.html

uniform in form, as the author states, as it may have a direct form consisting in meetings with specific politicians, but also an indirect form, which may be manifested, inter alia, by media campaigns promoting a given legal solution. In practice, it consists in the fact that lobbyists in order to influence the representatives of the authorities present them with specific evidence, arguments and information aimed at convincing politicians to a particular point of view and, consequently, to take a particular action (Rau, 2021, p. 5 and n.).

It is noteworthy that in various countries the material scope of lobbying regulation is sometimes so wide that it goes beyond activities addressed exclusively to the parliament. Lobbying activities may be addressed to the government, the president, local authorities and even the courts, but moreover it takes into account not only the role of the authority in the creation of legislation, but also other functions of the authorities, such as creative functions. This makes it possible to distinguish between different types of lobbying - legislative, executive, local government or judicial (Wiszowaty, p. 183). Although already at this point it should be pointed out that in Poland the statutory scope is not wide.

Referring to foreign literature, a worthwhile definition of lobbying is the one presented by Ogun Kurt, which states that these are strategies and techniques consisting in influencing and interfering in the activities of competent authorities. However, these strategies and techniques are nowadays characterised by rigorous engineering and a combination of various disciplines. Among the types of lobbying, the author distinguishes: public lobbying, which involves advisory and communication services; institutional lobbying, which involves corporate matters; class lobbying, which involves class actors; and finally private lobbying, which involves consultancy offices and private institutes (Kurt, p. 3-4).

Here it is necessary to answer the question of actually why there is a need for regulation of lobbying in national legislation (Kuczma, 2010). In practice, regulations on lobbying are primarily an anti-corruption mechanism. They allow legislative work to proceed properly. At the same time, they influence the openness of decision-making processes taken at various stages of the adoption of legal regulations. In addition, properly functioning lobbying, based on properly structured regulations, allows for the rationalisation of the lawmaking process, enforces but also facilitates the search for various types of compromises in positions represented by sometimes extremely equal interest groups. Moreover, it provides an opportunity to obtain information and its free flow, which in turn contributes to ensuring social order. Lobbying operating in this way becomes a guarantor of cooperation in decision-making and access to information, it is too an effective tool in the fight against corruption (Grochocińska, p. 37).

2. Lobbying in Polish practice

Following the data published annually by the Seimas, one can come to the conclusion that the number of lobbyists has more than halved over the last decade.

In 2007 there were 19 lobbyists . In 2015 there were 27 lobbying entities and 42 lobbyists, in 2018 there were 20 lobbying entities and 31 lobbyists, and one year later there were 16 lobbying entities and 19 lobbyists. In the current year 2023, there are 9 lobbying entities and 9 lobbyists. From the overview provided, the trend is clearly downward. Moreover, analysing the annual information on the activities undertaken towards the Sejm of the Republic of Poland in 2022 by entities performing professional lobbying activities, one can come to the further conclusion that there are years in which lobbyists have actually abandoned their activities (2019), or those in which they have increased their activities (2022). [1]

The real problem is one that this increase in activity in no way reflects the reality of the situation. Indeed, if we assume that in 2021 or 2020 lobbyists attended only 1 parliamentary committee meeting and in 2022 10, there is indeed a tenfold increase. Moreover, there is also an increase in the number of speeches made by lobbyists, as in 2020 and 2021 no lobbyist spoke at a committee meeting, while in 2022 there were six such speeches. The topics of their speeches included the areas of pension rights or public ICT systems. In view of the above, one has to agree with Wiktor Ferfecki's conclusion that, if one were to judge only, the number of parliamentary committee meetings, of which there are around 1,500, the participation of lobbyists in the work of parliament can be described as incidental (Ferfercki, https://www.rp.pl/polityka/art37917891-coraz-bardziej-intensywny-lobbing-w-sejmowym-gmachu).

3. Informal lobbying in Poland

The state of affairs outlined above, however, has nothing to do with reality and is evidence of the ineffectiveness of the Lobbying Act. And so the decline of this official lobbying has occurred in favour of informal lobbying. There are many manifestations of the latter and this is a direct result of the fact that the powers of lobbyists are far more likely to hinder them than to help them. This in turn results in lobbyists finding further opportunities to influence politicians, for example through the action of social organisations, foundations, associations or employers' associations (Ferfercki, https://www.rp.pl/polityka/art37917891-coraz-bardziej-intensywny-lobbing-w-sejmowym-gmachu). Lobbyists also operate not as lobbyists but as lawyers, experts and specialists in a particular field, industry representatives, journalists or as trade unionists. Additional proof of this is the fact that spouses sit in the parliament itself and former ministers, MPs or senators very often and without the slightest hindrance move from the public to the private sector. In addition, the very activities of lobbyists have moved from the Sejm to various economic congresses, conferences and seminars, where all sorts of circles, including political and economic circles, meet, including those represented by lobbyists. And it is at these types of events that there is an opportunity for non-

[1] https://www.sejm.gov.pl/sejm9.nsf/page.xsp/lobbing

committal talks, which de facto open the way to circumvent the Lobbying Act (Ferfercki, https://www.rp.pl/polityka/art9044641-w-sejmie-zostal-juz-tylko-jeden-oficjalny-lobbysta).

The above was confirmed by Leszek Graniszewski, who in the pages of the Infos periodical of the Bureau of Sejm Analyses, in his conclusion pointed out that, in practice, the Lobbying Act has not brought the expected results and even promotes a kind of hiding of lobbying. Indeed, this author concluded that this law "Instead of providing a basis for the development of professional and legal representation of interests, it has actually led to a decrease in the number of professional lobbyists active in parliament and government institutions. This can be confirmed by the negligible scale of professional lobbyists' activity as shown by the annual reports published by ministries and other public offices, even if the content of the reports is laden with minimalist, clerical formalism" (Graniszewski, 2019, pp. 1-4). The Ineffectiveness of the lobbying law is influenced by a number of factors. According to its content, institutions and at the same time officials are obliged to report on all contacts that occur between them and registered lobbyists. (Cf. Article 16(1) of the Lobbying Act: "Public authorities are obliged to make information on actions taken towards them by entities carrying out professional lobbying activity available in the Public Information Bulletin without delay, together with an indication of the method of settlement expected by these entities. (2) Heads of offices serving public authorities, each within the scope of its activity, shall determine the detailed manner of conduct of employees of the subordinate office with entities performing professional lobbying activities and with entities performing professional lobbying activities without registration, including the manner of documenting the contacts undertaken" (Graniszewski, 2019, pp. 1-4).

In practice, such regulation leads to officials taking a distanced approach to lobbyists, and it is much more convenient for the latter to act in other forms than by being a lobbyist. Here the question arises whether the law does not counteract such behaviour. Article 17 of the Lobbying Act, in which we read that "If it is found that activities falling within the scope of professional lobbying activities are performed by an entity not entered in the register, the competent public authority shall immediately inform the minister responsible for public administration of this in writing." remains relevant in this regard. However, in practice, this provision leaves many doubts. They stem from the fact that officials themselves have to declare which behaviours have a lobbying character, and this raises many doubts in practice. How to qualify the participation in a conference, where a scientist advocates a certain idea, leaves a large margin of discretion and makes it possible to qualify practically every opinion positively or negatively referring to a certain issue as lobbying.

In addition, there is a no less important issue than the above and that is the financial one. Usually, foreign players have much more resources to devote to lobbying, especially when dealing with global market players. These greater

resources make the lobbying activities of such companies much more sophisticated. Among other things, they work through foundations and associations, community groups that advocate for a particular solution that benefits the subsidiser. Another interesting way of lobbying by such companies is through organised congresses and scientific conferences, during which solutions are presented that are favourable or supportive of a particular activity related to the sponsor.

These examples are only one of many, which shows how serious this phenomenon is.

It remains to answer the question of the statutory shortcomings that contribute to this situation. The first factor in this respect is that, in fact, apart from a badge with their name and a number of obligations (entry in the register, various forms of declaring interest in the course of legislative work), lobbyists do not, at the same time, have any special rights in relation to those enjoyed by any citizen or other entity based on the content of constitutional norms and those concerning the provisions of the Act on Access to Public Information. The problem is also the lack of precision in the subjective scope covering openness of legislative work, nor the subjective scope of the Act. The subject matter of the Act omits, for example, the issue of openness of the creation of draft laws by the President or openness of the creation of local laws. In addition, the Act also lacks uniform rules on the control exercised over the activities of lobbyists. According to the wording of the Act, "control is to be exercised by officials of institutions that are also subjects of lobbying activities", which in practice breaks down this control and makes it unclear (Grochowska, pp. 37-38).

4. Conclusions

In modern societies, with state bodies, lobbying plays an important strategic role of convincing for certain rationales, adoption of laws.

Writing about lobbying, Marcin Wiszowaty pointed out that in order for it to play a positive function in a democratic system, it must remain "transparent, subject to appropriate control and accessible to all". It is impossible not to agree with this position, however, despite its obviousness, in practice the implementation of this postulate is not easy. First of all, it is due to the fact that informal lobbying takes very specific forms. This peculiarity, together with doubts related to the Lobbying Act, make lobbying a very dangerous phenomenon and, what is more, sometimes very difficult to diagnose unambiguously. Therefore, among the key tasks facing the legislator today is the regulation of lobbying in Poland. This is because the current situation is such that lobbyists can influence the shape of legislation in an non official manner, and the content of such legislation, instead of representing the best possible solutions for society and the state itself, can go far beyond this framework and be positive in its effects, especially for the entities for the benefit of which the lobbying is carried out.

References

Deszczyński, P. (2005). Rozwój lobbingu w Polsce. *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, z. 4.

Ferfercki, W. Coraz bardziej intensywny lobbing w sejmowym gmachu. https://www.rp.pl/polityka/art37917891-coraz-bardziej-intensywny-lobbing-w-sejmowym-gmachu

Ferfercki, W. W Sejmie został już tylko jeden oficjalny lobbysta, https://www.rp.pl/polityka/art9044641-w-sejmie-zostal-juz-tylko-jeden-oficjalny-lobbysta.

Graniszewski, L. (2019). Lobbing i jego instytucjonalizacja w Polsce, *Biuro Analiz Sejmowych*, no 13.

Grochocińska, A. Jawność działalności lobbingowej w procesie stanowienia prawa. http://www.repozytorium.uni.wroc.pl/Content/99426/PDF/03_A_Grochocinska_Jawnosc_dzialalnosci_lobbingowej_w_procesie_stanowienia_prawa.pdf

Kubiak, A. (2013). Lobbing w polskim prawie i praktyce. *Annales. Ethics in Economic Life*, vol. 16 .

Kuczma, P. (2010). *Lobbing w Polsce.* Toruń.

Microsoft Word - Ogun Kurt(A38140)-Evolution of Corporate Lobbying Activities in the European Union (Final version - AN).docx (ipb.pt),

Rau, M. (2021). *Prawnoporównawcze ujęcie lobbingu w wybranych państwach*. Warszawa.

Słownik języka polskiego. https://sjp.pwn.pl/szukaj/lobbing.html.

Wiszowaty, M. M. Prezydencki lobbing. regulacja prawna działalności lobbingowej w odniesieniu do prezydenta RP. Teoria i praktyka. https://repozytorium.uwb.edu.pl/jspui/bitstream/11320/4563/1/BSP_20B_Wiszowaty.pdf

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

STATE POWER AND HUMAN RIGHTS IN A DEMOCRATIC SOCIETY

Marius ANDREESCU[1]
Andra PURAN[2]
Ramona DUMINICĂ[3]

Abstract

The coding is not only the expression of the political will of the law maker, it firstly is a complex juridical technique for the choosing and systematization of the normative content necessary and adequate to certain social, political, economic, institutional realities. Since Constitution is a law, yet it nevertheless distinguishes itself from the law, the problem is to establish which juridical norms it contains. The solving of this problem needs to consider the specific of the fundamental law and also of the requirements of the coding theory. The determining with all scientific stringency of the normative content of the Constitution is indispensible both for the removal of any inaccuracy in delimiting the differences from the law, for the stability and predictability of the fundamental law and last, but not the least, for the reality and effectiveness of its supremacy.

In our study we realize an analysis based on compared criterions of the techniques and exigencies for the choosing and systematization of the constitutional norms with reference to their specific, to the practice of other states and within a historical context. The analysis is aiming to the actual proposals for the revising of the Constitution.

Key words: *Constitutional norms; constitutional norm establishing criterion; technical - juridical structure; supremacy of Constitution; normative content.*

1. Historic argument

From the beginning up to the present the human society is marked by two constants that have ontological value: the struggle for power and on the other hand the fight against the power, both in situations where it is illegitimate because it takes the form of dictatorship or tyranny, also in the versions of apparent legitimacy, especially in democratic societies, such as for example the legitimate

[1] **Lecturer PhD, University of Pitesti, Faculty of Economic Sciences and Law, Pitești (Romania), andreescu_marius@yahoo.com, ORCID: 0000-0001-7424-0160**
[2] **Lecturer PhD, University of Pitesti, Faculty of Economic Sciences and Law, Pitești (Romania), andradascalu@yahoo.com, ORCID: 0000-0002-8773-1548**
3 Lecturer PhD, University of Pitesti, Faculty of Economic Sciences and Law, Pitești (Romania), duminica.ramona@gmail.com, ORCID: 0000-0002-3416-2329

political activity of the opposition to come to power or the actions of civil society and individuals against abuse of power.

These ontological constants of any human society are inevitable no matter of the social form of organization or characteristics of political regimes, including in democratic societies because the existential and functioning essence of any social system is the expression of the contradictory difference between governors and the governed, between society as a whole and on the other hand, the man in his concrete and personality, between the normative order and moral values, between law and liberty, between public interest and private interest and of course between the vocation of human intangible fundamental rights, and on the other hand the public interest of the state to condition, limit and restrict their exercise.

These contradictions, if they remain in their absolute form, by antagonist excellence can be destructive to an organized state society, as history has shown. History shows the political and legal solutions which, especially in the modern period, were devoted to avoid dictatorial forms of power exercising. Here are some of them established since the first written constitution in the world - the US Constitution, adopted in 1787 - Declaration (French) of human and citizen rights on 1789, up to the internal and international contemporary political and legal instruments: supremacy of the Law and Constitution, separation and balance of powers within the state, proclamation and guarantee of the fundamental rights and freedoms, constitutional and judicial control.

Incontestable these principles in fact and the features of the lawful right materialized and guaranteed constitutionally define the contemporary democratic societies and virtually eliminates totalitarian, dictatorial forms of state power.

However the differences and contradictions mentioned above, because they are ontological constants of society, they exist in any democratic society. In addition there is a subtle situation, namely the difference between the legality of state decisions and on the other hand the state legitimacy. These realities may cause or encourage excess of the power of authorities in societies built upon the principles of modern constitutionalism.

In this context remains a problem of essence, not only theoretical but also practical to determine the limits of state power in a democratic society in concrete in Romania and to find solutions in cases of excessive form of manifestation of state authority.

2. Ideality and reality of democracy

The doctrine, in its majority reveals an insurmountable contradiction that exists between the democratic political regimes and, on the other hand those considered to be dictatorial, or simply between dictatorship and democracy.

Dictatorship means centralization and concentration of power, denial of pluralism in all its forms, absolute or discretionary power of the governors, coercion and excessive limitations of individual liberties, rigid separation of the

governors from the governed, inexistence or formal existence of constitutional guarantees of human rights, inexistence or fictitious, formal character of principles essential to the state organization of society, such as principle of supremacy of law and constitution. For a synthetic manner of speech, dictatorship represents the annulment, dissolution or in the best case, the minimizing of the individuality of the singular, of diversity and affirmation of unity as abstract and constraining generality.

Unlike this, democracy is associated with the idea of a lawful state, focused on the principle becoming real and applicable of the supremacy of law and constitution. The centralization and concentration of power is replaced, as a modality of organizing of state powers, with the principle for their separation and balance. Pluralism in all its forms is institutionalized and guaranteed. The individual freedoms are also consecrated and guaranteed, while their exercise is governed by the rule according to which: the limit of any individual freedom is the need to respect others' similar freedoms. The legitimacy of state power involves the distinction between the being or essence of power and on the other hand, its exercise. In a democratic regime is not necessary to demonstrate the legitimacy of power as such because the axiom according to which " the holder of power is the people or nation" does not require demonstration, being a prerequisite for the entire political and legal construction of the state organized society Instead, any democratic government must find ways through which the exercising of power, in other words, the phenomenality of power be legitimate and lawful. Such a legitimacy is achieved when between essence (power in itself owned by the people) and forms of exercising (the phenomenon of power) there are no irreconcilable contradictions. The legitimacy of the exercise of power in case of democratic political regimes means reflecting the essence of power in its phenomenality, respectively in the organizing and exercising manner. Therefore, in case of democracy there is always a conceptual distinction, and a real one between the legitimacy of the essence of power that requires no demonstration, this results as such by the mere proclamation of the principle that the power has as its holder the people and on the other hand, the phenomenal legitimacy of organizing and exercising of power, that is not a "given" but a construction, firstly constitutional, realized in the concrete forms of institutional organization and exercising of state power. The legitimacy of the organizing and exercising of power is outside the power's phenomenality, in the meaning that the phenomenality is not the source of its legitimacy, but this is constructed in a relation whose content is the correspondence between the essence of power and the manifestation forms.

The power, in its essence, can be considered a "thing in itself", in the Kantian sense, because the full knowledge of the essence will never be possible. Reality of the state power considered in the relationship between essence and phenomenon reveals another aspect: the phenomenality of power can never fully correspond to the essence of power. The object of knowledge for the legal or

political science is the phenomenon of power and not its essence. Therefore, the legitimacy of power phenomenal manifestation represents an ideal of which, the concrete forms of organization and exercising of power, get closer without ever touching it.

The legitimacy of power's phenomenality lies among others in achieving the principle of representation. This principle highlights very well the distinction between the being or essence of power and on the other hand the phenomenon of power. The holder of power cannot exercise it directly, only in exceptional circumstances. The essence is not the manifestation of power. The exercise of power reflects the being of power without containing it. Thus, the state institutions exercise the power without holding it, therefore, they need a recognition of the legitimacy of the acts of power, actually conferred mainly by applying the principle of representation.

The power and its phenomenality are undoubtedly at the heart of democracy. If the phenomenal legitimacy of power is an ideal of which the concrete forms of institutional embodiment through the principle of representation can get closer, results thus that democracy in its essence is still an ideal related to which the social and political reality is constructed and manifested, without letting the democratic ideal to coincide with the social and political reality. It is relevant in this regard the statement of Professor Ion Deleanu: "Democracy is a form of moral perfection. It dimensions the organization and operation of a power to humanize it and also the way of life of citizens to shape it."

It is necessary to distinguish between the *ideal democracy* that is a purely speculative construction based on the possible coincidence between the essence and the phenomenality of power, but also an ethical imperative that should mean the unity of will between the individual and society, and on the other hand, the *real democracy*, characterized through the contradictory dichotomy between the essence and the phenomenality of power, between the individual and society. Real democracy takes concrete forms, multiple manifestations (such as the form of "parliamentary or representative democracy "), is not an immutable given, but is in a continuous evolutionary process, in considering the historical progress as a finality, never possible to be achieved, the ideal democracy. The science of law has as a study topic the real democracy, or more precisely its forms of manifestation and for its implementation. Paradoxically, however, the legitimacy of any form of real democracy is conferred by the values and principles of ideal democracy, the latter forming mainly the studying topic for metaphysics.

Unlike dictatorship, democracy involves the rehabilitation of the individual, of the particular that is no longer absorbed and dissolved into the social abstract general or of the concentrated power. In democracy the individual has ontological value and manifests into existential coexistence with the social general. In other words, the individual has the meaning and power of the general, the latter being legitimate, precisely because it recognizes to the individual the existential and ontological dimension. The power, even in its concrete

manifestations is the expression of the general as such, reflected for example in the notion of "public interest". In a democratic society the legitimacy of the act of power lies not in reflecting own generality (of public interest) but in respecting the individuality of diversity in all forms specific to existential pluralism. In constitutional terms, this evokes the relation between "majority and opposition".

The issue of democracy cannot be reduced to the phenomenon of power as it seems to result from the constitutional definition of democracy that we find in Article 2 of the Constitution of French Republic: "government of the people by the people and for the people". The essence of democracy, in our opinion, is the forms and content of the concrete relation between society and individual. The relation expresses a unilateral contradiction because the society can contradict the individual (particularity and diversity), which is proper to dictatorship, but the individual does not contradict the society, situation particular to democracy. Furthermore, the dialectic report between the individual and society specific to democracy is an affirmative one, not containing a negation, such as Hegel argued. It is proper to democracy so that society asserts the individual (individuality and diversity), not to deny, therefore, to consecrate and guarantee the individuality and diversity. Any further analysis of the phenomenon of democracy involves references to the concepts of civilization and culture, the relationship between civilization, society and the individual.

In our opinion between dictatorship and democracy is obviously a contradiction, but one-sided: dictatorship is inconsistent and excludes democracy, yet democracy does not exclude the forms of dictatorship. The space and scope of this study do not allow further analysis of this interesting problem. However we mention that in doctrine are made referrals to forms of dictatorship that can characterize any democratic regime: parliamentary dictatorship, dictatorship of masses or the dictatorship of the majority. In all these situations the democratic reality, contradictions highlighted above become negative (majority excluded or ignoring the minority). Consequently, it gets to the exercising of authority in discretionary forms, which obviously contradicts the essential values of ideal democracy.

John Stuart Mill, in his works "Civilization," published in 1836 believes that civilization is contrary to the nature status or barbarism. A nation is civilized when the social conditions in which lives gives sufficient safety guarantees, so that social peace be a reality. Among consequences of higher civilization the most striking one, is the philosopher's opinion that the power tends to move from individuals and small communities to the masses. The importance of masses increases when that of individuals decreases. With the decreasing of individual's role, decreases the power of individual beliefs and the public opinion acquires supremacy. In this ideational context Stuart Mill pointed out that "the drawbacks of democracy lie precisely in this tyranny exercised by the masses, the majority of public opinion. Therefore, the political organization of representative governing must contain all guarantees for the individual against the tyranny of the masses.

Among other measures, Stuart Mill suggested the representation of opinions minority in the Parliament.

The great philosopher findings are, in our opinion, fully valid also for the contemporary forms of real democracy or representative. That's why the realization of the principle of representation in any of the types of electoral system should allow as much as possible, the reduction or even elimination of the forms of dictatorship in a real democracy through enhancement of individualities, of the political minorities or otherwise. In this way, the progress of a democratic society becomes a balanced one based on a unilateral affirmative contradiction in which the masses affirm and do not deny individual, and the majority affirm the minorities. Thus, the *famous parliamentary principle "the minorities express and the majority decides"* should become*: legitimacy of the decision is given by the representativeness and power to express of minorities.*

3. The discretionary power and power excess in a democratic society

In the administrative doctrine, that is primarily studying the issue of discretionary power, it was emphasized that the opportunity of administrative acts may not hinder their legality, and the conditions of legality can be divided into: general conditions of legality and specific conditions of legality on expediency (Iorgovan, 1996, p. 301). Consequently, the legality is the corollary of validity conditions, and the opportunity is a requirement (size) of legality (Iorgovan, 1996, p. 292). However, the right of appreciation is not recognized by the state authorities in exercising all the prerogatives they have. One needs to remember the difference between the competence of state authorities that exist when the law imposes on them a certain strict behavioral decision, on the other hand the discretionary power, in which situation the state authorities may choose the means for achieving a legitimate aim or in general, when the state body can choose between several decisions, within the law and its jurisdiction limits. We will remember the definition proposed in the literature to the discretionary powers: "there is a margin of freedom at the discretion of the authorities, so in order to achieve the purpose indicated by the law maker to have the possibility of use any means of action within its jurisdiction."

Although the problematic of the discretionary power is studied mainly in the administrative law, the right of appreciation in exercising some prerogatives represents a reality that is encountered in the work of all state authorities. In doctrine, Jellinek and Fleiner claimed the thesis according to which the discretionary power is not specific only to the administrative function, but it appears in the activity of other functions of the state, under the form of a liberty of appreciation on the contents, on the opportunity and covering of the juridical act. (see Apostol Tofan, 1999, p. 26)

The Parliament, as the supreme representative body and the sole legislative authority, has the broadest limits to manifest discretionary power, which identifies

itself through the characterization of the legislative act. Since the period between the two world wars I.V. Gruia pointed out: "The need to legislate in a particular matter, the choosing of enactment timing, the choosing of the timing for implementation of the law by fixing by the legislator of the date of application of the law, revising of previous legislation, which may not restrict and compel the activity of future Parliament, limitations of the social activities from the free and uncontrolled way of carrying out and their subjecting to law rules and sanctions, the contents of the legislative act etc, prove the sovereign and discretionary appreciation of the legislative body's function." (Gruia, 1934, p. 489)

That is the case today, because every Parliament has the freedom to exercise its powers almost unlimited. The legal limit of this freedom is shaped only by the constitutional principles applicable to the legislative activity and the mechanism for controlling the constitutionality of laws.

The discretionary power exists also in court's activity. The judge is required to decide only when it is noticed, within the referral's limits. Beyond that is manifested the sovereign right of assessment of the facts, the right to interpret the law, the right to set a minimum or a maximum punishment, to grant or not extenuating circumstances to determine the amount of compensation etc. The exercise of these powers means nothing else but discretionary power.

Exceeding the limits of the discretionary powers means breaching of the principle of legality or what in legislation, doctrine and jurisprudence is called to be "abuse of power". The excess of power in the activity of state bodies is equivalent to the abuse of rights, as it means the exercising of some legal competences without any reasonable motivation or without any appropriate relation between the imposed measure, situation in fact and the legitimate aim pursued.

The problematic of the excess of power forms mainly the subject of the law doctrine and administrative jurisprudence. Thus, the jurisprudence of the administrative prosecution courts in other countries delimited the freedom of decision of the administration from the excess of power. French State Council uses the concept of "appreciation manifest error" to describe situations where the administration exceeds, by legal acts adopted, the discretionary power. German administrative courts can annul the administrative acts for abuse of power or "wrong use of power". In such cases the legal acts of the administration have the appearance of legality, since they are adopted within the scope prescribed by law, but the excess of power consists in the fact that the administrative acts are contrary to the purpose of the law.

The Romanian Administrative Litigation Law no. 554/2004 uses the concept of "abuse of power of the administrative authorities", which it defines as "the exercise of the appreciation right belonging to public authorities, through the violation of the fundamental rights and freedoms of citizens consecrated in the constitution or by the law" (Article 2, paragraph 1, letter m). For the first time the Romanian legislator uses and defines the concept of abuse of power and also

recognizes the competence of the administrative prosecution courts to sanction the exceeding of the limits of the discretionary powers through administrative acts.

The exceptional situations represent a particular case in which the state authorities, and especially administrative ones, may exercise their discretionary power, with existence of the obvious dangers of power excess.

In the doctrine there is no unanimous agreement on the legal significance of the exceptional situations. Thus, in the older French doctrine, the discretionary power is considered to be the liberty of decision of the administration within the law permitted framework, and the opportunity evokes an action in fact of the public administration, under exceptional circumstances, action not necessary (therefore advisable) but contrary to the law (Iorgovan, 1996, p. 294). Jean Rivero (1973) believes that through exceptional circumstances means certain factual circumstances that have a double effect: suspending of the application of the ordinary legal system and triggering of the application of a particular law to which the judge defines the requirements. Another author identifies three specific elements for exceptional situations: 1) the existence of some abnormal and exorbitant situations or serious and unforeseen events; 2) inability or difficulty to act in accordance with the natural regulations; 3) the need to intervene quickly to protect a considerable interest, gravely threatened (Apostol Tofan, 1999, p. 81).

The excess of power can manifest itself in these circumstances at least by three aspects: a) an appreciation of a factual situation as being an exceptional case, although it has not this meaning (lack of a reasonable and objective motivation); b) the measures taken by the competent state authorities, by the virtue of the discretionary powers, exceed what is necessary for the protection of the public interest seriously threatened; c) if these measures restrict excessively, unjustified the exercise of the rights and freedoms constitutionally recognized.

The existence of an economic, social, political or constitutional - crisis does not justify the abuse of power. In this respect Professor Tudor Drăganu said: "the idea of the lawful state requires that they (the exceptional circumstances) to find adequate regulations in the constitution texts, whenever they have a rigid character. Such constitutional regulation is needed to determine the limits of the areas of social relations, in which the transfer of competence from the Parliament to the government may take place, to highlight the temporary character, by setting deadlines for application and by specifying the purposes in view of which it is carried out." (Drăganu, 1999, pp. 131-132)

Of course, the excess of power is not only a phenomenon manifesting itself in the practice of the executive bodies, it can also be found in the work of Parliament or of the courts.

We appreciate that discretionary power recognized by the state authorities is exceeded, and the measures ordered represent an abuse of power, wherever the following situations occur:

1. The measures decided do not pursue a legitimate aim;

2. The decisions of public authorities are not adequate to the factual situations or the legitimate aim pursued, as they go beyond what is necessary to achieve that purpose;
3. There is no rational justification of the measures imposed, including the situations in which is established a different legal treatment for identical situations, or an identical legal treatment for different situations;
4. Through the measures ordered the state authorities restrict the exercise of fundamental rights and freedoms, without any rational justification to represent, in particular the existence of an appropriate relation between these measures, the situation in fact and the legitimate aim pursued.

4. Examples of power excess in the activity of state authorities. Possible constitutional solutions

In the final part of this study we will refer to some issues that we believe that need to be considered in a future proceeding for revising the Constitution.

As shown above in regard to the excessive politicianism and the power discretionary manifestations of the executive contrary to the spirit and even the letter of the Constitution, with the consequence of violation of fundamental rights and freedoms, manifested throughout the last two democracy decades in Romania, we consider that the scientific approach and not only in reviewing matters of the basic law should be directed to find solutions to guarantee the values of the lawful state, to limit the violation of the constitutional provisions in view of some particular interests and to avoid the excess of power by state authorities.

1. The provisions of art. 114, paragraph 1 of the current drafting state: "The Government may assume responsibility before the Chamber of Deputies and the Senate in joint session on a program of general policy statement or a bill."

The engagement of Government liability has a political nature and is a procedural instrument which avoids the phenomenon of *"dissociation of majorities*" (Iancu, 2010, p. 482) where the Parliament could not meet the required majority to adopt a certain action initiated by the Government. To determine the Legislative forum to adopt the measure, the government through the accountability procedure, conditions to continue its work requiring a vote of confidence. This constitutional process ensures that the majority required for the government dismissal, in case of submitting a motion of censure to dismiss to coincide with that for rejecting the law, program or political statement of which the government binds its existence.

The adapting of the laws as a result of the political liability engagement of the Government has as an important consequence the absence of any discussions or parliamentary deliberations on the bill. If the government is supported by a comfortable majority in the Parliament, through this procedure one can achieve the adoption of the laws by "bypassing the Parliament", which can have negative

consequences on the principle of separation of powers in the State, but also in regard to the role of Parliament, as defined of Article 61 of the Constitution.

Consequently, the use of this constitutional procedure by government for adopting a law must be exceptional, justified by a political situation and a social imperative, well defined.

This particularly important aspect for respecting the democratic principles of the lawful state by the Government was well highlighted by the Constitutional Court of Romania: "To this simplified form of regulation one must reach *in Extremus*, when the adopting of bill in the ordinary procedure or emergency procedure is no longer possible or when the Parliament's political structure does not allow the adopting of the bill in the current or emergency procedure." (Decision nr. 1557 on 18th of November 2009, published in the Official Gazette. Nr. 40/19.01.2010) The political practice of the Government in recent years is contrary to these rules and principles. The Executive frequently used the assuming of responsibility not only for a single law, but for packages of laws without a justification in the sense shown by the Constitutional Court.

The politicianism of the government clearly expressed by the high frequency of assuming such a constitutional decision seriously harms the principle of political pluralism which is an important value of the lawful system as consecrated in the provisions of article 1, par. (3) of the Constitution but also of the principle of parliamentary law that shows that "the opposition expresses and the majority decides" (Muraru and Constantinescu, 2005, pp. 55-69). "To deny the right of the opposition to speak is synonymous with the denial of political pluralism which, according to Article 1, paragraph (3) of the Constitution is a supreme value and is guaranteed ... the principle the 'majority decides, opposition expresses "implying that in the entire organization and functioning of the Parliament's Chambers to ensure, on one hand that the majority is not obstructed, especially in the conduct of the parliamentary procedure and, on the other hand the majority to decide only after the opposition has voiced" (Muraru and Constantinescu, 2005, pp. 56). The censorship of the Constitutional Court has not proved to be sufficient and effective to determine the Government to respect these values of the lawful state.

In the context of these arguments we support the proposal to revise these constitutional provisions that limit the right of the Government to use its liability for a single bill in a parliamentary session. However, in our opinion there is no justification to exclude from the limitation of Government's liability, situations aiming the government draft law on state budget and state social insurances.

2. All post-December governments have massively used the practice of Emergency ordinances, fact widely criticized in the literature.

The conditions and prohibitions established by revising law in 2003 on the constitutional regime of emergency ordinances, in practice proved to be insufficient to limit this practice of the Executive and the control of the

Constitutional Court also proved insufficient and even ineffective. The consequence of such a practice is the violation of the Parliament's role as "the sole legislative authority of the country" (art. 61 of the Constitution) and creating of an imbalance between the executive and legislature by emphasizing the discretionary power of the Government, which most often turned into the abuse of power.

We propose in the perspective of a new revision of the Basic Law, that art. 115 par. 6 of the Constitution be amended so as to prohibit the adopting of emergency ordinances in the field of organic laws. In this way is protected an important area of social relationships as the constitutional legislature considers essential for the social and state system, the excess power of the executive through the practice of issuing emergency ordinance.

3. In our opinion is necessary that the Constitutional Court's role as guarantor of the Basic Law to be amplified by new responsibilities in order to limit the excess of power by the state's authorities. We disagree with the assertions in the literature that a possible improvement of constitutional justice could be achieved by reducing the powers of the constitutional court (Vrabie, 2010, p. 33). It is true the Constitutional Court ruled some questionable decisions regarding their compliance with the limits of exercising their duties according to Constitution, by assuming the role of a positive legislator (we refer with the title for example to the Decision No.356/2007, published in the Official Gazette.no.322on 14th of May 2007 and to the Decision no..98/2008 published in the official gazette no. 140 on 22nd of February 2008). Reducing the powers of the constitutional court for this reason is not a solution as a legal basis. Of course reducing the powers of the state authority has the consequence of eliminating the risk of improper exercise of those powers. This is not a way of doing things in a lawful state, but it should be done by seeking legal solutions to achieve better conditions of the tasks which prove to be necessary to the state and social system.

To the powers of the Constitutional Court may be included the one to rule on the constitutionality of administrative acts, exempted from the review of legality by the administrative courts. This category of administrative acts, to which refers Article 126 paragraph 6 of the Constitution and the provisions of Law no. 544/2004 of administrative litigation, are particularly important for the whole social system and state. Therefore it is necessary a constitutional scrutiny because in its absence, the discretionary power of the issuing authority is unlimited with the consequent possibility of restricting the excessive exercise of fundamental freedoms and rights or of breaching the important constitutional values.

For the same reasons our constitutional court should be able to control in terms of constitutionality also the Presidential decrees establishing the referendum procedure.

The High Court of Cassation and Justice has the power to take decisions in an appeal on points of law that are binding on the courts. In the absence of any

control of legality or constitutionality, the practice has shown that in many cases the Supreme Court has exceeded its power to interpret the law, and such decisions amended or completed acts behaving as a genuine legislature thus violating the principle of separation of powers in the state (for developments see Andreescu, 2011, pp. 32-36).

In these circumstances, in order to avoid the excessive power of the Supreme Court, we consider it necessary to assign the Constitutional Court the power to decide on the constitutionality of the decisions of High Court of Cassation and Justice adopted in the procedure of appeal on points of law.

4. The abuse of authority of all state authorities, paradoxically within the law limits, whenever, the normative documents recognize a marge of appreciation from the decider body (Parliament, administrative authorities or courts), on the moment of decision or on the measures decided. The State practice in Romania showed that in many instances the content of the decision which may materialize in: law, government ordinance, acts of administrative authorities at all levels, judicial documents of the prosecution or court orders, exceed through provisions, particularly the restrictive nature what is necessary to achieve the purpose of the law or inadequate to the situation in fact. Such manifestations of power can cause severe damages to fundamental human rights or public interest, in a word to the features of the lawful state. The criterion that could allow censorship by the courts of these forms of abuse of power is in our view *the principle of proportionality.*

Proportionality is a fundamental principle of law consecrated explicitly to the constitutional, legislation and international legal instruments regulations. It is based on the values of the rational right of justice and equity and expresses the existence of a balanced or appropriate relation between actions, situations, events, being a criterion for limiting the measures ordered by the authorities to what is necessary to achieve a legitimate aim, thus being guaranteed the fundamental rights and avoided the excess of power by the state's authorities. Proportionality is a fundamental principle of EU law being expressly consecrated by article 5 of the Treaty on European Union (for developments see Andreescu, 2010, pp. 593-598).

We consider that this principle's express regulation in the content of the provisions of Article 53 of the Constitution, with application in the restriction of certain rights, is not enough to highlight the full significance and importance of the principle of the lawful state.

It is useful that to article 1 of the Constitution to add a new paragraph stating that *"The exercising of state power must be proportionate and non-discriminatory"*. This new constitutional regulation would be a veritable constitutional obligation for all state authorities to conduct their duties in a way that the measures adopted to enroll within the discretionary power recognized by law. At the same time it creates the possibility for the Constitutional Court to sanction by means of the constitutional reviewing control of the laws and

ordinances, the excess of power in the work of Parliament and Government, using as criteria the principle of proportionality.

Of course, the existence of an institutional state viable, efficient qualitatively, well structured and harmonized, including under the aspect of moral and professional quality of the civil servants and magistrates dignitaries is obviously an ontological factor to eliminate or at least diminish the excess of power of state's authorities in all its forms, especially we would emphasize on the situation in which the measures decided by the political and legal manifestations will take the *form of legality* but are in obvious contradiction with the requirements of *the principle of legitimacy.*

Strengthening the judiciary power, the control of the courts and control of constitutionality, particularly, mainly in situations where being questioned the violation of human rights or of the principles of lawful state, particularly the separation and balance of powers, can be a viable solution to ensure not only the legality of the measures taken by the state authorities, but also of their legitimacy

5. Conclusions

Antonie Iorgovan says that a problem of the essence of the lawful state is to answer the question: "where ends the discretionary power and where starts the abuse of law, where ends the legal behavior of administration, materialized through its right of appreciation and where it begins the infringement of a subjective right or a legitimate interest of the citizen?" (apud. Apostol Tofan, 1999, p.45).

Addressing the same issue, Leon Duguit in 1900 is doing an interesting distinction between the "normal powers and the exceptional powers" conferred by the Constitution and laws to the administration, and on the other hand the situations where state authorities act outside the legal framework. The latest situations, are divided by the author into three categories: 1) the excess of power (when the state authorities go beyond the legal powers); 2) misappropriation of power (when the state authority accomplishes an act which falls within its jurisdiction following another purpose, other than the one prescribed by law); 3) the abuse of power (when the state authorities act outside their powers, but through acts that have no legal character) (Duguit, 1907, p. 445-446).

Therefore, the application and observance of the principle of legality in the work of state authorities is a complex issue because the performance of the state's functions assumes the discretionary power with which the state bodies are invested, in other words "the right of appreciation" of the authorities regarding the moment of adoption and the contents of the measures ordered. What is important to highlight is that discretionary power cannot be opposed to the principle of legality, as a dimension of the lawful state.

References

Andreescu, M. (2011). Constituţionalitatea recursului în interesul legii şi ale deciziilor pronunţate. *Juridical Courier*, 1.
Andreescu, M. (2010). Proporţionalitatea, principiu al dreptului Uniunii Europene. *Juridical Courier*, 10.
Apostol Tofan, D. (1999). *Puterea discreţionară şi excesul de putere al autorităţilor publice.* All Beck.
Drăganu, T. (1999). *Drept constitutional si instituţii politice. Tratat elementar. Vol II.* Lumina Lex.
Duguit, L. (1907). *Manuel de Droit Constitutionnel.* Fontemoing.
Gruia, I.V. (1934), Puterea discreţionară în funcţiunile Statului. *Weekly Pandectales.*
Iancu, Ghe. (2010). *Drept constituţional şi instituţii publice*. All Beck.
Iorgovan, A. (1996). *Tratat de drept administrativ.Vol. I.* Nemira.
Muraru, I., & Constantinescu, M. (2005). *Drept parlamentar românesc*. All Beck.
Vrabie, G. (2010). Natura juridică a curţilor constituţionale şi locul lor în sistemul autorităţilor publice. *Review of Public Law*, 1.
Decision no. 1557 on 18th of November 2009, published in the Official Gazette. No. 40/19.01.2010.
Decision No.356/2007, published in the Official Gazette no. 322 on 14th of May 2007.
Decision No. 98/2008 published in the Official Gazette no. 140 on 22nd of February 2008.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

HUMAN RIGHTS AND THE PANDEMICS. EXPERIENCES AND FAILURES

Versavia BRUTARU [1]

Abstract

In principle, in exceptional circumstances, social or natural, which threaten the normal existence of society, the state may resort to derogatory measures concerning most of human rights, that is their exceptional limitations, much more severe than those acceptable in a period of normalcy. However, the derogating measures must have a single purpose, namely to resolve the crisis situation and return to normalcy, so they must respond to an overriding social need, must be strictly proportionate, the limitation must be duly substantiated and the application must be non-discriminatory.

Key words: *fundamental human rights; pandemic; derogatory measures; limitations.*

1. Introduction

The Covid-19 epidemic has forced states to take measures to combat its effects, some more drastic, others more relaxed, depending on how governments have addressed health, economic or social issues. All these measures have had the common effect of restricting certain individual rights and freedoms, as guaranteed by international conventions, in particular the European Convention on Human Rights.

On March 11, 2020, the disease was declared a pandemic by the World Health Organization (WHO)[2]. On March 15, 2020 in Romania was declared a State of Emergency, in force for 2 months, until May 15, 2020[3]. In this pandemic

[1] **Ph.D, scientific researcher III, Institute of Juridical Researches "Acad. Andrei Rădulescu", Romanian Academy, Bucharest (Romania), bversavia@gmail.com, ORCID: 0000-0002-3445-257X**

[2] World Health Organization. *Coronavirus Disease 2019 (COVID-19) Situation Report – 67* (2020) www.google.scholar.

[3] Decree no. 195 of March 16, 2020 on the establishment of the state of emergency on the territory of Romania, published in the Official Gazette no. 212 of March 16, 2020; Decree no. 240/2020 regarding the extension of the state of emergency on the Romanian territory, Official Gazette no. 311 of April 14, 2020.

context, the Council of Europe[1] issued in April 2020 a series of recommendations for Member States to respect democracy, the rule of law and human rights. The Council of Europe reminds states of the values that underlie European construction and that the signatory states of the European Convention on Human Rights (the Convention) have committed themselves to respect: democracy, the rule of law and human rights, regardless of the current pandemic context. The Council of Europe emphasizes that the measures taken to respond to the current crisis must (1) remain exceptional, (2) be proportionate to the danger it poses and (3) be limited in time. The recommendations emphasize: The Charter of Fundamental Rights of the European Union and the rule of law must remain in force and that, in the context of emergency measures, the authorities must ensure that everyone enjoys the same rights and protection; Member States shall take only necessary, coordinated and proportionate measures when restricting travel and introducing or prolonging internal border controls, first thoroughly assessing their effectiveness for public health, on the basis of the legal provisions in force, namely the Schengen Borders Code and the Directive on free movement, and in full compliance with the Charter of Fundamental Rights of the European Union; traffic restrictions and border controls must remain proportionate and exceptional and that free movement should be restored as soon as deemed feasible.

The Council pointed out that a large part of the restrictive measures can be justified in the public interest regarding health protection, without the need for derogations from the Convention, as its mechanisms allow for limitations when necessary and proportionate to the aim pursued. But in the current context, states can also take exceptional measures that require derogations from the provisions of the Convention. In the latter case, although States enjoy a wider margin of appreciation, the Court may nevertheless examine the conditions under which States have resorted to derogations from the provisions of the Convention. With regard to *respect for the rule of law and democratic principles*, the Council referred to a number of specific principles and how states should relate to them. Regarding to the *principle of legality*, the Council recalled that even in special situations, compliance with the rule of law is mandatory. Any action of the state must be carried out in compliance with the law, but the law is not only represented by the acts of national parliaments, but by the acts of administrative power, provided that the latter have a constitutional basis. The possibility of parliaments delegating legislative powers to administrative authorities has been recognized, but in this case, it is necessary for parliaments to decide on delegation by the same majority as they would have decided to pass a law. The Council also recognized

[1] European Parliament Resolution of 17 April 2020 on coordinated EU action to combat the COVID-19 pandemic and its consequences (2020/2616 (RSP)); European Parliament Resolution of 13 November 2020 on the impact of measures on COVID-19 on democracy, the rule of law and fundamental rights (2020/2790 (RSP)) https://www.europarl.europa.eu/doceo/document/TA-9-2020-0054_EN.html.

that states may be required to adopt normative acts specific only to the current situation, but that these acts must also be subject to constitutional review.

2. In Romania, this mention of the Council could raise certain issues, as long as according to the Constitution and Emergency Decree no. 1/1999, the delegation of legislative attributions from the Parliament to Government bodies took place on the basis of a presidential decree and not on the basis of a decision of the Parliament. Indeed, based on the same normative acts, the Parliament exercised a form of control and approved the measure adopted by the President, by Decision no. 3/2020. On the other hand, certain problems could be generated by the fact that there is no precise regulation that would allow the exercise of a constitutionality control over the presidential decree or over the military ordinances issued based on it and on Emergency Decree no. 1/1999 (Alexandru & Novac, 2020). It has also been shown that it is not enough for the legislative attributes granted to governments to be limited in time, but it is necessary that the *effects* of normative acts adopted under these conditions by governments to have limited effects in time (Alexandru & Novac, 2020). In the situation where it is considered that some of the measures ordered by the government should be maintained even after the cessation of the emergency, they should be subject to parliamentary scrutiny in the usual procedure.

In this context, the Constitutional Court of Romania ruled by Decision no. 152 of 6 May 2020 regarding the exception of unconstitutionality of the provisions of art. 9, art. 14 letter c 1) -f) and of art. 28 of the Government Emergency Decree no. 1/1999 on the regime of the state of siege and the regime of the state of emergency and of the emergency ordinance, as a whole, as well as of the Government Emergency Decree no. 34/2020 for the amendment and completion of the Government Emergency Decree no. 1/1999 on the state of siege and the state of emergency, as a whole. The procedure for restricting the rights is established by Government Emergency Decree no. 1/1999 and the subsequent acts (Presidential Decree, military ordinances and orders) that are only acts of implementation of the ordinance. In that regard, the Romanian Constitutional Court rightly noted in paragraph 98[1] that: „*As regards the criticism of the author of the objection of unconstitutionality, (...), which states that the exercise of fundamental rights or freedoms may be restricted only by law, the Court notes that the President's decree is only a normative administrative act, therefore an act of secondary regulation implementing an act of primary regulation. The restriction of the exercise of certain rights is not achieved by the decree of the President, the provisions of art. 14 lit. d) of the Government Emergency Ordinance no. 1/1999 constituting only the norm by which the primary legislator empowers the administrative authority (the President of Romania) to order the execution of the law, respectively of the provisions of art. 4 of the same normative*

[1] Decision no. 152 of May 6, 2020, Oficial Monitor no. 387 of 13 May 2020.

act which expressly provides for the possibility of restricting the exercise of rights". The doctrine (Dragnea & Coraci, 2020, p. 3) has shown that the constituent legislator has assumed that it is not possible to trust that Parliament will respond quickly to urgent situations (as the conduct of parliamentary procedures involves quite long deadlines and the fulfillment of quorum/voting conditions for deputies and senators, currently 465, reason for which it established the legislative delegation on the basis of which the executive can take the necessary measures that do not support postponement by acts with the force of law subject to the confirmation of the Parliament).

3. The functioning of democracies and the system of balance of powers governing their functioning are affected when a health emergency generates changes in the distribution of powers, for example, allowing the executive power to acquire new prerogatives, under which it can limit individual rights and exercise powers usually reserved for the legislator and local authorities, while at the same time, imposing constraints on the role of parliaments, the judiciary authorities, civil society and the media, as well as on the activities and involvement of citizens. The Venice Commission supports a *de jure* constitutional state of emergency, rather than a *de facto* state of emergency, based on ordinary law, as "a system based on exceptional, *de jure* applicable constitutional prerogatives can provide better guarantees of human rights democracy and the rule of law and can more effectively protect the principle of legal certainty, which is its foundation"[1]. If legislative powers are transferred to the executive, any legal act issued by the executive must be subject to subsequent parliamentary approval and cease to have effect if it does not obtain such approval within a certain period of time[2]. Another issue that needs to be addressed is the excessive use of accelerated and emergency legislation, a problem also highlighted by the Commission in its 2020 rule of law report[3].

4. Therefore, the confidence in the government's actions is essential to ensure support for and implementation of emergency measures. In order to achieve these goals in a democratic context, it is vital that the decisions taken are transparent, based on scientific and democratic data, and that there is a dialogue with the opposition, civil society and interested parties and also their appropriate involvement.

In the current pandemic context, certain restrictive measures may be taken by States, including derogations from States' obligations under Article 15 of the Convention, depending on their nature and extent. When a State adopts a series of

[1] Venice Commission, Interim Report on Measures Taken in EU Member States following the COVID-19 Crisis and Their Impact on Democracy, the Rule of Law and Fundamental Rights, 8 October 2020 (CDL-AD (2020) 018), paragraph 57.
[2] Venice Commission, Interim Report of 8 October 2020 (CDL-AD (2020) 018), paragraph 63.
[3] (COM(2020)0580).

derogating measures, they shall inform the General Secretariat of the Council of Europe of the measures, the reasons and the duration of their establishment and also allow the competent European forums to monitor the manner in which the restrictive measures are applied. The European Court of Human Rights, in turn, will consider the derogations assumed, in judging any cases that are subject to resolution.

5. Presidential Decree no. 195/2020[1], which declared a state of emergency, implies derogations from the obligations assumed by the ECHR. Art. 48 lit. b) from annex no. 1 to the Decree of the President of Romania no. 195/2020 stipulates that: "*During the state of emergency, the Ministry of Foreign Affairs shall perform the following tasks: [...] b) shall notify the Secretary-General of the UN and the Secretary-General of the Council of Europe of the measures adopted by the decree establishing the state of emergency which have the effect of limiting the exercise of fundamental rights and freedoms, in accordance with Romania's international obligations".* Similarly, art. 73 letter b) from annex no. 1 to the Decree of the President of Romania no. 240/2020 on the extension of the state of emergency on the territory of Romania stipulates that: "*During the state of emergency, the Ministry of Foreign Affairs fulfills the following attributions: [...] b) will notify the UN Secretary General and the Secretary General of the Council of Europe of the measures adopted by the decree of prolongation of the state of emergency which have as effect the limitation of the exercise of some fundamental rights and freedoms, in accordance with the international obligations incumbent on Romania*". The use of derogative measures regarding the human rights is not arbitrary, is a state of *exceptional legality*, which replaces ordinary legality. However, legality does not disappear, we remain within the rule of law, the preeminence of law (Popescu, 2020, *International notification…*, p. 5 et seq.).

If there is an exceptional situation that calls for derogatory measures on human rights, the application of art. 4 of the Pact[2] and of art. 15 of the Convention is binding. Failure to apply these conventional rules would mean a violation of the State party's conventional international obligations and would result in its international legal liability. Therefore, one of the conditions for the validity of the derogation is the *international information* of the subjects of public international law indicated in art. 4 of the Pact, respectively in art. 15 of the Convention. The

[1] Decree no. 195 of March 16, 2020 on the establishment of the state of emergency on the territory of Romania, published in the Official Gazette no. 212 of March 16, 2020; by Decision no. 3 of March 19, 2020, the Parliament approved the state of emergency, as an exceptional measure adopted by the President of Romania by Decree no. 195/2020, Published in Official Gazette no. 224 of March 19, 2020; Decree no. 240/2020 regarding the extension of the state of emergency on the Romanian territory, Official Gazette no. 311 of April 14, 2020, by Decision no. 4/2020, Published in Official Gazette no. 320 of April 16, 2020, the Parliament approved the extension of the state of emergency, as an exceptional measure adopted by the President of Romania.

[2] International Covenant of 16 December 1966 on Civil and Political Rights, Published in the Official Gazette no. 146 of November 20, 1974.

international information shall consider those derogating measures that have been taken by the State party, indicating the restricted rights. In the event that the State party to the Convention and the Covenant (in our case Romania) did not make this international information, it could have attracted international legal liability and diminished the guarantee of human rights. Information means complying with and enforcing international legal obligations, which remain in force. At the same time, in the absence of international notification, the derogating measures are not considered valid and in case of a dispute the defendant state will not be able to defend itself validly, because the rights alleged to be violated exceed the scope of simple interferences or temporary limitation the exercise of fundamental rights.

6. The first paragraph of Article 15 of the Convention refers to exceptional situations in which the provisions of the Convention may be derogated from, namely in the case of a public danger threatening the life of the nation[1], and conditioning the taking of derogating measures only to the strict extent necessary and only if it does not violate other obligations of the State arising from international law (other ratified treaties and conventions). The second subparagraph protects some fundamental rights from any derogation or reservation. The last paragraph contains procedural provisions which oblige the Signatory States to inform the Secretary General of the Council of Europe of the measures taken and the deadline by which they will be applied. Although most cases, in the application of Article 15, concerned situations of war or terrorist threats, the criteria established by the Court could justify the adoption of derogations from the ECHR in the situation created by the Covid-19 epidemic, given the serious danger to health to all citizens, regardless of area or occupation.

The text of Article 15 obliges the Signatory States to strictly respect the *criterion of proportionality* of the measure when restricting the exercise of human rights protected by the ECHR. The judges of the Court may consider whether the restriction has been justified by circumstances and whether it complies with its obligations under international law[2]. Romania, in compliance with this obligation, specified the rights whose restriction was established in the exceptional situation generated by the Covid-19 pandemic: The right to free movement; The right to respect for private and family life; Inviolability of the home; The right to education; Freedom of assembly and association; The right to the protection of private property; The right to strike; Economic freedom.

[1] Lawless v. Ireland no. 3, § 28. In the case law of the Strasbourg Court, the phrase was interpreted as referring to "*an exceptional situation of crisis or urgency that affects the entire population and constitutes a threat to the organized life of the community that makes up the State*." https://70.coe.int/pdf/lawless-v.-ireland.pdf .

[2] Case of Mehmet Asan Altan v. Turkey, § 94, https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-181862%22]}.

7. Therefore, interference with the exercise of rights must be limited to the rights expressly provided above and be proportionate to the objectives pursued by the adoption of derogating legislation. Any modification of the rights concerned, of the measures indicated or of the initial period of 30 days for which the state of emergency has been established, must be the subject of a new notification addressed to the Council in order to benefit from the application of the provisions of the ECHR. Derogatory measures must have a single purpose, namely to resolve the crisis situation and return to normalcy, so they must respond to an urgent social need.

8. The specialized literature (Dima, 2020, p. 2 et seq.) states: "although the state of emergency has a deeply derogatory, exceptional legal and constitutional legal regime, it still remains a component part of the constitutional and legal order of the Romanian state". According to the laws in force: "During the state of siege or the state of emergency, the exercise of some fundamental rights and freedoms may be restricted, except for the human rights and fundamental freedoms provided in art. 32, only to the extent that the situation requires it and in compliance with art. 53 of the Romanian Constitution, republished". Regarding the art. 53 of the Constitution, it states the following: "its scope concerns the case in which a violation of the fundamental right / freedom was found, violation due to exceptional conditions arising in the life of the state (…) that, in this case, the legislative measure violated the law, without, however, having annihilated / denied it, since, in this case, neither art. 53 of the Constitution can no longer constitute a constitutional justification for the intervention operated on the fundamental right / freedom. This right could continue to be exercised, but not in its fullness (…) the legislator being obliged, after the cessation of the situation that determined such a measure, to return to the exercise of the respective fundamental right / freedom, in the fullness of its content". We notice that art. 53 of the Constitution considers only the *fundamental rights and freedoms*, namely the rights and freedoms enshrined in the Constitution, and *not all the rights* enjoyed by a subject of law[1].

If in art. 53 para. (1) of the Constitution, the word "law" is used in its narrow sense, as a legal act of the Parliament, however, the phrase "only by law" in this constitutional text *does not* in itself prevent the intervention of Government Decrees. The constitutional norm does not prevent the restriction of the exercise of fundamental rights and freedoms by the Government Emergency Decree, apart from the law, as a legal act of the Parliament [2]. Equally, the Government can legislate, namely to adopt acts of primary regulation, which are Decrees (simple or emergency), but not as its own power, but only as a delegated power, in

[1] Romanian Constitutional Court Decision no. 1189 / 06.11.2008, Official Gazette of Romania, part I, no. 787 / 25.11.2008.
[2] Decision of the Constitutional Court no. 80 / 16.02.2014, Official Gazette of Romania, part I, no. 246 / 07.04.2014.

accordance with art. 115 of the Constitution, "Legislative Delegation". Government Decrees, being issued on the basis of legislative delegation, are acts with the force of law, have legal force equal to the law, being subject to constitutional review according to art. 146 letter d) of the Constitution. But, art. 53 para. (1) of the Constitution cannot be interpreted in isolation, but correlated with art. 115 para. (4) of the Constitution, a rule which provides that "*emergency decrees [...] may not affect [...] the rights, freedoms [...] provided by the Constitution [...]"*.The Constitutional Court[1] has ruled that emergency decrees are not prohibited from intervening in the field of fundamental rights and freedoms, but only that they cannot affect these rights and freedoms: "*emergency decrees cannot be adopted if they "affect", if they have negative consequences but, instead, they can be adopted if, through the regulations they contain, they have positive consequences in the areas in which they intervene*". By the same decision, the Constitutional Court clarified the notion of "affect": "*the verb "affect" is susceptible to different interpretations, as it results from some dictionaries*. From the Court's point of view, it is to retain only the legal meaning of the concept, under various nuances, such as: "*to suppress", "to harm", "to prejudice", "to injure", "to have negative consequences", regarding the category of electoral rights [...]* ". Or, the restriction of the exercise of fundamental rights and freedoms, according to article 53 paragraph (3) of the Constitution, means their affectation, within the meaning of art. 115 para. (6).

By systematically interpreting the two constitutional norms, the exercise of fundamental rights and freedoms cannot be restricted by emergency decree. In a recent Decision[2], the Constitutional Court states: "*the interpretation of the notion of law contained in Article 53 was intended to limit the possibility of the delegated legislator - the Government - to regulate by emergency decree in the field of fundamental rights and freedoms of citizens, in the meaning of their restriction, contrary to the provisions of Article 115 paragraph (6) of the Constitution* ".

9. The Constitutional Court also draws attention to the fact that the establishment of a state of emergency or siege, namely exceptional measures, should not be confused with the restriction of the exercise of certain rights or freedoms (art. 53). The restriction of rights provided in art. 53 has a wider scope of application and is not limited only to the situation provided in art. 93 of the Constitution (the establishment of a state of emergency or siege). The provisions of art. 53 have application, even in the absence of art. 93 of the Constitution (example, the crisis situation of 2008-2009, which imposed a 25% reduction in the amount of salary / allowance / military pay, as a corollary of the right to work, is provided by the

[1] Decision no. 1189 / 06.11.2008, Official Gazette of Romania no. 787 of November 25, 2008.
[2] Romanian Constitutional Court, Decision no. 80 / 16.02.2014, Official Gazette of Romania no. 246 of April 7, 2014, point 339.

criticized law and is required to reduce budget expenditures[1]). Therefore, in *ordinary situations*, the restriction of the exercise of fundamental (constitutional) rights and freedoms can be done by law (as a legal act of the Parliament), as the case may be, ordinary or organic, depending on the matter to which a certain right belongs under the regulatory aspect infra-constitutional, or by simple decree of the Government, if the respective constitutional right or freedom is regulated infra-constitutionally by ordinary law. On the other hand, the legal regime of the state of emergency or the state of siege may be regulated by organic law or, in case of urgency of regulation, by emergency decree. If the two situations overlap, as is the case with the current pandemics, by Decrees no. 195 of March 16, 2020 and 240/2020, the restriction of the exercise of fundamental rights and freedoms, as part of the legal regime of the state of emergency, can be done only by organic law (and not by ordinary law or simple decree, because it does not allow art. 73 paragraph (3) letter g) of the Constitution, nor by emergency decree, because it opposes art. 115 para. (6) of the Constitution.

10. Another issue concerns the restriction of certain fundamental rights and freedoms by military decrees. Military decrees, issued during a state of emergency or siege, by the Minister of Internal Affairs, respectively by the Minister of National Defense, or by civil or military civil servants subordinated to them, are nothing but acts subordinate to the law, so administrative acts.

11. As we showed above, in case of emergency (pandemic, in the current situation) the restriction of rights *in general*, *in abstract*, is done by organic law. By military decrees, *concrete* rights and freedoms can be restricted, so *certain* rights or freedoms. The Organic Law on the Regime of the State of Emergency and the State of Siege contains *general rules* (including in terms of restricting the exercise of constitutional rights and freedoms). The establishment of the state of emergency can have several reasons, one of which is the pandemic. The restriction of rights and freedoms during a pandemic will be different from the restriction of rights and freedoms in a state of emergency established for other reasons, such as social unrest. The Organic Law provides the general framework, and the Military decrees provide a special framework, on a case-by-case basis, for the restriction of *certain* rights. In other words, the decree establishing a state of emergency or siege itself may contain, in addition to directly and immediately

[1] Decision 872 / 25.06.2010, Official Gazette of Romania no. 433 of June 28, 2010: "*The Court also observes that the authors of the objection start from a wrong hypothesis, namely that in order to apply the mentioned restriction, the state of emergency, siege or necessity should have been declared, institutions provided in art. 93 of the Constitution. Or, even if the establishment of the state of emergency or siege may have as a consequence the restriction of the exercise of certain rights or freedoms, the scope of application of art. 53 is not limited only to the situations provided by art. 93 of the Constitution. Consequently, the Court finds that, in the present case, the art. 53, on the thesis on national security, is applicable and, at the same time, constitutes a basis for justifying the envisaged measures".*

applicable rules on restricting the exercise of fundamental rights and freedoms, conditional rules, which enable the issuer of military decrees to decide in concrete terms to restrict the exercise of certain rights, constitutional rights and freedoms, if and to what extent (Popescu, 2020, *Restriction*….p. 9 et seq.). The Decree of the President of Romania establishing the state of emergency or siege establishes, within the limits of the organic law on the regime of state of emergency and state of siege, *the list of fundamental rights and freedoms* whose exercise may be restricted, as well as the forms and limits of restriction. Military decrees must comply with both the organic law on the state of emergency or siege and the decree establishing the state of emergency or siege.

One of the conditions for the validity of human rights interference is that the interference be provided for by "law", thus a foundation in national law. But, it is not enough for the "law" to exist, it must also meet qualitative requirements: to be accessible (the recipients to be able to know it); to be predictable (to be sufficiently clear, precise, so that the recipients, using a specialist, can understand its content); provide safeguards against arbitrariness (Popescu, 2020, *Human rights*….p. 2 et seq.). The obligation of predictability of the law in the elaboration of the normative act is provided in art. 23 of Law no. 24 of 2000, on the norms of legislative technique for the elaboration of normative acts, *in order to establish legislative solutions.*

12. The European Court of Human Rights has emphasized that "only a rule set out with sufficient precision to enable the individual to regulate his or her conduct can be considered law. *The individual must be able to foresee the consequences that may arise from a particular act",* meaning that" a rule is foreseeable only when it is drafted with sufficient precision, so as to enable any person who may, if necessary, to seek specialist advice, to correct their conduct even when "it offers a certain guarantee against arbitrary violations of public power".

13. The principle of legal security is correlated with another principle, the principle of legitimate expectations, which requires that legislation be clear and predictable, uniform and coherent; it also imposes the limitation of the possibilities to modify the legal norms, the stability of the rules established by them. The principle of predictability of the law does not preclude the idea that the person in question should be determined to use clarifying guidance in order to be able to assess, to a reasonable extent in the circumstances of the case, the consequences which might result from a particular act[1]. In view of the principle of the general applicability of laws, the Strasbourg Court has held that their wording

[1] Cantoni v. France, para. 35, Dragotoniu and Militaru-Pidhorni v. Romania, para. 35, Sud Fondi srl and Others v. Italy, para. 109.

cannot be absolutely precise. One of the standard regulatory techniques is to use general categories rather than exhaustive lists[1].

14. Analyzing the two presidential decrees (the one establishing the State of Emergency and the one of extension, mentioned) we observe that in the one of extension the constitutional phrase regarding "rights and freedoms" is respected, a phrase that **does not** appear in the first Decree. Also in the two decrees on the state of emergency (establishment and extension) are stipulated the fundamental rights that will be restricted during the state of emergency, namely: free movement (art. 25 of the Constitution) / freedom of movement (art. 2 P4- ECHR; art. 45 Charter of Fundamental Rights of the European Union) / right to move freely (art. 12 International Covenant on Economic, Social and Cultural Rights); the right to intimate, family and private life (art. 26 of the Constitution) / the right to respect for private and family life (art. 8 ECHR; art. 7 Charter of Fundamental Rights of the European Union; art. 17 International Covenant on Economic, Social and Cultural Rights); inviolability of the domicile (art. 27 of the Constitution) / right to respect for the domicile (art. 8 ECHR; art. 7 Charter of Fundamental Rights of the European Union; art. 17 International Covenant on Economic, Social and Cultural Rights); the right to education (art. 32 Constitution), (art. 14 Charter of Fundamental Rights of the European Union; art. 13 International Covenant on Economic, Social and Cultural Rights); freedom of assembly (art. 39 of the Constitution) / freedom of assembly (art. 11 ECHR; art. 12 Charter of Fundamental Rights of the European Union) / right of assembly (art. 21 International Covenant on Economic, Social and Cultural Rights); the right to private property (art. 44 of the Constitution) / protection of property (art. 1 P1-ECHR) / the right to property (art. 17 Charter of Fundamental Rights of the European Union); the right to strike (art. 43 of the Constitution; art. 28 Charter of Fundamental Rights of the European Union) / freedom of association (art. 11 ECHR) / the right to strike (art. 6 International Covenant on Economic, Social and Cultural Rights; art. 8 International Covenant on Economic, Social and Cultural Rights); economic freedom (art. 45 of the Constitution); freedom to undertake (art. 16 Charter of Fundamental Rights of the European Union).

However, from the interpretation of these decrees and from the enumeration of the restricted rights, it results that another important number of rights are restricted in reality, rights that ***were not explicitly*** enumerated in article 2 of the Decrees: the right of access to justice and a fair trial; the right to liberty; freedom of religion (only in the decree extending the state of emergency); freedom of expression and the right to information; the right to health protection; the right to work; the right to petition. These restricted rights are mentioned in the Annexes of the Decrees containing the derogating measures (Popescu, 2020,

[1] Romanian Constitutional Court, Decision no. 781 of December 5, 2017, paragraph 28, Published in Official Gazette of Romania no. 184 of February 28, 2018.

Human rights….p. 2 et seq.). Given their importance, we do not know why they were not mentioned (listed) in the first part of the Decrees. From the legislative technique point of view, of the clarity required for a normative text, this would have been necessary [1].

15. Conclusions

With the official recognition, by the WHO, of the Covid-19 pandemic, the states have adopted specific measures to prevent infections and combat the pandemic. At the national level, by presidential decrees nr. 195/2020 and no. 240/2020, the state of emergency was established, respectively extended. Both documents established the restriction of the exercise of the following fundamental rights and freedoms: a) free movement; b) the right to intimate, family and private life; c) inviolability of the home; d) the right to education; e) freedom of assembly; f) the right to private property; g) the right to strike; h) economic freedom.

Under the provisions of art. 53 The Constitution, the restriction of rights and freedoms is conditional and exceptional and applies only if the following requirements are cumulatively met: (1) the restriction is carried out only by law; (2) the restriction will only operate if necessary, taking into account certain specific situations such as the protection of national security, public order, health or morals, citizens' rights and freedoms; conducting criminal investigations; preventing the consequences of a particularly serious natural disaster; (3) the restriction must be proportionate to the determining situation and operate in a non-discriminatory manner; (4) the restriction concerns only the exercise of rights and freedoms and not the existence or content of the right itself; (5) the restriction provided for in Article 5; 53 of the Constitution carries only on the fundamental rights and freedoms, without extending, *de plano*, to all subjective rights.

The restrictions adopted during the state of emergency that had as a field of applicability the public services (especially the field of justice) must be reassessed in order to ensure the principles of openness, transparency and continuity. In the state of alert (similar to the state of emergency), it is necessary to maintain a fair proportion in the assumption and exercise of responsibilities by the executive power. Exceeding the legal and constitutional limits of the latter may give rise to abuses having visible effects on the protection of fundamental rights and freedoms.

[1] For example, Chapter V, "The field of justice", in Annex no. 1: suspension of the activity of courts, prosecutor's offices and bailiffs.

References

Alexandru, Ș. N., & Novac, M. A. (2020). *Information material prepared by the Council of Europe on the observance of democracy, the rule of law and human rights in the context of the situation generated by the spread of COVID-19*, www.juridice.ro, https://www.juridice.ro/679657/material-de-informare-elaborat-de-consiliul-europei-referitor-la-respectarea-democratiei-a-statului-de-drept-si-a-drepturilor-omului-in-contextul-situatiei-generate-de-raspandirea-covid-19.html

Dragnea, I., & Coraci, B. (2020). *Fiat iustitia, et pereat mundus. The potential effects of Decision no. 152/ 06.05.2020 pronounced by Romanian Constitutional Court*, www.juridice.ro, https://www.universuljuridic.ro/fiat-iustitia-et-pereat-mundus-potentialele-efecte-ale-deciziei-nr-152-06-05-2020-pronuntate-de-ccr/

Dima, B. (2020). The state of emergency will be constitutional or it will not be at all, *Universul Juridic Review, 3.* https://www.doi.org/10.31178/AUBD-FJ.2020.1.01

Popescu, C. L. (2020). International notification of derogations on human rights. *Online journal of the Faculty of Law, AUBD Legal Forum, 2*. https://www.doi.org/10.31178/AUBD-FJ.2020.2.01

Popescu, C. L. (2020). Restriction of the exercise of fundamental rights and freedoms by decrees establishing or prolonging the state of emergency or siege and by military ordinances. *Online journal of the Faculty of Law, AUBD Legal Forum, 1*. https://www.doi.org/10.31178/AUBD-FJ.2020.1.17

Popescu, C. L. (2020). Human rights targeted by the derogating measures established by the decrees establishing / extending the state of emergency. *Online journal of the Faculty of Law, AUBD Legal Forum, 1*. https://www.doi.org/10.31178/AUBD-FJ.2020.1.22

Decision no. 152 of May 6, 2020, Oficial Gazette no. 387 of 13 May 2020

Decision no. 1189 / 06.11.2008, Official Gazette of Romania, part I, no. 787 / 25.11.2008.

Decision of the Constitutional Court no. 80 / 16.02.2014, Official Gazette of Romania, part I, no. 246 / 07.04.2014.

Decision no. 1189 / 06.11.2008, Official Gazette of Romania no. 787 of November 25, 2008

Decision no. 80 / 16.02.2014, Official Gazette of Romania no. 246 of Ap Decision 872 / 25.06.2010, Official Gazette of Romania no. 433 of June 28, 2010

Decision no. 781 of December 5, 2017, paragraph 28, Published in Official Gazette of Romania no. 184 of February 28, 2018

World Health Organization. Coronavirus Disease 2019 (Covid-19) Situation Report – 67 (2020) www.google.scholar

European Parliament Resolution of 17 April 2020 on coordinated EU action to combat the Covid-19 pandemic and its consequences (2020/2616 (RSP)); European Parliament Resolution of 13 November 2020 on the impact of measures on Covid-19 on democracy, the rule of law and fundamental rights (2020/2790 (RSP)) https://www.europarl.europa.eu/doceo/document/TA-9-2020-0054_EN.html

Venice Commission, Interim Report on Measures Taken in EU Member States following the Covid-19 Crisis and Their Impact on Democracy, the Rule of Law and Fundamental Rights, 8 October 2020 (CDL-AD (2020) 018), paragraph 57

Venice Commission, Interim Report of 8 October 2020 (CDL-AD (2020) 018), paragraph 63 (COM (2020)0580).

International Covenant of 16 December 1966 on Civil and Political Rights, Published in the Official Gazette no. 146 of November 20, 1974

Lawless v. Ireland no. 3, § 28. https://70.coe.int/pdf/lawless-v.-ireland.pdf

Case of Mehmet Asan Altan v. Turkey, § 94
https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-181862%22]}

Cantoni v. France, para. 35. https://hudoc.echr.coe.int/fre#{%22fulltext%22:[%22cantoni%20france%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-58068%22]}

Dragotoniu and Militaru-Pidhorni v. Romania, para. 35. https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-122714%22]}

Sud Fondi srl and Others v. Italy, para. 109. https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-90797%22]}

Decree no. 195 of March 16, 2020 on the establishment of the state of emergency on the territory of Romania, published in the Official Gazette no. 212 of March 16, 2020.

Decree no. 240/2020 regarding the extension of the state of emergency on the Romanian territory, Official Gazette no. 311 of April 14, 2020.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

CASE C-872/19 P VENEZUELA VS. THE COUNCIL-A PANDORA'S BOX OPENED BY THE LUXEMBOURG COURT

Mihaela-Adriana OPRESCU[1]

Abstract

The provisions of art. 263 TFEU enshrines a judicial procedure in which the annulment of an act adopted by an institution, organ or body of the European Union can be requested before the Court of Justice of the European Union. Starting from the decision handed down by the CJEU in Case C-872/19P Venezuela v. Council, this study focuses on the active legal standing of a third State in bringing such an action, in the context in which the principle which the Union is based on, among other things, on the value of the rule of law also reverberates on the common foreign and security policy (CFSP). It remains to be seen whether the decision handed down in this case is likely to make vulnerable the entire architecture of the common foreign policy at the EU level.

Key words: *action for annulment; third States; Regulation 2017/2063; inadmissibility; Venezuela; common foreign and security policy.*

1. Introduction

In the appeal filed by the Bolivarian Republic of Venezuela against the Judgment of the General Court of September 20, 2019[2], the Court of Justice of the European Union was empowered to rule on the active legal standing of a third state in initiating an action for annulment grafted on the provisions of art. 263 of the Treaty on the Functioning of the European Union (TFEU).

According to the provisions of art. 263 paragraph 1 TFEU, the Court of Justice of the European Union „shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties".

Corroborated interpretation of paragraphs 2 and 4 of art. 263 TFEU leads to the conclusion that the plaintiffs in such a jurisdictional procedure are of two

[1] **Phd Lecturer, Babeș-Bolyai University, Faculty of European Studies, Cluj-Napoca (Romania), e-mail: mihaela.oprescu@ubbcluj.ro, ORCID: 0000-0002-6005-281X**

[2] General Court, Case T-65/18, Bolivarian Republic of Venezuela vs. Council of the European Union, Judgment of 20 September 2019, ECLI:EU:T:2019:649.

categories: privileged, the category of which includes the member states, the European Parliament, the EU Council or the Commission, respectively non-privileged, the scope of this category including natural or legal persons who must justify the interest in such a legal action. The interest can be justified because the action is formulated either against an act whose addressee is precisely the non-privileged claimant or which concerns him directly or individually, or against a normative act which concerns the claimant directly and which does not involve enforcement measures (For more detail about the plaintiffs in the annulment action regulated by art. 263 TFEU, see Fábián, 2017, p. 372; Leclerc, 2011, pp. 142-144; Raepenbusch, 2014, pp. 487-498; Foster, 2016, pp. 236-248)

2. Factual situation-Disputed premises

The factual situation that created the premises for the investiture of the Luxembourg court was generated by the context in which several acts of secondary law were adopted at the European Union level, whose purpose was to apply pecuniary sanctions against Venezuela, amid the continued deterioration of democracy, the rule of law and human rights in this country. Thus, on November 13, 2017, the Council of the European Union adopted the Decision (CFSP) no. 2017/2074[1] regarding restrictive measures considering the situation in Venezuela, a decision whose legal effects were extended by the Decision (CFSP) no. 2018/1656 until November 14, 2019[2].

Pursuant to Article 215 TFEU and Decision 2017/2074, the Regulation 2017/2063 was adopted, its preamble revealing the context in which the need for the European Union intervention was felt, namely the political, social and economic crisis in Venezuela. For ease of expression, throughout this study, references to this European derivative law instrument will be made by using the word „Regulation"[3].

Among other things, this Regulation enshrines certain prohibitions for EU member states (art. 2 and 3), in particular regarding: supplying, manufacturing, maintaining or providing technical assistance for military equipment to any natural or legal person, entity or body in Venezuela or for use in Venezuela; providing, directly or indirectly, financing or technical assistance in relation to military products and technologies; the sale, supply, transfer or export, directly or indirectly, of equipment that could be used for the purpose of internal repression, whether or not originating in the Union, to any natural or legal person, entity or

[1] Council Decision (CFSP) no. 2017/2074 concerning restrictive measures in view of the situation in Venezuela, published in Of. J. no. L 295/60/2017.
[2] Council Decision (CFSP) 2018/1656 of 6 November 2018 amending Decision (CFSP) 2017/2074 concerning restrictive measures in view of the situation in Venezuela, published in Of. J. no. L276/10/2018.
[3] Council Regulation (EU) 2017/2063 of 13 November 2017 concerning restrictive measures in view of the situation in Venezuela, published in Of. J. no. L295/21/2017.

body in Venezuela or for the purpose for use in Venezuela or providing financing or technical or financial assistance for such goods.

The following are exempted from the scope of the Regulation (art. 4): „the provision of financing, financial assistance and technical assistance in relation to non-lethal military equipment intended exclusively for humanitarian or protective purposes or for institutional strengthening programs of the United Nations (UN) and the Union or its Member States or of regional and subregional organizations"; „the sale, supply, transfer or export of equipment which might be used for internal repression and associated financing and financial and technical assistance, intended solely for humanitarian or protective use or for institution-building programmes of the UN or the Union, or for crisis-management operations of the UN and the Union or of regional and subregional organisations"; „the sale, supply, transfer or export of demining equipment and materiel for use in demining operations and associated financing and financial and technical assistance".

Article 6 of the Regulation states, among other things, that „it shall be prohibited to sell, supply, transfer or export, directly or indirectly, equipment, technology or software identified in Annex II, whether or not originating in the Union, to any person, entity or body in Venezuela or for use in Venezuela, unless the competent authority of the relevant Member State, as identified on the websites listed in Annex III, has given prior authorisation". Paragraph 2 of this article provides that the previously mentioned authorization cannot be granted to the extent that there are „reasonable grounds to determine that the equipment, technology or software in question would be used for internal repression by Venezuela's government, public bodies, corporations or agencies, or any person or entity acting on their behalf or at their direction". According to art. 7 paragraph 1 letters a) and b) of the Regulation, it is equally prohibited to provide, directly or indirectly, technical assistance, financing or financial assistance in relation to the goods mentioned in art. 6 of the previously mentioned regulation, to any person, entity or body in Venezuela or for the purpose of use in Venezuela.

As for the field of territorial application of the provisions of the Regulation (art. 20), this is incident:

a. „within the territory of the Union, including its airspace;
b. on board any aircraft or any vessel under the jurisdiction of a Member State;
c. to any person inside or outside the territory of the Union who is a national of a Member State;
d. to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State;
e. to any legal person, entity or body in respect of any business done in whole or in part within the Union. "

In essence, it can be observed that the Regulation prohibits natural persons who are nationals of a Member State, legal persons established in accordance with the law of a Member State as well as to legal persons, entities and bodies in

relation to any activity carried out wholly or partially within the Union, to provide military equipment, technology, monitoring software products, as well as related services to natural or legal persons, entities or bodies established or that operates in the territory of Venezuela, equipment and services that could be used for the purpose of exercising internal repression.

In the context of the above, Venezuela has filed an annulment action with the General Court against the Regulation, with reference to the provisions that concern it.

3.The judgment of the General Court of 20 September 2019

By the Decision of September 20, 2019, the General Court held that, insofar as the action was directed against Regulation no. 2017/2063, it concerned only articles 2, 3, 6 and 7 thereof and consequently it dismissed the action as inadmissible considering that these provisions do not directly concern the Bolivarian Republic of Venezuela.

Thus, the Court held that „as a State, the Bolivarian Republic of Venezuela is not explicitly and specifically referred to in the contested provisions" of the Regulation (para. 36), in the conditions where „a State is called upon to exercise public authority prerogatives, in particular in the context of sovereign activities such as defence, police and surveillance missions" (para. 37). The General Court also notes that „unlike such an operator whose capacity is limited by its purpose, as a State, the Bolivarian Republic of Venezuela has a field of action that is characterised by extreme diversity and cannot be reduced to a specific activity. That very wide range of competences thus distinguishes it from an operator usually carrying out a specific economic activity covered by a restrictive measure" (para. 37).

Or, in these circumstances, it was appreciated that the circumstance that „the contested provisions prohibit operators established in the European Union from having economic and financial relations with any natural or legal person, entity or body in Venezuela cannot lead to the conclusion that those provisions directly concern the Bolivarian Republic of Venezuela within the meaning of the fourth paragraph of Article 263 TFEU" (para. 48). This finding of the General Court no longer imposed the qualification of Venezuela as a legal person within the meaning of article 263 TFEU.

Against this decision, Venezuela filed an appeal solved by the Court of Justice of the EU through the decision under review[1].

[1] CJEU, Case C-872/19 P Venezuela vs. Council, Judgment of 22 June 2021, ECLI:EU:C:2021:507.

4. Judgment of the CJEU of 22 June 2021

It can be observed that, in resolving the appeal, the CJEU first focused on verifying the fulfillment of the admissibility criteria provided by art. 263 TFEU, respectively: (i) the qualification of Venezuela as a legal person and (ii) the finding of the existence/non-existence of its interest.

(i) As regards the question regarding the qualification of Venezuela as a „legal person", within the meaning of Article 263 paragraph 4 TFEU, the CJEU held, on the one hand, that this concept (legal person) could not be subject to a restrictive interpretation, and on the other hand, the principle of the rule of law on which the Union is based called for the recognition of active procedural quality for a third state, all the more so as the Union's obligations to ensure respect for the value of the rule of law are not subject to a condition of reciprocity (par. 52). Consequently, Venezuela, as a state with international legal personality, was considered a „legal person" within the meaning of Article 263 paragraph 4 TFEU.

(ii) With regard to Venezuela's interest, the Court held that „the General Court erred in law in considering that the restrictive measures at issue did not directly affect the legal situation of the Bolivarian Republic of Venezuela and by upholding, on that basis, the second ground of inadmissibility raised by the Council " (para.73). The arguments of the CJEU were as follows:

- the prohibition of economic operators from the Union to carry out certain economic and financial operations with public and private partners from Venezuela implies the correlative prohibition of Venezuela to carry out this type of operations with these operators (para. 68);
- the disputed provisions (art. 2, 3, 6 and 7 of the Regulation) had the effect of "immediate and automatic application of the prohibitions", a fact that prevented Venezuela from acquiring certain goods and services, a circumstance that directly produced effects on the legal situation of this state.

However, as long as the mentioned prohibitions affect the interests, especially economic of Venezuela, their annulement, by itself, can bring a benefit to the state in question (par. 83).

Moreover, the Court held that the Regulation constitutes a "normative act" within the meaning of article 263, fourth paragraph of the TFEU (par. 92). In addition, in relation to the fact that the challenged provisions apply automatically and do not require enforcement measures, it was assessed that Venezuela, as a third state, "does indeed have standing to bring proceedings against those provisions without having to establish that those provisions are of individual concern to it." (para. 92).

In the present study we aim to illustrate the importance of this decision by recognizing the active legal standing of third states before the EU judicial bodies and its consequences in the matter of judicial control in the field of EU foreign policy.

5. Reverberations of jurisdictional control in the field of the foreign policy of the European Union

The specificity of the case brought before the CJEU is determined by the applicable legal framework, which is not grafted on the provisions of an international agreement between the Union and a third state, but on the action of the Union in the arena of international relations. Under this aspect, what surprises first of all in the CJEU decision is the fact that in resolving a case with an "international component", the European judge builds the legal reasoning exclusively on two concepts of European "essence": the rule of law and the right to effective judicial protection, thus opening the door for third countries to challenge the legality of economic sanctions imposed unilaterally by the Union. Secondly, the analyzed judgment changes the perspective regarding the traditional competence of the International Court of Justice in the settlement of international legal disputes.

Returning to the economic sanctions unilaterally imposed on a state according to international law, they are usually the prerogative of the Security Council, which can intervene under the conditions of art. 41 of Chapter VII of the UN Charter, when the existence of a threat to the peace, a breach of the peace or an act of aggression is established. Although the Security Council has not yet adopted any sanctions against Venezuela, the European Union has applied art. 215 TFEU which authorizes the Council to adopt measures ordering the interruption or restriction, total or partial, of economic and financial relations with one or more third countries. In this case, by establishing restrictions on exports for certain types of goods and related services to natural and legal persons from Venezuela, the Union did not seek to protect its economic interests, but the objectives provided by art. 21 of the Treaty on European Union (TEU): supporting democracy and respect for the rule of law and human rights and fundamental freedoms.

Though generally the field of foreign and security policy is not subject to the jurisdictional control of the CJEU (art. 275 par.1 TFEU), the Treaty of Lisbon explicitly establishes a legal basis for the solving of annulment actions grafted on the provisions of art. 263 TFEU regarding the control of the legality of decisions that provide for restrictive measures against natural or legal persons, adopted by the Council in the area of international relations (art. 275 paragraph 2 TFEU).

The analyzed judgement prompts reflection on how European law articulates with certain principles and rules of international law, including when the external action of the Union in the sphere of common foreign and security policy is under discussion. The two principles of international law involved are that of state immunity and reciprocity, respectively.

A central element of the Council's defenses was the principle of state immunity[1]. The central argument in this regard was that Venezuela, being a third country in relation to the European legal order, cannot benefit from the jurisdictional protection for the rights derived from the rights of the Union, the european institutional framework being limited to the member states. Indeed, the European Union's relations on the international stage are governed by international law, which in turn is based on consent.

The Council built its argument around two basic ideas[2]: (i) the Union law does not grant third countries specific rights derived from the founding treaties, such as the right to benefit from equal treatment or to trade freely and unconditionally with economic operators in the Union and (ii) in the international legal order, subjects of international law do not automatically benefit from the right to a jurisdictional procedure, but have the right to submit to the jurisdiction of another state or an international court only if they have expressed their consent for this. However, the aforementioned arguments could not be successfully used in the case in the context in which the doctrine of immunity from jurisdiction (For more on the immunity of the sovereign state, see Constantin, 2010, pp. 234-236; Moldovan, 2019, pp. 216-219) implies that a state cannot be sued before the courts of another state, without the express consent of the defendant state (passive legal standing). However, this doctrine does not interfere with Venezuela's right to initiate a jurisdictional proceeding before the courts of another state (active legal standing). The action was brought by Venezuela, not against it.

As for reciprocity, this is considered a basic principle of public international law, a principle closely related to that of the sovereign equality of states on the scene of international relations. But wouldn't the recognition of the right of a third country to use a jurisdictional procedure before the CJEU affect the principle of reciprocity[3], given that the third countries could challenge the acts of the Union law before the CJEU, while the Union would not have automatically such a correlative right?

Under this aspect, according to the Council, the Union would be at a disadvantage compared to its international partners, „whose sovereign decisions pertaining to their international relations, trade or economic policies cannot be challenged before their courts, and in this way would unduly restrict the EU in the conduct of its policies and international relations".[4] This position was also supported by certain interveners in the case, such as Poland, Greece or Slovenia,

[1] See the Opinion of Advocate General Hogan delivered on 20 January 2021 in Case C-872/19 P Bolivarian Republic of Venezuela v Council of the European Union, paragraph 68, ECLI:EU:C:2021:37. For ease of expression, further references to these conclusions will be made using the phrase "Opinion of Advocate General Hogan ".
[2] See the Opinion of Advocate General Hogan, paragraph 35.
[3] See the Opinion of Advocate General Hogan, paragraph 39.
[4] See the Opinion of Advocate General Hogan, paragraph 38.

the latter anticipating the risk of the Court becoming "the court for contesting Union policies"[1].

It can be observed that the references to the principle of reciprocity in the jurisprudence of the CJEU are not recent (Peraki, 2022). Thus, in the past, the CJEU was called upon to decide on the admissibility conditions of an action for annulment against an act of the Union, because the latter one would violate an international agreement concluded between the EU and a third state. For example, in case C-149/96 Portugal vs. the Council[2], the CJEU was charged with an action to annul a Council decision from 1996, claiming that the decision violates the rules of the World Trade Organization (WTO), including the provisions of the General Agreement on Tariffs and Trade (GATT) of 1994. The Court considered in this case that „to accept that the role of ensuring that those rules comply with Community law devolves directly on the Community judicature would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners"[3]. In other words, the CJEU was not willing to recognize a direct effect of the WTO agreements in the Community legal order precisely because of the special type of reciprocity that the implementation of the agreements would entail: the courts of the Union would give effect to the obligations imposed in these multilateral trade agreements when they censure European law, but without a correlative obligation existing for the other trading partners who can enjoy the leeway allowed by the agreements (Craig & De Burca, 2017, p. 409).

Illustrative of the interaction between European and international law is also the argument of the Advocate General Bot[4] in the context of the Opinion no. 1/2017 of the CJEU[5]. The subject of the Opinion no. 1/2017 refers to the compatibility with EU treaties and fundamental rights of certain provisions of the Comprehensive Economic and Trade Agreement between Canada, on the one hand, and the European Union and its member states, on the other hand (CETA), respectively those relating to procedures for settling investment disputes between investors and states. Thus, the principle of reciprocity was invoked, among other things, to support the compatibility between the mentionned treaty and EU law: the „reciprocity must be regarded as being one of the guiding principles of the EU's external relations. The application of the principle of reciprocity to the EU's external treaty relations is justified by the fact that, as a subject of international law, the European Union is subject to the rules of international law by which it has voluntarily agreed to be bound, of which the obligation of reciprocity is an

[1] See the Opinion of Advocate General Hogan, paragraph 40.
[2] ECJ, Case C-149/96, *Portugal vs. Council*, Judgement of 23 November 1999, ECLI:EU:C:1999:574. See also, CJEU, Case C-377/02, *Léon Van Parys NV vs. Belgisch Interventie-en Restitutiebureau* (BIRB), Judgement of 1 March 2005, ECLI:EU:C:2005:121.
[3] ECJ, Case C-149/96, Portugal vs. Council, Judgement of 23 November 1999, par. 46.
[4] See the Opinion of the Advocate General Bot of January 29, 2019, ECLI:EU:C:2019:72
[5] CJEU, Opinion no.1/2017, ECLI:EU:C:2019:341

integral part"[1]. Moreover, it is noted that the relations between the Union and the third countries are not based on mutual trust (a concept found exclusively in the relationship between the Union and the member states) (For more details on the principle of mutual trust, see Lonardo, 2022), since none of the contracting parties necessarily trusts the jurisdictional system of the other party in order to ensure compliance with the agreed norms[2]. Therefore, from the perspective of the Opinion no.1/2017, reciprocity not only cannot be assumed in the Union-third state relationship, but moreover, it must be negotiated, agreed upon, even under the conditions of the existence of an international agreement.

In this case, the lack of reciprocity is evident. In a school example, to the extent that Venezuela were to adopt sanctions against the Union, Member States would not have jurisdictional leverage before national courts in Venezuela, to the extent that national law would not grant them.

It can therefore be observed that although the principle of reciprocity gave support to the actions of the Union in the sphere of external economic relations, marked by a significant competitive character, the European court chose to detach European law from the principles of international law when the action of the Union on the stage of international relations does not follow its interests economic, but the very values that represent the quintessence of European architecture: the rule of law and fundamental rights.

We can ask ourselves what is the rationale behind the change of perspective, in the context where in this case there is not even an international agreement, and the reverberations of this decision are difficult to anticipate in the context of the current international balance, fragile in some places. In fact, the CJEU settled a dispute with an apparent element of internationality, the plaintiff not being a member state, and applied instruments specific to an exclusively internal dispute.

First of all, the area in which the principle of reciprocity was invoked cannot go unnoticed: the common commercial policy, while the analyzed case calls into question the legality of a derivative law instrument through which the Union unilaterally, in an indirect manner, established sanctions economic against a third country (Lonardo & Cairo, 2022). It was said that through the jurisprudence related to the direct effect of the GATT, the Union developed its "sovereignty shield"(for more on the EU's "sovereignty shield" in relation to GATT, see Barani, 2009)[3] precisely to be able to exercise its economic power in an efficient way.

---

[1] See the Opinion of the Advocate General Bot of January 29, 2019, para. 77.

[2] See CJEU, Opinion no.1/2017, para 129.

[3] This expression, "shield of sovereignty", was used in a report of the European Parliament regarding the relationship between international law, community law and the constitutional law of the member states. See the European Parliament Report no. A4-0278/1997 on the relationship between international law, Community law and the constitutional law of the Member States,

Secondly, we can observe the Union's concern to provide, beyond the declarative level, consistency to the essential values of the European legal order, as is the case with regard to the right to have access to an effective appeal, a right that must be recognized both on the domestic as well as international and which is opposed even to the Union. The references that the CJEU makes in the judgment of June 22, 2021 (para. 49) illustrate exactly this: the concept of the rule of law is not one "on paper", but materializable in that it can guide, and even censure, the action external of the Union. Consequently, a subject of international law, such as a third state, to the extent that it is affected by an act of the Union in its rights or interests, must be able, obviously in compliance with the other requirements of art. 263 TFEU, to be able to request the annulment of such an act.

In these circumstances, as noted in the CJEU judgment of June 22, the Union's obligation to respect the rule of law cannot be conditioned according to whether or not the Union's relations with the third countries are based on reciprocity (para. 52).

The bold judgment of the CJEU can be considered a new declaration regarding the autonomy of EU law, which must be respected not only in the legal relationships that are established within the Union, but also in the legal relationships built as a result of the Union's foreign policy exercise.

At the same time, it does not go unnoticed that the effects of the decision are more of a procedural nature, and not substantive, as the case was sent back to the tribunal to rule on the merits.

6. The active procedural legitimation of third states before EU Judicial Courts

The recognition of the quality of a legal person within the meaning of the provisions of art. 263 TFEU for third countries paves the way for litigation before EU judicial bodies.

It is necessary to specify that following the analyzed decision, third countries are in no way assimilated to member states, considered privileged plaintiffs, who do not have to prove their interest in promoting the annulment action. Therefore, the third countries will be treated like any non-privileged claimant who avails himself of the provisions of art. 263 TFEU either against an act of which he is the addressee or which concerns him directly or individually, or against a normative act which directly concerns the applicant and which does not involve enforcement measures.

The fact that Venezuela is considered a legal person is not a surprise. The jurisprudence of the CJEU anticipated, at least at the level of principle, that a third state justifies active legal standing in an action for annulment. In an annulment

https://www.europarl.europa.eu/doceo/document/A-4-1997-0278_EN.html, accessed on 23.03.2023.

action brought immediately after acquiring the status of an EU member state, Poland requested the annulment of some provisions of a European regulation[1], and the Court noted the lateness of the formulation of the action. The Tribunal's argument was that Poland did not have to wait for the acquisition of the status of a member state to be able to challenge the provisions of the regulation, but as a legal person, a non-privileged claimant, could have used the provisions of art. 263 TFEU and would therefore have benefited from effective jurisdictional protection.[2] The solution in the case of Venezuela vs. the Council could be easily anticipated and by reference to the Ordinance of the Court of the EU in the case of Cambodia vs. Commission.[3]The factual context reveals the situation of the Kingdom of Cambodia challenging the provisions of a European regulation imposing safeguard measures on imports of rice designated as originating in Cambodia and Myanmar/Burma. The Court held that „in the absence of such an exclusion in the text of the Treaties, a third State, which has legal personality under both international and domestic law, may not be prevented from challenging an EU act before the General Court if the conditions required under the fourth paragraph of Article 263 TFEU are fulfilled" respectively that the expression "any natural or legal person" appearing in the fourth paragraph of Article 263 TFEU must be understood in the sense that it also covers states that are not members of the Union, such as the Kingdom of Cambodia[4].

Consequently, the recognition of active procedural standing for third states in annulment actions appears to be consistent with CJEU jurisprudence. On the other hand, however, beyond the concern of the European judge, which is reflected in the decision, that unilateral acts in the field of foreign and common security policy can be subject to the control of compliance with the rule of law and the right of access to justice, the boldness of the same judge is also noted, in the context in which the number of economic sanctions applied by the Union against third countries (Russia, Belarus, North Korea, Iran) is on an upward slope. It remains to be seen whether the judgment in question does not mark the opening of a veritable Pandora's box, creating the conditions for the potential success of a possible compensation action brought by third countries before the Union courts (Kassoti & Carrozzini, 2021).

The premise from which the reasoning of the CJEU started, however, seems to be that European values cannot have consistency unless they are

[1] Commission Regulation (EC) No 1972/2003 of 10 November 2003on transitional measures to be adopted in respect of trade in agricultural products on account of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, Published in Of. J. no. L 293/3.
[2] General Court, Case T-257/04, Republic of Poland vs. Commission, Judgment of 10 June 2009, par. 42 și 62, ECLI:EU:T:2009:182.
[3] See General Court, Case T-246/19, Kingdom of Cambodia, Cambodia Rice Federation (CRF) vs. European Commission, Order of the General Court of 10 September 2020, ECLI:EU:T:2020:415.
[4] See, General Court, Case T-246/19, Kingdom of Cambodia, Cambodia Rice Federation (CRF) vs. European Commission, Order of the General Court of 10 September 2020, para. 50 and 51.

implemented. The Union cannot show hypocrisy when it applies restrictive measures against states whose behavior is antithetical to democratic rules, fundamental rights and the rule of law, measures that it would adopt and then implement, even in contempt of the previously mentioned values, allegedly protected (see in the same sense Vandamme, 2022).

7. Conclusions

The reforming element brought by the CJEU judgement in the case of Venezuela vs. the Council is a procedural one, marking the expansion of the category of potential non-privileged claimants so as to include any third state with respect to which the Union decides, within its foreign policy, to interrupt or restrict, in whole or in part, economic and financial relations.

In fact, Venezuela did not pursue an objective legality check regarding the contested Regulation, but it wanted to protect its own rights against a Union normative act, the annulment action thus acquiring the character of an administrative litigation action.

At the same time, it is necessary to specify that the effects of this decision do not annihilate the sanctions imposed on Venezuela, in the context in which even the annulment of the Regulation will not affect the validity of Decision (CFSP) no. 2017/2074 whose legal effects were extended by Decision (CFSP) no. 2018/1656.

References

Barani, L. (2009). Relationship of the EU legal order with WTO law: Studying Judicial Activism, *Garnet Working Paper* No: 70/09, https://warwick.ac.uk/fac/soc/pais/research/csgr/garnet/workingpapers/7009.pdf

Constantin, V. (2010). *Drept internațional*. Universul juridic.

Craig, P., & De Burca, G. (2017). *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină.* VI th edition. Hamangiu.

Fábián, G. (2017). *Drept instituțional al Uniunii Europene*, Hamangiu.

Foster, N. (2016). *EU Law*, 5th ed. Oxford University Press.

Kassoti, E & Carrozzini, A. (2021). *A Curia Mundi? The CJEU's Judgment in Case C-872/19 P Venezuela v Council*, http://eulawanalysis.blogspot.com/2021/08/a-curia-mundi-cjeus-judgment-in-case.html

Leclerc, S. (2011). *Droit de l'Union Européenne. Sources. Caractères. Contentieux*. Lextenso.

Lonardo, L. (2022). The Extraterritorial Reach of EU Law: A Matter of External Trust?, *The application of EU law beyond its borders, Cleer Papers*

2022/3,14, https://www.asser.nl/media/795814/cleer_022-03_web_final.pdf

Moldovan, C. (2019). *Drept internațional public*. Universul juridic.

Peraki, M. (2022). *How Many Applicants Can Fit in Article 263 TFEU? Presentation and Criticism of the CJEU's Venezuela v. Council Judgment* (Part B), https://internationallaw.blog/2022/03/11/how-many-applicants-can-fit-in-article-263-tfeu-presentation-and-criticism-of-the-cjeus-venezuela-v-council-judgment-part-b/#sdfootnote13anc

Raepenbusch, S. V. (2014). *Drept instituțional al Uniunii Europene*. Rosetti.

Vandamme, T. (2022). *'Practice what you Preach': EU law extends to third countries the right to an effective legal remedy*, https://europeanlawblog.eu/2022/01/12/practice-what-you-preach-eu-law-extends-to-third-countries-the-right-to-an-effective-legal-remedy/

ECJ, Case C-149/96, *Portugal vs. Council*, Judgement of 23 November 1999, ECLI:EU:C:1999:574

CJEU, Case C-377/02, *Léon Van Parys NV vs. Belgisch Interventie- en Restitutiebureau (BIRB)*, Judgement of 1 March 2005, par. 53, ECLI:EU:C:2005:121.

CJEU, Case C-872/19 *P Bolivarian Republic of Venezuela vs. Council*, Judgement of 22 June 2021, ECLI:EU:C:2021:507.

General Court, Case T-257/04, *Poland vs. Comission*, Judgement of 10 June 2009, par. 42 și 62, ECLI:EU:T:2009:182.

General Court, Case T-65/18, *Bolivarian Republic of Venezuela vs. Council*, Judgement of 20 September 2019, ECLI:EU:T:2019:649.

General Court, Case T-246/19, *Kingdom of Cambodia and Cambodia Rice Federation vs. Comission*, Order of 10 September 2020, ECLI:EU:T:2020:415

Council Decision (CFSP) no. 2017/2074 concerning restrictive measures in view of the situation in Venezuela, published in Of. J. no. L 295/60/2017.

Council Decision (CFSP) 2018/1656 amending Decision (CFSP) 2017/2074 concerning restrictive measures in view of the situation in Venezuela, published in Of. J. no. L276/10/20183.

Commission Regulation (EC) No 1972/2003 on transitional measures to be adopted in respect of trade in agricultural products on account of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, published in Of. J. no. L 293/34/2003.

Council Regulation (EU) 2017/2063 concerning restrictive measures in view of the situation in Venezuela, published in Of. J. no. L295/21/2017.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

GENESIS OF THE EUROPEAN MONETARY UNION

Mariana -Alina ȘTEFĂNOAIA[1]

Abstract

In order to carry out the activities of the European communities, and therefore to achieve the objectives provided by the treaties, they have needed determined financial resources since their establishment. The situation is currently valid within the European Union. These resources must cover the expenses necessary from an administrative point of view, identifying the funds necessary for the functioning of community institutions and bodies, especially the funds necessary to support the so-called operational expenses, which correspond to the realization of the policies provided by the treaties (Lefter, 2003, p. 237).

Key words: *financial law; monetary union; economy; bank.*

1. Introduction

Strictly referring to the legal capacity of a collective subject of law, as is the European Union, we must analyze the attributes of the legal person, starting from the definition of this institution. Thus, the legal entity represents that collective of persons having their own patrimony, distinct from that of the natural persons who compose it, with independent organization, according to a certain statute and having a determined and legal purpose (Harbădă, Tofan, Bercu and Popescu, 2009, p. 49).

Economic and Monetary Union (EMU) is the result of progressive economic integration in the EU. EMU is an extension of the EU's single market, involving common product regulations and the free movement of goods, capital, labor and services. The euro was introduced as the common currency in the euro area, which currently consists of 19 EU member states. All EU member states except Denmark must adopt the euro after meeting the convergence criteria. The Eurosystem (comprising the Executive Board of the European Central Bank and the governors of the central banks of the euro area) sets a single monetary policy,

[1] **Legal adviser of Marcel Gaftoneanu lawyer's office, member of the Methodological and Professional Guidance Commission of the Suceava College of Legal Advisers and member of the Methodological and Professional Guidance Commission of the "Romanian Order of Legal Advisers" Federation, telephone 0741.214.631, e-mail - stefanoaia.mariana@yahoo.com, ORCID 0000-0003-2778-3749**

which is complemented by fiscal rules and varying degrees of economic policy coordination. There is no central economic administration within EMU. Instead, responsibility is shared between member states and various EU institutions.

At the summit in The Hague in 1969, the heads of state or government defined a new objective within European integration: economic and monetary union (EMU). A group led by Pierre Werner, the Prime Minister of Luxembourg, produced a report that outlined the achievement of full economic and monetary union within ten years, according to a multi-stage plan. The final objective was the complete liberalization of capital movements, the full convertibility of the currencies of the member states and the definitive fixation of exchange rates. The collapse of the Bretton Woods system and the US government's decision to float the dollar in 1971 generated a wave of exchange rate instability that called into question the parities between European currencies. The EMU project was abruptly stopped.

At the Paris Summit in 1972, the EU tried to give a new impetus to monetary integration by creating the "snake in the tunnel": a mechanism for the controlled fluctuation of currencies (the "snake"), with small margins of fluctuation against the dollar (the "tunnel "). Destabilized by the oil crisis, the weak dollar, and differences in economic policy, the "snake" lost most of its members in less than two years and was eventually reduced to the "German mark zone" consisting of Germany, the Benelux and Denmark.

Attempts to create an area of monetary stability were relaunched at the Brussels summit in 1978 with the establishment of the European Monetary System (EMS), based on fixed but adjustable exchange rates. The exchange rate mechanism (ERM I) involved the currencies of all member states except the United Kingdom (when it was still part of the EU). Exchange rates were based on central rates against the European Monetary Unit, or ECU (originally known as the European Unit of Account), which was calculated as a weighted average of participating currencies. Based on the central exchange rates expressed in ECU, a grid of bilateral exchange rates was calculated, and the fluctuations of the currencies had to be registered at a rate of ±2.25% compared to the bilateral rates (with the exception of the Italian lira, for which the allowed margin was 6 %). For ten years, the EMS has made great progress in reducing the variability of exchange rates: the flexibility of the system, combined with the political will to achieve economic convergence, has led to currency stability. However, as a result of speculative attacks against several currencies in 1993, the fluctuation margins were extended to 15%.

With the adoption of the Single Market Program in 1985, it became increasingly clear that the potential of the internal market could not be fully realized as long as the relatively high costs of currency conversion transactions and uncertainties related to exchange rate fluctuations persisted, whatever how low In addition, many economists denounced the so-called "impossible triangle":

free movement of capital, exchange rate stability, and independent monetary policies, which were considered incompatible in the long run.

In 1988, the Hanover European Council set up a commission to study EMU, under the chairmanship of Jacques Delors, then President of the Commission. The commission's report (the Delors report), presented in 1989, proposed to support the introduction of EMU in three stages. The report emphasized in particular the need for better coordination of economic policies, the establishment of fiscal rules that set limits for national budget deficits and the creation of a new independent institution to be responsible for the monetary policy of the Union: the European Central Bank (ECB). Based on the Delors report, the Madrid European Council decided in 1989 to launch the first stage of EMU: the full liberalization of capital movements by 1 July 1990.

In December 1989, the Strasbourg European Council convened an intergovernmental conference to identify what treaty changes were necessary to achieve EMU. The work of this intergovernmental conference led to the drafting of the Treaty on European Union, which was formally adopted by the Heads of State or Government at the Maastricht European Council in December 1991 and entered into force on 1 November 1993.

The treaty provided for EMU to be introduced in three stages (some of the most important were left open and were to be decided at subsequent European summits as the situation evolved):

- Stage 1 (from July 1, 1990 to December 31, 1993): establishment of free movement of capital between member states;

- Stage 2 (from 1 January 1994 to 31 December 1998): the convergence of the economic policies of the member states and the strengthening of cooperation between national central banks. The coordination of monetary policies was institutionalized through the establishment of the European Monetary Institute (EMI), which was tasked with strengthening cooperation between national central banks and making the necessary preparations for the introduction of the single currency. During this stage, national central banks were to become independent;

- Stage 3 (which started on 1 January 1999): implementation of a common monetary policy under the auspices of the Eurosystem from day one and the gradual introduction of euro banknotes and coins in all euro area member states. The transition to the third stage was conditional on the achievement of a high level of sustainable convergence, measured on the basis of criteria set out in the Treaties. Budgetary rules were to become binding, their violation by a member state being liable to penalties. Monetary policy for the euro area was entrusted to the Eurosystem, made up of the six members of the ECB's Executive Board and the governors of the euro area's national central banks.

Following the European sovereign debt crisis of 2009-2010, EU leaders pledged to strengthen EMU, including by improving its governance framework. A treaty amendment, affecting Article 136 of the TFEU, allowed for the creation of a permanent support mechanism for Member States in difficulty, provided that the

mechanism is based on an intergovernmental treaty, the stability of the euro area as a whole is threatened, and the support financial to be linked to strict conditionality. This led to the establishment of the European Stability Mechanism (ESM) in October 2012, which replaced several ad hoc mechanisms. In addition, ECB President Mario Draghi announced in 2012 that "within the limits of our mandate, the ECB is prepared to do whatever is necessary to maintain the euro". For this purpose, it created the definitive monetary transaction instrument (TMD). The TMD allows the ECB to purchase the sovereign bonds of a member state in difficulty, provided that the country signs a memorandum of understanding with the ESM, thus indirectly subjecting the ECB's support to strict conditions. To avoid a recurrence of a sovereign debt crisis, EMU secondary legislation has been improved. The European Semester was established, which strengthened the Stability and Growth Pact (SGP), introduced the Macroeconomic Imbalance Procedure (MIP) and sought to further strengthen economic policy coordination. The improved economic governance framework was complemented by intergovernmental treaties such as the Treaty on Stability, Coordination and Governance (TSCG or "fiscal pact") and the Euro Plus Pact.

A first attempt to further improve the EMU was proposed by the Commission in the Project for a Deep and Genuine EMU in 2012. The ultimate objective would have been to establish a political union. Another less ambitious initiative in 2012, the "Report of the Four Presidents", failed to bring substantial changes to the EMU's economic governance framework. In 2015, drawing inspiration from the above-mentioned project, the Presidents of the European Commission, the European Council, the Eurogroup, the ECB and the European Parliament published a report entitled "Completing Europe's Economic and Monetary Union" (known as the "Five Presidents' Report"). It outlined a reform plan to achieve a true economic, financial, fiscal and political union in three stages (to be completed by 2025 at the latest). However, to fully realize the grand plans of the project or the "Five Presidents' Report", it would be necessary to substantially amend the EU treaties. Since no treaty changes have been made since then, the most ambitious projects could not be realized.

The economic crisis caused by the COVID-19 pandemic has exerted considerable pressure on public finances. In March 2020, the Council activated the general derogation clause in the SGP to grant Member States a limited window of time in which they can increase their public debt beyond the constraints imposed by fiscal rules. In the same month, the ECB initiated the Pandemic Emergency Purchase Program (PEPP), which includes the purchase of large volumes of sovereign debt on secondary markets. This provides liquidity to the markets and is designed to avoid wide spreads between German government bonds and the government bonds of several highly indebted EU member states. The amounts provided are very large, but the program is limited in time.

In the summer of 2021, the ECB carried out a strategy review, the first since 2003, targeting an inflation objective of 2% over the medium term and

allowing for a temporary overshoot of the objective and the consideration of climate change in the Eurosystem's decisions.

In 2022, the post-pandemic economic situation as well as the consequences of the war in Ukraine, mainly in the form of sharp increases in energy prices, led to a historic rise in inflation in the euro area. The Eurosystem fundamentally changed its monetary policy, limiting asset purchases and raising interest rates. In response to concerns about excessive spreads on the sovereign bonds of highly indebted countries, the ECB announced in July 2022 an "anti-fragmentation tool", the Transmission Protection Instrument (TPI).

Debate within the Eurosystem and among euro area Member States on possible changes to the PSC intensified in the summer of 2022. However, Member States' positions were so divergent that there were doubts about the feasibility of any substantial changes. However, consensus was reached to give highly indebted countries more time to reduce their debt-to-GDP ratio.

2. Euro- The European currency

The collaboration of the Eurozone governments, the harmonization of monetary policies and security policy are elements that directly support the success of the EURO. The concept of a united Europe as a single economic and political block seems to be today more relevant than ever. Europe represents the home of many people (consumers, investors and tax payers) united by a single currency, compared to what the United States or Japan represent (Shaguna, 2003, p. 572).

The fundamental economic advantages of the EURO (elimination of risk related to the exchange rate, reduction of transaction costs, increase of price transparency and deepening of financial markets) result, inevitably, from the replacement of the currencies of the member states with a single currency.

Exchange rate risk is potentially unpleasant for any consumer, producer or investor who makes an economic decision today that involves a payment or provision of a service or good at a later date. Although hedging techniques certainly exist, they are not a sufficient solution to this problem. Firms constantly cover their risk through foreign exchange markets with forward delivery, where they buy the right to exchange foreign currencies in the future to the country that is valid today (Chabot, 2000, p. 37).

In terms of transaction costs, the tourism industry provides only a modest example of the savings that the euro brings in transaction costs. The economic domain of the euro zone included tens of thousands of transactions from one currency to another, every day. It is difficult to estimate how large the savings in terms of transaction costs will ultimately be for Europe alone, a continent where international trade is of vital importance, but the savings are indisputable today, after approx. 20 years of using the single, substantial currency.

Also, the single currency makes prices transparent due to the fact that price differences are obvious for any category of goods and services. Also, salaries in different countries will tend to standardize, improving competition between employers on the labor relations market, to the direct benefit of employees.

In addition, the EURO also offers a series of indirect economic advantages. These benefits relate to deeper changes in the behavior of financial markets and companies and are therefore more controversial. The indirect economic advantages are macroeconomic stability, low interest rates, structural reform, reserve currency status and economic growth.

The macroeconomic stability generated by the EURO is probably the most important objective pursued by the states recently integrated into the union. At the same time, among the states that have been participating for a longer time in the Economic and Monetary Union, there are arguments related to the macroeconomic stability generated by the euro. For example, Italians consider low inflation as one of the significant advantages of using the single currency. The EURO introduces a new regime with low inflation, deliberately guaranteed by the activity carried out by the most independent central bank in the world: the European Central Bank.

Although the very high level of ECB autonomy brings few advantages for the countries already recognized for their very low inflation (Germany, Austria, Belgium, the Netherlands), there are many other advantages for the economic future of these states. To the same extent that the EURO reduces inflation, it also exerts pressure in the sense of reducing interest rates.

This benefit is also important for the states that recorded low results in the fight against inflation (Italy, Spain, Portugal). The EURO brings lower inflation rates and by reducing the risk rate for the currency exchange.

The additional interest charged in the past as a risk premium for foreign exchange is today eliminated. Long-term interest rates are thus reduced by 2% or even more, depending on the banks' ceilings. Some experts argue that the euro encourages much-needed structural reform in Europe. States wishing to adopt the euro must adjust their economies, meeting the convergence criteria and, then, comply with the provisions of the Stability and Growth Pact. These measures led to large budget cuts and achieved sustained economic growth. Budget cuts in countries such as Portugal have led to drastic cuts in interest rates as financial markets have changed their view of the government, previously seen as unable to properly manage financial policy.

This triggered a prolonged economic growth that continues today. For this reason, the US government strongly supported the effect of the Euro on structural reforms in Europe, because the modernization of the economies of these states had beneficial effects at the global level. The leaders of the European Union have anticipated the reserve currency status that the euro has acquired. Only very liquid, stable currencies that are accepted as a means of payment in a wide

economic area have the potential to become important currencies in which to place reserves.

For some doctrinaires, the euro seems to be a new pretext for the centralization of power, of power differences at the community level, which would lead to the alteration of the national sovereignty of the member states, with all the consequences that arise from this. The loss of sovereignty created a psychological shock on the population of EU countries (Mardale, 2005, p. 20).

Economic shocks refer to unexpected changes in the macroeconomic environment of a country or a region that destroy the balance of production, consumption, investment, government spending and trade. The most threatening type of economic shock to the single currency area is known as an asymmetric shock, so named because these shocks affect countries differently.

However, the European construction has withstood numerous moments of crisis, and the current stage of European integration and development is the result of the concerted effort of the member states. Under these conditions, I consider it appropriate to express our conviction that in the face of a real and not hypothetical asymmetric shock, the member states will have the maturity to apply the solutions to counteract the negative effects on the affected state. Since labor migration will probably never have the promptness and scale of the US, the only economic adjustment mechanism against asymmetric shocks remains the transfer of financial resources. The constitution of some funds in the Union budget, in order to counter asymmetric shocks, seems to us a solution that could make it possible to counter asymmetric shocks in real time, before the effect is devastating for the economy of a state or a region.

Certainly, the transition to the single currency implies a certain degree in which the sovereignty of the state is lost, ceded in favor of community decision-making bodies (Jacoud, 2003, p. 68). However, the already proven advantages of using the single currency for the entire euro area confirm the general economic growth and prove the justice of those who supported the European monetary project.

3. Conclusions

The Economic and Monetary Union (EMU) represents a major step in the integration process of the EU economies. EMU involves the coordination of economic and fiscal policies, a common monetary policy and a common currency - the euro. Although all EU member states participate in the economic union, some countries have taken the integration further by adopting the single currency, forming the euro area. The decision to form an EMU was taken by the European Council in the Dutch city of Maastricht in December 1991 and was later enshrined in the EU Treaty (Maastricht Treaty).

The creation of the EMU and the introduction of the euro single currency represented two particularly important reference points for the European integration process.

References

Chabot, Ch.N. (2000). *Euro-European currency*. Teora.

Harbădă, M., Tofan, M., Bercu, A.M., & Popescu, A. (2009). *Economic law, course support for students majoring in Economics*. Alexandru Ioan Cuza University Pb. House.

Jacoud, G. (2003). *Le systeme monetaire et financier europeen. La monnaie dans la zone Euro*. Nathan.

Lefter, C. (2003). *Fundamentals of institutional community law*. Economic Pb. House.

Mardale, T. (2005). *The implications of the adoption of the euro by Romania on the banking activity*. Sitech.

Şaguna, D.D. (2003). *Financial and fiscal law*. All Beck.

The Maastricht Treaty was signed on 7 February 1992 and entered into force on 1 November 1993.

https://www.europarl.europa.eu/factsheets/ro/sheet/79/istoria-uniunii-economice-si-monetare.

https://www.mae.ro/node/35876.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

RESERVE OBLIGATION OF MAGISTRATES - INTERNAL AND INTERNATIONAL REGULATIONS

Viorica POPESCU [1]

Abstract

Modern society calls for greater transparency in the functioning of public bodies, including the judiciary. Society's expectations regarding judges and prosecutors, from the perspective of their manifestations and actions, determined the adoption of regulations that involve responsibilities and norms of conduct in relation to this evolution.

In this context, one of the most important obligations of a magistrate is that of reserve, this having the role of creating a balance between the prestige and independence of the judiciary, on the one hand, and the conduct of the magistrates, on the other. Judges and prosecutors must have a behavior appropriate to the profession, in the exercise of the function and outside it, both by reference to the internal standard of the dignity of the profession, and by the external one, of public trust in the act of justice.

This article aims to make a brief analysis of the content of the reserve obligation of magistrates, an obligation that expresses a practical synthesis of the general principles of the deontology of the profession (independence, impartiality, integrity) and involves moderation and restraint in professional, social and private life, through reference to the domestic and international regulations adopted in the field.

Keywords: *magistrate; reserve obligation; conduct; deontological values; the prestige of justice; domestic legislation; international documents.*

1. Introduction

The prestige of justice, the independence, impartiality and integrity of magistrates represent some of the most frequently used concepts in Romanian society today.

The importance of the magistrate in carrying out the act of justice and maintaining the social balance undoubtedly results from man's need to constantly seek the good.

In this context, the magistrate[2] is called upon to comply with a series of ethical standards that govern not only his professional activity, but also his private

[1] **Lecturer Ph. D, Faculty of Economic Sciences and Law, University of Pitești, Pitești (Romania), email: viorica_r30@yahoo.com**, ORCID:

[2] According to the provision of art. 1 of the Law no. 303/2022 regarding the status of judges and prosecutors published in the Official Gazette of Romania no. 1102/16 November 2022, "The

life, standards that go far beyond the deontological aspects of other professions. The specific nature of the position as judge and the need to preserve its dignity requires that the judge behave in such a way as to ensure that in the eyes of a reasonable observer his conduct is irreproachable, not only in the exercise of the position, but also in society, thus contributing to maintain public confidence in the integrity of the judiciary[1]. The conduct, from the perspective of the integrity of a judge or prosecutor, is not only evaluated in the courtroom or in the investigation or the activity of a prosecutor – although it is an essential aspect for integrity, but it must also be evaluated in the way of behavior in society. However professional a judge or prosecutor may be in their professional activity, a reprehensible conduct in society disqualifies not only the magistrate, but also the justice system[2]. Maintaining a reasonable balance between the public life and the private life of each judge and prosecutor is not easy to achieve in the context where they are always associated, in civil society, with the image of justice as a system. This association has put a lot of pressure on magistrates who may feel "morally stressed" or unsure about how they should act to combine professional and moral obligations most adequately (Ghigheci, 2017, p. 104).

From this perspective, in the field of magistrates' deontology, the reserve obligation was established, which represents an inherent limitation of the statute specific to the position of magistrate[3]. The institution of this obligation is the result of the legitimate interest of a democratic state to ensure that the public function complies with the goals stated in Art. 10 Para. 2 of the Convention for Human Rights and Fundamental Freedoms[4].

---

judiciary is the judicial activity carried out by judges for the purpose of administering justice and by prosecutors for the purpose of defending the general interests of society, the legal order, as well as the rights and freedoms of citizens. (2) Judges and prosecutors have the capacity of magistrates".

[1] Decision no. 62/18 May 2020 adopted by the High Court of Cassation and Justice, Panel of 5 judges, available at http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=171010, accessed on 2 May 2023

[2] See more about the magistrate conduct in Strengthening the integrity of the judicial system. Cooperation between the Superior Council of the Magistracy in Romania and the Judicial Council in the Netherlands Report, part II. Integrity indicators. Integrity advisors; Integrity Council; Electronic platform regarding the dynamics of integrity in the Romanian judicial system, available at https://www.csm1909.ro/ViewFile.ashx?guid=6aca60e6-7171-442f-ac63-13b3c6e19bd9-InfoCSM, accessed on 2 May 2023

[3] Application case Morissens *v* Belgium

[4] Art. 10 Para. 2 of the European Convention on Human Rights and Fundamental Freedoms, adopted in Rome on 4 November 1950 states that "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary". According to the European Court on Human Rights, "Given the

2. The reserve obligation of magistrates in domestic law. Theoretical and practical aspects

The reserve obligation of magistrates is not defined as such in domestic legislation but expresses a practical synthesis of the general principles of judicial deontology, with which it is associated, and which can be valued including in relation to public trust in justice; in its essence, the reserve obligation represents a quasi-irreproachable behavior that is expected from the judge, behavior that can regard the requirements of prudence and moderation associated with the position of judge, which means an obligation of distance to preserve his impartiality – which consists in its turn in other abstention obligations in relation to any professional or other activity estimated to be incompatible with his functions (Pivniceru & Luca, coord., 2008, p. 38).

In Art. 104 of Law no. 161/2003[1] regarding some measures to ensure transparency in the exercise of public dignities, public functions and in the business environment, preventing and sanctioning corruption, it is stipulated that the "Magistrates are prohibited from any manifestation contrary to the dignity of the position they hold or likely to affect its impartiality or prestige".

In the old regulation regarding the status of judges and prosecutors[2], it was stipulated in Art. 90 that "Judges and prosecutors are obliged to refrain from any acts or deeds of a nature to compromise their dignity in the profession and in society", and the violation of the reserve obligation of magistrates was included in the scope of disciplinary violations. Thus in Art. 99 were mentioned among the disciplinary offenses "the manifestations that affect the honor or professional probity or the prestige of justice, committed in the exercise of or outside the exercise of the duties of the service", but in the Law adopted in 2022 this disciplinary offense was eliminated.

However, in Art. 271 of Law no. 303/2022, the facts that still constitute disciplinary violations are mentioned, as the finding of the Constitutional Court

---

prominent position of the judiciary among state institutions in a democratic society, this approach also applies to the freedom of expression of judges in the exercise of their duties, even if the magistrates are not part of the administration in the strict sense [Albayrak v. Turkey, § 42; Pitkevich v. Russia (dec.)]. Also the Court "regarding officials in the judicial system recalled that they can be expected to exercise freedom of expression with restraint whenever the authority and impartiality of the judiciary can be called into question [Wille v. Liechtenstein (MC), § 64; Kayasu v. Turkey, § 92]. According to the Court, the prosecutor's office's magistrate status, having direct delegation under the law for the purpose of preventing and sanctioning crimes and protecting citizens, confers on him the duty of guarantor of individual freedoms and the rule of law, through his contribution to the proper functioning of justice and, thus, to the public's trust in it" (Kayasu v. Turkey, § 91).

[1] Law no. 161/2003 on measures to ensure the transparency in performing public dignities, public positions and in business environment, prevention and sanction of corruption, published in the Official Gazette of Romania, no. 279/21 April 2003, with modifications

[2] We refer to the Law no. 303/2004 on the Statute of Judges and Prosecutors, published in the Official Gazette of Romania, no. 576/29 June 2004, republished and amended, currently repealed

expressed in Decision no. 2/2012[1] according to which "the disciplinary liability... derives from his (A/N magistrate's) duty of loyalty to his role and function, as well as from the exigency he must demonstrate in fulfilling his obligations to litigants and to the state".

Regarding the current national provisions, analyzing the content of the Code of Ethics of judges and prosecutors[2], we find that the reserve obligation of magistrates is also not defined as such, but its content can be extracted from the duties, prohibitions and incompatibilities regulated, judges and prosecutors being obliged according to Art. 9 Para. 2 "to refrain from any behavior, act or manifestation likely to alter confidence in their impartiality".

Also, Art. 17 of the Code states that the "judges and prosecutors are obliged to refrain from any acts or deeds likely to compromise their dignity in office and in society".

The provisions of the Code of Ethics are supplemented with the provisions of the current Law on the status of judges and prosecutors, where it is also stated in Art. 223 that "(1) Judges and prosecutors are obliged to refrain from any acts or deeds likely to compromise their dignity in the profession and in society. (2) The relations of judges and prosecutors at work and in society are based on respect and good faith".

The imposition of these obligations of a deontological nature was imperative, because the credibility of the judicial system is the result of the action of several internal factors that exceed the control of the courts or prosecutors' offices.

With regard to jurisprudential issues, in national judicial practice it was considered that the reserve obligation of the magistrate involves, among other things:

- to show moderation and prudence in expressing one's opinions both in the exercise of the position and in private life, precisely in order not to create a negative public perception regarding the impartiality, independence and prestige of the judicial system[3];

[1] Decision no. 2 on the objection for unconstitutionality of the Law on the modification and amendment of the Law no. 303/2004 on the statute of judges and prosecutors and of the Law no. 317/2004 on the Supreme Council of Magistracy, adopted by the Constitutional Court on 11 January 2012 and published in the Official Gazette of Romania, no. 131/23 February 2012

[2] Deontological Code of Judges and Prosecutors adopted on 24 August 2005 by the Decision of the Plenum of the Supreme Council of Magistracy no. 385 and published in the Official Gazette of Romania, no. 815/8 September 2005

[3] Decision no. 128/27 May 2019 adopted by the High Court of Cassation and Justice, Panel of 5 judges, published in the Bulletin of Jurisprudence in the area of civil liability of judges and prosecutors, Collection of decisions for 2019, available at https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=154476#highlight=##, accessed on 2 May 2023

- to show moderation when expressing his point of view in situations related to legislation in the field of justice[1];
- to refrain from having an attitude that does not conform to the standards imposed on the position and that have the potential to affect the image of the court and to harm professional honor and probity, with the unequivocal aim of bringing into the public space disparaging or potentially disparaging information regarding judges and the activity of the court[2];
- not to state their personal opinions through purely subjective and accusatory assessments, in the public space, (– specifically the judge published online, on a legal website, an article in which he analyzed the content of a decision of the Constitutional Court, in which he expressed in an unprincipled manner, likely to question the moral profile and integrity of the judges of the Constitutional Court)[3];
- appropriate behavior outside of work (– specifically, the prosecutor in question, outside of exercising his duties, during the discussion held at the prosecutor's office with a certain person, in the presence of a lawyer and a journalist, adopted an aggressive behavior and had a high tone, asking the person in question for explanations regarding the accusations brought against him, i.e. the launching of rumors in the sense of protecting a mayor investigated for corruption offenses and some persons of Russian citizenship, supposed to be involved in carrying out criminal activities)[4].

3. Reserve obligation of magistrates in international regulations

The conduct of judges and prosecutors has been a permanent concern of international bodies because justice can only be achieved in the context in which magistrates obey common ethical values.

According to Art. 8 of the Basic Principles of Judicial Independence[5], "the members of the judiciary have, like other citizens, the right to freedom of

[1] Decision no. 192/2 November 2020 adopted by the High Court of Cassation and Justice, Panel of 5 judges, published in the Bulletin of Jurisprudence in the area of civil liability of judges and prosecutors, Collection of decisions for 2020

[2] Decision no. 26/4 February 2019 adopted by the High Court of Cassation and Justice, Panel of 5 judges, published in the Bulletin of Jurisprudence in the area of civil liability of judges and prosecutors, Collection of decisions for 2019

[3] Decision no. 128/27 May 2019 adopted by the High Court of Cassation and Justice, Panel of 5 judges, published in the Bulletin of Jurisprudence in the area of civil liability of judges and prosecutors, Collection of decisions for 2019

[4] Decision no. 90/8 April 2019 adopted by the High Court of Cassation and Justice, Panel of 5 judges, published in the Bulletin of Jurisprudence in the area of civil liability of judges and prosecutors, Collection of decisions for 2019

[5] Basic Principles on the Independence of the Judiciary adopted during the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and approved by the Resolutions of the General Assembly 40/32 of 29 November 1985 and 40/146 of 13 December 1985

expression, religion, association and assembly, with the condition, however, that in exercising these rights judges always behave in so as to maintain the dignity of their office and the impartiality and independence of justice".

The importance of implementing ethical principles that govern the activity and conduct of judges was also recognized by the Universal Charter of Judges[1], where in Art. 6 entitled Ethics, at Point 2 Para. 3 is stated that "the judge must refrain from any behavior, action or expression likely to affect the public's trust in his impartiality and independence".

In 2002, the Bangalore Principles on judicial conduct[2] were adopted, in which Art. 4 titled Etiquette at Point 2 mentions that "being permanently in the public eye, the judge must accept, freely and willingly, certain personal restrictions that would seem a burden to the ordinary citizen. In particular, the judge must have a conduct that is consistent with the dignity of the position of magistrate". In the 16 subsections from Art. 4 basically describe the most important aspects that should guide the conduct of a judge, in all aspects of his life such as: relationships with family and other people, the way in which he can exercise his way of expression and freedom of belief, the management of his financial interests, etc.

In the Declaration on judicial ethics from London[3] "the obligation to show reserve and discretion by the judge presupposes a balance between the rights of the judge as a citizen and the obligations related to the exercise of his office". In this international document all the elements that give content to the obligation to reserve are mentioned in detail and should guide the behavior of the judge both in terms of his private and public life[4].

---

[1] Universal Charter of the Judge adopted by the Central Council of AIJ in Taiwan on 17 November 1999, updated in Santiago de Chile on 14 November 2017, available at https://www.icj.org/wp-content/uploads/2014/03/IAJ-Universal-Charter-of-the-Judge-instruments-1989-eng.pdf, accessed on 2 May 2023

[2] The Bangalore Principles of Judicial Conduct, adopted by the Judicial Integrity Group, as revised at the Round Table of Supreme Courts' Presidents held at The Hague Peace Palace, 25-26 November 2002 and available at https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf, accessed on 2 May 2023

[3] The Declaration on Judicial Ethics of the General Assembly of the General Association of the European Network of Councils for the Judiciary, held in London on 2-4 June 2010 and available at https://www.encj.eu/images/stories/pdf/ethics/encj_london_declaration_recj_declaration_de_londres.pdf, accessed on 2 May 2023

[4] In this sense, it is stipulated that "His reserve obligation presupposes a conduct by which the citizens have full confidence in the judiciary, without worrying about the political opinions of the judge. The judge has the obligation to show the same reserve in relations with the mass media. He cannot, in the name of freedom of expression, appear to be biased or act in favor of one of the parties. In the face of attacks or criticism, the judge will exercise the same discretion and reserve. The judge will refrain from commenting on his decisions even if they are criticized by the mass media or by members of the academic class and even if they are overturned or modified on appeal. The way in which the judge expresses his point of view can be found in the reasoning of the court decision (considerations). Beyond the performance of his judicial duties, the judge shall refrain

The importance of the judge's behavior is also reiterated in Opinion no. 3 of the Consultative Council of European Judges (CCJE)[1] according to which "the behavior of judges in their professional activities is justifiably seen by the public as essential for the credibility of the courts", they must behave with integrity both in the exercise of their duties and in their private lives.

According to the Opinion no. 12 of the Advisory Council of European Judges and of Opinion no. 4 of the Consultative Council of European Prosecutors[2], judges and prosecutors are "The main actors in the administration of justice and must always maintain the honor and dignity of their profession and must behave in any situation in a manner worthy of their office". In this sense, they "must refrain from any action or conduct that could affect their impartiality".

4. Conclusions

Maintaining a balance between the independence of the judiciary (which is not a privilege) and the public and private life of magistrates has led both international bodies and national authorities to adopt a series of regulations in the field of judicial ethics that allow the magistrate and especially the judge to maintains the impartiality and efficiency that the citizen expects from him.

In this context, the reserve obligation of the magistrate appeared, which, although not defined as such by law, has a rich content determined by ethical principles, a principle that must govern the activity and conduct of a magistrate. It should be mentioned that the establishment of these ethical coordinates does not aim to remove the magistrate from society because this is neither in the interest of the magistrate nor in the interest of the community in which he works and lives, but only the nuance of the way in which he is expected to behave.

For these reasons, all judicial practice in the field represents nothing more than action directions in the field of managing the image of justice, so that it adequately responds to the contemporary expectations and needs of the public and in order to bring justice, as a public service, as close as possible to the citizen

---

from using his position as a judge in any relations with third parties. He will not give third parties the impression that he is exerting pressure on them or that a judge is entitled to exercise on a personal level the attributions with which the law invests him for the exercise of his office. Like any person, the judge has the right to the protection of private life. His reserve obligation cannot prevent him from having a normal social life: it is enough for the judge to act with a minimum of caution to avoid undermining the dignity of his office and his capacity to exercise it".

[1] Opinion no. 3 of the Consultative Council of European Judges on principles and rules governing judges professional conduct with especial reference to efficiency, incompatible behavior and impartiality, adopted at Strasbourg on 19 November 2002 and available at https://rm.coe.int/1680747bac, accessed on 02 May 2023

[2] Opinion no. 12 of the Consultative Council of European Judges and Opinion no. 4 of the Consultative Council of European Prosecutors, adopted by the Bordeaux Declaration on 20 September 2009 and available at https://rm.coe.int/168074768d, accessed on 02 May 2023

(Pantazi, https://www.juridice.ro/412545/daniela-pantazi-obligatia-de-discretie-nu-impune-izolarea-magistratului-de-celelalte-profesii-juridice.html).

References

Ghigheci, Cristinel. (2017). Etica profesiilor juridice. Bucharest, Hamangiu.

Pantazi, Daniela. Obligaţia de discreţie nu impune izolarea magistratului de celelalte profesii juridice. https://www.juridice.ro/412545/daniela-pantazi-obligatia-de-discretie-nu-impune-izolarea-magistratului-de-celelalte-profesii-juridice.html, accesed on 02 May 2023

Pivniceru, Mona-Maria, & Luca, C. (coord.). (2008). Deontologia profesiei de magistrat. Repere contemporane. Bucharest, Hamangiu.

Strengthening the integrity of the judicial system. Cooperation between the Superior Council of the Magistracy in Romania and the Judicial Council in the Netherlands. Report, 2nd part. Raport, partea a II-a. Integrity indicators. Integrity advisors; Integrity Council; Electronic platform regarding the dynamics of integrity in the Romanian judicial system.

European Convention on Human Rights and Fundamental Freedoms adopted in Rome on November 4, 1950

Law no. 303/2022 on the statute of judges and prosecutors, published in the Official Gazette of Romania, no. 1102/16 November 2022

Law no. 161/2003 on measures to ensure the transparency in performing public dignities, public positions and in business environment, prevention and sanction of corruption, published in the Official Gazette of Romania, no. 279/21 April 2003, with modifications

Law no. 303/2004 on the statute of magistrates and prosecutors, published in the Official Gazette of Romania, no. 576/29 June 2004, republished and modified, currently repealed

The Deontological Code of Judges and Prosecutors has been adopted on August 24, 2005, by the Decision of the Superior Council of Magistracy's Plenary no. 385 and published in the Official Gazette of Romania no. 815/8 September 2005

Basic Principles on the Independence of the Judiciary adopted during the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and approved by the Resolutions of the General Assembly 40/32 of 29 November 1985 and 40/146 of 13 December 1985

Universal Charter of Judges adopted by the Central Council of AJJ in Taiwan on 17 November 1999, updated in Santiago de Chile on 14 November 2017

The Bangalore Principles of Judicial Conduct, adopted by the Judicial Integrity Group, as revised by the Round Table of Presidents of Supreme Courts held in The Hague Peace Palace, 25-26 November 2002

Declaration on judicial ethics adopted by the General Assembly of the European Network of Judicial Councils, held in London, 2-4 June 2010

Opinion no. 12 of the Advisory Council of European Judges and of Opinion no. 4 of the Consultative Council of European Prosecutors adopted by the Bordeaux Declaration on 20 September 2009

Opinion no. 3 of the Consultative Council of European Judges (CCJE) on the principles and rules regarding the professional imperatives applicable to judges and in particular deontology, incompatible behaviors and impartiality adopted in Strasbourg on November 19, 2002

Application case Morisses *v* Belgium

Decision no. 2 on the objection for unconstitutionality of the Law on the modification and amendment of the Law no. 303/2004 on the statute of judges and prosecutors and of the Law no. 317/2004 on the Supreme Council of Magistracy, adopted by the Constitutional Court on 11 January 2012 and published in the Official Gazette of Romania, no. 131/23 February 2012

Decision no. 128/27 May 2019 adopted by the High Court of Cassation and Justice, Panel of 5 judges, published in the Bulletin of Jurisprudence in the area of civil liability of judges and prosecutors, Collection of decisions for 2019

Decision no. 26/4 February 2019 adopted by the High Court of Cassation and Justice, Panel of 5 judges, published in the Bulletin of Jurisprudence in the area of civil liability of judges and prosecutors, Collection of decisions for 2019

Decision no. 90/8 April 2019 adopted by the High Court of Cassation and Justice, Panel of 5 judges, published in the Bulletin of Jurisprudence in the area of civil liability of judges and prosecutors, Collection of decisions for 2019

Decision no. 192/2 November 2020 adopted by the High Court of Cassation and Justice, Panel of 5 judges, published in the Bulletin of Jurisprudence in the area of civil liability of judges and prosecutors, Collection of decisions for 2020

Decision no. 62/18 May 2020 adopted by the High Court of Cassation and Justice, Panel of 5 judges, published in the Bulletin of Jurisprudence in the area of civil liability of judges and prosecutors, Collection of decisions for 2020

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

REFLECTING THE PRINCIPLES OF JUDICIAL INDEPENDENCE AND IMPARTIALITY IN DOCTRINE AND JURISPRUDENCE

Florina MITROFAN[1]

Abstract

The present study analyzes the concept of independence and impartiality of justice as essential principles of the judicial organization as well as the means of guaranteeing them, as reflected in the doctrine, highlighting the particularities of jurisprudence.

The findings of the Constitutional Court with reference to the essential components of the principle of judicial independence are also significant, components that involve the existence of numerous aspects that will be highlighted in the following.

Keywords: *principle; justice; independence; impartiality; function, jurisprudence etc.*

1. Introduction

Justice is a fundamental function of the state, and its administration is an essential attribute of sovereign power.

The independence of the judiciary is an organizational principle resulting from the autonomy of the judicial function.

The Romanian Constitution[2] evokes the idea of independence of the judiciary in Art. 133 Para 1 which states the attribute of the Superior Council of the Magistracy as guarantor of the independence of the judiciary. This provision is reiterated in Art. 2 Para 3 of Law no. 303/2022[3].

The principles of independence and impartiality are closely related to the right to a fair trial and represent institutional guarantees on which the rule of law and democracy depend.

In the previously mentioned meaning, Art. 6 of the Code of Civil Procedure provides that: "every person has the right to judge his case in a fair manner, in an optimal and predictable period, by an independent, impartial court established by law".

[1] **Lecturer phd, faculty of law and administrative sciences, university of pitesti, pitesti, email: florinamitrofan@yahoo.com, orcid:**

[2] Published in the Official Gazette of Romania, Part I, no. 767/31 October 2003

[3] Published in the Official Gazette of Romania, Part I, no. 1102/16 November 2022

The independence of the judiciary should not be viewed in isolation, but in close connection with the independence of the courts and the independence of the judges in the activity entrusted to them.

It can be stated that the independence of the judiciary is also guaranteed by the independence, impartiality and immovability of the judges, but also by a rigorous delimitation of the judicial power from the legislative and the executive power.

2. Doctrinary and jurisprudential aspects

The principle of the independence of the judiciary refers to the performance of the judicial function without interference from outside or within the judicial system.

Regarding the independence of the courts, this concept has been analyzed in doctrine under a double aspect: functional independence implies separation from legislative and executive power, based on the principle of separation of powers in the state stated by Art. 1 Para. 4 of the Romanian Constitution; personal independence presupposes the resolution of cases without interference and is viewed in correlation with the status of the judge.

Personal independence is also ensured by the quality of judicial activity reflected in the reasoning of court decisions, in the continuous professional development of judges in order to achieve a quality act of justice.

In its Decision no. 873/2010[1], the Constitutional Court held that: "both the independence of justice – the institutional component (the concept of the 'independence of judges' not referring exclusively to judges, but covering the entire judicial system), and the independence of the judge – the individual component, implies the existence of numerous aspects, such as: the lack of interference of the other powers in the judicial activity, the fact that no body other than the courts can decide on their specific competences provided by law, the existence of a procedure provided by law regarding the appeals of judicial decisions, the existence of sufficient financial funds for the conduct and administration of judicial activity, the procedure for the appointment and promotion of magistrates and, possibly, the period for which they are appointed, adequate working conditions, the existence of a sufficient number of magistrates of the respective court for to avoid an excessive workload and to allow the completion of processes within a reasonable time, remuneration proportional to the nature of the activity, impartial distribution of files, the possibility to form associations whose main object is to protect the independence and interests of magistrates, etc.".

The independence of the magistrate is of general interest, which is why a series of regulations have been dedicated to him in the acts of a universal

[1] Published in the Official Gazette of Romania, Part I, no. 433/28 June 2010

character, in terms of the present analysis, the provisions of Resolutions no. 40/32 of November 29, 1985 and no. 40/146 of 13 December 1985, confirmed by the UN General Assembly, provisions according to which: "The independence of the judiciary is guaranteed by the state and enunciated in the Constitution or national legislation. It is the duty of all governmental and non-governmental institutions to respect the independence of the judiciary".

In the same sense, the provisions of Art. 2 Para. 3 of the Law no. 303/2022 provides that: "Judges resolve cases based on the law, respecting the procedural rights of the parties, without constraints, influences, pressures, threats or direct interventions or indirectly by any person or authority".

Regarding the impartiality of the judiciary, according to international standards, this is essential to guarantee independence.

In the absence of the independence of the judiciary, one could not speak of an authentic activity of administering justice. Where there are no rights of citizens and their guarantees, including an independent judiciary, we could not speak of a genuine constitutional democracy.

Independence and impartiality are closely related but distinct and separate values. In other words, the two notions do not overlap, since independence mainly refers to powers other than the judicial one, as well as the parties, while impartiality is more related to the organization and functioning of the courts and the judge.

Independence is the necessary premise of impartiality and a prerequisite for it, so an independent court can be impartial, however, a court that would not be independent could not, by definition, be impartial either.

In the specialized literature, it was noted that: "Justice is impartial, in the sense that, being carried out by specially created authorities, they are neutral, they do not and should not have any particular, specific interest in the process they judge. It is based on the idea of neutrality, excluding the attitude of bias or rejection towards one of the parties. The characterization constitutionally expresses the classical custom in the sense that you cannot be a judge in your own case; it expresses the idea of neutrality which is the essence of justice" (Constantinescu and Iorgovan, Muraru, Tănăsescu, *Constituția României-comentarii și explicații*, 2004, p. 266).

The guarantee of the independence of judges, both in relation to the public authorities and in relation to other influences or pressures, finds a strong constitutional support in the establishment of the incompatibilities of these functions with any other public or private function, the only functions excepted being the didactic ones in higher education (Constantinescu and Deleanu, Iorgovan, Muraru, Vasilescu, 1992, pp. 278-279).

One of the aspirations of people everywhere is justice. Justice, as a public service organized by the state, over the centuries and millennia has been carried out based on different criteria, each time considering that those official criteria are also the criteria of justice. The rule of law assumes, as a dimension of

constitutional democracy, the independence of justice and the submission of judges only to the law, precisely so that the act of justice is fair, both in terms of official criteria and in terms of popular perception (Constantinescu, Muraru, & Iorgovan, 2003, p. 101).

Also in the doctrine, the outlined idea was that: "The independence and impartiality of justice reflects the position of the citizen in society" (Enache and Deaconu, 2019, p. 54).

The independence and impartiality of justice, of judges ultimately conditions the constitutional order of a country. Such an order presupposes the pre-eminence of public authorities, which, functionally, define the state as a whole, compared to the political actors who, depending on the randomness of political developments, lead them. However, the stability implied by the constitutional order would not be possible without the independence and impartiality of the judiciary, for the defense of the legal order and legitimate interests that could come into conflict with the interests and conceptions of the new leaders. The constitutional order cannot be conceived in a political regime in which, apart from the legal and state order, there is also a parallel, political, superordinate order, pre-eminent to the law and the state authorities. In this way, the constitutional order can only be unique, and the independence and impartiality of the judiciary constitute its legal guarantee (Ciobanu, 2010, p. 43).

The independence of the judge, in resolving the case he judges, cannot be limited by any person or state authority. Of course, the independence enjoyed by the judge does not mean arbitrary, he must obey the law.

In this context, it is noted that, in its jurisprudence, the Court, by Decision no. 2/11 January 2012[1], ruled that "the constituent legislator consecrated the independence of the judge in order to defend him from the influence of political authorities and, in particular, of the executive power; this guarantee cannot, however, be interpreted as being likely to determine the judge's lack of responsibility. The fundamental law not only confers prerogatives – which, in the mentioned text, is limited to the concept of 'independence' –, but also establishes limits for their exercise – which, in this case, is limited to the phrase 'obey only the law'. The institutionalization of some forms of judges' liability gives expression to these limits, in accordance with the requirements of the principle of separation and balance of powers in the state, enshrined in Art. 1 Para. 4 of the Constitution. One of the forms of the judge's legal, personal and direct liability is disciplinary liability, which derives from his duty of loyalty to his role and function, as well as from the exigency he must demonstrate in fulfilling his obligations to litigants and to the state. […] This being so, it follows that the independence of judges, both from a functional point of view (in relations with the representatives of the legislative and executive power), as well as personally (respectively of the status that must be granted to the judge by law), represents a

[1] Published in the Official Gazette of Romania, Part I, no. 131/23 February 2012

guarantee for the administration of an independent, impartial and equal justice, in the name of the law".

With regard to Art. 124 Para. 3 of the Constitution, according to which "Judges shall be independent and subject only to the law", the Court ruled that this text represents the constitutional guarantee of the judge's "non-subordination" to another power, other persons or interests, inside or outside the judicial system, and of his "obedience" only to the law, so that any structure of subordination or command over him is excluded and cannot affect his independence. The notion of "law" is used in its broad sense, which also includes the Constitution, as a fundamental law, but also all other normative acts, with legal force equivalent to the law or inferior to it, which constitute the normative ensemble on which the act of justice must be based on[1].

The independence of the judge cannot be conceived in the absence of appropriate legal guarantees, among which: judicial control which has the role of ensuring compliance with legality, publicity of debates, secrecy of deliberation, immovability of judges, disciplinary liability of judges.

In the aforementioned sense, by Decision no. 808/3 July 2008[2], the Constitutional Court ruled that: "the principle of judicial independence, enshrined in Art. 124 Para. 3 of the Constitution, derives from the separation of state powers, from the need for a balance between the authorities exercising power in the state. It is imperative that the courts be protected from any interference and, consequently, the independence of judges is a fundamental guarantee of the exercise of human rights.

From the principle of the independence of the judiciary, on the one hand, the obligation of judges to resolve disputes with which they are vested only on the basis of the law, and, on the other hand, the obligation of all public authorities to refrain from any interference in judicial activity.

With regard to the judicial review exercised by the courts that solve the appeals against the courts that issued the challenged decisions, this does not represent a limitation of the independence of the judiciary, because the judicial review is always posterior, not being possible to influence the judge who ruled the decision subject to judicial control.

Also through the previously mentioned decision, it was held that the provisions according to which: "In case of annulment, the decisions of the Court of Appeal on the unresolved legal issues, as well as on the need for the administration of some evidence, are binding for the judges of the first instance". There is no violation of the judge's independence by the fact that, rejudging the case, it takes the decision established by the court of law, because the guidelines are given in the jurisdictional activity of the courts of different degrees, by way of the judgment ruled in some contradictory debates. Also, the independence of the

[1] Decision no. 799/17 June 2011, published in the Official Gazette of Romania, Part I, no. 440/23 June 2011
[2] Published in the Official Gazette of Romania, Part I, no. 587/5 August 2008

first instance judge is not undermined by the fact that, rejudging the case, he adopts the legal resolution established by the court of cassation, because by this he does not submit to the will of an authority foreign to the case being tried, but complies with the judicial decision given in the exercise the legal competence of judicial control.

The Constitutional Court established, by Decision no. 417/19 June 2018[1], that it is natural that the defense of the independence of the judiciary should be carried out by the section of judges of the Superior Council of the Magistracy, because only judges are part of the judiciary, not prosecutors[2]. Therefore, there is and cannot be any confusion between the judicial authority, a concept that includes the courts, the Public Ministry and the Superior Council of Magistracy, and the judicial power, which includes only the courts. That is why the competence of the Superior Council of Magistracy's Plenary will aim to defend the independence of the judicial authority as a whole, engaging when both the courts and the Public Ministry, on the one hand, or the Superior Council of Magistracy, on the other, are affected. On the other hand, when the courts or the Public Ministry are affected, the competence will naturally belong to the corresponding sections. Such a legislative solution also constitutes a legislative technical correlation operation, as it implements the principle enshrined in Art. I Point 1 [with reference to Art. 1 Para. 1) of the law, according to which "the judge's career is separated from the prosecutor's career, the judges not being able to interfere in the career of the prosecutors, nor the prosecutors in that of the judge". Moreover, the whole law establishes and maintains the dichotomy between judges' section and prosecutors' section regarding their careers. Such a legislative intervention, likely to correct a lack of correlation of the law, can only be in the sense of compliance with the rules of legislative technique (see *mutatis mutandis* the Decision no. 252/19 April 2018, Para. 134). The Court finds, therefore, that the separation of decision-making powers related to the career of magistrates does not affect the constitutional role of the Superior Council of Magistracy as guarantor of the independence of justice, as enshrined in Art. 133 Para. 1 of the Constitution[3].

The Court held in its jurisprudence that the SCM can be the guarantor of the independence of the judiciary only if, in carrying out this competence, it independently and impartially fulfills its duties established by law. And the factors that ensure the independence and impartiality of this body of jurisdiction are the way of appointing its members, the duration of the mandate and the immovability of the members during the mandate, as well as the existence of adequate

[1] Published in the Official Gazette of Romania, Part I, no. 534/27 June 2018, Para. 70- 71
[2] See also the Decision no. 358/30 May 2018, published in the Official Gazette of Romania, Part I, no. 473/7 June 2018, Para. 88
[3] Decision no. 524/9 November 2022, published in the Official Gazette of Romania, Part I, no. 1101/15 November 2022

protection against external pressures[1]. Regarding this last condition, the Court ruled, by Decision no. 196/4 April 2013, that, in the individual activity, the member of the SCM must enjoy a real freedom of thought, expression and action, so as to exercise his mandate in efficiently. He cannot be exposed to possible pressures, affecting his independence, freedom and security in the exercise of his rights and obligations according to the Constitution and laws.

By Decision no. 2/11 January 2012, it ruled that the constitutional principle of independence of judges necessarily implies another principle, that of responsibility. The independence of the judge does not constitute and cannot be interpreted as his discretionary power or an obstacle to the engagement of his liability under the law, regardless of whether it is about criminal, civil or disciplinary liability. It is the legislator's task to achieve the necessary balance between the independence and responsibility of judges, respecting the constitutional provisions in the matter and the commitments that Romania has assumed through the treaties to which it is a party.

The independence of the judge does not exclude his responsibility in the exercise of the position he holds. The judge's responsibility is, among other elements, at the basis of the quality of the judicial act, and, implicitly, at the basis of its impartiality[2].

3. Conclusions

State authorities must support the independence and impartiality of the judiciary, thus contributing to the proper functioning of a society governed by the principles of the rule of law, since when, for certain reasons, the function and role of the judiciary would be diminished, the rule of law would be lost, with all the consequences and implications that derive from it.

References

Constantinescu, Mihai, Iorgovan, Antonie, Muraru, Ioan, & Tănăsescu, Elena Simina. (2004). *Constituția României – comentarii și explicații*. Bucharest: All Beck.

Constantinescu, Mihai, Deleanu, Ion, Iorgovan, Antonie, Muraru, Ioan, & Vasilescu, Florin Bucur. (1992). *Constituția României - comentată și adnotat*. Bucharest: "Official Gazette" Autonomous Direction.

[1] Decision no. 518/31 May 2007, published in the Official Gazette of Romania, Part I, no. 559/15 August 2007; Decision no. 779/12 May 2009, published in the Official Gazette of Romania, Part I, no. 520/29 July 2009; Decision no. 1556/6 December 2011, published in the Official Gazette of Romania, Part I, no. 910/6 February 2012.

[2] Decision no. 54/7 February 2018, published in the Official Gazette of Romania, Part I, no. 683/6 August 2018, Para. 23

Constantinescu, Mihai, Muraru, Ioan, & Iorgovan, Antonie. (2003). *Revizuirea Constituției României. Explicații și comentarii*. Bucharest: Rosetti.

Enache, Marian, & Deaconu, Ștefan. (2019). *Drepturile și libertățile fundamentale în jurisprudența Curții Constituționale*. Bucharest: C.H. Beck.

Ciobanu, Viorel Mihai. (2010). Independența judecătorului și principiul legalității în procesul civil. *Revista română de drept privat* no.3.

Constitutional Court Decision no. 808/2008, published in the Official Gazette of Romania, Part I, no. 587/5 August 2008.

Constitutional Court Decision no. 873/2010, published in the Official Gazette of Romania, Part I, no. 433/28 June 2010.

Constitutional Court Decision no. 799/2011, published in the Official Gazette of Romania, Part I, no. 440/23 June 2011.

Constitutional Court Decision no. 2/2012, published in the Official Gazette of Romania, Part I, no. 131/23 February 2012.

Constitutional Court Decision no. 45/2018, published in the Official Gazette of Romania, Part I, no. 199/5 March 2018.

Constitutional Court Decision no. 522/2022, published in the Official Gazette of Romania, Part I, no. 1100/15 November 2022.

Constitutional Court Decision no. 524/2022, published in the Official Gazette of Romania, Part I, no. 1101/15 November 2022.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

REFLECTIONS ON THE PRINCIPLES OF JURIDICAL RESPONSIBILITY OF THE STATE IN INTERNAL RIGHT

Elena MORARU [1]

Abstract

The principles of juridical responsibility of the state must be investigated in accordance with the principles of juridical responsibility and those of the right. The principles of juridical responsibility develop and materialize the principles of the right. In their turn, the principles of the right represent the foundation of forming of the principles of juridical responsibility. The principles are being characterized by a determined subjectivity as those one are conditioned by the character of social relations on which is founded the system of determined right.

Key words: *principles; responsibility; legislation; state; social relations; right.*

1. Introduction

An important aspect of juridical responsibility of the state belongs to the principles and forms of achievement of these ones. The principles of the legal responsibility of the state find not only a reflection, but also usually a sanction in the legislation, regardless of the fact that they acquire a normative character and carry out an action to regulate the social relations of human behavior. Thus, we can formulate the following general features: a) the social determination of the principles; b) their generalization character; c) reflection and sanction in juridical norms (positive right); d) determined action of the principles on the processes of environmental reality and phenomenal evolution; e) the compulsory respecting the principle by all subjects of right. The principles in their individuality have own content specifically only to them, have a determined sphere of application and a concrete circle of subjects to whom are addressed specifically forms of achievement.

2. The 16th article of Constitution of the Republic Moldova stipulates as a primary obligation of the state the respecting and protection of the person, the respecting of the equality principle at all citizens before the law and public authorities, without indiscrimination of race, nationality, language, religion, sex,

[1] **Associate Professor PhD, TUM (Republic of Moldova), lenamoraru@mail.ru / moraruuasm@gmail.com.**

opinion, political affiliation, property, or social origin, to ensure the free access to the justice, providing the right to the petitioning, as well as the right to the re-establishment in rights and to the overhauling by the state of the damage caused by the authorities actions of criminal pursuit judicial, or of other public authorities[1].

The basic law of the country stipulates that the constitutional foresights concerning the rights and human freedoms are interpreted, and applied in accordance with Universal Declaration of the Human Rights, with international treaties to which the Republic of Moldova is part that the international norms regarding human rights have priority given the internal ones. Thus, the legality and proportionality, legality and equality, individualization and irreversibility belong to the principles of the juridical responsibility of the state.

The legality justice of the juridical responsibility. The supremacy of law as a principle of the rule of law equally spreads over the phenomenon of the state's legal responsibility.

The legislation concerning the juridical responsibility of the state must correspond to the right and equity. In fact, legality as general principle is incorporated in the constitutionality and legality of juridical responsibility of the state (Grama, 2003, p. 108).

The equity (justice) of juridical responsibility). The juridical responsibility in its diver's manifestations of genre and species is based on the principle of equity (justice). The equinity, correctness as a general principle find its expression in the legislative settling of the juridical responsibility, in the practice itself of applying of this institutions, is reflected nearly in all the principles of the juridical responsibility.

The hauling over the juridical coals of the public and state bodies and civil servants is correctly and fair as it appears as a result of violating of the right norm and the punishment is only possible in the term of law and according with it. A manifestation of the equity principle (equality) can be found in the norm settling non-retroactivity of the law that found its consolidation in the art.22 of Constitution of the Republic of Moldova. No one shall be convicted for acts or omissions, which at the time of their commission did not constitute crimes. It will not also apply harsher than that one being applied now of perpetrating of the criminal act (Baltag, &Moraru, 2015, p. 90).

The law disposes only for the future example criminal law more favorable. These constitutional stipulations are suitable strengthened in the branch of legislation. Thus for instant the paragraph 4 art.3 of Constitution of the Republic of Moldova stipulates that: it the new law stipulates a milder offence sanction it will be applied this sanction, paragraph 2 , the offence law which hardens the

[1] *Constituţia R. Moldova* din 29 iulie 1994, Monitorul Oficial al R. Moldova nr.1 din 12.08.1994

sanction or worsens the situation of the guilty person in committing an offence has not a retroactive effect[1].

The proportionality of the principle in the juridical responsibility of the state. The analysis the proportionality in doctrine, in legislation, in international treaties and jurisprudence must answer to several essential problems:

- it the proportionality is in fact of the right and in affirmative case if it is a constitutional principle; the principle having a reasonable, normative and jurisprudential signification;
- the procedural size of the principle;
- its application in exerting activity of the government power;
- the dedication and application of the proportionality principle in the common right;
- the signification of the proportionality for the protection of human rights;
- the possibility of the judge including the constitutional one to exercise the control regarding the respect of the proportionality principle and to sanction, the excess of power;
- the elaboration of a definition for the proportionality as a principle (Baltag, &Moraru, 2015, p. 98).

In the doctrine, it was affirmed that the proportionality can be analyses not more as a result of combination of three elements: the taken decision, its finality and real situation to which it is applied. The proportionality is correlated with legality concepts, opportunity and discretional power. In the public right the violation of the proportionality principle is considered as being the over fulfillment of the action freedom, let at the disposal of authorities and finally the excess of power.

Synthesizing we can say the proportionality is a general principle of the right and a principle of the juridical responsibility dedicated explicitly or deduced from constitutional legislative regulations and from international juridical instrument based on the values of reasonable right of the justice and equity and which expresses the existence of a balanced and adequate relation between action, situations, phenomena as well and the limitation of disposed measures by the government authorities to what is necessary for reaching of a legitimate goal, in this way being guarantied the right and basic liberties and being avoided the abuse in right (Moraru, 2009).

The legality is an omnipresent and compulsory principle to be respected in all the branches of right and by all categories of public authorities indifferently from its branch to which belongs this one. The legality is a principle on which must be based the behavior of every citizen in a state of right. In the domain of the juridical responsibility except the general requirement, this principle contains also some particular requirements specifically to the categories of juridical norms by which are being regulated different forms of the responsibility.

[1] *Constituţia R. Moldova* din 29 iulie 1994, Monitorul Oficial al R. Moldova nr.1 din 12.08.1994.

The investigation of these features in valves necessary a distinction between the activities of regulation of juridical responsibility by normative acts emitted by the competent bodies of state and the practical activity of applying normative acts, that is of i.e. holding the legal subjects accountable for violating the legal order. The practical action of applying presents numerous concrete aspects that must answer to some requirements identically numerous of the legality principle. As a form of manifestation of compulsion of the state, the juridical responsibility involves the application of juridical sanctions with reference to the persons, which violated effectively the right order its goal principal being the re-establishment of the integrity of this order. That is why one cannot conceive that the re-establishment of the order or right to occur outside of the legal requirements so with the violation of the legality (Baltag, 2006, p. 21).

The specialty doctrine certifies the existence of diver's conceptions about what is legality what does mean the nature, content and its principles. For the supporters of the approaching statist approach, legality means the strict respecting and compulsory of the right or that is identically, the respect of the law (the right and law in this case are being identified). For example in the jurisprudence it was formed the legislation concept as a strict execution and inviolable of the laws and legal normative acts by all the subjects of right.

In this sense, we will present the expressing of the principle of legality made by B.Negru and A. Negru: "The principle of legality of the juridical responsibility has a complex character that is being manifested by:
- the juridical responsibility occurs only on the bases of the juridical norm;
- the application of a sanction concerns the strict competence of the state and his official representatives;
- the state bodies themselves work in strict conformity with the provisions of the juridical norms" (B. Negru, & A. Negru, 2006, p. 490).

V.Patulea maintains that the legality was constituted as a counterweight of the arbitrariness: the principle of the legality involving the subordination of the state in relation to the right (considered as limiting the power of this one), the activity of the state's bodies being appointed and regulated by judicial norms (Pătulea, Șerban, & Marconesu, 1988, p. 45).

The principle of individualization of responsibility means the maximum individualization of the juridical consequences applicable to those who violate the law. This one is not only oriented toward re-establishing the rights compensation (repairing the caused damage) proportional reaction with the seriousness of the deed but also toward achieving and resocialization the juridical responsibility.

The principle of individualizing responsibility does not suppose only the application of easier punishment (that is characteristic of the humanistic principle) and does not even excludes the application of some actions more severe for reaching the purposes of juridical responsibility. In the existence of legal foundations, juridical responsibility is always timely but the character of the punishment is quite something more than the convenience of this one.

As a criterion of individualization of the juridical responsibility appears first the character and the degree of social peril created by committing an illicit action, the seriousness of this one. At the same time, the juridical quality of the illicit action exercise influences characteristically to the element of the make-up of the illicit deed (the form of quietness damage, etc.). A role in no way deprived of importance belongs to characteristics of the perpetrator is personality presenting importance form the juridical and social psychological point of view. To the category of individualization we also include attenuated and worsen a circumstances of the juridical responsibility. The list of attenuated circumstances of the juridical responsibility in the manner stipulated by the contravention law and criminal one is not exhaustive (art.42 CContr. of RM)[1]. All the more, there can be an exhaustive list of these circumstances in private law.

The principle of individualization of juridical responsibility of the state is materialized by taking into account of all circumstances of objective and subjective nature for achieving as possible as correctly of the responsibility. The obligation of the state to compensate the damage caused by the public power, to restoration of the rights and legitimate interests of the victims must in no way replace the identification and prosecution in retrogressive order of the persons concretely guilty of the illegality committed.

The principle of irreversibility is one universal for the institution of juridical responsibility. Applied in the responsibility of the state this one suppose an adequate reaction regulated by the law to the illicit action having as author the state in order to reestablish the equity , to repair the damage, to sanction the culprits and to educate the concrete persons and generally the entire society. Thus, the state of Republic of Moldova can be prosecuted bath as a state and by means of the bodies of state power, the bodies of local public administration and of civil servants.

3. Conclusions

In conclusion, we may mention the principle of juridical responsibility of the state have an objective character, being conditioned by the nature and society. Not the nature and society are complied with the principles but contrary the principles are true in a measure in which these ones correspond to the nature and history of the socially.

The principles like the ideological categories form in the social conscience of the people under the pressure of entire totality of the social relationships specifically to a certain step of social evolution is embodied in the conscious

[1] *Codul contravențional al R.Moldova* no.218-XVI from 24.10.2008, Official Journal of R. Moldova no.3-6 (2009).

activity, volitional and persistent human activity. The existent relationships determine objectively the real content of the principles.

Being formulated by the science, in different branches of social activity, these directing ideas appear as a result of creative activity of human concerning the environmental reality. Nevertheless, scientific principles cannot be any guiding ideas, even if people, but only those that adequately reflect the objective laws, trends of historical evolution, recognize them.

References

Baltag, D. (2006). Unele considerații referitor la dimensiunea socială a responsabilității juridice. *Revista națională de drept*, no. 1.

Baltag, D., & Moraru, E. (2015). *Statul subiect al răspunderii juridice*. Chișinău: Tipografia Centrală.

Grama, D.C. (2003). Evoluţia unor principii ale doctrinei statului de drept în viziunea gânditorilor Moldovei în secolele XV-XIX. *Problemele ale edificării statului de drept în Republica Moldova*. Chişinău.

Guțuleac, V. (2000). *Bazele teoriei dirijării de stat*. Chișinău.

Ковалевская, Д.Е., & Короткова, Л.А. (2001). Судебная практика: некоторые аспекты возмещения в результате действий (бездействия) налоговых органов и органов налоговой полиции. *Налоговый вестник, август, сентябрь*, №8, 9.

Moraru, E. (2009). Social responsability – a special relatiouship. *The international conference „European unions history culture and citizenship: Current problems of Europea Integration, 2-nd Edition*. Piteşti.

Negru, B.,& Negru, A. (2006). *Teoria generală a dreptului și statului.* Chișinău: Bons Offices.

Pătulea,V., Șerban, S., & Marconesu, G. (1988). *Răspunderea și responsabilitatea socială și juridică*. Bucharest: Științifică și Enciclopedică.

Чубуков, Г.В. (2002)/ Институт возмещения вреда: аспекты компенсации и ответственности**,** *Вестник МГИУ, Серия Гуманитарные науки.* №1.

Constituţia R. Moldova din 29 iulie 1994, Monitorul Oficial al R. Moldova nr.1 din 12.08.1994.

Codul contravențional al R.Moldova nr.218-XVI din 24.10.2008, Monitorul Oficial al R. Moldova nr.3-6 din 16.01.2009.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

CONFLICT OF INTEREST IN PUBLIC ADMINISTRATION

Miruna TUDORASCU[1]

Abstract

This material aims to clarify the concept of conflict of interest, the relevant legal aspects, the professional categories to which it is addressed, all of which are analyzed in the first part, entitled The Institution of Conflict of Interest. The second part, entitled Conflict of Interest in the European Union, then provides a summary assessment of this institution at European Union level. Relevant for highlighting the theoretical aspects of the subject is the identification of case studies and their analysis, which is carried out during the third part, entitled Relevant case law on the subject. Case studies - Jud. Alba, and finally some conclusions and proposals are outlined.

Key words: *conflict of interest; public administration; European Union; Administrative Code; public servant.*

1. The conflic of interest institution

According to Article 445 of the Administrative Code[2] "(1) Civil servants are obliged to comply strictly with the legal regime of conflict of interest and incompatibilities, as well as the rules of conduct." According to the same article, for the purposes of paragraph 2, we understand that public officials must play an active role and they are obliged to assess the circumstances that may lead to any incompatibilities or conflicts of interest and act to prevent or legally resolve their occurrence. As soon as a situation of this kind arises, either one of incompatibility or of conflict of interest, according to the legal requirements, they must make every effort to put an end to them within the legal time limit laid down by the rules in force.

First, we should answer to the following question: what is conflict of interest? According to Art. 301 of Romanian Penal Code - Conflict of interest is "*The act of a public official who, in the exercise of his duties, has performed an act or participated in a decision that has obtained, directly or indirectly, a financial benefit for himself or for his spouse, for a relative or a relative up to and including the second degree, or for another person with whom he or she has had*

[1] **Associate Professor PhD./University 1 Decembrie 1918 of Alba Iulia; PhD. Student/The National University of Political Studies and Public Administration (SNSPA), Bucharest, (Romania), email: miruna762001@yahoo.com.**

[2] Emergency Ordinance No. 57/2019 of 3 July 2019, on the Administrative Code.

a commercial or employment relationship in the last five years or from whom he or she has received or is receiving benefits of any kind, shall be punished by imprisonment for a term of one to five years and disqualification from holding public office". This offence was introduced by the legislator under the chapter "Service offences". "Although conflict of interest does not *ipso facto* mean corruption, nevertheless the occurrence of conflicts between personal interests and public duties of public officials, if not properly dealt with, may lead to corruption. Criminalisation of the offence requires not only the simple prohibition of private interests of the public official, but also the formation of the correctness of administrative decisions, so that an unresolved conflict of interest does not lead to abuse of office. By definition and content, the offence of conflict of interest has taken over from the constituent elements of corruption offences, in the vicinity of which it has been placed" (Lazăr, 2016, pp. 13-50).

In 2017, by Law 193, Article 301 of the Romanian Penal Code was amended as follows[1]: "*Use of the public function to favour persons (1) The act of a public official who, in the exercise of his or her official duties, has performed an act by which a pecuniary benefit was obtained for himself or herself, for his or her spouse, for a relative or a relative up to and including the second degree shall be punishable by imprisonment for a term of one to five years and a ban on holding public office for a period of three years. (2) The provisions of para. (1) shall not apply in cases where the act or decision relates to the following situations: a) issuing, approving or adopting normative acts; b) exercising a right recognised by law or in the fulfilment of an obligation imposed by law, in compliance with the conditions and limits laid down therein*".

In this scientific approach, in order to clarify the concept of this institution, we will refer in the following to the OECD[2] Guidelines on Conflict of Interest in Public Administration. This guide has adopted a highly pragmatic definition to clarify this concept so that it is easy to identify and effectively resolve the conflict situations that may arise. Thus "a 'conflict of interest' involves a conflict between the duty to the public and the personal interests of a public official, where the public official has interests, as a private person, which could improperly influence the discharge of official duties and responsibilities".

Another definition can be found in Article 70 of Law 161/2003[3]: "Conflict of interest means a situation in which the person exercising a public dignity, or a public office has a personal interest of a pecuniary nature, which could influence the performance with objectivity of the duties assigned to him by the Constitution and other normative acts".

[1] Constitutional Court of Romania: "The abolition of the conflict of interest notion is constitutional".
[2] Organisation for Economic Co-operation and Development.
[3] Law No 161/2003 on measures to ensure transparency in the exercise of public office, public functions and in the business environment, and to prevent and punish corruption.

Conflicts of interest in both the public and private sectors have become a major concern around the world. In the government and public sector, conflicts of interest have long been the subject of specific policy; legislative and administrative approaches have aimed to support integrity and disinterested decision-making in government and public institutions (OECD, 2003).

Article 463 of the Administrative Code states: "*Public officials are subject to the regime of conflict of interest in the exercise of public functions established by the special legislation on measures to ensure transparency in the exercise of public office and public functions*".

Returning to the special legislation on the subject, in particular the provisions of Law 161/2003, Chapter II (Articles 70-79) contains a *comprehensive regulation of this institution*. What is noteworthy is that Section II regulates the *Conflict of Interest in the exercise of the function of member of the Government and other public functions of authority in the central and local public administration*, and then Section III regulates the *Conflict of Interest concerning local elected officials*, and Section IV regulates the *Conflict of Interest concerning civil servants.*

We therefore note that the legislator felt the need to make different clarifications about the three categories of public administration representatives. Thus, a person who is a member of the government, secretary of state or deputy minister, other such state or similar positions, prefect or sub-prefect must not do anything to help them personally or to help their spouse or close relatives (first degree); they are not entitled to gain an advantage from their position. However, this does not apply to the issuing, approval, or adoption of legislation. According to the relevant provisions, if such acts occur, they constitute administrative misconduct, of course unless more serious acts are committed, and if it is found that such administrative acts or other legal acts are concluded in violation of these restrictions, they become absolutely null and void.

As far as local elected officials are concerned, the text of the law (art. 76, para. 1) tells us that: "Mayors and deputy mayors, the mayor general and deputy mayors of the municipality of Bucharest are obliged not to issue an administrative act or not to conclude a legal act or not to issue a provision, in the exercise of their office, which produces a material benefit for themselves, their spouse or their first-degree relatives." As in the previous situation, if such acts are found to have been concluded or issued, they are also subject to absolute nullity. As regards the presidents and vice-presidents of county councils or local and county councillors, we refer to Article 228 of the Administrative Code, which states that they: "*have the obligation to refrain from issuing or participating in the issuing or adoption of the administrative act, from concluding or participating in the conclusion of the respective legal act, which could produce a material benefit for themselves or for: (a) a spouse or relatives up to and including the second degree; (b) any natural or legal person to whom the local elected official is a debtor of an obligation; (c) a company of which he or she is the sole shareholder or director or from which he*

or she derives income; (d) any other authority of which he or she is a member; (e) any natural or legal person, other than the authority of which he or she is a member, which has made a payment to him or her or incurred any expenditure of his or her; (f) an association or foundation of which he or she is a member". Councillors, both local and county councillors, are obliged to announce at the beginning of the meeting if there are such situations, which is recorded in the minutes of the meeting, and the councillor will not be counted for the vote. If, however, violations of the above are found, the penalty is the same, i.e. absolute nullity of the acts in question. As for the act of the local elected representative, this is considered a disciplinary offence and the sanction is a 10% reduction of the allowance for a maximum period of 6 months.

As far as public officials are concerned, Article 79 of Law 161/2003 tells us that a public official is in conflict of interest if:

- he/she follows requests/decisions for persons, whether natural or legal, with whom he/she has relations of a pecuniary nature.
- is a member of a committee to which other first-degree relatives or spouses belong.
- own interests with economic content, or those of the spouse and first-degree relatives, may interfere with the act of decision-making as a civil servant.

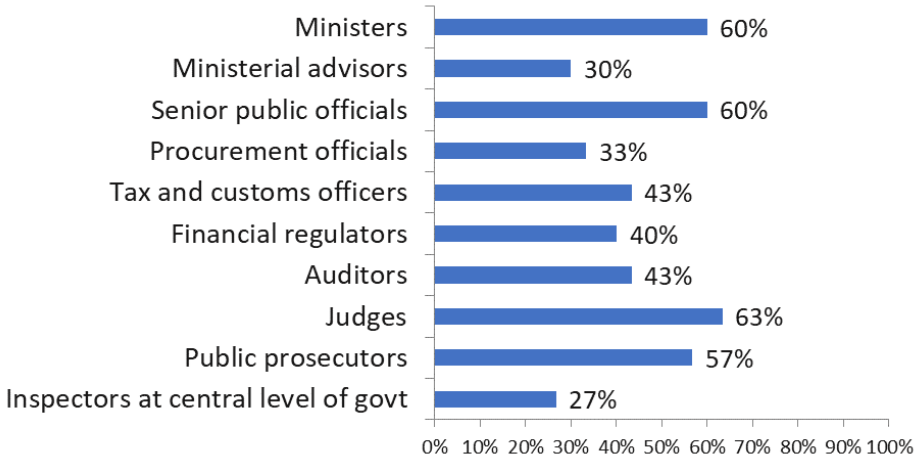
If the civil servant knows that he is in such a situation, he must refrain from any such action and notify his superior and a suitable person will replace him. Of course, if a conflict of interest situation is found with regard to the civil servant, the sanctions may be disciplinary, administrative, civil or criminal, depending on the seriousness of the offence.

2. Conflict of interest in the European Union

According to a study (OECD, 2005, https://doi.org/10.1787/5kml60r7g5zq-en) on the subject, the notion of conflict of interest implies a conflict between the public interest and the private interest of a public official, where the public official's private interest could influence the performance of his/her official duties and responsibilities. The same study reveals that conflict of interest should not necessarily be equated with corruption. Sometimes there is conflict of interest where there is no corruption and vice versa. For example, a public official involved in deciding in which he or she has a private interest can act fairly and in accordance with the law, and therefore there is no corruption. Another public official could take a bribe (existence of corruption) to decide that he would have made anyway, without any conflict of interest involved in his action.

According to an OECD Survey (OECD, 2014) - 2014 on Conflict-of-Interest Management in the Executive Branch and the Protection of Whistleblowers, it was highlighted which positions present a higher risk of conflict of interest? Depending on these, it was determined whether there is

specific conflict of interest policies for certain types of civil servants, depending on the nature of their work.



Source: Fig No. 1 (Bertok, 2019)

From a brief review of the literature and policy documents, we understand that there is, and has been, a continuing concern about conflict of interest at European level. Relevant in this respect is also a comparative study - commissioned by the European Parliament's Department for Citizens' Rights and Constitutional Affairs - which analysed the effectiveness of the relevant rules, policies, and practices in the Member States with regard to conflict of interest in high-level political appointments (heads of government, ministers and other senior officials). The research highlights the theoretical and practical aspects of the concept of conflict of interest and offers some recommendations on the subject (Demmke, Paulini, Autioniemi, & Lenner, 2020).

3. Relevant case law. Case studies – Alba county

In our scientific approach, we will refer from a practical point of view to some situations, which have taken shape at the county level. Alba County, in relation to the institution of conflict of interest. Therefore, a first situation to which we will refer is that according to which, on 12 June 2015, the National Integrity Agency found a situation of conflict of interest in which the Mayor of Teiuș, at that time, was involved, a situation generated by the fact that he signed contracts as a representative of the City Hall, with commercial entities in which he himself was a partner, and the wife of the mayor was the accountant of these companies. Based on these signed contracts (a total of 10 contracts), the Town

Hall made payments amounting to 105,913.38 lei, as reported in the local press at the time[1].

The National Integrity Agency referred the matter to the Aiud Prosecutor's Office following the findings made, to investigate the issues involved and establish the offence of conflict of interest. After the preliminary investigations, the case was brought before the court and the decision was to sentence the defendant to 2 years of imprisonment with suspension, prohibition of civil rights and 100 days of community service, according to the court portal. This decision was appealed by the Public Prosecutor's Office to the Alba Court of Appeal, but the final decision was to acquit the mayor in 2018.

The Court reasoned in this regard that[2] "... the acts of which the defendant is accused are not provided for by the criminal law as a crime, and the crime charged against him cannot be held because there is a cause justifying the acts carried out by the defendant, being required by the law in force at the time of July 2012 - January 2014. Due to the circumstances and conditions in which they were committed, the defendant's acts were neither prior to the indictment nor subsequently provided for by the criminal law, the current regulation being the more favourable criminal law."

It is a final decision, but we are right to question whether the solution is well-founded or not, as the court's reasoning also includes the phrase "when he signed those contracts, the defendant fulfilled an obligation imposed by law". It is true that in his capacity as a representative of the City Hall he was legally obliged to sign these contracts, but this quality does not remove the constitutive elements of the offence of conflict of interest, moreover, Article 76(1) of Law 161/2003 states that "mayors and deputy mayors, the mayor general and deputy mayors of the Municipality of Bucharest are obliged not to issue an administrative act or conclude a legal act or issue a provision, in the exercise of their office, which produces a material benefit for themselves, their spouse or their first-degree relatives".

Another interesting case at county level, had as author the named D.V.B., mayor of a commune in Apuseni Region, who was found in a state of administrative conflict of interest by the National Integrity Agency; he "as mayor, issued on February 7, 2013 the order on the employment of his wife for a fixed period, the post of referent in the Department of Urban Planning: cadastre, real estate advertising and land fund within the City Hall ...., thus violating the provisions of Article 76, para. (1) of Law no. 161/2003" (ANI Report, 2015). Moreover, "prior to the issuance of the provision of 7 February 2013, D.V.B. signed, as mayor, several documents that were the basis for the competition for the temporary vacancy" (ANI Report, 2015).

[1] https://justitiecurata.ro/alba-cinci-primari-cu-probleme-penale-si-de-conflict-de-interese-vor-un-nou-mandat/, accesed on 5th of December 2023.
[2] Penal Decision no 485 of 12th of June 2018 of the Alba Iulia Court of Appeal.

The National Integrity Agency has taken the necessary procedural steps and has therefore referred the matter to the competent Public Prosecutor's Office, following the legal channels, to establish the offence provided for in Article 301 of the Criminal Code. The legal route was a difficult but interesting one. In the first phase, he lost the case with ANI (contesting the ANI report) and was "dismissed" from the position of mayor by Order of the Prefect on 24 October 2018. He challenged this order in court and obtained its suspension, and on 11 December 2018 he resumed his work in the mayor's office. The deadline for resolving the criminal matters was set as 10 April 2019.

After being sanctioned by the relevant court with an administrative fine, he appealed to the Court of Appeal of Alba, which on 23 May 2019 pronounced the final acquittal of the mayor, thus highlighting a uniform practice in this regard with the first case invoked, on the grounds of the same text of the Code of Criminal Procedure: "the act is not provided for by criminal law or was not committed with the guilt provided for by law, but this time invoking the lack of expediency of the conviction.

4. Conclusions

We note from what has been presented that there are many case law situations in this area, but also a tendency of the courts to give the perpetrators of the facts, as such they, either elected or civil servants, return to work, acquitted, or convicted. In contrast to the Labour Code, which states in Article 56 that "the existing individual employment contract shall automatically terminate ... as a result of a custodial sentence, from the date of the final judgment", the Administrative Code states that: "the employment relationship shall automatically terminate from the date of the final judgment, regardless of whether the court imposes a custodial sentence or a suspended sentence".

The duration of litigation is very long, with many years elapsing before a judgment becomes final, and as such the civil servant or other categories mentioned have the possibility of remaining in activity, thus benefiting from the presumption of innocence. Moreover, candidates for public office cannot be prevented from running for office even if there is a final conviction, if it is not related to the public office held (see the "Piedone" case, the "Cherecheș" Baia Mare case, etc.). The law should provide for more detailed provisions in this regard, as the only leverage is now in the hands of the courts.

References

Bertok, Janos. (2019). *Best practices in managing conflict of interests: lessons learned from the OECD, Managing Conflict of Interest under EU Financial Rules Conference*. Brussels.

Demmke, Christoph, Paulini, Maros, Autioniemi, Jari, & Lenner, Florian. (2020). The Effectiveness of Conflict of Interest Policies in the EU- Member States, Policy Department for Citizens' Rights and Constitutional Affairs EN Directorate-General for Internal Policies – Brussels.

Lazăr, A. (2016). Conflictul de interese – O analiză comparativă, a study published in the monography "*Conflictul de interese. Teorie și jurisprudență. Studii de drept comparat.* Bucharest: Universul Juridic.

OECD. (2014). *Survey on Managing Conflict of Interest in the Executive Branch and Whistleblower Protection*.

OECD. (2005). Conflict of Interest Policies and Practices in Nine EU Member States: A Comparative Review, *SIGMA Papers, No. 36*. Paris: OECD Publishing.

Romanian Labour Code.

Romanian Penal Code.

Law No 161/2003 on measures to ensure transparency in the exercise of public office, public functions and in the business environment, and to prevent and punish corruption.

Emergency Ordinance No. 57/2019 of 3 July 2019 on the Administrative Code.

Penal Decision no 485 of 12th of June 2018 of the Alba Iulia Court of Appeal.

https://justitiecurata.ro/alba-cinci-primari-cu-probleme-penale-si-de-conflict-de-interese-vor-un-nou-mandat/

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

DEMOCRACY IN EUROPE-HISTORY END EVOLUTION OF A CONCEPT

Alina-Gabriela MARINESCU[1]

Abstract

In the last decade of the 20th century, Giovanni Sartori suggested the idea that democracy is a symbol for most states on the world map. But, perhaps more than a symbolic value, democracy is today an institutional reality in more than half of the states that make up the United Nations. In Europe, however, a state cannot be a member of the Council of Europe if it does not meet the requirements imposed by democratic institutions and human rights are not respected. Democracy has been and has remained a factor that, throughout the ages, has conditioned and therefore accompanied social progress. So, democracy has developed and develops only to the extent that the relationship between the leaders and the governed tilts in favor of the latter, when the governed impose on the leaders through various ways and means - respect for the fundamental rights of the individual and nations.

Keywords: *democracy; governance; human rights; concept; representative institutions; civil society.*

1. Introduction

The present work aims to analyze Democracy, from a historical perspective, leaving aside excessive descriptivism and formalism, proposing a problematizing and prospective approach.

The only historical theme approached by political scientists, over time, is that of the comparison between the democracy of the ancients and that of the moderns, with the aim of highlighting the fact that it has nothing to do with the other.

In the last decade of the last century, Giovanni Sartori specified that the idea of democracy represents a true symbol for most peoples of the world, but perhaps more than a value, it constitutes today an institutional reality in most of the member states of the United Nations Organization (Sartori, 1999, p.74).

In general, it is widely accepted that Democracy reflects a political order and a way of functioning of the system in which the right of the people to govern themselves is realized (Braud, 1995, p.97).

[1] **Lecturer PhD, Faculty Teologie, Litere, Istorie și Arte, University of Pitesti (Romania), email: alina.marinescu74@yahoo.com.**

Social-political history created a certain division, starting from the reality that not all citizens can be in government, in other words, democracy created the ruler-governed binomial, namely, a political class and an electoral body, political parties of various orientations, sometimes diametrically opposed. The essence of democracy emanates from the principle of the sovereignty of the people, which assumes that government can be legitimate only through the will of the governed (Sartori, 1999, p.82).

In the diversity of its forms of manifestation, democracy is the result of a long historical process in continuous movement of the evolution of human society, but also of involution, democracy being in certain socio-political areas, eroded in terms of some of its structures and forms of manifestation. Starting from the observation of such a phenomenon, theorists compared democracy to a "sand statue at the edge of the sea", a plastic but suggestive comparison, if we examine the phenomenon from the perspective of its historical development, its functionality (Mitran, 1997, p.64).

It becomes a commonplace of the research to find that in the history of democracy a succe ssion of distinct stages can be noted, each of them marking a certain qualitative stage. Thus, we note the existence of three different phases, the phase of ancient democracy, which evolves within the city-state (the Athenian, Spartan, Corinthian democracies), the second phase of modern democracy, specific to the contemporary state, characterized by the emergence and evolution of multiple systems and diversified forms of representation, and the third phase is that of the democracy of the future. Anticipating that this will evolve domestically and internationally leading to more effective forms of expression, democracy becomes the embodiment of that society in which citizens exercise a relatively high degree of control over leaders and governing structures (Dahl, p.3).

2. Paradoxes and contradictions

There are political analysts who describe the historical evolution of democracy in waves, at unequal time distances, thus, the first wave includes the era between the end of the modern revolutions and the outbreak of the Second World War, the second wave includes about two decades of the post-war period and the of the third wave of democratization, appreciated as "the most important political evolution in the last part of the 20th century, - would be inaugurated by the transformations in Portugal, Greece and Spain, continued in Latin America and Southeast Asia , to mark the end of the *80s, the collapse of communism in Central and Eastern Europe and the former Soviet Union (Huntington, 2018, p.194).

In practical terms, democracy constitutes a system of institutions and relationships that place citizens either in the position of deciding directly, or in that of delegating the decision-making power to elected representatives, both positions oscillating between a possible maximum of consensus and a necessary

minimum of coercion, assuring all able and willing citizens of this equality of conditions to participate in political life. Despite these conditions and premises, institutional and constitutional, given the diversity and divergence of social interests, the road to balancing these interests passes through the recognition of diversity and pluralism of interests, through the combined effort of social-political forces to adapt democratic systems to social-economic realities.

It is eloquent how a number of renowned thinkers understand the idea of democracy, because there are many contradictory discussions around this concept. But democracy is not so complicated and ambiguous that it cannot be used by those who will reason together.

According to such a conception, starting from the relationship between ideal and reality in democracy, it implies three fundamental conditions - citizens vitally affected by a human decision to have an effective vote in its adoption, another aspect would be, the full power to adopt thus of decisions to have a public legitimacy, and last but not least, that all those who adopt such decisions can be held publicly accountable (Dahl, 2002, p.83). Therefore, as none of these three conditions can be realized, since no society has been formed that is totally democratic, such a society remains an ideal, for which the American political scientist, Robert Dahl coined the phrase "paradoxes of democracy"(Dahl, 2002, p.86).

In his explanation, such paradoxes come from the fact that human society is characterized by tensions, latent conflictual states whose "activation" weakens and erodes democracy, potentially paving the way for an authoritarian political regime. It is about relatively permanent, normal contradictions between different sides or modes of manifestation of democratic life. Thus, such contradictions are noticeable in the relations between consensus and conflict, representativeness and governability, legitimacy and efficiency, in the sense of social performance.

As the reality of any democratic society demonstrates, the need for consensus and the state of conflict permanently accompany its evolution. Being by its nature a system of competition, of free competition in the economy, of electoral confrontations in politics, democracy "tests" various forces, and the clash of interests can endanger political stability.

3. The evolution of democracy - historical perspectives

Modern democracy begins with Montesquieu, whose concept, which inspired both the American and French revolutionaries, is built on the model of ancient democracy, for which the main historical examples are Athens and Rome. Montesquieu had expressed great admiration for the Roman Republic, implicitly, for the republic and the principle of virtue.

In reality, the Roman republic had been predominantly interpreted as a mixed government, and ancient democracy, understood exclusively as direct democracy, adapted to small states, city-states, just like Athens.

Starting from the two such illustrious examples as Athens and Rome, modernity also created a confusion, a certain overlap between the two concepts of democracy and republic, of which democracy was in reality only a species, but which was identified with the genus- virtue is the inspiring principle of the democratic republic, not of the aristocratic one. But current political language has for centuries been ambiguous about the distinction between species and genus (Montesquieu, 2011, p.34).

Jean Jacques Rousseau calls the republic, the body politic constituted as a result of the social contract, and therefore, the body politic is expressed in the general will that today we consider the fundamental institution of a democratic state (Rousseau, 2017, p.56 and next).

According to Rousseau, the Republic of Geneva represents a "constitution d'un gouvernement" which, with its wisdom, managed to maintain order and ensure the citizens' common happiness. This "democratic government" of the Geneva republic, which implies the sovereignty of the people and the common interest, seems to correspond to the characteristics of a republic or a democratic government. In fact, the citizens of Geneva have always shown their respect for their homeland, and have defended their freedom for centuries, therefore, this republic does not appear to be inferior to the Roman or Athenian model, but instead, it had a democratic mechanism characterized by by the freedom of the individual to choose the most capable and honest representatives to administer justice and govern the state (Rousseau, 2017, p.15 and next).

The issue of the democratic state is fundamental in Rousseau's political thought, therefore, we must not forget the fact that the first version of the Social Contract, called the Geneva Manuscript, was written in the period 1756-1758 and was intended to be an essay on the formation of the state Rousseau emphasizes the substance of the state, as a result of the social contract, the state serves as the basis of all rights, "the state, in relation to its members, is master of all their goods" (Rousseau, 2017, p.11).

On the other hand, the social contract, "instead of destroying natural equality, on the contrary, replaces a moral and legitimate equality in that point of physical inequality that nature was able to achieve between people, being possible to find through nature men unequal in strength or cunning, becoming all equal by convention and right" (Rousseau, 2017, p.12). In conclusion, for Rousseau, moral equality is given by the sovereignty of the democratic state.

A distinct stage in the European democratic process is represented by the French revolution of 1789, which through the Declaration des droits de l'homme et du citoyen answers the question what is democracy?

This represents a form of government in which people are "free and equal in rights...social distinctions are based on common utility", at the same time, citizens retain the natural and inalienable human rights, such as "liberty, property, safety and resistance to oppression", under a democratic government in which the principle of sovereignty does not reside in the monarch and the nation.

The 19th century will impress on European democracy, the American model that expressed a factual reality, based on "equality of conditions" which, in turn, exerted a profound influence on civil society and on the government. This fact prevails in European society, with the publication of the two volumes of the first volume, On Democracy in America, elaborated by Alexis de Tocqueville, at the beginning of 1834.

"The gradual development of equality of conditions is a providential and universal fact," says Tocqueville, who at the same time notes that "after feudalism is destroyed and after the kings are defeated, democracy will return in front of the bourgeois and the rich". Tocqueville's conclusion was that we are discussing a so-called "irresistible revolution" (de Tocqueville, 2017, p.9).

The type of democratic society envisioned by Alexis de Tocqueville is not the historical one of the French revolution, and it is not even the utopian one formulated with great freedom of imagination by egalitarian theorists, but the one realized in the United States of America.

Almost a hundred years after the publication of Montesquieu's The Spirit of the Laws (1748), which had indicated in England the country where the principle of freedom was deeply respected, Tocqueville presented America as the country where the principle of democracy, based on equality of conditions, developed.

It presents democratic freedom as a doctrine of compromise, in which all citizens form the people and it is the people who nominate the one who makes the laws, the one who executes them, the one who punishes crimes, the people directly nominate their representatives, so the form of government is representative, but the majority is the one that governs in the name of the people (Mastellone, 2006, p. 67).

Democracy in the 20th century takes on new meanings, which take into account the historical realities, the two world conflagrations, followed by the cold war period, and last but not least, a return to liberal democracy towards the end of the 20th century. In order to understand the course of democracy in the contemporary era, it is mandatory to remember the political reality of modern society, which is represented by political parties.

Numerous specialists, political scientists, historians insist on this new political reality, among which, in European political thought, we note the legal theme of a philosopher of law from the University of Vienna, Hans Kelsen.

For Kelsen, the primary themes were the essence and values of democracy, political regimes, the problem of parliamentarism, state sovereignty,

In order to achieve the democratic state that prevents the unbearable domination of man over man, the principle of totality must be renounced and the principle of majority must be accepted, whereby the absolute majority, and not the qualified one, makes the decisions. The social order assumes the decisions made by the majority, but does not prevent the minority from becoming the majority and making their own beliefs dominate.

For Kelsen, the majority principle presupposes not only the existence of a minority but also the protection of the minority against the majority, this protection of the minority is the essential function of the so-called rights of man and of the citizen, but it is also elemental that distinguishes democracy from autocracy. In this context, the parliamentary democratic form, with its majority-minority principle, is the political form that offers the possibility to peacefully resolve class conflict, an anathema of the 20th century.

4. Conclusions

In contemporary political theory, the definition of democracy tends to be resolved or exhausted in a set of universal rules or procedures. Overall, these rules set out how the policy decision should be reached, not what exactly should be decided. Of course, no historical regime has known the fulfillment of all these rules, and it is quite difficult to determine how many of these rules should be fulfilled for a regime to be called democratic.

References

Braud, Phillipe. (1995). *The Garden of Democracy's Delights*. Bucharest: Globus.
Dahl, Robert A. (2002). *Democracy and its critics*. European Institute Publishing.
Huntington, Samuel P. *The clash of civilizations and the restoration of the world order*. Bucharest: Polirom.
Mastellone, Salvo. (2006). *The history of democracy in Europe-from the 18th century to the 20th century*. Antet XX Press.
Montesquieu, C.L.S. (2011). *About spiritual laws*. Bucharest: Antet.
Mitran, Ion. (1997). *Politics before the 21st century*. Bucharest: Romania de Maine Foundation.
Rousseau, Jean Jacques. (2017). *Discourse on the origin and inequality between people.* Bucharest: Best Publishing.
Rousseau, Jean Jacques. (2017). *The Social Contract*. Bucharest: Antet.
Sartori, Giovanni. (1999). *Theory of democracy reinterpreted*. Bucharest: Polirom.
De Tocqueville, Alexis. (2017). *Despare Democracy in America*. Bucharest: Humanitas.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

FUNDAMENTAL PRINCIPLES OF INTERNATIONAL LAW IN TIME OF WAR

Andra PURAN[1]
Lavinia OLAH[2]

Abstract

International society can only be viewed and analyzed through the relationships between the subjects of public international law and it existence cannot be conceived without norms. The existence of any international entity as a social entity presupposes a series of obligations exercised throughout his life cycle, materialized in a series of norms, which compose a system of rules as a condition for the existence of society's life, a mechanism that requires good management of human relations and removes the imminent danger of chaos.

At the base of this system of rules are the fundamental principles that govern general international law as a whole, being intended to defend the most important values of international society and humanity.

In the context of a war of aggression that destabilized international society, in the era of international relations based on cooperation and diplomacy, we do not hesitate to ask whether these fundamental principles are still respected or not.

Key words: *fundamental principles; international society; war; international responsibility.*

1. Introduction

The dictionary of public international law defines the fundamental principles of public international law as "rules of maximum generality, tacitly or expressly recognized by all the States of the world as binding on them in the cooperative relations between them".

The fundamental principles constitute a distinct category of legal norms, being rules with normative legal value (Moca, Duțu, 2008, p. 113).

In the doctrine (Diaconu, 2005, p. 46) the following definition was proposed: "the fundamental principles of public international law are norms of maximum generality, with universal applicability, the compliance of which is mandatory for all States and other subjects of international law, in order to maintain peace and security and the promotion of international cooperation".

[1] **Lecturer PhD, University of Pitești, Faculty of Economic Sciences and Law, Pitești (Romania), andradascalu@yahoo.com. ORCID:0000-0002-8773-1548**
[2] **Lecturer PhD, University of Pitești, Faculty of Economic Sciences and Law, Pitești (Romania), lavinia_olah@yahoo.com. ORCID: 0009-0003-9330-8337**

The fundamental principles of public international law present certain specific features:
a) they are imperative norms, with jus cogens value. These rules cannot be derogated from, so all other rules adopted to regulate the relations between the subjects of public international law must be in accordance with the fundamental international principles.
b) they have the character of maximum generality.
c) they have a universal vocation, applying to international legal relations in their universality.
d) it defends the fundamental values of particular importance for humanity, such as international peace and security.
e) they are equal in terms of legal value. It is not possible to rank the fundamental principles of public international law, they have the same legal force.
f) they have a dynamic character, being in continuous evolution.
g) they have binding legal force.
h) they are interdependent, their contents conditioning each other. A principle can only be interpreted or applied in the context of the whole system of these principles.
i) they are stable beyond their dynamic character. Their stability emerges precisely from their jus cogens value.

The main international documents that define the fundamental principles of public international law are U.N. Charter, the Declaration of U.N. General Assembly, the Final Act of the Conference on Security and Cooperation in Europe of Helsinki in 1975 and Paris Charter for a New Europe in 1990, which the process of institutionalizing the Conference for Security and Cooperation in Europe and transforming it into the Organization for Security and Cooperation in Europe began.

Declaration of the General Assembly of U.N. since 1970 defines the following principles: Non-recourse to force or the threat of force (principle of non-aggression); Peaceful settlement of international disputes; Non-interference in the internal affairs of other States; International cooperation; The right of peoples to dispose of themselves (the right to self-determination); Sovereign equality of States; Pacta sunt servanda (observance in good faith of assumed obligations).

To these, the Final Act of the Conference for Security and Cooperation in Europe adds three others, which express the evolution process of contemporary international law, namely: Inviolability of borders; Territorial integrity; Respect for fundamental human rights and freedoms.

Among these principles, in the present study we will refer to those that are relevant in the context of the international dispute between Russia and Ukraine.

2. Initially, at the beginning of States -organized societies, jus ad bellum was the main means of capitalizing on the interests of States. However, the non-

recourse to force and the peaceful settlement of international disputes have become the main means of valorizing State interests in international relations. However, today we are witnessing a serious violation of these principles through Russia's war of aggression against Ukraine, a war that seems never-ending and has crossed the borders of the two countries.

For the first time when renouncing war is regulated at an international level, it is through "Briand Kellogg" Pact concluded in Paris in 1928, called the "General Treaty on renouncing war as an instrument of the national policy of States" known as the Pact of Paris or Briand Kellogg Pact, which prohibits the right of States to start war, taking it outside international law and establishing through a binding legal instrument the commitment of States not to resort to war, thus abolishing the old "jus ad bellum".

Art. 2 of U.N. Charter mentions that, in order to achieve the purposes for which it was established, all its members will refrain in their international relations from resorting to threats of force and the use of force, both against the territorial integrity and political independence of a State and in any incompatible way with the goals of the United Nations. It is stated in the doctrine (Scăunaş, 2007, pp. 51-52) that this regulation is ambiguous and that it requires certain changes, the current regulation explaining the fact that war is still used.

However, the use of force is permitted by U.N. Charter. in certain situations, including:

- for the exercise of the right to individual or collective self-defense (Art. 51 of U.N. Charter)
- for sanctioning the aggressors by decision of U.N. Security Council. (Art. 42 of U.N. Charter)

Ukraine was also in the first situation from the moment it was invaded by Russian forces, on February 24th, 2022. The principle of non-recourse to force does not exclude the exercise of the right to self-defense that derives from the national sovereignty of States (Moca, & Duțu, 2008, p. 135).

The second situation, however, is hard to imagine with Russia as a permanent member and with the right of veto within U.N. Security Council.

Declaration of the General Assembly of U.N. on the principles of international law from 1970 defines the war of aggression showing that it is, in essence, a crime against peace that engages responsibility by virtue of international law, resorting to force or the threat of force constituting a violation of international law.

According to this act, States have the obligation to comply with territorial integrity and not to resort to force or the threat of force to violate a State's borders.

However, this obligation was seriously violated by Russia by resorting to the use of armed force against Ukraine under the pretext of the situation of ethnic Russians in Donbas region, a situation based on which the Russians created a "casus belli".

Also, the Final act of the Conference for Security and Cooperation in Europe shows that, first of all, States must refrain from using armed force, especially from military invasion or attack against the territory of another State, adding also refraining from any economic coercion against another State.

However, in response to the invasion of Ukraine, the European Union ordered several economic sanctions against Russia, among other measures. The economic sanctions are intended to have serious consequences for Russia for its actions and to effectively counter its capabilities to continue aggression (www.consilium.europa.eu).

Resolution no. 3314 of U.N. General Assembly from 1974 that defines armed aggression enumerates, by way of example, the acts that constitute direct or indirect armed aggression. Among them are the acts committed by Russia in Ukraine: the invasion or attack of the territory of a State by the armed forces of another State or any military occupation, even temporary, resulting from such an invasion or such an attack or any annexation by the use of force, of the territory of a State or part of its territory; the bombardment by the armed forces of a State of the territory of another State or the use of any weapons by a State against the territory of another State; the attack by the armed forces of a State of the land, naval or air armed forces of another State or its navy or civil aviation; the sending by or on behalf of a State of gangs or armed groups, irregular forces or mercenaries to engage in acts of violence against another State of similar gravity to the acts enumerated above or the fact of engaging substantially to such an action (Wagner mercenaries).

Also, the Resolution provides as an act that constitutes armed aggression and the act of a State to admit that its territory, which it has made available to another State, is used by the latter to commit an act of aggression against a third State. We thus have in mind the support of Belarus in Russia's war against Ukraine, especially by making its territory available for launching missiles against Ukraine. For these acts, Belarus was sanctioned by the European Union.

Closely related to the principle of non-recourse to force or the threat of force are the emergence and evolution of the principle of peaceful settlement of disputes between States.

The first document that defines this principle was Briand-Kellogg Pact of 1928, according to which "the States parties recognize that the regulation or settlement of any disputes or conflicts of any nature or of any origin that they may have, which may arise between them, will never have to be solved except by peaceful means".

This principle was also adopted by U.N. Charter, which stipulates that "all members of the organization will settle their international disputes by peaceful means, in such a way that international peace and security, as well as justice, are not endangered".

Declaration of the General Assembly of U.N. on the principles of international law from 1970 establishes, in essence, the obligations of States to

resort to peaceful means of resolving disputes between them and not to endanger international peace and security.

This principle was reaffirmed and developed by other international documents, in particular by Helsinki Final Act of 1975 and the Declaration of the General Assembly of U.N., on the peaceful settlement of international disputes of 1982. This last document brings as a novelty the obligation of States to act in good faith in their relations in order to prevent disputes, aiming to live in peace and as good neighbors and to contribute to the consolidation of international peace and security.

The content of this principle is expressed in the general obligation to settle disputes peacefully and in the right to freely choose the means of settlement (Popescu, Grigore-Rădulescu, 2015, p. 74).

The difference between Russia and Ukraine has been subject to the means of peaceful settlement, with the two countries trying to reach an agreement through direct negotiations. Also, good offices were performed by Turkey, with the Turkish president expressing his willingness to mediate this dispute. However, it appears that the dispute between the two countries has not been extinguished, nor is there any imminent resolution.

U.N. Charter, in Art. 2 par. 1 uses the expression "sovereign equality" showing that the Organization is based on the principle of the sovereign equality of its members, sovereignty presupposing the supremacy of States internally and their independence externally, but also the equality of rights and obligations internationally of States.

Regarding the sovereignty of the States, in the doctrine (Diaconu, 2005, pp.60-61) some of its essential features were highlighted: the exclusivity of the territory, the original and plenary character of sovereignty, the indivisibility of sovereignty and the inviolability of sovereignty.

According to the Declaration of the General Assembly of U.N. on the principles of international law regarding relations of friendship and cooperation between States, since 1970 the States are equal from a legal point of view; each State enjoys rights inherent to full sovereignty; each State has the obligation to comply with the personality of other States; the territorial integrity and political independence of the State are inviolable; each State has the right to freely choose and develop its political, social, economic and cultural system; each State has the obligation to fulfill its international obligations fully and in good faith and to live in peace with other States.

This principle is closely related to the principle of non-aggression, the principle of territorial integrity and the principle of the inviolability of State borders, principles seriously violated by Russia through the war of aggression against Ukraine.

The sovereign equality of the States is consecrated and guaranteed internationally regardless of the size of the States, their economic or political

power, form of government, etc., being considered inherent to the existence of the village as an entity with international legal personality.

Another fundamental principle of international law is the principle of the inviolability of borders which was added to the seven principles enunciated by the Declaration of the General Assembly of U.N. of 1970, through Helsinki Final Act of 1975, which specifies that "participating States consider each other's borders as inviolable as well as the borders of all the States in Europe and consequently, they will refrain now and in the future from any attack against these borders".

Also, the Act specifies that the signatory States "will refrain from any request or any act of usurping all or part of the territory of any independent State".

The principle of the territorial integrity of States is also introduced by the Final Act of Helsinki from 1975, being closely related to the principle of the inviolability of borders.

The stated international document stipulates that compliance with the territorial integrity of States is done by:

- refraining from any action incompatible with the purposes and principles of U.N. Charter against the territorial integrity, political independence or unity of any participating State and in particular from any such action that constitutes a use of force or threat of force;
- refraining from making the territory of the other the object of a military occupation or other measures of direct or indirect use of force, in contradiction with the international law or the object of an acquisition by such measures or by threatening them, specifying that "no occupation or acquisition of this nature will not be recognized as legal".

Helsinki Final Act of 1975 is the first international document that expressly defines the principle of respect for fundamental human rights and freedoms, although references to it are also made in other international documents that appeared before the Act and its outline was made mainly by defining and guaranteeing in international legal instruments of fundamental human rights and freedoms.

Among other things, Helsinki Final Act of 1975 provides that participating States shall comply with the human rights and fundamental freedoms, shall consistently comply with these rights and freedoms in their mutual relations, and shall endeavor individually and jointly, including in cooperation with the United Nations, to promote the universal and effective compliance of them and will act, in the field of human rights and fundamental freedoms, in accordance with the purposes and principles of U.N. Charter, with the Universal Declaration of Human Rights, fulfilling their obligations, as stated in the declarations and the agreements in this field, including among others in the international covenants related to human rights by which the States could be bound.

During the invasion and occupation of certain territories in Ukraine, Russia grossly violated fundamental human rights and freedoms, with its army committing atrocities in the occupied areas. Thus, on March 17th, 2023, the

International Criminal Court issued arrest warrants on behalf of Vladimir Vladimirovich Putin - the Russian president - and Maria Alekseyevna Lvova-Belova - the commissioner for children's rights of the Russian president. They are allegedly responsible for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation.

The violation of fundamental rights was also found through UN resolution adopted by the Human Rights Council on March 4th, 2022 regarding the human rights situation in Ukraine as a result of Russian aggression, by which the Council decided to establish an independent international commission of inquiry.

The European Parliament also adopted the European Parliament Resolution of January 19th, 2023 on the establishment of a County Court for the crime of aggression against Ukraine (2022/3017(RSP)), calling for the establishment of such a County Court to try crimes against humanity, war crimes and the genocide. Among other things, the European Parliament took into account the order of the International Court of Justice of March 16th, 2022, by which the international court orders the immediate cessation of Russia's military operations on the territory of Ukraine, finding, at the request of Ukraine, that there is no legal justification for the invasion.

3. Conclusions

Despite the fact that jus ad bellum is no longer the main means of capitalizing the interests of States and the non-recourse to force and the peaceful settlement of international disputes characterize international relations, it seems that we are helplessly witnessing a serious violation of international law. With its illegal, unprovoked and unjustified war of aggression against Ukraine, Russia is seriously violating all fundamental principles of international law.

References

Diaconu, D. (2005). *Public international law*. Universul Juridic.
Moca, Gh, & Duțu, M. (2008). *Public international law.* Universul Juridic.
Popescu, C.F, & Grigore-Rădulescu. (2015). *Public international law. Introductory information.* Universul Juridic
Scăunaș, S. (2007). *Public international law. 2nd Edition.* C.H. Beck
www.europarl.europa.eu
www.consilium.europa.eu

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

OBSTACLES TO RECOGNITION OF A FOREIGN COURT JUDGMENT IN POLISH CIVIL PROCEEDINGS

Tomasz Szanciło[1]

Abstract

Judgments of foreign courts rendered in civil matters are subject to recognition in Poland by operation of law, unless there are specific obstacles. These are listed in the Polish Code of Civil Procedurę. A court which decides on the recognition of a foreign court judgement doesn't, in principle, examine the substantive validity of the judgement, as this isn't the subject of these proceedings and, moreover, the merits of the claim can't be decided twice. If one of the obstacles is present, the court dismisses the application for recognition of the foreign courfs decision, which makes such a decision ineffective on the territory of Poland.

The catalogue of obstacles thus determines the selection of judgments of foreign courts. The model adopted in Polish procedural law for the recognition of such judgments is transparent and deals with violations of fundamental procedural issues and basie principles of the Polish legał order.

Key words*: foreign court; judgment; recognition of judgment; obstacle; effectiveness of judgment.*

1. Introduction

The effect of a judgment of a court of a state is, as a rule, limited to its territory, which is related to the national jurisdiction, which is determined by the legislature of that state. In some situations, especially involving an international factor, the parties to legal proceedings (or at least one of them) are interested in the fact that a judgment made in one state has effects in the territory of another state, without the need for additional proceedings. The provisions of the Polish Civil Procedure Code apply in this regard, unless recognition of a foreign judgment is regulated differently in international agreements[2] or European Union

[1] **Dr hab. prof. European University of Law and Administration in Warsaw (Poland), e-mail: tszancilo@ewspa.edu.pl, ORCID: 0000-0001-6015-6769.**

[2] See Decision of the Supreme Court (Poland) of December 7, 1973, II CZ 181/73, OSNC 1974, No. 3-4, pos. 25. With regard to Poland, these are, for example, the agreement between the European Community and the Kingdom of Denmark of October 19, 2005 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Official Journal of the EU L No. 299, p. 62) - relations with Denmark, or the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed in Lugano

law, which take precedence over Polish procedural law. It is necessary to note here:
- Regulation (EC) No. 805/2004 of the European Parliament and of the Council of April 21, 2004 creating a European enforcement order for uncontested claims[1];
- Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of December 12, 2006 establishing a European order for payment procedure[2];
- Regulation (EC) No. 861/2007 of the European Parliament and of the Council of July 11, 2007 establishing a European Small Claims Procedure[3];
- Council Regulation (EC) No. 4/2009 of December 18, 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations[4];
- Regulation (EU) No. 1215/2015 of the European Parliament and of the Council of December 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[5];
- Regulation (EU) No. 606/2013 of the European Parliament and of the Council of June 12, 2013 on mutual recognition of protection measures in civil matters[6].

The most relevant seems to be Regulation No. 1215/2012, which adopts the mechanism that a judgment issued by a court of an EU member state is subject to recognition in other member states ipso iure, without the need for a specific procedure. However, it's possible to initiate proceedings (by any interested party, and in practice by the debtor), as a result of which it will be determined that in the circumstances of a particular case (in casu) either none of the grounds for refusal of recognition is present, or, on the contrary, such grounds exist. The provisions on proceedings to determine the existence or nonexistence of a ground for refusal of recognition apply mutatis mutandis to the course of proceedings for refusal of enforcement (Articles 36(1) and (2), 45(4) and 46 et seq.).

The regulations of Articles 1145 and 1146 of the Code of Civil Procedure apply to the recognition of foreign court judgments when recognition of a judgment isn't regulated by an EU regulation or international agreement[7], unless a bilateral agreement concluded by Poland with a specific state provides otherwise. The Polish legislator has abandoned the principle of reciprocity, so the condition for recognition in Poland of a foreign judgment isn't whether the law of the country of origin of the judgment provides for the recognition of foreign court judgments and on what terms.

---

on October 30, 2007. (Official Journal of the EU L No. 339, p. 3, as amended) - relations with Norway, Switzerland, Iceland and Liechtenstein.
[1] Official Journal of the EU L No. 143, p. 15 as amended.
[2] Official Journal of the EU L No. 399, p. 1 as amended.
[3] Official Journal of the EU L No. 199, p. 1 as amended.
[4] Official Journal of the EU L 2009 r., No. 7, p. 1 as amended.
[5] Official Journal of the EU L No. 351, p. 1 as amended.
[6] Official Journal of the EU L No. 181, p. 4.
[7] Decision of the Supreme Court (Poland) of January 22, 2015, III CSK 154/14, OSNC-ZD 2016, No. B, pos. 29.

2. The essence of recognition of a foreign court judgment

In general, it can be assumed that recognition of a foreign judgment consists in extending its effectiveness, the source of which is the laws of the state of judgment, to the territory of the recognizing state. As a result of recognition, such a judgment is taken into account in the state where it is recognized on a par with judgments rendered in that state by domestic courts, although it doesn't become a domestic judgment, nor does it gain an independent existence in the state of recognition (Piasecki, 1990, s. 13 i n.; Weitz, 1998, p. 84 i n.).

Thus, such a foreign court decision can be the basis for, for example, an entry in the land register, civil status records, registers of Polish courts and authorities. This is because the national authority (in particular, the court of the state of recognition) does not examine the decision of the foreign court on the merits (prohibition révision au fond, also in the course of examining the obstacles to recognition), including as to the correctness of the application of foreign law by the court of the foreign state[1], doesn't control the jurisdiction of the foreign court, and thus whether it had the authority to issue the judgment at all. For example, if a foreign court judgment declaring a divorce were to be recognized as effective in Poland, assessing whether the child's welfare would suffer as a result of the divorce judgment would amount to an impermissible review of the merits of the foreign divorce judgment[2]. A Polish court isn't even called upon to correct inaccuracies or mistakes in a foreign court's decision[3], including the name of the participant in the proceedings, different from that resulting from the Polish civil status certificate[4].

The concept of a foreign judgment should be understood not only as such a decision of a foreign court, which, as to its form, corresponds to the concept of judgments provided for by Polish law, but all kinds of decisions which, according to the law of the country in which they were issued, produce extra-procedural legal effects[5]. It's important that it was issued in a civil case. Such a judgment

[1] Decision of the Supreme Court (Poland) of April 27, 2006, I CSK 18/06.
[2] Decision of the Supreme Court (Poland) of May 7, 1980, IV CR 116/80, OSNC 1980, No. 11, pos. 220.
[3] Decision of the Supreme Court (Poland) of August 27, 1975, I CR 465/75, OSNCP 1976, No. 7-8, pos. 170.
[4] Resolution of the Supreme Court (Poland) of May 9, 1995, III CZP 55/95, OSNC 1995, No. 9, pos. 126.
[5] Decision of the Supreme Court (Poland) of November 25, 1977, I CR 9/77, OSNC 1978, No. 9, pos. 162. According to Article 2 lit. a of Regulation No. 1215/2012, „judgment" means any judgment rendered by a court of a Member State - however defined - including a judgment, decision, injunction, writ of execution, and order for the determination of costs of proceedings issued by an officer of the court, including provisional, including protective, measures ordered by a court that has jurisdiction under the Regulation to rule on the merits of the case; this definition does not include interim measures, including precautionary measures, ordered by such a court without summoning the defendant to appear, unless the judgment containing the measure has been served on the defendant prior to execution.

isn't, for example, a judgment of a foreign court dismissing an action to set aside an arbitral award[1], legal decision rejecting a lawsuit, or a court settlement, as a result of which the foreign court discontinued the proceedings.
Recognition is only granted to those judgments which are characterized by their effectiveness, understood as the possibility of producing legal effects - in accordance with the procedure of the recognizing state. Therefore, a foreign (recognized) judgment should be characterized by the force of res judicata and binding force - both for the parties to the proceedings and for Polish authorities[2]. Recognition applies to all effects of the judgment, except for its enforceability (Strumiłło, in: Jankowski (ed.), 2019, side number 10). Recognized produces only such effects as are provided for by the law of the judgment's country of origin, and therefore can't produce effects provided for by the law of the state of recognition that aren't provided for by the law of the country of origin. The question of triggering by a foreign judgment of effects unknown to the law of the state of recognition (and therefore to Polish law) is disputed. We can distinguish two basic concepts in this matter (Strumiłło, in: Jankowski (ed.), side number 15). The first is the theory of extending the effectiveness of (German: *Wirkungserstreckungstheorie*; English: *extention of effects theory*), according to which recognition leads to the attribution to judgments of such effects as they have in the state of origin (issuance). It seems, however, that in Polish law the second theory prevails - the theory of equalization (cumulation; German: *Gleichstellungstheorie*; English: *equalisation of effects theory*), according to which the extension of the effects of a foreign judgment is only to the extent that the law of the recognizing state permits it (Weitz, 1998, p. 56–57). Thus, as a rule, it's the law that sets the limits of recognition and the recognized judgment can't produce an effect unknown to the law of the state of recognition. A somewhat indirect view is also expressed, namely, that as long as the effect of a foreign court decision unknown to the Polish legal order would not be contrary to the Polish legal order (the public policy clause), it would be necessary to try to recognize such an effect by way of an institution of adjustment, through the analogous application of an institution similar to that unknown to the Polish legal order (Orecki, in: Wiśniewski (ed.), 2021).

Both judgments that are subsequently enforceable (by a bailiff) and a judgment unsuitable for enforcement by way of execution are subject to recognition. If a recognized foreign court judgment is suitable for enforcement by way of execution, it becomes an enforceable title after it is declared enforceable by a Polish court (Article 1150 of the Code of Civil Procedure), which allows enforcement to be initiated on Polish territory.

[1] Decision of the Supreme Court (Poland) of November 6, 2009, I CSK 159/09.
[2] Ruling of the Court of Appeals in Warsaw, of September 30, 2008, I ACa 385/08.

3. Mechanism for recognition of a foreign court judgment

Until June 30, 2009, Polish law provided for the so-called deliberation procedure, which consists in checking a foreign judgment for fulfillment of the prerequisites for recognition and enforceability under the law of the state of recognition[1]. Modeling itself on the solutions of European civil procedural law, the Polish legislator has introduced a system of automatic recognition of foreign judgments since July 1, 2009 (recognition *de plano*, *ipso iure*, *ex lege*) (On the different methods of treating foreign judgments, see Ereciński, in: Ereciński (ed.), 2017, art. 1145, thesis number 2). Thus, the premise is that judgments of foreign courts issued in civil cases are subject to recognition by operation of law, unless there are certain obstacles - the so-called obstacles to recognition (Article 1145 of the Code of Civil Procedure). This is in line with the solution adopted in Council Regulation (EC) No. 44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in force until January 9, 2015[2], which provided for automatic recognition, i.e. without the need for deliberation proceedings, and the possibility of declaring a judgment enforceable in another member state. The second mechanism provided for in EU law was adopted in Regulation No. 1215/2012, which, as indicated, also provides for automatic recognition of the judgment and enforceability, but with the possibility for the debtor to oppose both recognition and enforcement of the judgment.

The model adopted in Polish law means that a foreign judgment becomes effective as soon as it has effect in the country of origin, provided that the prerequisites for recognition have been met (Wołodkiewicz, in: Rylski (ed.), 2022, art. 1145, thesis number 7). Thus, a mechanism of automatic recognition of foreign judgments has been applied, so they produce effects by operation of law, without the need for additional proceedings. Thus, a foreign judgment becomes effective in Poland at the same moment that it became effective in the country of origin, unless the circumstances listed in Article 1146 of the Code of Civil Procedure, i.e. obstacles to recognition, occur. This is determined by the moment when the judgment became effective in the country of origin. If the foreign court's decision consists of several separate parts (e.g., it concerns several claims), it is possible to partially recognize it and refuse to recognize it in the part about which

[1] Such proceedings (with possible exceptions) are mandatory and there is no possibility of recognition incidentally in another case or by another authority. Pursuant to Article 1145 § 1 of the Code of Civil Procedure, in the wording in effect until June 30, 2009, the effectiveness in the territory of Poland of foreign court judgments in civil cases that weren't enforceable by way of execution, which belonged in Poland to the judicial route, depended on their recognition by a Polish court. Recognition of a foreign judgment took place when the recognition order became final, but with effect from the moment the foreign judgment became effective in its country of origin (Decision of the Supreme Court of April 2, 1975, II CR 67/75).

[2] Official Journal of the EU L 2001, No. 12, p. 1 as amended; replaced by Regulation No. 1215/2012.

there are obstacles to recognition. On the other hand, if a foreign judgment has been annulled, so that it ceases to have legal effects under the law of its country of origin, at the same time it ceases to have legal effects in Poland, as the country of recognition.

If a Polish court finds that a case covered by a foreign court decision is a civil case, it examines whether the negative prerequisites listed in Article 1146 of the Code of Civil Procedure do not exist. If they don't exist, it recognizes the effectiveness of the foreign judgment, which is done as a preliminary ruling, without issuing any ruling on the issue (Borkowski, in: Szanciło (ed.), 2023, p. 1925). Thus, the assessment of the prerequisites for recognition takes place in the proceedings whose outcome is affected by the foreign judgment, while it isn't binding on the court in other proceedings, which may assess the existence of obstacles to recognition differently. Different authorities may assess this issue differently, giving the foreign judgment effect in the territory of Poland or refusing it. Therefore, anyone who has a legal interest in this may apply to a court to determine that a foreign court judgment is or is not subject to recognition (Article 1148 § 1 of the Code of Civil Procedure). Only the decision made in this procedure is binding on other authorities in other proceedings.

4. Obstacles to recognition of a foreign court judgment

4.1. The essence of the obstacles to recognition

The introduction of grounds for refusing to recognize a foreign judgment is intended to prevent (in certain situations) the extension of its effectiveness to the territory of the recognizing state. *De lege lata*, these grounds are framed negatively and constitute obstacles to the recognition of a foreign judgment (Article 1146 of the Code of Civil Procedure), as well as obstacles to the declaration of enforceability of a foreign judgment (Article 1150 *in fine* of the Code of Civil Procedure). These obstacles are examined by the court ex officio, and thus regardless of whether an objection is raised in this matter[1]. Therefore, it is the court's duty, not just its power. However, it is the party's duty to submit an official copy of the judgment of a foreign court, a document stating that the judgment is final, unless the final validity of the judgment is apparent from its contents, and a certified translation into Polish of both documents. If the judgment was issued in a proceeding in which the defendant didn't enter an appearance on the merits, a document stating that the letter initiating the proceeding was served on him must be presented (Article 1147 of the Code of Civil Procedure).

The catalog of impediments to recognition is closed (enumerative enumeration in Article 1146 of the Code of Civil Procedure) and as exceptions to the rule (recognition of a foreign court decision) can't be interpreted broadly. Nevertheless, it's pointed out that there are some problems arising from public

[1] See Decision of the Supreme Court (Poland) of August 23, 1990, I CR 415/90.

international law - the assessment of the consequences of a foreign court issuing a judgment in violation of immunity from jurisdiction, enforcement or the Polish state, which circumstances aren't listed in Article 1146 of the Code of Civil Procedure. It's stressed that in such a situation one cannot limit oneself to this provision alone. According to Article 9 of the Constitution of the Republic of Poland, the Republic of Poland respects international law binding on it. Therefore, it's necessary to look for the possibility of taking into account the violation of a party's immunity from jurisdiction by the court of the state of origin as an obstacle to the recognition of a foreign judgment, and when this violation occurred to the detriment of Poland as the recognizing state, it's possible to consider the qualification of this circumstance from the perspective of the public policy clause (Wołodkiewicz, in: Rylski (ed.), art. 1146, thesis number 10; see also Grzegorczyk, 2010, p. 614 i n.).

4.2. Individual obstacles to recognition

According to Article 1146 § 1 of the Code of Civil Procedure, a judgment is not subject to recognition if:
1) it isn't final in the country where it was issued;
2) it was made in a case falling within the exclusive jurisdiction of Polish courts;
3) the defendant, who didn't enter an appearance on the merits of the case, wasn't duly served with the writ of summons initiating the proceedings in sufficient time to enable him to defend himself;
4) a party in the course of the proceedings was deprived of the possibility of defense;
5) a case for the same claim between the same parties was pending in the Republic of Poland earlier than before a court of a foreign state;
6) it's inconsistent with an earlier final judgment of a Polish court or an earlier final judgment of a court of a foreign state satisfying the conditions for its recognition in the Republic of Poland, made in a case involving the same claim between the same parties;
7) recognition would be contrary to the fundamental principles of the legal order of the Republic of Poland (public policy clause).

Re 1) According to the position adopted in the case law and the prevailing part of the literature based on the assumption that the qualification of concepts in the field of international civil proceedings should be made according to the law in force at the seat of the court, the term „validity" (used in Article 1146 § 1(1) of the Code of Civil Procedure) means formal validity in the sense adopted in Article 363 § 1 of the Code of Civil Procedure, i.e. a state of affairs expressed by the impossibility of bringing an appeal or other legal remedy against the judgment. In other words, it is the impossibility of revoking or amending the judgment in the

course of the same proceedings in which it was issued[1]. Since there would often be difficulties in determining whether a foreign court judgment is final, a person invoking recognition of such a judgment is obliged to present a document stating that it is final, unless the validity of the judgment is apparent from its contents (Article 1147 § 1(2) of the Code of Civil Procedure).

Re 2) Exclusive domestic jurisdiction of Polish courts may arise not only from the provisions of the Code of Civil Procedure, but also from European Union law or international agreements. In the period before the system of automatic recognition of foreign judgments, case law indicated that a case shouldn't fall under the exclusive jurisdiction of a Polish court both on the date of the foreign court's decision and on the date of the Polish court's decision to recognize the foreign court's decision, with the most relevant „jurisdictional situation" on the date of the foreign court's decision[2]. At present, it is the jurisdictional situation existing at the time the foreign judgment became final that decides. However, the court should take into account a subsequent change, i.e. refuse to recognize it, if at the time of the Polish court's assessment of this premise the case would already be within its exclusive jurisdiction (Ereciński, in: Ereciński (red.), art. 1146, thesis number 11.) - as a result of a change in factual circumstances (e.g., a party's change of residence) or a change in legal status.

The exclusive jurisdiction of Polish courts has been provided for in cases:

1) matrimonial and matrimonial property relations, if both spouses are Polish citizens and have their domicile and habitual residence in Poland (Article 1103(1) § 2 of the Code of Civil Procedure);

2) from relations between parents and children, if all persons appearing as parties are Polish citizens and have their domicile and habitual residence in Poland (Article 1103(2) § 2 of the Code of Civil Procedure);

3) for rights in rem in immovable property and for possession of immovable property located in Poland, as well as cases from the rental, lease and other relations concerning the use of such property, except for cases for rent and other dues related to the use or collection of benefits from such property (Articles 1103(8) § 1, 1107(1) and 1110(2) of the Code of Civil Procedure);

4) other than those mentioned in item 3 to the extent that the settlement concerns rights in rem, possession or use of real estate located in Poland (Article 1103(8) § 2 of the Code of Civil Procedure);

5) for dissolution of a legal person or an organizational unit that isn't a legal person, as well as for revoking or declaring invalid the resolutions of their bodies, if the legal person or the organizational unit that isn't a legal person has its seat in Poland (Article 1103(9) of the Code of Civil Procedure);

[1] See decisions of the Supreme Court (Poland) of: February 6, 1975, II CR 849/74, OSNC 1975, No. 1, pos. 11; May 31, 2020, I CKN 183/00, OSNC 2000, No. 12, pos. 225.

[2] Decision of the Supreme Court (Poland) of July 15, 1978, IV CR 242/78, OSNC 1979, No. 6, pos. 120.

6) for incapacitation, if the person who is the subject of the application for incapacitation is a Polish citizen with residence and habitual place of stay in Poland (Article 1106(1) § 2 of the Code of Civil Procedure);

7) for adoption, if the adopter, or, in the case of joint adoption, each of the adopting spouses, and the person to be adopted are Polish citizens with residence and habitual residence in Poland (Article 1106(4) § 3 of the Code of Civil Procedure);

8) from the scope of registration proceedings concerning a register kept in Poland (Article 1109(1) § 1 of the Code of Civil Procedure);

9) for dissolution of a legal person or a non-corporate organizational unit, if the legal person or non-corporate organizational unit has its registered office in Poland heard by the registry court (Article 1109(1) § 2 of the Code of Civil Procedure);

10) enforcement, if enforcement is to be initiated or conducted in Poland (Article 1110(4) of the Code of Civil Procedure).

Re 3) The system of automatic recognition of a judgment must ensure the right to defend oneself before the court of the country of origin of the judgment. This right is one of the most important principles of civil procedure. Article 1146 § 1(3) of the Code of Civil Procedure refers to the stage of initiation of proceedings, and the next section refers to pending proceedings (a case in progress). In the first situation, it's about a defendant who has not entered an appearance on the merits in the proceedings conducted in the country of origin of the judgment, that is, when the defendant didn't participate in the proceedings at all, as well as when his defense was limited to formal objections. Guaranteeing the defendant a real opportunity to defend himself requires that he be given the opportunity to familiarize himself with the reasoning of the statement of claim, which should therefore be served on him by the court. Thus, it isn't sufficient for anyone to simply inform the defendant that a case has been brought against him, nor is it sufficient to simply notify him of the date of the hearing of such a case, especially if the hearing is conducted by a foreign court[1]. The condition for this is that the party wasn't properly served with the letter initiating the proceedings and in time to be able to defend himself. This means that the failure to serve a statement of claim does not in itself cause a deprivation of the opportunity to defend, if the party was notified of the date of the hearing and its purpose and had the opportunity to raise defense objections and didn't use it[2].

The examination of whether a party was deprived of the opportunity to defend itself in the court of the country of origin should be based on the procedural law of the country of origin (*lex fori processualis*), However, the assessment of whether a deprivation of the opportunity to defend oneself has occurred is not limited to the correctness of the application of foreign procedural

[1] Decision of the Supreme Court (Poland) of November 25, 1998, II CKN 70/98.
[2] See decision of the Supreme Court (Poland) of November 26, 1981, IV CR 422/81, OSNC 1982, No 5-6, pos. 85.

law and belongs to the Polish court, which isn't bound in this respect by the findings of the court issuing the judgment. This means that the Polish court is obliged to refer to the understanding of the concept of „deprivation of the possibility of defense" adopted in Polish science and jurisprudence (Piasecki, 1980, p. 82 i n.).

Articles 1146 § 1(3) and (4) of the Code of Civil Procedure don't require that service in proceedings before the court of the State of origin be made in every situation to the addressee's own hands. A different method of service can't be considered *per se* as an obstacle to the declaration of enforceability of a foreign judgment, since the Polish legal order also allows for a waiver of hand delivery, and such solutions - justified by the desire to balance the interests of the plaintiff and the defendant - are necessary to prevent obstruction of court proceedings and are of a common nature in a comparative legal context[1]. Polish law, unlike Regulation No. 1215/2012, doesn't, however, require a defendant who invokes this ground to challenge the judgment in the country of origin, if he or she had the opportunity to do so.

Ad 4) Article 1146 § 1(4) of the Code of Civil Procedure, unlike the previous paragraph, which applies only to the defendant, protects all parties to the proceedings, and therefore also the defendant who has entered a dispute on the merits. This provision applies to the entire course of the proceedings, not just the initiation of them.

Re 5) The pendency of a case before a court of a foreign state (*lis alibi pendens*) is respected by Polish law. The court appointed to decide the case - within the meaning of Article 1146 § 1(5) of the Code of Civil Procedure. - is the Polish court with jurisdiction to hear the case. The term „Polish court" in this case means that there is domestic jurisdiction of Polish courts to resolve the case, regardless of whether the specific Polish court before which the suit was filed has material or local jurisdiction[2]. Thus, it doesn't matter whether the lawsuit was filed in a competent Polish court, as long as the lis pendens for the same claim between the same parties occurred before that court earlier than before a foreign court. This occurs when a copy of the statement of claim is served on the defendant (Article 192(1) of the Code of Civil Procedure).

The pendency of a dispute (litispendens, lis pendens) is determined by two elements (boundaries): subjective and object. As for the subjective aspect, it's irrelevant in what procedural roles the parties to both disputes appear, i.e. the plaintiff in one case may be the defendant in the other case (e.g., the parties, independently of each other, bring actions to establish the same legal relationship, or one party brings an action to establish the existence of a legal relationship, and the other to establish its non-existence). The substantive limits of lis pendens in the doctrine are more broadly understood than by referring to the demand

[1] Decision of the Supreme Court (Poland) of June 2, 2017, II CSK 704/16, OSNC-ZD 2018, No. C, pos. 43.
[2] Decision of the Supreme Court (Poland) of July 5, 2006, IV CSK 77/06.

formulated in the lawsuit and the facts cited to justify the demand. The limits of lis pendens are determined by the purpose of the legal protection sought (Olczak-Dąbrowska, in: Szanciło (ed.), 2023, p. 849). The adoption of a state of lis pendens is also not precluded by the fact that one of the cases involves an action for performance and the other an action for determination, as long as both cases in fact involve both identical claims and parties[1].

As for the subject matter boundaries, it's a well-established view in the jurisprudence of Polish courts that the identity of a claim occurs when not only the subject matter, but also the basis of the claim is the same[2]. It's a question of asking the court to resolve a specific legal problem, identical in every aspect, growing out of the same facts[3]. This is important, because the state of lis pendens is examined by the Polish court, taking into account the provisions of the Polish law, but at the moment of pendency of the case before the foreign court (this moment is determined according to the law in force at the seat of this court).

Ad 6) Conflict of judgments rendered between the same parties for the same claim is resolved according to the first-in-time rule (Weitz, 2001, p. 926), in which *res iudicata* is manifested. In order for it to be impossible to recognize a judgment of a foreign court on this basis, a Polish court must have previously issued a final judgment with a different content in a case involving the same claim between the same parties, or alternatively, a court of a foreign state has previously issued a final judgment meeting the prerequisites for its recognition in Poland. On the other hand, since the mechanism of automatic recognition applies, the judgment of a foreign court from the moment of its recognition is an obstacle to the issuance of a judgment by a Polish court in the same case, so if the Polish court issues a judgment, the proceedings will be invalid (Article 379(3) of the Code of Civil Procedure) (Kulski, in: Marciniak (ed.), 2020, art. 1146, side number 15).

Article 1146 § 1(5) and (6) of the Code of Civil Procedure, i.e. relating to *lis pendens* and *res iudicata*, doesn't apply when a judgment of a court of a foreign state declares, in accordance with the provisions of that state on domestic jurisdiction, the acquisition by a person living or domiciled in Poland of inheritance property located on the territory of the foreign state at the time of the testator's death. This regulation serves to protect the rights to the inheritance located abroad of persons residing on Polish territory (Rylski, in: Dolecki, Wiśniewski (ed.), 2013, art. 1146, thesis number 31). In this regard, the Polish legislator has allowed a broader possibility of recognizing a foreign judgment.

Ad 7) The public policy clause (ordre public clause) is intended to protect the legal order of the state of recognition against its violation in the situation of recognition and enforceability of a foreign court judgment that doesn't correspond

[1] Ruling of the Supreme Court of November 9, 1962, II CR 897/62, OSNC 1963, No. 10, pos. 12.
[2] See, for example, Ruling of the Supreme Court of June 9, 1971, II CZ 59/71, OSNC 1971, No. 12, pos. 226.
[3] Decision of the Supreme Court of June 1, 2011, II CSK 427/10.

to fundamental legal standards (here: Poland). It's of an auxiliary nature, i.e. it is applicable when there is no other ground for refusal of recognition, but the foreign court judgment can't be accepted. It is also not permissible to decide on the recognition of a foreign judgment on the basis of Article 1146 § 1(7) of the Code of Civil Procedure instead of on the basis of an international convention binding on Poland[1]. Although international conventions, as a rule, contain a public policy clause for the recognition of judgments of courts of a state party to the convention, when they don't contain such a clause, two positions are possible: either the impossibility of generally precluding the refusal to recognize a judicial decision of a state with which Poland is bound by a bilateral agreement (Jodłowski, 2000, p. 37 i n.), or the lack of grounds to apply this clause on general principles (Piasecki, 1990, p. 101). It seems that since the parties (states) to the international agreement didn't provide for some reason for this ground for refusal of recognition, it's necessary to give primacy to their will.

Contradictory to the basic principles of the Polish legal order isn't necessarily the judgment itself, but its recognition. It's unanimously accepted that by the basic principles of the legal order should be understood not only the fundamental principles of the socio-political system, i.e. constitutional principles, but also the supreme principles governing individual areas of law: civil, family, labor, as well as procedural law (Ereciński, in: Ereciński (ed.), art. 1146, No 26)[2]. A foreign court decision doesn't have to comply with all provisions of Polish law. What is important is that the mere dissimilarity of a foreign law, even a very far-reaching or even blatant dissimilarity, isn't sufficient to refuse to apply it or to refuse to recognize the effectiveness or declare enforceability of a judgment based on it by invoking the public policy clause. Necessary for this is the obvious and blatant incompatibility of the effects of the application of this law or the recognition of the effectiveness or declaration of enforceability of a foreign judgment with the fundamental principles of the legal order of the state applying the law or the state of recognition or enforcement. Otherwise, the norms of private international law would lose their meaning, because in view of the differences that exist between the different legal systems, the application of the foreign law indicated by these norms could not occur in practice; similarly, because of these differences, it would be practically impossible to recognize the effectiveness and enforceability of foreign judgments[3].

For example, based on the jurisprudence of the Polish Supreme Court, it can be pointed out that:

[1] See decision of the Supreme Court of February 7, 2000, I CKN 372/98, OSNC 2000, No. 9, pos. 156.
[2] Decisions of the Supreme Court of: z April 21, 1978, IV CR 65/78, OSNC 1979, No. 1, pos. 12; June 21, 1985, III CRN 58/85
[3] Decision of the Supreme Court of October 11, 2013 r., I CSK 697/12, OSNC 2014, No. 1, pos. 9.

- the basic principle of the legal order in the framework of contractual civil relations is the principle of autonomy of will and equality of parties[1];

- fundamental „procedural unfairness" - amounting to a violation of the guiding procedural principles, such as adversarialism and the right to a defense - falls within the concept of public policy[2];

- the fundamental principle of legal order is the obligation to compensate for the damage suffered, so the public policy clause is violated when the compensation awarded by a foreign court doesn't correspond to the damage suffered, or was awarded although the damage wasn't caused at all[3];

- a foreign court judgment awarding alimony in the amount of one-fourth of earnings may be enforced in the territory of Poland, and the manner of determining the amount of alimony due from the father to the minor child cannot be counted among the fundamental principles of the legal order of Poland[4];

- in violation of the constitutional principle of protection of the rights of the child is a decision of a court of a foreign country, which, by virtue of the mere departure of the mother with the child from that country, found that there are no child support arrears of the father, and ordered the mother to return to the applicant the amounts collected for the support of the child[5];

- foreign court decision excluding inheritance between divorced spouses isn't contrary to the fundamental principles of the Polish legal order[6].

5. Conclusions

Summarizing the above discussion, several conclusions of a general nature should be pointed out:

1) the provisions of Polish law on the recognition of a foreign court judgment are applicable when no different regulation is contained in international agreements and the provisions of EU law;

2) the Polish legislator has adopted a mechanism for automatic recognition of foreign court judgments, dispensing with the need to conduct any proceedings in this regard;

3) in Polish law there is the possibility of applying to a court to determine that a foreign court judgment is or is not subject to recognition, and the court's decision will be effective not only in a particular case;

4) the catalog of impediments to recognition of foreign court judgments is closed; these impediments cannot be interpreted broadly;

[1] Decision of the Supreme Court of March 9, 2004 r., I CSK 412/03.
[2] Decision of the Supreme Court of March 28, 2007 r., II CSK 533/06.
[3] Ruling of the Supreme Court of June 11, 2008 r., V CSK 8/08.
[4] Decision of the Supreme Court of July 9, 1973, I CZ 51/73.
[5] Decision of the Supreme Court of July 6, 2005 r., III CK 1/05.
[6] Decision of the Supreme Court of February 26, 2003 r., II CK 13/03, OSNC 2004, No. 5, pos. 80.

5) the catalog of these obstacles is not broad, it concerns the basic issues of civil proceedings: finality of judgments, exclusive domestic jurisdiction, deprivation of the party's ability to defend himself, lis pendens and res judicata;

6) a general clause of contradiction of recognition of a foreign court judgment with the fundamental principles of Poland's legal order has been introduced to allow refusal of recognition of such a judgment if there is no other basis for refusal of recognition, but this judgment cannot be accepted in view of the legal order of the Polish state.

References

Borkowski, P. (2023). In T. Szanciło (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom II. Art. 459-1217*. Warsaw.

Ereciński, T. (2017). In T. Ereciński (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom VI. Międzynarodowe postępowanie cywilne. Sąd polubowny (arbitrażowy)*. Warsaw.

Grzegorczyk, P. (2010). *Immunitet państwa w postępowaniu cywilnym*. Warsaw.

Jodłowski, J. (2000). *Uznanie i wykonywanie zagranicznych orzeczeń sądowych na tle orzeczenia Sądu Najwyższego*. Warsaw.

Kulski, R. (2020). In A. Marciniak, *Kodeks postępowania cywilnego. Komentarz. Tom V. Art. 1096-1217*. Warsaw.

Olczak-Dąbrowska, D. (2023). In T. Szanciło (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom I. Art. 1-458[16]*. Warszawa.

Orecki, M. (2021). In T. Wiśniewski (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom V. Art. 1096-1217*. Warsaw.

Piasecki, K. (1980). Pozbawienie możności obrony w międzynarodowym procesie cywilnym. *Państwo i Prawo* , No. 11.

Piasecki, K. (1990). *Skuteczność i wykonalność w Polsce zagranicznych cywilnych orzeczeń sądowych*, Warsaw.

Rylski, P. (2013). In H. Dolecki, T. Wiśniewski (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom V. Art. 1096-1217*, Warsaw.

Strumiłło, T. (2019). In: Jankowski (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom II. Art. 730-217*, Warsaw.

Weitz, K. (1998). Pojęcie uznania orzeczenia zagranicznego. *Przegląd Sądowy*, No. 7-8.

Weitz, K. (1998). Skutki uznania zagranicznego orzeczenia. *Przegląd Sądowy*, No. 9.

Weitz, K. (2001). Założenia i kierunki reformy przepisów kodeksu postępowania cywilnego o uznawaniu i wykonywaniu zagranicznych orzeczeń. *Kwartalnik Prawa Prywatnego*, No. 4.

Wołodkiewicz, B. (2022). In P. Rylski (ed.). *Kodeks postępowania cywilnego. Komentarz*. Legalis.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

TAKING OF EVIDENCE BY INTERNATIONAL ROGATORY COMMISSION BETWEEN THE COURTS OF THE MEMBER STATES OF THE EUROPEAN UNION - REGULATION NO. 1783/2020

Andreea Elena TABACU [1]

Abstract

The new Regulation (EU) no. 1783/2020 resumes the rule from the previous regulation, which provides for direct communication between the courts involved in order to obtain evidence but shows that requests and communications are transmitted through a decentralized, secure and reliable IT system, with due respect for rights and freedoms fundamentals.

Priority is given to the use of international rogatory commissions by accessing the online environment, without denying the possibility of direct taking of evidence, by the participation of the magistrates of the requesting court in the taking of evidence on the territory of the requested European state, but the use of communication technology, such as videoconference or teleconference, is encouraged, precisely to ensure the speed and efficiency of the taking of the evidence.

Key words: *taking of evidence; international power of attorney; European Regulation; online environment; communication technology.*

1. Introduction

The unfolding of the civil trial may in certain situations, in the case of legal relations with an extraneous element, require the taking of evidence in a place other than the one in which the court competent to resolve the case is located, as an exception to the rule of immediacy.

In domestic civil procedural law, in legal relationships without an element of extraneousness, the problem can be raised that the evidence be administered before a court other than the one that has to pronounce the decision by which the respective dispute is resolved, since the said evidence is at a considerable distance from the seat of the court and it would be more effective for the procedural act if it were drawn up by rogatory commission and not before the court that has to resolve the case.

[1] **Ph D Asoociated Professor University Of Pitesti, Faculty of Economic Sciences and Law, Pitești (Romania), email: zoom.tabacu@gmail.com.**

Even more so if the said evidence is beyond the country's borders, the participation of judicial bodies from a foreign state is needed to obtain and administer the said evidence, which will later be sent to the competent court to resolve the case, since it does not have the possibility to extend its competence beyond the borders of the state whose authority it bears.

At the level of the European Union in the matter under discussion, the legislator opted only in 2000 for the adoption of a community regulation, which would standardize the procedures of this form of cooperation between the member states, until then the aspect was regulated by international conventions[1]. Regulation no. 1206/2001[2] was thus adopted, which sought to ensure the proper functioning of the internal market by simplifying and accelerating cooperation between the courts of the member states in the field of obtaining evidence.

According to it, the Commission was obliged to present to the European Parliament, the Council and the Social and Economic Committee, every 5 years, a report on the concrete application of the regulation, and, over time, aiming to improve the regulation, the European legislator considered it necessary to adopt a new regulation, in this case Regulation no. 1783/2020 regarding the cooperation between the courts of the member states in the field of obtaining evidence in civil or commercial matters[3], which repealed Regulation no. 1206/2001 and which applies starting from 1 July 2022.

2. The main modification

When drafting the initial Regulation (EU) 1206/2001, the legislator also took into account the dynamism of the procedures, respectively their efficiency, in the Preamble of the normative act showing that a solution for a judicial procedure in civil or commercial matters to be useful is that the transmission and execution of requests to fulfill of a research act to be done directly and by the fastest possible means between the courts of the Member States. At the same time, it was shown what is meant by the rapidity of the transmission, being indicated a maximum period of ninety days from the receipt by the requested court, in which it will send its response, respectively the evidence administered at the request of the foreign court[4].

The new Regulation (EU) 2020/1783 aims to improve and accelerate cooperation between the courts of different member states in the field of obtaining

[1] The Hague Convention of March 18, 1970, on the Taking of Evidence Abroad in Civil or Commercial Matters.
[2] Regarding the cooperation between the courts of the Member States in the field of obtaining evidence in civil or commercial matters, published in the Official Journal of the European Union No L 174 (June 2001) 1-24.
[3] Published in the Official Journal of the European Union No L 405 (2020) 1-39.
[4] It is a form that must be completed in the language of the Member State of the requested court or in another language accepted by the respective Member State.

evidence, aiming at: improving the effectiveness and speed of judicial procedures, by simplifying and optimizing cooperation mechanisms in terms of obtaining evidence in cross-border proceedings, reducing delays and costs for individuals and the business environment. Considering the development of relationships in the online environment, as well as the fact that through this regulation the effective transition to a concrete communication in this environment and to digitization is achieved, it is foreseen that it is necessary to offer an increased degree of security of the transmitted data.

After resuming the rule from the previous regulation, which provides for direct communication between the courts involved ("requesting court" and "requested court") to obtain evidence, Regulation (EU) 1783/2020 shows that requests and communications are transmitted through a decentralized, secure and reliable IT system, with due respect for fundamental rights and freedoms (Onişor, 2022, pp.307-308)[1]. This decentralized IT system is subject to Regulation (EU) 910/2014[2] which also applies to requests and communications sent through the decentralized IT system. Regarding the fact that Directive 1999/93/EC of the European Parliament and of the Council[3] was not intended to provide a comprehensive cross-border and intersectoral framework for secure, reliable and easy-to-use electronic transactions, the purpose of Regulation (EU) 910/2014 was to increase trust in electronic transactions on the internal market to increase the efficiency of online services in the public and private sector, electronic economic activities and electronic commerce in the Union[4].

3. The specific procedure

Similar to the situation of the form of cooperation in the matter of evidence between the Member States at international conventions, the regulation requires that in each state a central body be designated that is responsible for providing information to the courts and for seeking solutions to the difficulties that may arise in connection with a request. These authorities do not have the role of transmitting the request between the courts of the Member States, except in exceptional cases, as the law provides that the transmission is carried out directly

[1] Same for the Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

[2] Regarding electronic identification and trust services for electronic transactions on the internal market and repealing Directive 1999/93/EC, published in the Official Journal of the European Union, No L 257 (2014) 73-114.

[3] Regarding a Community Framework for Electronic Signatures, published in the Official Journal of European Communities, No L 13 (2000) 12-20.

[4] Among other things, rules were established for trust services, in particular for electronic transactions, and the legal framework for electronic signatures, electronic seals, electronic time stamps, electronic documents, registered electronic distribution services and certification services for website authentication.

between the courts. In Romania, by Law no. 189/2003, the Ministry of Justice was designated as the central authority.

To obtain information regarding the language used to complete the forms, as well as the language used to translate the documents attached to them, accepted and notified to the European Commission by the member states of the European Union, the competent Romanian authorities access the specialized website of the European Commission and consult the contact points of the European Judicial Network in civil and commercial matters (Onaca, Burduf, Schuster, 2010, p. 25)[1].

The request, drawn up in the language of the requested state[2], includes: the requesting court and, if applicable, the requested court, the name and address of the parties and, if applicable, their representatives, the nature and object of the case and a summary statement of the facts, the research document that follows to be fulfilled, if a request refers to the hearing of a person: – the name and address of the persons to be heard, – the questions to be asked to the persons to be heard or the facts on which they must be heard, – if applicable, the mention of the right to refuse to testify according to the legislation of the member state of the requesting court, – if applicable, the request for testimony under oath or under own responsibility and, if applicable, any special form to be used, – if applicable, any other information that the requesting court deems necessary. In the case of a request related to another research document, the documents or other objects to be examined and any necessary information will be attached.

The application and all documents attached to the application are exempt from legalization or any other equivalent formality.

In order to facilitate the taking of evidence by the requested authority, the documents that the requesting court deems necessary to attach for the execution of the request must be translated into the language in which the request is made.

Upon receipt of the request, the requesting state will be sent the confirmation of receipt, the content of which is determined by the B form established by the regulation, in which it will also state whether the request is incomplete. If the request cannot be executed due to its incompleteness[3], the requested court must inform the requesting court about this within no more than 30 days after receiving the request by means of form D, requesting the court to

[1] Ministry of Justice, Directorate of International Law and Treaties – coordinator of the activities of the national contact points for the European Judicial Network in civil and commercial matters and of the activities of the Romanian Judicial Network in civil and commercial matters, www.just.ro.

[2] Technically, the Judicial Atlas and the e-justice website (https://e-justice.europa.eu/, accessed on 7 April 2022) provide the possibility of filling in the form in the language of the requesting state and its automatic translation, by keeping the fields filled in, in the language of the requested state.

[3] As a rule, when essential elements are missing, such as: the nature and object of the case, as well as a summary statement of the facts; description of the evidence requested. If the request refers to the hearing of a person, it cannot be executed if the following are missing: the name and address of the person to be heard; the questions to be addressed to the person to be heard or a statement of the facts in relation to which the said person is to be heard.

send the missing information, specifying as precisely as possible possibly what they are. The C form is completed when the court to which the request was sent does not have the competence to resolve it, so it forwards it to the competent one and notifies the transmitting authority about this aspect.

The request must be executed without delay, within a maximum of ninety days from receipt, and in accordance with the law of the Member State of which it is a part (requested state).

The requesting court may request that the execution of the request take place in accordance with a special procedure provided by the legislation of its state, the requested court complying with this request if the procedure is not incompatible with the legislation of the member state from which it originates or for reasons of major practical difficulties[1].

The procedural act can be performed in the presence and with the participation of the parties, if the legislation of the Member State of the requesting court provides for this, the requested court being notified to establish the conditions under which they can participate.

The regulation provides the requested court with form I, through which it informs the parties and, if applicable, their representatives, about the time and place where the proceedings will take place and, if appropriate, about the conditions under which they can participate.

If the possibility of the participation of the parties is provided by the legislation of the requested Member State, the requested court may ask the parties and, if applicable, their representatives, to be present or participate in the performance of the research act.

It is possible to perform the act in the presence and with the participation of the representatives of the requesting court[2], if this possibility is compatible with the legislation of the Member State of the requesting court, so that its representatives have the right to be present when the requested court performs the research act, which will establish conditions of participation[3].

The incomplete request will be fulfilled when the requested court is notified, including in the situation where a deposit or a down payment is required[4], even if the rule established by the regulation is that the execution of the

[1] The requested court informs the requesting court by means of form H in the annex. The difficulties may be of a technical nature, perhaps if the requesting court asks the requested court to use communication technology to carry out the research act, in particular using videoconferencing and teleconferencing.

[2] Magistrates appointed by the requesting court, in accordance with the legislation of the Member State of which it is a part. The requesting court may also appoint, in accordance with the law of the Member State of which it is a part, any other person, for example an expert.

[3] Form I will be used to notify the requesting court of the time and place where the proceedings are held and, if applicable, of the conditions under which the representatives may participate.

[4] If the requested court requests this in accordance with the legislation of the Member State of which it is a part, the requesting court, subject to the obligation of the parties to bear the costs according to the law of the Member State of which it is a part, ensures the reimbursement without

request does not give the right to the reimbursement of fees or expenses[1].

In principle, the execution of the power of attorney request cannot be refused, especially when the only reason given is that, in accordance with the legislation of the requested member state, a court of the respective member state has exclusive jurisdiction over the respective cases or that the legislation of the respective member state does not allow the right of action provided for in the application.

The request for the execution of the rogatory commission can be refused only if: the request does not fall within the scope of the regulation or the execution of the request in accordance with the legislation of the Member State of the requested court does not fall within the powers of the judiciary or the requesting court does not complete the request within 30 days of on the date of the request for this aspect by the foreign court, or a deposit is not made, or the advance is not paid when an expert's opinion is required.

Particularly, in the matter of evidence with witnesses, it is possible to refuse the execution of the request if under the legislation of the Member State of the requested court[2] or under the legislation of the member state of the requesting court, the right of the person to refuse to testify is enshrined. The refusal must be communicated to the requesting court[3].

To be sure, however, that the European rules do not prevent a court of a Member State, which wishes to hear as a witness a person residing in another Member State, summoning this person before it and hearing him in accordance with the law of the Member State of the court[4]. Similarly, in the case of technical expertise, the regulation does not prevent the evidence being carried out by an expert sent by the court that solves the dispute on the territory of another state, without resorting to the rogatory commission, however, this time it is possible that the action of the expert interferes with that of other authorities in the state on whose territory it is carried out, which are not required to give him the tender for

---

delay of: the fees paid to the experts and interpreters and for the administration of a special procedure at the request of the requesting court or for the use of technologies, in particular the use of videoconferencing or teleconferencing.

[1] C-283/09 – Art 14 and 18 of Regulation (EC) 1206/2001 of the Council of 28 May 2001 on cooperation between the courts of the Member States in the field of obtaining evidence in civil or commercial matters must be interpreted in the sense that the requesting court is not obliged to pay the requested court a down payment for the compensation due to the witness or to reimburse the compensation paid to the interviewed witness.

[2] But only when this right is mentioned in the request or, if applicable, confirmed by the requesting court at the request of the requested court.

[3] Fill in form K from Annex I to the Regulation

[4] C-170/11, in a dispute where witnesses requested a rogatory commission to be heard by a court in their state of residence, so as not to be called before a court in another state to give testimony, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62011CJ0170&from=RO, accessed on 13 April 2022.

the completion of the work. In the considerations of the judgment in C-332/11[1], it was noted in the jurisprudence of the CJEU that "since the expert appointed by a court of a Member State must travel to the territory of another Member State to carry out the expertise entrusted to him, this could, in certain circumstances, to prejudice the public authority of the Member State in which it must be carried out, especially when it comes to an expertise carried out in places related to the exercise of such authority or in places where access or other intervention are, under the legislation of the Member State in which it is carried out, prohibited or not allowed except to authorized persons".

The second way of administering the evidence on the territory of another Member State is the direct one, allowed by the regulation in the conditions where a court wishes to proceed with an act of investigation in another Member State, and its request is accepted by the requested state.

The request is presented to the central body or the competent authority of the requested state by means of form L from Annex I of the regulation, which, within thirty days, informs the requesting court whether or not the request is accepted and, if necessary, under what conditions to be fulfilled in accordance with the legislation of the Member State, by means of form M.

To facilitate the obtaining of evidence, the central body or the competent authority of the requested state has the possibility to designate a court in its state to provide practical assistance in obtaining the evidence directly by the judicial authorities of the requesting state.

In relation to the request for the admission of the taking of evidence directly by the authorities of the requesting state, the central body in the requested Member State can refuse the request in limited cases provided by the regulation. Thus, the refusal is only possible if: the request does not fall within the scope of the regulation, the application does not contain all the necessary information, and the request for evidence directly contravenes fundamental principles of law in the requested Member State.

The regulation indicates to the Member States to encourage the use of communication technology, such as videoconference or teleconference, precisely to ensure the speed and efficiency of taking the evidence. However, the requested court must have the said technology (have the possibility to use videoconferencing or other remote communication technology) and, at the same time, appreciate that its use is appropriate in the specific circumstances of the case.

It is thus noted that between the EU Member States, the formalities have been eliminated, the use of the Internet facilitating collaboration between the

[1] C-332/11 – Art 1 Para 1 Let b) and Art 17 of Regulation (EC) 1206/2001 must be interpreted in the meaning that the court of a Member State that wants an act of research entrusted to an expert to be carried out on the territory of another Member State is not necessarily obliged to resort to the means of obtaining evidence provided by these provisions to order carrying out this act of research.

courts, but a correct application of these rules first requires the knowledge of them by the applicants or at least of the persons and contact points established for information in this domain.

As far as other states are concerned, the rogatory commissions will be fulfilled in compliance with the Hague Convention of 1970, in the application of which, at the domestic level, Law no. 175/2003, and for the states that are not signatories to it or with which Romania does not have bilateral international conventions, the rules of international courtesy will be used.

If the respective states are parties to both international conventions and members of the European Union, the European law, respectively the Regulation, will be applicable with priority, by signing the constitutive treaties the states agree to the delegation of sovereignty in this area, so that derived European law it will be directly and primarily applicable to them.

4. Conclusions

The information society that has acquired a particular scope during and on the occasion of the Covid 19 pandemic, starting from 2020, represents a useful environment also in the matter of the taking of evidence through international rogatory commission, European regulations encouraging the use of these means to facilitate procedures and for speed, without denying the classical means at the same time.

Justice, as a traditional form specific to the rule of law, which maintains it and ensures its continuity, is characterized by a certain inertia, not always being connected to the evolution of technology, since such an adaptation first of all requires the modification of internal and supranational regulations, which does not it can be done ad hoc.

However, the European legislator seems to have taken advantage of the experience gained during the pandemic, adapting the European regulations in the field of international, civil and commercial judicial cooperation, by using modern technological means and imposing them in the procedure of the international rogatory commission, as a solution for safety and speed.

References

Onaca, V., Burduf, I., & Schuster, W. (2010). *Continuarea asistenței în domeniul cooperării judiciare în materie civilă, comercială și penală, Noi instrumente comunitare în domeniul cooperării judiciare în materie civilă, comercială şi dreptul familiei*. Bucharest: Euro Standard.

The Hague Convention of March 18, 1970, on the Taking of Evidence Abroad in Civil or Commercial Matters.

Regulation no. 1206/2001 Regarding the cooperation between the courts of the Member States in the field of obtaining evidence in civil or commercial

matters, published in the Official Journal of the European Union No L 174 of 27 June 2001.

Regulation (EU) 910/2014, Regarding electronic identification and trust services for electronic transactions on the internal market and repealing Directive 1999/93/EC, published in the Official Journal of the European Union, No L 257 of 28 August 2014.

Directive 1999/93/EC of the European Parliament and of the Council, Regarding a Community Framework for Electronic Signatures, published in the Official Journal of European Communities, No L 13 of 19 January 2000.

Regulation no. 1783/2020 regarding the cooperation between the courts of the member states in the field of obtaining evidence in civil or commercial matters, Published in the Official Journal of the European Union No L 405 of 2 December 2020.

C-283/09, *Artur Weryński v Mediatel 4B spółka z o.o*. https://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=283/09&td=ALL .

C-170/11, *Maurice Robert Josse Marie Ghislain Lippens and Others v Hendrikus Cornelis Kortekaas and Others*. https://curia.europa.eu/juris/liste.jsf?num=C-170/11&language=EN.

C-332/11, *ProRail BV v Xpedys NV and Others*, https://curia.europa.eu/juris/liste.jsf?num=C-332/11&language=EN.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

THE BUDGETARY EQUILIBRIUM AND THE PUBLIC NEEDS: WHICH IS THE CORRECT BALANCE OF THEM? – BRIEF CONSIDERATIONS –

Marius VĂCĂRELU[1]

Abstract

The budget balance today is mostly just a principle of the science of financial law and a provision of the legal norms, unrelated to practice. However, it is necessary to keep in mind that public debts press on the current life of every person, reducing the development capacities of each country for a long period of time. For this reason, it is necessary to emphasize the relationship between public needs and budget balance, because this decade brings other challenges to this relationship.

Key words: *Budget equilibrium; Public needs; Social pressures; Public debt; Level of life.*

1. Introduction

Governments very often make the mistake of giving more hope to the population than is necessary. As a rule, these hopes are expressed quite simply, namely through a simple and almost magical formula: "you will have more money for what interests you". Although it is important to inform the electorate that "there is money to fulfil their interests", it must be taken into account that good governance does not mean only money, but a general conduct that ensures satisfaction to the normal person.

Satisfying the public interest is a difficult undertaking, because it cannot be expressed through a mathematical formula. At the same time, the fluidity of this type of interest attracts higher costs than are estimated at the beginning of the budget projection, which means that the deficit is often found at the end of the fiscal year.

However, money alone is not the only thing that can attract increased trust of citizens towards their own political and administrative leaders. An abusive or indifferent behaviour does a lot of harm to the politician, and as a quasi-rule this type of acting is also accompanied by a bad administration of the community's income. Without developing too much the theme of the relationship between good

[1] **Lecturer PhD, National School of Political and Administrative Studies, Bucharest (Romania), email: marius333vacarelu@gmail.com.**

governance and the electoral behaviour of politicians, we cannot but admit that "a misfortune never comes alone", that is, a bad management of a community's budget is also accompanied by other defects of the leaders, all of which contribute in the medium and long term, reducing the development prospects of a given area.

2. Today is a common thing for governments to describe national budgets as being austere, meaning that no public institution will be satisfied about its own money. As usual, this expression becomes something used too frequent to impress, but is also describing a fact: public service costs a lot to fulfil its tasks and to improve its quality requests in many cases large amounts of money.

It is a famous expression that describes the relationship between performance and costs, and which is undoubtedly also applied in the sphere of public administration. Concretely, "it is easy to make quality products if you will use huge quantities of the best quality raw material, but the value and profit appear when you manage to produce things of superior quality using as little raw material as possible". The most used argument is the comparison between luxury furniture, on the one hand, and furniture produced by a famous Swedish company – the differences in raw material consumption being easily visible for everyone.

The public services fulfilment is largely subject to the same rules of an economic nature, because the last years' context forces even more the adaptation of the public administration to a pragmatic and almost mathematical perspective. Practically, the situation of the explosive demographic growth of the last 65 years – when the population of the planet increased by more than 5 billion inhabitants[1] – made the amount of natural resources available for the fulfilment of public services to a very strong decrease. This huge consumption of resources – of which that of drinking water is the most important – determines more and more not only assessments of the quality of public services, but also results in political elections. A scandal regarding the contamination of water or the failure to provide it in certain quantities in hot summers has the effect of not only economic losses, but especially the population dissatisfaction to a level of public protest, with relevant political effects in the short and medium term.

3. Most of the time, the common man considers the state as an entity that demands sums of money in order to offer "something". This "something" is defined by the legal doctrine as a rule in the form of public services, although there is a certain discussion if national defence can be included here, through the prism of its different content.

The relationship between the two entities – the state, on the one hand, and the citizen, on the other – is usually based less on trust and more on coercion. It is a reality from which no legislator can escape, namely that the state can impose

[1] World Bank, *A changing world population*, available at https://datatopics.worldbank.org/world-development-indicators/stories/a-changing-world-population.html, consulted at 19th of May 2023.

mandatory contributions and levies from any subject of law, and private law actors do not have the right of legislative initiative in fiscal matters. However, there is a particularity – namely, that of the action of different ideologies on public services, which can determine not only changes in the size and quality of them (public services), but also the appearance of new ones. The result is usually specific, meaning that the amounts needed to provide public services must increase, which also has the effect of changing the fiscal policy of a state.

It is important to understand why ideologies play an important role in public law and especially in the public services legal configuration. Expression of the political aggregation of different groups of people, ideology is actually the general electoral message with which they want to gain power in a country. They are not science, as Milio specifies – "ideologies – strong beliefs based on untestable assumptions – are the antithesis of science. Ideologies are weak, even counterproductive, as guides to government policy. Science, basic or applied, does not claim to be «truth», only to reveal plausible, testable hypotheses, methodologically acceptable, transparent, and replicable; it is an essential ingredient to responsible and responsive policymaking, not the sole criterion" (Milio) – but they play an important role in terms of electoral competition, because the common man does not read political programs with good governance handbooks.

Since ideologies do not mean science, it is very possible that the success of one or the other in the elections will be followed by implementation plans. In this perspective, political leaders will seek to achieve either the domination of ideology over any form of economic, social, moral reality, etc. (countries where the government was taken over by communist parties will strictly follow this type of implementation, with always disastrous effects on the quality of life, the standard of living and life expectancy – a list of works demonstrating these negative effects is available here (Evers, 2020), or to harmonize the demands of the supporters/voters with what the accounting of the national public budget shows.

4. In any situation, however, the realities come behind any ambitious plan to expand public services (Spenkuch et al., 2021), because all citizens want them to be fulfiled to that standard of luxury furniture, while the practical needs of tax collection consider it necessary to create the Swedish type of furniture mention above.

This is easy to understand by referring to a quantifiable element, but different from any person: the fiscal affordability threshold. This threshold – as several studies show (Ryu and Fan, 2023, pp. 16–33; Chai, 2023, pp. 1-13)– is not a fixed one from a financial point of view, and even less from a psychological perspective.

The strictly financial aspect is an easier one to measure, from the perspective of the daily cost of life reality. Obviously, here we will find

differences between countries, and those that can more easily ensure a higher standard of living – a good salary, lower housing and food costs – have the ability to attract labour from more places. Objectively, the GDP rankings are a good indicator of the development prospects of the continents, and the migration directions will follow them most of the time.

The major problem is given by the psychological aspect of the affordability taxation. On the one hand, every man tries to be an individuality, and this makes all citizens with the right to vote consider themselves "possible kingmakers". Hence, one's own opinions on what is necessary for a country and its development, which can be expressed through attachment to a specific ideology, but also through other characteristics (a person's economic past, attachment or rejection of a party or leader, plans of the future etc.). In all these situations, however, the common man is worried about any prospect of increasing taxes, knowing that only they (taxes) are inevitable, but not a certain amount of them.

From here, a clear perspective: when citizens consider that the level of taxation will affect their own plans, then the desire to protect as much of the family wealth as possible will appear, and in this sense they will later use specific methods, such as not declaring income and properties, hiding part of them, changing the registered office in another country (where tax regime is more "friendly"), etc. As everyone's plans are different, the result is a flexible threshold for accepting tax levels. However, there is a clear distinction between what a person can pay and what he can accept to pay. In the first case, the man can be the victim of his own lack of money – because otherwise he could pay a lawyer who would change his tax domicile – and he will not find ways to evade a substantial proportion of his own income. In the second case, however, the person can see in advance what the possible evolution of taxes will be, and from that moment he can prepare for the possible subsequent increases, and at the time of the new tax increases, part of his assets will be protected from watchful eyes of the fiscal inspection.

5. Thus, on the one hand, we will have the desire to provide as many public services as possible, but with the lowest possible costs in terms of taxation, because otherwise the citizens may emigrate. Since we are no longer in the period when the horse and cart were the main means of locomotion, it turns out that a man dissatisfied with of his country fiscal policy can quickly leave for another area, without ever returning, and the administrative authorities will have practically have no tool to stop it.

At the same time, elections are won with the most diverse promises, among which those of increasing the size and quality of public services are the most frequent and impactful.

Thus, where is the balance between the two dimensions – the demand and the capacity to perform public services? The answer cannot be a philosophical

one, but rather a strictly material one, of a juridical-economic nature. Yes, it is necessary to have a certain set of public services that will be fulfilled with costs of different levels, but we cannot sacrifice the development of a country strictly to create or develop the area of public services. Even if *imperium* exists and based on it the state does not lose its right to create and set the amount of taxes, it does not mean that citizens are still "prisoners of the governments" today. The fact that in a short time the specialists from a more heavily taxed field can leave is a fact, and no country can afford to decrease the number of taxpayers.

Without discussing the general effect of the quantitative increase in the number of public services, it is obvious that at some point any ordinary person will understand that this growth (of public services) will require an increase in the level of taxation, in order to pay the respective costs. It is not difficult to understand the fact that an increase in taxation will not be accepted easily, and those who will be able to hide their income are precisely the rich, who have money to pay good lawyers who know how to apply tax avoidance procedures.

That's why the states have to take into account that considering the public services expansion as a necessity can make them in the long term remain without enough taxpayers, and from here until the increase of the budget deficits, there won't be much left. Over time, covering the deficits will require more taxation, and those who are dissatisfied will seek even more to protect their assets from tax inspections.

However, public needs are an area where ideologies operate too much, and science is followed only after political conceptions fail (a famous expression in the communist countries describe its apostles as people without any scientific level, because in such case they could make experiments on animal firstly). However, the money lost on the various ideological dreams that ignore science cannot usually be recovered, and the governments apologize by saying that "this is what the citizens wanted". The idea of public need must therefore be more strongly brought into the public discussion, but only if the financial aspect of its fulfilment is emphasized, compared to the medium and long-term budgetary dimensions of a country.

6. Conclusions

Public needs presuppose many discussions around concepts and philosophies that avoid the financial aspects of their implementation. As a rule, this type of approach is a sterile one, without bringing anything good to the state and its citizens.

At the same time, we cannot hide the fact that man is not able to perform without a part of his life benefiting from the support of the state, and in this sense the same problem of drinking water offers us an example that cannot be contradicted. Going to the fountain every day is more expensive for a person than having running water at home; at the same time, water consumption is harder to

monitor, and in times of drought, every litre counts. Then, adulthood brings with it old age, and the needs in this sphere are always increased, because physical strength weakens, and someone has to take over a part of what a perfectly healthy person did before without difficulty.

However, the states must be prepared to legislatively adapt the legal framework of public services not only in the sense of their appearance, but also in the perspective of reducing their fulfilment. Long-term thinking requires the legislator to take into account the changes to their own administrative service, as well as the citizens' conviction that not everything can be provided in the form of public services, because in the end the cost will be paid by them (taxpayers). It is quite visible that in the coming decades, precisely this conviction of the citizens will make the distinction between strong countries and those that will collapse under the burden of public debts that will constantly increase. The public budget is not a fund that will always ensure well-being, and the citizen who does not understand that he is the main one who will suffer from the increase in public expenses – no matter how justified in the short term – will pay later, along with his children.

References

Chai, L. (2023). *Financial Strain and Psychological Distress Among Middle-Aged and Older Adults: A Moderated Mediation Model*. Journal of Gerontological Social Work. 3. http://doi: 10.1080/01634372.2023.2207611.

Evers, W.M. *Best Books on the Folly of Socialism. What Everyone Should Know About the Practical and Moral Failures of the Socialist Project*. https://www.independent.org/issues/article.asp?id=13056.

Milio, N. *Ideology, science, and public policy*. https://jech.bmj.com/content/jech/59/10/814.full.pdf.

Ryu, S. & Fan, L. (2023). *The Relationship Between Financial Worries and Psychological Distress Among U.S. Adults*. Journal of Family and Economic Issues. 44. https://doi.org/10.1007/s10834-022-09820-9.

Spenkuch, J. L., Teso, E., & Xu, G. *Ideology and Performance in Public Organizations*. http://guoxu.org/docs/IdeologyPerformance_Apr2021.pdf.

World Bank, *A changing world population*, available at https://datatopics.worldbank.org/world-development-indicators/stories/a-changing-world-population.html.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

BRIEF CONSIDERATIONS ON THE INTERPRETATION OF THE CRIMINAL LAW

Cătălin BUCUR[1]

Abstract

The interpretation of the criminal law is that logical-rational operation to clarify the content of a criminal law, to find out and explain the real meaning of the law, according to the will of the legislator who adopted it.

In the process of theoretical and practical knowledge of the legal provisions, the interpretation of the criminal law is necessary, no matter how clearly it is formulated, for a better legal framing of the facts by the perfect incorporation of the factual situation in the legal framework fixed by the criminal legal norms.

Key words: *criminal law; interpretation; means of interpretation; results; limits.*

1. Introduction

The principle of the legality of incrimination itself, insofar as it imposes particularities in the matter of the interpretation of criminal law norms, obliges to study and master them, the thorough knowledge of the respective issue being one of the most important concerns of a correct application of criminal law norms.

The interpretation of the criminal law is defined as that logical-rational operation to clarify the content of a criminal law, to find out and explain the real meaning of the law, according to the will of the legislator who adopted it.

In the process of theoretical and practical knowledge of the legal provisions, the interpretation of the criminal law is necessary, no matter how clearly it is stated, for a better legal framing of the facts by the perfect incorporation of the factual situation in the legal framework fixed by the criminal legal norms.

2. Forms of interpretation

The interpretation of the criminal law can be done by the legislator, the judicial body or the theoreticians of the criminal law.

[1] Lecturer PhD, Faculty of Law and Administrative Sciences, University of Pitești, Pitești (Romania), e-mail: bucurc2000@yahoo.com.

a. The legal interpretation is made by the legislator at the time when he adopts the criminal law and consists in the explanation, in its content, of certain terms or expressions in the criminal law.

The legal interpretation can be contextual – when it is made with the adoption of the criminal law and in its content, or posterior – when it is made after the adoption of the law by a separate normative act.

An example of contextual legal interpretation is Title X of the Criminal Code – The meaning of some terms or expressions in criminal law; terms such as: criminal law (Art. 173), public clerk (Art. 175), family member (Art. 177), particularly serious consequences (Art. 183), etc. are explained.

b. The judicial interpretation is made by the criminal investigation body or the court, through the legal classification of the concrete action committed in the text of the law that incriminates the action as a crime or through the solutions that the latter pronounces.

An important role in the activity of legal interpretation is played by the High Court of Cassation and Justice, which, in plenary decisions, in solving some appeals in the interest of the law, declared by the Prosecutor General of the Public Prosecutor's Office attached to the High Court of Cassation and Justice, ensures a unitary interpretation of the criminal laws.

c. The doctrinal or scientific interpretation is made by the theoreticians of criminal law, in treatises, courses, monographs, these being of a nature to guide, especially the judicial interpretation.

3. Means of interpretation

Several methods of interpretation are known such as literal, historical, rational, systematic, by analogy.

a. Literal or textual interpretation

This method of interpretation uses the analysis of the content and meaning of the criminal law with the help of the text, based on an etymological (the meaning of the words), stylistic (the way of expression) and syntactic (the functions of the words in the sentence and the functions of the clauses in the sentence) study.

b. Logical or rational interpretation

Logical interpretation seeks to establish the real will of the legislator by using logical procedures, reasonings.

Among the rationales used are:

-The "*a fortiori*" reasoning which is based on the argument that if the criminal law prohibits less, it also implicitly prohibits more (*a minori ad majus*) and conversely, if the criminal law allows more, it also implicitly allows less (*a majori ad minus*).

For example, the right to adopt the law belongs to the Romanian Parliament, as a legislative body; if the Parliament has the right, according to the *a fortiori* reasoning it has the right to do even less, i.e., to interpret the law (contextual or posterior interpretation) (Diaconu, 2010, p.66).

- The "per a contrario" reasoning is based on the argument that if a criminal provision sanctions an act only under certain conditions (regarding certain factual situations), it means that it does not apply to other factual situations than these, the incidence of the norm being excluded from situations not foreseen by the law.

For example, territorial incompetence in criminal matters does not entail the nullity of the acts already performed, but – *per a contrario* – if the procedural acts were performed by an incompetent body from a material point of view, they are not considered valid.

- The reasoning "*reductio ad absurdum*", which is based on the idea that the interpretation that would lead to absurd, inadmissible consequences contrary to the spirit of the law is excluded.
- The reasoning "*a pari*" which is based on the argument that for identical situations there must be the same legal solution (*ubi eadem ratio ibi idem jus*).

In logical interpretation, several reasonings can be used simultaneously when the use of only one is not sufficient.

c. Historical-legal interpretation

This method of interpretation involves the analysis of the history of the law, or the norm being interpreted, studying the social, economic, political and legal data existing at the time of the adoption of the law.

They are included in the scope of the historical method:

- the preparatory works (preliminary draft and final draft of the criminal law), the parliamentary discussions that preceded the adoption of the law;
- the provisions of previous criminal laws;
- the provisions of foreign laws, which served as a source of inspiration;
- the doctrinal and judicial practice material, supposed to be influenced on the legislative work.

d. Systematic interpretation

Systematic interpretation consists in researching the criminal law in correlation with other provisions of the same law or with other laws that make up the legal system (Vasiliev, 1955, p. 865)

e. Interpretation by analogy

Interpretation by analogy is a method of interpretation that is used to a lesser extent in criminal law and consists in explaining the meaning of a criminal law with the help of other rules that are similar.

In the legal literature, attention is drawn to the fact that the interpretation by analogy is not to be confused with the extension of the criminal law by

analogy, which considers the application of the criminal law to acts that are not criminalized.

4. Results and limits of interpretation

Using one or more of the mentioned methods of interpretation, a certain result is reached regarding the meaning of the interpreted criminal norm, namely that the text corresponds to the will of the legislator, or that it says more than the legislator intended, or that it says less. Thus, we speak of the declarative, restrictive, extensive interpretation.

a. Declarative interpretation

It can be noted that despite some apparent ambiguities, there is a perfect agreement between the legislator's will and the way it was expressed in the law, the result of the interpretation being declarative (*lex dixit quam voluit*).

b. Restrictive interpretation

It can be seen that the legislator wanted to say less than it results from the way he expressed himself, the interpretation being restrictive (*lex dixit plus quam voluit*), so it is necessary to restrict the meaning of the law. Through this interpretation, the meaning of the norm is restricted to correspond to the real will of the legislator.

c. Extensive interpretation

It can be seen that the legislator wanted to say more than what follows from the way he expressed himself, the interpretation being extensive (*lex dixit minus quam voluit*).

In this situation, it is normal that through interpretation, the meaning of the norm is extended to correspond to the real will of the legislator.

Extensive interpretation is quite rare in criminal law and when it is used, it is only done in favor of the defendant (*in dubio pro reo*).

Starting from the premise that the interpreter must pursue knowledge, and not the creation of the law, the principle was imposed that criminal laws are of strict interpretation (*poenalisa sunt strictissime interpretationis*), according to which the real meaning of the criminal law cannot be extended and nor restricted by interpretation.

5. Conclusions

In the process of applying the legal norm, its interpretation is a duty of the legislator, the judge or the one who applies the law. Interpreting the law is synonymous with establishing the meaning of the legal norm, its significance, its spirit. Beyond the letter of the law hides its spirit, which cannot be discovered

without resorting to a series of legal artifices, including the general principles of law.

The interpretation of rights is of several kinds. Thus, a clear distinction can be made between the official and unofficial interpretation of the law.

The official interpretation of the law is the binding interpretation, which has legal force.

Legal interpretation is carried out by state bodies that have powers either in the field of law creation or in the process of applying the legal norm. The issuing body of a normative act, when it finds that its act may give rise to contradictory solutions in practice, in order to eliminate these contradictory solutions, it is forced to adopt an interpretation act.

Those who apply the law are obliged to apply the law under the conditions in which they establish a certain state of fact, establishing, through interpretation, its meaning. The interpretation of the cases thus belongs to the application of the law and is the prerogative of public authorities, public institutions, or other legal subjects, charged with the application of the law. The one who applies the law, after establishing the state of facts, is obliged to legally qualify this state, and in this process, he is obliged to clarify the meaning of the applicable legal norms, in order to legally solve the case with which he was referred.

References

Boroi, Al. (2014). *Drept penal. Partea generala* (2nd Edition). Bucharest: C.H. Beck.

Bucur, C. (2022). *Drept penal. Partea generală* 1st Volume. Craiova: Sitech.

Diaconu, Gh. (2013). *Răspunderea penală*. Bucharest: Lumina Lex.

Dima, T. (2014). *Drept penal. Partea generală* (3rd Edition). Bucharest: Hamangiu.

Pascu, I. (et al.). (2012). *Noul Cod Penal comentat. Partea general*. Bucharest: Universul Juridic.

Pașca, V. (2015) .*Drept penal. Partea generală* (5th Edition). Bucharest: Universul Juridic.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

THE MAGISTRATE – CRIMINAL PROCEDURAL SUBJECT AND THE CONSEQUENCES FOR HIS PROFESSION

Camelia MORAREANU[1]

Abstract

Going through a criminal procedure is a traumatic experience that produces different consequences among the most severe. Not only on a personal level, a series of psychological changes occur, but also on a family level, situations arise where not all family members provide the necessary support to the person involved in a criminal trial, blaming or marginalizing the person concerned. Along with these, in the socio-professional level, in which the individual carries out his activity, there appear a series of "sanctions" from the community, but with an increased degree of severity it seems to be the impossibility of exercising the profession. The considerations expressed are generally valid for any person who is the subject of criminal proceedings, but the magistrate's capacity of the person in question brings a series of particularities because it leaves its mark on the entire professional career of a magistrate. These particularities will be dealt with in the material that follows, depending on the procedural phase completed and the coercive measures applied in the criminal process launched against a magistrate.

Key words: *penal trial; magistrate; criminal conviction; professional career.*

1. Introduction

On December 16, 2022, a new law regarding the status of judges and prosecutors entered into force, respectively Law no. 303 of 2022. On the date of entry into force of this normative act, Law no. 303/2004 regarding the status of judges and prosecutors, republished in the Official Gazette of Romania no. 826 of September 13, 2005.

Many of the provisions of the ols law have been maintained in the new statute of magistrates and others have changed.

Considering the subject to be treated in this material, we will highlight the consequences that the new law foresees on the magistrate's career when he goes through a criminal judicial procedure.

[1] **Associate professsor, Ph.D., University of Pitești, Faculty of Economic Sciences and Law (Romania), email: cameliamorareanu@yahoo.com.**

2. Criminal procedural measures that lead to suspension from the position of magistrate

Considering the standards of conduct imposed on magistrates, both by the status of the judge and the prosecutor as it was over time regulated by various normative acts, as well as by the Code of Ethics of the judge and the prosecutor, the commission of a crime precisely by such person appears to be a real image blow for the entire judicial apparatus.

That is why both the old regulation of the status of the judge and the prosecutor, as well as Law no. 303/2022 provides that such a magistrate can be removed, even temporarily, until the final resolution of his case from the justice system. The measure of temporary removal is the suspension from office of the magistrate concerned by the criminal investigation.

According to art. 197 of Law no. 303/2022, the judge or prosecutor is suspended from office in the following moments of the criminal process in which the magistrate is under criminal investigation:

- being sent to court for the commission of a crime causes the magistrate to be suspended from office from the moment the conclusion by which the judge of the preliminary chamber ordered the start of the trial becomes final;

- taking preventive measures; preventive measures that determine the suspension of the magistrate from office are: preventive arrest, house arrest, judicial control, judicial control on bail. It should be noted that when either the preventive measure of judicial control or the measure of judicial control on bail has been ordered, the suspension of the magistrate only occurs if the judicial body that ordered the preventive measure has established in his charge the obligation not to exercise the profession in the exercise of which he committed the deed.

In accordance with Article 267 of Law no. 303/2022, judges and prosecutors may be searched, detained or arrested only with the approval of the Section for judges or, as the case may be, the Section for prosecutors of the Superior Council of Magistracy. Approval is also required for the preventive measure of judicial control or judicial control on bail, if the obligation not to exercise the function of judge or prosecutor is to be ordered.

If the crime is flagrant, judges and prosecutors may be detained and searched according to the Code of Criminal Procedure, the Section for judges or, as the case may be, the Section for prosecutors being informed immediately by the body that ordered the detention or search.

In the old regulation of the status of judges and prosecutors, the criminal procedural measures that attracted suspension from office were the same. But, in addition, Law no. 303/2004 provided in art. 62 paragraph 1^1 that the judge or the prosecutor could be suspended from office also in case he was sent to court for a crime, if it was estimated, in relation to the circumstances of the case, that the prestige of the profession is being harmed. If for any crime, the suspension from office was ordered from the moment of the confirmation of the judge of the

preliminary chamber, from the interpretation of the cited article it is understood that, in certain circumstances - which led to the assessment that the offense committed harms the prestige of the profession - the suspension from office was ordered before confirmation of the preliminary chamber judge. According to the old normative act, if it was estimated that the judge or the prosecutor could be kept in office, he could be temporarily prohibited from exercising certain powers until the case is finally resolved.

Such regulations in the new law on the status of judges and prosecutors are no longer found, a fact for which we conclude by saying that regardless of the crime committed, the suspension of the magistrate takes place only after the finalization of the conclusion by which the judge of the preliminary chamber ordered the trial to begin. Therefore, evaluations on a possible impact on the prestige of the judiciary are no longer made, the suspension from office starting from the specified moment, for any crime committed.

According to Law no. 303/2022, the suspension of judges and prosecutors is ordered by the Section for judges or, as the case may be, the Section for prosecutors of the Superior Council of Magistracy, starting with the date established in the decision of the section. Following this measure, the decision ordering the suspension from office is immediately communicated by the Section for judges or, as the case may be, by the Section for prosecutors, to the concerned judge or prosecutor, as well as to the management of the court or prosecutor's office where he works

It is known that during the exercise of the profession of judge or prosecutor, the magistrate is subject to the numerous prohibitions and incompatibilities provided by the statute, during the suspension from office, the provisions relating to the prohibitions and incompatibilities provided for in art. 227 and art. 231 of Law no. 303/2022 and his salary rights are not paid but he is paid the social health insurance contribution, as the case may be.

In this context, we appreciate that it is useful to specify that according to art. 227 of Law no. 303/2022, the position of judge and prosecutor, along with that of the assistant magistrate as well as legal specialist personnel assimilated to judges and prosecutors, is incompatible with any other public or private position, with the exception of teaching positions in education higher, as they are defined by the legislation in force, and of the teaching positions at the National Institute of Magistracy and the National School of Clerks. The persons, who hold the mentioned positions as an exception, are obliged to refrain from any activity that implies the existence of a conflict between their personal interests and the public interest, likely to influence the impartial and objective performance of their duties established by the Constitution or by other normative acts. It should be noted that, in consideration of their status, judges and prosecutors, including those who are elected members of the Superior Council of Magistracy, are not dignitaries, not being able to simultaneously be part of the judicial authority, executive or legislative power.

Also, according to art. 231 of Law no. 303/2022, judges, prosecutors, assistant magistrates and legal specialist personnel assimilated to them are prohibited from:

a) to carry out commercial activities, directly or through intermediaries;

b) to carry out arbitration activities in civil or other disputes;

c) to have the capacity of associate or member in the management, administration or control bodies of companies, credit or financial institutions, insurance/reinsurance companies, national companies or autonomous governments; By way of exception, judges, prosecutors, assistant magistrates and legal specialist personnel assimilated to judges and prosecutors may be shareholders or associates as a result of the mass privatization law;

d) to be a member of an economic interest group.

In the case of acquiring, through inheritance, the quality of associates or shareholders in companies, credit or financial institutions, insurance/reinsurance companies, national companies, national companies or autonomous kings, judges, prosecutors, assistant magistrates and legal specialist staff are obliged to take the necessary measures so that this quality ceases within a maximum of one year from the date of its effective acquisition.

Therefore, when he is suspended from office, the incompatibilities and prohibitions that I detailed do not apply to the magistrate, but the period of suspension seriously affects his career, especially since this period does not constitute seniority in work and in office.

3. The solutions provided in the criminal process and the consequences on the professional career of the magistrate

Knowing that a criminal trial in Romania consists of the criminal prosecution phase, the trial phase (with its preceding stage – the preliminary chamber) and the sentence execution phase, we will mention in the following, the consequences that the solutions produce ordered in the process of his suspension from office.

If the prosecution phase ends with a settlement, the suspension ends.

If the trial phase of the criminal process in which the magistrate has the capacity of defendant ends with an acquittal or termination of the criminal process, the suspension from office also ends. With regard to these solutions, we make it clear that, if they are pronounced in the first instance, the suspension from office ends on the date of the pronouncement, but the reinstatement to the previous situation with all related rights, is granted after the court decision of acquittal or termination of the criminal process remains final .

Following these solutions provided in the criminal process, the suspended judge or prosecutor is reinstated in the previous situation, he is paid the monetary rights he was deprived of during the period of suspension from the executive

position or, as the case may be, during the entire mandate of the management position on who could not exercise it due to the suspension.

The monetary rights granted are increased, indexed and updated on the payment date, including the legal penal interest, payment obligations that are established by order of the president of the High Court of Cassation and Justice or, as the case may be, of the general prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice.

At the same time, the judge or prosecutor is recognized for his seniority in the position of judge or prosecutor for the entire period in which he was suspended.

If the criminal prosecution phase is completed with a decision to abandon the criminal prosecution confirmed by the judge of the preliminary chamber, the judge or prosecutor under criminal investigation is released from office.

If the trial phase of the criminal process in which the magistrate has the capacity of defendant is completed with the solution of final conviction or with the postponement of the application of the penalty or the waiver of the application of the penalty, ordered by a final court decision, the magistrate is released from office.

Dismissal from office is not ordered in situations where these solutions were pronounced for crimes committed through negligence for which the corresponding section of the Superior Council of Magistracy considers that it does not affect the prestige of justice.

However, all these solutions will be reflected in the evaluation activity of the magistrate, being relevant aspects regarding his integrity. In this sense, in Annex I of Law no. 303/2022 in the evaluation chapters regarding the integrity of the judge (art.3) and the prosecutor (art.16), one of the reference indicators is the pronouncement against the assessed judge/prosecutor of some solutions to postpone the application of the penalty, waiver of the application of the penalty , ordered by a final court decision, as well as the dismissal of the criminal prosecution, confirmed by the judge of the preliminary chamber, for which the Section for Judges, respectively the Section for Prosecutors did not propose the release from office, in accordance with the law.

In the phase of enforcement of the judgment within no more than 3 days after the judgment rendered in a criminal case against a judge or prosecutor has become final, the enforcement court communicates a copy of the judgment to the corresponding section of the Superior Council of Magistracy the decision. The dismissal of judges and prosecutors is ordered by decree of the President of Romania, upon the proposal of the corresponding Section of the Superior Council of the Magistracy.

4. The solutions ordered in the criminal process and the consequences for the retired magistrates

In the situation where, prior to the completion of the criminal trial, the criminally investigated magistrate retired, it should be noted that according to art. 214 of Law no. 303/2022, do not benefit from the service pension those who, even after being released from office, have been definitively convicted or have been ordered to postpone the application of the punishment for a crime of corruption, a crime assimilated to crimes of corruption, a crime of service or a crime in connection with them or a crime against the administration of justice, committed before the release from office.

Therefore, the nature of the crime committed before the release from office, attracts the loss of the service pension, but they will benefit from the pension in the public system, according to the law.

Also, the initiation of criminal proceedings for a crime of corruption, a crime assimilated to crimes of corruption, a service crime or a crime related to them or a crime against the administration of justice entails, by law, the suspension of the resolution of the request for granting the service pension or, as the case may be, the suspension of the service pension payment, if it was granted until the final resolution of the case. During this period, the person against whom the criminal action was initiated benefits, according to the law, from a pension from the public system.

If it is ordered to classify, abandon the criminal investigation, acquit, terminate the criminal process or abandon the application of the penalty against the criminally investigated judge or prosecutor, he is reinstated in his previous situation and he is paid the service pension he was deprived of as a result of the in the initiation of the criminal action or, as the case may be, the difference between it and the pension from the public system collected after the initiation of the criminal action.

The judgment of conviction or by which the postponement of the application of the penalty, which remains final, is communicated by the execution court to the Superior Council of Magistracy.

The corresponding section of the Superior Council of Magistracy will inform the National House of Public Pensions regarding the occurrence of one of the situations presented above which has the effect of granting, suspending, terminating or resuming the payment of the service pension or, as the case may be, suspending or resuming the settlement procedure of the service pension application.

5. Conclusions

The involvement of a magistrate in a criminal trial has serious consequences for his professional career, more so than the involvement of any other person in any other profession.

Both the temporary measure of suspension from office and the definitive measure of release from office, having "the commission of a crime" as a trigger, bring with it, beyond the loss of salary rights, even the impossibility of practicing any other legal profession. If in any other profession, after a certain period of "rehabilitation", the convicted persons - even for crimes committed in connection with the profession - re-enter the professional environment and continue to exercise their activity, such "re-inclusion" is not allowed to the judge and the prosecutor.

The present study is not intended to be a comparative analysis with the situation of other professions, but it is intended to be a plea for professionals who exercise their functions as a judge or prosecutor according to the ethical standards and society's expectations, fulfilling their chosen profession with fairness, honor and dignity , knowing that this is the only way they belong to the justice system, and through this, they are an integral part of the judicial power in a state of law.

References

Law no. 303/2022 regarding the status of the judge and prosecutor. Official Gazette of Romania, Part I, no. 1102 of November 16, 2022.

Law no. 303/2004 regarding the status of the judge and prosecutor. Official Gazette of Romania, Part I, no. 826 of September 13, 2005.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

SIMPLIFYING CRIMINAL PROCEEDINGS: A LOCAL INTEREST OR A EUROPEAN IMPERATIVE?

Delia MAGHERESCU[1]

Abstract

The issue of simplifying criminal proceedings has been regulated in the Romanian legislation and is the result of several factors involved in criminal justice system. They were primarily determined by the principle of due process and its particular feature structured around the aim of solving the criminal cases in reasonable time. This paper focuses on the issues of criminal cases after a considerable period of time which has passed from the new Code of criminal procedure of Romania entered into force. The legal expectations are currently in the lawyers' attention in order for them to outline the main achievements gained in the field of respecting the participants' rights during the special criminal procedure. The paper is based on the conceptual research combined with the jurisprudence references provided in particular criminal cases. One question is related to the issue if simplifying criminal proceedings is the result of the local interest or the European imperative. The result of the study has concluded that the criminal proceedings is more accustomed with the idea of delivering judicial decisions by using the principle of due process in a comprehensive environment, featured by the appropriate simplification of criminal proceedings.

Key words: *criminal proceedings; due process; principle of reasonable time; simplifying criminal proceedings; parties' rights; rules of criminal procedure.*

1. Introduction

The new generation of criminal proceedings is currently highlighted by a series of rules and principles implemented in the home legislation under the whole regulations adopted at the international level, on the one hand, and at the European level, on the other hand. They are primarily connected to the main principle of due process, which states that the criminal proceedings should be developed in accordance with the respect of the parties' rights and this concept cannot exceed beyond the above-stated regulations.

Changing rules in the field of solving the criminal cases has, at the moment, begun a different way of approaching the discussed issue. If, in the past, the criminal process was by definition solved under the ordinary procedure, as a rule in the matter, in different way it is, at the moment, viewed this issue. Based

[1] **PhD, Lawyer, Gorj Bar Association, Târgu Jiu (Romania), delia_magherescu@yahoo.com. ORCID: 0000-0003-0939-1549.**

on the general changing in the field of criminal cases, it has been highlighted that the criminal justice is now more characterized by agreements instead of a system of ordinary procedure. In this regard, it has been emphasized that "Criminal justice today is for the most part a system of pleas, not a system of trials" (Kennedy, 2012).

One of the issues of criminal proceedings, which has been advances a long time ago, focuses on the procedural way in criminal matters able to assure its simplification both in the investigation stage and during the judgment stage of criminal proceedings as well. These arguments have been supported by the fact that, in some special circumstances, the judicial bodies have to be entitled to follow a particular criminal procedure by derogation from the ordinary one, in which both the judicial bodies and the parties involved have to be convinced that their rights are fully respected (Campbell, Ashworth, & Redmayne, 2019, pp. 314-339).

This situation is thus characterized by a series of particular circumstances which firstly guarantee the defendants' procedural rights during the criminal proceedings, and the judicial bodies' response to the society's general requirement and interest, both of them being organized around the idea of solving the conflict of criminal law legally.

In the beginning of the current research activity, the main aim has been directed to a pertinent question. It refers to the issue of stating if the judicial activity of simplifying criminal proceedings is the result of the home interest, required by the social general interest, or it has arisen as a European imperative came from the European authorities which adopted the legal framework in the matter and obliged the domestic judicial authorities to comply it and respect then the new legal order.

The above-stated syllogism states that the idea of simplifying the criminal proceedings is more accustomed to the concept of delivering judicial decisions under the "umbrella" of the principle of due process, understood in the larger and comprehensive meaning of solving the criminal cases in reasonable time (Allen, Hoffmann, Livingston, Leipold, & Meares, 2020). Thus, the issue of simplifying criminal proceedings appears in this context as a well-known structure of the contemporary criminal process.

Consequently, the aim of the current research study is organized around the following items:

(a) Understanding the source of developing the newer context of simplifying criminal proceedings;

(b) Studying the causes which have contributed to outlining the legal framework of special criminal procedure;

(c) Analysing the characters of the special criminal procedure of simplifying the criminal proceedings.

In purpose to gather useful results as a consequence of the outlined aims, the research activity on the current topic has been conducted under the conceptual

approach and theoretical issues, enriched by the case-law presentations on the most relevant jurisprudence in the matter of solving criminal cases through pertinent and legal framework. It is relevant the decisions pronounced by the courts of law in Romania in those criminal cases in which the need of solving them appears as an imperative feature.

The paper is also accompanied by an extensive analysis of the legal doctrine expressed on the issues of simplifying criminal proceedings. It is necessary due to the fact that there are several contradictory opinions expressed by doctrine on this topic. Considering these aspects, after a period of about ten years from the new Code of criminal procedure has entered into force, there are still certain procedural issues arisen in practice, which need analysis and explanations (Magherescu, 2019, pp. 60-91).

2. Practicalities of simplified procedure

First of all, in the matter of outlining some practicalities of simplified criminal procedure, it is necessary to approach the issue of originating simplified procedure, in order to have a comprehensive background on the special procedure of admitting the guilt agreement.

Discussing about the origin of the simplified special procedure in which the criminal cases are solved through signing the guilt agreement by defendant with the prosecutor, it is very important to establish what origin and implicitly its status are taken currently into account by the doctrine in criminal matters (Campbell, Ashworth, & Redmayne, 2019, pp. 314-339).

This is one of the most relevant trends in the matter of solving the criminal cases by using more efficient instruments of simplifying criminal proceedings, in such a manner to avoid the bureaucratic procedural means of investigation and judgment, carried out under the common rules and principles of the ordinary procedure (Campbell, Ashworth, & Redmayne, 2019, pp. 314-339).

Beside the national interest of the states' authorities, which have permanently been involved in finding appropriate solutions in order to respect the parties' rights during the criminal proceedings (Sebba, 1996, pp. 131-136), in those cases in which the investigative procedure and also the procedure in trial exceed the reasonable time, there is another side to be taken into account. It is about the European perspective, viewed as an imperative especially for the European countries organized around the Council of Europe (Spano, 2021).

On the one hand, the issue of originating the simplified criminal procedure has been approached from a bidirectional perspective. This means that the concept of simplifying criminal proceedings is at the same time originated in the domestic analysis of the judicial bodies, which are firstly interested in finding the truth and apply the right and legal solution in the criminal cases they are invested with, in such circumstances in which they establish beyond reasonable doubt that the defendants are guilty for the crimes committed (Cross, 2020).

On the other hand, the guilt agreement procedure is originated in the common-law criminal justice, based on the casually law concept applied successfully in the United States of America and Great Britain (Campbell, Ashworth, & Redmayne, 2019, pp. 314-339).

The European continental countries have also adopted legal instruments of simplifying criminal proceedings as a consequence of their own judicial interest in solving the criminal cases through more efficient judicial tools provided by the Code of criminal procedure. From this point of view, the simplification of criminal proceedings, under the guilt agreement procedure, seems to be one of these instruments, which reflect the parties' procedural rights both in the investigative stage and in the judgment stage of criminal proceedings.

One of the main features of the simplified criminal proceedings is prone to the current interest of all "actors" involved in solving the criminal cases in a reasonable time. Firstly, the defendant is interested in ending the conflict of criminal law by trying the judicial tools provided by the law. Secondly, the prosecutor is equally interested in regulating the criminal cases in order to avoid the spillover of cases within the prosecution, while the judges are interested in assessing the crimes evidence and finding the truth in those criminal cases they are invested with. From this point of view, the overall feature of the simplified criminal procedure is not organized around the judicial interest, but more particular within the general framework arisen from committing a crime which generates the conflict of criminal law whose solution is searched.

3. Specificity of simplifying criminal proceedings

The specific context of the judiciary in criminal cases in which the simplification of criminal proceedings is required is characterized by certain special features. Speaking about the terminology, the legal doctrine has expressed its multiple forms of approaching the issue of simplifying the criminal proceedings. In this regard, it has often been viewed as a tool of defining the terminology, being concordant with the variable definitions provided.

The accelerated proceedings are thus analysed in accordance with the judicial tools provided by the continental system in criminal matters (Coscas-Williams, Alberstein, 2019, pp. 585-617). In these countries, the Council of Europe "called on both the inquisitorial and adversarial models of criminal justice - and member countries - to simplify and accelerate their criminal justice proceedings through the introduction of guilty pleas, summary procedures, out-of-court settlements by competent authorities, and simplified procedures" (Coscas-Williams, Alberstein, 2019, pp. 588).

Basically, the issue of simplifying criminal procedure is viewed as a mixt concept established both by doctrine and jurisprudence. In the matter of fact, the main role obviously belongs to the legislator which has had the initial wish to

provide the courts of law with a new procedure, derogatory from the ordinary procedure of solving the criminal cases.

Subsequently, the legal doctrine has significantly contributed to this concept through establishing a series of multidisciplinary items for a unitary concept of simplifying criminal proceedings. They are referring to the particular circumstances in which the crime was committed, on the one hand, and the criminal proceedings' context of generating the simplification of criminal procedure, on the other hand.

The typology of simplifying proceedings comes to highlight the importance of the special simplified procedure results, as a consequence of the evolutive process of remaking the criminal proceedings more suitable to the concept of due process, including the parties' procedural guarantees of respecting their rights in criminal cases in which they agree to simplify the criminal proceedings by using the special procedure.

Promoting this idea, the judicial authorities are thus able to assign them with certain limits in which their judicial behaviour should be integrated. They refer to the limits in which the defendant will sign the guilt agreement with the prosecutor, in terms and conditions previously stated by the judicial bodies in accordance with the provisions regulated by the Code of criminal procedure of Romania[1].

Referring to the issue regarding the legal framework of solving the criminal cases through signing the guilt agreement, it should be pointed out that the prosecutor is entitled to state on the limits in which the "contract" of guilt will be signed with the defendant. In fact, the defendant's wish of finalizing his criminal case by applying the special procedure of admitting the guilt agreement is subordinated to the prosecutor's legal duty of stating on the agreement limits.

Moreover, as stipulated by Article 478 (4) of the Code of Criminal procedure of Romania, these limits are *ab initio* imposed by the prosecutor and consented by the head of prosecution unit. This means that, from a procedural point of view, the guilt agreement limits – terms and conditions – are double authorized within the same prosecution unit. One of them is imposed by the case-prosecutor, while the second one by the head of the prosecution unit in which the case is investigated.

Missing one of these official actions implies a serious judicial drawback and a good condition for the court of law to reject the guilt agreement signed by the prosecutor with the defendant. Regarding the above-stated explanation, the legal doctrine has pointed out that the double consent came from the case-prosecutor, on the one hand, and from the head of the prosecution unit, on the other hand.

[1] Law no. 135 of 2010 on the Code of Criminal procedure of Romania, published in the Official Journal of Romania no. 486 of 15 July 2010.

In the matter of practice, it has several times asked the question on: What happens in cases in which the head of the prosecutor unit does not consent on the limits of signing the guilt agreement, but, despite this inconvenience, the case-prosecutor still signs the agreement with the defendant and send then it to the court of law in order to solve the criminal case under the special simplified procedure and pronounce therefore the judicial decision?

The real situation exceeds to this hypothesis due to the fact that, in the matter of practice, the judicial profile of the case law examination supposes that the guilt agreement, once it has been signed by the two parties involved, should be sent again to the head prosecutor in order to be finally approved until sending it to the court of law. This means that, the procedure is very strictly regulated by the Code of criminal procedure and the legislator has taken into account each step before sending the guilt agreement to the court of law in purpose to pronounce the decision.

However, the answer to the above-specified question is very easy to be expressed, having into regard the specific rules of criminal proceedings regulated for the special simplified procedure. It refers to the solution which will be given by the court of law in these circumstances, which will analyse the procedural issues in detail. Thus, the only one solution came from the court of law should be of rejecting the guilt agreement in cases in which it does not fulfil the entire legal elements provided expressly by the Code of criminal procedure.

Nevertheless, the court of law may either reject the guilt agreement or return it back to the case-prosecutor in order to supply the drawback and send it back to the court of law in a minimum period of five days, also expressly provided by the Code for these circumstances.

The analysis on the jurisprudence in criminal matters in which the guilt agreement has been signed does not highlight several criminal cases in which the presented hypothesis has happened. Moreover, these a few cases have been produced in the beginning of the Code entrance into force and did not create a serious jurisprudence in the matter of solving the criminal cases through the simplified criminal proceedings.

Consequently, the issue discussed in this context strengthen the role of the judicial bodies and subsequently of the prosecutors in the process of achieving the final judicial decisions in criminal cases. Actually, the role of double functions established for the case-prosecutor and for the head prosecutor is remarkable in the activity of solving the criminal cases by the legal means of simplified special criminal procedure.

4. Issues of jurisprudence

During the period of about ten years succeeded from the new Code of criminal procedure entrance into force till present, the jurisprudence in criminal matters has known several criminal cases in which the defendants have chosen to

solve their conflict of criminal law, born from committing crimes, through signing the guilt agreement. In this field, some judicial solutions given by the courts of law present high relevance for the current study, as they will be discussed in the current section.

(1) *The minimum standard admitted in the judicial activity of simplifying criminal proceedings requires that the defendants should imperatively be assisted by their lawyers, during the process of signing the guilt agreement.*

In cases in which this standard is infringed by the judicial bodies, the principle of due process is violated and the court of law is not entitled to pronounce the legal decision on the guilt agreement signed within an unlawful judicial framework. In the matter of fact, the court of law has been invested with the criminal case having as object the crime of accessing the informatic system illegally, according to Article 360 of the Criminal Code, and the crime of informatic fraud incriminated by Article 249 of Criminal Code[1].

According to the evidence administered by the judicial bodies, it has been stated that the defendants were found guilty and therefore convicted in accordance with their participation in committing the criminal activity. The defendants have appealed the first instance's solution which has been pronounced, both from the point of view of its illegality and unjustified feature. The main reason invoked leads to the fact that, during the criminal proceedings, the principle of due process has not been applied, including the right to defence[2].

The court has stated that the punishment provided by the penal law for the crime committed is between two years and seven years imprisonment. However, due to the reduction of punishment with one third, as a consequence of signing the guilt agreement, the punishment limits have become from one year to four years imprisonment[3]. In these circumstances, it is recognized that the courts of law can only analyse the legal conditions provided by the penal law on signing the guilt agreement, and therefore state if these conditions are achieved in those criminal cases in which they have been invested legally. Otherwise, the only one decision which could be pronounced by them is that of rejecting the guilt agreement.

The right to defence is considered part of the principle of due process, the European value established by the European Convention on Human Rights[4] and by the jurisprudence of the European Court of Human Rights as well, and cannot be infringed by the judicial bodies neither during the investigation stage, not during the judgment stage of criminal proceedings. Moreover, asserting this argument is given by the fact that the issue of simplifying the criminal proceedings is, along with the local interest, a European imperative, as provided above, which imposes the respect of the defendants' procedural rights during the

[1] Criminal Decision no. 194/RC/2022 of the High Court of Cassation and Justice of Romania, available online at https://www.scj.ro/.
[2] *Idem.*
[3] *Idem.*
[4] European Convention on Human Rights, adopted in 1950.

criminal proceedings. This principle is more particularly applied in those criminal cases in which they agree to sign the guilt agreement with prosecutors and solve their criminal case through using the simplified criminal procedure.

Last but not least, the defendant's lawyer is exercising the function of defence during the special simplified criminal procedure of admitting the guilt agreement, as it is imperatively regulated by the Code of criminal procedure of Romania, at Article 480 (2) thereof. In this matter, the legal doctrine has divided the function of defence into four categories. One of them refers to the function of verifying the opportunity of signing the guilt agreement, the second to the function of informing the defendant regarding the signing the guilt agreement, the third to the function of initiating the guilt agreement, while the last one to the function of negotiating the guilt agreement's content (Rotaru, 2013, p. 10; Magherescu, 2019, pp. 29-32).

(2) *The practical issue highlighted by the criminal co-participation of defendants regarding those who did not agree to sign the guilt agreement requires that the judicial bodies should imperatively respect their presumption of innocence.*

First of all, referring to this procedural standard, imposed by the simplified criminal proceedings, it could be pointed out that the prosecutor's office has stated that, during the criminal procedure of admitting the guilt agreement in the end of the investigation stage, the procedure does not entirely infringe the presumption of innocence for the defendants who did not agree to sign the guilt agreement with the prosecutor[1]. The solution came from the legal procedure which is based on the principle of personality of criminal liability, and consequently on the respect of the principle of presumption of innocence (Klip, In Rafaraci, Belfiore (Eds.), 2019, pp. 3-25).

In fact, it is very difficult to establish a limit between the two legal status of the defendants who have agreed to admit the guilt and therefore sign the agreement, on the one hand, and the other ones who have chosen to use the ordinary procedure under the presumption of innocence, on the other hand. A simply qualification between the two procedural status of defendants is not difficult to outline due to the fact that there is no obstacle imposed by the judicial bodies and no inconvenience to infringe the principle of presumption of innocence.

Secondly, the courts of law are always taking into account the special status of the defendants who are not involved in a special simplified criminal procedure, along with the other ones who have already signed a guilt agreement. This is because, in practice, if only some defendants have agreed with the accusation and accepted to admit the guilt, then a guilt agreement will be signed

[1] Communication No. 1022/VIII/3 of 31st of October 2017 of the National Anticorruption Directorate, available online at: http://www.pna.ro/ .

with the prosecutor for each defendant separately, without any infringement of the other defendants' right of the presumption of innocence.

Equally, the law court's main duty is to verify the guilt agreement content and its essential legal conditions. Moreover, the legal conditions provided by the Code of criminal procedure in these cases create for judges two possibilities to solve the criminal cases. In fact, only one solution pronounced by the court of law means a simplification of criminal proceedings. It refers to the cases in which the guilt agreement meets the criteria of legality, and the solution proposed by the prosecutor is proportional to the defendant's dangerous behaviour in committing the crime.

Consequently, the issue of admitting the guilt agreement by the court of law is decided under the framework established by the specific provisions of the Code of criminal procedure of Romania. In the cases stated by the code provisions – condemnation, renouncing to applying the punishment or adjourning the application of punishment – the court of law is obliged to respect the presumption of innocence for those defendants who did not agree to admit the guilt and sign therefore the guilt agreement. This legal solution is an opportunity for these defendants to prepare the right to defence under the ordinary criminal procedure, in missing the right to negotiate the simplification of criminal proceedings with the prosecutor.

5. Conclusions

One of the main dilemmas risen from the issue of originating the simplifying criminal proceedings still creates problems for the doctrine in criminal matters. In the area of researching this issue, the purpose of the current study was to identify the origin of the simplified criminal procedure. More specifically, the research activity conducted on this topic was focused on establishing the source of implementing the special procedure, as well as to identify if this is the result of the local interest or a European imperative.

In this regard, it has been stated that there is no only one way of solving the dilemma, as long as the simplified criminal procedure is based on concurrent factors. Some of them have procedural feature, while the other ones have legal feature, but the main characteristic is subordinated to the home interest, on the one hand, and on the European imperative, on the other hand. Why? The answer is very easy to be understood. Firstly, because the home legislation was very permissive until 2014, when the new Code of criminal procedure has entered into force. This means that the principle of solving the criminal cases in reasonable time was many times infringed and the criminal proceedings have been solved during a long period of time. This solution was sanctioned by the European Court of Human Rights, which condemned Romania in several cases. Secondly, the European strategy to harmonize the home legislation of the Member States to the European values of due process was clarified since Romania has become a

member of the European Union. Its standards were fully respected by the Romanian legislative and judicial authorities, and the justice system in criminal matters was even in the beginning a priority.

The simplification of criminal proceedings is currently viewed as a form of the negotiated justice, although, in fact, there is no negotiation, in terms and conditions stipulated by the other criminal justice systems, as the casually-law is provided in the criminal justice of the United States and the United Kingdom.

Despite this restrictive opinion expressed by the doctrine in criminal matters, the jurisprudence has devoted an ample space to the terminology used in the simplified criminal proceedings, both under the special procedure and the abbreviated ordinary one. Moreover, the court of constitutional contentious has stated that the guilt agreements signed legally during the investigation stage of criminal proceedings, under the special criminal procedure, is an element of negotiated justice[1]. This is because the form of punishment, its quantum, as well as the way of executing penalty are negotiated by the prosecutor with defendant.

The above-stated syllogism is also supported by the fact that the court of law, invested through the guilt agreement, is not entitled to pronounce a more serious punishment than the main "actors" of criminal proceedings have decided[2].

References

Allen, R.J., Hoffmann, J.L., Livingston, D.A., Leipold, A.D., & Meares, T.L. (2020). *Comprehensive criminal procedure*. (5th ed.). Aspen Publishing.

Campbell, L., Ashworth, A., & Redmayne, M. (2019). *The criminal process*. (5th ed). Oxford: Oxford University Press.

Coscas-Williams, B. & Alberstein, M. (2019). A patchwork of doors: Accelerated proceedings in continental criminal justice systems. *New Criminal Law Review,* 22(4), 585-617. https://doi.org/10.1525/nclr.2019.22.4.585

Cross, N. (2020). *Criminal law for criminologists: principles and theory in criminal justice.* Abingdon: Routledge.

Kennedy, J.A. (2012). *Case No. 10-109, Missouri v. Frye, March 21, 2012*. Retrieved from https://supreme.justia.com/cases/federal/us/566/156/.

Klip, A. (2019). Fair Trial Rights in the European Union: Reconciling Accused and Victims' Rights. In T. Rafaraci, R. Belfiore (Eds.). *EU Criminal Justice*. Cham: Springer. 2019.

Magherescu, D. (2019). *Recunoașterea vinovăției și aplicarea pedepsei*. Bucharest: Hamangiu.

[1] Constitutional Court's Decision no. 350 of 11 My 2017, published in the Official Journal of Romania no. 595 of 25 July 2017.

[2] Criminal Decision no. 158/A/2022 of the High Court of Cassation and Justice of Romania, available online at https://www.scj.ro/.

Rotaru, V. (2013). *Aplicare prevederilor legale privind acordul de recunoaștere a vinovăției*. Sirius.

Sebba, L. (1996). *Third parties. Victims and the criminal justice system*. Columbus: Ohio State University Press.

Spano, R. (2021). The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary. *European Law Journal. Special Issue: Between Ought and Is: European integration through the rule of law*, 27(1-3), 211-227. https://doi.org/10.1111/eulj.12377.

European Convention on Human Rights, adopted in 1950.

Law no. 135 of 2010 on the Code of Criminal procedure, published in the Official Journal of Romania no. 486 of 15 July 2010.

Criminal Decision no. 194/RC/2022 of the High Court of Cassation and Justice of Romania, available online at https://www.scj.ro/.

Criminal Decision no. 158/A/2022 of the High Court of Cassation and Justice of Romania, available online at https://www.scj.ro/.

Decision of the Constitutional Court no. 350 of 11 My 2017, published in the Official Journal of Romania no. 595 of 25 July 2017.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

SOME OBSERVATIONS ON THE CAUSES OF DIFFERENTIATION OF PUNISHMENT

Mihai ȘTEFĂNOAIA[1]

Abstract

In the present study, we want to highlight the influence of the so-called general causes of differentiation of punishment as well as some special cases of legal individualization. Accordingly, we point out that the legislator has carried out a special operation of individualization, i.e. adaptation of the penalty for the crime, the result of this operation being the establishment of lower limits of the penalty for the crime committed when one of the causes of differentiation provided by law is found to exist.

Key words: *general cases; special cases; individualization of the penalty; minority; attempt.*

1. Introduction

As we know, the individualization of the penalty and in general of the criminal law sanctions can only take place in strict compliance with the principle of the legality of the incrimination (art.1 of the Criminal Code) and of the criminal law sanctions, within the framework and limits established by law (art.2 of the Criminal Code). According to this principle, the penalty to be imposed for the commission of an offence is provided by the criminal law in force at the time the offence was committed (Antoniu, 2015, p. 391). In this way, the person who commits an offence provided for by the criminal law knows the penalty to which he is exposed and this penalty expresses the will of the law and not that of the person who applies it (Antoniu, 1996, pp. 18 and following).

However, the implementation of the principle of legality of criminal law sanctions requires different penalties for different offences, because if the penalty were the same it would not be necessary to provide for each offence (Bulai, 1967, pp. 525-541).

The differences in penalties correspond to the differences in the degree of social danger, generically assessed, of the offences provided for by the criminal law, and respect for a certain proportion between the degree of social danger of the offence and the penalty provided for its commission is an essential

[1] **Lecturer PhD, Facultatea de Drept si Stiințe Administrative, Universitatea "Stefan cel Mare" , Suceava (Romania), email: stefanoaia_mihai@yahoo.com.**

requirement for the effectiveness of the preventive function of the criminal law (Dongoroz et al., 1970, p. 162).

2. Our Criminal Code naturally enshrines these distinctions about the particular danger of the offences. It is based on the fact that the social values protected and the social realities thus protected do not all have the same significance and do not all require the same intensity of anti-crime reaction. The very order of the subdivisions of the special part of the Criminal Code is based on the importance of the values and social relations protected and reflects a certain hierarchy of them, even if it does not always reflect a hierarchy of offences in terms of their seriousness (Dongoroz, 1969, p. 30).

Since offences necessarily differ in terms of their degree of social danger, the penalties laid down by law will also differ from one offence to another about their social danger (Dongoroz et al., 1969, p. 112). This means that the penalty prescribed for a given offence is the result of an individualisation operation carried out by the legislator himself.

Indeed, by translating the principle of the legality of criminal law sanctions into practice, i.e. by providing for the punishment it deems necessary for each of the offences which present social danger and which it provides for in the criminal law, the legislator is "obliged" to individualise, to adapt the punishment about the social danger which an offence might generally present and about the danger, also generically assessed, of the possible perpetrator of the offence. In other words, by applying the very principle of the legality of criminal law penalties and as a corollary of this principle, our legislator is ensuring that the punishment is legally individualised.

Thus, by the principle of legality of criminal law sanctions (Article 2 of the Criminal Code), our Criminal Code provides in Chapter I of Title III of the General Part the categories of punishments that may be applied in our criminal law system and their general limits (Ifrim, Ionescu, 2017, p. 64).

The punishments[1] thus provided for reflect the penal policy of our State as regards the repressive reaction against offences, and the fact that these

[1] Art. 53 of the Penal Code: "Punishments are principal, complementary and accessory:
1) The principal penalties are:
The principal penalties are:
(a) imprisonment for life;
b) imprisonment;
c) fine.
Art. 54. The accessory penalty shall consist in the prohibition of the exercise of certain rights, from the moment the judgment of conviction has become final until the execution or deemed execution of the custodial sentence.
Art. 55. Complementary penalties are:
(a) the prohibition of certain rights;
(b) military demotion;
(c) publication of the sentence

punishments are provided for by a general rule which must be taken into account when drafting the special part of the Penal Code and in general the special part of our criminal legislation means that the punishments laid down in law for the various offences provided for either in the special part of the Penal Code or in special non-criminal laws are among those which make up the system or general framework of punishments.

Indeed, for each of the offences provided for in the special part of our Criminal Code or special non-criminal laws, the penalty or, possibly, the alternative penalties have been selected by the legislator from the general framework of penalties and so determined that their specific limits do not exceed the general limits. This determination by the Romanian legislature of the penalty applicable to each offence is at the same time a process of individualisation since both the selection of one of the penalties provided for in the general framework and the determination of its special limits were subject to the aim of ensuring that the criminal response was as complete as possible about the generic social danger of each offence[1]. As a result of this assessment, the penalties have been determined differently from one offence to another, i.e. in proportion to the social danger of the offence. The penalty prescribed by law for each offence is precisely determined in terms of type, but only relatively determined in terms of amount or duration. An exception is made for punishments that do not allow for relative determination (for example, military degradation). The rule, confirmed by the above exception, remains, however, that of the consistent use by our legislator of the system of relative determination, with maximum and minimum penalties.

The special maximum and minimum limits correspond to the maximum and minimum possible variations in the social danger that the prescribed offence could present in practice. The special maximum penalty may not exceed the general maximum and the special minimum may not be less than the general maximum.

By legally individualising criminal law penalties (Antoniu, Toader coordinators, 2015, p. 77), our legislator has, as a rule, set a special minimum higher than the general minimum and a special maximum lower than the general maximum, thereby narrowing the limits of the penalty applicable for a given offence as compared with the general limits of the penalty applicable for a given offence as compared with the general limits of the penalty.

[1] The criteria used by our legislator to assess the degree of social danger of the offences in question could only be criteria that can generally be used to make such an assessment: the social values endangered or damaged, their importance and hence the importance of the social relations protected for the criminalisation of the acts in question, the specific features of the acts which damage social values and relations and, in this connection, the seriousness of the immediate consequences of those acts, the form of guilt with which they are committed, the objectively determined characteristics of certain categories of persons which increase or decrease the intensity of the necessary criminal response, the data concerning the phenomenon of crime and the need to combat certain categories of crime using criminal law, etc.

Under these circumstances, the special limits of the penalty thus established are binding on the court, which may exceed them only in the cases and under the conditions provided for by law (Daneș, 1982, p. 23).

However, as is well known, our criminal law sometimes provides for two standard variants of the same offence under the same nomen juris, or one standard variant and one or more aggravated or mitigated variants, establishing special punishment limits for each of them. Any of these penalties becomes applicable when the offence has been committed in the variant for which it is provided (Bodoroncea, Cioclei and others, 2020, p. 475). Therefore, "the penalty prescribed by law" (Article 187 of the Criminal Code) means both the penalty prescribed for the standard offence and the penalty or penalties prescribed for the different variants of the offence (Dongoroz, 1969, p. 553). Provisions which provide for different variants of the standard offence implicitly achieve a legal individualisation which allows the correct classification of the acts committed.

But the individualisation operation carried out by our legislator is not limited to determining the penalties for the offences in question. It also includes the regulation of changes to the special limits of penalties under the influence of the so-called general causes of differentiation of the penalty as well as some special cases of legal individualisation.

Consequently, about each of the grounds for differentiation, the legislator has carried out a special individualisation operation, i.e. an adjustment of the penalty for the offence in question, the result of which is the establishment of lower limits for the penalty for the offence committed when one of the grounds for differentiation provided for by the law is found to exist (Manzini, 1933, p. 669). Thus, our criminal law provides for a special penalty regime for juvenile offenders, on the one hand establishing for them a double system of criminal law sanctions, educational measures and penalties, and on the other hand providing for a mandatory reduction of the special limits of the penalty if the offender is a minor (Dongoroz, 1969, 681).

According to the provision of art. 115 of the Criminal Code, the penalties that can be applied to juvenile offenders are educational measures or non-custodial[1] or custodial measures[2]. The juvenile is not subject to additional penalties, and convictions for acts committed while a juvenile does not entail disqualification or forfeiture. Thus, our legislator has deepened its

[1] Non-custodial educational measures are:
(a) civic training;
b) supervision;
c) weekend detention;
d) daily attendance.

[2] The custodial educational measures are:
(a) placement in an educational centre;
(b) placement in a detention centre.
(2) The choice of the educational measure to be taken in respect of the juvenile shall be made, by Article 114, according to the criteria laid down in Article 74.

individualisation process, taking into account the age characteristics of this category of offenders and considering that they can be re-educated with the help of sentences of shorter duration or lesser amount than those provided for adult offenders (Biró, 1969, p. 69).

Regarding the punishment of attempted offences, our criminal law enshrines the so-called system of diversification of penalties, according to which an attempt always attracts a lighter penalty than the offence committed. Unlike most European penal codes, which establish the so-called part material system, in which the penalty prescribed by law for the completed offence is also applicable to the attempt, our criminal law establishes the theory that the generic social danger posed by an attempt to commit a criminal offence is objectively or subjectively lower than that of the completed offence (Ciobanu, 2022, p. 151). Consequently, according to the provision of Article 33 para. 2 of the Criminal Code, the penalty applicable in the case of an attempt is that provided for by law for the completed offence, but its limits are reduced by half (Antoniu, Toader coordinators, 2015, p. 317). The minimum penalty thus reduced may not, however, be less than the general minimum.

It is possible that the attempt was committed by a minor. In such a case, the two grounds for differentiation will have a successive effect on the limits of the penalty prescribed by law for the offence attempted by the minor. The law does not specify the order in which these reductions are to be made. In this respect, we note that contradictory opinions have been expressed in the criminal literature.

In a first opinion, it was argued that reductions should be made first based on the provisions concerning the minority of the offender (Grigoraș, 1969, p. 182).

In a second opinion, the contrary view was taken that the reductions required by the minority provisions should be made first and then those arising from the attempted provisions (Biró, 1971, p. 237).

In our view, from a scientific point of view in interpreting the legal provisions concerning the two general causes of sentencing differentiation, we cannot fail to observe that since each of these causes has the effect of reducing the statutory sentencing limits to a predetermined and fixed extent, the order in which these reductions would be made is generally indifferent from a practical point of view. However, since the possibility of the two grounds for differentiating the penalty is not entirely excluded, in the sense that it is possible for a juvenile to attempt an offence for which the law provides for the death penalty, the question of the order of application of the reductions corresponding to each ground for differentiation is nevertheless of interest and must be examined and properly resolved.

A correct interpretation of the legal provisions in the matter in question requires the observation that in the system of our Criminal Code, there is no concurrence between minority and attempt (Bodoroncea, Cioclei and others, 2020,

p. 149). Minority as an institution of criminal law concerns the special penalty system for minors, whereas attempt concerns the forms of the offence either in the penalty system for adult offenders or in that for minor offenders. Therefore, we cannot speak of a competition of penalty-modifying causes that dispute each other's primacy, but rather of two legally individualised systems of punishment (Dongoroz, 1969, pp. 668-671).

In light of the above, we consider that the rules concerning the system of punishment are reserved for minors and then, within this system, the rules concerning the punishment of attempts should apply in the event of the two general causes of differentiation of punishment.

It should also be noted that the determination of the applicable penalty under the general grounds for differentiation of the penalty takes place before the legal individualisation operation begins, and the influence of the various grounds for aggravating or mitigating the penalty will have as its object the penalty within the limits thus reduced. But apart from the charges of differentiation, the limits of the penalties laid down in the law may be modified by the legislator as a result of a special individualisation operation (Antoniu, Toader coordinators, 2015, p. 344).

For these considerations, it follows that the legal individualisation of the penalty takes the form both of determining the specific limits of the penalty for each offence and of determining changes in these limits under the influence of the causes of differentiation or other causes of individualisation. The limits of the penalties thus modified are usually determined by derivation, i.e. by reducing the limits laid down for each offence by a certain amount, in the standard form or its various variants. But not in all cases where the legislator uses the derivation procedure to determine special penalty limits are we faced with a general case of differentiation or a special case of legal individualisation.

The technique of deriving the limits of the penalty is also used by our legislator when determining the penalty for the various aggravated and especially mitigating variants of the standard offences. However, in these cases, there are special grounds for individualising the penalty, which the legislator took into account when determining the specific penalty or penalties for the various types of offence but which, although sometimes somewhat general, were not regulated by law alongside the general grounds for differentiation. One of these cases which we find interesting to mention is that of the non-punishment of the family member in the case of the offences of concealment (Article 270(2) of the Criminal Code), favouring the offender (Article 269(3) of the Criminal Code) and failure to report offences (Article 266(2) of the Criminal Code).

The legal individualisation of penalties is an adaptation of criminal sanctions to the offences in question, i.e. a proportionalisation of penalties about the generic social danger of the offence in question and taking into account, where possible, certain characteristics of certain categories of persons. This adaptation makes the penalty provided for by law more effective as a preventive measure. It is made to correspond to the social danger that the offence for which it is provided

may present in concrete terms and which the offence in general presents and is thus made to appear as a just sanction about the seriousness of the offence.

This individualisation also indirectly ensures a certain proportionality between the penalties laid down for the various offences, so that all the penalties contribute to the preventive function of the criminal law and do not create disproportions which may encourage the commission of offences, under the cover of a real immunity due to these disproportions.

3. Conclusions

Our legislator's concern to ensure a fair proportion between the penalty prescribed by law and the generic social danger of the offence for which it is prescribed can be seen throughout the special part of the Criminal Code and our criminal legislation in general; this is clear from a comparison of the legal penalties and their differentiation. The determination of the penalty for each offence is therefore the result of an individualisation operation, and it should be noted that in carrying out this operation the legislator is much freer than the court, which is bound by the special limits and means of individualisation laid down by law.

The legislator is bound only by the general limits of penalties, which he has set when determining the framework of penalties. Therefore, the differences in penalties from one offence to another are not accidental, but express the legislature's careful concern to proportionate and adapt the penalty in the law in such a way that it can fulfil both its general preventive function, by simply providing for it as a penalty for a specific act provided for by the criminal law, and by actually establishing and applying it to the commission of that act.

Given this concern on the part of the legislator to determine with all necessary care the penalties for each offence provided for in the law, and for the different variants or forms thereof, it is difficult to suppose that the differences in the legal penalty would not express precisely the result of the individualisation made by the legislator (Dongoroz, 1969, p. 494).

References

Antoniu, G. (2015). *Criminal Law Treatise*, vol. I. Bucharest: Universul Juridic.

Antoniu, G. (1996). Penal reform and the fundamental principles of Romanian criminal law. *R.D.P.* no.3.

Antoniu, G., & Toader, T. (coordinators). (2015). *Explanations of the New Penal Code,* vol. II, (art.53-187). Bucharest: Universul Juridic.

Antoniu, G., & Toader, T. (coordinators). (2015). *Explanations of the New Penal Code,* vol. I, (art.1-52). Bucharest: Universul Juridic.

Biró, L. (1969). Considerations on general criteria for individualization of sentences in the new Romanian Criminal Code. *Studia Universitatis Babeș-Bolyai*.

Bodoroncea, G., Cioclei, V., and others. (2020). *Criminal Code. Commentary on articles*, 3rd edition - revised and added. Bucharest: C.H.Beck.

Bulai, C. (1967). Correlation between the principle of legality and the principle of individualization of punishment in criminal law. *SCJ* no.4.

Ciobanu, P. (2022). *Annotated Criminal Code.* Bucharest: Rosetti.

Daneș, Șt. (1982). Individualization of punishment by Romania's penal policy. *Revista Română de Drept* no. 2.

Dongoroz, V. et al. (1970). *Theoretical explanations of the Romanian Penal Code. General Part*, vol. II. Bucharest: Academiei.

Dongoroz, V. (1969). Synthesis of the New Romanian Penal Code. *Studii și Cercetări juridice* no.1.

Dongoroz, V. et al. (1969). *Theoretical Explanations of the Romanian Penal Code. General* Part, vol. I. Bucharest: Romanian Academy.

Ifrim, I., & Ionescu, O.R. (2017). *Romanian Criminal Law in a European Vision*. Bucharest: Universul Juridic.

Grigoraș, J. (1969). *Individualization of punishment.* Bucharest: Științifică.

Manzini, V. (1933). *Trattato di diritto penale italiano*. Torino.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

ANTI-CORRUPTION POLICY AT EU LEVEL

Sorina IONESCU[1]

Abstract

At EU level a series of measures are going to be implemented during the next period of time in what the anti-corruption policy within the Member States is concerned.

These measures contained in the recent proposals are considered by the EU institutions a milestone in the fight against corruption at national and EU level.

We intend to analyze in the present paper the importance of this EU policy and also the impact that the recent proposals are going to have within the EU.

Key words: *corruption; anti-corruption; EU; policy; regulations.*

1. Introduction

For the public institutions and also for the citizens, the present situation in what the corruption phenomenon is concerned represents a red flag stating that the national democracies and also the economy of every state can be seriously affected.

Thus, corruption is seen as an obstacle for sustainable economic growth and also an important factor for the rule of law crisis. Nowadays, we can observe a lot of attempts to breach the rule of law and these can be frequently identified as high-level corruption and abuse of power.

Article 2 of the Treaty on European Union states that „the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

So, the rule of law represents the main value for every democratic society and also the foundation of all fundamental rights and civil liberties, generating chaos within the public authorities when this principle is threatened.

At EU level, the need to protect the rights of every citizen can be observed when trying to prevent and also to fight against corrupt practices. All these can be

[1] **Lecturer Ph.D, University of Pitesti, Faculty of Economics and Law, Pitesti (Romania), e-mail: sorina.serban@upit.ro**

observed since 2020, when the European Commission started to monitor anti-corruption developments at national level as part of the annual Rule of Law Report cycle and also after 2022, are made recommendations for each country in order to solve their corruption related problems.

In this context, the European Commission has a new proposal for a Directive on combating corruption published on May 3rd 2023.

2. Instruments for combating corruption

The current challenge regarding the improvement of the present regulations on combating corruption represents an important preocupation for the EU institutions. Luckily, the existing legal frame is a solid one that can be a good starting point for the new proposal mentioned above.

The United Nations Convention Against Corruption[1] to which the European Union is a party to is the most important international legal instrument in the field of anti-corruption. Thus, the Convention regulates the preventive measures, criminalisation and law enforcement, the international cooperation, the asset recovery, and technical assistance and also the information exchange. It is very important to mention that the standards binding on Eu established by the Convention are part of the recent proposal for Directive on anti-corruption.

The Convention on the fight against corruption involving EU officials or officials of EU Member States from 1997[2] emphasises the difference between passive and active corruption. Thus, article 2 contains the definition of passive corruption stating that „the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatesoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties shall constitute passive corruption". And article 3 contains the definition of active corruption stating that „the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties shall constitute active corruption".

Also, currently, the Council Framework Decision 2003/568/JHA regulating the criminalisation of corruption in the private sector is in force and represents an important instrument at EU level for combating corruption, in this case, in the private sector. This was generated by the need of regulating the effects of globalization and the increase in cross-border trade in goods and services. In

[1] Adopted by the UN General Assembly on 31 October 2003, by resolution 58/4 and entered into force on 14 December 2005.

[2] Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union.

this context, the instruments provided by the European Union represent a more effective way to address the corruption generated problems than the national legislation.

Another instrument is the Council Decision regulating a contact-point network against corruption 2008/852/JHA of 24 October 2008. By this Decision a network of contact points of the Member States of the European Union was set up wishing to improve cooperation between authorities and agencies and also to prevent and combat corruption in Europe. The network is represented by authorities and agencies of the Member States of the European Union charged with preventing or combating corruption. An important aspect regulated by this Decision is that the network members are designated by the Member States and also the fact that Europol[1] and Eurojust may participate in the activities of the Network.

3. The need to upgrade the EU current anti-corruption regulations

The instruments mentioned above reflected the needs that the society was having at the point they were adopted. Nowadays, the challenges for the European authorities and also for the Member States are different.

Thus, there are several challenges that the national authorities are facing nowadays and we believe the most important are: the length of prosecution, the existance of many regulations on immunity and privileges and also the resources that are limited (Singh, 2018, p. 85).

An obstacle in the way of upgrading the regulations concerning the anti-corruption measures are also the late enforcement at national level and also the inefective cooperation between the competent authorities in different Member States.

It is important for both national and EU authorities to implement represive but also preventive mechanisms in order to fight the corruption phenomenon. We consider that these mechanisms have to be reflected in the criminal repression that will bring along citizens trust regarding the public officials activities.

Thus, corruption represents a major problem and also a preoccupation for the authorities and this needs a multidisciplinary approach to ensure the protection of democracy, the protection of the rule of law and also the fundametal rights (Singh, 2018, p. 600).

We believe that the current directive proposal will update the EU legislative framework by containing all the international standards mentioned above regulated by the international conventions on anti-corruption and also having as main purpose to harmonize the regulations in this field within all Member States.

[1] Europol provides an important support for Member States in the fight against corruption due to the connections that exist between corruption and organized crime.

This proposal comes after the Commission`s deccision in 2020 to monitor anti-corruption developments at national level as one of the pillars of the annual Rule of Law Report cycle[1]. Thus, since 2022, the reports contain recommendations for Member States in order to encourege developments, changes or reforms.

4. New regulations to combat corruption

As we have mentioned above, the European Commission has a new proposal for a Directive on combating corruption published on May 3rd 2023. As every directive needs to be implemented, this directive will have to go through the same procedure in order to become a national regulation in each Member State bound by it (Craig & De Burca, 2017, p. 227). After this procedure is complete, the 1997 Convention and 2003 Council Framework decision will be replaced by the new Directive.

The purpose of this legislative change is to regulate all forms of corruption in all Member States, the ones concerning legal persons also, thus, this category of persons may be held responsible for such offences.

So, the changes contained by this directive are supposed to modernise the existing EU anti-corruption regulations and they mainly consist in:

First, the definitions for the most important terms regarding corruption, such as "prevention of corruption", "property", "public official", "Union official", "national official", "and breach of duty ","legal person ","" high level officials" are established in article 2 of the Directive. This represents an important harmonization because these terms are going to be identified in the same manner in all national regulations.

Secondly, another very important harmonization is represented by fact that the directive brings together in one regulation all corruption offences and sanctions. Thus, the directive regulates beside bribery, also other criminal offences prosecuted as corruption such as misappropriation, trading in influence, abuse of functions, as well as obstruction of justice and illicit enrichment related to corruption offences.

Thirdly, the preoccupation to ensure a real prevention for corruption and raising the integrity level at EU and national level represents an important point regulated by the directive proposal. And the way this can be realized is by information and awareness-raising campaigns, research and education programmes that can raise public awareness on the effects this phenomenon has on society. Also, for the Member States are set obligations to adopt

[1] The Rule of Law Report is the foundation of this new process called the European Rule of Law Mechanism that represents an annual dialogue between the Commission, the Council and the European Parliament together with Member States as well as national parliaments, civil society and other stakeholders on the rule of law.

comprehensive and up-to-date measures in order to prevent corruption in the public and also in the private sector.

Fourthly, it is regulated for the Member States the obligation to perform regularly an assessment in order to identify the sectors most at risk of corruption and also to develop plans to address the main risks in the sectors identified.

Finaly, a very important aspect regulated in the directive proposal refers to the liability of legal persons that can be held liable for any of the criminal offences related to corruption that are committed for the benefit of those legal persons by any natural person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person.

5. Conclusions

We believe that the key to an administrative and institutional system without corruption is a coordinated legislation that has to be based on integrity, transparency and accountability. Public authorities have to accomplish the highest standards of integrity and transparency in order to really eliminate the phenomenon of corruption.

Also, public authorities must implement all mechanisms necessary to keep the risk of corruption under control and this has to be an obligation for all Member States institutions.

An important step toward harmonizing the legislation in the field of combating corruption is the Directive proposal published on May 3rd 2023 and the fact that it contains definitions for the most important terms regarding corruption and also it brings together in one regulation all corruption offences and sanctions.

References

Craig, P, & De Burca, G. (2017). *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină*. Hamangiu.

Singh, A. (2018). General notes regarding the disciplinary liability of bailiffs. *The International Conference European Union's History, Culture and Citizenship*, 600-611;

Singh, A. (2018). Răspunderea disciplinară a executorilor judecătoreşti. *RRES*, 3, 85-101.

The United Nations Convention Against Corruption. (2005).United Nations New York.

The Treaty on European Union.

Proposal for a Directive on combating corruption, published on May 3rd 2023.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

HUMAN TRAFFICKING CONSIDERATIONS. EXPLOITATION THROUGH LABOUR AT THE EUROPEAN UNION LEVEL

Carmina Tolbaru [1]

Abstract

Trafficking in human beings is one of the most serious forms of crime, which flagrantly violates human rights, having different forms of manifestation, such as sexual exploitation, forced labour or services, slavery, servitude, removal of vital organs etc. At the level of the European Union, this complex phenomenon is approached from the perspective of cross-border organized crime, implying close cooperation between all member states. It is considered a modern form of slavery, which does not take into account gender or age, labour exploitation being the predominant form of exploitation for the purpose of obtaining material advantages. Thus, human trafficking for labour exploitation is on the rise across Europe, affecting women, men and children alike. Greater attention should be paid to children from vulnerable groups, such as street children, children belonging to ethnic minorities or children in state foster care, who have a high index of victimization. Efforts are currently underway to strengthen action against human trafficking for the purpose of labour exploitation.

Key words: *human beings trafficking; labour exploitation; EU Strategy; protection; labour market.*

1. Introduction

The human trafficking, seen as a phenomenon which manifests itself as a form of slavery for victims, is considered worldwide a serious violation of human rights, in terms of dignity and integrity of the human being, regardless of his/her gender. With a focus on the fundamental human rights and on the protection of victims of human trafficking, the Convention of the Council of Europe on action against trafficking in human beings, is set up in an international legal instrument which establishes a specific monitoring mechanism. In art. 4 of the Convention, human trafficking is defined in a comprehensive manner, referring to the recruitment, transportation, transfer, harbouring or reception of the persons, by means of the threat or use of force or of other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of

[1] **Lecturer PhD, Faculty of Economic Sciences and Law, Pitesti (Romania), e-mail: carmina.tolbaru@upit.ro.**

the giving or accepting payments or benefits in order to achieve the consent of a person having control over another person, for the purpose of exploitation. Also, as per Convention, exploitation include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. Thus, we have to consider all forms of exploitation, regardless of the modalities of accomplishing the human trafficking, of the means by which it is accomplished, and of the purpose in which it is accomplished.

At the European Union level, Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, sets out minimum standards regarding the definition of offences and criminal sanctions in matter of human trafficking. In accordance with the provisions of the Convention, Directive 2011/36/EU incriminates in art. 2 the "recruitment, transportation, transfer, harbouring or reception of the persons, including the exchange or transfer of control over such persons, made under threat or by use of force or of other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or taking advantage of a position of vulnerability or of the giving or accepting payments or benefits in order to achieve the consent of a person having control over another person, for the purpose of exploitation" " (JO L101, 2011, p. 6). However, the correct and complete transposition of its provisions into the legislation of the Member States, has remained a challenge having been taken care of by the European Commission and the European parliament. The legislative gaps and the divergent practices existing in the legislations of the Member States create opportunities for offenders, and the minimal rules established in the directive are not enough to correspond to the current reality of the phenomenon. It is the reason for which the European Commission proposed the revision of Directive 2011/36/EU, requesting to the Member States the annual collection of data regarding the trafficking of human beings, in order to be able to identify the current trends and challenges of the phenomenon, in a real and concrete manner,

2. Combating human trafficking - a priority for the European Union

Human trafficking is a complex criminal-related category, well-organised and lucrative (Botnari, Bujor, Bejan, p. 120). Gaining profit is the main purpose of this offence, whose accomplishment is extremely expensive, as it requires substantial financial resources and generates huge profits for offenders. Most times, the traffickers act within a well-organised system of the cross-border criminality, and for that we need a structured way of cooperation between the law enforcement authorities and the judicial ones, both in a national and transnational context. This octopus-like network includes chain criminal activities, in a continuous and recurrent form, most often in connection with other offences, such as smuggling of immigrants, drug trafficking, money laundry, forgery of documents or of payment cards, cyber-crimes and others.

There is an increasing number of victims of trafficking, within the European Union strategy such a threat being related to the increased demand of services obtained by the exploitation of victims of human trafficking. The decrease of demand efficiently is a strategic priority at European Union level. They have in view the discouragement the users of such services by establishing minimum rules at the European Union level regarding the incrimination of the use of services obtained by exploitation of victims of human trafficking European Commission, EU Strategy on Combatting Trafficking in Human Beings 2021-2025, pp. 6-7). Directive 2011/36/EU lists exhaustively different forms of trafficking, without limitation to only some activities or fields of activity. From these, a major challenge is the trafficking in human beings for the purpose of exploitation by labour, this becoming a practice at the level of all States at present. Human trafficking is an offence which does not account for gender, women and men being equal subjects of the trafficking, but for different purposes. Also, children are victims of human trafficking for the purpose of exploitation by labour. For that matter, they are the most exposed ones to the risk of becoming victims of traffickers which make use of the increased use of internet and of social communication networks, these being used as modality of recruitment online. According to a report of the European Commission, the most common form of trafficking within the European Union is sexual exploitation, followed rapidly by exploitation labour, the number of victims increasing lately.

The adjustment of offenders to the digital technology comes to hinder the investigation of such phenomenon, the offenders using more and more the digital space to recruit victims, for example by launching fake job offers, and also to organise the details regarding the subsequent stages of trafficking: transportation, transport, harbouring, reception etc. Also, internet is an important means of communication and information, having a strong impact on its users, being widely exploited by traffickers to advertise the services offered by victims, to contact then potential clients, to control the victims, including to communicate among offenders and to hide the incomes obtained from offences (European Commission, EU Strategy on Combatting Trafficking in Human Beings 2021- 2025, pp. 12-13). Thus, internet and social media are means which facilitate human trafficking in all its stages, at the same time hindering the detection of offences and identification of offenders, but especially the early identification of victims and granting support to them.

The proposal regarding the implementation from a gender perspective of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, wishes a new approach of the phenomenon, so that the states could adjust their own preventing and combating policies in the context of cyber technology, also considering the use of internet in awareness and warning campaigns of the population over the risks to be trafficked (European Parliament resolution of 12 May 2016, OJ C 76, pp. 8-9).

The proposal to revise the directive is based on a systematic and multilateral approach, with legal, political and operational actions based on the protection of victims, and on the criminal prosecution and conviction of offenders (European Commission, Proposal for a Directive, 2022, p. 1). The evolution of the phenomenon, considering its cross-border aspect, and the diversification of the modus operandi used by offenders, represented the base of the proposal to amend Directive 2011/36/EU, which targets a legal framework applied on current reality. Concretely, the reform of the directive targets a package of legislative amendments to include (European Commission, Proposal for a Directive, 2022, p. 10):

- Explicitly refer to the online dimension of offence;
- Include in the definition some new forms of exploitation – explicitly refer to forced marriage and illegal adoption in the list of forms of exploitation;
- Strengthen the regime of sanctions against legal persons and the legal framework related to incrimination of the use of services obtained by exploitation of some persons with knowledge that such persons are victims of trafficking;
- Establish some official national mechanisms of referral by acts with legal authority and administrative acts, and designate national focal points for referral of victims;
- Impose to Member States the obligation to introduce as offence the use of services obtained from exploitation of victims of human trafficking, and requirement addressed to Member States to collect data and report data on indicators regarding trafficking in human beings yearly.

At the same time, for a good implementation, the legislative measures should be accompanied by legislative-free measures, in this regard indicating the promotion of cooperation between the Commission and the companies operating in the internet, as well as the creation of a theme group of specialised prosecutors in combating human trafficking.

3. Actions in combating human trafficking for the purpose of exploitation by labour

Human trafficking for the purpose of labour has increased alarmingly at European Union level, being felt in many economic sectors and affecting mostly different groups of cross-border workers. Considering the growing number of still unidentified cases, we need a firm answer on behalf of the criminal justice regarding the phenomenon of human trafficking for labour. Labour inspectors and social partners should intensify their efforts, inspections performed in high-risk areas in order to identify the victims and the exploiters, and to cooperate more closely with the European Union agencies, especially Europol, and also with the European Labour Authority, for the fields of its competence. In this regard, we need inspections performed in high-risk areas in order to identify the victims and the exploiters. Such cooperation is ensured through the European platform

tackling undeclared work, a cross-border cooperation mechanism implemented since 2016, meant to serve mutual support, practice exchange, and mainly to allow the identification of the victims trafficked for labour. In this context, the European Parliament invites the European Labour Authority to approach as a matter of priority the issue of severe labour exploitation and to support the Member States to strengthen their capacities in this regard, for a better detection and sanction of the practices of severe labour exploitation, through specific inspections, emphasizing the following guidelines (European Parliament resolution of 10 February 2021, pp. 39-40):

- detect severe labour exploitation by specific inspections and correspondingly sanction them;
- include labour exploitation into the training programmes for the officials assisting the victims, so that such cases could be detected in time;
- to establish to what extent human trafficking for labour exploitation is stimulated by the request of cheap labour services;
- to eliminate all forms of informal and unregulated labour, thus guaranteeing labour rights for all workers;
- to take account that the precarious professional status of such workers is the one making them depend on their employers, allowing the authors of human trafficking to exploit their victims.

In accordance with article 2 para.3 of Directive 2011/36/EU, the different forms of exploitation referred to, include "the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organ". Forced begging should be understood as a form of forced labour or service, as well as any form of exploitation of a criminal activity, regardless of its type. But we mention that it is considered human trafficking for labour exploitation only in the context where the constituent elements of human trafficking are met. The consent of the victim is irrelevant when means of coercion or deception are used. Once stablished all the elements of the offence, especially the means (threat, use of force, deception etc.), the problem of the victim`s consent is not even to be put in question (Jitariuc, Rusu, 2023, p. 118). Therefore, the validity of any possible consent of the person to render a form of work or a certain type of service, should be assessed for each situation separately. By way of exception, there is, under any circumstances, no problem of validity of consent when there is a child below 18 years of age. In such situations, child labour should be treated as an extremely serious issue, which may hinder their development, traumas being both physical and mental (ILO, 2019, pp. 42-44). That is why, in terms of the Directive, a child is considered as a victim of human trafficking, even they used or not means to recruit, transport, transfer, harbour or receive the child, for exploitation.

4. Severe forms of labour exploitation

There are many forms of labour exploitation, some of which being considered severe, as they are classified as offences in the States` criminal legislation. But we cannot speak about trafficking in all cases, only when they use illicit means for exploitation purposes, as referred to in art. 2 of Directive 2011/36/EU. Thus, there are incriminated for the purpose of exploitation ”recruitment, transportation, transfer, harbouring or reception of the persons, including the exchange or transfer of control over such persons, made under threat or by use of force or of other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or taking advantage of a position of vulnerability or of the giving or accepting payments or benefits in order to achieve the consent of a person having control over another person”. As mentioned already, in such situations, the alleged consent of a person to be exploited is irrelevant if any of the means listed were used (threat, use of force, deception, abuse of a position of vulnerability etc.). Moreover, in such cases, such person will be considered as trafficked victim, in any of the trafficking stages (recruitment, transport, transfer etc.) by the use of one of the means indicated, even if the exploitation did not take place. In the doctrine, recruitment is considered as finalised at the moment when the consent of the person to be trafficked was obtained, even if the transaction did not come true (Jitariuc, & Rusu, 2023, p. 117).

The problem of approaching the phenomenon also comes from the fact that there is no definition of what labour exploitation represents in the context of human trafficking, but this concept is considered to cover, at minimal level, forced labour or service, slavery or servitude. As for forced labour or service, we should have in view a series of international instruments with an essential role in combating forced labour. Thus, pursuant to Convention no. 29/1930 of the International Labour Organisation, by forced labour we understand any work or service which is obtained from any person under the menace of any penalty and for which the said person has not offered himself voluntarily (art. 2 of ILO Convention). The Convention forbids all forms of forced or compulsory labour and imposes the provision of forced labour as an offence into the legislation of the States. However, the persistence of the practices of forced labour extensively determined the adoption of Protocol of 2014 to the Forced Labour Convention, 1930 and the Forced Labour (Supplementary Measures) Recommendation 203/2014. The 2014 Protocol is conceived as a compulsory judicial instrument from a legal point of view, whose purpose is the elimination of all contemporary forms of slavery, human trafficking for labour exploitation being considered the most challenging form of ”modern slavery” (GRETA, 2019, p. 9).

Human trafficking for labour exploitation is incriminated in all States, but we need that they provide in their domestic legislation, their own parameters in matter of labour exploitation and at the same time, establish specific regulations regarding their interpretation and application. The legislation of the states is

lacunary regarding the configuration of the legal framework in the matter, that is why it is difficult to solve this problem in the context in which the phenomenon takes place both inside and outside the European Union. In states like Belgium and Germany, the offence of human trafficking includes, besides slavery and servitude, other illegal activities, such as performance of work or rendering services in conditions contrary to human dignity or making a person work under labour conditions which are in contrast with those of other workers performing the same activity or a similar one (GRETA, 2020, pp. 6-7). Thus, such practices are good examples to follow for all states that should prioritize this problem and strengthen their legislation accordingly. By the diversity of forms that labour exploitation may take and, in consideration of some abusive labour conditions, it is imposed that the scope of competences of the competent institutions in matter of human trafficking be extended regarding the forms of exploitation manifested within labour relationships, too. They have in view an extended mandate of the bodies with competences in combating human trafficking, so that it also includes extremely abusive labour conditions, as well as the cases of exploitation on victims of human trafficking, by an employer that is not involved in the trafficking process, including the situations of illegal hiring of minor children (FRA, 2016, pp. 10-11). Such a process requires specific investigation procedures, and also the setting up of some specialised units within the police and prosecutors` units, given that these may act more efficiently if they were especially trained in this regard. Moreover, o more comprehensive regulation of labour market is imposed, so that labour authorities decide measures granted within some extended mandates, benefit from specialised training and dispose of enough human and financial resources, in order to allow them to be pro-active in all economic sectors (Council of Europe, 2023, pp. 15-17).

The cases of labour exploitation target different fields of activity, such as constructions, agriculture, hospitality industry, production and cleaning services. Men especially are targeted for such works, while women are trafficked for housekeeping exploitation or care work for children and elders. Reality shows that such cases are much more difficult to detect, as they take place in private households, the victims being subjected to sexual exploitation and to labour exploitation, within forced or arranged marriages (GRETA, 2019, pp. 14-15).

Also, the category of victims presenting the highest risk is the migrant workers, posted or seasonal workers, likely to be exploited as a result of their status. The high unemployment rate and poverty are the main causes which makes these workers accept work under legal standards and therefore be subjected to different forms of severe labour exploitation (FRA, 2016, pp. 10-11). By inspections at the work place performed by labour inspectors or by other public authorities, such risks can be significantly reduced. An essential role comes to the competent authorities that should decide protection measures related to risk factors.

Also, the victims of severe labour exploitation who are in a situation of illegal stay feel discouraged by their status, thus avoiding to tell the authorities the situation of exploitation they are in. practically, as long as they are not offered a guarantee of regulation of their status, the number of such offences keeps increasing. This is the reason why states should establish safe and efficient mechanisms of referral of trafficking cases, offering concrete possibilities to regulate the status of resident of the trafficked persons, as well as of access to labour market. Finally, the problem of compensations and of compensatory payments is extremely important, being considered a disadvantage in reporting the cases of trafficking for labour exploitation. Therefore, overdue payments and compensations established in the criminal lawsuits is a problem that need to be solved and that is on the agenda of European Commission meetings, the States having to establish a national fund for victims.

5. Conclusions

A significant problem of the current society is the modern forms of forced labour, generated by the economic and social context of globalisation. As I have shown before, the phenomenon of migration determines an alarming growth of the cases of human trafficking for exploitation, requiring cross-border investigation and criminal prosecution. This requires close cooperation among states, at the level of the law enforcement authorities, respectively between ministries, labour authority, police units, social partners, the civil society in its whole in fact. The labour market requires a stricter regulation and calls for a more comprehensive involvement of labour inspection, as well as a concrete monitoring of labour conditions. The proposal to revise Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, targets the stricter criminal rules that states should implement into their legislation, practically a criminal justice system adjusted to the new forms of human trafficking. Setting up some compulsory sanctions against the enterprises involved in human trafficking offences, and also incrimination of the use of services obtained from the victims of human trafficking, are only a few legislative measures for the purpose of reducing the phenomenon. At the same extent, they wish a victim-centred approach and also on his needs, considering the aspects determined by gender dimension and by children's issues, pursuing mainly a consolidation of the rights granted to victims – the offer of unconditional support, by avoiding additional sanctioning of the victim, as well as the right to financial compensations, are only a few of them.

References

Botnari, Gh., Bujor V, & Bejan O. (2008). *Caracterizare criminologică şi juridico-penală a traficului de fiinţe umane*. Chişinău: Ericon.

Jitariuc, V., & Rusu, V. (2023). Particularităţile obiectului probatoriului în cazurile privind traficul de fiinţe umane. In *Dreptul* no. 1, 115-131.

Council of Europe. (2023). *Preventing and combating trafficking in human beings for the purpose of labour exploitation – Recommendation CM/Rec(2022)21*. Preventing and combating trafficking in human beings for the purpose of labour exploitation - Recommendation CM/Rec(2022)21 (coe.int)

European Union Agency for Fundamental Rights (FRA). (2016). *Forme grave de exploatare prin muncă: lucrătorii care se deplasează în interiorul Uniunii Europene sau intră în Uniunea Europeană*. Forme grave de exploatare prin muncă: lucrătorii care se deplasează în interiorul Uniunii Europene sau intră în Uniunea Europeană – Rezumat (europa.eu),

Group of Experts on Action against Trafficking in Human Beings (GRETA). (2020). *Compendium of good practices in addressing trafficking in human beings for the purpose of labour exploitation*. 16809f9bef (coe.int)

Group of Experts on Action against Trafficking in Human Beings (GRETA). (2019). *Human trafficking for the purpose of labour exploitation, Council of Europe*. ES278502_PREMS 133519 GBR 2579 Human trafficking GRETA Texte 16x24 WEB.pdf (coe.int)

International Labour Organization (ILO). (2019). *Rules of the game: An introduction to the standards-related work of the International Labour Organization*. International Labour Office: Geneva. wcms_672549.pdf (ilo.org)

Council of Europe Convention on Action against Trafficking in Human Beings, entered into force on 1 February 2008, CETS 197 - Council of Europe Convention on Action against Trafficking in Human Beings (coe.int)

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L101, 15.04.2011, pp. 1-11). Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (europa.eu)

European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU, Strategy on Combatting Trafficking in Human Beings 2021- 2025, Brussels, 14.4.2021 COM(2021) 171 final, eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0171

European Commission, Proposal for a directive of the European Parliament and of the Council amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims COM/2022/732

final, eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:52022PC0732

European Parliament resolution of 12 May 2016 on implementation of the Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims from a gender perspective (2015/2118(INI), (OJ C 76, 28.2.2018, pp. 61-75)

European Parliament resolution of 10 February 2021 on the implementation of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (2020/2029(INI), (OJ C465, 17.11.2021, pp. 30-46) European Parliament resolution of 10 February 2021 on the implementation of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (2020/2029(INI)) (europa.eu)

International Labour Organization (ILO). Forced Labour Convention no. 29/1930. Convention C029 - Forced Labour Convention, 1930 (No. 29) (ilo.org)

Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344, (OJ L 186, 17.06.2019, pp. 21-56).

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

THE OBLIGATIONS TO INFORM AND CONSULT THE UNION/EMPLOYEES' REPRESENTATIVES IN THE COLLECTIVE REDUNDANCY PROCEDURE

Mădălina-Ani IORDACHE[1]

Abstract

At European level, Directive 98/59/EC was adopted on the approximation of the legislation of the member states regarding collective redundancies, this being implemented in the national legislation within the provisions of articles 68-75 of the Labour Code.

The collective redundancy procedure imposesthe fulfilment by the employer of two main obligations, in relation to the union or employee representatives:

• The obligation to consult.

• The obligation to inform.

These two obligations represent the application of the general principle of good faith which is the basis of the legal employment relationship.

Keywords*: collective redundancies; consult; inform; union.*

1. Introduction

Informing and consulting the union, respectively the employees' representatives in the field of employment relations has the role of promoting and strengthening the bipartite social dialogue between employers and employees, with the purpose of improving the living and working conditions of employees.

The employees' right to information and consultation involves, on the one hand, the transmission of data by the employer to the employees' representatives in order to actively involve the latter in the decisions adopted by the employer, and on the other hand, the exchange of opinions and the establishment of an effective and useful dialogue between the two partners.

At EU level, there has been a permanent concern regarding the promotion of social dialogue, the employees' right to information and consultation being treated as a:

- fundamental social right of workers.

[1] **Associate Professor PhD, University of Bucharest, Faculty of Law; S.C.A. Ciulei, Iordache, Morozov, Co-Managing Partner (S.C.A. = Civil Society of Lawyers) (Romania), email: madalinaani.iordache@yahoo.com.**

- right of a collective nature. More precisely, it is intended for the employees' representatives, a notion understood in a broad sense –union organizations or employees' representatives – and not for workers considered individually.[1].

In this context, we point out that the right to information and consultation, as provided for in the European Social Charter[2], in article 21imposes:

- Regular but also punctual information, in certain cases where the measures adopted by the employer could lead to important changes in the organization of work. The information is carried out in a clear manner on the economic and financial situation of the undertaking, the Charter also establishing an exception regarding the object of the information: information that could bring prejudice to the undertaking.
- Consultation in a timely manner on the proposed decisions that are likely to substantially affect the interests of workers and in particular on those decisions that could have important consequences regarding the employment situation in the undertaking.

Article 27 of the Charter of Fundamental Rights of the European Union[3] recognized the right of workers to information and consultation as a fundamental right, with member states having the obligation to regulate it under the conditions provided for under Community law and national legislation and practices.

In the same sense, the Community Charter of the Fundamental Social Rights of Workers[4]establishes under point 17 that workers or their representatives have the right to be informed and consulted in a timely manner on matters relevant to them, especially on the transfer, restructuring and merger of undertakings and regarding the collective redundancies. Based on point 17 of the Community Charter of the Fundamental Social Rights of Workers, the Directive 2002/14/EC[5]was adopted, establishing a general framework for information and consultation of workers in the European Community, this constituting the general regulatory framework.

In relation to Directive 2002/14/EC, the regulations on the right to information and consultation regarding the approximation of the member states' legislations related to: collective redundancies[6], the protection of the employees' rights in the case of transfers of undertakings, businesses or parts of undertakings

[1] C-12/08, Mono Car Styling SA, in liquidation v. Dervis Odemisand Others, ECLI:EU:C:2009:466, pt.38
[2]https://rm.coe.int/168047e170, consulted on 20.03.2023
[3]https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:ro:PDF, accessed on 20.03.2023
[4]file:///C:/Users/madal/Downloads/community%20charter%20of%20the%20fundamental%20social%20rights-gp_eudor_PDFA1B_CB5789483ENC_001.pdf,
accessed on 20.03.2023
[5]OJ L 80/29, 23.03.2002, pp.29-34
[6]Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225, 12.8.1998, p. 16

or businesses[1], but also those of the directive on the establishment of a European council of the undertakings or of a procedure for informing and consulting workers in undertakings and groups of undertakings of a Community dimension[2]have a special character. Under these conditions, the regulations specific to the incident matter will apply.

Directive 2002/14/EC was implemented in Romania through the adoption of Law no. 467/2006 regarding the establishment of the general framework for the information and consultation of employees[3].

Also, Directive 98/59/CE was implemented under the Labour Code[4] (abbreviated here in after as: LC), in articles 69-71.

The redundancy procedure, as it is regulated by article 69 of the LC, considers the fulfilment by the employer of two main obligations:

- The obligation to consult.
- The obligation to inform.

2. The notion of employer in the light of the provisions of article 69 of the LC and those regulated by Directive 98/59/CE.

According to article 14 of the LC, *the employer* represents the natural or legal person who can hire labour on the basis of an individual employment agreement, which implies that the information and consultation, as regulated by article 69 LC, will be carried out either by the natural person who is an employer, or by the legal person who concluded with the employee an individual employment contract.

Directive 98/59/CE operates with two notions: *undertaking* and *establishment*, without defining these notions, thus leaving to the Court of Justice of the European Union this task.

Ab initio, it must be stated that according to the Court of Justice of the European Union case law[5], the notion of *employer* also includes legal entities that carry out non-profit activities, but it is not applicable to workers in the public administration or public law institutions, nor to part-time workers and whose contracts have expired.

[1]Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.03.2001, pp. 16-20
[2]Directive95/45/CEE, OJ L 254, 30.09.1994, pp. 64-72
[3] Published in the Official Gazette no. 1006 of 18th December 2006
[4] Law no. 53/2003 republished in the Official Gazette no. 345 of 18th May 2011
[5]Commission v. Italian Republic. C-32/02, ECLI:EU:C:2003:555

In a first approach, the Court of Justice of the European Union[1]established that the notions of undertaking and establishment are different, the former including the latter.

Subsequently, the Court of Justice of the European Union[2]established that a distinct entity, characterized by a certain continuity and stability, which is intended to perform one or more specific tasks, and which has a team of workers, as well as of technical means and a certain organizational structure to enable it to fulfil these tasks, can constitute an "establishment" within an undertaking. In the same ruling, the Court of Justice of the European Union[3]showed that the establishment:

- should not necessarily be characterized by a certain degree of legal autonomy, nor by an economic, financial, administrative or technological autonomy.
- is not essentially defined by the existence of a management that can independently carry out collective redundancies[4];
- an establishment is not necessarily defined by a geographical separation from the other establishments and facilities of the undertaking[5];

In the Valerie Lyttle case, the Court of Justice of the European Union ruled on the scope of the notion of "establishment" provided for in article 1 paragraph 1 letter a) (2) of Directive 98/59/EC to establish whether collective redundancies have taken place. In this sense, the Court of Justice of the European Union ruled that the notion of *establishment* requires considering the actual redundancies in each establishment taken into account separately[6]and not only if the cumulative number of redundancies in all establishments or in certain establishments of an undertaking in the same period reaches or exceeds the threshold of 20 workers.

Contrary to EU case-law, the Labour Code provides forthe implementation of the collective redundancy procedure to the extent that the legal conditions are met at the level of the employer – legal person, thus excluding the application of the collective redundancy procedure at the level of establishments without legal personality.

Finally, the Court of Justice of the European Union also ruled that the terms "establishment" or "establishments" have the same meaning both in article 1 paragraph 1 first paragraph letter a) point (i) as well as in article 1 paragraph 1

[1]C-449/93, Rockfon A/S c Specialar-bejderforbundetiDabmark, pt.28, https://curia.europa.eu/juris/showPdf.jsf?text=&docid=99330&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1331426 , consulted on 18.03.2023
[2] C-270/05, AthinaïkiChartopoïïa AE v. L.Panagiotidisand Others, ECLI:EU:C:2007:101, pt.27
[3] Idem, pt. 28
[4] Idem pt.29
[5] Idem
[6]C-182/13, Valerie Lyttleand Othersv. Bluebird UK Bidco 2 Limited, ECLI:EU:C:2015:317, pt.49

first paragraph letter a) point (ii)[1], taking into account the fact that the notion of "establishment" cannot have a totally different content depending on whether the Member State in question opts for one or the other possibility proposed to it.

According to article 69 paragraph 4 of the LC, the obligations of information and consultation are maintained regardless of whether the decision that determines the collective redundancies is taken by the employer or by an undertaking that has the control of the employer, this norm representing an implementation of article 2 paragraph 4 of Directive 98/56. More precisely, in the situation where such a decision is adopted by the parent company regarding one or more of its subsidiaries, the subsidiary has the obligation to implement the procedure established by the Labour Code.

In the case of a company in liquidation, the liquidator has the obligation to fulfil the procedure from article 69 of the LC, but the deadlines from articles 71 and 72 are reduced by half, according to article 123 paragraph 8 of Law no. 85/2014 on insolvency prevention and insolvency procedures[2].

3. The dialogue partners of the employer, in the case of collective redundancy

The employer, in order to start the redundancy procedure, will consult with the union or, as the case may be, with the representatives of the employees[3].

Specifically, the employer will consult (alternatively, as appropriate) with:

- The representative union, in the situation where there is only one union at the employer's level, and it is representative.
- The union or unions that exist at the level of the employer, even if they are non-representative, or only some non-representative and another representative, considering the fact that the legal norm does not distinguish between the representative or non-representative character of the union.
- The representatives of the employees, in the situation where there is no union at the level of the employer.

[1]"(1) For the purposes of this directive:
(a) "collective redundancies" means redundancies carried out by an employer for one or more reasons, unrelated to the person of the worker, where, according to the Member States' option, the number of redundancies is:
(i) either, for a period of 30 days:
— of at least 10 in establishments that normally employ more than 20 and less than 100 workers.
— of at least 10% of the number of workers in establishments that normally employ at least 100 but not more than 300 workers.
— of at least 30 in establishments that normally employ at least 300 workers;
(ii) either, in a period of 90 days, of at least 20, regardless of the number of workers normally employed in the respective establishments;'

[2]Published in the Official Gazette no. 466 of 25th June 2014

[3]According to article 69 paragraph 1 of the LC

Therefore, article 69 paragraph 1 of the LC regulates the obligation to consult either with the union or with the representatives of the employees, considering the alternative enumeration by using the conjunction "*or*", which theoretically, but also practically, can raise question about the opposability of both the consultation process and any agreement concluded during this process in relation to employees who are not union members.

We take into account the fact that law on the social dialogue[1] defines the trade union organization as the union organization established for the purpose of promoting the professional, economic, social, cultural-artistic and sports interests of its members, as well as the defence of their individual and collective rights as provided for in collective and individual employment contracts, in collective labour agreements and service relationships, in collective labour conventions, as well as in national legislation, in international pacts, treaties and conventions to which Romania is a party. More concisely, the union organization promotes the interests of its members.

Also, according to article 119 of Law no. 367/2022 regarding the social dialogue[2], the union organization may conclude with the employer any other types of agreements, conventions, or understandings, in written form, which represent the law of the parties and whose provisions are applicable only to the members of the signatory organizations. From the content of the aforementioned legal provisions, it emerges that any agreement (with the exception of the collective labour agreement[3]) concluded between the employer and the union organization

[1]Article 1 point 8 of Law no. 367/2022 on the social dialogue

[2]Published in the Official Gazette no. 1,238 of 22nd December 2022

[3]Article 101 of Law no. 367/2022 on the social dialogue:

(1) The clauses of the collective labour agreements produce effects as follows:

a) for all employees/workers in the establishment, in the case of collective labour agreements concluded at this level;

b) for all employees/workers employed in the establishments that are part of the group of establishments for which the collective labour agreement was concluded and who are signatories of the agreement;

c) for all employees/workers employed in the establishments of the collective bargaining sector for which the collective labour agreement was concluded at the collective bargaining sector level and who are part of the signatory employers' organizations, respectively for all employees/workers employed in the establishments of the employers' organizations and of the employers from the respective collective bargaining sector who subsequently joined the sectoral collective labour agreement;

d) for all employees/workers at the level of autonomous administrations, national companies, companies with the Romanian state or local public administration authority as sole shareholder/associate; for all employees/workers employed in the establishments subordinated or under the coordination of the public authorities and institutions that have under or under their coordination other legal entities that employ labour and who constituted the group of establishments for which the collective labour agreement was concluded at the level of group of establishments;

e) for all employees/workers in the establishments of the national economy for which the national collective labour agreement has been concluded and who are part of the signatory employers' organizations, respectively for all the employees employed in the establishments of the employers' organizations and of employers who subsequently joined the collective agreement national level work.

existing at their level will apply only to the members who are part of the union that signed the agreement.

From this perspective, the information and consultation that would be done only with the non-representative union would not cover the interests of all employees, *i.e.* those of employees not affiliated to the union, since, in principle, the union organization exclusively promotes the interests of its members. Specifically, it is possible that a non-representative union is constituted at the level of the employer, that has a small number of members by reference to the total number of employees. We consider that in such a situation the information and consultation is not carried out at an optimal/relevant level of representation. This means that there is a risk for not all employees to be properly represented, but only those who are trade union members.

Similarly, the consultation of the employees in the case of collective redundancies, as provided for in article 31 paragraph 2 of Law no. 367/2022, takes place between the employer and employees represented according to article 102 paragraph 1) letter B, the solutions regulated by law being alternative, respectively used depending on the concrete situation, namely through:

- the legally established and representative union organizations in the establishment.
- the union federation to which the non-representative unions in the establishment are affiliated and which have in the establishment a number of members representing at least 35% of the establishment's employees.
- all non-representative unions legally established at establishment level and not affiliated to union federations in the collective bargaining sector.
- representatives of employees/workers elected by the vote of half plus one of the total number of employees/workers in the establishment, in the situation where there are no unions established at the level of the establishment.

In this context, we emphasise that Law no. 467/2006 regarding the establishment of the general framework for information and consultation of employees uses the notion of *employees' representatives* to name either the representatives of union organizations, or in their absence, the representatives of employees, as they are regulated by Law no. 367/2022.

According to article 5 paragraph 1 letter c) from the mentioned normative act, the employer is obliged to inform and consult the representatives of the employees (union organization or, in its absence, the representatives of the employees) regarding the decisions that may lead to collective redundancies.

Therefore, both from the content of the provisions of article 69 paragraph 1 of the LC, of article 31 of Law no. 367/2022 as well as those of article3 point d in conjunction with those of article 5 paragraph 1 point c) of Law no. 467/2006, it emerges that the information and consultation take place either with the representative union, or with the non-representative unions, or in the absence of any union organization, with the employees' representatives.

Such a conclusion implies four observations:

- Article 69 paragraph 1 of the LC does not make a distinction between the representative and non-representative union, so that in the situation where there is a representative and a non-representative union at the employer's level, the information and consultation will be carried out with these two union organizations. In this sense, there is no perfect corroboration between the hypothesis of article 69 paragraph 1 ofthe LC regarding the consultation with the existing unions within the employer, regardless of whether they are representative or not and the one from article 31 paragraph 2 of Law no. 367/2022 which requires the information and consultation only with the representative union, when it exists, regardless of whether there are also non-representative unions within the employer.
- According to article 221 paragraph 1 of the LC, the interests of the employees can be promoted by representatives in the situation where there are more than 20 employees within the employer and representative union organizations are not established at that level, which means that non-representative union organizations can coexist with employees' representatives. In other words, although in principle, according to the aforementioned rule, the non-representative union organizations can coexist with employees' representatives, however, in the case of collective redundancies, information and consultation is carried out only with non-representative organizations.

Given the above, we conclude that article 221 ofthe LC was implicitly amended by article 57 paragraph 1 of the Law on the social dialogue, which established a minimum threshold of 10 employees/workers in order to elect employees' representatives. In addition, the provisions of the Labor Code contrary to Law no. 367/2022 should have been harmonized within 60 days from the date the law was published with the Official Gazette[1], but this deadline was not observed. In any case, we consider that, in the absence of an express legislative intervention, article 67 paragraph 1 of Law no. 24/2000 regarding the legislative technical rules for the elaboration of normative acts[2] can be applied, regarding the implicit repeal.

- Law no. 367/2022 on the social dialogue limits without justification the role of employees representatives during the information and consultation process in the context of collective redundancies[3], as it denies them the right to take part of this process in the event at the level of the employer exists even a non-representative union, with a small number of members compared to the total headcount.

Such a legal approach is debatable, considering that art. 5 Para 3 point b) under Law no. 467/2006 imposes an adequate representation level of trade unions an employees representatives. Concretely, in the event a non-representative trade

[1]According to article 188 of Law no. 367/2022
[2]Republished in the Official Gazette no. 260 of 21st April 2010
[3]Art. 31 Para.2 read together with Para. 102 alin.1 lit.B

union who has 10 members out of a total headcount of 50 employees, the information and consultation process will be carried out only with the non-representative trade union, even if the latter represent a small number of employees.

- In the absence of employees' representatives, the employer, considering the principle of good faith promoted by article 8 of the LC, must consult with the employees and do all the diligence so that the information regarding the collective redundancy reach their knowledge.

4. The obligation to inform in the case of collective redundancies

The obligation to inform implies the employer's obligation to make available to the union/employees' representatives all the information listed in article 69 paragraph 2 of the LC, relating to:

- the total number and categories of employees.
- the reasons that determine the anticipated redundancy.
- the number and categories of employees who will be affected by the redundancy.
- the criteria taken into account, according to the law and/or collective labour agreements, for establishing the order of priority for redundancy.
- the measures considered to limit the number of redundancies.
- the measures to mitigate the consequences of the redundancy and the compensations to be granted to the dismissed employees, according to the legal provisions and/or the applicable collective labour agreement.
- the date from which or the period in which the redundancies will take place.
- the term within which the union or, as the case may be, the employees' representatives can make proposals to avoid or reduce the number of dismissed employees.

The enumeration from article 69 paragraph 2 of the LC is not exhaustive, thus the parties can establish by mutual agreement also to provide other information necessary for the exact determination of the causes that generate the adoption of such a measure.

Among the information that must be provided to the union organization/employees' representatives is also the one related to the criteria for establishing the order of priority for redundancy, as they are regulated by law and/or by collective labour agreements. However, these criteria will be applied after the evaluation of the performance objectives achievement. Therefore, the criteria have a subsidiary role in the tie-breaking of employees targeted by collective redundancy and who obtain the same grade/score in terms of achieving the performance objectives. To the extent that the legal norm establishes that any tie-breaking criteria established by collective labour agreements are applied subsequently to the evaluation of the way of achieving the performance

objectives, it must be accepted that the evaluation procedure must be carried out compulsorily on the occasion of the collective redundancy, and an evaluation based on the last assessments already completed can be considered.

The Labour Code does not regulate the situation in which the criteria for tie-breaking are not established at the employer's level by the collective labour agreement if it exists. We consider that to the extent that they must be determined by the collective labour agreement, which implies an agreement between the union/employees' representatives and the employer, the employer, in the absence of the collective labour agreement or the provision in its content of the tie-breaking criteria in case of collective redundancy, must subject them to negotiations with the union organization/employees' representatives, at the time of consultation, unless they are provided for in the Internal Regulations and uncontested by the employees.

The Labour Code does not contain provisions regarding the subsidiary criteria for tie-breaking the employees. That being the case, in practice, several types of criteria were used, according to which to establish the categories of staff affected by the redundancy measure. Thus, by way of example, in practice it was decided that the measure of redundancy will affect:

- Employees who accumulate several positions, employees who accumulate pension with salary, employees who, although they meet the standard age and contribution period conditions, have not applied for retirement.
- In the case of two employees, husband, and wife, within the same employer, the redundancy will concern the employee with the lower income.
- The employee who has no dependents.
- The employee who cares for children or who are sole breadwinners are considered last.

The Court of Justice of the European Union established in case C-7/12[1], that Directive 76/207/EEC on the implementation of the principle of equal treatment between men and women in terms of access to employment, training and professional promotion, as well as to the working conditions, as amended by Directive 2002/73/EC, assuming that the number of women taking parental leave is much higher than that of men in this situation, a circumstance of which verification is the competence of the national courts, and the Framework agreement on parental leave, which appears in the annex to Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, as amended by Directive 97/75/ CE, must be interpreted in the sense that they oppose:

[1]Nadežda Riežniece v. Zemkopības ministrija, Lauku atbalsta dienests, ECLI:EU:C:2013:410

- that, with a view to the evaluation of workers within the restructuring of civil service positions due to national economic difficulties, a worker who has taken parental leave should be evaluated in his absence on the basis of principles and evaluation criteria that place him/her in a situation unfavourable in relation to workers who did not take such leave; in order to verify that this situation is not found in that case, the national courts must ensure in particular that the assessment concerns all workers who may be affected by the job restructuring, that it is based on criteria strictly identical to those applicable to the active workers and that the implementation of these criteria does not involve the physical presence of workers on parental leave and
- that a worker who was transferred to another position at the end of the parental leave and following the respective evaluation be dismissed due to the restructuring of this new position, to the extent that the employer was unable to offer her the same position or if the position that was assigned to her was not equivalent or similar and did not correspond to her contract or employment relationship, especially as a result of the fact that, at the time of the transfer, the employer was aware of the fact that the new position was to be restructured, a circumstance to be verified by the national courts.

5. The obligation to consult in the case of collective redundancies

The obligation to consult with the union or, in the situation where there is no union at the level of the establishment, with the employees' representatives is premised on the employer's intention to carry out collective redundancies. Therefore, the consultation will always take place prior to the adoption by the employer's management body of a decisions regarding the implementation of collective redundancy. In this sense, in the Akavan case[1], the Court of Justice of the European Union established that *"a consultation that would begin under the conditions in which a decision imposing collective redundancies has already been adopted could no longer usefully have as its object the examination of possible alternatives in order to avoid them."*

In the same case[2], the Court of Justice of the European Union established that "*Article 2, paragraph (1) of Directive 98/59 provides for the employer's obligation to initiate timely consultations with the workers' representatives when "considering collective redundancies". As the advocate general pointed out in points 48 and 49 of the presented conclusions, from a comparison of the different language versions of this provision it emerges that, in the view of the Community legislator, the birth of the respective consultation obligation is linked to the*

[1]Akavan Erityisalojen Keskusliitto AEK ry and Othersv. Fujitsu Siemens Computers Oy, C-44/08, point 47, ECLI:EU:C:2009:533
[2]Idem point 39

existence of an intention, on the part of the employer, to carry out collective redundancies."

The Court of Justice of the European Union established in its case law[1]that the obligation to consult and inform has as starting point the employer's declaration regarding the intention of collective redundancy.

Therefore, the collective redundancy procedure initially requires, on one hand, an intention of the employer and, on the other hand, a declaration by them regarding their intention to initiate the procedure, moments positioned in time before the adoption of the decision on collective redundancy.

Under CJEU case law[2], the redundancy represents any termination of the employment relationship, unwanted by the worker and, therefore, without his/her consent.

The Constitutional Court, through Decisions no. 24/2003[3]and no. 89/2008[4]stated that article 69 does not limit the employer's right to manage their establishment, so the obligation to inform and consult does not interfere with the employer's right to organize their activity as they see fit.

However, in order to observe the rights of the employees and for the decision-making transparency of the employer, it is necessary to carry out an effective bipartite dialogue that leads to the improvement of the effects of the collective redundancy, to their restriction or even to the abandonment of the collective redundancy measures.

5.1. The consultation must be carried out in a timely manner, with the aim of creating a framework through which the collective redundancy can be avoided/restricted or at least its consequences can be reduced, simultaneously with the achievement of the objectives envisaged by the employer by adopting the measure of the collective redundancy.

Carrying out the consultation *in a timely manner* takes into account the observance of the terms provided for in article 71 of the LC, in the sense of giving the possibility that, within a reasonable period, the union, respectively the representatives of the employees, can formulate a point of view regarding the employer's intention to start the collective redundancy procedure. The Court of

[1]Irmtraud Junk v. Wolfgang Kuhnel, C-188/03, ECLI:EU:C:2005:59

[2]C-422/14, Christian Pujante Rivera v. Gestora Clubs Dir SL and Fondo de GarantíaSalarial, ECLI:EU:C:2015:743, point 48*"In this regard, it should be remembered that Directive 98/59 does not expressly define the notion of "redundancy". However, given the objective pursued by that directive and the context in which Article 1 paragraph (1) first paragraph letter (a) of it is inserted, it is necessary to consider that it is a notion of Union law that cannot be defined by reference to the laws of the Member States. In the present case, this notion must be interpreted in the sense that it encompasses any termination of the employment contract not desired by the worker and therefore without his/her consent (Judgment Commission v. Portugal, C 55/02, EU:C:2004:605, points 49-51, as well as the Judgment in Agorastoudis and Others, C 187/05-C-190/05, EU:C:2006:535, point 28).*

[3]Published in the Official Gazette no. 72 of 5thFebruary 2003

[4]Published in the Official Gazette no. 153 of 28thFebruary 2008

Justice of the European Union established that the dialogue between the employer and the union can be initiated independently of the employer's possession of all the information that they are obliged to make available to the union/employees' representatives.[1]

In any case, the consultation does not imply the obligation of the parties to reach an understanding or to conclude an agreement, being an obligation of diligence and not one of result. It should be mentioned that the directive establishes that the initiation of consultations aims at reaching an agreement (article 2 paragraph 1), in other words, the consultation must aim at reaching an agreement. We consider, however, that the directive did not consider the effective obligation to conclude an agreement, given that the will of the parties cannot be violated regarding the acceptance or not of the measures proposed either by the employer or by the union, but rather expresses the purpose of consultation.

5.2. The consultation covers at least:

- the methods and means of avoiding collective redundancies or reducing the number of employees who will be dismissed.
- mitigating the consequences of the redundancy by resorting to social measures aimed, among other things, at support for the professional requalification or retraining of dismissed employees.

The consultation must also comply with the provisions of article 31 paragraph 2 of Law no. 367/2022, in the sense that:

- employers will initiate and finalize the process of informing and consulting the employees prior to the implementation of decisions on redundancy, with the aim of allowing them to formulate proposals for the protection of their rights.
- if the employees believe that there is a threat to their jobs, the information and consultation process will begin at their written request, within no more than 10 calendar days from the communication of the request.
- in order to prepare the consultation, employers have the obligation to transmit to the employees, based on a request, the necessary information to allow the issue to be examined adequately.

6. Conclusions

Informing and consulting the union or, as the case may be, the representatives of the employees in the matter of collective redundancy represent specialized obligations in the matter of addressability, established in the employer's charge, derived from the general matter regarding the obligation to inform and consult workers regarding:

[1] C-44/08, point 54-55

- the recent evolution and likely evolution of the undertaking's activities and economic situation.
- the situation, structure, and likely evolution of the employment within the undertaking, as well as regarding the possible anticipatory measures considered, especially when there is a threat to jobs.
- the decisions that may lead to important changes in the organization of work, in the contractual relations or in the labour relations, including those covered by the Romanian legislation regarding the specific information and consultation procedures and in the case of collective redundancies and of the protection of employees' rights, in the case of the undertaking's transfer.

Informing and consulting the union/employee's representatives is a permanent European legislative concern, as they constitute a fundamental collective rig

References

Directive 98/56/EC on the approximation of the laws of the Member States regarding collective redundancies.

Directive 2002/14/EC establishing a general framework for information and consultation of workers in the European Community,

Directive 2001/23/EC on the approximation of the laws of the Member States relating to the protection of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

Directive 94/45/EEC on the establishment of a European Works Council of the undertakings or a procedure for information and consultation of workers in the undertakings and groups of undertakings of a Community dimension;

Labour Code – Law no. 153/2003 republished in 2011, with subsequent amendments and additions.

Law no. 467/2006 on the establishment of a general framework for information and consultation of employees.

Law no. 367/2022 on social dialogue.

Law no. 85/2014 on insolvency prevention and insolvency procedures, with subsequent amendments and additions.

Law no. 24/2000 on legislative technical rules for the elaboration of normative acts, republished and with subsequent amendments and additions.

Decision of the Romanian Constitutional Court no. 24/2003.

Decision of the Romanian Constitutional Court no.89/2008.

C-449/93, Rockfon A/S v. SpecialarbejderforbundetiDabmark;

C-32/02, Commission v. Italian Republic, ECLI:EU:C:2003:555

C-188/03, Irmtraud Junk v. Wolfgang Kuhnel, ECLI:EU:C:2005:59;

C-270/05, AthinaïkiChartopoïïa AE v. L. Panagiotidis and Others, ECLI:EU:C:2007:101.

C-12/08, Mono Car Styling SA, in liquidation v. Dervis Odemis and Others, CLI:EU:C:2009:466.
C-44/08, AkavanErityisalojenKeskusliitto AEK ry and Others v. Fujitsu Siemens Computers Oy, ECLI:EU:C:2009:533;
C- 7/12, Nadežda Riežniece v. Zemkopības ministrija, Lauku tailata dienests, ECLI:EU:C:2013:410;
C-182/13, Valerie Lyttle and Others v. Bluebird UK Bidco 2 Limited, ECLI:EU:C:2015:317.
C-422/14, Christian Pujante Rivera v. Gestora Clubs Dir SL and Fondo de GarantíaSalarial, ECLI:EU:C:2015:743.
https://curia.europa.eu/juris/showPdf.jsf?text=&docid=99330&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1331426;
https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:11997E/TXT&from=RO;
https://rm.coe.int/168047e170

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

COOPERATION BETWEEN THE EUROPEAN UNION AND GEORGIA IN THE ASPECT OF LABOR MIGRATION

Irina BENIA[1]
Tamara SAJAIA[2]

Abstract

Report deals with the problems of labor migration that developed in Georgia after the collapse of the Soviet Union. The main reason for the intensification of migration processes is the complex socio-economic problems among the population. Migration affects not only labor outflow, but also gender ratio within migration. Women, like men, are forced to leave their families and look for work in other countries. Based on this, migration processes and their management have become one of the important directions of Georgia's policy. In recent years, the country has seen significant changes in the regulation of migration processes, government has developed legislation, policies and institutional arrangements. Despite the work done, there are still open questions on providing legal ways for Georgian workers to access employment in the Member States of the European Union.

Key words: *Labor Migration; Circular Migration; Georgia; European Union; Gender Equality; Decent Work.*

1. Introduction

Since the 1990s, there has been an actual emigration of the population of Georgia, caused by the collapse of the Soviet Union. One of the main reasons for migration is unemployment, which is still a serious problem. The legal basis for relations between Georgia and the EU is the Partnership and Cooperation Agreement signed in 1996, it entered into force in 1999. The agreement regulates relations in such areas as political dialogue, trade, investment, economy, legislation, culture. In 2023 Georgia celebrates: 8 years since the completion of the visa liberalization action plan and 6 years since the introduction of a visa-free regime for Georgian citizens in the EU/Schengen area. This process has led to the need for constant reforms and forced to strive and set high standards. For quite a long period there was no official documentregarding the regulation of labor

[1]**Associate Professor, TbilisiHumanitarian Teaching University (Georgia), email: irinabenia1984@gmail.com.**
[2]**Assistant Professor,Tbilisi Humanitarian Teaching University (Georgia), email: tamarisaj1@gmail.com.**

migration policy. The rapprochement with the EU and other European structures put the need to develop an internal and external migration policy on the agenda. Georgia has made significant progress in the development of migration policy, which implies the creation of a coherent migration policy at the national level. Management of labor migration processes is one of the prerequisites for ensuring the country's security and long-term stability. The rapprochement process with the EU (Neighborhood Policy, East. Partnership Initiative, Partnership for Mobility, Visa Facilitation, Readmission Agreement, Visa Dialogue/Liberalization Action Plan, Association Agreement, Visa-Free Travel and Implementation of long-term VLAP tasks) gave a significant impetus to the development of the migration management system in Georgia. In 2009, 16 EU states and Georgia signed a joint declaration on cooperation within the framework of the EU "Mobility Partnership" which aims at a joint fight against illegal migration. It envisages cooperation on issues such as labor migration, readmissions, reintegration and diaspora, security of documents, labor market and recognition of professional qualifications. The development of cooperation within the framework of the Partnership for Mobility initiative contributes to the legal employment of Georgian citizens in the EU countries including through circular migration. The priority of the Georgian government is the development of bilateral contractual relations with the EU in order to use the opportunities of circular migration. The agreement between the EU and Georgia on the "Readmission of people living without permission" entered into force in 2011. (https://legalclinic.iliauni.edu.ge/readmisiis-shethankhmeba/)

2. Migration in Georgia has permanent nature. The main reason why people move outside the state is a difficult socio-economic situation. The indicator of the balance of migration growing every year.Since the 1990s, the gap between the number of emigrants and immigrants increased. Over the past 20 years, the country has experienced significant growth in gross domestic product (GDP), but this has not led to an increase in the standard of living of the majority of the population, therefore was insufficient to stop the growth of the negative migration balance.(Skills and Migration in Georgia: Brief Report, European Education Fund, 2021(in Geo))

It should be noted that most migrants from Georgia usually have a higher than secondary level of education.(OECD and CRRC - Georgia, 2017; ETF and BCG, 2013)

In 2020, the number of immigrants was 21.6% of the total population, women were 50.2%. Statistics also show that the main destination of migration was Europe, followed by Asia and North America. The total number of emigrants in 2020 was 2% of the total population, where women immigrants make up 56.1%. Most of the Georgian emigrants were in Russia, Greece, Ukraine, Azerbaijan, the United States of America and Armenia, Germany, Italy, Cyprus,

etc.(Skills and Migration in Georgia: Brief Report, European Education Fund, 2021(in Geo))

In 2021, the number of immigrants was up 34.6% from the previous year, while the number of immigrants decreased by 17.8%. During the same period, 82.5% of immigrants and 88.6% of emigrants were of the working age population (age group 15-64).(https://www.geostat.ge/ka/modules/categories/322/migratsia)

The first document created in 1997 was the concept of migration policy of Georgia approved by the President, it presented the vision of the state regarding the regulation of immigration, international protection, internal migration. The concept was mainly declarative and did not have an implementation mechanism in the form of a concrete action plan. The 2013-2015 migration strategy and its action plan, approved by the Government, laid the foundation for the institutional development of migration management mechanisms; Important steps have been taken in the direction of clarification and convergence with the European legislation. Currently, cooperation with EU member states and other countries is dynamically developing in terms of expanding the possibilities of legal and illegal migration, and prevention of transnational and cross-border organized crime. Special attention is paid to the development of mechanisms for the return and reintegration of Georgian citizens, protection of the rights of people with refugee or humanitarian status and asylum seekers. To effectively overcome modern challenges and international obligations, effective measures are being taken to improve the existing system of combating illegal migration.

Accelerating the process of rapprochement with the EU (*Neighborhood Policy, Eastern Partnership Initiative, Partnership for Mobility, Visa Facilitation, Readmission Agreements, Visa Dialogue/Liberalization Action Plan, Association Agreement, Visa-Free Travel and Implementation of Long-term VLAP tasks)* has given a significant impetus to the development of the migration management system. Also, a corporate governance body „Government Commission on Migration" was formed in 2010,it brought together all the actors related to the field. Based on such a platform, it was possible to unite the main thematic areas of migration in the sectoral departments.

The Migration Strategy for 2016-2020 considered the experience gained from the implementation of previous strategies and the new reality created by the Association Agreement and the 2015 Visa Liberalization Action Plan. In this way, the strategy prepared the basis from which the strategic goals of the coming years could be defined, and the corresponding objectives set in the prism of "migration and development", that is, an approach that considers the long-term benefits associated with the national development policy or local strategies of the last decade. During the implementation of the strategy at the local, regional and global levels, new challenges have arisen in connection with changes in the field of migration and related changes. That is why the goal of the 2021-2030 migration strategy is to adapt to the new reality and continue to deal with modern challenges. Unlike the two previous strategies the 2021-2030 strategy is long-

term. Promotion of labor migration is one of the priorities and is fully reflected in the country's migration strategy document. Promotion of legal labor migration is increasingly considered in the context of the development of circular migration schemes and programs.

Circular migration projects provide opportunities for legal employment abroad for citizens. Intensive dialogue is underway with EU member states and other highly developed countries to sign agreements expanding opportunities for temporary legal employment abroad and protect the rights of workers. Georgia currently has circular migration agreements signed with France, Bulgaria, Germany, Israel.The German side provides a quota of 5,000 people every year. During 2021 308 citizens were employed, in 2022 132 citizens. 2076 citizens of Georgia are registered in the base of legal employment in Israel, 60% was selected.Within the framework of the agreement signed with France on the residence and circular migration of qualified specialists, work continues to create opportunities for legal employment. A pilot project has been prepared to promote the employment of Georgians in France, according to which it is planned to temporarily employ 100 Georgian citizens in France. According to the agreement signed with the Republic of BulgariaGeorgians were allowed to work temporarily legally. To create opportunities for legal employment a dialogue was initiated with Portugal, Spain, Czech Republic, Croatia, Cyprus, Hungary, Finland, Belgium, Greece and a draft agreement was developed on cooperation in the field of legal temporary (circular) labor migration.

To determine a unified policy of the Government of Georgia in the field of migration and improve the management of migration processes, the activities of the Government Commission on Migration laid the foundation for the creation of a centralized system of strategic management, which makes a significant contribution to integration with the EU. At the initial stage, in cooperation with the EU, a solid foundation was prepared for a unified structure of the national migration management system (commission, migration strategy for 2013-2015, various links and institutions of the chain of command); On this basis, at the second stage, the state implemented comprehensive multidisciplinary mechanisms, the implementation tools were determined in the strategy for 2016-2020; The third stage (development and continuous modernization), which is planned to be implemented as part of the 2021-2030 strategy, is a particularly important stage. At this stage, the process of creating a migration management system as close as possible to EU standards should be completed to enable adequate response to growing challenges, international mobility, and the latest trends with the help of strong state institutions.Importance of information technology and new tools in migration management became important. By creating the Unified Analytical System of Migration Data (ASMD), Georgia has somewhat responded to the latest trends in the processing of migration data in the world (for example, Big Data).ASMD uses the latest technologies for data processing, while taking the first steps towards the use of administrative data for

analytical purposes in Georgia, which is already a well-tested resource in the world. The development of ASMD was one of the priorities of the 2016-2020 Migration Strategy aimed at improving the availability of migration data. In the same period, the implementation of the Visa Liberalization Action Plan made contribution to the implementation of this process. It is problematic for local employers to inform the Ministry of Labor about the employment of foreigners. Therefore, to regulate the rules of foreigners working in Georgia, the control system and the responsibility of local employers should be increased.

Most international migrants leave for employment, education, and family reunification. The labor and education market has become global, people were given the choice of temporary or permanent migration to improve employment and study conditions.In case of Georgia, legal migration is determined by all three main reasons, labor migration remainsmain.

Falling income during the pandemic led to job losses. However, the situation of labor migrants varies by country, industry and qualification, as migrants can perform both highand lowskilled jobs in the most demanding sectorssuch as agriculture. Migrant workers were in demand around the world during and after the pandemic. Depending on the need, the emphasis will be on temporary employment abroad, after which the migrants should return to their countries, where they will use the experience and income gained. This is possible thanks to organized, safe, development-oriented temporary labor migration schemes, which ensure the strengthening of inter-state cooperation in the direction of temporary circular and seasonal labor migration.

The feminization of migration from Georgia affected many families. If at the initial stage the main flow of labor migrants was the male population, today the reality is already different. This was first noted in a report published by the UN in 1998. The beginning of this process was noticed in the 60s, 47 out of 100 international migrants were women. The increase in divorce rates and the lack of local economic opportunities are considered as the reason. Most immigrant women work as nannies, nurses, domestic servants. According to the reports of international organizations, migrant women are the most vulnerable group. There are cases when they become victims of sexual exploitation and human trafficking; Added to this are the facts of discrimination based on race, nationality, and religion. http://dictionary.css.ge/content/feminisation-migration

There are many who want to return to their homeland. This process is difficult as it requires a special approach to returnees, especially migrant women who are single mothers, divorced or widowed and are the sole breadwinners of their disabled family members.

IOM (Int. Org. for Migration) has set up a counseling hotline to help migrants decide to return. Virtual counseling sessions allow migrants to get direct access to information about reintegration support in Georgia through trusted counselors who speak their language and try to help them solve their problems.(IOM Mission to Georgia, Short Edition, 2022 (in Geo))

As a result of circular migration, the economic opportunities and professional skills of Georgian citizens are improved, the risks associated with illegal migration are reduced (including cases of trafficking); the rights of labor migrants are protected; mitigating the problem of unemployment within the country; It becomes possible to use the experience gained abroad in one's own country.(Migration strategy of Georgia for 2021-2030, 2020 (in Geo))

To effectively implement the agreement between Georgia and the EU on the readmission of people living without permission, the Government of Georgia has introduced a "Readmission Application System".The forced return of Georgian citizens from the Schengen countries is mainly carried out within the framework of the readmission agreement. In recent years, the number of readmission applications from EU countries has increased. The rate of satisfaction of applications received from the mentioned countries is one of the highest in the case of Georgia compared to other third countries and exceeds 95% every year.

The Electronic Management System (RCMES) has received a positive assessment from the European Commission and has recommended EU member states to join the system. 19 EU/Schengen states participate in the system. New features are regularly added to the system, and intensive work is underway to popularize it and include additional countries.

3. Conclusions

For Georgia where the employment rate is low, the migration processes have allowed the money accumulated by the labor of the employed to flow here. The positive effect is that it allows people to show their potential, get a job in other country with their skills, what was impossible before. After the collapse of the Soviet Union, when there was extreme poverty here due to migration process money was flowed into the country. The negative side of migration is that the main brains of the nation are drained from the country. They work for others, there is an outflow of intellectual capital, which a small country doesn't have luxury of. Today thanks to digitalization the internet allows us to work in our own country without leaving, internet lets us work from anywhere. The middle-aged people don't have such luxury as they don't have skills relevant to modern challenges, they work in the service sphere and must leave the country for basic work. At the same time, funds are coming into the home country, but this case is accompanied by deterioration of health, negativity, leaving the family, alienation, moral and ethical factors.

References

Georgia-EU Cooperation in the Field of Migration Summary of Key Events Facts and Dates, March 2021(in Geo)https://migration.commission.ge/files/ge-eu_m_coop_web_g.pdf

IOM Mission to Georgia, Short Edition, 2022 (in Geo) https://georgia.iom.int/sites/g/files/tmzbdl1311/files/documents/iom-georgias-brief-for-int.-womens-day-2022-geo.pdf
Law of Georgia about labor migration, 2018 (in Geo) https://matsne.gov.ge/ka/document/view/2806732?publication=3
Migration strategy of Georgia for 2021-2030, 2020 (in Geo) https://migration.commission.ge/files/ms30_geo_web4.pdf
OECD and CRRC - Georgia, 2017; ETF and BCG, 2013
Skills and Migration in Georgia: Brief Report, European Education Fund, 2021(in Geo) https://www.etf.europa.eu/sites/default/files/2021-11/etf_skills_and_migration_country_fiche_georgia_2021_ka_0.pdf
http://dictionary.css.ge/content/feminisation-migration
https://www.geostat.ge/ka/modules/categories/322/migratsia
https://legalclinic.iliauni.edu.ge/readmisiis-shethankhmeba/

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

THE ACTIVITY OF THE DIGITAL NOMAD IN ROMANIA BETWEEN SOCIAL REALITY AND LEGAL REGULATION

Carmen Constantina NENU[1]
Daniela IANCU[2]

Abstract

The digital nomad is a new actor, who carry out telework activity in Romania, for his own benefit or for an employer whose headquarters are outside the country's borders.

Being a new way of providing the activity, it was necessary to regulate the legal situation of the digital nomads, both from the point of view of social security and tax legislation.

Digital nomads earn income from the performance of professional activities and have distinct tax regime for the first 183 days spent in Romania. An analysis of the way in which the Romanian legislator understood to adapt the legislation to respond to the challenges of the work of digital nomads, is necessary in order to be able to identify the measures to increase the protection degree of these workers.

Key words: *remote work; fiscal obligations; rights; protection; digital transformation.*

1. Introduction

Digital technologies have a positive impact on all the domains of social and economic life, including the domain of work relationships which is in a permanent dynamic. The new ways of providing the activity from places that differ from the classical ones, directly under the employer`s control, the beneficiary of the performed work, should have a correspondence into a coherent legislative regulation in order to ensure the equal treatment of workers.

Digital nomads are a professional category mainly interlinked with the digital technology. The exponential growth of the number of workers choosing the capacity of a digital nomad, requires an enhanced focus on implementing the principles that should govern the legal provisions from the labour, social security and fiscal domains. The digital technology changes the workers` professional and private lives, and the balance between the two components is the main objective of the legislative regulation in the matter.

The Romanian legislator understood the need to adapt the legislation to the requirements imposed by digitalisation, and initiated legislative amendments in

[1] **Associate Professor, PhD, University of Pitești (Romania), email: carmen.nenu@upit.ro.**
[2] **Lecturer, PhD, University of Pitești (Romania), email: daniela.iancu@upit.ro.**

this regard. It is important, though, that the regulations from the domains of labour and tax law, assure the reduction of the precarity of work generated by a relationship whose main feature places it outside classical regulations.

2. Actions of the Romanian legislator in regulating the work of digital nomads and in the fiscalization of the incomes obtained by them.

The reaction of the national legislator materialized firstly in defining the concept of digital nomad[1], then in establishing the fiscal regime applicable to the incomes obtained by yhe digital nomad worker[2].

Pursuant to art. 2 " n[3]" of Government Emergency Ordinance OUG 194/2002 on the regime of foreigners in Romania, by digital nomad, we understand *the foreigner who is employed based on a labour agreement at a company registered outside Romania, who renders services by using the technology of information and communications, or who owns a company registered outside Romania, within which he renders services by using the technology of information and communications and can provide the activity of an employee or the activity within the company, remotely, by using the technology of information and communications.*

The same legislative act defines the foreigner as *being the person who does not have a Romanian nationality, the nationality of another Member State of the European Union of the European Economic Area or the nationality of the Swiss Confederation*.

Therefore, the concept of digital nomad, especially regulated by the Romanian legislator, is the one of the foreigner, without including the Romanian citizen or the citizen of another Member State of the European Union providing the same activities and under the same conditions as the foreigner.

With regard to the fiscal regime applicable to the incomes obtained by the digital nomads, we notice the legislator`s concern to identify the digital nomad as a category of tax non-residents.

Pursuant to art. 7 point 22 of Tax Code[3], the tax non-resident is any foreign legal person, any non-resident natural person and any other foreign entities, including collective investment organisations for securities, without legal personality, that are not registered in Romania in accordance with the law.

The tax resident is, pursuant to art. 7 point 37 of Tax Code, any Romanian legal person, any foreign legal person having the place of conducting the actual

[1] Law no. 22/2022 for the amendment and addition of the Government Emergency Ordinance no. 194/2002 on the regime of foreigners in Romania, published in the Official Journal of Romania, Part I, no. 45 of 14.01.2022

[2] Law 69/2023 for the amendment and addition of Law no. 227/2015 on Tax Code, published in the Official Journal of Romania, Part I, no. 265 of 30.03.2023

[3] Approved by Law 227/2015, published in the Official Journal of Romania, Part I, no. 688 of 10.09.2015, with further amendments and additions

management in Romania, any legal person with registered office in Romania, established in accordance with the European legislation, or any resident natural person. The resident has a full tax obligation in Romania, being a taxpayer subjected to taxing in Romania for the world incomes obtained from any source both inside and outside Romania, pursuant to the provisions of this law and of the treaties in force concluded by Romania[1].

Falling under the category of tax non-residents, the digital nomad does not have the obligation to pay social security contributions to the public pension system, health insurance contributions or income tax. This tax benefit is granted only under certain conditions and for a limited period of time.

This, in accordance with the provisions of art. 136 "b" of Tax code, the capacity of taxpayer to the public pension system is held by the Romanian citizens, the citizens of other states and the stateless persons who do not have the domicile or residence in Romania, under the conditions provided by the European legislation applicable in the domain of social security, as well as by the agreements Romania is a part of, regarding the social security systems, except for the digital nomads, defined pursuant to the provisions of art. 2 "n^4") from OUG no. 194/2002 on the regime of foreigners in Romania, as republished, with further amendments and additions, *given that the digital nomad is present on the Romanian territory for a period or several periods not exceeding 183 days during any consecutive 12 month period which ends in the respective calendar year*.

In accordance with the provisions of art. 153 para.(1) "b" of Tax code, the capacity of taxpayers to the health social security system is held by the foreign citizens and the stateless persons who requested and obtained the extension of the temporary right of stay or they have the domicile in Romania, except for the digital nomads, defined pursuant to the provisions of art. 2 "n^4") from OUG no. 194/2002 on the regime of foreigners in Romania, as republished, with further amendments and additions, given that the digital nomad is present on the Romanian territory for a period or several periods not exceeding 183 days during any consecutive 12 month period which ends in the respective calendar year.

By the provisions of art. 228 of Tax Code, it was established expressly the non-taxable fiscal regime of the salary incomes or of similar incomes obtained by the natural person having a status of digital nomad, defined pursuant to the provisions of OUG no. 194/2002, as republished, with further amendments and additions, from the activity provided by such natural person based on a labour agreement at a company registered outside Romania and who provides services by using the technology of information and communications or who owns a company

[1] Romania – the state territory of Romania, including its territorial sea and air space above the territory and the territorial sea, over which Romania exerts its sovereignty, as well as the contiguous zone, the continental shelf and the exclusive economic area, over which Romania exerts its souverain rights and jurisdiction in accordance with its legislation and pursuant to the rules and principles of international law.

registered outside Romania, within which he provides services by using the technology of information and communications and can perform the activity of an employee or activity within the company, remotely, by using the technology of information and communications, given that the natural person is present on the Romanian territory for a period or several periods not exceeding 183 days during any consecutive 12-month period which ends in the respective calendar year.

3. Digital nomads who are nationals or live legally in a European Union State and foreign citizen digital nomads.

The mobile work based on the technology of information and communications is a method of telework activity. Teleworkers use smartphones, tablets, laptops or desktop computers in order to provide the activity in different places, even situated in different countries and they connect to the computerized systems managed by employers by means of telecommunications. This social reality where the mobile telework activity takes place should be regulated at legislative level, so that workers may benefit from equal treatment compared to the workers with fixed workplaces, in terms of social security.

At the European Union level, they acted directly regarding the coordination of the social security systems, adopting the Regulation (EC) no. 883/2004 on the coordination of social security systems, which establishes common rules to protect the rights of social security when moving within the European Union (EU), and Iceland, Liechtenstein, Norway and Switzerland). By this regulation, the EU Member States decided with regard to aspects, such as beneficiaries of social security systems, level of benefits and eligibility conditions, but without replacing the national systems with a unique European system.

All EU nationals and their families, who are subject to the social security legislation of a Member State, can benefit from these coordination rules. Rules apply to employees and workers who perform independent activities, to officials, students and pensioners, as well as to unemployed persons and to persons who still do not have or no longer have a job. Rules also apply to nationals outside the EU and to the members of their families who live legally in the EU.

The beneficiaries are subject to the legislation of a single country and pay contributions in such country – the organisations operating social security systems decide whose judicial competence they belong, according to the principle of a single applicable law and they have the same rights and obligations as the nationals of the countries where they are covered, pursuant to the principle of equal treatment.

Considering those mentioned above, the national legislative amendments regarding digital nomads do not have an impact on the judicial regime established by the Regulation EC no. 883/2004 on the coordination of social security systems, the purpose being only the regulation of the tax regime applicable to the foreign citizens performing telework activities on the Romanian territory for an employer

outside Romania. When this foreigner lives legally in the European Union, then, for the period he provides his work in Romania, he will be applied the provisions of Regulation EC no. 883/2004 on the coordination of social security systems.

It is important to mention that, in case of digital nomads who are nationals or live legally in a European Union Member State, it was signed, based on art. 16 para.(1) of Regulation 883/2004/EC on the coordination of social security systems, a Framework Agreement with regard to social contributions that will allow employers and employees to choose to stay covered by the social insurance system from the employer`s State for the situations when employees work from home in the residence country, for less than 50% of the time[1].

4. The tax regime applicable to digital nomads, foreign citizens, who perform activities in Romania.

4.1 The tax regime applicable for the first 183 days of telework activity performed in Romania.

Pursuant to the provisions of art. 7 point 10 of Tax Code, compulsory social contributions are compulsory collections made based to the law, the purpose being the protection of the natural persons required to make insurance against certain social risks, in exchange for whom those persons shall benefit from the rights covered by such collection. Unlike taxes which are also compulsory collections, but without direct and immediate consideration, the payment of contributions gives the taxpayer the right to consideration, but only in cases when the insured risks are produced (Gherghina, 2010, p. 44).

Art. 2 para.2 of Tax Code regulates the following categories of compulsory social contributions:

- the social security contributions due to the state social security budget. The categories of income for which social security contribution is due, are provided at art. 137 of Tax Code;
- health social security contribution due to the budget of the National Unique Fund of health social security
- compulsory labour insurance contribution due to the general consolidated budget (See also Costaș, 2019, pp. 335-336; Trăilescu & Popa, 2021, pp. 36-37).

Foreign citizen digital nomads were expressly exempt from the payment of social security contributions for the incomes obtained from abroad, provided that they do not exceed a 183 day-stay period in Romania during any consecutive twelve-month period.

Also, the incomes obtained by foreign digital nomads from salaries or similar activities from the activity rendered based on a labour agreement at a

[1]https://kpmg.com/ro/ro/home/publicatii/2023/04/acord-cadru-articol16-regulament-ce-883-telemunca.html, accessed on 19.08.2023

company registered outside Romania and who render services by using the technology of information and communications or who own a company registered outside Romania, within which they render services by using the technology of information and communications and can perform the activity of employee or the activity within the company, remotely, by using the technology of information and communications, given that the natural person is present on the Romanian territory for a period or several periods not exceeding 183 days during any consecutive twelve-month period which ends in the respective calendar year, are not taxable in Romania, pursuant to the provisions of art. 228 para.1 "d" of Tax Code.

In order to receive a right to stay in Romania, the digital nomads can request from the competent territorial Romanian Consulate, related to the applicant`s judicial status, a long-term visa, having the obligation to meet two conditions cumulatively:

- that they dispose of means of self-support obtained from the activity rendered, in amount of at least three times the monthly gross average salary in[1] for each of the last six months previous to the date of submission of the application for visa, as well as for the entire period written in the visa;
- that they perform the activities from which they obtain incomes, remotely, by using the technology of information and communications.

Meeting these conditions is shown by submitting the following documents:

- the labour agreement signed with the employer registered outside Romania, to make proof of the remote service rendering and by using the technology of information and communications, or the proof of remote management, and by using the technology of information and communications, of a company registered outside Romania at least three years before the date of visa application;
- the document issued by the company registered outside Romania that he signed a labour agreement with, or by the company registered outside Romania owned by the foreigner, showing all the identification and contact data of the company, its field of activity, the participation of the foreigner in the company and information regarding its legal representatives;
- the application letter by which the foreigner provides details of his purpose of travelling to Romania and the activities he intends to perform in Romania;
- a document issued by the competent institution from the place of tax residence, showing that, on the date of visa application, the employed foreigner or, if any, the company owned by him, has paid the taxes, duties and other compulsory obligations up to date and that he/it is not registered with any actions or deeds having or having had tax evasion or tax fraud as a consequence;

[1] At present, the gross average salary used to substantiate the state social security budget is 6789 lei, established by art. 17 of Law 369/2022 on state social security budget for 2023, published in the Official Journal of Romania, Part I, no. 1215 of 19.12.2022.

- the proof of the means of self-support obtained from the activity rendered, in amount of at least three times the monthly gross average salary in Romania for each of the last six months previous to the date of submission of the application for visa, as well as for the entire period written in the visa.

4.2. The tax regime applicable after the expiry of the exemption period.

If the stay in Romania exceeds more than 183 days, the foreign citizen digital nomad becomes a taxpayer and has the obligation to pay social security contributions to the public pension system and to the health insurance system, as well as income tax for the incomes obtained from the employer from abroad, from the telework activity rendered in Romania. The payment of these contributions gives right to digital nomads to insurance benefits, as well as for pensions and medical services.

In accordance with the provisions of art. 138 of tax Code, the quotas of social security contributions are as follows:

a) 25% due by the natural persons who have the capacity of employees or for whom there is the obligation to pay the social security contribution, pursuant to this law;

b) 4% due for special labour conditions, as provided by Law no. 263/2010 on the public pension unitary system, with further amendments and additions, by the natural and legal persons who have the capacity of employers or similar to those; See also Law no. 263/2010.

c) 8% due for special labour conditions, as provided by Law no. 263/2010, by the by the natural and legal persons who have the capacity of employers or similar to those.

The basis of calculation for the social security contribution[1] for the natural persons who obtain incomes from salaries or similar activities, is represented by the gross gain achieved from salaries or similar incomes, within the country or in other states, by complying with the provisions of the European legislation applicable in the social security domain, and with the agreements regarding the social security systems to whom Romania is a part of.

Pursuant to art 156 of Tax Code, the contribution quota of health social security is 10% and is due by the natural persons who have the capacity of employees or for whom there is the obligation to pay the health social security contribution, pursuant to this law.

The monthly basis of calculation of the health social security contribution[2], for the natural persons who achieve incomes from salaries or similar activities, within the country or abroad, by complying with the provisions of the European legislation applicable in the social security domain, and with the agreements

[1] Art. 139 of Tax Code
[2] Art. 157 para.(1) of Tax Code

regarding the social security systems to whom Romania is a part of, is represented by the gross gain.

The income tax is applied, pursuant to the provisions of art. 59 "b" of Tax Code, for the resident natural persons, others than the Romanian resident natural persons, with the domicile in Romania, to the incomes obtained from any source both inside and outside Romania, starting with the date when they become residents in Romania.

Establishing the tax on the incomes from salaries or similar activities, is made in accordance with the provisions of art. 78 and art. 82 of Tax Code.

In case the foreign citizen digital nomad, who became a taxpayer, obtains the incomes from salaries or similar activities as a result of rendering the activity of design of computer programmes, under the conditions established by joint order of the Minister of Communications and Information Society, of the Minister of labour and Social Justice, of the Minister of National Education, and of the Minister of Public Finance, he will benefit from the exemption for payment of the tax income, provided at art. 60 point 2 of Tax Code.

From the analysis of such legal regulations, the result is that, after the first 183 days during which the telework activity in Romanian is rendered, the digital nomad acquires the status of tax resident and, therefore, they are applied the provision regarding the payment of social security contributions to the public pension system and to the health insurance system, as well as those regarding the payment of the tax income.

5.Conclusions

The technology of information and communications has shaken up the work and life in the 21st century, opening the path to new working methods. Telework and mobile work based on the technology of information and communications is part of a package of flexible working methods which aims at modernizing work organisation, and also the adjustment of the legislative system to this new reality. In order to accomplish this goal, the political decision makers have the responsibility of creating the necessary legislative framework as a response to these dynamics of work forms, by means of the technology of information and internet. The purpose of such regulations is to organize the work, in all respects, in order to ensure the balance between the professional and the private life, the health and the wellbeing of workers.

The European Framework Agreement on telework, signed by the social partners at EU level in 2002, defined the remote work and established a general framework at European level for the work conditions of teleworkers. It concerns the reconciliation of the needs of flexibility and security shared by employers and workers. Since then, the technological evolutions have contributed to the extension of this form of work and have opened the way for a higher level of mobility of the workers who work remotely. This is how digital nomads were

born, characterised by their cross-border mobility. This change offers opportunities for employers and helps workers to keep their jobs, but also presents some challenges with regard to the health and the balance between the professional and the private life, related to fading borders, to extended work schedule, and to social security of workers.

The social partners and the political decision makers have the obligation to include in the judicial rules or in collective agreements, provisions that should ensure the equal treatment of digital nomads, given that this form of rendering work will become predominant.

References

Costaș, C.F. (2019). *Drept financiar,* Ediția a II-a, revăzută și adăugită. Universul Juridic

Gherghina, S. (2020). *Drept financiar public*, editia 2. C.H.Beck.

Trăilescu, A., & Popa, C.D. (2021). *Dreptul finanțelor publice.* Universul Juridic.

Law no. 22/2022 for the amendment and addition of the Government Emergency Ordinance no. 194/2002 on the regime of foreigners in Romania, published in the Official Journal of Romania, Part I, no. 45 of 14.01.2022.

Law 69/2023 for the amendment and addition of Law no. 227/2015 on Tax Code, published in the Official Journal of Romania, Part I, no. 265 of 30.03.2023

Law 369/2022 on state social security budget for 2023, published in the Official Journal of Romania, Part I, no. 1215 of 19.12.2022.

Tax Code approved by Law 227/2015, published in the Official Journal of Romania, Part I, no. 688 of 10.09.2015, with further amendments and additions.

https://kpmg.com/ro/ro/home/publicatii/2023/04/acord-cadru-articol16-regulament-ce-883-telemunca.html, accessed on 19.08.2023

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

THE RIGHT TO DISCONNECT, FUNDAMENTAL RIGHT OF THE EMPLOYEE

Livia-Florentina PASCU [1]

Abstract

The digital age has created the possibility for many employees to perform work anytime and anywhere, which gives them both advantages and disadvantages.

One of the disadvantages of working remotely is that the employee is always connected, which can have a negative impact on their fundamental rights.

The right to disconnect implies the employee's right not to perform activities or to engage in communications through digital tools outside of work hours.

By regulating the right to disconnect, a balance between professional and private life is ensured, the employee is protected from possible repercussions from the employer for disconnection.

Key words: *the right to privacy; health and safety at work; the right to disconnect.*

1. Introduction

Digital technologies have made the current period characterized as the "digital age" or the Fourth Industrial Revolution. Digitalisation influences all segments of society and the economy, including work and employment.

Currently, companies are forced to cope with the constant flow of new technologies and information, to adapt the way they manage and organize the workforce in the context of digitalization and in relation to the skills of employees

The increasing use of digital tools for work purposes has led to a culture of being „always connected", „always online" or „always on the job", which negatively influences workers' fundamental rights and fair working conditions, including fair pay, limitation of working time, work-life balance, physical and mental health, safety at work and well-being, as well as equality between men and women, due to the disproportionate impact on workers with caring responsibilities, who tend to be women.

Although digital technology can lead to an increase in the quality of work and employment, there are still consequences that can have a negative impact on the fundamental rights of the employee, so that it is necessary that the

[1] **Lawyer, Arges Bar (Romania), email: livia.pascu@ymail.com.**

employment relationships are adapted to the new realities, including in terms of the rights and obligations of the employee and the employer.

2. A 2022 Eurofound[1] report showed that employees who worked in the form of telework during the COVID-19 pandemic (March 2020 until the end of 2021) worked a greater number of hours, above the usual working hours, as opposed to the pre-crisis period. This amendment confirms previous findings showing that employees are more likely to work longer hours when working remotely (Eurofound and IOM, 2017; Gschwind and Vargas, 2019; Eurofound, 2019, 2020). Therefore, it is expected that those who worked from the employer's premises before the pandemic will have experienced an increase in the number of hours worked when they switched to remote work.

Ample evidence shows that during the pandemic, many teleworking employees were unable to disconnect during non-working hours, which could be one of the causes of prolonged working time. At EU level, EWCTS 2021[2] shows that people working remotely were more likely to work overtime and be connected about the workplace even when they were not actually working. Both conditions could be associated with "disconnection" difficulties.

It was noted that the difficulties that employees face when trying to disconnect stem from the lack of regulation of a disconnection right and the culture of "disconnection" at the company level.

The increasing use of digital tools for work purposes has led to a culture of being 'always connected' 'always online' or 'always on the job', which negatively influences workers' fundamental rights and fair working conditions, including fair pay, limitation of working time, work-life balance, physical and mental health, safety at work and well-being, as well as equality between men and women, due to the disproportionate impact on workers with caring responsibilities, who tend to be women.

Currently, there is no EU legislation that specifically addresses the right to disconnection, although a number of legal texts address related issues, for example the Working Time Directive (Directive 2003/88/EC), the Framework Directive on Safety and Health at Work (Directive 89/654/EEC), The Directive on work-life balance (irective (EU) 2019/1158) and the Directive on transparent and predictable working conditions (Directive (EU) 2019/1152).

The Working Time Directive (Directive 2003/88/EC) aims to protect the health and safety of workers as regards the duration of working hours, including compliance with rest and leave periods, the directive being applicable both to work performed on the premises of the employer and to teleworking.

The 2019 Directive on work-life balance (Directive EU 2019/1158) is relevant in the context of the right to disconnection, primarily because it extends

[1] Eurofound (2022), The rise in telework: Impact on working conditions and regulations, Publications Office of the European Union, Luxembourg, www.eurofound.europa.eu
[2] European Working Conditions Surveys, www.eurofound.europa.eu

the right to request flexible forms of work to all working parents, with children up to the age of eight and to all carers.

The Court of Justice of the European Union, in its case-law (Case C-55/18 of 14 May 2019), stated that employers are obliged to put in place a system for measuring daily working hours – paragraph 60 (CJEU, 2019). In addition, in Matzak (C-518/15), the CJEU ruled that the waiting time spent at home by a volunteer firefighter, during which he was required to respond to his employer's calls within a few minutes, significantly limiting his possibilities to carry out other activities, should be regarded as working time under Directive 2003/88/EC — paragraph 66 (CJEU, 2018).

Through the Framework Agreement of the European social partners on digitalisation[1], it was noted that it is the duty of the employer to ensure the health and safety of workers with regard to all aspects of work. In order to avoid possible negative effects on the health and safety of workers and on the operation of the undertaking, emphasis should be placed on prevention.

It refers to a culture in which employers and workers actively participate in ensuring a safe and healthy working environment through a well-defined system of rights, responsibilities and duties, and where the principle of prevention is a priority.

Among the measures to be considered are measures on compliance with the rules on working time and rules on teleworking, the provision of guidance and information to employers and workers on how to comply with the rules on working time and the rules on teleworking and mobile work, including on how to use digital tools such as e-mails, including the risks of being over-connected, in particular for health and safety purposes; management's commitment to create a culture that avoids contact outside working hours; the achievement of organisational objectives should not require a connection outside working hours. In full compliance with the working time legislation and the working time provisions of collective agreements and contractual agreements, on any kind of contact of workers by employers outside working hours, the worker is not obliged to be contacted; adequate compensation should be granted for any additional time worked.

The Teleworking Agreement[2] also establishes that teleworkers should enjoy the same general protections granted to workers established on the premises of employers and includes additional elements to be taken into account, such as the determination of working hours in accordance with applicable law, in collective agreements and in company practices; the health and safety at work of teleworkers must be guaranteed by employers on the basis of applicable EU and national legislation and collective agreements (if in force); standards on the workload and performance of teleworkers should be specified and should be

[1] Framework-Agreement-on-Digitalisation, http://erc-online.eu/wp-content/uploads/2021/09/
[2] Framework agreement on telework, https://www.osha.europa.eu,

comparable to those of workers working on employers' premises; applying measures to ensure the psychological well-being of the teleworker, preventing them from being isolated from the rest of the workforce.[1]

In the context of digitalisation, and due to the fact that more and more employees are working in the form of teleworking, the European Parliament adopted its resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect.[2]

According to art. In point 2 of point 2 of the Annex to the resolution on the adoption of a directive, 'to disconnect' means not to engage in activities or communications related to the professional activity by means of digital tools, directly or indirectly, outside working time.

In order to protect and respect the right to disconnection, Member States must take the necessary measures to enable workers to exercise their right of disconnection and employers to implement this right in a fair and transparent manner. It is recommended to take measures covering at least the following working conditions: the practical arrangements for closing digital tools used for professional purposes, including any type of monitoring tools for professional purposes; the system for measuring working time; health and safety assessments, including psychosocial risk assessments, related to the right to disconnect; the criteria on the basis of which employers are granted any derogation from the obligation to implement the right of workers to disconnect; the criteria for determining how compensation for work performed outside the time worked in conformity is to be calculated.

Member States must ensure that employers are prohibited from discrimination, less favourable treatment, dismissal or other adverse measures on the grounds that workers have exercised or attempted to exercise their right to disconnect. It is also necessary for employers to provide each worker with sufficient, clear and adequate information in writing about his or her right to disconnect.

At the national level, France is considered to be a pioneer in the legal recognition of this new right. As early as 2013, a national cross-sectoral agreement on quality of life at work encouraged companies to avoid any intrusion into the privacy of employees, specifying the periods during which devices should be turned off.

This right was subsequently made law on August 8, 2016, and is currently regulated by Article L.2242-17 of the Labor Code.

The French legislator established that the annual negotiations on professional equality between women and men and the quality of life and working conditions must also cover the way employee exercise his right to disconnection and the implementation by the company of mechanisms to regulate the use of

[1] Eurofound (2021), Right to disconnect: Exploring company practices, Publications Office of the European Union, Luxembourg, https://www.eurofound.europa.eu,
[2] https://www.europarl.europa.eu/

digital tools, in order to ensure respect for periods of rest, as well as personal and family life. In the absence of an agreement, the employer draws up a charter establishing the ways of exercising the right to disconnect and also organizes awareness-raising actions regarding the reasonable use of digital tools.

France's approach has gone in a way to inspire other EU countries. According to a 2021 Eurofound report, so far, Belgium, France, Italy and Spain have legislation that includes the right to disconnection and discussions were ongoing in other Member States.[1]

Belgium passed a law in February 2022 that allows civil servants to stop work emails, texts and phone calls received outside working hours without fear of retaliation. The legislation protects the country's 65,000 public sector employees from exposure to being on-call permanent, although out-of-hours contact is allowed in exceptional circumstances. Plans are being discussed to extend the new laws to private sector employees.

Portugal in its legislation on work-life balance regulates the 'right to rest', with companies of 10 or more employees being fined for contacting staff outside the established working hours. Workers with children under the age of eight are also allowed to work remotely under the new laws, which came into force in November 2021.[2]

In Italy, Law No. 81/2017, which refers only to "smart workers" (i.e. employees who can work remotely for part of their working hours following an individual written agreement with their employer – an arrangement distinct from teleworking, which is regulated by different legislation and tends to involve more regular work at home), states that smart work should be carried aut 'within the limits of the maximum duration of daily and weekly working time as provided for by law and by collective bargaining'. The individual agreement between the employee and the employer providing for intelligent work "includes the rest time of the worker, as well as the technical and organizational measures necessary for the right to disconnection;the employer's practices must ensure that the worker is disconnected from technological working tools. Therefore, the law does not recognise an "explicit" right to disconnect, but provides a regulatory framework on working time, leaving it up to individual agreements to define actual working times and ways of connecting and disconnecting.

In Spain, the right to disconnection was introduced for the first time by the law on the protection of personal data and the guarantee of digital rights (3/2018 of 3 December 2018). The law contains a generic reference to collective bargaining and provides that it should be used to enforce the right to disconnection. However, instead of imposing an obligation on the social partners to negotiate on this issue, it calls on employers to draw up an internal policy defining the right to disconnection and the measures adopted to implement it.

[1] Right to disconnect, EurWORK, www.eurofound.europa.eu

[2] These countries have laws for workers' right to disconnect | World Economic Forum (weforum.org) https://www.weforum.org/

Unlike the legislation of Belgium, France and Italy, the right in Spain applies to all workers.[1]

The national legislation does not expressly regulate the employee's right to disconnection, but the legislation implicitly protects this right of disconnection, by regulating the working time and the rest time, and by regulating the additional work.

According to the provisions of the Labor Code[2], the working time represents any period during which the employee performs the work, is at the employer's disposal and fulfills his tasks and duties, according to the provisions of the individual employment contract, the applicable collective labour agreement and/or the legislation in force. The employer has the obligation to keep at the workplace the record of the working hours performed daily by each employee, highlighting the start and end times of the work schedule, and to submit this record to the control of the labor inspectors, whenever this is requested. For mobile employees and employees who carry out work at home, the employer keeps records of the hours of work performed daily by each employee under the conditions established with the employees by written agreement, depending on the specific activity carried out by them.

At the same time, the legislature defines additional work as work performed outside the normal duration of weekly working time. Additional work may not be carried out without the employee's consent, except in the case of force majeure or for urgent work aimed at preventing the occurrence of accidents or removing the consequences of an accident. and in compliance with the limits established by law, the performance of additional work above these limits being prohibited.

By Law no. 81/2018[3] on the regulation of teleworking activity, the legislator provided that the consent of the teleworker to perform additional work must be manifested in writing.

Therefore, in this legislative context, employees do not have the obligation to perform work outside the limits of the regulated working time and cannot be sanctioned to the extent that they refuse to perform work outside the working hours.

However, in reality, there are situations in which employees perform work outside working hours, respond to employers' requests sent by phone or mail, which has implications beyond work-life balance, physical and mental health, occupational safety and well-being of employees are affected.

In the preamble to the European Parliament resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect, it is noted

[1] Idem 8
[2] Labor Code, published in Official Monitor no. 345 of May 18, 2011, with amendments, 11th revised edition, Universul Juridic, 2021
[3]Law no. 81/2018 on the regulation of the teleworking activity, published in Official Monitor no. 296 of April 2, 2018

that the use of digital tools over long periods of time can cause reduced concentration, as well as cognitive and emotional overload, aggravate phenomena such as isolation, dependence on technology, sleep deprivation, emotional exhaustion, anxiety and extreme fatigue. According to the OMS, more than 300 million people worldwide suffer from common depression and mental health disorders related to work and 38.2% of the Union's population suffers from a mental health disorder every year.

3. Conclusions

In this context, the right to disconnect appears to be a fundamental right, which constitutes an inseparable component of the new working patterns of the new digital age. This right should be seen as an important social policy instrument at European Union level, so as to ensure that the rights of all workers are protected, as the right to disconnect is particularly important for the most vulnerable workers and those with caring responsibilities.

The right of employees to disconnect is vital to protect their physical and mental health and well-being and to protect them against psychological risks.

The main objective of the right to disconnect is the protection of the private life of the employees so that the express regulation of the right of disconnection with the guarantees of its observance is necessary and welcome.

The employee's right to disconnect must also be correlated with the employee's obligation to disconnect, as there is an increased trend in "self-exploitation", the eight hours of daily work being, in many situations, exceeded.

References

Eurofound (2022). Developing teleworking: Impact on working conditions and regulations, Publications Office of the European Union. Luxembourg. www.eurofound.europa.eu, accessed 21.03.2023.

Eurofound (2021). Right to disconnect: Exploring company practices, Publications Office of the European Union. Luxembourg. https://www.eurofound.europa.eu, accessed 23.03.2023.

European Working Conditions Surveys. www.eurofound.europa.eu, accessed 10.03.2023.

Right to disconnect, EurWork. https://www.eurofound.europa.eu , accessed 10.02.2023.

World Economic Forum (weforum.org). https://www.weforum.org.

Framework-Agreement-on-Digitalisation. http://erc-online.eu/wp-content/uploads/2021/09/ accessed 21.01.2023.

Framework agreement on teleworking. http://www.osha.europa.eu/, accessed 23.01.2023.

European Parliament resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect. https://www.europarl.europa.eu/, accessed 10.02.2023.

Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ L 299, 18.11.2003).

Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (OJ L 188, 12.7.2019).

Labour Code (2021). Published in Official Monitor no. 345 of May 18, 2011, revised 11th edition. Univesul Juridic.

Law nr. 81/2018 on the regulation of the teleworking activity, published in Official Monitor no. 296 of April 2, 2018.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

A NEW PROPOSAL FOR AN EU DIRECTIVE AND A NEW CHALLENGE TO HARMONISE INSOLVENCY LAW RULES. CREATING A SPECIAL INSOLVENCY REGIME FOR SMEs - A "KEY" ITEM ON THE EU AND UNCITRAL AGENDA

Ionel DIDEA[1]
Diana Maria ILIE[2]

Abstract

Recent years have been marked by successive and partially interconnected shocks, creating an unprecedented economic and geopolitical context. The Covid-19 pandemic and the war in Ukraine have "shaken" the global economy, generated risks and socio-economic vulnerabilities and disrupted universal value chains, outlining a "picture" full of challenges, given the "slowdown" of economic growth from almost 6% in 2021 to approx. 4% in 2022. Gobal inflation, but also green and digital transitions further increase the need to identify effective tools that allow the rapid reorganization of businesses and above all stimulate global economic "renewal". Recent insolvency statistics confirm the challenges companies face in trying to survive in a changing economic landscape.

Through this research we aim to outline new trends and visions in the field of insolvency, all the more so as the field of insolvency seems to be "thirsty" for reform, enjoying an accelerated dynamism in internationalization, harmonization and unification. Moreover, on 07 December 2022, the European Commission proposed a new directive on the harmonization of certain aspects of the insolvency law rules, a directive that creates a new "safety net" through coherent measures capable of mitigating the socio-economic consequences at the intersection of contemporary crises, representing, at the same time, a new "brick" to the consolidation and harmonization of the insolvency field. We will stop at one of the key dimensions of this directive, namely the creation of a special insolvency legal regime for SMEs, a dimension already outlined internationally by UNCITRAL.

In essence, the central objective of our research is to raise awareness of the need to respond concretely to the insolvency needs of SMEs, in the context in which the pressure on them arises from the gradual withdrawal of COVID-related policy support, the increase in energy costs and interest rates, together with the restructuring needs induced by the green and digital transition. The SMEs sector is crucial for macroeconomic stability and inclusive growth. In order to flatten the insolvency curve, it is essential that in the future SMEs can benefit from a simplified insolvency regime, not just pre-insolvency, especially a simplified judicial reorganisation procedure. In reality, this represents an urgent and absolutely necessary measure, promoted at

[1] **Prof. Ph.D. Ionel Didea, University of Pitesti, Faculty of Economics and Law, Pitesti (Romania), Faculty of law-Doctoral School, Titu Maiorescu University, Bucharest (Romania), email: prof.didea@yahoo.com.**
[2] **Legal Adviser, Ph.D. Diana Maria Ilie, University of Pitesti, Legal and Human Resources Department, Pitesti (Romania), email: dianamaria.ilie@yahoo.com.**

international level by UNCITRAL since 2019, recently ordered by the USA (2020) or Colombia, and taken over here by the EU, to be implemented through a legal instrument of the hard-law type.

In this context, restructuring and cross-border insolvency must be re-evaluated in relation to European and international initiatives in the field, Romania being able to become a reference point on the map of the European Union, by realizing that the regulatory differences of the insolvency regime constitute a deterrent to cross-border expansion and investment.

Key words: *insolvency; SMEs restructuring; proposal for an EU directive; UNCITRAL harmonisation instruments; OECD macro-economic indicators; legislative reform.*

---

1. *New thoughts on old ideas* - the global "review" of insolvency law continues

Although we have become accustomed to living with the pressing, sometimes suffocating, of the reality of this geopolitical "landscape" prefaced by Russia's actions that generated tensions in multiple global points of interest and merged with those generated by the economic and health crisis triggered by the pandemic, the tendency to respond to this "isolated scream" to overcome the crisis and enter normality undoubtedly remains the timid but insistent echo of the contemporary world.

The synergy between science and research perhaps gives us the eternal power to move forward, to identify solutions, to "dust off" old ideas in order to dare to reform them and to interconnect them with new thoughts and optimistic perspectives, resonating with that general interest to positively change the world around us and constantly adding to the common patrimony of universal values, vulnerable to an obvious "crisis" of international law.

Given the critical moment we are in, marked by inflation, financial blockage, decrease in investment "appetite" and fiscal changes, there were voices stating that the economy will "freeze" in 2023, but also voices stating that businesses will "evolve on an extremely thin ice", at the limit of survival, "the optimistic expectations of managers regarding the return of consumption after the pandemic being dimmed by the effects of the inflationary wave that shattered the purchasing power and that caused the economic chains to register significant disruptions, especially as a result of the explosion production, mainly from the area of energy resources (electricity, gas, fuels)" (*Sierra Quadrant barometer: Economy will evolve on extremely thin ice in 2023*, 2022).

If we do a nationwide analysis based on the latest barometers *Coface* (*Coface study: insolvencies in romania increased by 7% in 2022 compared to 2021*, 2023) and *Sierra Quadrant* (*Sierra Quadrant analysis: Top of the riskiest businesses in Romania. 135,000 businesses at risk,* 2023), we find that 73,639 companies were deregistered in 2022, 10% more than in 2021, 39,320 were dissolved (+24.2%), 15,700 suspended their activity (+20.5%), and 6649 went into insolvency (+8.22%), the prospects of 2023 not at all encouraging. Although in the last 3 years were reported the lowest values of the number of companies

entered into insolvency in the last decade, the increasing trend indicates, in reality, that the period marked by the support measures against the effects of COVID-19, through various financing schemes, is over. Not long ago, we (Didea, Ilie, 2021, http://revista.universuljuridic.ro/2021/04/) were talking about those "*hidden insolvencies*", insolvencies that, instead of being prevented, were postponed due to the massive "injection" of liquidity into the economy, the state managed to temporarily "freeze" a capital crisis of enterprises.

In view of these aggressive "diseases" on the dynamics of the economy, 2023 remains a year in which the watchword will be "*business restructuring*" and the adaptation of offers to the new economic reality characterized by an acute lack of predictability.

From an economic perspective, restructuring remains that plan to defend against the difficulties of a company's life, a rescue plan based on operational and financial measures, with the aim of minimizing the losses suffered and repositioning the company on a healthy trajectory.

From a legislative perspective, restructuring becomes a multifaceted instrument and accessed according to the normative act to which we relate, either as a mechanism for avoiding insolvency proceedings or as a specific mechanism for insolvency, through judicial reorganization, which also becomes a chance to restructure the debtor. However, the concepts should not be duplicated, the insolvency prevention procedures, although similar to the judicial reorganization procedure, benefiting from their own functioning mechanisms and institutions.

Here's how *insolvency*, by its mechanisms of *restructuring (as insolvency prevention procedure)* and *judicial reorganization* it can become one of the main pillars of the reconstruction of the post-Covid economy, post-systemic crisis, through a careful and rigorous "polishing" of its regulations, driven of course by the change in the perception of the insolvent debtor and the vision of the essence of our culture stuck in the idea of unforgivable fault of the bankrupt.

On the "global stage" we are witnessing major trends and efforts to standardize and harmonize legislation in the field of insolvency, both at international and regional level, both through instruments such as *hard-law*, as well as instruments of the type *soft-law*, which we will highlight in the following sections. Moreover, Europeanization and globalization, alike, have created not only an international law order, by drawing up some model laws and principles, a Community *acquis* but they also contributed to the management of economic crisis situations through a revolutionary insolvency. The new international and regional legal instruments deliberately broke away from the archaic approach to the phenomenon of insolvency, incorporating more and more the desire to save the debtor in financial difficulty. The concept of "second chances", care for anticipation and prevention of difficulties are explicitly highlighted, a uniform perspective and standardisation being essential for the proper functioning of the large single market.

At a global level, the main "actor" in the harmonization and unification of international commercial law, as well as of the other systems of law that emerge from it, as is the case with international insolvency law, remains the United Nations Commission on International Trade Law (*UNCITRAL*), which plays a key role in underpinning the insolvency approach strategy.

We enjoy a real legislative convergence also at the level of the European Union, the tendency being to harmonize and crystallize some universal principles and rules, by merging all legal systems. We believe that this is an irreversible process based on *principle of universalism (*Kirshner, 2018, pp. 130-139*)*, what UNCITRAL is trying to shape through the model laws it regulates, meaning that national governments will have to adopt "universal ideals" in national law. In a March 2019 report by INSOL International, INSOL specialists (Zucker, Antonoff, 2019, https://www.blankrome.com/sites/default/files/2019-03/uncitralmodellaw-antonoffzucker2019.pdf) discuss the likely path to the adoption of UNCITRAL model laws across the globe, through a universalist approach even to cross-border insolvency.

At European level, the sources of insolvency law are varied, being divided into two categories, as they refer to effective laws or non-binding legal instruments. The first category consists of regulatory instruments that are mandatory (*hard law*), while the second consists of recommendations, advice, codes of good practice and anything that refers, broadly speaking, to the idea of non-authoritarian or permissive regulation (*soft law*). The reality is that in this area of insolvency, the European Union has sent a growing number of recommendations that are, according to art. 288 (5) of the Treaty on the functioning of the European Union (TFEU), non-binding. Currently, the sources of European cross - border insolvency law remain: Regulation 848/2015 on insolvency proceedings, which is binding, including Annexes A, B, C and D, the communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - A new European approach on business failure and insolvency, which is non-binding, the european communication and cooperation guide for cross-border insolvency (CoCo instructions), which is not binding, and Directive (EU) 2019/1023 on restructuring and insolvency, which entered into force on 16 July 2019 (published in the Official Journal of the European Union on 26 June 2019), which is mandatory. The directive was transposed at national level by law no. 216/2022 (published in the Official Journal no. 709 of 14 July 2022, date of entry into force: 17 July 2022) to amend and supplement law no. 85/2014 on insolvency prevention and insolvency procedures and other normative acts, thus ensuring a modern support for insolvency practice.

We can say that we are currently enjoying a real mobilizing force of the European Commission regarding the legislative harmonization at EU level in the field of insolvency, especially in the area of developing a culture of rescuing

debtors in difficulty, increasingly promoting instruments such as *hard-law* against those of the type *soft-law*.

Directive no. 2019/1023 is the first major step in the process of harmonizing the various European insolvency laws, going beyond the stage of achieving standards that are limited to cooperation between courts and coordination of insolvency proceedings of a cross-border nature, such as, for example, Regulation (EU) no. 848/2015 on insolvency proceedings. This first step triggered a positive reaction at european level and somewhat accelerated the courage of the European legislator to create new instruments such as *hard-law* in September 2021, the president of the European Commission, Ursula von der Leyen, announced to the Parliament and the Council a new legislative initiative on the harmonization of insolvency legislation, with the project 0408/2022 to be launched in less than a year. On 07 December 2022, the European Commission proposed *a new Directive on the harmonisation of certain aspects of insolvency law* (https://data.consilium.europa.eu/doc/document/ST-15896-2022-INIT/ro/pdf), developing new mechanisms to simplify procedures for SMEs facing insolvency.

We all know that from a simple proposal to the assimilation, implementation and especially awareness and sedimentation in the culture of a nation, especially in the culture of the 27 EU countries, of new insolvency mechanisms, represents a tortuous, thorny road, but the effort of a unified vision of rescue at European and international level is claimed by the socio-economic context more than ever. Moreover, regulatory differences between EU member states in a number of key aspects of the insolvency regime were rightly considered to have a deterrent effect on cross-border expansion, but also on investment, a higher degree of legislative harmonization in this matter being essential for achieving a single capital market.

We believe that the strength of the proposal for a Directive is the simplification of insolvency procedures for SMEs, through mechanisms that allow micro-enterprises to initiate them more easily and in a more efficient way, a perspective that is in line with the objective of the package of measures to help SMEs announced by the president of the European Commission in September 2022, in her speech about the state of the Union.

We are glad that some "old ideas", some perspectives that we have invoked in numerous previous researches, are being materialized in the normative plan (Ilie, 2021, pp. 446-473), now "cleaned" of the dust and brought into the light of the creative European legislative act, through a *hard-law* instrument that we will develop in a later section, in contrast to a *soft-law* instrument on the UNCITRAL agenda since 2013, the core of interest being the improvement of the business environment for SMEs.

2. Macro - economic indicators of smes insolvency. realities and solutions for recovery through the OECD filter

According to the OECD (Organisation for Economic Co-operation and Development), global growth slowed in 2022 to 3.2%, more than 1 percentage point weaker than expected at the end of 2021, expected to remain below trend in 2023 and 2024, under the pressure of Russia's war in Ukraine and the associated cost-of-living crisis in many countries (*OECD Economic Outlook - Interim Report*, March 2023, https://www.oecd.org/economic-outlook/march-2023/). OECD is an intergovernmental forum that aims to identify, disseminate and evaluate the implementation of optimal public policies to ensure economic growth, prosperity and sustainable development among member states, as well as globally. The 38 members of the OECD are developed countries, holding approx. 70% of global production and trade and 90% of global foreign direct investment. The organization's headquarters are in Paris, France. The accession of RO to the OECD is a major objective of Romanian foreign policy. RO formally applied for membership of the OECD during previous enlargement exercises, namely in April 2004 and November 2012, and renewed it annually from 2016. On 25 January 2022, the OECD Council decided to start accession talks with all 6 aspiring countries – (in alphabetical order) Argentina, Brazil, Bulgaria, Croatia, Peru and Romania, (https://www.oecd.org/about/document/enlargement).

The development of concrete strategies for financial recovery and economic recovery has become perhaps the most claimed object of research and analysis in the last 3 years. According to statistics, the most affected companies during the pandemic were those of small and micro sizes (SMEs), which for a period relied only on government loans, subsidies and schemes to resist until the reintroduction of normal circumstances. Discussions and debates at both international and regional level have highlighted the need for an imminent instrument to help SMEs cope with new blockages.

Moreover, in recent years there has been a growing awareness of the need to better address the insolvency needs of SMEs (World Bank, 2017, 2018). On 02 April 2021, the World Bank (Atkins, Luck, 2021, https://www.nortonrosefulbright.com/en-bi/knowledge/publications/ffbd7c0b/the-new-world-bank-insolvency-principles-informal-workouts-and-mse-insolvency-processes) released a revised edition of its *Principles for effective insolvency regimes*, principles covering issues as diverse as the role of courts and judicial training, business groups, effective cross-border insolvency protocols, but also cover an area considered special, namely *the need for flexible and efficient rescue and restructuring laws for SMEs*.

This last area has indeed become a strong focus point on the agenda of international bodies such as OECD, INSOL International, UNCITRAL and the International Association of insolvency regulators, highlighting the fact that the formal insolvency procedures that prevail are designed primarily for larger

companies. According to World Bank estimates, SMEs account for more than 95% of businesses and account for more than 60% of global employment, and the scale of these adverse effects is therefore particularly profound. Previous update of *Principles* it focused on lessons learned from the 2008 global financial crisis, but today the update comes at a time when the world is facing unique challenges, with SMEs experiencing significant levels of financial difficulty. New principles recommend eliminating red tape but also *development of out-of-court restructuring schemes, which involve low costs for SMEs.*

On 22 December 2022, the OECD published a study (André, Demmou, 2022) on *insolvency framework indicator* that summarises the main features of insolvency systems in 45 OECD member countries, including EU members. The OECD insolvency indicator is a composite indicator, originally built as part of an OECD project (McGowan, Andrews, 2016) carried out in 2016, which targeted exit and productivity growth policies, based on responses and completion of a questionnaire by experts from each country. This first analysis carried out in 2016 identified 13 "key" features based on international best practices and existing research, which included: 1) two characteristics that raise personal costs for bankrupt entrepreneurs: time to discharge and fewer exceptions; 2) the absence of three mechanisms that contribute to prevention and simplification: early warning mechanisms, pre-insolvency regimes and special insolvency procedures for SMEs; 3) five characteristics that could impose barriers to restructuring: failure of creditors to initiate restructuring, indefinite suspension of capitalization and restructuring; non-imposition of restructuring plans on creditors who do not agree with them, and ,,dismissal of acting management" during proceedings; 4) three other factors: a high degree of court involvement, a lack of distinction between honest and fraudulent bankruptcy, and restrictions on individual and collective redundancies during proceedings. Although the indicators were designed to address the link between insolvency and productivity, they were relevant to understanding other economic phenomena, including the spread of macroeconomic shocks, financial sector behaviour and a number of other labour market consequences.

The 2016 indicator covered 39 countries, including all current OECD members except Colombia and Iceland, as well as China, Malaysia and Russia. The 2022 indicator covers all OECD countries, plus Bulgaria, Croatia, Cyprus, India, Malta, Romania and South Africa.

The last analysis carried out by the OECD in December 2022, based on the same 13 macro-economic indicators and the same data collection mechanism, respectively through a questionnaire started in 2016, highlights that pre-insolvency proceedings are particularly relevant in the wake of COVID-19, but amid recent interconnected crises, the differentiation between viable and non-viable firms has become even more difficult to achieve. Insolvency frameworks improved between 2016 and 2022 in most of the countries covered by the survey,

with progress particularly strong in most central and eastern European countries and Greece, but also in Canada and some northern European countries.

Sixteen OECD countries have added early warning systems since 2016 and nine have added pre-insolvency regimes. However, 13 OECD member countries and five non-OECD countries still lack early warning systems. Building on previous work on corporate liquidity deficits during the pandemic, the OECD assessed a key medium and long-term risk element in this study, namely the implementation of simplified formal procedures for SMEs. Progress in simplifying insolvency frameworks for SMEs, however, appears more limited. While six OECD countries have introduced such frameworks since 2016, they are still missing in 21 OECD countries and six non-members, encouraging that many countries still report reform plans in this area.

The update of the OECD insolvency indicator suggests that countries are better prepared than a few years ago to tackle potential challenges. However, there is room for reforms, which are all the more important as the recovery appears to be losing momentum due to increased economic uncertainty. According to OECD specialists (Demmou, Franco, 2021), countries should focus their actions in particular on *five key areas* to facilitate corporate restructuring and reallocation of resources*:*

- Simplified procedures for SMEs, the specific procedures for these enterprises being currently available in just over half of OECD countries.
- Efficient liquidation process and the possibility of a new beginning – "*fresh start*", given that while costs for entrepreneurs who have failed in a business have been reduced in many countries, the time to discharge debts remains a long one in most countries.
- Incentives for investors to provide new financing to borrowers in financial difficulty.
- Specific out-of-court procedures, as despite the progress made, the results of the analysis suggest the possibility of further exploring the prospects for a wider range of methods.

The responses to the OECD insolvency questionnaire were collected in the second quarter of 2022, and the outlook for future trends in insolvency reform was also covered. Thirty countries reported planned or ongoing insolvency reforms, notably towards facilitating SMEs restructuring, strengthening preventive debt restructuring and giving honest borrowers second chances. This is primarily due to the *EU Directive on preventive restructuring frameworks*, although there are several non-EU countries that are planning refome in this direction.

Facilitating SMEs restructuring is the focus of most countries that have reported reform plans, with SMEs accounting for the vast majority of firms and a large share of jobs in all OECD countries, which is crucial for macroeconomic stability and inclusive growth. In addition, start-ups and young firms play a key role in innovation and productivity growth.

Currently, insolvency frameworks are generally inadequate for SMEs because they are expensive, complex, long-lasting, rigid and designed more for multinationals, while SMEs are often individual traders.

Interesting reforms have recently been implemented in the United States, which have facilitated the restructuring of SMEs by introducing the Small Business Reorganization Act in February 2020, but also in Colombia, which implemented a new insolvency framework for SMEs applicable during the pandemic. Thus, the Small Business Reorganization Act introduced subchapter V to Chapter 11 of the Insolvency Code and reduced the complexity and costs of an insolvency procedure, the new procedure being innovative in that it deviates from the standard creditor-controlled procedures in which the reorganization plan must be approved by the majority of participating creditors, thus giving the court extensive power to limit cases of dissent and encouraging voluntary agreements between creditors and debtors. The initial debt ceiling was set at around $ 2.7 million, but was temporarily raised to $ 7.5 million during the pandemic to allow as many borrowers as possible to access these easy restructuring and reorganization mechanisms.

The main difficulty remains finding the balance between implementing a simplified insolvency procedure for SMEs and protecting the rights of all stakeholders. On the one hand, there are relatively simple solutions, such as the introduction of standardised forms, electronic information packages, mediation or subsidised advice, but on the other hand, some issues remain controversial, such as the imposition of short deadlines for creditors.

OECD has identified certain elements likely to contribute greatly to the success of a simplified SMEs restructuring regime: respect for the "*debtor in possession*" principle enabling the debtor to have control of the company, which is crucial to incentivising debtors to submit a restructuring application on time, the focus on information that can be facilitated by introducing a mediator to manage out-of-court or hybrid proceedings, such as in Portugal, limiting stigmatisation, digitisation, which is increasingly being used to facilitate filing documents, information exchange and asset sales, as well as reducing the cost of insolvency proceedings through government support, regulation already found in Singapore, or through restructuring grants, such as in Japan.

The OECD analyses were a source of inspiration and imminent direction both for the European Union bodies, in this case the European Commission, through the need to urgently outline an instrument for flattening SMEs insolvencies, crystallized here by the proposal for a directive that will be the subject of our research in the following sections, but also a point of debate on the agenda of the session of the Working Group V UNCITRAL in December 2022.

As the OECD also points out, for flattening the insolvency curve it is essential that in the future SMEs can benefit from a simplified insolvency regime, not just pre-insolvency, especially a simplified judicial reorganization procedure,

this being a measure and a reference indicator in the reconstruction of the insolvency policy, promoted at international level.

3. „*Legislative guide on insolvency law for micro and small enterprises (mses*)" - legal instrument of the type *soft-law* outlined by uncitral to support SMEs

Socio-economic shocks intensified the work of analyzing *Working Group V (https://uncitral.un.org/en/working_groups/5/insolvency_law),* with duties in the field of insolvency, of UNCITRAL but also of *Working Group I* UNCITRAL, specialized in supporting and improving the activity of SMEs (*Working Group I: Micro, Small and Medium-sized Enterprises, https://uncitral.un.org/en/working_groups/1/msmes),* which focused on the potential consequences of the gradual withdrawal of the protection measures granted to SMEs during the pandemic, but also on the post-covid revival, developing and promoting much more intensively instruments such as *soft-law* dedicated to the activity of SMEs, instruments that have long taken shape in the UNCITRAL portfolio.

As proof of the interconnection and permanent cooperation in the field of insolvency, a key element in the re-establishment of the world economy, both at european and international level, numerous discussions and debates have been launched (Gant, 2021, https://www.insol-europe.org/news/inside-stories) which highlighted the need for an imminent instrument to help SMEs cope with the bottlenecks generated by the cascading crises of recent years.

We are talking about *Legislative Guide on Insolvency Law for Micro and Small Enterprises - MSE insolvency (Draft legislative guide on insolvency law for micro and small enterprises,* https://documents-dds-ny.un.org/doc/UNDOC/LTD/V21/074/07/PDF/V2107407.pdf?OpenElement*).* It should be pointed out that UNCITRAL Working Group V brought to public attention the need to provide a model for a simplified insolvency regime for micro-enterprises, but since the preliminary examination of this idea at the 45th session of Working Group V in 2013 it has taken some time for the concept to find its form in a legal instrument *soft-law*, non-binding, respectively *MSE insolvency Guide.* The first full draft of the simplified insolvency regime was considered at the 56th session in Vienna in 2019, discussed and revised several times during the sessions that followed in 2020, latest update at the 59th session of the working group from 13-17 December 2021 in Vienna.

This proposed law is largely based on similar concepts and provisions included in the UNCITRAL legislative guide on insolvency law(https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law), which was designed with the aim of providing "a comprehensive statement of the key objectives and principles that should be reflected in the insolvency laws of a state". The key objectives of the simplified insolvency law are to provide a fast, simple, flexible and low-cost insolvency procedure, targeted and easily accessible

by SMEs. The regime also aims to promote the opportunity for a "fresh start" and a discharge of debtor obligations by agreeing and implementing a debt restructuring plan with creditors.

Unfortunately, however, like all models of laws and legislative guidelines produced by UNCITRAL, the World Bank and other international organisations, the simplified insolvency regime remains, of course, a non-binding legal instrument that is fully optional in terms of its scope. The UNCITRAL guide does not offer any kind of binding harmonisation instrument, such as Directive 1023/2019, but as we were saying, fortunately, it can be a model to follow, already representing a perspective of legislative reform at European level, as evidenced by the new proposal for an EU directive that we will address in the next section.

Thus, the MSE insolvency provides 107 recommendations and 389 comment paragraphs that add clarity and explanation to those recommendations, and which states can adapt or implement in their own system of law.

According to this legislative guide produced under the aegis of UNCITRAL, States should provide for a simplified insolvency regime for SMEs and, under this aim, take into account the following *key objectives (Report of Working Group V (Insolvency Law) on the workn f its fifty-eighth session*, 2021, https://undocs.org/en/A/CN.9/1052*)*: "(a) The establishment of fast, simple, flexible and low-cost insolvency procedures for SMEs, hereinafter referred to as "simplified insolvency procedures"; (b) Making available and facilitating access to simplified insolvency procedures for micro, small and medium-sized enterprises (SMEs); (c) Promoting a "fresh start" for the SME debtor by facilitating the liquidation of a non-viable SME and the reorganisation of a viable SME through simplified insolvency procedures; (d) Ensuring the protection of persons affected by the simplified insolvency procedure, including creditors, employees and other stakeholders throughout the simplified insolvency procedure; (e) Provide effective measures to facilitate the participation of creditors and other stakeholders in simplified insolvency proceedings; (F) Implement an effective sanctions regime to prevent abuse or misuse of the simplified insolvency regime and impose appropriate sanctions for misconduct; (G) Addressing concerns about stigma due to insolvency; and (H) Where reorganisation is feasible, retain jobs and investments". At the same time, states should ensure that a simplified insolvency regime applies to all SMEs, noting that aspects of the regime may differ depending on the type of SMEs, as recommended in recommendations 8 and 9 of the guide.

The guide refers to "reorganization" as the process by which one can restore the financial well-being and viability of a business while continuing to operate, using various means, including debt erasure, debt rescheduling, debt-to-capital conversions, and the sale of the business (or parts thereof). Reorganisation in the case of SMEs will translate into a reduction, write-off or rescheduling of

debt for which complex reorganisation steps usually envisaged for larger companies will not be required.

According to UNCITRAL specialists, we must also bear in mind that the SME debtor may not be able to draw up a feasible reorganization plan at an early stage and, for this reason, the insolvency law should ensure the possibility for the SME debtor to be supported in the preparation of the reorganization plan, through the assistance of an independent party, a specialist in the field. As regards deadlines, UNCITRAL recommends very short procedural deadlines. Thus, the internal rules of the states, applicable to simplified insolvency proceedings, should allow expedited proceedings, with legal deadlines shorter than those applicable in standard insolvency proceedings, with limited reasons for possible extensions of the deadlines. At the same time, the development of rules on notification, the operation of creditor committees, meetings and the verification of claims should be disabled or adjusted, in particular where there is little value for distribution.

At the same time, it is recommended to implement measures to make the system easily accessible and usable, including by making available standardised forms and templates and possibilities for accessing online procedures where possible. States should consider the interaction of the competent authority with other state bodies, such as tax authorities, trade register offices, electronic government platforms, considerably accelerating this task.

Last but not least, UNCITRAL also underlines in the guide that eligible debtors, who do not have sufficient resources to finance insolvency proceedings, should still be able to access a procedure to resolve financial difficulties and obtain discharge. In this respect, alternative mechanisms should be in place to meet the costs of administering simplified insolvency proceedings when the SME debtor is unable to meet them, including the use of public funds or the establishment of a fund from which the costs of insolvency proceedings can be borne. For example, allowing the payment of administrative expenses in installments, including from future revenues, by implementing the debt repayment or reorganization plan, allowing the SME debtor to at least partially share the costs of the procedure.

As there is clearly a need to balance the rights of creditors with the need for speed in the management of SME insolvencies, the text itself provides that a notice of the opening of a judicial reorganisation procedure must be addressed to all creditors affected by the plan, with sufficient time within which to object or to oppose. However, a lengthy voting process of the recovery/reorganisation plan would cause a potentially excessive delay, during which SMEs could fall into complete financial failure, unable to survive during that period, also depleting the last available reserves.

A clear message from Working Group V experts was that the simplified insolvency regime is aimed at small businesses, many of which, in severe financial difficulties, require quick help. In any case, in front of an instrument *soft-law* States may "juggle" with the proposed mechanisms and

recommendations in the sense of "shaping" them at the time of national implementation, relative to their culture and jurisdiction.

The provision of multiple instruments, supported by different political perspectives, actually opens the "alley" of successful implementation of at least one mechanism/principle specific to a simplified insolvency legal regime for SMEs, which will indeed have to step into the "shaky ground" of the reality of national legal culture, social and economic policies specific to each state.

The importance given to this sector of the economy represented by SMEs, also results from the establishment of a specialized group at UNCITRAL level, dedicated exclusively to the analysis and substantiation of recommendations to these enterprises. Thus, *Working Group I: Micro, Small and Medium-sized Enterprises* managed at the 39th session, held in New York on 13-17 February 2023, to complete the review of the latest version of *Guide on access to credit for micro, small and medium-sized enterprises (Draft Guide on access to credit for micro, small and medium-sized enterprises (MSMEs),* 2023), insisting that SMEs represent the majority of business types in all parts of the world, contributing most to job creation and supply chain development, entrepreneurship, innovation, the economy and social welfare. Moreover, the World Bank estimates that around 600 million jobs will be needed to absorb young people entering the labour market over the next 15 years, which is why supporting SMEs becomes crucial and requires priority for funding.

UNCITRAL experts stress that access to finance is essential for SMEs throughout their lifecycle, as it enables entrepreneurs to innovate, improve efficiency and productivity and ultimately expand their businesses, with lack or limited access to finance being the second biggest obstacle SMEs face in emerging markets. Moreover, rapid advances in digital technology over the past decade have led to the crystallization of new financial services and products, as well as new business models that can facilitate SMEs' access to credit in a faster, more convenient and sometimes cheaper way than traditional methods.

As a conclusion to close the circle of this section approached from a global perspective, we can note with enthusiasm and optimism that the instruments offered by international organizations in supporting SMEs are multiple, complex and flexible, being able to be adapted to the legislative and socio-economic realities within each state.

4. *"Proposal for an EU directive on the harmonisation of certain aspects of insolvency law"* - european legal instrument of the type *hard-law* aimed at improving the business environment for SMEs

Not only on the global stage we are talking about an (r)evolution of insolvency law, but also at regional level, the EU institutions developing a real "palette" of solutions in the restructuring area. We are thus witnessing a

legislative "effervescence" through which a new facet of insolvency is emerging, on which a "rescue culture" is slowly but surely being built.

Even at national level we have recently enjoyed transposition of *Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (*Directive on restructuring and insolvency*)*, by the entry into force of *Law no. 216/2022 for amending and supplementing Law no. 85/2014 on insolvency prevention and insolvency procedures and other normative acts (published in the Official Journal no. 709 of 14 July 2022, date of entry into force: 17 July 2022)*, thus ensuring a modern support for insolvency practice.

This law ensured an important alignment for Romania to the requirements of the European Union, especially since Directive 2019/1023 represents a European legal instrument of the type *hard-law* which aim at two key levels, namely: harmonisation / uniformity of legislation at EU level in the field of insolvency and the development of a rescue culture, which can be achieved, on the one hand, through sound insolvency prevention procedures, and on the other hand, by promoting and accessing the judicial reorganisation procedure in the insolvency phase.

Because this Directive has enjoyed a real success in harmonizing the insolvency legislation at the level of the European Union, the activity of the European Commission has intensified, counting on legal instruments such as *hard-law*, instruments that ensure in a much higher percentage the achievement of the proposed objective, through the obligation of implementation at national level. Thus, *on 7 December 2022, the European Commission proposed a new Directive (Proposal for a directive of the European Parliament and of the Council on the harmonisation of certain aspects of insolvency law*, Brussels, 2022, https://data.consilium.europa.eu/doc/document/ST-15896-2022-INIT/ro/pdf*)* on the introduction into european law of new mechanisms designed to simplify insolvency procedures for SMEs, in Romania already launched an extensive consultation process of the main actors on this subject, under the coordination of the Ministry of Justice.

We wonder, however, how much this new Directive will impact the national legislation, and especially the entrepreneurial environment, given that the previous Directive, transposed in Romania by law no. 216 of 2022, does not yet "make its presence felt" in practice, but only in theory. Thus, according to a statistics of the ONRC (www.onrc.ro/index.php/ro/statistici), between July 2022 and February 2023, only 17 arrangement procedures were opened, one of which has already entered insolvency, which reaffirms the fact that we are facing an acute lack of a negotiation culture but also of a rescue culture, insolvency prevention procedures being still a stigmatized subject at the level of our country and beyond.

Before summarizing the challenges of the new Directive, we must point out that the previous EU Directive no.1023/2019 has revealed somewhat of the intentions of the immediate future perspective of the EU institutions, stating in its content that the support of SMEs is needed in order to ensure low-cost restructuring. In this regard, the European Commission has since recommended the need to develop model restructuring plans tailored to the needs and specificities of SMEs, to be made available electronically, and to insist on early warning tools to be effectively implemented to warn debtors of the urgency to act, taking into account the limited resources of SMEs to hire experts.

If Directive 1023/2019 "revolved" mainly around elements corresponding to the prevention area, in the area of insolvency prevention procedures, the proposal for the December 2022 Directive "pedals" on the area of the debtor's judicial reorganization procedure, an imperative aspect for a uniform harmonization of the insolvency institution.

Of course, there are many legislative nuances that can be improved on the judicial reorganization side, first of all in order to develop a "rescue culture", which we have developed on other occasions, but this time, we proposed to analyze as a key legislative reference, but of major and immediate interest, the need to create a legal reorganization framework adapted to SMEs. By the law implementing the previous Directive (no. 1023/2019) was tried to create a regulation to support them, but, as mentioned above, only in the prevention area. Here, too, we consider the possibility of SMEs with a turnover of less than EUR 500,000 (in the initial, unrevised form, an amount of 1 million euro was stipulated, in our view much more advantageous) to benefit from an entirely out-of-court solution through the conclusion of a restructuring agreement that coagulates the unanimity of the votes of the affected creditors.

With the proposal for a Directive of December 2022, the European Commission is taking an important step towards harmonising some of the key elements of insolvency proceedings themselves, with the aim of "faster, simpler, affordable" insolvency proceedings. The key dimensions of the insolvency law rules covered by the new Directive are: (i) the recovery of assets from the liquidated mass of assets subject to insolvency; (ii) the efficiency of the proceedings; and (iii) the predictable and equitable distribution of the recovered value between creditors. These three dimensions cover, in particular, issues relating to actions for annulment, the pursuit of assets, the powers and liability of directors, the sale of an undertaking as an undertaking which has the capacity to continue its business through the procedure of "*pre-pack*", initiating insolvency proceedings, *a special insolvency regime for micro and small enterprises,* claims rank and creditors' committees.

In the light of these synthetic clarifications, we note that in addition to other key elements on insolvency proceedings, the proposal for a Directive also aims to improve the business environment for SMEs. Thus, by increasing the expected recovery rates for creditors and investors with exposures to SMEs, the

proposal seeks to reduce the perceived risk of investing in SMEs, which is expected to be reflected in lower financing costs for these enterprises, while all other elements remain unchanged. At the same time, the proposal does not impose compliance obligations or costs for economically active SMEs and simplifies procedures for those facing insolvency.

The proposal for a Directive also introduces a special procedure to facilitate and speed up the winding-up of micro-enterprises, allowing for a more cost-efficient insolvency process for these micro-enterprises. These mechanisms also support the orderly winding-up of "asset-free" micro-enterprises, addressing the problem of some member states rejecting access to insolvency proceedings if the expected recovery amount is less than court costs.

As a consequence, the new Directive gives all micro-enterprises the opportunity to initiate proceedings to resolve their financial difficulties and ensures that the founding entrepreneurs can benefit from debt remission and a fresh start, in accordance with the provisions of Directive (EU) 2019/1023 (*Regulatory adequacy and simplification: 11* - https://data.consilium.europa.eu/doc/document/ST-15896-2022-INIT/ro/pdf). Of course, the solutions target SMEs that deserve to stay on the labour market, especially honest debtors, as the European Commission has been invoking since 2009, retaining their knowledge, skills and restarting activities most of the time in an innovative manner.

5. Conclusions

We also close the last page of this research, research "crowned" by the joy of discovering the news in the matter, but "constrained" by the space allocated to a scientific article.

In the light of the above, we conclude by pointing out that the challenges of the new Directive are numerous, this valuable instrument still being in the "minefield" of debates and forecasts. Despite this inevitable enthusiasm for the intense activity of the European bodies in the area of developing a rescue culture, through the thorough and rigorous "polishing" of the insolvency institution, we feel the need to intervene by specifying that the success of the implementation of legal mechanisms does not lie in the adoption of instruments such as *hard-law*. The success of a normative act "draws its sap" from an *in globo* research, enabling sound legislative reform at all levels.

Furthermore, the phenomenon must be approached from a qualitative perspective of the application of the insolvency regime, in the sense that the legal norms in the matter achieve or not the objective of having as many successful judicial restructurings/reorganizations, with saved jobs, with adequate and balanced guarantees for creditors, and not from a statistical perspective, which concerns the number of procedures opened, but concluded with bankruptcy.

Moreover, the series of partially interconnected shocks and challenges faced by the global economy in recent years, superimposed on the need for digitization, the green transition, the shift of some economic activities to online platforms, but also the dynamism of consumption and labor models through the validation of hybrid models, imply nothing more than the restructuring of enterprises that have stagnated technologically, digitally, as well as polluting, environmentally unsustainable companies.

All this creates winners and losers, increasing the needs for restructuring. However, many companies, especially SMEs, may face serious difficulties in financing these transitions, despite government support. However, starting from the certainty that the pandemic gave the start of a change in perception, through which humanity has endured the "new" more easily from the need to adapt, digitization has reached unimaginable levels, legislation has undergone a surprisingly rapid "modelling", we can expect that "*culture of second chances and prevention in business*" to "take solid roots" against the background of these overlapping elements.

Entrepreneurs should first of all consider insolvency prevention, transparency and negotiation being much more useful than "sweeping under the carpet" economic reality and lack of capital. We need, of course, a change in the perception of the insolvent debtor and the vision that pertains to the essence of our culture, strongly imprinted by the idea of inexcusable fault of the bankrupt. The good news is that the insolvency legal regime, as it has been and is to be "imprinted" by the latest international and regional legal instruments also invoked in our research, encourages parties to seek dialogue and out-of-court solutions, gives businesses more options for restructuring rather than bankruptcy, speeds up insolvency court proceedings, improves the accountability of insolvency managers and establishes new supervisory rules involving stronger self-regulation.

References

André, C., & Demmou, L. (8 December 2022). Enhancing insolvency frameworks to support economic renewal - Economics department, *OECD - Working papers No. 1738*. Retrieved from https://www.oecd-ilibrary.org/docserver/8ef45b50-en.pdf?expires=1679564561&id=id&accname=guest&checksum=21C98418F34A632856AB71278AF8F69C.

Atkins, S., & Luck, K. (2021). *The New World Bank Insolvency Principles: Informal Workouts and MSE Insolvency Processes as Key Pillars of Economic and Financial Stability*. Australia Publication. Retrieved from https://www.nortonrosefulbright.com/en-bi/knowledge/publications/ffbd7c0b/the-new-world-bank-insolvency-principles-informal-workouts-and-mse-insolvency-processes.

Demmou, L., & Franco, G. (2021). Mind the financing gap: Enhancing the contribution of intangible assets to productivity, *OECD Economics Department Working Papers, No. 1681*. Paris: OECD.

Didea, I., & Ilie, D.M. (2021). A new stage in the development and consolidation of a "rescue culture and prevention in business" in the spirit of a European legal instrument of the type hard law. National transposition of Directive (EU) 2019/1023. *Universul Juridic Review*, 4. Available by accessing http://revista.universuljuridic.ro/2021/04/.

Gant, J. (2021). UNCITRAL Working Group V and a Simplified Insolvency Regime for MSEs, *Insol Europe – Inside Story*. Retrieved from https://www.insol-europe.org/news/inside-stories.

Ilie, D. (2021). *The effects of insolvency on the economic and social environment in Romania in the context of globalization* (pp. 446-473). Bucharest: Universul Juridic.

Kirshner, J.A. (2018). *International bankrupty. The Challenge of Insolvence in a Global Economy* - ``Where do we go from here? - Nationalism as an obstacle to universalism, Possible Solutions" (pp. 130-139). Chicago: The University of Chicago Press.

McGowan, A., & Andrews, D. (2016). Insolvency Regimes and Productivity Growth: A Framework for Analysis. *OECD Economics Department Working Papers, No. 1309.* Retrieved from https://www.oecd-ilibrary.org/docserver/d44dc56f-en.pdf?expires=1555057715&id=id&accname=guest&checksum=78CF5C280D89FEBDEA625C7C89C29C12.

Zucker, E. J., & Rick Antonoff, R. (March 2019). UNCITRAL's Model Law on Recognitionand Enforcement of Insolvency - Related Judgments - a universalist approach to cross-border insolvency, *INSOL INTERNATIONAL - SPECIAL REPORT.* Retrieved from https://www.blankrome.com/sites/default/files/2019-03/uncitralmodellaw-antonoffzucker2019.pdf.

Proposal for a Directive of the European Parliament and of the Council on the harmonisation of certain aspects of the rules of insolvency law. Brussels, 7/12/2022 COM (2022) 702 final 2022/0408 (COD). Retrieved from https://data.consilium.europa.eu/doc/document/ST-15896-2022-INIT/ro/pdf

Draft legislative guide on insolvency law for micro and small enterprises - United Nations Commission on International Trade LawWorking Group V (Insolvency Law) Fifty-ninth session Vienna (December 2021). Retrieved from https://documents-dds-ny.un.org/doc/UNDOC/LTD/V21/074/07/PDF/V2107407.pdf?OpenElement.

UNCITRAL legislative guide on insolvency law, https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law.

Draft Guide on access to credit for micro, small and medium-sized enterprises (MSMEs), United Nations Commission on International Trade Law Working Group I (MSMEs), Thirty-ninth session -New York, (13–17 February 2023). Retrieved from https://documents-dds-ny.un.org/doc/UNDOC/LTD/V22/186/87/PDF/V2218687.pdf?OpenElement

OECD Economic Outlook, Interim Report (March 2023). Retrieved from https://www.oecd.org/economic-outlook/march-2023/

Working Group V: Insolvency Law. https://uncitral.un.org/en/working_groups/5/insolvency_law.

Working Group I: Micro, Small and Medium-sized Enterprises. https://uncitral.un.org/en/working_groups/1/msmes

United Nations Commission on International Trade Law, Fifty-fourth session Vienna (28 June–16 July 2021). *Report of Working Group V (Insolvency Law) on the workn f its fifty-eighth session*. Retrieved from https://undocs.org/en/A/CN.9/1052.

Sierra Quadrant barometer: Economy will evolve on extremely thin ice in 2023 (30/12/2022). Retrieved from https://www.sierraquadrant.ro/barometru-sierra-quadrant-economia-va-evolua-pe-o-gheata-extrem-de-subtire-2023.

Coface study: insolvencies in Romania increased by 7% in 2022 compared to 2021 (22/02/2023). retrieved from https://www.coface.ro/Stiri-Publicatii/Stiri/STUDIU-COFACE-INSOLVENTELE-IN-ROMANIA-AU-CRESCUT-CU-7-in-2022-FATA-DE-2021.

National Trade Register Office - www.onrc.ro/index.php/ro/statistici.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

THE EFFECTS OF THE RESIGNATION OF THE ADMINISTRATOR'S MANDATE AND THE REPRESENTATION OF THE LEGAL ENTITY IN THE CONTEXT OF DECISION HCCJ RIL NO. 24/2017

Răzvan SCAFEȘ[1]

Abstract

The provisions of the common law establish the fact that the representation of the legal entity is done through its administrative bodies, resulting in the administrators being the bearers of the social will in legal relations with third parties, respectively those through which the legal capacity of the legal person is manifested. An analysis of the atypical situations arising in the functioning of legal entities is therefore required, in relation to the apparent lack of representation given by the expiration of the mandate of the administrators or their possible relinquishment of the mandate. The High Court of Cassation and Justice's decision no. 24/2017 pronounced in RIL procedure, regulates a unique hypothesis regarding the administrator of the joint-stock company whose mandate has expired, without there being an act appointing a new administrator and an express acceptance from him, as long as the termination of the position has not been published in accordance with the law. However, other situations can be identified in practice that involve discussions regarding holding the quality of representative of the legal entity.

Keywords: *legal persons; administrator; resignation; mandate; joint-stock company.*

1. Brief presentation

The functioning of the legal person is effectively not possible in the absence of some administrative bodies, since through them the social will is manifested through the conclusion of civil legal acts. There are a number of legal provisions that refer to the power of representation of administrators of legal entities in general and companies in particular. Starting from the general regulation regarding the legal person, set out in art. 209 and 218 Civil Code, the situation of administrators is that of trustees charged with the power of representation of the legal person in the legal relations in which it takes part[2]. In

[1] **Assistant Professor Ph.D., University of Craiova, Law Faculty (Romania), email: razvan.scafes@yahoo.com.**

[2] According to art. 209 para. 1 and 2 of the Civil code: *"The legal entity exercises its rights and fulfills its obligations through its administrative bodies, from the date of their establishment. (2) natural persons or legal persons who, by law, act of incorporation or statute, are designated to act in relations with third parties, individually or collectively, in the name and on behalf of the legal person have the capacity of administrative bodies, in the sense of para. (1)".* According to art. 218

the same sense the special regulation, Law no. 31/1990 on companies continues this reasoning within the provisions generally applicable to the operation of companies[1]. It follows that according to the law, the company can be represented in legal relations with third parties through its administrative bodies, as they result from the public records, against third parties. It was thus held that *"the commercial company is activated by the acts and deeds of its administrator, and the latter acts as an intrinsic part of the legal person and manifests in the legal life the will of this legal subject"* (Todică, 2011, p. 96). As such, although there are differences between the concrete way of exercising the mandate by administrators, depending on the corporate form, the defining elements of this function are applicable in all situations in which the relationship between the administrator and the legal entity and the limits of its powers are analyzed, regardless of the form of organization of the legal entity.

2. Debate

A controversial issue regarding the limits of the powers of an administrator concerned the situation of the administrator whose mandate has expired. Specifically, it was necessary to establish whether the administrator still has the possibility to legally represent the company according to the previously mentioned rules. By Decision no. 24/06.11.2017, pronounced in the RIL procedure[2], the High Court of Cassation and Justice partially settled this issue, establishing that the administrator of the joint-stock company whose mandate has expired, without an act appointing a new administrator and an express acceptance on his part, holds the prerogatives of representation as long as the termination of the position has not been published in accordance with the law.

In order to issue the aforementioned solution, the supreme court referred to the content of the provisions of art. 72 and art. 153^{12} from Law no. 31/1990, related to art. 1552 of the Civil Code from 1864, respectively to art. 2030 of Law no. 287/2009 regarding the Civil Code, with the application of art. 54 para. (2)

---

para. 1 of the Civil code: *"The legal acts made by the administrative bodies of the legal entity, within the limits of the powers conferred on them, are the acts of the legal entity itself"*.

[1] Art 70 para. 1: *"The administrators can do all the operations required to carry out the object of the company's activity, apart from the restrictions shown in the constitutive act"*.

Art. 70^{1}: *"Deeds of disposal of a company's assets can be concluded based on the powers conferred on the company's legal representatives, as the case may be, by the law, the constitutive act or the decisions of the company's statutory bodies adopted in accordance with the provisions of this law and the constitutive act of to the company, not requiring a special power of attorney in authentic form for this purpose, even if the acts of disposition must be concluded in authentic form"*.

Art. 72: *"The obligations and liability of administrators are regulated by the provisions relating to the mandate and those specifically provided for in this law"*.

[2] Decision of the High Court of Cassation and Justice no. 24/2017 of 06/11/2017 (RIL), pronounced in Case no. 1699/1/2017, was published in the Romanian Official Gazette (Mof), Part I no. 153 of 02/19/2018

from Law no. 31/1990. Specifically, the provisions applicable to all forms of companies from the special law regarding the mandate relationship between the administrator and the company (art. 72 of Law no. 31/1990), those from the special law regarding the duration of the administrator's mandate were taken into account of the joint-stock company (art. 153^{12} of Law no. 31/1990), those of common law in the matter of the termination of the mandate (art. 1552 of the Civil Code from 1864, respectively art. 2030 of Law no. 287/2009 on the Civil Code) and those relating to the objectionability of the appointment of representatives to third parties (art. 54 para. (2) of Law no. 31/1990).

In this context, the analyzed reference period is between the date of expiry of the term of office of the administrator and the date of appointment (and acceptance) of a new statutory administrator, within which the normal operation of the company requires the adoption of a solution close to the goal pursued by the applicable rules and the specifics of the legal entity, that of a legal subject created for the performance of concrete activities in a certain field.

In the jurisprudence prior to the HCCJ Decision no. 24/2017 the mentioned legal provisions had been interpreted differently. In a first opinion[1], it was held that the establishment by legal rule of the duration of the mandate would be meaningless in the hypothesis in which it would be appreciated that the mandate would cease exclusively in the cases regulated by art. 1552 of the Civil Code from 1864, excluding the situation of expiration of the term. Also, regarding the necessary conditions for the legality of the representation, it was assessed that the administrator must expressly accept the mandate, to be appointed to the position, as well as that *"the solution needs to be nuanced in the case of an extension of mandate, which could intervene even tacitly"*[2].

As such, the supreme court sought to clarify through Decision no. 24/2017, to what extent an extension of the administrator's mandate is possible when its duration has expired without having completed the formalities of advertising for the termination of the position and a new administrator who has accepted the mandate has still not been appointed. The issue of the extension of the powers during the reference period was resolved exclusively regarding the situation of the expiration of the mandate, but the dynamics of the functioning of the companies requires a separate analysis for the situation of revocation or resignation of the administrator. At the same time, we appreciate that the analysis

[1] Decision no. 178/C/2014 of the Oradea Court of Appeal, upheld by Decision no. 1417/21.05.2015 of the High Court of Cassation and Justice (unpublished), quoted in I. Sferdian, *Expired mandate of the administrator and company management. Another perspective*, available at https://www.juridice.ro/619445/mandatul-expirat-al-administratorului-si-administrarea-societatii-o-alta-perspectiva.html#_ftn3 – last consultation, 02.08.2023;

[2] Decision no. 920/25.03.2015 of the High Court of Cassation and Justice, Second Civil Section, available at jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=126038#highlight=## – last consultation, 02.08.2023;

of this legal situation in relation to other corporate forms or legal entities is also of interest.

That the court's decision is in the sense of extending the administrator's powers in the given situation in the reference period is less important from the perspective of this analysis, precisely because, being mandatory, the supreme court's decision will be applied in all cases with such specificity. What is really interesting from the perspective of this analysis is the reasoning by which the pronounced solution was reached, in order to understand to what extent it can also be applied to other legal situations of termination of the administrator's mandate, as well as to determine the limits of supplementing the period of applicability of the power of representation.

In the analysis of the reasoning of Decision 24/2017, it is essential to determine the moment from which the company mandate will produce effects, to understand the effects of the termination of the mandate by reaching its deadline. Practically, in the mirror there are two situations starting from the circumstance in mind: the situation of the terminated mandate (through its expiration) and the situation of the new mandate that should succeed it. As such, to be able to discuss a new mandate, it must not only be granted by the general assembly of associates (in the case of companies) but must also be expressly accepted by the new trustee. Therefore, only an express act of acceptance by the new administrator would be able to produce the effects sought by the associates, and until such an act, the (terminated) mandate granted to the old administrator should continue to be valid.

However, after the expiration of the mandate, if a new appointment does not take place, the situation of its acceptance cannot be discussed (Cărpenaru, Piperea, David, 2014, p. 356; Nasz, 2019, p. 143)[1]. Acceptance therefore becomes important in the limited situation where there was a new appointment, and the effect of the refusal to accept the fulfillment of the mandate is based on the theory of the individual will of the trustee.

Next, the supreme court establishes that the expiration of the mandate leads to its immediate termination, excluding the applicability of the provisions of art. 2030 final thesis of the Civil Code[2] reasoning that the legislator did not intend to regulate such a situation also in the case of the revocation or relinquishment of the mandate, which would have been closer to the situation of its termination by

[1] In the doctrine it was emphasized that the appointment of the administrator is the exclusive attribute of the general assembly of associates/shareholders. In this sense, see L.B. Săuleanu, *Provisional Administrator of the company*, available at https://www.juridice.ro/essentials/4074/administratorul-provizoriu-al-societatii#_ftn3 - last consultation on 02.08.2023.

[2] Art. 2030 Civil Code: *"In addition to the general causes of termination of contracts, the mandate terminates in any of the following ways: a) its revocation by the represented part; b) resignation of the trustee; c) death, incapacity or bankruptcy of the represented part or the trustee .Nevertheless, when it has as its object the conclusion of successive acts within an activity with a continuity character, the mandate does not cease if this activity is in progress, respecting the right of revocation or renunciation of the parties or their heirs."*

expiration, but only in the case of the death, incapacity or bankruptcy of the represented part or the trustee. Curious, however, that the supreme court concludes that the provisions of art. 2030 of the Civil Code are not applicable in the case of the mandate has reached the end of the term, because the functioning of the company would be concluded through an extended term of a mandate for an unlimited period, interrupted only by acts of revocation or relinquishment. We consider that under this aspect the solution can be criticized, first of all because this reasoning is not continued to explain why such a situation is considered unacceptable, all the more since it is possible in the dynamics of the legal entity. Secondly, the criticism of the solution refers to the contradiction between the reasoning and the ruling, more precisely between the exclusion of the theory of the apparent mandate and the support of its de jure termination on the expiry date and the adoption, however, of the possibility of extending its effects.

We share the opinion already expressed in the juridical doctrine, according to which the supreme court *"not only did not try to justify the solution of continuing the administration, but even removed, in the considerations, the application of the only text on which it could base its decision. Therefore, out of two, one. Either the mandate of the administrator ceases by law, and the acts concluded by the representative without the power of attorney will acquire effectiveness thanks to the theory of apparent mandate, or the mandate of the administrator continues after the expiration of the term, but then the question of the need to apply the theory of appearance no longer arises"* (Sferdian, https://www.juridice.ro/619445/mandatul-expirat-al-administratorului-si-administrarea-societatii-o-alta-perspectiva.html#_ftn3).

Although we consider the solution correct from the point of view of the ruling, in the sense that the admission of the possibility of continuing the mandate of the administrator that has expired should be based, first of all, on the rationale related to the need for the legally constituted legal entity to be able to express itself continuously by concluding civil legal acts. As it is generally recognized that the legal person is a distinct subject of civil law, it means that its possibility to take part in legal relations must also be recognized during its existence, especially since the analyzed hypothesis does not correspond to a limiting situation of its protective capacity to exercise. In conclusion on this aspect, the expiration of the administrator's mandate could not lead to the deprivation of the legal person's legal capacity, as it is necessary to maintain this part of its civil capacity precisely for the continuation of its existence by carrying out the authorized activities.

Secondly, with applicability in the matter of companies, admitting the legal termination of the mandate as a result of its expiration would imply an important shortcoming resulting from the specifics of corporate life and the rules that govern it. According to art. 237 para. (1) of Law no. 31/1990, the lack of statutory bodies is a case of dissolution, and this sanction can be ordered at the request of any interested person or the Trade Registry Office. It becomes excessive, from the perspective of the principle of safeguarding the company, but

also of the general rights granted and protected for any subject of law, that the possibility of dissolution exists when the mandate has expired and a new trustee cannot be appointed.

Thirdly, we appreciate, in agreement with the opinion previously expressed in the jurisprudence, that the solution of recognizing the extension of the mandate after its expiration is the result of the interpretation of the provisions of art. 2030 of the Civil Code. The legal norm refers to the methods of termination specific to the mandate contract, but it expressly establishes that these are supplemented by all the general causes of contract termination. The latter are regulated separately by art. 1321 of the Civil Code which lists: the execution, the agreement of the parties, the unilateral denunciation, the expiration of the term, the fulfillment or, as the case may be, the non-fulfillment of the condition, the fortuitous impossibility of execution, as well as from any other causes provided by law. Therefore, the expiration of the term is one of the causes of termination of the mandate contract, from the corroboration of the two legal provisions.

Once this aspect is clarified, we must return to the analysis of the provisions of art. 2030 of the Civil Code, this time in the second thesis of the text of the law. Contrary to the opinion of the supreme court, we appreciate that the exception does not refer only to the situation of art. 2030 let. c), but can be applied to any situation in which the exercise of the mandate is done by concluding successive acts within an activity of a continuous nature, as is also the case of the administrator of a legal entity and his assignments. The consequence of this interpretation is that the aforementioned exception will be incidental to all general causes of termination of the contract, including the expiry of the term, in order to avoid prejudice to the principal's interests.

Under these conditions, what will be the extent of the mandate, both from the perspective of duration, but also from the perspective of its content?

The answer to the first question derives from the content of art. 2030 second thesis of the Civil Code, combined with the provisions of the special law on the appointment of the administrator. Thus, the extended mandate under the conditions shown can continue until revocation by the represented part or until renunciation by the trustee. On this occasion, we appreciate that it is necessary to emphasize that the solution adopted according to the previous reasoning will not apply to the situation of revocation of the trustee by the legal person, even in the absence of the appointment of another trustee, because this is expressly regulated as a case of termination in which the effects of the contract do not persist, the party's manifestation of will being relevant. Moreover, it was noted under this aspect that since *"the granting of the administrator's mandate is carried out in consideration of the person, intuitu personae, the trust that the associations have in him, the quality of the person, knowledge, personal skills or professional skills, his revocation is carried out ad nutum, being able to intervene at any time and independently of any fault of the latter"* (Daghie, 2016, p. 298).

Also, with regard to the previously described aspects, we appreciate that a distinct solution must be adopted when the mandate ends by renunciation, either before the expiration of its duration, or during its extension stage as a result of reaching the deadline and the lack of appointment of a new trustee. In this case, the provisions of art. 2034 and 2037 of the Civil Code assume, in the author's opinion, that within the framework of maintaining the obligation to give an account, the trustee should complete the legal acts in progress or the ones that cannot be postponed, precisely in order not to prejudice the legal person, unless such operations would cause him significant damage. Such an interpretation is also supported by the provisions of art. 849 para. (2) of the Civil Code, which makes express reference to those urgent and necessary operations, as well as art. 847 of the Civil Code, which governs a reasonable notice period included in the renunciation notice. As such, maintaining as the only solution the action in liability for damage caused as a result of relinquishing the mandate is not sufficient in corporate matters, the legal acts concluded by the company being needed permanent, distinct from the situation of natural persons, so the need to conclude them and maintain the activity is paramount. Moreover, the trustee's general obligation of loyalty to the legal person will last even after the formal termination of the mandate, meaning that he must deal with unfinished and urgent business, because for the legal person the renunciation is untimely (on this aspect, see a similar opinion in Stanca, 2009, p. 153).

Last but not least, the effects of the lack of statutory bodies addressed previously would also be applicable to this hypothesis. We also share the opinion expressed in the doctrine according to which *"the sole administrator can renounce the mandate at any time, notifying the trustees of his renunciation, but he has the legal obligation to convene the AGOA (the ordinary general meeting of shareholders), before manifesting his intention in this sense. If they do so, there is no injury to the company or its shareholders"* (Golgojan, in In Honorem Flavius Antoniu Baias, 2021, p. 136-137).

The answer to the second question can be found in the provisions of art. 849 of the Civil Code, which distinguishes between the acts concluded by the administrator that acts in good faith from the perspective of terminating the mandate and the acts concluded by him to prevent damage to the legal entity.

Thus, when the administrator acts without being aware of his revocation or replacement (hypothesis of good faith), the documents concluded by him will be valid and will bind the company to third parties. The extent of the legal operations that he can conclude depends on the limits previously granted to his mandate and will take into account the criteria established during the period in which the mandate was normally carried out.

Such a solution will be applicable exclusively to the situation of its revocation or replacement, since in the other analyzed hypotheses, reaching the deadline and renunciation, we cannot discuss a lack of knowledge of the administrator about the reason for termination. In these cases, art. 849 para. (2)

regulates the administrator's obligation to undertake all urgent and necessary legal operations to prevent losses. In such a situation, it means that the administrator will be obliged to conclude those acts which are the result or consequence of his previous acts, as well as new acts, which are not a consequence of the continuation of his previous acts, to the extent that their non-conclusion would lead to the detriment of the legal person.

3. Conclusions

Instead of a formal conclusion on this analysis, we propose an answer to another self-addressed question: Is it possible to extend this rule established by Decision no. 24/2017 for other categories of legal persons in general and for other types of companies in particular?

Starting from the effects of the *specialia generalibus derogant* principle of law, a new review of the legal provisions that were taken into account when issuing Decision no. 24/2017, as well as the additional provisions, proposed in this study to be retained for application to the described situation, must be done. It follows that a good part of these provisions are general, applicable to all legal entities, such as art. 847, art. 849, art. 2030, art. 2037, art. 2037 and art. 1321 of the Civil Code. As such, regarding the effects derived from these legal texts, they will be applicable to all legal entities.

Regarding the provisions of the analyzed special law, we will first refer to those of art. 72 and 54 para. (2) of Law no. 31/1990, to observe whether they establish exceptions to the general rules or apply to atypical situations. First of all, the provisions are applicable to all corporate forms, being provisions of a general nature in this matter. Secondly, as art. 72 makes express reference to the provisions of common law, and art. 54 para. (2) creates the obligation to fulfill the publicity formalities in order to oppose the appointment or termination of the position of administrator to third parties, we appreciate that their application is not excluded within other legal entities as well, once the formality of publicity towards third parties is mandatory in order to be able to bring to the attention of third parties the structure of administrators.

It can thus be established that the ruling of Decision no. 24/2017 has general applicability to all legal entities subject to registration, when it refers to the termination of the mandate both by reaching its deadline, or by resignation by the administrator, as long as a new administrator (who has accepted the mandate) has not been appointed. We consider that the issue of publicizing the termination of mandate in these forms strictly refers to the opposability towards third parties, so that the conclusion of legal acts after the publicizing the termination, by an administrator who renounced the mandate but who exercises his powers regarding urgent and necessary operations, with a third party who accepts the conclusion of such an operation and executes it in good faith, will also be possible.

References

Cărpenaru, St. D., Piperea, Gh., & David, S. (2014). *Law of companies. Commentary on Articles*, 5th Edition. Bucharest: C.H. Beck.

Daghie, D.-M. (2016). *Administration of the joint stock company*. Bucharest: Universul Juridic.

Golgojan, I. (2021). Theoretical controversies and practical solutions in case the administrator of a joint-stock company is revoked, renounces the mandate or it expires, in *In Honorem Flavius Antoniu Baias, Appearance in law*, Volume II. Bucharest: Hamangiu.

Nasz, C. B. (2019). *Corporate Law*. Bucharest: Universul Juridic.

Săuleanu, L.B. *Provisional Administrator of the company*, available at https://www.juridice.ro/essentials/4074/administratorul-provizoriu-al-societatii#_ftn3.

Sferdian, I. *Expired mandate of the administrator and company management. Another perspective*, available at https://www.juridice.ro/619445/mandatul-expirat-al-administratorului-si-administrarea-societatii-o-alta-perspectiva.html#_ftn3.

Stanca, I. A. (2011). *Administration of the joint stock companies*. Bucharest: Hamangiu.

Todică, C. (2011). *Legal status and powers of the administrator in the commercial company*. Bucharest: Universul Juridic.

Decision no. 920/25.03.2015 of the High Court of Cassation and Justice, Second Civil Section, available at jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=126038#highlight=## .

Civil Code of Romania from 1984.

Civil Code of Romania.

Romanian Official Gazette (Mof), Part I no. 153 of 02/19/2018.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

HOTEL LIABILITY INSURANCE POLICY IN THE HORECA FIELD AND METHODS OF ALTERNATIVE DISPUTE RESOLUTION (ADR) HEREIN

Laura Ramona NAE[1]

Abstract

The ever-changing demands of consumer-tourist customers, the development of technological means that improve their experience as well as the hotel operation method, the context of the Covid-19 pandemic situation, are among the factors that have changed the entire risk landscape of the hotel business for hospitality companies from within HoReCa field.

The impact of the financial risks faced by companies in the HoReCa field following Covid-19, has determined that hotel service providers reconsider their way of contractually allocating risks and covering financial losses. This provides, including the interpretation of clauses related to pandemic situations that have led to an increase in the number of disputes.

Therefore, this article also refers to extrajudicial methods of dispute resolution (ADR) in the field of HoReCa insurance, used both in Romania and at the level of the European Union.

Key words: *HoReCa; hotel services; tourist-consumer; insurance policy; brokerage mandate; disputes; ADR methods.*

1. Introduction. Advance specifications

1.1. Definition of the HoReCa field.

Originally from the Netherlands, the term HoReCa is an abbreviation of the following words: hotels, restaurants and cafes/canteens[2]/catering, widely used in: Scandinavian countries, France, Benelux member countries.

Later, its use also expanded in the areas of Latin origin in Europe, in the field of tourism[3], and also defines hotel activities and services (Vâlcu, 2009,

[1] Legal advisor within the College of Legal Advisors from Bucharest, affiliated and PhD student of the Doctoral School of Law within the Academy of Economic Studies from Bucharest (Romania), email: lauranra@yahoo.com.

[2] Spaces such as cafes and canteens can be included in the restaurant category.

[3] From December 1, 2009, the Treaty on the Functioning of the European Union (TFUE) 2012/C 326/01 published in the Official Journal C 326, 26/10/2012 entered into force. According to art. 6 (letter D) and art. 195 title XXII of the TFUE, tourism policy is regulated at the level of the European Union, a field that thus benefits from its own legal basis within which the HoReCa sector enjoys official recognition, under the conditions that it also benefits from non-reimbursable financing programs (including post Covid 19). Thus, art. 6 letter d, from the TFUE, provides the following: "The Union is competent to carry out actions to support, coordinate or supplement the actions of the member states. Through their European purpose, these actions have the following areas: (a) the protection and improvement of human health; (b) industry; (c)

pp.60-65) that concern simultaneously: accommodation, catering services (food and drink)[1] as well as other related services.

1.2. The risk of the hotel business in the HoReCa field.

Terrorist attacks, biological outbreaks, pandemics (for example, the Covid-19 pandemic), as well as incidents of political or social violence, affect hotel activities and businesses, including the way hotel providers fulfill their contractual obligations. All of these have a significant impact on the provision of hotel services as well as on the travel and leisure behavior of European consumer tourists, both in a given region and globally.

Thus, the related risks are much more difficult to predict and difficult to insure, especially for hotel companies-legal entities, which are affected by business interruption losses, with or without the involvement of material damages. In this sense, the civil liability of legal entities organized in one of the structures with the function of tourist accommodation (hotel) is ensured, which operate on the basis of tourist licenses and patents[2] necessary for the conduct of hotel activities, in favor of their customers-consumer tourists (natural or legal persons).

---

culture; (d) tourism.." and art. 195 title XXII of the TFUE on tourism, provides the following: "(1) The Union complements the action of the member states in the tourism sector, in particular by promoting the competitiveness of Union enterprises in this sector. To this end, the action of the Union aims to: (a) encourage the creation of a favorable environment for the development of enterprises in this sector; (b) to promote cooperation between Member States, in particular through the exchange of best practices. (2) The European Parliament and the Council, deciding in accordance with the ordinary legislative procedure, establish the special measures intended to complement the actions taken in the member states, in order to achieve the objectives set out in this article, with the exception of any harmonization of the laws and regulations administrations of the member states".

[1] According to the provisions of the Order of the President of the INS no. 337/20.04.2007 regarding the updating of the Classification of activities in the national economy - CAEN, published in the Official Gazette of Romania, Part I, no. 293 of May 3, 2007 ("CAEN CODE"), the provision of predominant services within the hotel industry, can be found in the following CAEN codes: Hotels and other similar accommodation facilities - 5510; Restaurants- 5610; Food activities (catering) for events - 5621; Other food activities nca- 5629; Bars and other beverage service activities - 5630.

[2]Government Decision no. 1267/2010 regulates the issuance of classification certificates, licenses and tourism patents published in the Official Gazette of Romania no. 866 of 23.12.2010, with subsequent amendments and additions. Also, in accordance with the provisions of art. 2 lit. a, b and c, from the Methodological Norms of 2013 regarding the issuance of classification certificates of tourist reception structures with accommodation and public catering functions, of tourism licenses and patents, published in the Official Gazette of Romania no. 353 bis of 14.06.2013 , with subsequent amendments and additions, for the purpose of protecting tourists, accommodation and catering services are provided only in classified tourist reception structures. Tourist reception structures with an accommodation function, consist of: "hotels, apartment hotels, hostels, motels, tourist villas, tourist cabins, bungalows, holiday villages, campsites, tourist stops, camping cottages, apartments and rooms rented in family homes, river and maritime vessels including floating pontoons, tourist guesthouses and agro-tourist guesthouses and other units with tourist accommodation functions" and tourist reception structures with public catering function, consist of: "food units within the premises of the reception structures with accommodation functions (including those that serve them), public catering units located in tourist resorts, as well as those managed by commercial tourism companies, restaurants, bars, fast food units, confectioneries, patisseries and which are certified according to the law".

2. The hotel liability insurance policy in the HORECA field and the main types of risks

2.1. The headquarters of the matter. Parties.

The general regulation of insurance in Romanian law can be found in the provisions of art. 2199-2241 from the Romanian Civil Code supplemented with those ofLaw no. 236/2018 on insurance distribution[1]activity as well as Law no. 237/2015 regarding the authorization and supervision of insurance and reinsurance[2]. Also, in terms of insurance and reinsurance, in addition to the provisions of the national legislation, we encounter regulations within the European Union legislation, respectively those of the Directive 2009/138/EC[3] as well as EU Directive 2019/2177[4].

In the case of the hotel insurance contract concluded with the insurance company or the insurer, depending on the types of risk insured, the insured may be- the hotelier/owner of the hotel business (the hotel), the insurance contractor may be the hotel operator or hotel management company concluding the contract of insurance and the third party beneficiary can be the customer or the consumer tourist. The insurance contractor represents the person who concludes the hotel insurance contract, for the insurance of a hotel risk regarding another person or their goods/ activities (Moțiu, 2011, p.337).

According to the provisions of the insurance contract, in the event of the occurrence of the insured risk, the insured or the insurance contractor undertakes to pay a premium to the insurance company or the insurer and the latter undertakes to pay an indemnity, as the case may be, (i) to the insured, (ii) to the beneficiary insurance,(iii) to the damaged third party (Macovei & Macovei, 2020, pp. 117-124).

2.2. Types of insurance from the perspective of the insured risk.

The proof of the conclusion of the hotel insurance contract between the insured and the insurer consists in the hotel liability insurance policy. This may include the following types of risks:

[1] Law no. 236/2018 regarding the distribution of insurance published in the Official Gazette of Romania no. 853 of 08.10.2018, with subsequent amendments and additions.
[2] Law no. 237 /2015 regarding the authorization and supervision of the insurance and reinsurance activity published in the Official Gazette of Romania no. 800 of October 28, 2015, with subsequent amendments and additions.
[3] Directive 2009/138/EC of the European Parliament and of the Council of November 25, 2009 regarding the access to the activity and the conduct of the insurance and reinsurance activity (Solvency II), published in the Official Journal L no. 335 of 17.12.2009.
[4] Directive (EU) 2019/2177 of the European Parliament and of the Council of 18 December 2019 published in the Official Journal of the European Union L 334/155, amending Directive 2009/138/EC on the access to and pursuit of insurance and reinsurance activities (Solvency II), Directive 2014/65/EU on markets in financial instruments and Directive (EU) 2015/849 on preventing the use of the financial system for the purpose of money laundering or terrorist financing.

1. products liability or the insurance of stocks of raw materials and materials. This occurs if the hotel owns restaurants or bar serving areas, *lounges*[1] within it, where alcoholic beverages are also consumed.

In this sense, hotel employees must benefit from special training procedures in order to serve food and drinks, in order to prevent their alteration or the spread of infectious diseases to its tourists;

2. *liquor liability*, i.e. exposure to liability for alcoholic beverages. This exposure may increase if the employees of the insured hotel are not properly trained by it in order to recognize the effects of excessive alcohol consumption in relation to tourists;

3. *ensuring stocks of raw materials and materials*, which also includes their seasonal increase. For example, within this type of liability, the following are taken into account:(i) the fact that, over the course of a year, a hotel's stock of goods can only consist of certain goods specific to certain annual holidays (Christmas, Easter, etc.), (ii) the route of the stocks of refrigerated goods as well as the stocks in transit, from suppliers to hotel, etc;

4. *business interruption and loss of gross profit or business interruption insurance*, which consists of covering losses arising from business interruption and loss of gross profit, as a result of an insured event (for example, as a result of a fire, flood occurring within the hotel , of an epidemic situation of the Covid19 (Militaru, 2021, pp. 219-225) type that causes employee absenteeism at work, the interruption of the supply chain of raw materials and materials, the cancellation of orders/bookings of rooms and accommodation that causes loss of profit, etc.).This last type of insurance policy protects the hotel against financial losses in the event of unforeseen events. This exists to help a hotel business return to the financial position it was in prior to the situation that triggered that loss, thereby offsetting the profit the insured would have earned had the disaster not occurred.

As a general rule, most insurances compensate the insured for lost income during the "indemnity period" as well as for "additional expenses" incurred by him, less for expenses that do not show continuity within this period called "non-continuous expenses". In this sense, the insured will draw up together with the insurer, a report through which the proof of the interruption of his business will be ensured, through all possible means of proof (for example, express written requests for reservation of accommodation rooms received from tourists, within the period of interruption, etc.). Therefore, the insurer will undertake a visit to the actual location of the hotel, where it will ascertain and analyze the causes that led to the insured's loss of business.

The main factors that influence the income of accommodation rooms thus lost, can be the following: a. the percentage or degree of occupancy for each

[1]Generally, within hotels with a number equal to or greater than 5 stars.

individual hotel room, b. the average daily rate at which a certain type of accommodation room is sold ("ADR")[1].

In this sense, in relation to the insurer, the hotel must prove the degree of occupancy as well as the ADR that it expected to achieve during the compensation period, under the conditions that the loss would not have occurred, c. pandemic causes of the Covid19 type.

The occupancy rate of the hotel as well as the ADR thus projected by the insured are supported by the occupancy trends in the specific hotel market, for a *competitive set*[2] of hotels in the geographical area where the hotel in question is located.

Also, if the accommodation reservations prior to the loss are higher than those recorded by the hotel for the similar period a year ago, it indicates that their growth trend would have continued in the following year as well[3].

Important to note in this regard is the fact that, on September 22, 2021, the European Commission adopted a review of the EU insurance rules[4] (called "Solvency II"), which aims to favor and recover investments in insurance as well as protecting the insured - the holders of insurance policies, following the Covid19 pandemic situation.

5. *premises liability, safety and security of goods*, or the liability for the coverage of the personal belongings of the tourists of the insured hotel (for example, in the case of burglary[5] and/or acts of robbery on the goods belonging to the tourists, material damage caused to the vehicles in the parking lot belonging to the hotel (Moțiu, 2011, p.341), etc.).

Are considered to have been brought into the hotel premises, (i) the goods located within it during the entire period of accommodation of the tourist, (ii) as well as those outside the hotel, but for which he or one of his employees assumes the obligation of supervision: on the entire period of accommodation or for a reasonable period of time, before or after the accommodation.

The purpose of this type of insurance is to cover damages caused to tourists, within the insurance period, for acts committed through the fault of the insured, in which case the civil liability of the latter is incurred. Therefore, the hotel - as a provider of hotel services, is liable, in its capacity as a hotel

[1] ADR – average daily rate, means the average daily income per accommodation room.
[2] Competitive set, i.e. the same number of stars, similar facilities available to the hotel's customers, etc.
[3] In this situation, it is important to analyze each individual revenue stream of the hotel and consider how much it would have generated depending on seasonality, market conditions, customer groups and other related factors, if the loss had not occurred.
[4] The review consists of the following: legislative proposal to amend the Solvency II Directive (Directive 2009/138/EC of the European Parliament and of the Council of 25.11.2009 regarding access to the activity and the performance of the insurance and reinsurance activity (Solvency II) as well as with on a new directive on the recovery and resolution of insurance institutions; communication on the revision of the Solvency II Directive.
[5] In accordance with the provisions of art. 299 of Law no. 286/2009 regarding the Criminal Code of Romania, published in the Official Gazette, Part I no. 510 of July 24, 2009, regarding qualified theft - paragraph 1 letter d) provides the following "Theft committed in the following circumstances:.... by burglary, escalation or by unauthorized use of a real key or a false key."

depository[1] of the goods brought by tourists within its location, for the damages (Piperea, 2019, pp. 710-715).
caused to them, through theft, destruction, damage. Damages are granted on the basis of a written request for compensation received by the insured, during the insurance period or after it, but before the operation of the statute of limitations regarding the right of the injured person to request that the damage suffered be repaired. In this sense, the insured must implement appropriate procedures in order to ensure the safety of its tourists and their goods, in accordance with the applicable legal provisions in force[2].

6. *workers compensation or the employer's liability for the insured's employees,* (Moțiu, 2011, pp.342-343) with or without full-time part-time work[3]. This type of liability is a special one due to the fact that the hotel activity, belonging to a specific activity sector[4], involves a daily duration of work time greater than 8 hours.

7. *liability in the case of washing/cleaning operations* carried out by the insured's salaried staff, who ensure the cleanliness of all hotel spaces[5] (for example, the accommodation rooms, restaurants, event halls, bar area, confectionery, hallways on the floors, etc.). This intervenes less in the case of spaces that have a different legal regime from the hotel one (for example, in the case of renting parts of the hotel premises, a situation in which the tenant ensures cleaning, at his own exclusive expense).

8. *civil liability for third parties*[6] (Moțiu, 2011, p.344). In the case of this type of liability, as a general principle, the owner of a hotel business is not liable for the wrongful actions or negligence[7] of a third party, unless the risk of the

[1] In accordance with Art. 2127 of the Civil Code regarding the hotel deposit contract.
[2] The insured must draw up and comply with a series of internal procedures, in accordance with the provisions of Law 333/2003 on the protection of objectives, assets, values and the protection of persons, republished, Official Gazette of Romania no. 189 of 18.03.2014. Also, also within the hotel's internal procedures, safety measures must be provided regarding the ascending/descending stairs, elevators, escalators, all of which must be maintained in good conditions for the safety of customers. At the same time, the escape routes must be clearly marked distinctly, and in case of forced evacuation from the hotel, tourists will have to have at their disposal electronic room entry/exit cards, unique, personalized for each individual room.
[3] Art. 112. [normal duration of working time] from Law no. 53/2003 (Labor Code) republished, Official Gazette of Romania no. 345 of 18.05.2011, provides the following: "(1) For full-time employees, the normal duration of working time is 8 hours per day and 40 hours per week. (2) In the case of young people aged up to 18 years, the duration of working time is 6 hours a day and 30 hours a week".
[4] Art. 115 paragraph 1 [special duration of working time] of the Labor Code, provides the following:"(1) For certain sectors of activity, units or professions, a daily working time of less or more than 8 hours can be established through collective or individual negotiations or through specific normative acts".
[5] For example, the chambermaids who ensure the cleanliness of the hotel rooms, the employees who ensure the cleanliness in the kitchen/restaurant areas, in the public spaces of the hotel. All these operations can cause employees to be exposed to the substances used for cleaning (through irritation of the face, eyes, skin, etc.). Also, injuries during work hours in the hotel can cause back injuries, sprains, etc.
[6] This is also called liability insurance.
[7] Art. 16 of Law 287/2009 on the Romanian Civil Code, republished, Official Gazette of Romania no. 505 of 15.07.2001, provides the following: "Guilt. (1) If the law does not provide otherwise, the person is liable only for his acts committed with intent or through fault. (2) The act is committed with intent when the author

wrongful act is foreseeable to justify the imposition of an obligation on him. In this situation, the owner will take all the necessary legal steps to protect the goods and interests of his tourists, for the entire time they benefit from hotel services in the hotel.For example[1], the insured - as the owner of the hotel building[2], offers its tourists the following related services/facilities[3]: relaxation (fitness and spa), gambling (casino), beauty activities, etc. Thus, the insured concludes rental contracts regarding spaces - parts of the hotel premises[4] (Piperea, 2019, pp. 547-555), with third-party companies (tenants) whose object of activity are these services and which they can promote and offer as facilities to the hotel's tourists.

This type of rental contract presents certain particularities, for example, there are provided: (i) on the one hand, clauses according to which the tenant's employees (who provide the fitness/spa, casino activities, etc.) must comply with the standards established by the hotel's policies, personnel and training procedures and (ii) on the other hand, provisions according to which the hotel has the right to request and compel the tenant to apply disciplinary measures to its employees responsible for violating the hotel's procedures.In the case of concluding a policy with such liability risk, the insured may rely on such provisions included in the rental agreement concluded with the third party tenant.

9. *property risk or the property risk of the building/property* in which the hotel operates, together with all its contents (for example, heating systems, electrical, air conditioning, ventilation systems, sprinklers, equipment and machinery including those used within kitchen, fixed assets or inventory[5], etc.).

10. *automobile liability*. This type of liability occurs when the insured makes available to his tourists, including transportation from/to the airport to the

---

foresees the result of his act and either seeks its occurrence through the act, or, although does not pursue it, accepts the possibility of producing this result. (3) The act is committed by fault when the author either foresees the result of his act, but does not accept it, considering without grounds that it will not occur, or does not foresee the result of the act, although he should have provides. The fault is serious when the author acted with a negligence or imprudence that not even the most tactless person would have shown in relation to his own interests. (4) When the law conditions the legal effects of an act on its being committed out of fault , the condition is also fulfilled if the deed was committed with intent".

[1] For example, in the event of a fire in the hotel, neighboring buildings could also be affected, and the insurance also covers the damage caused to these buildings.

[2] A 5 star hotel located in the center of a city.

[3] For example, in accordance with the provisions of the CAEN Code, Activities of fitness centers - 9313, Body maintenance activities - 9604, Gambling and betting activities - 9200, Hairdressing and other beautification activities - 9602.

[4] The hotel could take advantages of the spa/fitness, casino services to offer its guests/customers additional relaxation facilities and attract additional revenue, and in turn, the spa/fitness center as well as the casino- ul, would benefit from the presence of hotel guests tired from a trip/business looking for relaxation. From a business perspective, it is a mutual win-win for all parties involved in this contractual relationship.

[5] Their replacement cost is also important because it represents the cost of repair or reconstruction to the same quality and type, adapted to the evolution of the currency market in the respective country. For example. the case where the hotel company owns and operates two properties (hotels) in Bucharest: one property (one of the hotels) suffers a fire and the other property (the other hotel) has a high degree of room occupancy, because it takes over part of the business from the first property affected by the fire. Thus, the insurable loss in the case of the damaged property (the first hotel) will be reduced by "changing" the business of the other property.

hotel. This type of liability also includes parking services - valet services/valet parking[1] provided by hotel employees to its tourists, which may cause damage to the latter.

11. *data privacy or the confidentiality of personal data of tourists*. In this situation, the programs, the cyber liability software of the hotels are of particular importance regarding the running of the daily operations of the hotel, especially in the case of the sale of hotel services online (Piperea, 2019, pp. 465-471), in the context of the present digital era[2].

In this sense, as hoteliers as well as their customers, use digital systems to automate and streamline their tasks and obligations, they must also be aware of the potential risks adjacent to them. Thus, the hotel stores and processes information - personal data of its tourists, including financial data, based on internal procedures drawn up in accordance with the applicable legal provisions[3]. In the event of a violation of the procedures, the insured has the obligation to contact the customers thus affected and to inform them that their personal data has been compromised, which may represent a costly problem for the hotel.

12. pandemic situation namely pandemic situations such as the coronavirus pandemic- Covid19. The entire hospitality industry, including the HoReCa field and its customers, faced this liability situation recently (March 2020-March 2022). In this sense, the legal provisions of the central and local institutions, determine the owners of hotel businesses/hotel management companies, to adapt their internal procedures, in the sense of respecting and applying them, within the hotel activity carried out.

13. risk management or hotel risk management. In this sense, the insured must have a risk management strategy, which includes: risk assessments, control measures, health and food safety audit reports, etc., aimed at preventing and reducing the exposure of the hotel, of natural persons with who he comes into contact with (employees, third-party clients, beneficiaries-tourists, collaborators), at any kind of risk.

2.3. Obligation of the insured hotel to conclude insurance contracts.

The insured hotel develops and applies various risk management policies and procedures, in order to avoid injury, injury to all the aforementioned natural persons as well as to protect its commercial operations - from financial ruin (insolvency/bankruptcy cases) as well as from physical wear and tear.

[1] It involves the services of a person responsible on behalf of the hotel for the parking of vehicles belonging to its customers (including in the underground garages belonging to the hotel), or from the entrance to the hotel to the restaurants within it.

[2] Cyber security is an important issue facing hotels, with cyber terrorism on the rise, as in the case of the major data attack suffered by the Marriott International hotel chain in 2018.

[3] Regulation (EU) 2016/679 of the European Parliament and of the Council/ 27 April 2016 on the protection of natural persons with regard to the processing of personal data and the free movement of such data and repealing Directive 95/46/EC.

Consequently, hotel owners, through the administrators/members of the supervisory board as well as the general managers/members of the directorate, are liable to the hotel company for not fulfilling their duties[1]. The legal provisions regarding civil liability towards the company also apply to its general managers, who are each responsible for their own actions, the members of the directorate being jointly responsible for the actions, decisions, or omissions of their constituent body. Thus, the hotel company will have to take out a liability insurance policy, adequate to cover any unwanted event in the context of a civil liability claim. The policy will be concluded based on the obligation of prudence and diligence of the general director as well as the administrator, in achieving the company's interest, for the entire duration of their mandate.

2.4. The role of the insurance broker.

The hotel must take out a liability insurance policy covering all possible risks. In this sense, an important role is also played by the insurance broker, who provides the hotel with all the necessary assistance in this regard, based on an insurance brokerage mandate (Cărpenaru et al., 2009, pp. 178-187; Piperea, 2019 pp.497-514).

The insurance brokerage mandate represents the contract between the hotel - as the potential insured (the principal) and the insurance broker - as the trustee, concluded for a fixed period. Within this contract, the trustee has the following obligations: (i) negotiating insurance offers with insurance companies in the name and on behalf of the hotel, in order to conclude validly and in accordance with the applicable legislation, insurance contracts with the agreed insurance companies by the principal, (ii) the identification of an insurer to monitor and assist the hotel in identifying activities that present a high degree of risk and which has: experience in insurance in the field of hotel hospitality as well as a department specialized in loss, risk control that a hotel may suffer in the course of its activity, (iii) the evaluation of all the risks that could arise in this field, so as to offer the hotel the best liability insurance/reinsurance options.Also, the insurance broker will assist the hotel in the following operations, analyses, which will be part of the operation strategy of the insured hotel, namely: (i) obtaining information adjacent[2]to estimates of the operation of the hotel for the future period of activity[3], (ii) concluding the best possible liability insurance/reinsurance[4] policy, at the lowest possible price (insurance premium)

[1]According to art. 152 para. (1) sentence I, art. 1532 para. (6) from Law 31/1990 on companies - Publication in the Official Gazette of Romania no. 1066 of 17.11.2004.

[2] For example, the location of the hotel, the developed/useful area of the hotel building, the year of construction, the income from the sale of accommodation rooms versus other income from other profit centers within the hotel, the total number of invoices/tax receipts issued as a result of the hotel activity, the number of warehouses, swimming pools, spa/fitness rooms, fire alarms/sprinklers, access systems in the hotel building, etc.

[3] An estimate is usually made for the next 5 years of operation of the respective hotel.

[4] Reinsurance is regulated by the provisions of art. 2240 of the Romanian Civil Code.

(Cărpenaru et al., 2009 p. 250) as well as in the best terms and conditions, (iii) regularization of damages[1], as the case may be, as well as any other requests regarding insurances . Thus, the hotel will not have to pay for liability insurance, large sums of money for the payment of insurance premiums, due to the fact that the insurer did not have the necessary capacity and experience in risk assessment.

3. Methods of alternative dispute resolution (ADR) regarding hotel insurance

The insured, through his hotel business, must also consider his exposure to unintentional torts, especially negligence and imprudence. In this sense, if the hotel safety conditions established by its internal procedures, fall below a certain standard and damage can thus be caused, the injured person can file a lawsuit against the hotel, for negligence.

Consequently, non-compliance with these safety conditions can also have negative effects on the image and reputation of the hotel, the injured person being able to claim material and moral damages, lawsuits can also result or, the most tragic result, can lead to the physical injury of tourists, collaborators, hotel employees.

The triggering of the Covid 19 pandemic has led to major changes and disruptions, both social and economic, which have negatively influenced the activity of traders. These have led to major financial losses in business, including in the HoReCa field. Thus, the hoteliers made claims to the insurers, regarding the insurance policies.

In the event of a dispute over a claim, the collaborative relationship between insurers and policyholders in the HoReCa field is often affected. This makes the use of a voluntary alternative dispute resolution method (ADR) viable. Given that trade insurance disputes in this area can often be prolonged and costly, this type of case may be ideal for non-judicial settlement.

Increasing the presence of ADR clauses in commercial insurance policies in the HoReCa field, followed by their use in the event of disputes, has countless benefits for both policyholders and insurers.

In order to prevent disputes that may arise in such situations, the contracting parties can resort to alternative extrajudicial dispute resolution methods (ADR), such as: conciliation (Lew et al., 2011, pp 12-13), arbitration, mediation, dispute commissions, online dispute resolution (e-ADR or ODR), early neutral or expert evaluation, extrajudicial expertise performed jointly by the parties, mini-trial (Born, 2012, p. 14), etc.

[1] According tothe provisions of art. 2 paragraph 2 of the Insurance Law, "the activity of intermediation in reinsurance - the activity of introducing, proposing or performing other preliminary activities for the conclusion of reinsurance contracts or providing assistance for the administration or performance of contracts, especially in the case of a damages.....The following will also not be considered reinsurance intermediation activities: providing information on an occasional basis, ...administering claims to a reinsurer on a professional basis, as well as regularizing claims".

Most collaborative relationships between insurers and policyholders have a long time based on trust, understanding, concessions as well as mutually beneficial win-win gains. In the event of a dispute, if the level of hostility between them is increased, the likelihood of keeping these relationships in good condition can be considerably diminished. Consequently, in order for this business relationship to continue, the parties use the above-mentioned ADR methods.

The general advantages of practicing these methods are the following:
-represents confidential (Born, 2012 pp. 7-11, pp. 195-200), private, transparent mechanisms for resolving disputes compared to proceedings before state courts;
-can be used in almost all fields of activity, by natural or legal persons (Sîrbu, 2020, p.15), governmental or non-governmental organizations;
-ensures the neutrality and impartiality of the settlement of conflicts between the contracting parties, the case deducted and the solution pronounced;
-guarantees the autonomy of the parties, speed (Lew et al., 2011 pag.7).

In this sense, from the perspective of insurers, the speed of settlement of the dispute is essential, the duration necessary to resolve a claim for compensation having a significant impact on the means of continuing the business of the insured. Solving applications as quickly and efficiently as possible is thus one of the aims of insurers' business because it eliminates unpredictable costs related to unresolved insurance issues. They are also voluntary procedures in which the parties create their own agreement / transaction and process;
-involves the participation of third parties experts or arbitrators, specialized in the field of activity related to the dispute deduced to the settlement procedure in question.

In the case of arbitration, in particular, the advantages of its use are the following:
-the arbitral award is faster[1] than that carried out before the state courts and the arbitrators can be selected directly by the parties, thus there is no delay in resolving the cases. For example, arbitral organizations such as the American Arbitration Association (AAA)[2] provide specific expertise tailored to business in the hospitality industry including the HoReCa domain, which also involves arbitrators specializing in this, thus allowing the parties to choose a neutral arbitrator who will resolve their case.

Insurers thus include in the insurance contract concluded with the insured, arbitration clauses that encourage the parties to arrive at the amicable settlement of disputes concerning their agreements. This means that the parties have the opportunity to design and choose the procedure for resolving any disputes as part of their contractual relations.

[1] See in this regard, https://ccbjournal.com/articles/court-backlogs-make-arbitration-an-attractive-option-for-resolving-cases, accessed on 31.05.2023 at 17.04.
[2] See in this regard, https://www.adr.org/commercial, accessed on 31.05.2023 at 16.32.

In the global context of policies, standard commercial procedures, elements such as: the method of selecting arbitrators, their number, applicable law, possible remedies, etc., may be included in these ADR clauses. Therefore, even after a case is subject to the arbitration procedure, the parties may further personalize it, thus retaining the benefits of the previous negotiations. However, such an option is not available in the case of processes resolved by state courts;
-the proceeding strengthens the recognition and enforcement of judgments handed down by foreign arbitral institutions / courts (Tudor, 2013, pp. 67-69) subsequently carried out voluntarily by the parties.
- obtaining a judgment on the interpretation of the contract between the parties, which will implicitly affect each level of insurance concluded between them, it is much faster compared to the one pronounced by the state court;
-the parties may intervene in the conduct of the procedure[1] in such a way as to restrict the problems deduced to the settlement through the arbitration and to streamline the process of finding the facts. For example, parties to an arbitration may create a restricted hearing to deal with and resolve issues that require discretion and confidentiality in the affairs of the insured, unlike the situation of a dispute resolved by the courts.

In this respect, the statistics undertaken at international level, namely those compiled by the institution FTI Consulting Inc., show, through the Report published in March 2022[2], that, cross-border economic activity and trade and investment has increased over the last 20 years, leading to the development of the entire world economy. This also led to an increase in the number of national / international disputes as well as their resolution mechanisms, including through arbitration. In this respect, there was an annual increase in the number of requests for settlement of disputes through the arbitration procedure, of over 3% in the period 2010-2019, reaching a percentage of 9.9% in 2020.

For example, within the German Arbitration Institute, the average amount of receivables deducted for settlement increased from EUR 3.8 million in 2016 to EUR 13.9 million in 2020 and within the Arbitration Institute of the Chamber of Commerce in Stockholm, in the period 2016 and 2020 - the average amount increased from EUR 8 million to EUR 9.4 million, where in 2018 alone it was EUR 87.5 million.

At the same time, in 2020, the arbitral institutions registered an increase in the cases of arbitration. For example, the International Centre for Settlement of Investment Disputes (ICSID) reported a record of 58 new conventions, increasing from 39 in 2019 and Singapore International Arbitration Center (SIAC)

[1] See in this regard, https://www.americanbar.org/content/dam/aba-cms-dotorg/products/inv/book/313721953/Chapter%201.pdf, accessed on 31.05.2023 at 18.35 .
[2] See in this regard, https://www.fticonsulting.com/-/media/files/emea--files/insights/reports/2022/apr/international-arbitration-after-pandemic.pdf?rev=99711bd4cbed4c0aac79a728e96a7144&hash=434F6C319A7AC48D1943F0AC3A3B1F75, accessed on 31.05.2023 at 17.51.

registered a number of 612 cases which represents an increase of 47% compared to 2019.

4. Conclusions

In order to protect the commercial operations of the hotel, protection is included against material damage[1], its reputation as well as any other financial impacts that may occur in the context of disputes or litigation. Keeping tourists, collaborators and employees safe (which also includes avoiding emotional and physical injuries), represents both a moral and ethical responsibility of the hotel company, through this type of liability, the insured demonstrating diligence and prudence in the activities conducted.

With these, the insured hotel proves that it prioritizes the health and safety of people (including food safety and hygiene)[2], while taking the necessary measures to protect the operational sustainability of its business.

Also, technology and the current pandemic context have substantially changed the optics of tourists' expectations regarding the type of experience and involvement of hoteliers regarding the hotel services provided. All these represent particular challenges in this field where reputation, confidentiality regarding the personal data of tourists as well as their satisfaction regarding the hotel services provided, are vital.

In the case of hotel insurance, the use of alternative dispute resolution methods by the contracting parties gives them the opportunity to resolve their disagreements in a much faster and more efficient manner compared to a process resolved by state courts. By means of these methods, the parties reach, without the intervention of any judge, an advantageous agreement for both, which has a very important role in ensuring the protection of the reputation of the parties. The transaction of the parties is carried out, including with the help of independent arbitrators, specialized in the field of insurance, which is a way of further guaranteeing their competence regarding the judgments rendered.

[1] In accordance with Art. 1530 of the Romanian Civil Code "The creditor has the right to damages for the reparation of the damage that the debtor has caused him and which is the direct and necessary consequence of the non-execution of the obligation without justification or, as the case may be, culpable".

[2] In this regard, see https://eur-lex.europa.eu/summary/chapter/food_safety.html?locale=ro&root_default=SUM_1_CODED%3D30, accessed on 13.12.2022, at 14.38. In the same sense, see also Regulation (EC) no. 178/2002 of the European Parliament and of the Council of January 28, 2012 establishing the principles and general requirements of food legislation, establishing the European Food Safety Authority and establishing procedures in the field of food safety. Thus, the insured hotel will implement, within its hotel activity, a HACCP Guide of good hygiene practices imposed by Romanian legislation in accordance with the European Commission Directives that contain a series of food safety principles and procedures that must be applied by economic operators to prevent disease of the population.

References

Born, Gary B. (2012). *International Arbitration: Law and Practice*. Kluwer Law International BV.

Lew, Julian M., Mistelis, Loukas A., & Kröll, Stefan Michael. (2011). *Comparative International Commercial Arbitration*, Kluwer Law International.

Cărpenaru, Stanciu D., Stanciulescu, Liviu, & Nemeș, Vasile. (2009). *Civil and commercial contracts*. Hamangiu.

Macovei, Ioan, & Macovei, Codrin. (2020). *The law of insurance contracts*. Universul Juridic.

Moțiu, Florin. (2011). *Special contracts in the New Civil Code*. Universul Juridic.

Piperea, Gheorghe. (2019). *Contracts and commercial obligations*. C.H.Beck.

Sîrbu, Manuela. (2020). *ADR methods in the European and international context*. Hamangiu.

Tudor, Mihaela. (2013). *The insurance contract. General theory and special contracts*. Tandem Media.

Militaru, Ioana-Nely. (2021). *Tourism in the European Union in the context of the Covid-19 Pandemic crisis.Conference on Comparative and International Law International Conference*.

Vâlcu, Elise Nicoleta. (2009). Brief consideration of the impact of the regional development policy and tourism in Romania, *volume 9, The Annals of the Stefan cel Mare University of Suceava. Fascicle of the Faculty of Economics and Public Administration*.

Directive (EU) 2019/2177 of the European Parliament and of the Council of 18 December 2019 published in the Official Journal of the European Union L 334/155, amending Directive 2009/138/EC on access to the activity and the conduct of the insurance activity and of reinsurance (Solvency II), Directive 2014/65/EU on financial instruments markets and Directive (EU) 2015/849 on preventing the use of the financial system for the purpose of money laundering or terrorist financing.

Law no. 237 /2015 regarding the authorization and supervision of the insurance and reinsurance activity published in the Official Gazette of Romania no. 800 of October 28, 2015, with subsequent amendments and additions.

Law no. 236/2018 regarding the distribution of insurance published in the Official Gazette of Romania no. 853 of 08.10.2018, with subsequent amendments and additions.

Law no. 286/2009 regarding the Criminal Code of Romania, published in the Official Gazette, Part I no. 510 of July 24, 2009.

Law no. 53/2003 (Labor Code) republishing, Official Gazette of Romania no. 345 of 18.05.2011.

Law 287/2009 on the Romanian Civil Code, republished, Official Gazette of Romania no. 505 of 15.07.2001.

Law 31/1990 on companies -publication in the Official Gazette of Romania no. 1066 of 17.11.2004.

Order of the President of the INS no. 337/20.04.2007 regarding the updating of the Classification of activities in the national economy - CAEN, published in the Official Gazette of Romania, Part I, no. 293 of May 3, 2007.

Treaty on the Functioning of the European Union (TFEU) 2012/C 326/01 published in the Official Journal of the European Union C 326/47 from 26/10/2012.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

THE MINOR'S DOMICILE

Oana-Nicoleta RETEA[1]

Abstract

According to the legal provisions, the domicile is where the person lives permanently, so in the hypothesis where a person has more than one permanent residence, the domicile is where the person has both permanent and main residence. Thus, the domicile as an identifying attribute of the person indicates its location in space. The rule is that the domicile of the minor who has not acquired full legal capacity under the conditions provided by law is with his parents or with the one of the parents with whom he lives permanently. As a result, the domicile as an identification attribute is important from a procedural point of view, in order to determine the court where the action will be registered, respectively the place where the procedural documents will be communicated. In this sens we are going to analyse the jurisprudence thoroughly emphasising the problems appeared.

Key words: *domicile; residence; minor; law; identification attribute.*

1. Introduction

When we discuss about the domicile of the minor, we are speaking about the legal domicile (E. Chelaru, & M. Chelaru, 2023, p.148) witch is the domicile established by law for certain categories of natural persons. Along with the minor, in the category of natural persons benefiting from the legal domicile is also the one who benefits from the measure of special guardianship (art. 92 Civil Code); the missing person over whose property guardianship was instituted, but only in those cases where the guardian has the right to represent him (art. 94 Civil Code); those called to collect an inheritance, if a custodian or a curator has been appointed for the administration of the inheritance (art. 95 Civil Code); the person protected by the special guardianship regulated by art. 150, art. 159 and art. 167 Civil Code.

Therefore, as professor C. Stătescu also pointed out, legal domicile (Stătescu, 1970, p.154) is always a measure of protection, as the case may be, of a person deprived of exercise capacity or with restricted exercise capacity, or of a person who, for various reasons, can not defend rights.

[1] **Assistant professor, Faculty of Law, University of Craiova (Romania), email: retea.oana.nicoleta@gmail.com.**

At the same time, Professor N. Titulescu, analyzing the varieties of domicile (Titulescu, 2004, p.149), shows that the minor's legal domicile is his parent's domicile, in the sense of domicile of origin, and when he turns 18, and moves, or, in the hypothesis where he stays together with his parents, we discuss the acquired domicile.

In other words, the legal domicile is mandatory and represents, according to C. Hamangiu, that the main settlement must be in the place established by law, a presumption that is not always accurate, in a context in which the legal domicile is also unreal (Hamangiu, Rosetti Bălănescu, & Băicoianu, 2004, p.147).

According to the relevant provisions (Civil Code, art. 92-93, Law no.272/2004, art.59-63, The Government's Emergency Ordinance no 97/2005, art.28) the legal domicile (Dogaru, & Cercel, 2007, p. 683) of the minor is at his parents, at the parent with whom he permanently lives, at the parent designated by the guardianship court, at the persons, other than the parents, designated by the guardianship court, at the institution, family or persons to whom he was placed, at the tutor.

2. Case Law

In the civil sentence no 2013/2015 High Court of Cassation and Justice (available on www.lege5.ro), shows that the request with the object of establishing the domicile of a minor is a request regarding the protection of the natural person given by the Civil Code in the jurisdiction of the guardianship and family court.This is resolved by the court in whose territorial constituency the person protected, has his domicile or residence, according to art. 114 C. proc. civ., which stipulates that "if the law does not provide otherwise, the requests for protection the natural person given by the Civil Code in the jurisdiction of the guardianship and family court is resolved by the court in whose territorial constituency the protected person has his domicile or residence".

Therefore, *the minor M. was born in the town of Baza, Spain, from the cohabitation of the parties, being recognized by the plaintiff, his father. During the time when the parties lived in Spain, the plaintiff behaved violently towards the defendant, reason for which the Spanish courts have adopted restrictive measures, namely the measure of removal and of prohibition to approach the defendant, by Decision no. 1 of March 19, 2014 of the Court of First Instance from the Base, respectively, of permanent location for a duration of 4 days, by Sentence no. 36/14 of September 17 2014 of the Court of Granada. By the decision of June 3, 2014 of the Court on Violence against Women no. 2 of Granada was maintained the removal measure for a duration of 6 months. during these legal proceedings, the defendant initiated the procedures for the protection and custody of the minor, file no. 204/2013 of the Court no. 1 of Granada, and by Sentence no. 1 of December 17, 2013 of Court no. l from the locality of Baza, the characteristic measure was taken temporary protection and custody of the minor*

in favor of the mother, as well as obliging the father to pay a pension maintenance of 150 euros per month. Also, by the Sentence dated 08.04.2014 of the Court no. 1 from the town of Baza decided the approval for the defendant, together with the minor, to leave the territory of Spain in order to make a trip to Romania.

In this case, the full legal recognition of a foreign judgment works, because it refers to the personal status of the citizens of the state where they were pronounced, a situation regulated by the provisions of art. 166
from Law no. 105/1992, so that the previously highlighted decisions produce their effects in Romania as well. In this context, it was held that, by granting "protection and custody" of the minor in favor of the mother, even temporarily,establishes the "domicile of the minor" where the defendant's mother also has it.

From May 2014, the defendant, accompanied by the minor M., returned to the country to the maternal grandparents' residence in Nimigea. In the meantime, the mother of the minor returned to Spain, and the minor remained in the country with her maternal grandparents. In this period of time the applicant father visited the minor, and on September 27, 2014, at the end, the visiting schedule, he did not return with the minor, and since that moment, the minor was in the care of his paternal grandmother, with effective domicile in the municipality of Sf. G, Covasna county.

After the case was dismissed in favor of the Nasaud Court, the plaintiff invoked, in turn, the exception of incompetence of this court, with the consequence of declaring the case in favor of the Court of St. G, motivated of the fact that the minor resides with the plaintiff, and, according to the psychosocial investigation ordered in the case, the minor and the father actually live in the municipality of Sf. G.

In interpreting the phrase "domicile of the minor", the court had in mind the actual residence of the minor, as person on whom the subject of the case falls (exercise of parental authority), at the time of registration of the action – November 5, 2014, and did not presume that the minor's domicile would be similar to that of maternal grandparents or with the domicile in the country of the defendant, located in the town of Nimigea.

So, according to the provisions of art. 400 Civil Code, "(1) In the absence of agreement between the parents or if this is contrary to the best interests of the child, the guardianship court establishes, once the divorce is pronounced, the residence of the minor child with the parent with whom he lives permanently. (2) If until the divorce the child lived with both parents, the court establishes his residence with one of them, taking into account his best interest. (3) In mod exceptionally, and only if it is in the best interest of the child, the court can establish his residence with the grandparents or to other relatives or persons, with their consent, or to a protective institution. They exercise supervise the child and fulfill all the usual acts regarding his health, education and learning. " Also, art.

496 para. (1) - (3) Civil Code provides that "(1) The minor child lives with his parents. (2) If the parents do not live together, they will establish, by common agreement, the child's residence. (3) In case of misunderstanding between the parents, the guardianship court decides, taking into account the conclusions of the psychosocial investigation report and listening to the parents and the child, if he has reached the age of 10. The provisions of art. 264 remain applicable," In the enumeration in art. 106 of the Civil Code of protective measures states that the protection of the minor is carried out by parents, by establishing guardianship, fostering or, as the case may be, by other special protection measures specifically provided by law. According to art. 261 Civil Code, titled "parents' duty", placed in Book II, "On the Family", the parents have the first of all, the duty of raising and educating their minor children, and, according to art. 265 of the same normative act, "All the measures given by this book within the competence of the court, all the disputes concerning the application of the provisions of this book, as well as the child protection measures provided for in special laws are by the jurisdiction of the guardianship court. The provisions of art. 107 are applicable accordingly". Art. 107 para. (1) Civil Code provides that "Procedures provided by this code regarding the protection of natural persons are under the jurisdiction of the guardianship and family court established according to the law, hereinafter referred to as the court of guardianship".

However, the negative competence conflict that occurred was determined by the different interpretation of the phrase "domicile or residence of the protected person" by the courts that mutually declined the competence to resolve the presidential ordinance request.

The High Court notes that, according to art. 92 para. (1) and (2) Civil Code, "(1) Domicile of the minor who has not acquired capacity full of exercise under the conditions provided by the law, it is with his parents or with the one of the parents to whom he live permanently. (2) in case the parents have separate residences and do not agree on which one they will live in had the child's domicile, the guardianship court, listening to the parents. as well as the child if he has completed age 10, will decide taking into account the interests of the child. Until the decision remains definitive judicially, the minor is presumed to be domiciled with the parent with whom he permanently resides".

In this situation, the presumed domicile of the minor M. is with her father, with whom she actually lives, respectively in Covasna county, Sf. G municipality, legal domicile of permanent residence held on formulating the summons request.

Moreover, the documents in the file do not reveal that the Spanish court would have ruled on the establishment of the minor's domicile in the town of Nimigea, Bistrita Năsăud county, the address in the identity card of the defendant mother, who, in fact, lives in Spain. So, the court on the Spanish territory did not actually rule on a petition for the determination of minor residence by nominating the town of Nimigea, but only ruled on entrusting the minor to the protection and custody of the defendant mother and regarding the defendant's request to leave

with the minor from Spanish territory, accompanied by her mother, in order to travel to Romania, without identify the destination town in Romania. The Spanish court, by the provision which concerns the measure adopted with a temporary nature of returning the protection and custody of the minor in favor mother and with the return of parental authority in favor of both parents, it retained and analyzed the material conditions and morals held by the parents in Spain, in the circumstances in which they lived in Spain at that time. Or, these circumstances ciuld no longer be considered valid, because the location of the minor have changed, as well as the actual domicile of her parents and, implicitly, the existential conditions that could be retained for analysis. Thus, until the court establishes another situation regarding the residence of the minor, compared to the previously cited legal provisions, considering that the domicile of the protected person - the minor M., is at his father, in Covasna county, Sf. G municipality, the High Court have determined the jurisdiction to resolve the the case in favor of the Court of St. G.

3. Conclusions

In this context, the proof of legal domicile is usually done by proving the common law domicile of the person providing the protection. The minor who has reached the age of 14 can prove his/her legal domicile with the identity card, the decision of the guardianship court or the decision of the county commission or of the sector of the Bucharest municipality for child protection, which ordered the placement of the child, as the case may be.

References

Cercel, Sevastian, & Dogaru, Ion. (2007). *Drept civil. Persoanele.* Bucharest: C.H.Beck.

Chelaru, Eugen, & Chelaru, Marius. (2023). *Drept civil. Persoanele.* Bucharest: C.H. Beck.

Chelaru, Eugen. (2003). *Drept civil. Persoanele.* Bucharest: All Beck.

Cantacuzino, B., Matei. (1998). *Elementele Dreptului Civil:* Bucharest, All Educational.

Dogaru, Ion, Cercel, Sevastian, Dănișor, Dan Claudiu, & Popa, Nicolae. (2008). *Bazele dreptului civil, Vol. I,. Teoria generală,* Bucharest: C.H.Beck.

Retea, Oana Nicoleta. (2018). *Dreptul la nume. Jurisprudență națională și europeană.* Bucharest: C.H.Beck.

Stătescu, Constantin. (1970). *Drept civil*. Didactică and Pedagogică.

Titulescu, Nicolae. (2004). *Drept civil*. Bucharest: All Beck.

Ungureanu, Ovidiu, & Munteanu, Cornelia. (2015). *Drept civil. Persoanele în reglementarea noului Cod Civil.* Bucharest:Hamangiu.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

MIGRATION AND FAMILY LIFE: THE INTERPLAY OF FAMILY UNITY AND FAMILY REUNIFICATION IN COUNCIL OF EUROPE AND EU LEGAL DOCTRINE

Giorgi CHACHKHIANI[1]

Abstract

Migration and family life has become a critical issue in contemporary Europe. There is also a debate that the Council of Europe and the EU have taken different approaches to address this issue. Besides, in international practice, there is still no universal definition of the family, moreover, the issue of the interplay between family unity and family reunification in the European legal framework is particularly interesting, since in one case it raises questions on an upcoming separation (expulsion) and in the second -on an already existing separation (denial of entry). The article reviews both the legal framework of the Council of Europe and the European Union, as well as case law of ECtHR and CJEU and derives practical conclusions of the interplay.

Key words: *family unity; family reunification; EU legal doctrine; migration; ECtHR.*

1. Introduction

Unfortunately, a significant number of individuals have been forced to flee their countries of origin or have voluntarily chosen to seek better opportunities abroad. The process of migration is often accompanied by several challenges, including family-related issues. The need and desire to be with loved ones is frequently hindered by state-oriented regulations and practices. It should be noted that family life cannot be viewed as a one-dimensional concept, as it encompasses several layers that must be examined. Although there is no universally accepted definition of a family, it is widely acknowledged that minor children are the cornerstone of family unity. Therefore, when discussing migration and family unity, it is essential to be mindful that this context is not only intertwined with state security reasons and human rights issues, but also the governing principles of child rights, particularly the best interests of the child.

UNICEF has numerous times stated that children, irrespective of their or their parents' refugee, temporary protection, or migration status, have the right to

[1]**LLB in International Law, Tbilisi State University, MA Candidate, Business and Technology University, Head of the International Law and International Relations Program, Georgian Young Reformers' Association, Tbilisi (Georgia), e-mail: giorgi.chachkhiani.1@btu.edu.ge.**

grow up with their families. It has emphasized that family unity plays a crucial role in safeguarding the lives, development, and overall well-being of children. Migrant and refugee families can flourish and make more productive contributions to host communities by residing together. This, in turn, promotes acceptance and integration within the host community. Furthermore, family unity can decrease the necessity for irregular migration, trafficking, and smuggling while also supporting worldwide efforts aimed at creating a safe, orderly, and regular global migration management system (UNICEF, n.d., p.1).

Even this passage suggests that protecting family unity and establishing a positive environment to preserve it, play a key role in effective migration management system. Furthermore, it is apparent that this issue must be approached from multiple perspectives. For the aims of the paper, various concepts of family life are analyzed in the context of migration, which involves both expulsion and denial of entry. Despite these two processes having the same outcome - family separation, the process and framework can differ significantly,as in one case it is spoken on protection against removal (negative obligation) and in the second, affirmative action to protect - family reunification (positive obligation). In addition, the paper examines the international legal framework pertaining to family life and discusses the definitions of family and the interplay between family unity and family reunification within the legal framework of the European Council and the European Union. The primary focus is placed on analyzing the most important case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU).

2. "Family" in the international legal framework and its definition

Family life is an integral part of modern human rights' architecture. This right is acknowledged and enshrined in various fundamental international legal instruments, inter alia, in Article 8 of the European Convention on Human Rights; Article 16 of the Convention on the Rights of the Child; Article 17 (1) of the International Covenant on Civil and Political Rights; Article 10 (1) of the International Covenant on Economic, Social and Cultural Rights; Article 12 of the Universal Declaration of Human Rights; Article 7 of the Charter of Fundamental Rights of the European Union; Principle 17 of the Guiding Principles on Internal Displacement, etc.

Legal documents stipulate that "*the family is the natural and fundamental group unit of society and is entitled to protection by society and the State*" (UDHR, 1948, Art. 16(3); ICCPR (1966) Art 23(1);CRC (1989) Recital 6).According to some scholars,the term "family" or "family life" is often used as a synonymous to "family unity," which is seen as a characteristic or subset of having a family life (Edwards, 2005, p. 311). However, some argue that family unity should not be conflated with family life or family reunification (Chetail & Bauloz, 2014, p. 200). In academic discourse, family unity has two meanings: a

broad one that covers issues related to admission, stay, and expulsion, and a narrow one that refers to an "existing intact family" that the state seeks to separate by expelling one of its members. Family reunification, on the other hand, refers to the process of reuniting family members who have already been separated by forced or voluntary migration and whose regrouping in a country other than their country of origin is being prevented by the state. Therefore, these two are totally different concept (Chetail & Bauloz, 2014, p. 200). In this paper, the term "family unity" is used in its narrow definition, as the primary focus is on examining its interaction with family reunification within the framework of European law.

Although family unity and family reunification are both important components of family life, they are distinct concepts, and the key issue is whether they should be considered as separate rights or simply as part of the right to family life. As we have demonstrated, family life is a critical aspect of the human rights framework, and none of the previously mentioned articles explicitly mention a distinct "right to family reunification." Instead, family reunification is viewed as a means of maintaining family life and family unity. However, it is noteworthy that the European framework is quite delicate in this regard. Apart existing directive on this regard, Recommendation 1686 (2004) on Human Mobility and the Right to Family Reunion, issued by the Parliamentary Assembly of the Council of Europe, also uses the term "The Right to Family Reunion". According to the document: "*Family reunion is the term used to describe a situation in which members of a family come to join one of its members (the "sponsor"), who is lawfully resident in another country*" (Recommendation 1686, 2004, Para 2) and the right is applicable to individuals who are citizens of non-European Union member states and can be exercised by migrants who are lawfully residing in a member state. Additionally, it applies to individuals who have been granted refugee status in accordance with the 1951 Geneva Convention on the Status of Refugees, as well as those who have been granted complementary or subsidiary protection (Recommendation 1686, 2004,Para 4).

The lack of an agreed-upon definition of the term "family" is another issue that complicates the determination of terminologies. This is a practical problem, as establishing a right to family reunion and an obligation to maintain family unity raises questions about who can exercise these rights. In practice, there is a significant difference between the broader definition of family used in many countries of origin and the narrower definition of "nuclear family" that is typically applied by countries of asylum. The former includes, for example, the dependent parents of each spouse (UNHCR, 2001, para. 78) and also can include relationship with siblings, cousins. uncles, aunts and grandparents, while the latter encompasses the relationship between a minor child and their parents or between spouses or unmarried cohabitating partners, if children are not involved (Chetail & Bauloz, 2014, p. 201). The Committee on the Rights of the Child's general comment No. 14 (2013) on the right of the child to have their best interests taken as a primary consideration stipulates that the term "parents" should be broadly

interpreted to include biological, adoptive, or foster parents or members of the extended family or community as defined by local custom (CMW, 2017, para. 27). To ensure the protection of children's rights to family unity, it is crucial to adopt a flexible definition of family, as recommended by the United Nations High Commissioner for Refugees (UNHCR). The UNHCR suggests that the definition should take into account the levels of physical, financial, psychological, and emotional dependency. This is because in many societies, children are often fostered or adopted by relatives or community members who may not have any blood ties with them (UNICEF, n.d., p. 6)

In regards to this issue, Recommendation 1686 is of a significant importance as well. Paragraph 12.3. A. recommends that member states should apply a broad interpretation of the concept of family and specifically include in that definition "*natural family, non-married partners, including same-sex partners, children born out of wedlock, children in joint custody, dependent adult children and dependent parents*". (Recommendation 1686, 2004,Para 12).Although European regulation may not be as broad as African practice, the recommendation to broaden the nuclear definition is still suggested. Having covered the fundamental concepts, the subsequent chapter will explore the interplay between family unity and family reunification.

3. The interplay of family unity and family reunification under ECTHR'S practice

In order to examine the interplay between family unity and family reunification, it is necessary to carefully analyze each concept. As previously mentioned, for the purposes of this discussion, family unity will be defined narrowly as an already existing intact family in a member state. Therefore, the power of a state to expel a member of an existing family to their country of origin or to a third country entails issues of family unity. On the other hand, the power of a state to deny entry to a family member for the purpose of reunification with another family member living in the host state refers to matters of family reunification. Thus, in the former case, we are talking about separation, while in the latter case, we are dealing with an already existing separation. These conclusions are derived from the case law of the European Court of Human Rights, which distinguishes between expelling a foreigner from the territory, which violates the unity of the family, and issues related to the entry of foreigners.

As a result of the analysis of the Court's practice, it has been ascertained that the European Court of Human Rights is more inclined to protect family rights in cases of removal than in refusal of entry (Lambert, 1999, p. 429).In legal doctrine, remarks are rightfully made that a differentiation has indeed been introduced by the Court, distinguishing between instances of removing an alien from the contracting Party's territory that results in the disruption of family unity and those concerning an alien's entry or refusal into the territory of a contracting

party with the intention of reuniting with their family. When dealing with the cases of removal, ECtHR upon showing strong family or private ties with members in the country where the family lives and having the record of not committing a serious criminal offence,has tipped the balance in favor to integrated aliens (Chetail & Bauloz, 2014, p. 204).

The illustration of the above mentioned is Ciliz case (Ciliz v. The Netherlands, 2000).According to the facts, the applicant, a Turkish national, arrived in the Netherlands in March 1988, where he married a Turkish woman. After this marriage, he was granted a residence permit for one year, which was renewed indefinitely in April 1990 after the birth of his son. However, when the applicant and his wife separated in November 1991, he lost his right to reside in the Netherlands indefinitely. He applied for an independent residence permit and worked pursuant to the relevant provisions of the Aliens Circular. In 1993, he requested a prolongation of his residence permit in order to work in the Netherlands, which was rejected. He subsequently requested a review of this decision, which was also rejected by the State Secretary for Justice in October 1994. The applicant appealed this decision, arguing that he had an intense relationship with his son. The Dutch authorities ordered his expulsion from the Netherlands, which was done shortly after a trial meeting had taken place concerning his access to his son. The applicant argued that his expulsion from the Netherlands violated his right to respect for his family life under Article 8 of the European Convention on Human Rights. The Court noted that the Convention does not prohibit states from regulating the entry and length of stay of aliens, but the decision-making process leading to measures of interference must be fair and provide due respect to the interests safeguarded by Article 8 (Ciliz v. The Netherlands, 2000, para. 66). The Court found that the applicant had not been involved in the decision-making process to a sufficient degree to provide him with the requisite protection of his interests. The authorities not only prejudged the outcome of the proceedings relating to the question of access by expelling the applicant when they did, but, more importantly, they denied the applicant all possibility of any meaningful further involvement in those proceedings. The Court concluded that the decision-making process concerning both the question of the applicant's expulsion and the question of access did not afford the requisite protection of the applicant's interests as safeguarded by Article 8, and therefore, the interference with the applicant's right under this provision was not "necessary in a democraticsociety"(Ciliz v. The Netherlands, 2000, para. 71-72).

When it comes to the matters of family reunification and instances where entry is denied, the Court has weighed an individual's rights against the community's interests at the initial phase of determining whether whether it is reasonable to expect aliens to develop family life elsewhere. Consequently, only a small number of cases have succeeded in this matter.(Chetail & Bauloz, 2014, p. 205).

One of the crucial cases of the matter is Gül v. Switzerland (Gül v. Switzerland, 1994). According to the facts, the applicant, a Turkish citizen living in Switzerland, requested permission for his sons to join him in Switzerland, but the request was denied due to various reasons including the lack of a permit to establish domicile and financial means. In Gül's case, the Court stated "*where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory. In order to establish the scope of the State's obligations, the facts of the case must be considered*"(Gül v. Switzerland, 1994, para 38). Derived from that, the Court had to determine to what extent it was true that move of his son to Switzerland would have been the only way for the applicant to develop life with his son. The Court stipulated that by leaving Turkey in 1983, Mr Gül caused the separation from his son and he could not demonstrate that he indeed was a victim of persecution in the country of origin. Also the visits he had made to his son in recent years showed that grounds for potential persecution were no longer valid and as it would not be easy for the them to return to Turkey (considering the health condition of his wife), there were no obstacles preventing them from developing family life in Turkey, therefore, the Court founded that Switzerland had not failed to fulfil the obligations arising under Article 8 (Gül v. Switzerland, 1994, para 41-43).

It should be noted that inthe doctrine Gül's case is also used as a supportive argument for the idea that actually there is no and cannot be any difference between admission and removal(Costello, C., 2016 p. 250),as in para 38 the Court also stated that "*the boundaries between the State's positive and negative obligations under [Article 8] do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both cases, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation*"(Gül v. Switzerland, 1994, para 38). Also, this idea have been shared by the UK Supreme Court in Quila case concluded that the distinction between a State's positive obligation to permit applicants to reunite with their British spouses from its negative obligation not to expel a foreign national was 'elusive' and should be abandoned(Quila and Others v Secretary of State for the Home, 2011, para 43).

` As it was cited, in cases of immigration, Article 8 does not contain general obligation and to establish the scope, facts of the individual cases must be taken into the consideration. In the Introduction we have spoken about the importance of the principle of the best interests of the child, this is also reflected in the ECtHR's practice. For instance, in Rodrigues Da Silva &Hoogkamercase, the Court has emphasized the importance of the best interests of a child and allowed a mother from Brazil to stay in the Netherlands with her daughter Rodrigues Da Silva &Hoogkamer v. The Netherlands, 2006).This demonstrates that when

dealing with the best interest of a child, it can serve as an overriding factor in the interplay.

As previously mentioned, considering that these two situations result in the similar outcome of separated family, should similar approaches be taken in applying the law? To answer this question, we must first examine the legal framework and case law of the European Union.

4. EU's legal framework and the practice of CJEU

There are number of binding regulations and directives that deals with the discussed issue from different dimensions. As have been mentioned, right to family life is established under Article 7 of the Charter of Fundamental Rights of the European Union. Moreover, through EU regulations and directives, the concept is more detailed. For instance, in 1986 EEC Regulation 1612/68 with regard to the migrating the worker's right to be joined by his family, stipulated that the right to reside with a worker who is a citizen of one Member State and employed in the territory of another Member State is granted, regardless of their nationality, to the worker's spouse and their descendants under 21 years of age, or those who are dependent on them; also dependent relatives in the ascending line of the worker and his spouse. Also, regulation stipulates that if a family member who is not covered by paragraph 1 is dependent on the worker or lives under his roof in the country from which the comes, Member States also shall facilitate their admission (EEC Regulation 1612/68, 1986, Art. 10).

As it has been mentioned, no major international treaty had indicated separate right to family reunification. In EU there is a special directive regarding to it which reinstates the right. Council Directive 2003/86/EC regards to the exercising of the right to family reunification by third country nationals residing lawfully in the territory of the Member States. It is noteworthy that directive only applies when "*the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence, if the members of his or her family are third country nationals of whatever status*" (Directive 2003/86/EC, 2003, Art. 3). Also, directive gives exhausted list for family members, including a sponsor's spouse, minor children (including adopted children), and minor children of the spouse, where custody is held by either the sponsor or the spouse. Additionally, Member States may authorize the entry and residence of first-degree relatives in the direct ascending line, where they are dependent on them and do not enjoy proper family support in the country of origin, adult unmarried children who are unable to provide for their own needs due to health reasons, unmarried partners, and their minor and adult unmarried children who are unable to provide for their own needs due to health reasons. Polygamous marriages are not eligible for further family reunification (Directive 2003/86/EC, 2003, Art. 4). Nevertheless, an application for entry and residence of family members can be rejected on

grounds of public policy, public security or public health and permit can be withdrawn based on same grounds (Directive 2003/86/EC, 2003, Art. 6).

As for the other directives, Directive 2003/109/EC provides protection from expulsion of long-term residents who do not pose a threat to public order and security, even in economic considerations (Directive 2003/109/EC, 2003, para 12). Directive 2004/38/EC affirms right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. To assess the individual context, the principle of proportionality is used by the directive(Directive 2004/38/EC, 2004, para 27).

Another quite important directive is Qualification Directive 2004/83/EC which refers to the international protection. According to the directive, to exercise the right,family already had to beexisted in the country of origin, including the spouse of the beneficiary of refugee or subsidiary protection status or his or her unmarried partner in a stable relationship (depending the legislation) and the minor children, on condition that they are unmarried and dependent (regardless being born in or out of wedlock or adopted) (Qualification Directive 2004/83/EC, 2004, Art. 2).

As for the case law of the European Court of Justice, in Parliament v. Council (C-540/03 2006),the Court stated its readiness to follow the Strasbourg practice on Article 8 as the main source of the human rights standard(European Parliament v. Council of the European Union,2006). Despite this, Directive 2003/86/EC exceeds Article 8 of the ECHR in two ways: by establishing protocols for how States should handle requests for family reunification, and by outlining the entitlements of family members residing in the Member State following approval of the application (Chetail & Bauloz, 2014, p. 212).This stipulates that EU's law is more specified and concrete on the matter.

Other important cases from the Court's practice are Zambrano v. Office National de l'Emploi (C-34/09 2011) and McCarty v. Secretary of State for the Home Department (C-434/09). In Zambrano case, the Court concluded that the interpretation of Article 20 TFEU suggests that a Member State cannot deny a third country national, who has minor children that are European Union citizens and dependent on them, the right to reside in the same Member State as their children or to obtain a work permit. Such denials would prevent those children from fully enjoying the benefits of the substance of the rights attaching to the status of European Union citizen. Denying a right of residence will result in putting the children in a position to leave the Union if they wish to stay with their parents. Moreover, if the said person is not granted a work permit, it would result in inadequate resources to support their family, which could ultimately compel the children, who are EU citizens, to leave the Union. Consequently, these citizens of the Union would be unable to fully exercise their rights bestowed upon them by their status as EU citizens (Zambrano v. Office National de l'Emploi, 2011, para 41-45).

The case of McCarty v. Secretary of State for the Home Department could be interpreted as a demonstration of the Zambrano ruling, specifically relating to adults seeking to assist their third-country national spouses based on their freedom of movement rights. According to the facts, Ms McCarthy, a UK and Irish national, applied for a residence permit for her Jamaican husband in the UK under EU law, but her application was refused as she had never exercised her right to freedom of movement.In the case of Ms McCarthy, the Court determined that Directive 2004/38/EC did not apply to her because she had never exercised her right to free movement and had always resided in the same Member State of which she was a national. Accordingly, the Court also ruled that Ms McCarthy's husband could not benefit from the rights conferred by the Directive as he was not the spouse of a national who had exercised her freedom of movement. According to the Court, a citizen of the Union who is also a national of another Member State and has always resided in the same Member State of which they are a national, and has never exercised their right of free movement, is not covered by Article 21 TFEU unless they face measures that would impede their exercise of free movement or deprive them of the rights conferred by their status as a Union citizen (McCarty v. Secretary of State for the Home Department, 2011, para 57).

5. Conclusions

Hindering someone to exercise their right to family reunification is equal to the interference in the right to family life, therefore the outcome that is on its surface based on the positive obligation is similar to the outcome of negative obligation – separation of family unity by expulsion.From the analyzing legal framework and case law, it is evident that in European context State's obligation to respect family reunification is attached to the special statuses, such as, residence and work permit, refugee, Union citizen. Although, CJEU has stipulated that the Article 8 of ECHR is the primary point for human rights standards, the legal framework of EU is much sophisticated and detailed in this regard.Taking into account the above, it is possible that the European Court of Human Rights may even use EU law as an auxiliary source, in any case, the reviewed cases show that the right to family life in the context of migration does not exist in one dimension, but rather it depends on individual, specific circumstances and is always linked to the status of a family member, therefore, there is a kind of flexibility and sometimes it leans towards the heavier tip of the scales, such as the best interests of the child.

As demonstrated in the paper, there is a debate regarding whether cases of expulsion and refusal of entry are distinct areas of regulation in judicial practice. Nevertheless, the ultimate outcome remains the same, and the key issue is which obligation carries greater importance, the positive or negative one. While in social terms, expulsion may be perceived as a more severe measure than simply denying entry, in legal terms, the state's positive and negative obligations must carry equal

weight, as the enjoyment of individual rights depends on both. Therefore, both approaches should be considered equally, particularly in the context of European Union law, where the right to family reunification is not only regarded as a component of the right to family life but also as a separate right, and holds the same legal significance as family unity.

References

Chetail, V., & Bauloz, C. (Eds.). (2014). *Research Handbook on International Law and Migration*. Edward Elgar.

Costello, C. (2016). *The Human Rights of Migrants and Refugees in European Law*. Oxford University Press.

Edwards, A. (2005). Human Rights, Refugees, and the Right "to Enjoy" Asylum. *International Journal of Refugee Law*, 17(2).

Convention on the Rights of the Child. (1989). 1577 U.N.T.S. 3 United Nations General Assembly.

Council of Europe: Parliamentary Assembly. (2004). Recommendation 1686 (2004) Human mobility and the right to family reunion.

Council of the European Union. (1968). Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

European Economic Community. (1968). Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community.

European Parliament and Council of the European Union. (2003). Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

European Parliament and Council of the European Union. (2004). Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

European Parliament and Council of the European Union. (2004). Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

European Parliament v. Council of the European Union, C-540/03. (27 June 2006). Court of Justice of the European Union.

European Parliament, & Council of the European Union. (2004). Directive 2004/83/EC of the European Parliament and of the Council of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who

otherwise need international protection and the content of the protection granted.

International Covenant on Civil and Political Rights. (1966). 999 U.N.T.S. 171 United Nations General Assembly.

Universal Declaration of Human Rights. (1948). 217 A (III). United Nations General Assembly.

Ciliz v. The Netherlands, 29192/95. (11 July 2000). Council of Europe: European Court of Human Rights.

Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm), C-34/09. (8 March 2011). Court of Justice of the European Union.

Guild, E., Grant, S., &Groenendijk, C. (Eds.). (2018). Human Rights of Migrants in the 21st Century. Routledge.

Gül v. Switzerland, 23218/94. (10 October 1994). Council of Europe: European Commission on Human Rights.

Lambert, H. (1999). The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion. International Journal of Refugee Law, 11(3), 427–450.

McCarty v. Secretary of State for the Home Department, C-434/09. (5 May 2011). Court of Justice of the European Union.

R (Quila and Others) v Secretary of State for the Home Department. (2011). UKSC 45.

Rodrigues de Silva and Hoogkamer v. The Netherlands, 50435/99. (31 January 2006). Council of Europe: European Court of Human Rights.

UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), & Committee on the Rights of the Child. (2017). Joint general comment No. 4 and No. 23 on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return. https://www.refworld.org/docid/5a12942a2b.html.

UNHR. (2001). Note on International Protection, UN Doc. A/AC.96/954, 13 September 2001. https://www.refworld.org/type,UNHCRNOTES,,,3bb1c6cc4,0.html.

UNICEF. (n.d.). Working paper: Family Unity in the Context of Migration. https://www.unicef.org/media/58341/file/Family%20unity%20issue%20brief.pdf.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

PRACTICE OF INTERNATIONAL ORGANIZATIONS IN ASSET TRACING AND RECOVERY

Lia CHIGLASHVILI [1]
Kristine TSIREKIDZE [2]

Abstract

Globalization has facilitated the movement of assets across different regions of the world, with each jurisdiction enforcing local laws and regulations. An important factor hindering the development of asset recovery policy is the excess of corruption. Accordingly, in today's environment, criminals use sophisticated financial means to hide the location and source of misappropriated assets. As a result, identification is difficult because assets are located in multiple jurisdictions, and moreover, it is problematic to adopt favorable laws in these jurisdictions for recovery and enforcement of claims.

In this thesis, we will discuss the challenges facing asset recovery, evaluate the technical, political and economic perspectives in the practice developed on that field and see what international organizations are doing or can do to achieve more sustainable standards of asset tracing and recovery.

Key words: *Asset tracing; effective cross-border recovery of assets; international organizations and their practices.*

1. Introduction

In today's reality, it is quite common for criminals to try to take advantage of gaps between different jurisdictions and hide illegal proceeds from their own criminal activities. Globalization and modern means of communication allow individual criminals to easily transfer their illicit income around the world, Which makes it even more difficult for their victims to find traces of stolen funds and assets and consequently return them. Successful recovery from fraudulent damage requires a great deal of energy, commitment, and resource allocation; In addition to the amount that should be invested in recovering lost investments, you need the involvement of experienced advisors who know how to find, identify, collect and recover lost assets. One of the most important elements in the recovery process is support for fraud victims by individual jurisdictions; Who are involved in the

[1] **Doctor of Law, Professor, Deputy Rector of the Tbilisi Humanitarian Teaching University, 032 255 24 24 (Georgia), email: Lika.Chig@yahoo.com.**
[2] **Master of Laws, The Tbilisi Humanitarian Teaching University, 032 255 24 24 (Georgia), email: tsirekidze.kristine@gmail.com.**

chain of transferring and concealing misallocated assets. Based on 2009 data, the United Nations estimates that the total amount of misappropriation of funds was approximately $ 2.1 trillion. Which accounted for 3.6 percent of this year's global GDP. It should be noted that about one percent of this revenue has been successfully restored ,EU Commissioner Cecilia Malmstrom identified key success factors in preventing white-collar crime and corruption. When introduced new legislation for more effective asset tracking, which involves the interrogation and recovery of both assets and other property. "We need to hit criminals where it hurts, by going after the Money (Knoetzl, & Marsch, https://knoetzl.com/wp-content/uploads/Who_s-Who-Challenges-of-Asset-Tracing-_-Recovery.pdf .).

2. International communities and international organizations

International businesses, and the legal community, have recognized the importance of asset tracking and recovery not only in crime prevention but also in strengthening and supporting the rights of victims of crime and recovering stolen funds and assets both within and outside their jurisdiction.[1]

The United Nations Convention against Corruption[2] considers the return of stolen property as one of its fundamental principles and requires member states to provide a factual and legal basis for the effective transboundary recovery of assets. Chapter 5 of the Convention provides for a framework for the return of stolen assets, which requires States to take steps to contain corruption proceeds, confiscation and repatriation under Article 51: The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.

The EU has even introduced several legal instruments aimed at facilitating the recovery and tracking of assets, which is considered a strategic priority within the jurisdiction of its member states.

At its fifth session, the Conference of the Parties to the United Nations Convention against Corruption adopted Resolution 5/3 "Facilitating international cooperation in asset recovery", which encourages the parties to share experiences in the management of frozen and foreclosed assets in order to Identify best practices based on available resources related to the administration of seized assets and develop non-binding guidelines on this issue. At a meeting of the Asset Management Working Group in Vienna in September 2015, recommendations were made for states and the UNODC (United Nations Office on Drugs and Crime) to continue sharing experiences to identify best practices, and conclusions

[1] See *Outcomes FATF Plenary, 21-23 October 2020*, available at https://www.fatf-gafi.org/en/publications/Fatfgeneral/Outcomes-fatf-plenary-october-2020.html.

[2] See *United Nations Convention against Corruption*, https://www.unodc.org/unodc/en/corruption/uncac.html

and recommendations were prepared on how the international community should take further action on these issues[1].

The meeting highlighted that the management of recovered and returned assets in accordance with the requirements of Chapter V of the UNCAC (Convention) is a crucial topic for many countries[2].

A number of organizations or networks have been set up to address this issue, including the Stolen Property Recovery Initiative (StAR), launched in September 2007 by the World Bank and the United Nations Office on Drugs and Crime. To facilitate the ratification and implementation of the United Nations Convention against Corruption, Specifically, the fifth chapter, which is the first comprehensive framework for asset recovery. This innovative partnership supports international efforts to combat corruption. StAR works with developing countries and the financial center to prevent money laundering and to facilitate the timely return of stolen assets.[3]

Another mechanism is the Open-ended Intergovernmental Working Group on Asset Recovery, called the "Working Group on Asset Recovery".[4] It is a subsidiary body of the United Nations Conference of States Parties to the Convention against Corruption; Which is responsible for assisting and assisting the Conference of States Parties in carrying out the necessary mandate to recover the proceeds of corruption. Their function derives from Chapter Five of the Convention, and since its inception (since 2006), the Working Group has held one Interesting Meeting per year, during which participants can exchange information and develop recommendations for submission to this Conference.

To date, more networks have been established between jurisdictions that facilitate cross-border asset tracking and recovery, which in turn builds trust between local authorities and allows them to liaise on asset tracking and recovery. This particular includes not only private practice networks but also formal and informal networks between local government and practitioners. One example of this is the EU, which requires its member states to set up or designate National Asset Recovery Offices as national contact points, which will not only be obliged to assist in the tracking and recovery of assets but also to exchange information on best practices. With such offices, the EU intends to support new global networks

---

[1] Brun, J.P. *Barriers to Asset Recovery An Analysis of the Key Barriers and Recommendations for Action*, available at https://documents.worldbank.org/en/publication/documents-reports/documentdetail/204221468338390474/barriers-to-asset-recovery-an-analysis-of-the-key-barriers-and-recommendations-for-action.

[2] See *United Nations Convention against Corruption*, available at https://www.unodc.org/unodc/en/treaties/CAC/.

[3] McArthur, G. *New Ontario Initiative Targets Complex, White-Collar Crimes*, available at https://www.theglobeandmail.com/canada/article-new-ontario-initiative-targets-complex-white-collar-crimes/.

[4] See *Open-ended Intergovernmental Working Group on Asset Recovery*, available at https://www.unodc.org/unodc/en/corruption/WG-AssetRecovery/working-group-on-asset-recovery.html.

of practitioners and experts in the field of cross-border asset tracking and recovery.

The current round of FATF Mutual Evaluation Reports (MERs)[1], which assessed 102 countries, reflected the scale of the challenges currently facing both internationally and nationally. Most jurisdictions largely comply with the requirements set out in Recommendations 4 on confiscation and provisional measures and Recommendation 38 on mutual assistance for freezing and confiscation; Eighty percent of countries have achieved effective immediate results, and some meet the characteristics of an effective system to some extent that need fundamental improvement.[2]

It is also important to consider the role of the European Court of Justice and the European Commission in the cross-border recovery of assets and see the actions taken by them:

Eurojust provides legal and practical support to judicial authorities at different stages of asset recovery, helps practitioners to solve existing problems, answer questions and promotes effective cooperation and communication between states. In addition, it supports complex investigations, including the creation of joint search teams and the organization of coordinated search days.

In 2019, Eurojust published a report on Eurojust's Casework in Asset Recovery to support the competent judicial authorities of EU Member States in effective asset recovery in cross-border cases. Based primarily on asset recovery issues registered with Eurojust and complementing the views expressed during discussions with the National Service, the report reviews the key legal and practical issues facing eurojust in the asset recovery process, in addition to detailing Eurojust's support at each stage of asset recovery and identifying best practices.

Regulation (EU) 2018/1805[3] of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing and confiscation orders entered into force on 19 December 2020. The mentioned regulation represents a completely new legal framework in the European Union, which regulates judicial cooperation in the process of asset recovery, which replaces the legal instruments in force until now, the new regime introduced important changes and innovations, which may affect the daily activities of practitioners.

Eurojust has published notes on the aforementioned regulation, which aim to provide a brief description of the regulation in order to raise awareness of its

[1]See *Procedures for the FATF Fourth Round of AML/CFT Mutual Evaluations*, available at https://www.fatf-gafi.org/en/publications/Mutualevaluations/4th-round-procedures.html.
[2]See FATF Report, *Terrorist Financing Risk Assessment Guidance*, available at https://www.fatf-gafi.org/content/dam/fatf-gafi/guidance/Terrorist-Financing-Risk-Assessment-Guidance.pdf.
[3] See *Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders*, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32018R1805.

introduction and to provide practitioners with updates on the new legal framework, in addition to providing information on issues that may be of particular interest in the early days of its application.

The most significant tool for asset recovery at the EU level is the 2007 Decision of the Council of the European Union.[1]The main goal of the mentioned Decision is to create national asset offices in EU countries,The purpose of these offices is to facilitate the tracing, identification, and subsequent recovery or confiscation of the proceeds of crime in both criminal and civil cases.EU countries are required to have at least one or two AROs in their territory, whereby countries exchange information with each other (around investigative, judicial or administrative matters).

The ARo, as well as other similar bodies within the EU countries, can request information from the AROs of other EU member states. The request must include the reason for the request, the subject, the nature of the proceedings and the target of the said investigation (be it property, natural or legal persons), they can also exchange information without a request, if they consider that this information may be relevant for the performance of ARO's tasks.In addition to efficient and rapid inter-agency cooperation, members are required to designate a maximum of two offices in each country.

Finally, in 2004, the European Union issued a directive on asset freezing and confiscation. The Directive includes an important requirement to regularly collect and store statistics to review the effectiveness of the confiscation system.The statistics collected should include data on the number of freezing orders and confiscations made following all criminal offences, as well as the value of frozen property and seized assets, which should be sent to the Commission annually.[2]

3. Conclusions

Still, there is a long way to go.The UN Convention against Corruption, as well as UNTOC, has played an important role In terms of progress in asset recovery.

Although many countries have already ratified and fulfilled their obligations under this Convention, a significant number still need to use the potential of UNCAC to take effective steps in asset recovery.

[1] See *Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime*, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007D0845.

[2] See *Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union*, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0042.

Criminals are always finding new ways to hide their ill-gotten gains, and investigators must use all the tools at their disposal to trace money laundering schemes and return it to victims.

References

Brun, J.P. (2011). *Barriers to Asset Recovery An Analysis of the Key Barriers and Recommendations for Action*.

Knoetzl, B., & Marsch, P. (2015). *Challenges of asset tracing/recovery*.

McArthur, G. (2019). *New Ontario Initiative Targets Complex, White-Collar Crimes*.

OECD. (2019). *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention*.

LexisNexis. (2017). *The True Cost of Anti-Money Laundering Compliance – European Survey*.

Law Business Research Ltd. (2020). *The Asset Tracing and Recovery Review*.

StAR. (2011). *Asset Recovery Handbook. Stolen Asset Recovery Initiative*.

FATF. (2012). *Recommendations for a definition of funds or other assets.*

FATF. (2012). *Operational Issues: Financial Investigations Guidance.*

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

THE OPPORTUNITY TO SWITCH TO THE EURO DIGITAL CURRENCY

Adriana Ioana PANȚOIU [1]

Abstract

It is becoming more and more obvious every day that we are participating in the beginning of the era of digital currencies. They appear to come in three forms: stablecoins, cryptocurrencies, and central bank digital currencies. This is the context in which the European Central Bank, in collaboration with the central banks of the euro area, has launched a study which aims to investigate whether a "digital euro would provide an anchor of stability for our money in the digital age". The investigation phase started in October 2021 and is still ongoing. It is expected to last approximately two years, ending in October 2023. A parallel research is ongoing. Private banks are also concerned about this issue. All these studies must emphasize whether a central bank digital euro is a viable and optimal solution to an unserved market need for which there is no other more efficient solution.

Key words: *digital currency; central bank; payments; cryptocurrency; credit institutions.*

1. Introduction

The period we are going through is certainly an extremely important one in the historical evolution of the currency. The emergence of digital currency seems to lead to the radical transformation of money, as it has been conceived and used until now.

Fin Tech is a new concept that is gaining more and more popularity, a concept that highlights an apparently irreversible phenomenon at this moment. By FinTech or "financial technology" we mean a business that aims to provide financial services through the use of software and other advanced technologies, which provide low-cost solutions. These new ways of providing financial services are becoming more and more relevant in a world that is becoming more and more digitized.

FinTech (financial technology) refers to entities that use technology-based systems either to provide innovative and cheaper financial services directly (without the involvement of banks or other intermediaries) or to streamline traditional financial businesses.

[1] **PhD Lecturer, Faculty of Economic Sciences and Law, University of Pitesti (Romania), email: adrianapantoiu@yahoo.com, https://orcid.org/0000-0002-5540-9159.**

Among FinTech innovations, we mention mobile phone services, mobile transactions on commodity exchanges, digital wallets (such as the Google or Apple mobile wallet system), commission-free stock trading (Robinhood app, Revolut), peer-to-peer loans (Lending Club) or financial advice sites (Betterment, Wealthfront etc)[1].

2. Electronic currency, digital currencies and cryptocurrencies

Electronic money appeared as a result of the development of electronic commerce and was regulated for the first time by Directive 2000/46/EC, later repealed by Directive no. 2009/110/EC. In our country, the Directive was transposed by Law no. 127/2011 on the activity of issuing electronic money, currently repealed, being replaced by Law no. 210/2019 on the activity of issuing electronic money.

Electronic money is defined by the legislator as "a monetary value stored electronically, including magnetically, representing a claim on the issuer, issued upon receipt of funds, for the purpose of carrying out payment operations and which is accepted by a person other than the issuer of electronic money " (art. 4 letter f) of the law).

Being relatively recently introduced into use, the notions still present a slight degree of uncertainty or confusion. There are authors who believe that electronic currency and digital currency represent the same thing[2]. More recently, however, the specialized doctrine makes an important distinction between the two, stating that digital currency, unlike electronic currency, never takes a physical form[3].

Digital currencies currently come in 3 forms: cryptocurrencies, stablecoins and central bank digital currencies.

Cryptocurrencies are defined by Directive (EU) no. 2018/843 amending Directive (EU) 2015/849 on preventing the use of the financial system for the purpose of money laundering or terrorist financing, as well as amending Directives 2009/138/EC and 2013/ 36/EU. According to the Directive, virtual currency is a digital representation of value that is not issued or guaranteed by a central bank or public authority, is not necessarily legally established and does not have the legal status of currency or money, but is accepted by persons physical or legal as a medium of exchange and which can be transferred, stored and

[1] See https://www.financialmarket.ro/terms/fintech-tehnologie-financiara/, accesed on 27.03.2023.
[2] S.Văleanu, *The difference between cryptocurrencies, digital currencies and virtual currencies*, article available at https://www.mediafax.ro/economic/diferenta-dintre-criptomonede-monede-digitale-si-monede-virtuale-20483153, accessed on 27.03.2023.
[3] M. Adams, & D. Rodeck, *Digital Currency: The Future Of Your Money*, article available at https://www.forbes.com/advisor/investing/cryptocurrency/digital-currency/ accessed on 27.03.2023.

transacted electronically. It is used, as a rule, for the sale-purchase of goods or services or as an investment method.

Cryptocurrencies or cryptoassets are highly speculative generating for holders the risk of recording significant losses. As long as these assets do not represent a claim on the issuer, such as a central bank in the case of fiat currencies, they are deemed unsuitable for use as a form of money.

On the other hand, the technology behind crypto-assets, namely distributed ledger technology (DLT), seems to offer some advantages to users, by reducing transaction costs and the speed of transactions, by decreasing settlement time.

The accelerated spread of the use of crypto-assets has led to the emergence, at European level, of some regulatory projects, such as the Proposal for a Regulation on crypto-asset markets and amending Directive (EU) 2019/1937, on the protection of persons reporting violations of Union law (Regulation MiCA - Markets in Crypto-assets). This project wants to achieve an adequate regulation of some aspects that are not currently within the scope of European legislation, such as the status of issuers and service providers related to cryptoassets.

According to the new regulation, cryptoassets are a digital representation (token) of a value or rights that can be transferred electronically by means of distributed ledger type information technology (or other similar technology)[1].

The term "stablecoin" is used for assets that are backed by other assets to limit their price fluctuation. In an attempt to protect crypto-asset investment income from high volatility, financial service providers and IT companies have been working on a new type of digital asset that uses stabilization mechanisms that can minimize price fluctuations. These stabilization mechanisms ensure that the value of digital assets is backed by: (i) holdings of money (in a currency or a basket of different currencies), (ii) securities and commodities such as gold, (iii) crypto- assets or even (iv) users' expectations of future purchasing power[2].

3. Central Bank Digital Currencies and Digital Euro

Finally, central bank digital currencies are digital currencies issued, regulated and overseen by the central banks of states. These coins are guaranteed by central banks, entailing a debt of the central bank, unlike ordinary digital currencies which assume a claim on the issuer, an institution under private law.

The convertibility of electronic currencies to fiat currencies provides security and value to the former. This conversion is done within commercial banks and depends on the availability of funds held by them.

[1] See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0593, accessed on 29.04.2023.

[2] BCE, *Stablecoins – no coins, but are they stable?*, available at https://www.ecb.europa.eu/paym/intro/publications/pdf/ecb.mipinfocus191128.ro.pdf?adf9157e3e022dceaadac7b24b54ed0b, accessed on 27.03.2023.

Since CBDCs are issued by the central bank itself, they are considered to offer greater security than regular cryptocurrencies because the central bank is always backed by the state whose interests it serves. However, we must not lose sight of the fact that, in the case of such digital currencies, even issued by the central bank, the liquidity risk is borne by the entire population, unlike in the case of private banks, where the liquidity risk is borne only by the bank's depositors .

CBCD are currently designed in two forms:

- for low-value payments available to the public (retail CBCD/rCBDC), as a digital version of banknotes; or

- for payments of relatively high value (wholesale CBCD), available only to a limited range of participants, selected from among financial institutions.

The move to CBDC would create numerous advantages, such as the ability for states to manage monetary policy more easily, with state authorities having the power to directly influence consumer and business behavior through the use of interest rates.

However, the introduction and use of CBDC can also generate serious disadvantages, such as the exclusive control that central banks would have over depositors' funds and how consumers dispose of them, the issue of the confidentiality of the operations performed, as well as the issue of cyber attacks (Panțoiu, 2022, http://economic.upit.ro/BS/Content_2022_1.html).

At the level of the European Union, the European Central Bank is preparing to launch its own electronic currency, Euro Digital. On the ECB's official website, the digital Euro is presented as "the equivalent of euro banknotes, but in digital format. It would be an electronic form of currency, issued by the Eurosystem (ECB and the national central banks of the euro area), and would be accessible to all citizens and businesses.

A digital euro currency would not replace cash, but rather complement it. A digital euro currency would give citizens an additional choice of payment methods, facilitating payments and contributing to accessibility and inclusion." This measure appears as a natural consequence of the decrease in the percentage of cash usage in the Euro zone in the last 3 years, to 59% from 72% [1].

Offline use would allow transactions even when the internet is not available, and would also offer a level of anonymity comparable to cash.

Digital Euro wants to be an innovative and competitive payment currency, in the context of the "new economy". However, the ECB's initiative is not without criticism or concerns.

The main risk signaled would be the increased probability that the savings of customers of the banking system will be oriented towards the new forms of currencies, which allow to avoid the commissions of a classic savings account. Choosing this savings option would strongly weaken the banks in the euro area. A

[1] D.Oancea, *XTB Analysis: Will the Digital Euro Rewrite the Future of the European Financial System?*, article available at https://www.zf.ro/burse-fonduri-mutuale/analiza-xtb-va-rescrie-euro-digital-viitorul-sistemului-financiar-21589368, accessed on 20.04.2023.

possible remedy envisaged by the ECB would be to establish the digital euro currency only as an additional payment option, and not as a form of financial investment. For the situation in which citizens would hold large sums in digital euro in the form of a risk-free investment or in which they would transfer funds from bank deposits to the digital euro currency, the possibility of establishing limits for definitive holdings or constituting it is considered remuneration on levels (Oancea, *XTB Analysis*).

Another concern of specialists in the field concerns ensuring a balance between the desire and need for privacy of users and the imperative to maintain a high degree of transparency for the monitoring of transactions by banks, in order to avoid the illicit use of funds.

While the authorities' desire consists in greater transparency, necessary to limit illicit uses and, subsidiarily, for a better management of monetary policy - the more informed, the more effective.

On the other hand, consumers want adequate protection of their right to privacy, there is a fear that any purchase transaction, of goods and services, would become visible to the banking authority and others(Oancea, *XTB Analysis)*.

Important for the present study is also the position of commercial banks, whose activity will certainly and perhaps be affected by the market introduction and use of central digital currencies, respectively the digital Euro currency.

It is estimated that the market presence of commercial banks will decrease in relation to that of central banks, which would massively gain in visibility.

The European Banking Federation, which represents 33 European national banking associations, has been involved in analyzing the feasibility of introducing and using the digital Euro, aiming to clarify aspects regarding the demand, design and interaction of an electronic form of currency issued by the Eurosystem with the banking and payments system.

The Federation highlighted the need to design a digital Euro that would benefit European end-users and the economy in general, while avoiding generating any destabilizing effect on the financial system. One of the main concerns of the Federation is how the digital Euro project will be reconciled with private payment and deposit solutions[1].

On the other hand, according to their representatives[2], the banks believe that many opportunities arise by creating a domain for the digital euro. The private sector could provide solutions to the challenges posed by the emergence of European digital currency by using digital currencies backed by central bank reserves (ie tokens backed by 100% fiat money held at the ECB).

[1]The statement of FBE from 14th july 2021 available at https://www.ebf.eu/innovation-cybersecurity/ebf-committed-to-actively-participating-in-digital-euro-investigation/ , accessed on 25.04.2023.

[2] FBE study *Vision on a Digital Euro Ecosystem*, available at https://www.ebf.eu/ebf-media-centre/updates/european-banking-industry-sets-out-a-vision-for-digital-euro/, accessed on 24.04.2023.

However, introducing a digital Euro is a long-term project. In a first stage, at least, a partnership between central and commercial banks is expected, a partnership that will support "hybrid CBCDs" (on two levels), which assume the preservation of the current role of banks as financial intermediaries.

It is expected that banks will continue to play an important role in the context of the emergence of the digital euro. In this sense, we mention the recent statement of Fabio Panetta, member of the ECB Executive Board[1].

"These intermediaries will open accounts and (electronic) wallets. They will conduct due diligence and anti-money laundering checks. And they will provide the necessary devices or technology to pay in brick-and-mortar stores, online or person-to-person…..

Intermediaries will also play a role in funding and reducing users' digital euro holdings. Users will be able to fund their digital euro accounts or wallets with cash, or they will be able to convert commercial bank money - i.e. bank deposits - into digital euro…

Finally, intermediaries will be responsible for transaction management tasks, in a similar manner to current payments. This means that they will be responsible, both for initiating digital euro transactions and for authenticating customers and validating transactions[2]."

Therefore, it does not appear that the fear that banks will disappear in the CBDC model envisioned for the euro zone countries is founded, as neither cash nor money from bank deposits will disappear.

4. Conclusions

Issuing and using the digital Euro is a measure that will have a strong impact not only on national economies but also on the lives of each of us. The digital Euro project involves a complete and transparent public-private partnership, such cooperation being necessary to achieve common objectives such as:

- the creation of a digital currency that brings value to citizens and the European economy, by using innovative techniques complementary to existing ones, without excluding payment services provided by the private sector;
- maintaining financial stability;
- maintaining the private financing system, thus protecting the essential role of European commercial banks in lending to citizens and economic operators,

[1] F. Panetta, *Building on our strengths: the role of the public and private sectors in the digital euro ecosystem*, disponibil la (https://www.ecb.europa.eu/press/key/date/2022/html/ecb.sp220929-91a3775a2a.en.html, accessed on 29.04.2023.

[2] C.Bichi, *Central Bank Digital Currency (CBDC): Between Dystopia and Reality*, available at https://www.opiniibnr.ro/index.php/politica-monetara/583-moneda-digitala-de-banca-centrala-cbdc-intre-distopie-si-realitate, accessed on 25.04.2023.

- design of a digital currency whose use does not threaten the confidentiality of transactions and the protection of aspects related to the private life of citizens, allowing intermediaries to process customer payment data based on their informed consent;
- maintaining a broad, secure and flexible framework that allows the private banking sector to identify and add solutions and services appropriate to market requirements.

References

Adams, M., & Rodeck, D. *Digital Currency: The Future Of Your Money*, available at https://www.forbes.com/advisor/investing/cryptocurrency/digital-currency/.

Bichi, C. *Central Bank Digital Currency (CBDC): Between Dystopia and Reality*, available at https://www.opiniibnr.ro/index.php/politica-monetara/583-moneda-digitala-de-banca-centrala-cbdc-intre-distopie-si-realitate.

Oancea, D. *XTB Analysis: Will the Digital Euro Rewrite the Future of the European Financial System?*, article available at https://www.zf.ro/burse-fonduri-mutuale/analiza-xtb-3. va-rescrie-euro-digital-viitorul-sistemului-financiar-21589368.

Panetta, F. *Building on our strengths: the role of the public and private sectors in the digital euro ecosystem*, available at https://www.ecb.europa.eu/press/key/date/2022/html/ecb.sp220929-91a3775a2a.en.html.

Panțoiu, A. (2022). Banking aspects in the current economic context. In *Scientific Bulletin – Economic Sciences*, Volume 14/ Issue 1.

Văleanu, S. *The difference between cryptocurrencies, digital currencies and virtual currencies*, article available at https://www.mediafax.ro/economic/diferenta-dintre-criptomonede-monede-digitale-si-monede-virtuale-20483153.

BCE study *Stablecoins – no coins, but are they stable?* Available at https://www.ecb.europa.eu/paym/intro/publications/pdf/ecb.mipinfocus191128.ro.pdf?adf9157e3e022dceaadac7b24b54ed0b.

FBE study *Vision on a Digital Euro Ecosystem*, available at https://www.ebf.eu/ebf-media-centre/updates/european-banking-industry-sets-out-a-vision-for-digital-euro/.

FBE statement from 14th july 2021 available at https://www.ebf.eu/innovation-cybersecurity/ebf-committed-to-actively-participating-in-digital-euro-investigation/.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

ASSESSMENTS ON ANTI-COMPETITIVE BEHAVIORS THROUGH "NO-POACH" PRACTICES. CONSEQUENCES

Manuela NIȚĂ[1]

Abstract

The concern of the national and European authorities to identify and sanction any action of a party that by illicit means affects competition, has led to the outline of relatively new operations, with a worrying frequency that concern illicit agreements, with a direct effect on the labor market. Thus, in the present study, we turn our attention to "no-poach" practices, analyzing the main ways of realizing these illicit deals and the effects they produce on the relevant market, both from the perspective of the participants in the deal (employers), the employees, as well as the economic environment. We will also consider for a comparative analysis the relevant cases from other states and the solutions adopted in this regard by the competent authorities.

Key words: *illicit agreement; no-poach; labor market; labor recruitment.*

1. Introduction

The analysis of anti-competitive practices of the cartel type, as illegal agreement, concerns both practitioners in the field (authorities and market participants alike) and legal theorists, fine observers of the phenomenon in its evolution, with whom I focused my attention to analyze a practice recently outlined by the authorities under the name of "no-poach". Concretely, this practice represents an illicit understanding agreement of employers, who have an independent market existence, in the sense of competition law in the form of enterprises[2], an agreement regarding the labor market. The occurrence of such cases, which the authorities of several states have identified and sanctioned or are

[1] **Lecturer PhD, Faculty of Law and Administrative Sciences; Law Department, Valahia University of Târgoviște (Romania), e-mail: manuela_nita74@yahoo.com; ORCID: https://orcid.org/0000-0002-8838-5990.**

[2] See in this regard the provisions of art. 2 para. 2 of Law 21/1996, the competition law, as well as the supporting documents: the Guide on compliance with competition rules and the Guide on compliance with competition rules by business associations, developed by the Competition Council: ghid_privind_conformarea_cu_regulile_de_concurenta_decembrie.pdf (consiliulconcurentei.ro); Ghid-FINAL-ian-2021-SITE.pdf (consiliulconcurentei.ro)

under investigation[1], have attracted attention by their gravity and by the relevant markets in which they take place.

During the study we will start from the general regulatory framework of anti-competitive practices, then narrowing down the scope of the illegality to these no-poach practices, highlighting the methods of realization, as they are found in the current casuistry, with the expression of their own points of view regarding the typology of such practices.

We also propose to analyze the effects that the existence of such agreements can produce on the market, the labor market being a sensitive market, in which one of the main subjects, the employee, is often subject to external pressures, which lead to discrimination, limitation or deprivation of rights arising from an employment relationship.

2. The legal framework regarding anti-competitive agreements

The Treaty on the Functioning of the European Union establishes by art. 101 para. 1 that "All agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market shall be incompatible with the internal market,... " aiming at the creation at the level of the states that are part of the European economic space, of a competitive market based on the free movement of goods, an undistorted, effective competition aimed at the formation and operation under normal conditions of single markets (see in this sense Almașan, 2018, pp. 208-209; Lazăr, 2016, pp. 156-159).

In our law, we can derive the definition of the cartel from the contents of art. 5 para. 1 of the competition law as any agreement between businesses, any decisions of business associations and any concerted practices that have as their object or effect the prevention, restriction or distortion of competition on the Romanian market or on a part of it (on the evolution of the legal framework dealing with anti-competitive practices, see Niță, & Gheorghiu, 2022, pp.134-134).

We note that both cited texts uniformly regulate this illicit practice and, more than that, at the same time, identify some of the effects that we frequently find on the market, without establishing a limiting enumeration, using the expression "especially those which"; "establish, directly or indirectly, purchase or sale prices or any other trading conditions; limit or control production, marketing, technical development or investments; divide markets or sources of supply; applies, in relations with commercial partners, unequal conditions for equivalent services, thus creating a competitive disadvantage for them; conditions the

[1] How is the investigation launched by the Competition Council on the skilled/specialized labor market in the field of motor vehicle production and/or other related activities in Romania: investigatie-piata-muncii-ian-2022.pdf (consiliulconcurentei.ro)

conclusion of the contracts on the acceptance by the partners of some additional services which, by their nature or in accordance with commercial usages, are not related to the object of these contracts"[1].

Regarding no-poach practices, even if they are not expressly mentioned in the text, their form of manifestation undoubtedly represents what the legislator naturally declares as incompatible with the internal market and places them in the category of anti-competitive practices.

3. No-poach practices

3.1. Concept

The anti-competitive behaviors called "no-poach" represent a coordination of the market manifestations of some competing enterprises with the aim of dividing their market for skilled/specialized labor in a certain field.

Basically, the companies agree to make their employees unavailable for a long period of time according to the agreement between the companies, who will not contact, recruit and/or hire people who work and/or have worked at any of the companies participating in the agreement (who have agreed to such an illicit initiative). In other words, competition on the labor market is excluded, the employees being in a state of total dependence on a single employer. The latter is no longer concerned with improving its own human resources policy, i.e. maintaining and attracting qualified labor, for which it must allocate substantial financial resources.

Normally the market works through its own mechanisms in which each enterprise decides individually (see in this sense Didea, 2014, pp.106-108) how it will act on the market from a commercial and competitive point of view and what will be its own strategy for attracting labor force.

The qualified labor market is a sought-after market and the specialized labor market is superior to it, the experts, the specialists being in a limited number, offering their services at a high cost. This is also the reason why there are entities concerned with lowering costs, but illegally. They should identify other legal cost-effectiveness measures, including by offering attractive packages on the labor market to attract specialists that lead to increased quality and innovation, thus making a profit. Using no-poach practices lowers costs, illicitly increasing profits.

3.2. The emergence of the no-poach phenomenon

Competent authorities in the field of competition have been constantly concerned with stopping or limiting to a very large extent cartels and discouraging any initiative of illicit understanding. As we can see from the content of the legal

[1] The final part of art. 101 paragraph 1 of the TFEU, respectively art. 5 para. 1 of Law 21/1996, Competition Law

text that I referred to above, the main threat is those behaviors that can affect trade, harming both competition and the consumer, especially through agreements aimed at price fixing and territorial division.

However, as the European Commissioner Margrethe Vestager[1] also pointed out, these agreements are considered "traditional", that is, they are the ones frequently identified on the market over time, but the evolution of trade and the success of the authorities have, unfortunately, determined some entrepreneurs to find new means that contravene the rules of fair competition. Thus, we find on the market agreements regarding technical agreement, which limit development, buyer cartels[2] and last but not least the labor market through no-poach practices.

At the same time, the US Department of Justice, through the Antitrust Division[3], has signaled the existence since 2009 of such practices in violation of Section 1 of the Sherman Act, which have been perpetuated over time[4], which led to the development of a Guide addressed professionals in human resources[5], in order to stop this harmful phenomenon.

There are similar signals within the European space, with national competition authorities in Lithuania, Hungary, Poland, Portugal, Italy, Spain and the Netherlands launching investigations into the human resources sector and sanctioning no-poach and wage-fixing agreements .

---

[1] European Commission Initiates a Series of Antitrust Inspections and Signals Interest in No-Poach Agreements | Wilson Sonsini (wsgr.com) accesed on the 8th of March 2023

[2] Regarding this type of agreement, we also find a special situation, highlighted by the vice-president of the European Commission Maroš Šefčovič regarding a request by 27 member states of the bloc and three neighboring countries to jointly purchase 24 billion cubic meters of gas in the next three years, according to AGERPRES (UE își va testa luna viitoare puterea colectivă de achiziţie pe piaţa gazelor | AGERPRES • Actualizează lumea. accesed on the 10th of March 2023). Also, the quoted source shows that there is interest in joint purchases of gas from industrial consumers in sectors such as steel, aluminum, ceramics, glass and car production. From our point of view we understand the economic rationale of this request (to buy gas from global suppliers, less Russia), but from a competitive perspective it is a form of cartel that raises the issue of violating the provisions of the TFEU.

[3] No-Poach Approach (justice.gov)

[4] See in this sense the case United States v. Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation (aprilie 2018, Final Judgment: U.S. v. Knorr-Bremese AG, and Westinghouse Air Brake Technologies Declarația de interese a Corporation (justice.gov)), Statement of interest of the United States of America în cazul Case 2:18-mc-00798-JFC Document 158 Filed 02/08/19 Statement of Interest of the United States: In re Railway Industry Employee No-Poach Antitrust Litigation (justice.gov); Statement of interest of the United States of America în cazul Case 1:15-cv-00462-CCE-JLW Document 325 Filed 03/07/19 Statement of Interest of the United States of America : Danielle Seaman v. Duke University, et al. (justice.gov).We also note the Department of Justice's intervention against a network of health centers for labor market settlements, where the alleged conduct involved an agreement not to compete for the services of the CEOs of the companies under investigation – in this sense
Estados Unidos: DOJ presenta primer caso criminal de 'no-poach agreement' | CeCo (centrocompetencia.com)

[5] Antitrust Guidance for Human Resources Professionals (justice.gov)

Also, the OECD in the document "Power and Buyers' Cartels-OECD Competition Policy Roundtable Background Note"[1] shows that at the global level there is this concern to combat such practices, not only in the European space, indicating public statements made by Japan, Hong Kong, China and Portugal or even concrete measures in Brazil and Turkey. The scope of the agreements referred to covers a wide range of industries, from digital markets, production films, medical and healthcare markets, to information technology services, railways and fast food franchises.

At the same time, the Romanian authority, the Competition Council, as early as January 2022, suspects possible anti-competitive behavior of the no-poach type between competing companies with the aim of dividing the market for qualified/specialized labor[2].

3.3. Forms of manifestation in the European space

In the following section we will show the diversity of the cases under investigation or that have been the subject of investigations in various European states in order to understand the seriousness of the operations, but also the particularity of the subject of possible agreements aimed at the specialized workforce (in various forms).

In 2021, the Lithuanian[3] competition authority sanctioned the Lithuanian Basketball League, which also accepted 10 basketball clubs that agreed not to pay player salaries and other financial remuneration for the remainder of the 2019–2020 season after the end of basketball championship due to the pandemic.

The authority's suspicion of a possible agreement arose in April 2020, when information regarding the payment of salary rights appeared in the public space.

Basically, with the onset of the coronavirus pandemic, the clubs applied the force majeure clause and agreed not to pay the salaries and remuneration of the basketball players for the rest of the championship, starting in mid-March 2020. Against any attempt to violate this agreement, the other clubs were expressing their displeasure. On the other hand, the authority also intervened against them by sanctioning them because, if they did not clearly express their position, it means that they accepted the agreement and did not apply it, but they had to express themselves clearly, unequivocally against it.

Analyzing this case, we must separate what the no-poach practice consists of. In normal, non-pandemic conditions, competitors (including clubs) compete in the market to offer employees (in this case, players) more advantageous contracts,

[1] OECD (2022), Purchasing Power and Buyers' Cartels, OECD Competition Policy Roundtable Background Note, www.oecd.org/daf/competition/purchasing-power-and-buyers-cartels-2022.pdf.
[2] investigatie-piata-muncii-ian-2022.pdf (consiliulconcurentei.ro)
[3] BY AGREEING NOT TO PAY PLAYERS' SALARIES LITHUANIAN BASKETBALL LEAGUE AND ITS CLUBS INFRINGED COMPETITION LAW | Competition Council of the Republic of Lithuania (kt.gov.lt)

because it is in their interest to attract performance, and this is how the mechanism of normal, healthy competition works. In the absence of the agreement, if following an individual decision of a club, the basketball players are not paid, then they can reorient themselves to another club that has an attractive offer. In the given situation, the clubs do not admit new negotiations/recruits because they respect the agreement, although in other conditions they would have done it, even if it was the period of the pandemic and there were no competitions, but they respected the contractual conditions and paid the players.

We find a similar situation in Portugal[1], but it concerns an agreement between the Portuguese Professional Football League and 31 sports companies. Thus, in April 2021, the competition authority (Autoridade da Concorrência – AdC) issued the first decision to sanction an anti-competitive practice on the labor market, which had as its object the agreement between football clubs in League I and II not to hire players who unilaterally terminated their employment contract citing problems caused by the Covid-19 pandemic. According to their agreement, they were only allowed to sign for a club outside Portugal or in the lower league.

Regardless of the sports field we are referring to (for example basketball or football), such agreements reduce the competitive environment between clubs, with direct consequences on the quality of the sporting act, some athletes getting out of shape or their absence lowers the quality of the other players' performance. Also, the consumer is affected, being deprived of competitive matches that in normal conditions of competition had a different standard of quality. Also, if a player is forced by the existence of anti-competitive practices to compete for clubs in another state, he may refuse to play for the national representative team, which is a great loss for the national team.

3.4. Involvement of the Competition Council in detecting no-poach practices

For the first time in Romania, at the beginning of 2022, the Competition Council announced through a press release that it has indications, as a result of the information received on the Competition Alert Platform, regarding a possible coordination of the behavior of 7 competing companies with the aim of -share the skilled/specialized labor market in the field of motor vehicle production and/or other related activities (e.g. motor vehicle components and systems, testing, design) and to impose a minimum level of wage rights.

Until this moment, the investigation is not completed, operating the presumption of innocence for the parties involved, not having issued a decision to establish or not, the violation of the legal provisions.

[1] AdC accuses for the first time entities of anti-competitive agreement in the labour market | Competition Authority (concorrencia.pt)

4. Assessments regarding the characteristics of no-poach practices

From the experience of the states (through the competent authorities) that have faced such practices, generically titled "no-poach", we can distinguish the following characteristics, with the mention that the evolution of the phenomenon can generate new characteristics or the identified ones can be much more complex:

- no-poach practices represent anti-competitive behavior of enterprises;
- they can appear on the market in various ways, as official, unofficial, public, secret, written or unwritten agreements or arrangements between companies;
- these practices are subject to the rules of competition, there are the same obligations regarding the conduct of a normal, fair and lawful competition, as in the case of products and services;
- most of the time the agreement are of the "horizontal" type, but their manifestation on the "vertical" side is not excluded;
- the subjects targeted by the no-poach practices are specialized employees. We support this because the costs are higher with these employees. In order to attract and maintain them, employers make additional financial efforts, compared to the expenses of ordinary employees, who can be easily pulled from the labor market for the company's activities. The particularity of these employees is given precisely by their level of specific knowledge, which not every employee possesses, or by their sports, artistic skills, experience in a field, national/international recognition. These qualities increase their value in the labor market and employers are willing to make substantial efforts to benefit from their services or to improve their performance by sending them to training/specialization courses. On the other hand, unjustifiably, violating the principle of good faith in contractual and competitive relations, some employers pursue obscure interests, being willing to increase their profit by any means, accepting deals that restrict or eliminate the mobility of this employee on the labor market. In a natural, normal competition, these employees are willing to negotiate, raising the usual level of offers, there being a real competition to maintain and attract them.
- we find a current of opinion[1] that identifies two categories of no-poach agreements: pure and simple agreements, which have an independent existence, beyond any other contractual relationship that may take place between the parties, and auxiliary agreements to another commercial operation licit, between which there is a close connection. It is appreciated that in the first case the agreement is illegal and there is no need to prove the anti-competitive effects, while in the

[1] The Competition Center (CeCo) of the Adolfo Ibáñez University is a space for information and dialogue on competition issues, with particular reference to the Latin American area and beyond: No-poach agreements | CeCo (centrocompetencia.com)

second case this must be proven, looking at whether it is a necessary operation for the realization of the main contract.

- from the perspective of the effects they produce on the market, we distinguish between effects between competitors, effects towards employees and effects towards consumers.

The direct effect of the no-poach agreement between competitors is to divide the employees according to the agreement, and also the companies coordinate their labor acquisition in order to increase purchasing power and thus reduce labor costs.

Regarding the effect produced on the labor market (in relation to employees), artificial barriers are created on the market, employees being almost unable to find new jobs, specific to their qualifications, and at the same time, they have as a consequence, maintaining the level salaries for that type of specialization at a much lower level than normal.

For consumers, the effect is direct. Employees are no longer motivated to give the optimal performance specific to their work and this is reflected in the quality of products or services. These employees are determined to maintain a high professional standard also due to the complex salary packages offered and accepted. In their absence, there is a lack of motivation for maximum involvement in solving the job duties.

- we distinguish between no-poach practices and wage-fixing agreements, both of which produce negative effects on the labor market, being prohibited, but the latter does not directly affect the mobility of the labor force and does not particularly concern specialized employees;

- as regards the proof of these practices, it is very difficult to achieve because the exchange of information between enterprises would not normally constitute a cartel, therefore an illegal practice, but if following this exchange the enterprises, knowing better the structure of their specialized employees and their coordinates the actions based on the data obtained affecting the market, this is equivalent to a voluntary renunciation of the autonomy of action on the market.

5. No-poach versus non-compete practices

As we have shown above, no-poach practices are agreements between companies that aim at an illegal human resource policy, more specifically they agree not to hire current or former employees of a competitor, party to the agreement, restricting free access to the market work.

From an employment law perspective, a clause used in employment relationships is the non-compete clause. This clause is a lawful and useful clause for employment relationships that are born on the basis of the free negotiation of the employment contract, whereby the parties - the employee and the employer, agree to limit the freedom of the employee to carry out certain activities during

the employment relationship with the employer or at termination of the employment contract.

To understand the non-competition clause, we must start from the provisions of art. 39 para. (2) lit. d) The Labor Code, which stipulates one of the employee's obligations towards the employer, that of loyalty, as a legal obligation. Fidelity has 2 components: non-compete and confidentiality.

In principle, non-competition implies that the employee does not compete with his employer during the execution of the individual employment contract, but the Labor Code by art. 21 and 22 allows this clause to have effects even after the termination of the employment contract, for a maximum period of 2 years from the date of termination of the individual employment contract, under certain conditions and on the basis of an allowance.

In conclusion, no-poach practices are concluded between employing companies, are illegal and restrict free access to the labor market, while the non-competition clause is concluded between employers and employees and is regulated, having a licit character.

6. Exercising the action for damages

In our law, with a delay compared to other European states, Emergency Ordinance no. 170/2020[1], which regulates the right of any person who has suffered damage caused by a violation of competition law by an enterprise or an association of enterprises, to request from the competent courts[2] full compensation for the damage suffered (art. .3 paragraph 1).

Full compensation restores the persons who have suffered a loss to the situation in which they would have been if the competition legislation had not been violated (to be seen in this sense Lazăr, pp. 232-233). The full compensation includes the actual loss, the profit of which the injured person is deprived, as well as the payment of the related interest (art. 3 paragraph 2).

With regard to the disclosure of evidence (Toma-Bianov, 2015, pp. 34 et seq.), the ordinance regulates the method of disclosure differently, depending on the holders of the evidence. If they are held by the competition authority, the court may order the disclosure of certain categories (regarding the concept of "evidence", see theoretical explanations in Boghirnea, 2013, p. 168) of evidence only after the competition authority, by adopting a decision or another administrative act, has completed its procedures, even if the parties or third parties are in their possession before the procedures are completed. These evidences concern either information that was prepared by a natural or legal person

[1] Published in M.Of. 952 from 16.10.2020

[2] The Bucharest Court has the competence to resolve requests for compensation for damage caused by businesses as a result of a violation of competition law. The decision of the tribunal can be appealed to the Bucharest Court of Appeal, against its decision an appeal can be declared to the High Court of Cassation and Justice.

specifically within the proceedings carried out by the Competition Council, or information that the Competition Council drafted and transmitted to the parties during its proceedings or the closing proposals of a transaction that has been withdrawn (art. 6, point 8).

The Ordinance enshrines in principle, in the case of action for compensation as a result of the violation of competition law, the joint liability of the parties. More precisely, the companies that have shown common behavior are jointly and severally liable for the damage caused by the violation of the competition law, that is, each of the companies has the obligation to fully compensate the damage, and the injured party has the right to request full compensation from any of these until it is fully compensated (art. 11 paragraph 1).

7. Conclusions

Although the case history of the Romanian authority in this field of no-poach practices is not a rich one, being only at the beginning, without having a completed investigation, we could say that we are a happy case in which competition is not affected by such anti-competitive practices in the field human resources. As mentioned by the Competition Council, the only investigation instrumented by the authority so far is reported on the Competition Whistleblower Platform, which leads us to the idea that there may be other unreported practices, especially since the examples shown during the study are from different fields, apparently non-economic, but they are carried out by enterprises within the meaning of competition law.

The seriousness of anti-competitive practices of the no-poach type, led European Commissioner Margrethe Vestager to push the authorities to increase vigilance in this area and, on the other hand, to warn the companies operating on the market.

At this moment, we believe that it would be appropriate to complete the legislative framework, more precisely article 5 paragraph 1, with a new letter (as an effect), in which to insert "limits or controls the mobility of the labor force".

We note the concern of the Competition Council in promoting the principle of proactivity and we consider it useful to include in the content of the guidelines developed by the authority for combating anti-competitive practices and a separate chapter on this subject. At this moment, the existence of a person with attributions/competencies on competition (including training) at the company level is optional, but for the personnel who make up the human resources department, it can be legally imposed to complete a compulsory training course in the field of competition (to promote the rules of legal competition), which also aims to combat no-poach practices.

Also, with the support of the Territorial Chambers of Commerce and Industry, businesses can be informed and encouraged to be proactive, as it is known that preventing the commission of illegal acts is very important so that the

phenomenon does not spread, especially since the European signals are in the sense increasing no-poach practices.

At the same time, a good cooperation between the Competition Council and the Territorial Labor Inspectorates can lead to the identification of possible violations of the law, and the current case history (in a much larger manner compared to the present study) can be highlighted to ITM officials, during the trainings themes in which they participate.

References

Almășan, Adriana. (2018). *Dreptul concurenței*. Bucharest: C.H. Beck.

Boghirnea, Iulia. (2013). *Teoria generală a dreptului, ed. a III-a revizuită și actualizată*. Craiova : Sitech.

Didea, Ionel. (2014). *Drept european al concurenței*. Bucharest: Universul Juridic.

Lazăr, Ioan. (2016). *Dreptul Uniunii Europene în domeniul concurenței*. Bucharest: Universul Juridic.

Niță, M., & Gheorghiu Gh. (2022). *Dreptul concurenței, ediția a III-a modificată și completată*. Bucharest: Universul Juridic.

Toma-Bianov, Anamaria. (2015). *Aplicarea privată a regulilor concurenței în Uniunea Europeană. Acțiunile în despăgubire promovate în fața instanțelor naționale și tribunalelor arbitrale*. Bucharest: University.

ghid_privind_conformarea_cu_regulile_de_concurenta_decembrie.pdf (consiliulconcurentei.ro).

Ghid-FINAL-ian-2021-SITE.pdf (consiliulconcurentei.ro).

UE îşi va testa luna viitoare puterea colectivă de achiziţie pe piaţa gazelor | AGERPRES • Actualizează lumea.

European Commission Initiates a Series of Antitrust Inspections and Signals Interest in No-Poach Agreements | Wilson Sonsini (wsgr.com).

Antitrust Guidance for Human Resources Professionals (justice.gov).

No-Poach Approach (justice.gov).

investigatie-piata-muncii-ian-2022.pdf (consiliulconcurentei.ro) .

BY AGREEING NOT TO PAY PLAYERS' SALARIES LITHUANIAN BASKETBALL LEAGUE AND ITS CLUBS INFRINGED COMPETITION LAW | Competition Council of the Republic of Lithuania (kt.gov.lt).

AdC accuses for the first time entities of anti-competitive agreement in the labour market | Competition Authority (concorrencia.pt).

www.oecd.org/daf/competition/purchasing-power-and-buyers-cartels-2022.pdf..

Estados Unidos: DOJ presenta primer caso criminal de 'no-poach agreement' | CeCo (centrocompetencia.com).

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

HUMAN RIGHTS – PURPOSE OR END FOR LAW NO. 165/2013?

Andrei SOARE[1]

Abstract

The relationship between Law no. 165/2013 and certain jurisprudential benchmarks of the European Court of Human Rights, in cases decided against Romania, becomes important to study especially through the prism of legal consequences on the current situation, consequences that indirect "interaction" can generate between the two.

Key words: *Law no. 165/2013; ECHR jurisprudence; effects; compensations; value; evaluation.*

1. The moment 2010

The year 2010 found Romania in full maturity as regards the legislation of reparative measures. Grafted on the moral imperative of repairing the damage caused by the communist state, the legislation of reparative measures had already, for 20 years, displayed its main pillars. The most important normative acts had been adopted which, regarding the abuses committed by the communist state on private property, offered the reparative solution from the Romanian society established on a democratic basis. The main reparative laws in the matter were fully producing their legal effects and created a vast jurisprudence: Law no. 18/1991, Law no. 169/1997, Law no. 1/2000, Law no. 112/1995, Law no. 10/2001 and Law no. 247/2005. All categories of immovable property in respect of which the communist state had unleashed the rapture on private property in the period 1945-1989 were now subject to the regulation of restitution in kind or equivalent.

The same year 2010, which, at the enunciative level, housed, as we have shown, a complex legislation on reparative measures and which had begun to sediment jurisprudential practices, found Romania, as a passive subject, at a peak moment of complaints before the European Court of Human Rights on the same issue.

From the point of view of the European Court of Human Rights, the situation in Romania was seen to be worrisome regarding the issue of property restitution. Worrying were not only the more than 1000 cases (Voicu, 2017)

[1] **Lecturer PhD, Faculty of Law and Administrative Sciences, University of Pitesti, Pitesti (Romania), e-mail: andrei.soare@yahoo.com**.

resolved against Romania in this regard in these years, but more worrying was the lack of an adequate reaction at the systemic level (Ramașcanu, 2015, pp. 145-170) of the Romanian state despite convictions in cases such as: Viașu *v* Romania (2008), Feinblat *v* Romania (2009), Katz *v* Romania (2009), cases in which the Court found major deficiencies in the domestic solution of the complex process of restitution of buildings wrongfully taken over by the communist state between March 6, 1945 and December 22, 1989.

2. The consequences

The previously presented context led the European Court of Human Rights to appeal to the provisions of Art. 46 of the Convention, deciding to apply the pilot judgment procedure.

The mechanism of the pilot judgment triggers the levers through which the state, in respect of which a systematic violation of a right guaranteed by the Convention is found, is required to find a solution through general measures to the structural problem that the Court has found. The effects of the pilot decision benefit not only the involved parties but also all the people whose legal situation is the same as that of the plaintiffs, both the people who have already addressed the Court and the people who have not yet resorted to this last remedy for various reasons.

The pilot decision we are referring to is pronounced in the case of Maria Atanasiu et al. *v* Romania[1]. The Court considered that for a better administration of justice it was necessary to connect the request of the applicants Maria Atanasiu and Ileana Iuliana Poenaru with the request of the applicant Ileana Florica Solon.

Through this ruling, the Court found both the violation of the rights regulated by the provisions of Art. 6 of the Convention as well as the provisions of Art. 1 of the Additional Protocol no. 1 to the Convention. The most important element is that in the application of the pilot decision procedure, the Court found that it was adopted after violations of the same regulations had been found in several previous decisions, which indicates serious deficiencies in the Romanian system of compensation or restitution[2]. These deficiencies constitute a recurring problem whose persistence in the future could affect not only the internal legal

[1] Text published in the Official Gazette, Part I no. 778/22 November 2010. In force since November 22, 2010.

[2] Para. 215 of the Decision Maria Atanasiu et. al. *v* Romania. The Court notes that, unlike the Broniowski and Hutten-Czapska cases, mentioned above, in which the deficiencies in the domestic legal order were identified for the first time, the Court pronounces itself in the present cases after several judgments in which it has already found the violation of Art. 6 § 1 of the Convention and Art. 1 of Protocol no. 1 due to the deficiencies of the Romanian compensation or restitution system [see, in the same sense, Bourdov *v* Russia (no. 2), no. 33.509/04, §§ 129, ECHR 2009-..., Yuriy Nikolayevich Ivanov v. Ukraine, no. 40.450/04, § 83, CEDO 2009-... (excerpts)

order but also the future efficiency of the control device implemented by the Convention[1].

As a result of these findings, the Court required the Romanian state to guarantee, through administrative and legal measures, the respect of the property rights of all persons in a situation similar to that of the plaintiffs. In choosing these future measures, the state must adopt clear and simplified procedural rules that would make the compensation system more predictable and accessible in its application. At the same time, the Court appreciates that the defendant state must be given a wide margin of appreciation to choose the measures intended to ensure the respect of the violated rights and that capping the compensations or stagger them in the long term could represent viable measures in ensuring the balance between the interests of the former owners and the general interest of the community[2].

3. The reaction

The response of the Romanian State to the requirements imposed by the judgment of Maria Atanasiu et al. *v* Romania was, finally, after repeated requests to extend the term granted for this purpose (the initial term granted by the Court being 180 days), the adoption of Law no. 165/2013.

Law no. 165/2013[3], on the measures to complete the restitution process, in kind or by equivalent, of buildings taken over abusively during the communist regime in Romania – is the normative act adopted with the purpose of definitively solving all the problems arisen in the enforcement of remedial measures legislation. At the same time, the legislator aimed for the regulation to protect the fundamental values enshrined in the European Convention on Human Rights, ruling in the sense of what was indicated and in the same manner recommended by the European Court in the decision of Maria Atanasiu et al. Therefore, it was desired to adopt a single procedure, with clear and simplified rules and which would make the compensation regime accessible and predictable. Also realizing

[1] Para 217 of the Decision Maria Atanasiu *v* Romania. After the adoption of these decisions, the number of findings of violation of the Convention from this point of view increased continuously and several hundred other similar requests are pending before the Court. They could give rise to new decisions in the future that find a violation of the Convention. This is not only an aggravating factor regarding the state's responsibility towards the Convention due to a past or current situation, but also a threat to the future effectiveness of the control device implemented by the Convention [see, mutatis mutandis, Bourdov (no. 2), mentioned above, §§ 129-130, and Yuriy Nikolayevich Ivanov, mentioned above, § 86].

[2] Para. 232, 235 of the Decision Maria Atanasiu et. al. *v* Romania. **232.** The defendant state must, therefore, guarantee through appropriate legal and administrative measures the respect of the property rights of all persons in a situation similar to that of the plaintiffs, taking into account the principles enunciated in the Court's jurisprudence regarding the application of Art. 1 of Protocol no. 1 (Para. 162-177 above).

[3] Published in the Official Gazette of Romania, no. 278/17 May 2013.

that, in the opinion of the Court, capping the compensations or phasing them would represent viable measures ensuring the balance between the private interest of the dispossessed former owners and the general interest of society, the Romanian legislator adopted a criterion for establishing compensatory measures for buildings that cannot be returned in kind by reference to an accessible standard (but not without controversy), the values of the notary grids.

The reactions in terms of domestic law caused by the appearance of Law no. 165/2013 are not the subject of this study, nor the analysis of the evolution of its subsequent content as determined by successive amendments and interpreted by decisions of the High Court pronounced on appeal in the interest of the law or through the procedure of prior decisions. The object of the analysis of this study is the reporting of Law no. 165/2013 to the European Convention on Human Rights as reflected in the case law of the European Court.

As we have shown, Law no. 165/2013 arose precisely from the need to ensure in the internal normative plan the guarantee, in the reparative legislation procedure, of the rights regulated by the European Convention and whose repeated violation has been the subject of many decisions of the Court, which culminated in the judgment handed down in the case of Maria Atanasiu et al.

4. The first test

In 2014, Law no. 165/2013 was subjected to a demanding conventionality test. In the case of Preda et al. *v* Romania[1], the European Court of Human Rights had to analyze the effectiveness of the provisions of Law no. 165/2013 by referring to the protection offered to the right to property regulated by the provisions of Art. 1 of the Additional Protocol no. 1 to the Convention. As a result of the adoption of the pilot decision in the case of Maria Atanasiu et al. *v* Romania, the Court had suspended (Ramașcanu, 2015) the resolution of the plaintiffs' claims, resuming it after the adoption by the Romanian state of the Law no. 165/2013. Thus, by connecting these requests, the case Preda et al. *v* Romania was established.

However, Law no. 165/2013 passed this first test. The Court found that the new law does not abrogate but complements and, in some places, modifies the existing regulatory landscape in the matter of restitution. The law establishes the obligation to analyze all restitution requests left unresolved, and in the case of the impossibility of restitution in kind, the law confirms the obligation to analyze the request for compensation. The law introduces a new procedure for granting compensations, which are expressed in points. The Court also found that the new law establishes precise deadlines for each procedural stage and provides for the possibility of a judicial control that allows the courts not only to verify the legality of administrative decisions but also to subrogate the administrative authorities by

[1] Decision Preda et. al. *v* Romania, ruled on April 29, 2014.

pronouncing, if necessary, a decision to grant a title to an asset or a decision to grant compensatory measures. All this under the conditions in which access to judicial proceedings is exempted from the payment of the stamp duty[1].

Worthy of highlighting is the fact that in Para. 127 of the decision, the Court also reminds that "in the case of deprivation of property within the meaning of Art. 1 of Protocol no. 1 to the Convention, imperatives of general interest may militate for a reimbursement lower than the total market value of the asset, provided that the amount paid is reasonable in relation to the value of the asset [James and others *v* The United Kingdom, 21 February 1986, Para. 54, Series A no. 98, Lithgow and others *v* The United Kingdom, 8 July 1986, § 120, Series A no. 102, and Scordino *v* Italy (no. 1) (GC), no. 36813/97, point 95 et seq., ECHR 2006-V]".

In a concluding note, the Court states in Para. 129 of the decision[2] that the "Law no. 165/2013 provides, in principle, an accessible and effective framework for the settlement of complaints related to infringements of the right to respect for goods, in the sense of Art. 1 of Protocol no. 1, as a result of the application of restitution laws".

5. The second test

Although, as we have shown, in the case of Preda et al. *v* Romania, the European Court found in principle the effectiveness of the national normative act represented by the Law no. 165/2013 in completing, with respect for the rights protected by the Convention, the procedures for awarding compensation, this left open the possibility of future reanalysis of the situation, given the impossibility of establishing a relevant national jurisprudence between the entry into force of the Law no. 165/2013 (20.05.2013) and the moment of the decision in the case of Preda et al. (29.04.2014)[3].

[1] See Para. 119-123 of the Decision Preda et. al. *v* Romania

[2] Para. 129 of the decision Preda et. al. *v* Romania. Taking into account the previous considerations and taking into account the margin of appreciation of the Romanian state and the guarantees that are offered, mentioned previously, namely clear and predictable rules of procedure, accompanied by mandatory deadlines and an effective jurisdictional control, the Court considers that Law no. 165/2013 provides, in principle, an accessible and effective framework for the settlement of complaints regarding infringements on the right to respect for goods, in the sense of Art. 1 of Protocol no. 1, as a result of the application of restitution laws in particular in the following situations: the coexistence of competing property titles for the same land, the cancellation of a title in the absence of contesting the right to restitution or compensation, the pronouncement of a final decision confirming the right to a compensation the value of which has not been determined, non-payment of the amount awarded as compensation by the final judgment and the prolonged absence of a decision in response to a request for restitution.

[3] Para. 132 of the decision Preda et. al. *v* Romania. The Court is aware that, due to the recent adoption of Law no. 165/2013, no judicial and administrative practice has been developed in its application. However, he considers that there is no reason to conclude, at this stage, that this solution is ineffective in the situations described previously (above, point 129). The doubts

The second test of the Law no. 165/2013 took place almost 10 years after its adoption, i.e., at a time long enough to consolidate a relevant jurisprudence in the application of the law, capable of being analyzed through the prism respecting the values guaranteed by the European Convention on Human Rights.

This analysis was carried out by the European Court of Human Rights in the case of Văleanu et al. *v* Romania (Decision in the case Văleanu et. al. v Romania ruled on November 8, 2022).

And in this case, as in the two previously analyzed cases, the Court ordered the connection of several requests that present similarities, essentially extracting the fact that the object of criticism of all the plaintiffs is the request addressed to the Court to reevaluate its conclusions expressed by the pronounced decision in the case of Preda et al. *v* Romania, showing that in the almost 10 years of application of the Law no. 165/2013, its mechanism proved ineffective and inconsistent, subjecting the plaintiffs to an excessive burden (Borghesi, 2022).

The Court essentially extracted and analyzed 3 aspects starting from the premise that the claimants were the beneficiaries of final court decisions that had recognized their right to certain assets and/or compensation (Cătlin, 2023):

a) *non-execution of final judgments* that either recognized the plaintiffs' right to certain assets and/or compensation, or non-execution of those that confirmed their right to obtain a final judgment regarding their restitution claims;

"229. The Court considers that the fact that the applicants have not obtained the execution of their pending judgments and have no certainty as to when it might happen, this constitutes a violation of the rights guaranteed by Art. 1 of the Additional Protocol no. 1 to the Convention.

230. Similarly, these findings are also relevant in the case of applicants who, despite the recognition of their right to restitution at the administrative level and the fact that the national courts have obliged the competent administrative authorities to issue a decision on their restitution requests and/ or compensation, are still in a situation where no definitive response has been issued to their claims (see points 101-102 and 105 above; see also the decision of Maria Atanasiu et al., cited above, § 180).

231. Consequently, in the present case, there was a violation of Art. 1 of the Additional Protocol no. 1 to the Convention in respect of the requests listed in point 15 above".[1]

---

expressed by the plaintiffs regarding the chances of success of the new domestic legislative device cannot change this conclusion. However, the Court reserves the right to examine, in the future, any accusation of ineffectiveness of the new legislative device, based on its concrete application [see, mutatis mutandis, Nogolica *v* Croatia (dec.), no. 77784/01, ECHR 2002- VIII, and Nagovitsyn and Nalgiyev, previously cited decision, point 30].

[1] Para. 253-254 of the decision Văleanu et.al. *v* Romania

b) the situation in which the titles issued on the basis of the decision recognizing the right to restitution were canceled by the courts due to the mistakes of the state authorities at the time of their issuance, with the consequence that the restitution requests must be considered pending before the administrative authorities again;

"253. Taking into account the above considerations, the Court concludes that the cancellation of the plaintiffs' titles as a result of the state authorities' failure to comply with the legal provisions relevant to the procedure for issuing property titles, without any compensation, created an excessive individual burden for the plaintiffs.

254. Consequently, there was a violation of Art. 1 of the Additional Protocol no. 1 regarding requests no. 28856/18, 25503/19 and 34359/19".

c) the amount awarded as compensation under the law, considered by the claimants to be too small in relation to the market value of the requested property (Călin, 2023);

"253. (…) having regard to the nature of the proceedings in question, by means of which the claimants and/or their perpetrators have sought for over twenty years (see Para. 107, 112 and 117 above) compensatory measures for their assets, having regard at the same time to the state's margin of appreciation in these areas, the Court considers that, based on the elements at its disposal, there are convincing elements that sufficiently demonstrate that the amounts awarded to them as compensation were not reasonably related to the value of the property , in the sense of the Court's jurisprudence [see mutatis mutandis decision for Vistiņš and Perepjolkins *v* Latvia (just satisfaction) [MC], application no. 71243/01, § 35-36, ECHR 2014).

254. In view of this finding regarding the amount of compensation, which must be analyzed in relation to the context underlying the significant delays in the restitution process (see Para. 243 above and the Šimaitienė contrast, cited above, § 54), the Court can just conclude that the plaintiffs in the applications no. 59012/17, 47070/18 and 21500/19 were forced to bear an excessive individual burden, in violation of Art. 1 of the Additional Protocol no. 1" (Călin, 2023)[1].

The Court ruled, based on the findings that, "despite the guarantees introduced by law and validated a priori by the Court in the decision for Preda et al., the restitution mechanism is not sufficiently effective and comprehensively coherent, so that it does not represent an excessive burden on the plaintiffs' (Para. 262).

In applying the provisions of Art. 46 of the Convention, "given the scale of the recurring problem in question and given the identified deficiencies and shortcomings of the global restitution mechanism (see Para. 262 above), the Court considers it essential that the respondent State to continue its consistent efforts

[1] Para. 253-254 of the decision Văleanu et.al. *v* Romania.

and adopt appropriate additional measures, with a view to aligning its legislation and practice with the Court's findings in this case and its relevant jurisprudence, so as to ensure full compliance with Art. 1 of the Additional Protocol No. 1 and Art. 46 of the Convention".

6. Where are we now?

We are at the moment when the European Court of Human Rights found the inefficiency of the restitution mechanism as regulated by the provisions of Law no. 165/2013 and ordered the Romanian state to adopt appropriate additional measures.

We are, therefore, in the same situation as we were after the adoption of the pilot decision in the case of Maria Atanasiu et al. *v* Romania.

The following question appears to be legitimate: "In the context of litigations already before the courts and in the context of future litigations, pending new appropriate legislative measures, how will the courts have to proceed when they find that compensation should be awarded? How will they determine these compensations?"

The difficulty, or on the contrary, the lack of difficulty, comes from the fact that the Law no. 165/2013 is neither expressly nor implicitly repealed, and the well-known Art. 21(6) is in force, generates legal effects and has not been declared unconstitutional. We have stated that the problem may not be considered difficult precisely because the text of the law regulating the method of determining compensation is in force and produces legal effects. Therefore, some courts will determine without reservation the amount of compensation strictly applying the provisions of Art. 21(6). The solution seems simple and legal, but it is not the right one in all cases.

There is a hypothesis in which the European Court of Human Rights has explicitly ruled that the establishment of compensations by the algorithm of Law no. 165/2013, that is, by the application of Art. 21(6) of the law, violates the right to property regulated by the provisions of Art. 1 of Additional Protocol no. 1 to the Convention, if the value obtained through compensation is unreasonably disproportionate to the current circulation value of the good whose restitution in kind is not possible. All 3 hypotheses analyzed by the Court in the case of Văleanu et al. *v* Romania converge towards this matrix of analysis – in all 3 hypotheses, the problem of reparations due to the entitled person for the impossibility of restitution in kind of the asset taken abusively by the communist state is reached.

In such a hypothesis, the granting of compensation by reference to Art. 21(6) of the Law no. 165/2013, when the value is unreasonably disproportionate to the current circulation value of the asset that cannot be returned in kind, represents a violation aware by the court of the property right (of the right to the good) as regulated by the provisions of Art. 1 of Additional Protocol no. 1 to the

Convention. This places the respective court decision in an obvious situation of illegality, given the principle of priority application of international regulations if they conflict with domestic law (Art. 20 Para. 2 of the Romanian Constitution). However, the situation of conflict with domestic law is already identified and resolved, as we have shown, by the decision issued by the Court in the case of Văleanu et al. *v* Romania.

Therefore, we consider that the correct approach requires the prior identification of the actual current circulation value of the asset that cannot be returned in kind and its comparison with the compensation value that could be obtained by applying the provisions of Art. 21(6) of the Law no. 165/2013. In the hypothesis that there would be an unreasonable disproportion between these values, the court can no longer apply directly the provisions of Art. 21(6) given the fact that it is clear that the hypothesis violates the provisions of Art. 1 of the Additional Protocol no. 1 to the Convention.

Compensation should be granted, in this case, according to the actual circulation value.

But what provisions would justify such a solution?

First of all, we identify within the normative act represented by the Law no. 165/2013 provisions that state regulations for concrete legal situations:

Art. 1) - (1)**)* Immovable properties taken over abusively during the communist regime are returned in kind.

*(2)**)* In the situation where the restitution in kind of the buildings taken over abusively during the communist regime is no longer possible, the reparative measures in equivalent that can be granted are the compensation with goods offered in equivalent by the entity vested with the settlement of the request formulated on the basis of Law no. 10/2001 regarding the legal regime of some buildings taken over abusively between March 6, 1945 – December 22, 1989, republished, with subsequent amendments and additions, the measures provided by the Land Fund Law no. 18/1991, republished, with subsequent amendments and additions, and Law no. 1/2000 for the reconstitution of the right of ownership over agricultural and forest lands, requested according to the provisions of the Land Fund Law no. 18/1991 and Law no. 169/1997, with subsequent amendments and additions, as well as the measure of compensation by points, provided for in Chapter III.

Art. 2 The principles underlying the granting of the measures provided for by this law are:

a) the principle of the prevalence of restitution in kind

b) the principle of equity

The law (which is the special law on refunds) therefore uses the following as a principle:

a) The principle of the prevalence of restitution in kind – which assumes that the compensation fully covers the material damage suffered;

b) The impossibility of restitution in kind determines that the reparation of the same damage must be done in kind. The use of the term equivalent in a legal sense cannot be foreign to the meaning of the term in the Romanian language: "Having the same value, effect, meaning or sense as something else";

c) The award of damages is subject to the principle of equity. This principle necessarily requires that it is fair that the compensation established as an equivalent of immovable property that cannot be returned in kind covers the material damage suffered in the same way as the return in kind of the property could do.

These regulations in force, cited and interpreted, determine, in the absence of the application of the effects of the provisions of Art. 21 Para. 6, the obligation to determine the number of compensation points by reference to the real circulation value of the property that cannot be returned in kind.

The provisions of the General Law - the Civil Code, which in Art. 1527-1531 as well as in Art. 566 establish the obligation to execute in the equitable equivalent of the obligation that is not executed in kind, are also in the sense of those highlighted.

This is also the way in which the European Court of Human Rights established in its recent jurisprudence how to repair the damage caused by the violation of the right to Good (regulated by the provisions of Art. 1 of Additional Protocol no. 1 to the Convention).

We refer to the effects of the decision handed down by the European Court of Human Rights on February 26, 2019, in the case of Ana Ionescu et. al. *v* Romania. We quote below Art 38-39 of this decision:

"38. The Court considers that, in the circumstances of the case, the restitution of the properties in question will put the claimants, as far as possible, in a situation equivalent to the one in which they would have been if Art. 1 of Protocol No. 1 had not been violated.

39. In the absence of such restitution from the defendant state, the Court notes that it must pay the plaintiffs, as compensation for the material damage, an amount corresponding to the current value of the properties".

Here, through this decision, the Court found that the compensation corresponding to the impossibility of returning the asset in kind cannot be other than an amount corresponding to the current value of the properties.

7. Conclusions

We conclude by pointing out that also in the decision whose effects we invoke, the case of Văleanu et. al. *v* Romania, the Court adheres to the reasoning according to which the compensation value must be in a direct dependency relationship with the real current value of the circulation of immovable property that cannot be returned in kind.

In addition, the Court takes note of the findings of the HCCJ according to which the law aimed to give the claimants the equivalent in money of what they would have received if restitution in kind had been possible (see Para. 172 in fine above), implicitly considering that any method of valuation other than that which takes into account the technical specifications of the property as it was at the time of deprivation would be unjust and inequitable. However, the Court cannot lose sight of the fact that, if restitution in kind had been possible, the applicants would have come into possession of an asset that would have included at least some developments that took place over time, either of a general nature (urban planning policy), or of a more special nature (for example, redevelopments or renovations); it follows that, if the compensation awarded must remain equivalent to the value of the good in kind, it cannot ignore such developments" (Călin, 2023).

References

Borghesi, S. (2022). *Pasivitatea statului român sancționată de CEDO, pentru a treia oară, prin hotărârea-pilot Văleanu și alții împotriva România,* available at https://costas-negru.ro/pasivitatea-statului-roman-sanctionata-de-cedo-pentru-a-treia-oara-prin-hotararea-pilot-valeanu-si-altii-impotriva-romania/

Călin, R.M. (2023). *Rezumatul hotărârii Secției a IV-a din 8 noiembrie 2022, cererile nr. 59012/17 și alte 29* (relevant paragraphs, Roxana Maria Călin, judge at the Bucharest Tribunal), available at https://www.hotararicedo.ro/index.php/news

Ramașcanu**,** B. (2015). Hotărarea Curții Europene a Drepturilor Omului în cauza Preda ș.a. c. României. Da capo al fine?. *Avocatura în România -150 de ani în linia întâi a luptei pentru drept*. Hamangiu, pp. 145-170

Voicu, M. (2017). *România – 20 de ani de jurisdicție a CEDO – Privire statistică și de sinteză*, available at https://www.juridice.ro/essentials/893/romania-20-de-ani-de-jurisdictie-a-cedo-privire-statistica-si-de-sinteza

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

NATIONAL AND COMPARATIVE LAW REGARDING THE CONCESSION AND SUPERFICIES AGREEMENTS, AS TOOLS FOR THE EXPLOITATION OF LANDS PRIVATELY OWNED BY THE STATE AND ADMINISTRATIVE-TERRITORIAL UNITS

Raluca CHELARU[1]

Abstract

Often, local public authorities call for the establishment of superficies in favour of investors interested in building on the lands that are privately owned by administrative and territorial units. While such a possibility is not expressly forbidden by the legislation, the Administrative Code seems to limit the ways of exercising the right of private property of the State/administrative and territorial units. Thus, the most appropriate institution would seem to be that of the concession, which involves following the same arduous procedure as in the case of the public property of the State. The second part of this study ("National and European judicial practice regarding the concession and superficies agreements, as tools for the exploitation of lands privately owned by the State and administrative-territorial units") will establish how doctrinal and jurisprudential opinions are divided, and how recent decisions of the Constitutional Court of Romania, but also of the Court of Justice of the European Union are a reference in the field and must be taken into account in practice, alongside with TFUE and European directives provisions.

Key words: *superficies; concession; private property; Administrative Code; severance of private property.*

1. Introduction

The evolution of some institutions in Romanian law, such as the right of concession and the right of superficies, is controversial and at least interesting, both with regard to the public property of the State and of the administrative and territorial units, but especially with regard to their private property.

While the public property has always been protected by certain prohibitions and restrictions laid down by law and the Constitution, the private property of the State and the administrative and territorial units has not always been clearly regulated.

[1] **PhD student, Faculty of Law, University of Bucharest, Lawyer, Buharest Bar (Romania), e-mail: raluca.chelaru@gmail.com.**

Given the "scarcity of land" (Reboul-Maupin, 2008, p. 316) and the "scourge of a shortage of buildable areas" (Malaurie & Aynès, 2013), in practice, public authorities have resorted to institutions specific to private law, resorting to the establishment of easements rather than concession contracts, given the cumbersome procedure to be followed. The next step is to establish whether such practical solutions are in line with the legal provisions, what are the concrete risks to which the co-contractors are exposed and what could be the solutions when such situations arise.

Recent practice has shown that preference is given to superficies established by local public authorities for the development of energy capacities, both *intra muros* and *extra muros* of the urban areas, on the basis of Land Law 18/1991. As a rule, investors want to acquire project companies that hold such superficies rights over large areas of land. Given that, in general, no public tender or other procedure leading to the idea of a concession is conducted, the question arises as to the legality of such operations.

If the case law of the national courts of general law is not clear enough, the case law of the Constitutional Court, but especially of the Court of Justice of the European Union (alongside with the European law on the matter), speaks for itself.

2. Evolution of concession institution at national level

At national level, the evolution of concession has involved the adoption of regulations which have often raised questions about the private property of the State or of the administrative and territorial units.

Initially, after communism, Local public administration law No. 69/1991 was adopted, which provided rules for both the public and private property of the State or the administrative and territorial units. The concession was set up as an institution specific to both areas. According to Article 76 of this law, local and county councils decide on the concession, lease, and operating lease of goods belonging to the public or private property. They also decide on the sale of goods belonging to the private property. It is expressly provided that the sale, concession, lease and operating lease shall be carried out by public tender, organised in accordance with the law. The disposal of goods belonging to the private property of communes, towns or counties, exchanges of land, demarcation or division of real estate held in undivided ownership with this private property, waivers of rights or recognition of rights in favour of third parties are made on the basis of an expert's report approved by the council.

At the same time, Law No. 50/1991 on the authorization of construction works and some measures for the construction of housing was adopted, which regulates in Article 10 that land belonging to the private property of the State or of the administrative and territorial units, intended for the execution of construction, may be granted by public tender if the urban and territorial planning documents,

approved according to the law, are complied with, and the concessionaire executes the construction. According to this law, the concession is made on the basis of bids submitted by the applicants, in compliance with the legal provisions, seeking to make the best use of the potential of the land, based on the urban planning concept. This law therefore regulates the concession for construction, but refers only to the private property of the State or of administrative and territorial units. Such a concession, for the purpose of construction, is similar to the institution of superficies (secondary type). This law does not take account of the situation where a private construction already exists, as is often the case in practice, in which case a main superficies is established. It should be noted that, in the originally adopted version, Law No. 50/1991 contained provisions only for the concession of land held in the private property of the State and of the administrative and territorial units.

Subsequently, Law No. 213/1998 on public property and its legal regime was adopted, which, of course, provided rules only for the public property. According to Article 15 of this law, the concession or lease of public goods is carried out by public tender, in accordance with the law.

At the same time, Law No. 219/1998 on the regime of concessions came into force, and clarified, in Article 1, that this law concerns public or private goods of the State, county, city or commune and public activities and services of national or local interest. A concession is made on the basis of an agreement whereby a person, called the concession grantor, transfers for a limited period of not more than 49 years to another person, called the concessionaire, who acts at his own risk and responsibility, the right and obligation to use a public asset, activity or service in return for a royalty. According to Article 8 of this law, the concession of public or private State property, activities or public services is approved on the basis of the concession tender book, by decision of the Government, county, city or communal council, as the case may be. Further, according to Article 10, the concession of a public property, activity or service is carried out by public tender or direct negotiation.

Three years later, the Local public administration law No. 215/2001 was adopted. According to Article 125 of this law, local councils and county councils decide that goods belonging to the public or private property, of local or county interest, as the case may be, may be placed in the management of autonomous regies and public institutions, or may be concessioned or leased. They decide on the purchase of goods or the sale of goods belonging to the private property, of local or county interest, in accordance with the law. It also expressly provided that the sale, concession and lease shall be awarded by public tender, organised in accordance with the law.

Subsequent regulations on public procurement and concessions only concerned the public property of the State. These include Ordinance No. 118/1999 on public procurement, Emergency Ordinance No. 60/2001 on public procurement, Emergency Ordinance No. 34/2006 on the award of public

procurement contracts, public works concession contracts and service concession contracts, Emergency Ordinance No. 54/2006 on the regime of public property concession contracts. Among the most recent legislative acts, we mention Law No. 99/2016 on sectoral procurement, Law No. 100/2016 on works concessions and service concessions, Law No. 101/2016 on remedies and means of appeal in the award of public procurement contracts, sectoral contracts and works concession and service concession contracts, as well as for the organisation and functioning of the National Council for the Settlement of Disputes, Law No. 98/2016 on public procurement. All these recent legislative acts were intended to implement the relevant European directives, namely Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC.

Since 1 October 2011, with the entry into force of the "new" Civil Code, an attempt has been made to clarify and give a general law value to the private property of the State and the administrative and territorial units. The authors of the Civil Code intended institutions such as concessions to be specific to the public property. The intention was that the private property of the State and the administrative and territorial units should be subject to general law, in a similar way to the right of ownership belonging to a private individual. Article 551 lists concession among rights in rem. According to Article 861, public property may be placed in management or use and may be granted under concession or leased. Article 866 lists the rights in rem corresponding to public property: public property may be placed in management or use and may be granted under concession or leased. Art. 871 et seq. regulates the right of concession (content, exercise, defense), so that the concession procedure and the conclusion, performance and termination of the concession contract are subject to the conditions laid down by law.

3. Public property of the state and of the administrative and territorial units

Firstly, according to Article 136 of the Romanian Constitution, property is public or private. Public property is guaranteed and protected by law and belongs to the State or to the administrative and territorial units.

The public wealth of the subsoil, the airspace, the waters of national interest with energy potential which may be capitalized, the beaches, the territorial sea, the natural resources of the economic zone and the continental shelf, as well as other goods established by the organic law, are the exclusive object of public property.

According to the Constitution, public property is inalienable. Under the terms of the organic law, they may be placed in the management of autonomous regies or public institutions or may be granted under concession or leased; they may also be given free of charge to be used by public utility institutions.

Article 136 of the Romanian Constitution also states that private property is inviolable, under the conditions of organic law.

The Constitution does not use the term "public or private property", but this term has been enshrined in special legislation, such as Article 6 of the Land Law No. 18/1991, Article 4 of Law No. 213/1998 on public property and its legal regime, Article 121 of Local Public Administration Law No. 215/2001.

As far as the public property is concerned, the law, the doctrine and case law have always been clear.

By way of example, we recall that the High Court of Cassation and Justice has ruled, as a matter of principle, that the inalienability of public property requires not only the prohibition of their alienation, but also the impossibility of their acquisition by third parties by any other means of acquisition regulated by law, legal acts concluded in violation of this principle being subject to absolute nullity (High Court of Cassation and Justice, Decision No. 1273/2011). The former Supreme Court of Justice has also ruled that public property is not subject to severance and that only public goods are inalienable (Supreme Court of Justice, Decision No. 513/1995, Decision No. 152/1994).

Inalienability therefore refers not only to the prohibition of alienation and acquisition of the public property right as a whole by means of private law, but also to the prohibition of its severance. The Alba Iulia Court of Appeal confirmed the impossibility of establishing a right of superficies over public property. The Court ruled that doctrine and case law overwhelmingly support the existence of this severance (superficies) of the right of ownership as applicable only to private property, not to public property (Court of Appeal Alba Iulia, Decision No. 81/2013).

In the specialized literature, there have also been views that easements, for example, are possible if compatible with public use and interest. According to Article 862 of the Civil Code, which regulates the limits to the exercise of the right of public property, the right of public property is subject to any limits regulated by law or the Civil Code for the right of private property, insofar as they are compatible with the use or public interest for which the affected property is intended. Incompatibility shall be established by agreement between the owner of the public property and the person concerned or, in case of disagreement, by a court of law. In such cases, the person concerned is entitled to fair and prompt

compensation from the public property owner. In this regard, it has been argued that easements under the new Civil Code system would not be *de plano* incompatible with the right of public property, but this compatibility is not based on Article 862 of the Civil Code, but on Article 28 para. (2) of Law No. 33/1994 on expropriation for public utility, according to which easements established by human action are extinguished to the extent that they become incompatible with the natural and legal situation of the objective pursued by the expropriation, the obligations between the old and the new owner remaining subject to general law (Baias, Chelaru et al, 2012).

4. Private property of the state and of the administrative and territorial units

Civil Code regulations

As a general rule, under the Civil Code, private property is subject to the general legal regime. According to Article 553 of the Civil Code, private property is all property for private use or private interest belonging to natural persons, private law legal persons or public law legal persons, including goods held in the private property of the State and of the administrative and territorial units. Goods held in private property, regardless of the owner, are and remain in the civil use, unless otherwise provided by law. They may be alienated, may be the subject of enforcement and may be acquired by any means provided by law.

Regulations of the Administrative Code

Diametrically opposed to the vision of the Civil Code, as of 5 July 2019, the Administrative Code came into force, which regulates, in Article 362, the modalities of exercising the right of private property. According to this article, the private property of the State or of administrative and territorial units may be placed under management, concessioned or leased. The private property of the administrative and territorial units may be given free of charge, to be used for a limited period, to non-profit legal entities, which carry out charitable or public utility activities, or to public services. Last but not least, the Administrative Code assimilates, to a certain extent, the rules specific to the private property of the State and the administrative and territorial units with those relating to its public property. According to the last paragraph of Article 362 of the Administrative Code, the provisions on the granting of management, concession, lease and free use of goods belonging to the public property of the State or the administrative and territorial units apply accordingly.

Therefore, we understand that the private property of the State and of the administrative and territorial units can be exercised by means of concession, granting of management and lease. Prior to the entry into force of the Administrative Code, the Local public administration law No. 215/2001 provided

for other ways of capitalizing private property, namely the exchange of goods held in the private property of the administrative and territorial units[1].

The main question arising from the interpretation of this Article 362 of the Administrative Code is whether the private property of the State and of the administrative and territorial units can be capitalized in other ways. As rightly pointed out in the specialized literature (Vedinaș, 2022), the phrase "may be" from Article 362 does not seem to be used in a restrictive sense, and placing Article 362 in the chapter "certain rules on the exercise of private property rights" would lead to the conclusion that other ways of exercising the private property rights of the State or the administrative and territorial units can be imagined. Such an interpretation is also based on the correlation with Article 355 of the same Administrative Code, which regulates the legal regime of the private property of the State or of administrative and territorial units and according to which the goods which are part of the private property of the State or of administrative and territorial units are in the civil use and are subject to the rules laid down in the Civil Code, unless otherwise provided by law. Of course, it could be argued that the opposite is true, in that Article 362 is precisely the exception where "the law provides otherwise". We believe, along with other authors (Vedinaș, 2022) , that the text needs to be clearer on this point, so as not to leave room for interpretations which may even prove to be diametrically opposed.

Regulations of Law No. 50/1991 on the authorization of the execution of construction works

Although in the original version of Law No. 50/1991, only the possibility of concession for construction of land held in private property was regulated, the present analysis takes into account the current version of the law, which regulates both the public and private property of the State and of the administrative and territorial units.

According to Article 13 of Law No. 50/1991, land belonging to the private property of the State or of administrative and territorial units, which is intended for construction, may be sold, granted under concession or rented by public tender, according to the law, subject to compliance with the provisions of the urban and land-use planning documents, approved by law, so that the owner may carry out the construction.

According to the same article, land belonging to the public property of the State or of administrative and territorial units may be granted under concession only for the construction of buildings or objectives of public use and/or interest, in compliance with the planning documents approved by law.

[1] Article 121 (4) of this law provided that the exchange of real estate belonging to the private property of the administrative and territorial units shall be made under the conditions of the law, on the basis of an evaluation report, approved by the local council.

The concession is based on bids submitted by the applicants, in compliance with the legal provisions, seeking to make the best use of the potential of the land.

Also, by Law No. 50/1991, when discussing the public or private property of the State or of an administrative and territorial unit, the legislator provides that obtaining a building permit is conditional on the existence of a right of ownership, a right of management or a right of concession in favour of the holder.

5. Concession *versus* superficies

Miscellaneous

While the possibility to lease land held in public property has always been regulated with a high degree of precision, the lease of land held in the private property of the State and of administrative and territorial units has not always been regulated in a satisfactory manner.

Concessions almost always require strict compliance with carefully regulated procedures, often involving a public tender.

Often, because of the "scarcity of land" (Reboul-Maupin, 2008, p. 316) and the "scourge of a shortage of buildable areas" (Malaurie & Aynès, 2013), in practice, public authorities have often resorted to institutions specific to private law. And as the right of superficies is primarily a response to this "scourge of a shortage of buildable areas" and is a solution to the problem of the scarcity of land, local public authorities have often preferred to resort to the establishment of easements under general law rather than to conclude concession contracts which were either not exhaustively regulated or involved cumbersome procedures.

It remains to be seen to what extent such practical solutions are in line with the legal provisions.

Superficies - severance of the ownership right

Only the law can allow the legal operation of severance, which is why the number of severances is also limited.

According to Article 555 (2) of the Civil Code, under the conditions of the law, the right of private property is subject to modalities and severances, as appropriate.

Once created, severances of the ownership right have an existence of their own. For example, with reference to the right of usufruct, it has been said that the relationship between the bare owner and the usufructuary, during the normal exercise of this right, is characterised by independence and mutual ignorance (Malaurie & Aynès, 2013) , so that it belongs to the category of main rights in rem.

The superficies can be established in two forms, a so-called "main" form and another "secondary" form.

The main form of the superficies right requires the existence of the building, plantation or work on the land over which the superficiary acquires a right of use, at the time the superficies right is established (Stoica, 2004, pp. 553-554).

When the superficiary obtains the right to build on another person's land, the secondary form of the superficies right is regulated. In this case, the landowner severes his right and transfers to the superficiary the right to use the land and, to a limited extent, possession and disposal, with the building or the agreed works or the planting of seedlings to be carried out thereafter. At the time the superficies right is established, the building, plantation or work does not exist. Even in this form, the superficies right is a proper severance of the right of ownership of the land.

In practice, there has also been the question of the superficies "in the form of the right to build additional storeys". In the specialized literature, it was considered that this was not regulated, although the issue of building additional storeys or attic on existing buildings is topical (Sferdian, 2006, pp. 77-79). Case law has decided that limiting the establishment of a right of superficies to the situation where the building is attached to the ground and rejecting it in the case of building a storey is unacceptable, since the connection between the building and the land is achieved through the common parts of the existing building (Voicu & Popoacă, 2002, p. 272).

Duration of the superficies right *versus* duration of the concession right

According to Article 694 of the Civil Code, the right of superficies may be established for a maximum of 99 years. At the end of this period, the superficies right may be renewed.

There is practically no limitation on the possibility of renewing the superficies right, so it can operate *ad infinitum*, but each time its duration will not be more than 99 years.

By comparison, the duration of a concession right differs depending on the law applicable at a given point in time. Thus, the concession granted for the purpose of construction, in accordance with the provisions of Law No. 50/1991, is granted for a duration set by the local councils, county councils and the General Council of the Municipality of Bucharest, depending on the provisions of the urban planning documents and the nature of the construction, according to Article 22 of that law. According to Article 17 of the same law, the minimum limit of the concession price is established, as the case may be, by decision of the county council, the General Council of the Municipality of Bucharest or the local council,

in such a way as to ensure the recovery in 25 years of the sale price of the land, under market conditions, plus the cost of the related infrastructure works.

According to Article 30 of Law No. 219/1998 on the concession regime, the concession contract shall be concluded in accordance with Romanian law, regardless of the nationality or citizenship of the concessionaire, for a duration not exceeding 49 years, starting from the date of signature. The duration of the concession is determined according to the period of amortisation of the investments to be made by the concessionaire. The concession contract may be extended by a period equal to no more than half of its initial duration by simple agreement of the parties. It should be recalled that this law was applicable to both the public and private properties of the State and the administrative and territorial units.

The duration of 49 years and the possibility of extension for a period equal to no more than half of its initial duration was also taken over by subsequent legislation, which regulated only the concession of goods belonging to public property. We refer here in particular to Emergency Ordinance No. 54/2006 on the regime of public property concession contracts, which was repealed and replaced by the Administrative Code.

Further, according to Article 306 of the Administrative Code, the public property concession contract is concluded in accordance with the Romanian law, regardless of the concessionaire's nationality or citizenship, for a duration that may not exceed 49 years from the execution date. The duration of the concession is determined by the grantor on the basis of the opportunity study. The public property concession contract may be extended by parties' written agreement, provided that the total duration does not exceed 49 years.

Of course, these provisions will also apply, "as appropriate", by virtue of Article 362 of the Administrative Code, to the private property of the State or administrative-territorial units. According to para (3) of this article, the provisions on the administration, concession, rental and free use of assets belonging to the public property of the State or administrative-territorial units shall apply accordingly.

The Administrative Code also provides in Article 306(4) that special laws may also establish concessions with a duration exceeding 49 years.

In conclusion, while the superficies can be established *ad infinitum*, the duration of a concession is always limited to a number of years expressly provided for by law.

In practice, local authorities conclude superficies contracts under the Civil Code for different periods of time, 20 years, 33 years, 49 years, 99 years.

From this perspective, the question arises to what extent a superficies concluded by a local council for 99 years, with the possibility of indefinite extension, would affect the interests of the local community.

Superficies price *versus* concession price

Under Article 697 of the Civil Code, a right of superficies may be established either for consideration or free of charge. According to this article, where the superficies is established for consideration, if the parties have not provided for other methods of payment by the superficiary, the holder of the right of superficies owes, in the form of monthly instalments, an amount equal to the rent established on the open market, taking account of the nature of the land, the use of the building if there is one, the area in which the land is located and any other criteria for determining the value of the use. In the event of disagreement between the parties, the amount owed to the owner of the land will be determined by the courts.

By comparison, a concession always involves a royalty.

Even more so, the question arises to what extent a superficies concluded by a local council for 99 years, with the possibility of indefinite extension, free of charge, would affect the interests of the local community.

Effects of termination of the superficies *versus* effects of termination of the concession, with respect to ownership of the construction

In principle, according to Article 699(1) of the Civil Code, the effects of the termination of the superficies by expiry of the term on the construction are as follows:

- the effects provided for in the parties' agreement (if any);
- in the absence of a stipulation to the contrary, the owner of the land acquires ownership of the building erected by the superficiary by way of accession, with the obligation to pay the value of its circulation from the date of expiry of the term.

Further, according to Article 699(2) of the Civil Code, in cases where the building did not exist at the time the building right was established and its value is equal to or greater than that of the land, the owner of the land may request that the builder be ordered to buy the land at the value it would have had if the building had not existed.

The question arises as to what would happen if a local council were to rely on these permissive provisions of the Civil Code in establishing a superficies right. In other words, under the first paragraph of Article 699, the local council would have the right not to acquire ownership of the building, but to provide for other effects of the termination of superficies on the building. Next, on the basis of the second paragraph of Article 699, the local council could request that the private co-contractor be obliged to buy the land from the private property of the local council, under certain conditions; this would lead, by using the provisions of the Civil Code, to a sale at the end of the superficies, without a public tender.

By comparison, concession operates with notions such as "return assets", "take-back assets", "own assets". The concession contract will mention the distribution of these assets on termination of the concession for any reason. In practice, there are many cases where concession contracts do not provide for such a clear division of assets.

However, we draw attention to the fact that such a division was rather accepted by Law 219/1998 on the regime of concessions (which regulated both the public and the private property), while Emergency Ordinance 54/2006 on the framework of concession contracts for public property which replaced this law did not use the notion of "takeover assets" at all (most probably because the regulations concerned only the public property this time).

The same is true for the Administrative Code. According to Article 324(5) of the Administrative Code, the concession contract for the concession of public (or private) property must clearly specify the categories of assets to be used by the concessionaire in the course of the concession, namely: a) the return assets which are automatically transferred free of charge and free of any encumbrances to the grantor upon termination of the public property concession contract. Return assets are assets which were the subject of the concession and those resulting from the investments required by the technical specifications; b) own assets which remain the property of the concessionaire upon termination of the public property concession contract. Own assets are assets which belonged to the concessionaire and were used by him during the concession.

In conclusion, as far as the constructions built by a concessionaire on land in the private property of the local council are concerned, most probably, at the end of the concession, they would pass into the private property of the local council. By comparison, as we have shown above, in the case of a superficies, the Civil Code allows other solutions. In the absence of specific legal provisions, it is, however, questionable whether these "other solutions" should also be allowed in relation to the private property of the State and administrative-territorial units.

6. The consequences of the possible illegality of the creation of superficies

In most cases, questions regarding the (il)legality of legal acts that allow the development of constructions arise as a result of legal investigations led by legal practitioners (the so-called "due diligence" investigations). Once a superficies regarding the private property of the State or an administrative-territorial unit is noticed, the risk brought by the legislative uncertainty in the field will also be envisaged. In other words, a legal evaluation is carried out from both perspectives - of the probability of materialization of the risk and of the potential practical remedies available to the investor - beneficiary of the superficies.

Specifically, we consider that the risk would be that of the incidence of a case of absolute nullity, given the protected interests. Without intending to perform an analysis of nullity theories, we are of the opinion that the nullity

would be absolute rather than relative, even if we are talking about a private property of the State or of the administrative and territorial units.

The probability of materialization of this risk, which lasts over time, respectively is not time barred, must be analysed on a case-by-case basis, but it seems that it is quite high. However, it should not be overlooked that the legal notions, institutions, and norms in general are few and – even these – are unclear and, as such, interpretable.

The solutions at hand are many, but they will almost never be able to completely remove the risk to the investor, mainly because an absolute nullity of this type cannot be covered under the general law. The solutions can be both legal and business-oriented and can be taken into consideration when an investor intends to acquire, for example, a company that holds a superficies right on a land that is privately owned by the State or an administrative and territorial unit, in order to use such land:

- payment of a sum of money in an escrow account, with release after a certain period of time (period which is sufficient to recover the investment);
- reducing the price, so that the benefits of the business exceed - at least apparently - the assumed risk, by reference to the concrete circumstances of the case;
- extended contractual declarations and guarantees, from the shareholders - natural persons, but there is, of course, a risk of their insolvency or even difficulties in enforcement procedures, especially if they are foreigners;
- the conclusion of title insurances, which cover this risk, but such a procedure involves high expenses and, last but not least, there is the possibility that this risk be not considered "insurable";
- the conclusion of a concession contract, with effects for the future (not for the past), with the strict observance of the applicable rules, but with the risk of other investors expressing their intention to participate.

As already previously stated, none of the solutions are perfectly satisfactory and bear certain intrinsic risks.

7. The practice of local authorities to establish superficies rights

For the purpose of this research, we analysed more than twenty local council decisions, by which a superficies right was constituted on land belonging to the private property of the administrative and territorial unit (from the years 2015, 2020, 2021)[1].

[1] Relevant decisions may be identified here:
• https://www.primariatulcea.ro/wp-content/uploads/2021/05/Proiect-de-hotarare-177.pdf;
• https://www.primariavoinesti-iasi.ro/ari_afisare_document.php?document=1429
• https://consiliullocaleforie.ro/wp-content/uploads/2020/03/HCL-32-din-27.02.2020.pdf
https://www.baiamare.ro/Baiamare/Hotarari/2020/24%20august%202020/hot273_20%20Osan%20Salustia%20.pdf

Some superficies have passed through the approval of the "Bureau of Concessions".

The decisions generally refer to the provisions of the Civil Code, Law No. 50/1991 and the Administrative Code.

• http://primaria-urziceni.ro/files/Proiect-HCL-superficie.pdf
https://xpage.primariatm.ro/lotusweb.nsf/xsp/.ibmmodres/domino/OpenAttachment/domino6/primariatm/RO!!BIAB%20PMT/hotarari.nsf/0DF6A2EBC048C317C22586C300447775/anexa/raport+%20referat.pdf
• http://primaria-constanta.ro/docs/default-source/librarie-consiliu-local/proiecte-de-hotarari/proiecte-hotarari---sedinta-31.01.2022/26-superficie.pdf?sfvrsn=2
• https://primaria-navodari.ro/wp-content/uploads/2020/03/HCL-nr.40-din-27.02.2020-constituire-drept-de-superficie-cu-titlu-oneros-prin-licitatie-publica-asupra-unui-t.pdf
• https://primaria-navodari.ro/wp-content/uploads/2020/08/HCL-nr-118-din-09.07.2020-min.pdf
• http://cbn-aplicatie-comune.appspot.com/download/ServeFile?blobKey=AMIfv97iV3mTZusxCL7L5dfaHrWInuEz1bckbB6CtXASCPFe_o2Hqb7j4XnPxZqJOETU9OOEYFo27jjNnDJc8v2K_9z8tWPYRbgihia6Zq8Xye9G4OY4QYOCoe0mp-rWvsfmcgscs4Oakj7JyX8MPFVg7bj2MreGfwGJnmYyudnwWnudP7TiS9BydRT8PQB0LGmCt_1tHhlXALAMQUC73_ThEQtGqTmkSWOtUyFcc5wjqZTtiAL4C3EjHYn1VFYJrreXzYzAL28-pokaeV8fM67PylkSykMQNL6DiVQAu9y-udSc8SORLxL36BD7yZC-FAm6djFvblM9wIoD8ZNakl9MxRVXCMoTyk0-t8ImLGFE0wyN7uAI1cNzsy8w1Che1eKlBsHrZZqyXGBbqsT2hqOEtopwwLm9Tw
• https://edirect.e-guvernare.ro/Admin/Proceduri/ProceduraVizualizare.aspx?IdInregistrare=620455&IdOperatiune=2
• https://primariaroman.ro/wp-content/uploads/2021/12/288-ANX-1-2021-12-constituirea-dreptului-de-superficie.pdf
• https://www.scribd.com/document/459128480/Regulament-superficie
• https://hcl.civicul.ro/view-hcl/hcl_302_14.06.2019/attachment/004_Regulament.pdf
• https://hcl.civicul.ro/view-hcl/hcl_302_14.06.2019
• https://www.brmovilamiresii.ro/had/HCL%2011%20DIN%2028.01.2021.pdf
• http://www.primariacampina.ro/wp-content/uploads/2019/08/18-Proiect-hot%C4%83r%C3%A2re-privind-constituirea-dreptului-de-superficie-teren-559-mp-din-933-mp-str.-Petrolistului-nr.-16.pdf
• https://mangalia.ro/wp-content/uploads/2022/01/HCL-69.pdf
• http://www.primariaboranesti.ro/z_Consiliul%20Local/Hotarari/2017/hot%2011.pdf
• https://primariamereni.ro/wp-content/uploads/2021/09/scan0141-1.pdf
• http://elo.primariabr.ro:9091/hotarare/253284
• https://www.oradea.ro/fisiere/module_fisiere/29757/h320_18%20Anexa%20nr.%201.pdf
• https://somcutamare.ro/anunturi/stiti-si-noutati/281-regulament.html
• http://primariaorasinsuratei.ro/documente/HCL%20Nr.66%20din%2028.08.2019.pdf
• https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fprimariapiatra.ro%2Fwp-content%2Fuploads%2F2021%2F07%2FHotarare-drept-de-superficie.docx&wdOrigin=BROWSELINK
• https://www.chisinau.md/public/files/anul_2020/cmc_2020/14.07.20/19.Regulamentul_privind_raporturile_juridice_de_superfice.PDF
• https://www.vinatorineamt.ro/wp-content/uploads/filebase/consiliu_local/hotarari_consiliu_local_2020/HCL%20NR.%2024%20DIN%202020%20DR%20SUPERFICIE%20%20CEC%20BANK.pdf
• https://primariapiatra.ro/wp-content/uploads/2021/07/Hotarare-drept-de-superficie.docx

In general, superficies have been constituted in favour of owners of buildings on land (main superficies), but there are also cases where superficies have been constituted for the purpose of future construction.

In the annexes to the decisions, a so-called "Regulation on the procedure for the establishment of the right of superficies for good and valuable consideration, on land privately owned by the administrative-territorial unit" is attached. The regulation details rules such as the land required for operation, the need for a local council resolution for each individual plot, the period of the superficies, the need for the authentic form of the superficies, compulsory clauses, the necessary documents, the way the price is established by an ANEVAR assessor, etc.

Sometimes the draft superficies contract is also attached to the decision approving the superficies.

The duration of the superficies is usually 99 years; sometimes it is also 25, 33 or 49 years.

In some decisions, it is stipulated that the administrative and territorial unit waives the right to claim the right of access to buildings on the land. According to Art. 693 para. (4) of the Civil Code, where a building has been constructed on another person's land, the superficies may be registered on the basis of the waiver by the owner of the land of the right to invoke accession in favour of the builder. It may also be registered in favour of a third party on the basis of an assignment of the right to invoke accession.

Some decisions make it clear that the buildings in question were built without planning permission more than three years before the establishment of the superficies.

Some decisions limit the maximum surface area that can be the object of the superficies to 1,000 sqm for one dwelling (as provided for in Law 50/1991 on concessions granted in rural localities).

There are also decisions to revoke previously issued decisions for the establishment of superficies rights in order to "enter into legality".

Some decisions contain an explanatory memorandum stating that at that time the legislation (Emergency Ordinance No. 34/2006 and Emergency Ordinance No. 54/2006) did not contain express provisions on the concession of private property owned by the State and the administrative and territorial units. According to these decisions, the Civil Code would have been applicable, and the most appropriate institution for capitalizing the potential of such land was considered to be the superficies

Only three times was the public tender procedure used in the decisions analysed.

In relation to the content of these administrative acts of local public authorities, the question arises as to the legality of such superficies. Moreover, the legal nature of a regulation adopted by resolution, by which the local council commits itself to a certain procedure established not by law but by itself, also

raises questions. In our view, we do not rule out the possibility that the public authorities intended to implement European legislation and case law in this area in the absence of clear national rules.

8. Comparative elements of french law

Superficies is not regulated by the French Civil Code, but is recognised by case law and doctrine (similar to our old Civil Code)[1].

The best known way of creating a right of superficies is *bail emphytéotique* (long-term lease).

The General Public Property Code states that public entities manage their private property freely, in accordance with the rules applicable to them. However, the Code only mentions the sale and exchange of property[2].

The answers given to a question put to the French Senate are interesting[3]. In the reply from the Ministry of the Interior, Internal Security and Local Freedoms published on 16 January 2003, it is stated that local authorities may grant long-term leases (*i.e.*, "*bail emhythéotique*") on their private property on the basis of Article L. 451-1 of the Rural Code and Articles L. 1311-2 et seq. of the General Code of Local Authorities.

The choice of whether to use such lease contracts, depending on whether they fall under the provisions of the first or the second code, depends on the purpose of the lease itself. Thus, where the lease is concluded for the performance of a public service task or an operation of general interest falling within the competence of the local authority, it can only be a long-term administrative lease granted under the General Code of Local Authorities. Indeed, the High Assembly (EC 6 May 1985, Association Eurolat - Crédit foncier de France) has held that, in such a case, the land which is the subject of the lease, although initially belonging to the private property, is intended, given its future use, to enter the public property and cannot therefore be the subject of an emphyteutic lease contract, known as a general lease, as defined in Article L. 451-1 of the Rural Code. However, Article L. 1311-2 of the General Code of Local Authorities lays down a number of conditions, relating in particular to the status of the lessor and that of the lessee: the lessor may only be a local authority, while the lessee exclusively must be a private person, thus excluding a municipality from being a lessee. On the other hand, the provisions of Article L. 451-1 of the Rural Code apply unconditionally where the land belongs to the private property of the municipality and is intended to remain so.

[1] La propriété superficiaire ou le droit de superficie – A. Bamdé & J. Bourdoiseau (aurelienbamde.com).
[2]https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070299/LEGISCTA000006134949/#LEGISCTA000006134949.
[3]https://www.senat.fr/questions/base/2002/qSEQ020801654.html.

9. Conclusions

Along with public property, the private property of the State and administrative-territorial units must also benefit from a legal protection regime.

The Romanian national legal regime does not, at this moment, provide sufficient precision and clarity with regard to the operation of the private property of the State and the administrative-territorial units. Concession or superficies are used in practice, but competitive award procedures are often not followed.

As of 2019, the Administrative Code has, at least in appearance, assimilated the private property with the public property and has limited the possibilities for the operation thereof. Concessions are allowed in the private property under the same conditions as for the public property. The superficies regulated by the Civil Code continue to be established on the private property of the State and administrative-territorial units, but without a clear and predictable legislative basis.

In a context of instability and unpredictability, caution is always preferable, but not at the cost of halting investment.

References

Baias, Fl.-A., Chelaru, E. and others. (2012). *The New Civil Code – Commented Articles* (*Noul Cod Civil - Comentariu pe articole),* 1st edition, reviewed, comment on art. 862. Bucharest: C.H. Beck.

Malaurie, Ph., & Aynès, L. (2013). *Droit civil. Les biens*, 5th ed. Defrenois.

Reboul-Maupin, N. (2008) *Droit des biens.* 2nd ed. Dalloz.

Sferdian, I. (2006). Discussions on the right of superficies (Discuţii referitoare la dreptul de superficie). *Dreptul,* 6.

Stoica, V. (2004). *Civil Law. Main Rights in Rem* (*Drept civil. Drepturile reale principale*), *Vol. I.* Humanitas.

Vedinaș, V. (2022). *Annotated Administrative Code* (*Codul Administrativ comentat*), *Vol. I.* Bucharest: Universul Juridic.

Voicu, M., & Popoacă, M. (2002). Brasov Court of Appeal, the Civil Division, decision No. 319/1995, Ownership and Other Rights in Rem. Case law treatise 1991-2002 (*Dreptul de proprietate şi alte drepturi reale. Tratat de jurisprudenţă 1991-2002*). Lumina Lex.

A.D. (2015, February 21). Major natural resources in Romania (*Cele mai importante resurse naturale din România*). Retrieved from: https://epochtimes-romania.com/news/cele-mai-importante-resurse-naturale-din-romania---230132.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

THE RELATIVE AND PERSONAL CHARACTER OF THE OBLIGATION

Dumitru VĂDUVA[1]

Abstract

Obligations represent one of the pillars of civil law, along with persons, family and assets.

Debt rights are, like real rights, subjective rights and therefore they are opposable erga omnes, a prerogative that consists in the right of the owner to protect his right in relation to any person. Their object and mode of exercise give them a specific regime, not the opposition, as claimed by some of the authors.

It is true that the effectiveness of this opposition and therefore of the protection of the two categories of rights is fundamentally different. However, this effectiveness is dictated by the possibility of publicity of these species of law. Only to the extent that the formalities provided by the law for the publicity of real rights are fulfilled, they are erga omnes opposable, for example, to movable goods, by their nature this requirement is fulfilled by exercising its possession in a public way. On the other hand, for real real estate rights, the lack of legal publicity formalities lacks the respective right of opposition. From here we deduce that opposability is not a specific element of real rights, because it is attached only by fulfilling the requirements of publicity.

By their nature, debt rights cannot be exercised through a public possession and this makes them lack an opposability close to that of real rights. Instead, there are some debt rights for which forms of advertising are organized: the National Registry of Real Estate Advertising is the legal advertising system for real estate mortgages, but also for trusts, secured claims, and mortgage bonds. For claims that benefit from a publicity system, the erga omnes opposition has the same effectiveness as that of real rights.

It is thus even better understood that the erga omnes opposability is specific to subjective rights as a characteristic necessary for their erga omnes protection, protection exercised through the actions attached to subjective rights: the claim action, the confessional action, the negation action, etc., as well as the prerogatives of prosecution and preferably, these being specific especially to accessory real rights, as opposed to an action for damages for the violation of a right of claim by a third party.

What differentiates the real right from the claim right is therefore not the erga omnes opposability but the object and the manner of their exercise. The first one is exercised directly by the holder on the physical asset object of the right (in rem), while the right of claim is exercised against a person, the value expected by the creditor is acquired indirectly through the activity of the debtor's person (ad rem personam). Hence the difference between the regime of the two categories of subjective rights: the first having as its object an asset over which the creditor directly exercises your prerogatives, on the other hand, in the case of the debt right, its exercise can only be carried out through the debtor, hence the relative and personal character of this right, opposed to the real and direct right of real.

[1] **Lecturer PhD, Faculty of Economic Sciences and Law, University of Pitesti, Pitesti (Romania), email: dumitru_vaduva@yahoo.com.**

The opposability of a right is therefore not synonymous with the relative nature of the right to claim.

Key words: *Debt right; bond; relative and personal character of the obligation; opposability erga omnes; real right.*

1. Introduction

The relative and personal character of the obligation are complementary, being dictated by its essence: the legal link between two determined persons, creditor and debtor, by virtue of which the creditor has a power of coercion against the debtor. (Diaconescu, & Vasilescu, 2022, p. 297; Genoiu, 2022, p. 68; Boroi, & Anghelescu, 2021, p. 64; Bîrsan, 2020, p. 36; Vasilescu, 2017, p. 8; Pop, Popa, & Vidu, 2015, pp. 11-16; Chelaru, 2013, p. 26; Micescu, 2000, p. 94; Hamangiu, Rosetti-Bălănescu, & Băicoianu, 1996, p. 526), the latter guaranteeing the execution with his patrimony.

These characters are more evident if we look at the obligation from the creditor's perspective. The right of claim is the creditor's right over the debtor's activity, an intangible object, through which he acquires a tangible thing or a service. However, the creditor does not have a direct right to an asset of the debtor, but he has a right to the entire patrimony, which he can pursue if the debtor does not perform his duty to provide the promised thing or service. Hence the name given by the Romanians to personal law, *ius ad rem trans personam*. The creditor does not have a right over a thing, *jus in re*, but only over the debtor's patrimony, a legal universality.

The personal and relative character are all the more evident in the obligations which have a pronounced personal- character, the obligations *intuituu personae.*

2. The personal and relative character, imprints specific effects of the obligation

Being held personally and guaranteeing with his own patrimony, the debtor is held he, and only he, for the execution of the obligation (debt)[1]. That is why the person, the personality of the debtor is important in the matter of obligations because depending on his professional, moral qualities, etc., there is a greater or lesser risk of obtaining the execution of the debt, the solvency of the debtor being essential in this respect (Vlachide, 1994, p. 39, pp. 47-49).

[1] In current law, the personal character of the obligation no longer has the meaning of Romanian law, which, by this character of the obligation, meant that the debtor was responsible for the execution of the obligation personally.

In opposition, the person of the creditor is most often indifferent to the debtor, he being held to perform the debt to the creditor or to another person in the case of his substitution, but the reciprocal is not true.

Since the debt is of a personal nature, the passive side of the obligation cannot be assigned, being excluded from legal commerce, but it can be transmitted, as an element of the patrimony, together with the transmission of the patrimony. In contrast, the right to claim being an economic value, it is part of trade being assignable, it can be transferred as an element of the patrimony and seissable, it can be seized and forcibly sold, it is prescriptive.

3. The evolution of the personal and relative nature of the obligation: the tendency towards the objectification of the obligation, by considering it as a patrimonial value, at least from the perspective of the creditor

In ancient Roman law, the personal character of the obligation reflected the inalienable, non-transmissible and inalienable character of the debt as well as the creditor's prerogatives over the debtor, then the subjective right was not yet structured, so neither was the debt right (Vasilescu, 2017, p. 6).

3.1. Ever since classical Roman law, a first step was taken towards mitigating the personal character of the obligation and objectifying it, attaching to it the legal regime close to that of goods, making the transition from personal to patrimonial. In this sense, the Poetelia Papiria Law was essential, in the application of which enforcement was no longer done directly on the debtor's person but on his patrimony (Vlachide, 1994, vol. II, p. 11). For the same purpose, the Romans admitted that the obligations of de cujus, although personal, could be inherited. The compromise made by Romanian jurists was determined by economic needs, more precisely by the need for credit (Terré, Simler & Laquette, 2002, p. 9), and legally it was based on the fiction of the continuation of the person of the deceased by his successors.

This rule has been passed down through time until today. The new Civil Code enshrines it by regulating the universal transfer of debts of de cujus (art. 1114). Likewise, for legal entities, their debts are transferred in the event of their reorganization through division or merger (art. 235; art. 238 of the Civil Code and art. 240 of L. no. 31/1990).

3.2. Beginning with modern law, attempts were made to extend the inclusion in legal commerce and debt. Thus, the concept of the personal nature of the debt tended to objectify it.

The obligation, seen from the perspective of the debt, still remained a personal bond and only some rules to mitigate it can be considered a manifestation of the tendency to objectify it (b). Instead, starting with modern law, the conception of the personal nature of the claim, the active side of the obligation (b), was abandoned.

a. The objective nature of the claim. From the perspective of the creditor, the obligation is seen to be an asset rather than a personal bond because the unexecuted debt is a value in the creditor's accounting that can be assigned and through execution it becomes a concrete value in the hands of the creditor, even if the execution will be done on the debtor's patrimony. Consequently, the claim could be assigned without seeking the debtor's consent. The claim thus became a circulating asset. It is easy to observe the circulation of receivables materialized in securities. Instead, due to the personal nature of the debt, assignment of the obligation was not accepted.
b. Attempts to objectify the obligation, viewed from the perspective of its passive side. Since the interwar period in the legal systems of Europe there has been a tendency to objectify the legal link, French and German law being in the vanguard of this approach. This tendency had an echo in our doctrine as well. Then (Vlachide, 1994, vol. II, p. 12, p. 269), as today (Vasilescu, 2017, p. 4), it is increasingly argued that the obligation is a legal bond between two people, but it is also a bond between the patrimony (Vasilescu, 2017, p. 11) of the two parties, thus losing its personal character.

In German law, the transfer of debt is legally organized (Schuldubername *apud* Vlachide, 1994, vol. II, pp. 261, 269). On the other hand, in French law the assignment of the debt is not legally regulated, but in doctrine this subject is widely debated (Gaudement, 2004, p. 12).

The new Civil Code, however, made some concessions to this trend, making some innovations that can be considered to be timid steps towards the objectification of the obligation, as we will show.

In order to take the step towards including the debt in the civil circuit, we try to objectify it. Personal character of the debt is synonymous with the subjective character of the obligation and opposite to its objective character. The first character signifies the fact that the obligation is dependent on its source (the person of the debtor) and that therefore it cannot be transferred because its extinguishment can only be done by the personal performance of the debtor. In opposition, the objective character reveals the fact that the debt is a value in the patrimony of the parties of the obligation relationship (positive in that of the creditor and negative in that of the debtor) and consequently it can be transmitted like any asset.

The new Civil Code regulated several techniques to mitigate the personal nature of the obligation.

The assignment of the contract is an instrument by which the assignor transmits both his rights and his obligations (art. 1315-1320). Along with this, the new Civil Code took over the old rule of the assignment of debt as an instrument for the transmission with the private title of the personal right (the active side of the obligation relationship), like any patrimonial asset, without the consent of the debtor, thus abstracting the connection of this right with the person of the holder (art. 1566-1592).

However, the debt (the passive side of the obligation relationship) remained marked by the connection with the person of the debtor, preventing its transmission through the private title deed, the subjective conception of the obligation still prevailing today. The technique of taking over the debt by which the third person undertakes to execute the obligation is not a genuine act of transmission because the consent of the creditor must also exist (art.1599 letter a and art.1605 Civil Code). Also, the assumption of the debt by a third person through the commitment to the creditor (art. 1599 letter b Civil code) is a novation by changing the debtor, not a private transmission of the obligation. The original obligation report is extinguished and the new report takes its place. However, the usual transmission of an asset is done without extinguishing the initial relationship.

These techniques do not remove the personal character of the obligation but mitigate it, thus making it considered that the obligation is a link between the patrimony of the parties.

4. The consequence of the personal and relative character of the obligation. the knowledge of these characters, useful because they shed light on the legal force and specific effectiveness of the obligation, requires comparison with real law

4.1. Effectiveness and solidity of real law. The opposite of the debt right is the real right. The property right, the full real right, is a legal relationship that gives the owner full powers over the tangible thing, object of the right (art. 555 Civil Code) advantages that he exercises directly, without the intervention of another person, *ius in rem*.

At the same time, by definition, property is an absolute right, that is, it is opposable *erga omnes*, giving it a superior legal force because, by virtue of this character, property and real rights in general, are endowed with the prerogative of pursuing the good, the object of its right, against any person and the prerogative of preference in competition with other persons who have a right to the same asset.

4.2. The reduced effectiveness and fragility of personal law. According to the doctrine of the absolute character of the right of ownership or any real right, it is opposed to the relative character of the right of claim which confers legal force only in relation to the debtor and in case of enforced execution, due to its personal nature, it does not confer either the right to pursue or right of preference, his guarantee, called the joint guarantee of unsecured creditors, giving him a prerogative only over the assets existing in the debtor's patrimony on the date of notification to the enforcement bodies for the seizure of assets from the patrimony (Vlachide, 1994, vol. I, p. 48).

The two characters determine: a reduced effectiveness of the obligation, because it engages personally, only and only the debtor (A); and a fragility of the claim, which does not have the prerogative of pursuit and preference (B).

A. The personal and relative character of the debt gives a reduced effectiveness to the right of claim.

a. The execution of the debt, a personal act of the debtor, depends on his personality: diligence, good faith, solvency. In order to satisfy the right, the creditor must address the debtor, interposing himself between him and the expected service or the promised good. The creditor cannot become the owner of the expected good unless the debtor performs the performance (*ius ad rem trans personam*), for example, the service owed (the provision of a service by a doctor), or transfers the right and hands over the good.

Execution being a personal act of the debtor, the creditor cannot intervene directly, through a personal act, but only through the public force during the forced execution phase, after completing the formality of obtaining the execution form from the court. In this case, the execution can be carried out in kind or it can end up being obtained only by equivalent and at the same time there is the risk of non-execution due to the insolvency of the debtor.

The execution of the debt may therefore depend on the qualities of the debtor's personality.

Specific obligations are the provision of services, that is, the obligation to do or not to do. These, having a strong personal character, can in principle only be executed by the debtor.

The personal character is partially mitigated in the execution of the obligation to give movable property. This, having as its object the transfer of a real right, deviates from the personal character of the execution, the Civil Code enshrining in art.1273 and art. 1674 the principle of the solo consensus transfer of the property right or other real rights by virtue of which the transfer it is done by law, at the moment of the formation of the translational contract.

Consequently, this transfer does not depend on the debtor's personal performance. And yet, the full execution of the obligation to give depends on the debtor's activity, when the transfer of ownership is conditional or suspended until the performance of a performance by the debtor, mainly because the execution of the obligation to give also includes that of handing over and to preserve the property (art. 1483 Civil Code), both of which are obligations to do.

Thus, for example, in the case of the sale of generic goods, the transfer of ownership of these goods is done by law, but only after the individualization of the goods by counting, measuring, weighing.[1] Moreover, in the case of the

[1] Also, if the obligation to give has as its object the transfer of movable goods, the seller's refusal to execute an obligation to make, respectively to hand over the good, will make the legal execution of the obligation to give ineffective when the seller has alienated that asset to another person. In the case shown, between the seller and the buyer the transfer of ownership of the good has taken

transfer of real real estate rights, the personal character of the obligation is preserved, because the execution of the obligation to give is achieved only by the fulfillment of some personal services of the debtor: the obligation to register the transfer act and to cancel the transferor's right (art. 885, art. 1676- 1677 civil code). In addition, the transfer of real property right is not sufficient for the execution of the obligation to give. The obligation to hand over the property, the object of the transfer, is an obligation to do so that the full execution of the obligation depends on the personal characteristics of the debtor, more rigorous or not, good faith or not, more or less insolvent, diligent, And so on It is true that in this case the obligation to deliver the asset can be forcibly enforced, the executor having the authority to collect the asset from the debtor who stubbornly opposes the transfer of the alienated asset.

b. Compensation of the reduced effectiveness of the personal right with the legal establishment of a guarantee: the common pledge of unsecured creditors.

The performance of the obligation is a personal act. The creditor cannot interfere with the debtor's patrimony to obtain execution. However, he has the right to compel the debtor to pay.

In Romanian law, the debtor was the personal guarantor of the execution of the debt. If he did not fulfil the debt, the creditor could sell the debtor, kill him, turn him into a slave, etc.

Over time, the creditor lost the right over the debtor's person, being replaced by the right to request his deprivation of liberty in the so-called debtor's prison.

Under the conditions of the humanization of modern law, of respect for the human being, of the emergence of the concept of human rights, the debtor can no longer be personally compelled to execute the debt. To compensate for the reduced effectiveness of the personal right, the legislator grants the creditor a guarantee of the execution of the object of the obligation: by law, the debtor guarantees the execution of the debt with his entire patrimony (art. 2324 Civil Code), this being considered an emanation of the debtor's person. The right of joint guarantee of unsecured creditors over the debtor's patrimony is not a real right but a personal guarantee. It is a guarantee that replaces the right of life and death over the person of the debtor.

---

place by law, the seller remains debtor only for the execution of the obligation to make, to deliver the good. However, if the seller did not hand over the asset and alienated it to a third party, the buyer, even if he became the owner of the asset, will not be able to oppose this right to the third party because he, being the owner, will be preferred (art. 1275 and art. 937 paragraph 1 civil code). In conclusion, in the case shown, the effectiveness of the execution of the obligation to give depends on the personal performance of the debtor. This rule does not apply to the transfer of ownership of real estate, because the effectiveness of the transfer of this right is conditioned by its entry in the land register and not by the debtor's performance by handing over the alienated property.

The asset is responsible for the liability. It is what we call the right of joint guarantee, or general: "He who is personally liable is liable with all his movable and immovable property, present and future. They serve as the joint guarantee of his creditors." (art. 2324 civil code). It gives the creditor the right over all the present and future assets of the debtor, *i.e.* the right over his patrimony and not the right over the body of the debtor. Based on this right, the creditor can obtain the benefit owed in kind or its equivalent. The execution of the debt directly on the person of the debtor was replaced by the indirect execution on the person of the debtor, by seizing and selling the assets in his patrimony (Vlachide, 1994, vol. II, p. 11)[1]. In law, following the debtor personally or following his assets are synonymous expressions because the patrimony is conceived as an emanation of the person. The text of art. 2324 Civil Code translates this relationship.

Enforcement is done by the public authority, that is, a third party that has the legal power to use force against the will of the debtor. This guarantees objectivity as it protects the rights of both parties. He is not oppressive with the debtor doing nothing but to perform what he owed the creditor, and he is not partial to the creditor by allowing him to interfere beyond his prerogatives. He cannot demand anything and anyway even if the debtor owes him.

Under the common pledge, the unpaid creditor can request the public force to seize any asset of the debtor and sell it to be paid from the price obtained. His right does not have as its object a specific good, but all the goods that, at the time of the prosecution, belong to the debtor. All creditors of the same debtor jointly have the same security right over the latter's assets, joint security, each can be paid out of all the assets. A creditor could not be advantaged by reference to others unless his claim was accompanied by a real, conventional or legal guarantee: lien, mortgage, pledge, etc. according to these causes of preference.

B. The fragility of the personal right: the lack of the right of pursuit and the right of preference.

The refusal to execute the debt gives the creditor the right to execute on the object of the right, the person of the debtor, more precisely on one of his attributes, the patrimony.

By virtue of its personal and relative nature, the right of the enforcement creditor does not confer exclusivity over the patrimony or over an asset, nor priority in relation to other creditors with whom it enters competition, for this reason the force and legal effectiveness specific to the personal right being considered inferior to those of the real right.

The joint guarantee of unsecured creditors gives a fragile guarantee of execution, the creditor's chance to see his claim executed depends on the solvency of the debtor's estate. The joint pledge of unsecured creditors, as it was called in the old Civil Code, although it suggests the idea of a real guarantee (the pledge is

[1] In Roman law, this transition was made through the *Poetelia Papiria law*.

a real guarantee), confers prerogatives that are far from being real because it does not attach to it the right of follow-up nor the preferred one.

The creditor has no right of follow-up. If the debtor alienates one of his assets, the creditor loses this asset from his general pledge because he cannot pursue the alienated assets in the hands of the sub-acquirer. His claim will be executed only on the assets existing in the debtor's patrimony at the time of the sequestration.

The creditor has no right of preference. If the debtor contracts new debts, the number of creditors who have joint security rights over his patrimony will increase, and through this the old creditors will bear the competition of the new creditors, and if the debtor's patrimony will be insufficient to cover all the claims, each of them will realize their claim, in principle, proportional to its value (art. 2326 Civil Code).

On the other hand, unlike the insolvency system of professionals, in civil law there is no system of bankruptcy payment of creditors, so that, as a rule, those who first requested the enforcement of the debtor's patrimony will be paid.

In order to prevent situations in which the debtor in bad faith simulates an emptying of the patrimony or in which there is a risk of diminution due to the negligence or the intention of the debtor to make the creditor unable to execute his claim, knowing that he does not have the prerogative to pursue and that of preference, the law created for the creditor, in compensation, special means: the revocation (*Paulian*) action (art. 1562 Civil Code) and the oblique one (art. 1560 Civil Code).

5. Limitations of the opposition between the absolute nature of the real right and the relative nature of the obligation. the real obligations, legal category of border between the two subjective rights

The real right is a subjective right with immediate realization by the holder of the right exercising his prerogatives directly over the property (for his exercise no intervention of another person is necessary), and creating an opposition relationship with everyone. The personal right is a right with mediated realization by creating a relationship between the creditor and a determined person. The object of the personal right is not a thing but the determined person, bound to have a behaviour (to give or do something, a service), therefore the personal right has an incorporeal object.

Having a patrimonial character, real and personal rights are assignable, transmissible, cognizable. From the perspective of the debtor, the debt is non-transferable.

On the other hand, according to the doctrine, the real right differs from the right of claim by the absolute character of the first, manifested by its opposability erga omnes, opposed to the personal and relative character of the right of claim; and through the prerogatives of pursuit and preference, manifestations of the

absolute character of the real right, prerogatives that we therefore do not meet with the right of claim.

6. The opposition between the opposability of the real right and the relative effect of the obligation is not absolute because the debt rights are also opposable *erga omens* (a); some real rights produce relative effects (b); and the prerogative of pursuit and preference is not a manifestation of the absolute character of rights in rem, for they attach only to some of the rights in rem (c).

a) Debt rights are also enforceable *erga omnes* but, with some exceptions, their effectiveness is more limited.

Analyzing the nature of opposability that the majority doctrine attributes only to real rights, it is found that in reality all subjective rights are opposable *erga omnes*, because they all must be protected from the intervention of third parties.

Thus, there are claims expressly declared by law to be objectionable *erga omnes*, for example, the claim of the person who exercises a right of retention; or another claim, for which there is no form of publicity, that of the seller of a movable good for the price of the good sold to a natural person, to whom a privilege is also attached (art. 2339 Civil Code). At the same time, the law gives the lessee a right of follow-up, bringing him closer to the usufructuary. Thus, the lessee can pursue his right of claim against any current owner, provided that this right has been publicly announced through the various specific methods: registration in the land register or, as the case may be, through the formality of the definite date of the lease agreement, etc. (art. 1811 Civil Code) and against the third party who disturbs his possession, he has possessory action.

It is true, however, that the effectiveness of the protection conferred by the erga omnes opposability is different, this discrimination is dictated by the way the subjective rights are publicized, not by their nature: real or debt.

Thus, all the holders of subjective rights, who have made their right public, can claim opposability *erga omnes*, or at least relative to the persons to whom it was made known. The real right is opposable *erga omnes*, and therefore its protection is more effective in relation to that of the debt right because the real right by its nature is publicly owned, as it is in the case of movable assets, so that according to art. 935 civil code, the possessor of the movable asset is presumed to be the owner, and for immovables the publicity is ensured by the land register, the tabulation being now also constitutive of law. Non-compliance with these advertising rules lacks the real right to the protection conferred by the *erga omnes* opposability and therefore the protection against the third person. For example, the owner of a mortgage not registered in the land register could not claim opposition and therefore not invoke the right of follow-up or preference. In the same way, the acquired property right will be objectionable in case of successive sales only if it has been registered.

b). Real obligations, middle category between real rights and debt rights. On the border between the right of ownership, the right with a full character, and the personal right, essentially producing relative effects, are the real rights over the goods of another, the dismemberments of the right of ownership. They create a legal relationship between the holder of these dismemberments and the owner of the asset. Like obligations, they also exist as a pair between two people. Their specific connection is not personal, characteristic of the obligation, but real, that is why they give rise to real obligations, the counterpart of real rights, just as personal obligations are correlative to debt rights.

Based on these relative similarities, some debt rights can be close to some real rights in the category shown.

Thus, a situation close to the usufructuary, the holder of the right to use and harvest the fruits, is that of the lessee of a building. Like the first, the latter has the use of the thing, but its extent is conferred by the lessor, so his right of use is a personal and not a real right, so the prerogatives of the right of use are limited to those conferred to him by the contract of lessor and not by law, as in the case, for example, of usufructuary use resulting from a legal act.

Holding a debt right, the use of the lessee can be very close to that of the usufructuary or it can be extremely limited. The use granted to the usufructuary can never be restricted because it is established by law not by a person, even if the source of his right could be a legal act, that is why we say that the right shown is a real right and not personal.

At the same time, the law gives the lessee a right of follow-up, bringing him even closer to the usufructuary. Thus, the lessee can pursue his right of claim against any current owner, under the same condition that this right has been publicly announced through the various specific methods: registration in the land register or, as the case may be, through the formality of the definite date of the lease contract, etc. (art. 1811 civil code).

7. In Conclusion, the right to claim, the active side of the obligation relationship, a subjective right like the right to claim, is by definition a personal and relative right, characteristics that give it a lower guarantee of obtaining its execution, being dependent on the solvency of the debtor, thereby distinguishing itself as a principle from real law.

The relative character of the right of claim must not, however, be opposed to the *erga omnes* opposable character of the real right. All rights *in rem* are opposable *erga omnes*, not just rights *in rem*. Unlike the debt rights, the real ones are by their specific nature publicly exercised, either by registration in the land register, in the case of immovable assets, or by their possession, in the case of movables, this being the condition for invoking the opposability of the rights shown. Instead, the claim rights are equally opposable for all those cases in which a form of public information of their existence is ensured, the law creating specific forms of publicity for certain categories of claim rights.

The right to claim is therefore not opposable *erga omnes* not because it has a personal character but because by its very nature its publicity cannot be organized. For the cases in which it can be organized, the right of claim is *erga omnes* opposable.

References

Bârsan, C. (2020). *Drept civil. Drepturile reale principale*. Hamangiu.

Boroi, G., & Anghelescu, C.A. (2021). *Curs de drept civil. Partea general*. Hamangiu.

Chelaru, E. (2013). *Drept civil. Drepturile reale principale*. Hamangiu.

Diaconescu, Ș., & Vasilescu, P. (2022). *Introducere în dreptul civil*. Hamangiu.

Gaudement, E. (2004). *Théorie générale des obligations*. Dalloz .

Genoiu, I. (2022). *Drept civil. Teoria Generală. Persoanele*. C.H. Beck.

Hamangiu, C., Rosetti-Bălănescu, I., & Băicoianu, A. (1996). *Tratat de drept civil roman*. All.

Micescu, I. (2000). *Curs de drept civil*. All Beck, Restitutio.

Pop, L., Popa, I.F., & Vidu, S.I. (2015). *Curs de drept civil. Obligațiile*. Universul Juridic.

Terré, F., Simler, P., & Laquette, Y. (2002). *Droit civil, Les obligations*. 8e edition. Dalloz.

Vasilescu, P. (2017). *Drept civil. Obligații*. Hamangiu.

Vlachide, P. C. (1994). *Repetiția principiilor de drept civil*. vol. I and II. Europa Nova.

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

THE CONTRACT AND CONVENTION

Dumitru VĂDUVA[1]
Amelia GHEOCULESCU[2]

Abstract

The contract is the most important type of legal act, the latter being the closest type of all types of legal manifestations with the aim of creating legal effects.

The new Civil Code expressly regulates the unilateral legal act and the contract as species of the legal act. Apart from these, the new Civil Code also refers to other types of legal acts creating legal effects, conventions and plurilateral contracts, without however regulating their own legal regime, but organizing some of the types of legal operations that it defines as conventions. Leaving aside the latter, which the legislator of the mentioned normative act only mentions in one context, that of nullities, the notion of convention is used in several times either when he wants to reveal any kind of agreement of wills generating legal effects (art. 557 paragraph 1 Civil Code), or when organizing certain types of legal operations, such as the transfer or modification of some of the legal relationships. It is thus understood that the new Civil Code preserves the distinction inherited from Roman law between convention and contract, in which the former was the proximate type of legal agreements born through agreements of will, having as its object any other legal operation apart from the birth of obligations, effect what would be proper to the contract, the latter being the most important type of convention.

Such a conclusion is however contradicted by the definition given by the new Civil Code of the contract which includes the operations of birth, modification and extinguishment of legal relations. However, this definition does not make any reference to the transfer of real rights, nor to the birth of legal entities.

Key words. *Contract; convention; legal act; legal effects; legal report.*

1. Introduction

The civil code left the division of sources inherited from Roman law: contracts, quasi-contracts, delicts and quasi-delicts; adopting a regulatory technique that allows us to understand that these sources are grouped into legal acts (the contract and the unilateral legal act) and legal facts (legitimate and illicit legal facts - civil liability). The break with the old texts was thus avoided, each of them being extensively regulated, almost like a doctrinal work. By comparison, in

[1] **Lecturer PhD, Faculty of Law and Economic Sciences, University of Pitesti, Pitesti (Romania), email: dumitru_vaduva@yahoo.com.**
[2] **Lecturer PhD, Faculty of Law and Economic Sciences, University of Pitesti, Pitesti (Romania), email: singh.amelia@yahoo.com. ORCID: 0000-0001-7179-2875.**

the old Civil Code crimes were regulated in 5 articles, currently they are organized in 49 articles.

The reason for this division is the destination of these two categories of sources: legal facts are legal means by which the protection of patrimony is achieved; legal documents, especially the contract, are intended to be used to set the elements of the heritage in motion, especially through economic exchanges.

The contract, the most important type of legal act, was defined in Civil Code 2009 by highlighting the essential elements as well as by listing its effects. By comparison with the definition from Roman law, transmitted to modern law, the effects included in the current legal definition of the contract also include those that, by tradition, were included in the definition of the convention, the proximate type of contract.

As the very title of Book V, "The Sources of Obligations" implies, the contract is intended to give rise to obligations. But, from the legal definition of the contract, it follows that, in addition to this effect, it is also intended to modify and extinguish already existing obligations. These latter effects are, in the classical conception, specific to the gender category of the contract, the convention. Considering the legal definition of the contract, which also includes the effects of the convention, it follows that in the eyes of the legislator, the notion of convention is absorbed by that of the contract.

However, the conclusion shown is contradicted by the specific legal figures of modification or transfer of obligations (claims), traditionally included in the notion of convention. In their legal definition, the classical concept is maintained according to which they are conventions.

In the following we will try to clarify these legislative inconsistencies: are they a simple terminological omission or not?

2. Definition of legal act. Unity and diversity

2.1. Manifestations of people's will with the aim of producing legal consequences are called legal acts.

2.2. Leaving aside the legal documents belonging to other branches of law, for example, administrative law or procedural law, those specific to civil law are subdivided into several species. According to the criterion of the number of people who express their will at the conclusion of legal acts, they can be: a) unilateral legal acts, b) conventions, c) collective (or plurilateral) legal acts.

a. The unilateral legal act engages or creates, modifies or extinguishes subjective rights through the manifestation of its singular will (art. 1324 n. Civil Code). For example, the will, the most important unilateral legal act.

b. The convention is the agreement of will between two or more persons with the aim of producing any legal effect (Albu, 1994, p. 8): the establishment of real rights, the transformation, transfer or extinguishment of subjective rights. The most important convention is the contract.

Apart from the specific rules that identify them within the genre, the unilateral legal act and the convention, species of the legal act, have common formation rules.

d. **The collective legal act** is a type of contract concluded between several persons who are in identical legal situations, for example, the association contract, the decision of co-divisions regarding the assets under division, etc.

3. The theory of the contract, not that of the legal act

The new Civil Code continues the tradition of the old Civil Code to regulate the general theory of the contract and not the legal act as, for example, in German law[1].

The legislator reserves to it the greatest importance in relation to all other sources of obligations organizing in detail the conditions of formation and the general effects of the contract.

This regulatory option is dictated by practical reasons. Almost the majority of legal acts concluded by legal entities are contracts. Consequently, by regulating the theory of the contract, the most important part of the practical applications of legal acts is legally organized. The other categories of legal acts are regulated by their organization as particular applications in relation to contract law. For example, for the unilateral legal act it is specified "Unless the law provides otherwise, the legal provisions regarding contracts are applied accordingly to unilateral acts" (art. 1325 Civil Code). The same concept is applicable to collective agreements. Accordingly, for all species of legal acts other than contract, the general theory of contract is the common law.

Regarding the unilateral legal act, regulated for the first time in the Civil Code 2009, the need to organize it as a legal category in itself was determined by its recognition as a source of obligations. Thus, in addition to some unilateral legal acts, already organized in the old Civil Code and taken over in the current one, the effect of which was: the establishment, modification or transfer of rights, such as the acceptance of inheritance, the renunciation of the right, the will, etc., (art. 1326 Civil Code) the novelty brought by the current regulation is the consecration of the binding effect of unilateral commitments as sources of obligations (art. 1327-1329 Civil Code). This latter category of unilateral legal acts led the legislator to regulate the theory of unilateral legal acts.

Among the types of unilateral legal acts, other than the unilateral commitment, only the will has been organized an extensive regulation, according

[1] The German Civil Code regulated as elements common to all legal acts: a) the capacity to exercise, b) the declaration of will (substantial and formal conditions, the penalty for their violation), c) acceptance of the offer as a manifestation of the will for the formation of the contract, d) the term and condition, e) representation and power of attorney, f) ratification (§104-§186).

to its wide application in practice, this character being joined by that of gratuity, which gives it its own regime in relation to that of the contract.

So, among legal documents, the contract is its most important category.

§1. The contract, source of obligations, and the convention its close kind

4. Etymology

The word contract comes from the Latin contractus, which in turn derives from the word contrahere, which means reunion, conclusion.

The Romans also used the word convention, which comes from the Latin conventio, itself derived from convention which means to come together or to agree.

The word contract, however, is more technical. Today, concluding a contract or convention has the same general meaning: agreeing on some things.

5. The notion of contract

5.1. From named contract to contract theory

The notion of contract evolved from three named and formal contracts, from Roman law, the obligation of which was based on the fulfillment of the formalities necessary for their conclusion, to the regulation towards the end of the republic of "informal" contracts, the *re* and *consensual* contracts (Dogaru, Popa, Dănișor, & Cercel, 2008, p. 424-425). It is about the unnamed contracts: nexum; verbis and litteris; and the so-called consensual contracts: sale-purchase, lease, mandate and deposit), in order to reach the crystallization during the Middle Ages and up to the Enlightenment era of a "general theory of the contract" based on the voluntarist conception, reaching a coherent exposition in the works of the great French jurists Domat and Pothier in the 17th-18th century (Ghestin, 1990, 27-chaier-Chronique) and taken over at the beginning of the century. XIX by the drafting commission of the French Civil Code and through it by most of the modern civil codes in Europe.

According to this model, the "general theory of the contract", in short "the contract", was also taken over in the Civil Code from 1864 and, with some additions, in the 2009 Civil Code. The contract, as it is organized, is a kind of mold, or a model, which must be followed in the formation and conclusion of concrete contracts, the individual contracts, these being the ones that produce binding legal effects and not the theoretical model.

The "contract" is therefore the legal instrument made available by the new Civil Code to be used in the formation of countless concrete and binding contracts under the condition that the parties show their will to commit themselves legally (Șerban-Barbu, 2016, pp. 218-225).

5.2. Identification of the contract

To define the contract, we must delimit it within the general category, the legal fact in general, in which (A) is included. Within this general framework, the proximate type of volitional acts (B) is distinguished by its essential specificity, shared with that of the legal act. Finally, abstracting from the accidental or specific elements of the nature of one type of contract or another, we must detach the specific elements of the contract that individualize it within the proximate genre of agreements of will (C).

A. The contract and the legal fact in general. With the exception of natural events, all the sources of obligations are human actions, to which the law gives this legal consequence, called juridical facts *lato sensu*. Among the human actions that the law has selected as a source of obligations, the voluntary ones are distinguished, i.e. committed with the intention of producing legal effects, being called legal acts, in opposition to involuntary legal acts, the actual legal acts, in which the human action is carried out, with intention or not, but without having the purpose of producing legal consequences.

B. The contract and legal act. Within the framework of legal acts, similar to voluntary acts with the intention of producing legal consequences, the convention is included, in turn similar to the contract.

Although situated at the basic level of this inclusive relationship, the contract is the most important convention and legal act. This is the reason why the law does not regulate the theory of the legal act, nor that of the convention, but the theory of the contract.

Within the legal act category, the convention and its species, the contract, are distinguished by the particularities of the will. The will is a specific element of the legal act, but for the contract and the convention, as the name implies, the will is an agreement of wills, an agreement, i.e. a manifestation of the will of two or more people with the aim of producing legal effects.

C. Contract and Convention. Unlike the first two distinctions, easy to make, the latter is more difficult because, on the one hand, the contract, as defined in the new Civil Code (art.1166), could be considered synonymous with the convention, on the other hand, the same code uses the convention as an instrument intended to be used for intervention on pre-existing obligations, suggesting that these notions are not a contract and that they differ from it through a specific object and effect, thus contradicting the definition of the contract and showing synonyms.

Moreover, the new Civil Code uses the notion of contract also with the general meaning of the same kind.

The difficulty of distinguishing the two notions used by the new Civil Code is fueled by the fact that Roman law delimits these notions, a theory taken over, according to some of the authors, by the French Civil Code and then by the Romanian one from 1864. Finally, in the new Civil Code the definition given to the contract by the old Civil Code was taken over and with it the dispute of our

doctrine regarding the existence or not (Pop, Popa, & Vidu, 2015, p. 55; Adam, 2011, p.6) of the distinction between the two terms.

(i). Traditionally, the doctrine defines the convention as the agreement of wills to produce legal effects (Albu, 1994, p. 8), i.e. to transmit, transfer, or extinguish obligations, as well as to transfer or constitute real rights. Instead, the contract has been defined as a species of convention, the most important, but which has a special purpose, to give rise to obligations.

(ii). In our modern law, the old Civil Code ignored the above definition of the contract, handed down from the Romans, and defined the contract (art.942) in a manner close to the traditional definition of the convention, without defining the latter. The doctrine from the old Civil Code noted this overlap of the two notions, reinforced by the names given in book III, "Title III About contracts or conventions": "the object of the conventions", "the cause of the conventions", "the effects of the conventions", etc.

It is the reason why a large part of the doctrine from the period of the Civil Code 1864 considered these notions to be synonymous (Stătescu, & Bîrsan, 1993, p. 15).

Other authors considered that the distinction between the two terms taken over by the French Civil Code from Romanian law also implicitly exists in the Romanian Civil Code from 1864 (Popescu, & Anca, 1986, p.21). *The contract* was considered by the doctrine shown to be the most important type of *convention* (Albu, 1994, p.8), which has as its object the creation of *obligations* and the creation of *real rights* (Plastara, 1925, p. 45); and that, along with the contract, there is also a group of "other conventions" whose object is the transmission, transformation or extinguishment of pre-existing obligations.

In the same period, other authors considered that, although synonymous, in an exact legal language the contract designates the agreement of will that aims to give birth to a relationship of obligation, while the convention is a general notion in relation to the first and is used to designate agreements of will that aim to modify, transmit or extinguish relationships of obligations already born (Cantacuzino, 1998, p. 393; Rosetti- Bălănescu, & Băicoianu, p. 12.).

(iii). The new Civil Code, as shown above, is equivocal regarding the distinction between the two terms as will be shown below when defining the contract.

6. Definition of the contract in the new Civil Code

The contract is the agreement of wills between two or more persons with the intention of establishing, modifying, or extinguishing a legal relationship (art. 1166). This text takes the old definition from art. 942 of the Civil Code of 1864 (Adam, 2011, p. 2)[1], to which it also added the operation of "modification" of the legal relationship.

[1] Similar definition in art.1321 of the Italian Civil Code of 1942.

But nothing about the transmission and transformation of the claim (obligations in the global sense) by contract; nor about the constitution and transmission of real rights.

7. Definition of contract in doctrine

Some authors (Pop, Popa, & Vidu, 2015, p. 46.) define the contract as the agreement of will between two or more people with the intention of giving birth, modifying, transforming, displacing or extinguishing legal relations, effects that could not otherwise occur.

An author (Stănciulescu, 2012, p. 22) defined the contract as an understanding (agreement of will) between two or more persons, concluded under the terms of the law, which produces legal effects (means) in order to achieve the interests (goals) of the parties.

8. In doctrine, contract and convention are considered either synonymous or distinct notions

Being legal acts, both notions are agreements of will with the aim of producing legal effects, but by tradition their object was different.

In Roman law, the convention was considered to be the substrate of any contract, because the first signified the existence of the agreement of wills with the aim of producing legal consequences, while contractum then contractus, signified a certain legal relationship, generated by any act (solemn, real, consensual), gesture or fact, from which obligations were born (Chevreau, Mausen, & Bauglé, 2007, p.16). The convention has become the essential element in the constitution of any contract, formal, real or consensual. Its lack entails the sanction of nullity. And yet, if any contract implied a convention, the reverse relationship was not true. For the agreements, considered only bare pacts, there were no actions, being devoid of legal effectiveness. The contract was, until the end of the first century of our era, only the legal form in which the agreement of wills, the convention, was fixed. He was then close to the current notion of a legal relationship of obligation.

Beginning with the 2nd century AD. when the notion of contract that we know even now was fixed, it was thus defined as the agreement made in compliance with the conditions and forms required by civil law, with the aim of giving rise to obligations. For the Romans, the contract was the legal instrument intended to give rise to obligations. The modification, transformation, transmission, or extinguishing of the effects of the obligations, through the agreement of will, were carried out through other conventions, for example, the remission of debt, an agreement of wills by which the obligation born through the contract is put to an end, primarily the agreement of the creditor to forgive the debt of the debtor (*acceptilatio*, a verbal agreement that took a precise form).

Although there is no essential difference between the two notions, both being agreements of will with the aim of producing legal effects, it is essential to establish whether the new Civil Code preserves the traditional distinction between these notions, which was reduced only to the relation of inclusion between them: the contract was a convention, the most important one, having as its object the creation of obligations, and the operations on pre-existing obligations, are "other types of conventions", with special names, as was shown; on the contrary, considering the definition of the contract, we must forget this distinction.

§2. The legal definition of contract imposes the idea that the notion of convention handed down from the Romans was replaced by that of contract

The contract as defined by the new Civil Code has a very extensive object overlapping with that given by tradition to the convention and that therefore the latter has lost its usefulness since it was legally substituted by the notion of contract.

That is why the authors claim that the term convention is synonymous with contract (Pop, Popa, & Vidu, 2015, p. 55; Adam, 2011, p.6).

It can be deduced from the definition given by art. 1166 of the Civil Code that therefore there is no more proximate gender and specific difference, all agreements of will are only contracts, the convention being also a contract and therefore all agreements of will, with the aim of producing a legal effect, are contracts. So there would be contracts and assignment, conventional subrogation, debt forgiveness, etc. although in the Civil Code 2009 they are all expressly referred to as conventions.

9. Other texts from the 2009 Civil Code that contradict the definition given by it to the contract

Some texts of the 2009 Civil Code suggest that the old distinction between the notion of contract and convention is being applied, as some authors also claim.

Given that the law itself uses the notion of agreement: either in a very general sense, for example, art.557 Civil Code refers to the agreement as a way of acquiring property, to designate the proximate type of voluntary agreements that aim to produce legal effects; or with a restricted meaning only to the contract, it is necessary to decide whether the Civil Code 2009 distinguishes between the two notions or uses them indistinctly with the meaning of the contract, as seems to result from the definition given to the contract. For this we will analyze whether the new Civil Code is consistent with the very global conception of the contract, as it results from the enumeration of the object (operations) (a) in its definition; or if, along with the contract, it also recognizes the convention as a notion in itself (b).

a. Traditionally, the contract is the most important type of convention whose object is the creation of obligations, also mentioned in art. 1166 n. Civil Code.

In the legal definition of the contract, it is added, in addition, that the contract modifies or extinguishes obligations (Tudorașcu, 2019). However, this object has, according to the rules of the obligations regime, "other conventions" (assignment, subrogation, novation, debt remission, etc.).

Nothing, however, in the definition of the contract, about the establishment and transmission of real rights.

b. The new Civil Code also uses the notion of convention. In the absence of a definition, we recall that according to tradition, the convention has two meanings:

- On the one hand, *the global meaning* of agreement intended for any legal effect (birth, transmission, transformation and extinguishment of obligations), meaning also used by the 2009 Civil Code, for example, in art. 11 (similar to art. 5 Civil Code 1864) according to which, no convention can be contrary to public order;
- and on the other hand, with the meaning of "other types of agreements" having as object: transmission of the claim, transformation and extinguishment of pre-existing obligations. And these "other types of agreements" (other than the contract) are used by the Civil Code 2009 as instruments for the assignment of claims and for the extinguishment of the obligation. According to art. 1566 "Debt assignment is the convention (…)". Also, subrogation is considered by the 2009 Civil Code to be a convention (art. 1593 paragraph 2). Regarding debt forgiveness, an operation that has traditionally been considered a convention, the legislator of the 2009 Civil Code avoids using one or the other of the two notions.

Under these conditions, we must consider that the law respects tradition, otherwise it would have expressly contradicted it. Instead for novation, traditionally a convention, the new Civil Code occasionally uses the term contract.

Also according to art. 557 n. Civil Code, "The property right can be acquired, under the terms of the law, by convention, (...)". The legislator used the term convention here to express the next kind: any agreement of wills. This includes, on the one hand, the agreements establishing accessory real rights, qualified by some authors as conventions, and on the other hand, the transfer of real rights through contracts.

The transfer of real rights are the object of the contract, as it follows from the rules of sale (art. 1650-1762). That is why, in the contract theory, the transfer or creation of real rights are regulated by the effects of the contract (art. 1273 n. Civil Code).

10. For the rigor of the specialized legal language it is useful to keep the traditional distinction between the notions of contract and convention

The legislator himself felt the need to use the notion of convention, on the one hand, in the sense of a similar type of contract and "other conventions", where

the agreement of will could have any object (legal operation), such as art.11 of the Civil Code, and, on the other hand, in the sense of "other conventions" (other than the contract), that is, types of conventions whose object is pre-existing obligations (modification or termination of legal relationships).

For this argument, we consider that in a rigorous language it is useful to keep the distinction between the contract, the most important convention, which has as its object the creation of obligations, and the other conventions, which have as its object the conventional transmission and extinguishment of pre-existing obligation relationships, both categories being parts of the gen proxim convention. In the same sense, we must note that relative to the operation of modifying a pre-existing contractual relationship, the phrase "additional act to the contract" entered the legal language, as the agreement by which a contract is modified. The legal text expressly provides that a contract is modified by the agreement of wills (art. 1270 par. 2 Civil Code), without specifying that this agreement would be a contract or convention. The same text also regulates the operation of extinguishing a contractual obligation, using the same expression of agreement of wills. In the absence of a specification to the contrary, the "agreement of wills" has, according to the traditional conception, the meaning of the convention by which the contractual obligations are modified or extinguished (Pascu&Singh, 2017, p. 800).

Also, the contract may have as its object the transmission or establishment of real rights (Singh, & Pascu, 2016, pp. 73-81). This operation is not listed in the definition of the contract, but is regulated in the general effects of the contract (art. 1273-1275 Civil Code).

11. **In conclusion**, the definition of the contract has a content of maximum generality absorbing the notion of convention. Consequently, according to the Civil Code 2009, all voluntary agreements are contracts, regardless of whether they create or modify, transform or extinguish an obligation. On the other hand, noting that the legislator expressly uses the term convention for those legal operations which in the classical conception were defined as "other conventions", we consider that in a rigorous language, the distinction must be made between the contract, the source of obligations, as the most important type of convention, and the other conventions, as agreements of will by which pre-existing obligations are modified, transformed or extinguished. Keeping in mind this distinction of language, the 2009 Civil Code also verifies the inclusion relationship existing in Romanian law: any contract is a convention, but not all conventions are contracts.

References

Albu, I. (1994). *Drept civil*. Cluj-Napoca: Dacia.
Adam, I. (2011). *Dreptul Civil. Obligațiile. Contractul*. Bucharest: C.H. Beck.
Cantacuzino, Matei B. (1998). *Elementele dreptului civil*. All Education.

Dogaru, Ion, Popa, Nicolae, Dănișor, Dan Claudiu, & Cercel, Sevastian. (2008). *Bazele dreptului civil, vol. I. Teoria general*. Bucharest: C.H. Beck.

Ghestin, Jacques. (1990). *La notion de contrat*. Sirey: Recuiel Dalloz, 27-chaier-Chronique.

Pascu, Livia, & Singh, Amelia. (2017). The imprevision - exception to the principle of binding force of the legal act. In *Volum of The international conference "European Union's History, Culture and Citizenship", X edition.* Pitesti.

Pop, Liviu, Popa, Ionuț-Florin, & Vidu, Stelian Ioan. (2015). *Curs de Drept civil. Obligațiile*. Bucharest: Universul Juridic.

Plastara, George. (1925). *Curs de drept civil român, vol. IV*. Bucharest: Cartea românească.

Popescu, Tudor Radu, & Anca, Petre. (1986). *Teoria generală a obligațiilor*. Bucharest: Științifică.

Rosetti- Bălănescu, Ioan, & Băicoianu, Alexandru. (1943). *Drept civil roman*. Bucharest: Cartea Românească.

Singh, A., & Pascu, L. (2016). The nonperformance exception of the contract - specific effects of the sinalagmatic contracts. *JLAS no. 1*. 73-81.

Stănciulescu, Liviu. (2012). *Curs de drept civil. Contracte*. Bucharest: Hamangiu.

Stătescu, Constantin, & Bîrsan, Corneliu. (2009). *Drept civil. Teoria generală a obligațiilor, Ediția a IX-a, revizuită și adăugită*. Bucharest.

Șerban-Barbu, Sorina. (2016). EU regulations on unfair contract terms. In *Volum of International Conference „European Union`s History, Culture and Citizenship"*. CH Beck, 218-225.

Tudorașcu, Miruna. (2019). Dreptul contractelor speciale. Privire comparativa cu dreptul spaniol. *Journal of Law Faculty of Oradea no. 2.*

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

THE NEGATIVE EFFECTS OF TRANSPORT ON THE ENVIRONMENT AND MEASURES AGAINST THEM

Amelia GHEOCULESCU[1]
Andreea DRĂGHICI[2]

Abstract

The increase in the frequency of transport, in addition to the positive effects in the market economy, brings with it negative effects on the environment and implicitly on human life. The general objective of the states of the European Union, as well as of the other states, is to limit the polluting impact of the means of transport, imposing a series of measures in this sense by adopting some normative acts.

Key words: *polluation by transports, limits, measures.*

1. Introduction

The transports represent an important activity in the current world economy. Along with the development of the society and the increase of the population, the transports have intensified, being the need for the development of the infrastructure so that the flow of transports to be one that does not harm the needs of the citizens.

Each transport sector had a positive evolution, but after the Industrial Revolution, starting from the 19th century, when the transition was made from means that involved human and animal traction force (in the case of land transport) and wind force (in the case of naval transports from the long period of sailing), the transports led to a proportional increase in environmental pollution. The invention of the steam engine and then the internal combustion engine, together with the use of electricity and its sources of production developed, in a way unprecedented on a planetary level, the networks and transport routes that today litter the planet and led at a significant level of influence in environmental pollution.

[1] **Ph.D., Lecturer, Faculty of Economic Sciences and Law, University of Pitești (Romania), email: singh.amelia@yahoo.com. ORCID: 0000-0001-7179-2875.**
[2] **Ph.D., Associate Professor, Faculty of Economic Sciences and Law, University of Pitești (Romania), email: andidraghici@yahoo.com.**

Considering these, taking also into account the fact that it is desired to protect the environment, an aspect that emerges from the multitude of normative acts adopted in the field, a series of measures were taken in the field of transport and the production of eco means of transport to achieve this objective imposed internationally.

2. The negative effects of transport on the environment

In increasing the degree of air pollution, a special weight they have human activities, the burning of fossil fuels (oil, coal, natural gas), activities for the maintenance of industrial processes and, in particular, motor vehicles (Bejan, Rusu, & Balan, 2009, pp. 102-106).

To counteract this phenomenon, among the most special measures taken worldwide, in December 1977, in Kyoto in Japan, an international agreement on the environment - KP was concluded, the protocol being negotiated by 160 countries.

After the Marrakesh Conference (November 2001), the seventh conference of the signatory parties, 40 countries ratified the Kyoto Protocol. In October 2004, Russia, responsible for 17.4% of greenhouse gas emissions, ratified the agreement, which led to the fulfillment of the quorum required for the entry into force of the protocol.

In November 2004, there were 127 participating countries including Canada, China, India, Japan, New Zealand, Russia, the 25 members of the European Union together with Romania and Bulgaria, as well as the Republic of Moldova. Among the countries that have not ratified this protocol are the United States and Australia, responsible for more than 40% of total greenhouse gas emissions.

The environment is attacked intensively and diversified by transport in general, and by road transport in particular. Large quantities of materials (many being energy-intensive) are used in the construction of road infrastructure. The ecological impact is manifested both due to the consumption of energy and natural resources, as well as the noise produced, air, water and soil pollution (Duminică, Iancu, 2021). In addition to these polluting factors, road transport also leads to traffic congestion and numerous accidents, which negatively affect the standard of living of citizens. Car transport removes up to 50% of the amount of hydrocarbons into the atmosphere, being considered the main polluter of urban areas with organic substances. It is considered that at the level of the European Union, around 28% of greenhouse gas emissions are caused by transport, 84% of which come from road transport. More than 10% of carbon dioxide emissions in the EU come from road traffic in urban areas (Bejan, Rusu, &Balan, 2009, p. 105).

The European Environment Agency has published a report that incriminates road transport (including cars) as the most important polluter of compounds harmful to health of all economic branches. The report includes

measurements made by the 27 member states between 1990 and 2013 and notes "significant improvements" in emissions from cars, trucks, buses and coaches. However, as a share of total emissions, road transport remained at the top of the ranking in most categories of compounds harmful to health. Thus, motor vehicles are the dominant source of pollution with sulfur oxides, carbon monoxide and volatile organic compounds (other than methane). In order to reduce pollution, AEM pursues the development of a decision support system for increasing the resilience of transportation infrastructure based on combined use of terrestrial and airborne sensors and advanced modeling tools – PANOPTIS[1] (Șerban-Barbu, 2016).

The European Union - conductor and author in environmental policy (at national, regional and international level), oriented towards sustainable development (Șerban-Barbu, 2008), has established a series of regulations on vehicle emissions since 1991: Euro 1 standards - Directive 91/441/EEC or 93/59/EEC; Euro 2 standards - Directive 94/12/EC or 96/69/EC; Euro 3/4 standards (2000/2005) - Directive 98/69/EC as amended in 2002/80/EC (Euro 4 standard in force since January 1, 2005); Euro 5 standards (2009/2014) – regulated in December 2005; the Euro 6 standards – the proposal of the limits for Euro 6 published in December 2006 in the European Parliament (T6-0561/2006), which entered into force in 2014. There were a number of taxes imposed at the domestic level for second-hand vehicles, precisely to encourage the purchase of new cars, which lead to less pollution (Iancu, & Drăghici, 2016, pp.7-18).

The overall EU target, set out in White Paper on Transport from 2011[2], is to reduce greenhouse gas emissions from transport (including international aviation but excluding international transport) to 60% below 1990 levels by 2050. This includes the 2030 Target of reducing greenhouse gas emissions from transport by 20% compared to 2008 levels. This is equivalent to an increase of +8% from 1990 levels. Similarly, emissions from international transport will be reduced by 40% from 2005 levels by 2050. These overall transport targets are monitored annually and are in line with economy-wide targets of a 20% reduction in total greenhouse gas emissions by in 2020 compared to 1990, and a 40% reduction by 2030. Other transport policies supporting the achievement of these targets, 2 emissions targets for new cars and vans, are also monitored in the Transport Reporting Mechanism and Environment (TERM). In support of these efforts, representatives of the Romanian Car Registry carried out traffic checks of road vehicles, to check their polluting emissions and their technical condition.

Aviation activities, but also airports themselves, exert a number of negative pressures on the environment, including greenhouse gas emissions, air pollutants, noise pollution, water consumption and waste generation. In the EU,

[1] https://climate-adapt.eea.europa.eu/en/metadata/projects/development-of-a-decision-support-system-for-increasing-the-resilience-of-transportation-infrastructure-based-on-combined-use-of-terrestrial-and-airborne-sensors-and-advanced-modelling-tools

[2] http://www.afer.ro/onfr/documents/Cartea%20Alba%20Transporturi%202011.pdf

greenhouse gas emissions from international aviation and shipping have more than doubled since 1990 to the present. Unfortunately, for aviation, reducing greenhouse gas emissions remains one of the most difficult challenges in the transportation sector. Aircraft will continue to be dependent on fossil fuels for the foreseeable future, and the demand for air transport is expected to continue to grow.

Maritime transport activities also cause significant emissions of greenhouse gases and air pollutants, noise and water pollution. Carbon dioxide emissions from global shipping could account for 17% of all carbon dioxide emissions by 2050 if more action is not taken. Although emissions of certain pollutants from road transport have fallen overall (but not carbon dioxide), emissions from air and sea transport continue to rise. It is estimated that by 2050, global air and maritime transport will contribute almost 40% of global carbon dioxide emissions if more measures are not taken to reduce them.

Due to their global nature, emissions from air and maritime transport are mostly regulated through international organizations such as IMO and ICAO. However, the EU is also taking action. Carbon dioxide emissions from air transport have been included in the EU Emissions Trading System (ETS) since January 2012. To comply with the limits, operators can, for example, use low-sulphur fuels, install filters on board or adopt alternative fuel technologies.

EEA will continue to closely monitor emissions from the aviation and shipping sectors through updated indicators and periodic reports and briefings [1].

3. Measures that would be imposed in order to limit transports for less environmental pollution

Jacqueline McGlade, EEA chief executive, stated: "One of the biggest challenges of the 21st century will be to mitigate the negative effects of transport, such as greenhouse gases, air pollution and noise, while preserving the positive aspects of mobility. Europe can position itself as a leader by intensifying its activity in the field of technological innovation in electric mobility. Such a change could transform urban life"[2].

EU countries have started to take numerous measures to reduce transport pollution.

For example, the new package of climate measures in Germany provides reducing pollution from the transport and housing sectors as part of the country's plan to eliminate CO2 emissions by 2045. Transport Minister Volker Wissing stated his ministry plans to boost the installation of electric vehicle charging stations, expand public transport and to build more bike lanes in the hope that people will leave their gas cars at home. Including speed limits on German

[1] https://www.eea.europa.eu/ro/articles/emisiile-generate-de-aviatie-si
[2] https://www.eea.europa.eu/ro/pressroom/newsreleases/poluarea-cauzata-de-trafic-este

autobahns to 100 km/h, 80 km/h on country roads and 30 km/h in the city would be a measure to reduce pollution, as it would save up to 9.2 million tons of CO2 per year.

Italian constitutional reform introduced with Constitutional Law no. 1/2022, which included among the supreme principles of the Italian constitutional order, referred to in articles 1-12 of the Constitution, the unequivocal duty of the State to protect the environment, biodiversity and ecosystems (Aruta Improta, 2022).

Another example is Norway. Harbor ships that are part of Copenhagen's public transport system use biofuels. Some ferries in Norway and other countries already use batteries to improve their environmental footprint. Cities can provide infrastructure for ships in ports, which can provide electricity on land so that ships can connect to the grid and not have to leave their engines to go empty. This will not only reduce emissions, but also help improve air quality.

At the level of all European Union countries, the aim is to reduce environmental pollution from transport by encouraging public transport, especially non-polluting vehicles, such as trains and electric buses, trams; the implementation of stricter vehicle emissions standards, such as Euro 6 and higher emission standards for cars and trucks with thermal engines; the imposition of obligations in the form of taxes and contributions for emissions, which transport companies are obliged to pay in order to assume the "polluter pays" principle and the economic actors in the field call on specialized environmental consulting services in order to optimize their activities and compliance with the increasingly numerous environmental regulations; promotion telework and work from home to reduce the number of trips with own cars at long distances from home and decrease traffic jams in large urban agglomerations; the delimitation of zero-emission and low-emission zones (many cities open streets and city centers only to non-motorized means of transport); the adoption at local level of vehicle access regulations in urban areas by which local authorities can manage the types of vehicles entering their areas and the hours of access; prohibition of car traffic in certain historical or central areas; forcing the decommissioning of old vehicles and the rigorous recycling of end-of-life transport vehicles in order to reduce the negative effects on the environment; building an infrastructure for active travel (for example, by increasing the number of safe bicycle lanes) and improving the infrastructure of electric vehicles (creating numerous public recharging and refueling stations by 2025); the realization of intelligent traffic management systems, as well as intelligent applications that facilitate the combination of different means of transport, allowing the user to search and pay through a single platform (a concept known as MaaS - Mobility as a Service), the realization of strategies long-term, such as Sustainable Urban Mobility Plans and Sustainable Urban Logistics Plans that should help cities develop an integrated and well-balanced transport system (Tutunea, 2013).

At the national level, many countries have their own strategies, recently supplemented by Recovery and Resilience Plans. Romania's Recovery and Resilience Plan should help our country improve the unfavorable transport situation. The Sustainable Transport component - one of the 15 components of the NRDP - recognizes that transport reform and investment is a means, not an end in itself. This is due to the fact that the transport sector is an essential pillar for other sectors and for the recovery of the post-COVID19 economy.

These are some of the major investments planned for Romania: renewal of railway and vehicle infrastructure (adapting them to people with reduced mobility and setting up space for bicycle storage to encourage multimodal travel), development of sustainable road infrastructure in the TEN-T network, including road tolling , traffic management and road safety measures, the development of the subway systems in Bucharest and Cluj Napoca, the creation of over 3000 km of marked bicycle routes by 2026, as well as the establishment of a national coordination center for cycling, the creation of a national promotion strategy of bicycle use and the adoption of design rules for bicycle infrastructure[1].

Behold, beyond the legislator's regulations, the negative effects of transport can be removed by each of us by adopting a healthy lifestyle that involves giving up frequent travel by car, walking and bicycling, being encouraged also by doctors. For long-distance travel, flying may seem like the only option for those journeys, but there are quick and comfortable ways to get to any European city by train[2].

4. Conclusions

Although modern and developed transport systems enable fluidity and even contribute net to global economic development, the negative influence of transport in environmental pollution is beginning to be fully recognized. Moreover, the costs of economic development generated by transport come together with increasing costs regarding pollution of any type generated by this activity and, in this sense, the efficiency of transport in general, together with active measures to reduce their influence on the environment are the general directions to follow in the medium and long term.

References

Aruta Improta, Antonio. (2022). *Some considerations on the party responsible for the threat or environmental damage: International, European and Italian legal system in comparison.* Italy: Academia Letters.

[1] https://mfe.gov.ro/wp-content/uploads/2021/06/0c2887df42dd06420c54c1b4304c5edf.pdf

[2] https://euagenda.eu/publications/european-mobility-atlas-2021-facts-and-fi-gures-about-transport-and-mobility-in-europe

Bejan, M., Rusu, T. & Balan, I. (2009). Unele aspecte privind influenţa transporturilor asupra mediului. *Buletinul AGIR no. 4.*

Duminică, Ramona, & Iancu, Daniela. (2021). The historical fundaments of the environmental law. From the old romanian law to modern ages. In *The International Conference "European Union's History, Culture and Citizenship"*, C.H. Beck.

Iancu, Daniela, & Drăghici, Andreea. (2016). The tax on the pollution generated by motor vehicles in Romania and compatibility with the law of the European Union. *Journal of Legal and Administrative Studies, year XIV, nr.1 (15)*, pp.7-18.

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

Șerban-Barbu, Sorina. (2008). Romania and the European Union`s environmental policy. In *International Scientific Conference ECO-TREND 2008, „European Developments and Globalization"*, Tg. Jiu: Universitatea Constantin Brâncuşi.

Tutunea, Dragos. (2013). *Poluare în transporturi*. Bucharest: Universitaria. https://www.researchgate.net/publication/314243014_Poluare_in_transporturi.

https://ecosynergy.ro/influenta-transportului-in-poluarea-mediului-si-masuri-de-atenuare-a-efectelor-negative

https://www.eea.europa.eu/en

https://climate-adapt.eea.europa.eu/en/metadata/projects/development-of-a-decision-support-system-for-increasing-the-resilience-of-transportation-infrastructure-based-on-combined-use-of-terrestrial-and-airborne-sensors-and-advanced-modelling-tools;

http://www.afer.ro/onfr/documents/Cartea%20Alba%20Transporturi%202011.pdf

https://www.eea.europa.eu/ro/articles/emisiile-generate-de-aviatie-si

https://www.eea.europa.eu/ro/pressroom/newsreleases/poluarea-cauzata-de-trafic-este

https://mfe.gov.ro/wp-content/uploads/2021/06/0c2887df42dd06420c54c1b4304c5edf.pdf

https://euagenda.eu/publications/european-mobility-atlas-2021-facts-and-fi-gures-about-transport-and-mobility-in-europe

THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 26 May 2023

THE IMPLICATIONS OF ARTIFICIAL INTELLIGENCE FOR LEGAL DECISION MAKING

Antonio Tirso ESTER SÁNCHEZ[1]

Abstract

The use of Artificial Intelligence in the field of law is a reality. The aim of this study is to analyse its use in this field, and especially its impact on legal decision-making. To do so, we will carry out a descriptive analysis of its use in this field, in order to determine whether AI acts as a support tool in legal decision-making, or whether it becomes a new source for generating legal decisions. In addition, we will learn about the cognitive and logical processes involved in legal decision-making and test whether AI will be able to process them.

Key words: *Artificial Intelligence; Legal decision; Machine Learning; Big Data.*

1. Introduction

The jurist cannot be oblivious to the advance of technology since he requires constant updating to adapt to this new reality that has a direct impact on the development of his professional field. In recent decades, technological progress has been made not only in the field of information technology but also in the legal field, using different technologies for the practice of law that have evolved from the typewriter, computer science, Artificial Intelligence (hereinafter AI) to Big Data systems, among others. This so-called fourth industrial revolution impacts the legal world making possible the study of trends and case law analyses to predict judicial decisions.

One of the objectives of this study is to perform an analysis on AI in a descriptive way and its implication in the elaboration of judicial sentences. In this way, AI is understood as the performance of machines that can perform intelligent automatic behaviors, reach conclusions, and even reach a way of thinking similar or, if necessary, superior to that of human beings. AI systems, based on reasoning and deduction algorithms, seek to use stored data to generate the results that make up a legal analysis in order to provide a solution to a specific legal issue. In this context, the data acquires prominence by becoming the means that generates new

[1] **Lecturer in Philosophy of Law, Departament of Basic Legal Sciences, University of Las Palmas de Gran Canaria (Spain), email: tirso.ester@ulpgc.es. ORCID:0000-0002-3450-5344.**

connections from the existing ones, feeding back with the new information created.

The legal protection of AI-generated information raises various questions, which vary according to the field in which it is produced. In the legal field, one of the issues under debate is whether legal protection applies to data engineering. This question will require more specific legislation on the copyright protection of software, with software being considered a protected work, especially the source code and object. However, it should be noted that data generated by AI has been used by engineers, lawyers and designers to develop intelligent systems .

Software programs are used by legal firms to provide legal data processing and machine learning technology services for data collection and contract drafting. These companies incorporate AI programs that function as capable assistants that can read contracts before they are signed. This is evidence that the provision of legal AI is a reality in these aspects and also demonstrates that the transfer of information can be analyzed as partial data in other intelligent searches (Lacruz Mantecón, 2022, pp. 47-52).

The presence of AI in the field of law is becoming increasingly evident. This effect will continue to increase as the technology evolves, making it an interesting topic to analyze. Moreover, law is a field that falls within the social sciences and cannot ignore the direction that society is taking, in which AI tools play a significant role. In this context, a brief analysis of the historical development of computer systems and their impact on the field of law is relevant.

Before exploring practical AI tools to support decision making, it is necessary to mention a fundamental theoretical aspect to build systems capable of making intelligent decisions. In this regard, one of the main issues surrounding AI is how to embody operational knowledge in order to propose intelligent answers. Thus, logic has been trying to provide a solution to this problem for centuries and has been used since the dawn of AI.

In addition to logic, the application of AI in the field of law must take into account its own way of reasoning, which is studied through philosophical and legal theory. Perhaps AI shares a problem with the study of legal judgment theory: how thinking is formalized and applied in intelligent systems. It is therefore pertinent to address how decision-making for legal purposes takes place in the setting of a predominant AI, and to pay attention to the role played by logic. To this end, a review of the decision-making process will be conducted, followed by an analysis of the tools that AI is developing to support this process. Some of these tools are already in common use by legal practitioners, while others may become available in the near future.

2. Artificial intelligence computer systems in the legal field

The term AI was first used in 1956 by the computer scientist John McCarthy during a conference organized at the University of Darmouth (USA) to

refer to "the science and engineering of creating intelligent machines" (McCarthy, Minsky, Rochester & Shannon, 1955), which can reason like human beings and learn by themselves, while being able to solve relatively complex problems (Herrera de las Heras, 2022, p. 18). That can reason like human beings and learn from themselves, while being able to solve relatively complex problems. This first lexical antecedent was followed by other technological advances that have been marking the path of what we know today as AI.

AI is part of computer science, seeking to emulate human cognitive functions, such as reasoning, memory, judgment or decision making, and then assign some of these intelligence skills to computers. The scientist Alan Turing claimed that a machine is intelligent if its behavior is indistinguishable from human behavior. To evaluate this intelligence he devised the Turing Test, which was based on observing whether the machine was capable of imitating a human being, without taking into account the internal functioning, but only the final result (López Oneto, 2020, p. 40).

The dawn of AI was marked by overly ambitious goals, which led to some disappointments. These early challenges have led researchers to seek new directions in the development of intelligent systems. Two trends can be distinguished in the field of AI: Weak AI is that science that allows computers to be designed and programmed in such a way that they perform tasks requiring intelligence with hardly any evidence to show (solving mathematics, statistics, playing chess, steering a missile, etc.), and strong AI comprises those AI systems that can process the same intellectual capabilities performed by human beings: thinking, predicting, reasoning or learning (López De Mantarás Badía & Meseguer González, 2017, p. 53). This distinction is understood by part of the doctrine as a fallacy because it is based on the false belief that the only way to develop expert AI systems is to replicate the most relevant cognitive processes of human thought (Solar Cayón, 2019, pp. 24-25).

Both trends have influenced the development of the legal system if the deductive argument is established. It is important to reflect on the study of reason and argument in order not to fall into the fallacy of imitation. For it is not just any procedural reasoning like a judge but the results can be easily integrated between a judge and a lawyer in their practice. In addition, strong AI has found a place in legal work with the development of neural network systems that mimic the brain and are used to retrieve documents or extract data.

When studying the practical application systems developed by AI, two main strands that condition its creation can be distinguished. The first emerged in the 1970s, integrating a large amount of subject-specific knowledge and creating so-called expert systems that have a wide range of practical applications. These expert systems rely on heuristic rules previously developed by the knowledge engineers who wrote them. The second focuses on the ability of machines to learn from previous cases and reach their own conclusions, without relying on rules predefined by programmers. This type of machine learning has evolved from

patterns based on the connections maintained by neural networks play a crucial role. Some of the most outstanding applications include systems capable of driving without the need for a human driver, systems that manage stock market operations, among others. These systems are becoming increasingly common in our daily lives.

Computer systems can have a significant impact on the field of law. Some deal with the automation of legal processes, such as scheduling hearings or filing documents. This can save time and reduce human error. Similarly, in data analytics, computer systems can analyze large data sets and extract useful information for legal practitioners. For example, they can identify patterns in similar cases, which can help in lawyering to make informed decisions thanks to the influence of Big Data.

Also in the field of E-discovery, based on the collection and review of large amounts of electronic documents in the discovery process can be much more efficient (López Oneto, 2020, p. 174). Information security with computer systems are guaranteed in the field of law. For example, they can protect confidential client data and ensure that only authorized users have access to it. The emergence of legal technology has given rise to a number of applications that can help lawyers work more efficiently. One example of an application is one that can help lawyers create customized contracts and analyze the risks of certain clauses. In general, computer systems can have a significant impact on the field of law by improving the accuracy of legal processes and decision making.

Computer systems can influence legal decision-making in several ways. On the one hand, data analytics and AI can help lawyers identify trends in legal cases, which can affect the way a case is presented or the legal strategy that is adopted. On the other hand, there are also computer systems designed specifically for legal decision-making, such as predictive justice systems. These systems use historical data to predict the outcomes of legal cases and can be useful in making decisions in similar cases in the future.

However, it is important to bear in mind that legal decision-making also involves ethical and moral considerations, which may be difficult to encode in a computer system. Furthermore, it is necessary to ensure that computer systems used in the field of law are fair and impartial and are not based on bias or discrimination. Although computer systems can influence legal decision-making, it is essential to use them in a way that respects ethical and legal principles during the process (Castells I Marquès, 2017, p. 119). These systems can be a useful tool for jurists, but they should never replace human decision-making and the consideration of all relevant factors in a legal case.

3. The role of ai in juridic decision-making

A legal decision is one of the most relevant elements of legal science and is the result of a process of analysis and evaluation of a specific legal case,

making a decision to resolve the legal dispute. It may be issued by a judge, a court or an arbitrator, and is usually based on the interpretation of the law and the application of relevant legal principles. Thus, the legal decision is the final outcome of the process of resolving a legal case and may take the form of a judgment, arbitral award or decision, and may or may not be binding depending on the context in which it is rendered and the nature of the dispute or legal issue.

The role of AI in legal decision-making is becoming more prevalent. However, when implementing systems based on these tools, issues related to judicial rulings cannot be ignored. The symbiotic relationship between AI and law requires an understanding of how experts handle large amounts of information to make decisions. In addition to documentation issues, one of the key challenges for AI in law is the modelling of knowledge, concepts, arguments and reasoning, which are central themes in legal theory that has evolved over centuries and has been central to the development of AI systems used in law.

One of the fundamental goals of AI is to formalise human thought patterns so that they can be presented to computers in a symbolic form that they can understand. Therefore, AI uses logic as a tool to represent knowledge. When the problem is properly represented in a way that an intelligent system can handle it, the task of drawing conclusions is greatly facilitated.

It is difficult to trace the lines of thought that lead to an expert's decision. To facilitate this task, it is possible to allude to informal logic in the analysis. Such is the case, law is a field in which specialists also participate, but with the particularity that the field of law operates according to formalised rules and has its own form of decision-making developed from legal theory. Under the pretext of trying to explain the logical function of norms, it is possible to cite in the last third of the last century normative logic, the so-called deontic logic.

One of the main objectives of law is to prevent inconsistencies in legal norms that do not abandon formal logic as an essential element of normative systems. In order to create complete, independent, coherent systems that guarantee legal certainty, the basic principles of the system must form a simple and clear basis, which implies reformulating the systems.

Deontic logic presents three variables that go beyond the simple true or false classification of normative statements. These operators are confined to the concepts of permissions, which grant the ability to do or not to do something; prohibitions, which deny the ability to do something; and duties, which correspond to the authority to perform an action (Velázquez, 2015, p. 103). The refinement of these deontic operators is crucial for the automatic deduction and creation of AI systems used in the field of law. This has enabled a deeper understanding of the rational processes that guide the decisions of legal experts. Although there are logical theories that explain many facets of decision-making, there are still aspects that require a broader approach.

Through the study of the legal psyche, the rational process that guides legal practitioners in making a decision is better understood. Still, some parts of

the problem require a broader approach, such as the study of legal discovery to find solutions to the legal issues raised. Heuristic rules help to solve problems, although they do not guarantee the outcome. In legal heuristics, two currents stand out: those who argue that these legal foundations are based on the logical and reasoned argumentation of the legal syllogism, and those who believe that experts make decisions in a way that departs from the reasonable and then justify them through a process of rationalization.

With regard to the separation between explanation and justification in legal decisions, Professor Atienza refers to two concepts of scientific philosophy: the discovering context and the justifying context. The former refers to the way in which a decision is made that is not susceptible to analysis by the parameters of logic. In contrast, the justifying context relates to the expert's obligation to justify his decision on the basis of the scientific method and logical analysis in order to demonstrate the validity of his reasoning (Atienza, 1994, p. 59).

If this theory is taken to the practical level, it is easy to infer that it refers to the need to justify the decisions of judicial bodies, even if these decisions do not conform to rationality. In this sense, the logical operation goes beyond discovery to encompass the range of justification. Within this context of justification, two types of justification can be distinguished: internal and external. In simpler cases, where the premises are clear, the judge only needs to make an exercise of logical inference to arrive at an internally justified conclusion. But in complex cases he must substantiate the premises supported by additional arguments. In this so-called external possibility of justification, deductive logic is attached with other types of arguments for or against the acceptance of certain premises that will determine the conclusion reached (Atienza, 1994, pp. 58-59).

The grounds argued in the external justification allow a control of the arbitrariness of an institution such as that emanating from the judge's decision. Thus, the doctrine has identified these arguments as "the analogy, the a fortiori argument, the argument a contrario, the argument from principles, the systematic arguments, the psychological argument, the argument from non-redundancy, the pragmatic argument, the teleological argument, the historical argument or the argument from absurdity" (Ezquiaga, 1994, pp. 70-99). However, the simple application of deductive logic is not sufficient to test the acceptability of these arguments because they are expressed in a language that is natural and are constrained to conclusions drawn under conditions of uncertainty.

It is crucial to understand the importance of non-deductive elements in the configuration of AI systems, since the exclusive application of deductive logic in difficult cases leads to simple and ineffective solutions. Therefore, in order to build effective AI systems, it is necessary to understand how experts use knowledge, as many non-deductive elements are implicitly applied prior to deduction. An appropriate theory of argumentation can enable AI to improve the formulation and justification of argumentation for judicial decisions, through the ability to gather and retrieve relevant information. Thus, the effectiveness of any

application of AI in the legal field depends on the argumentative paradigm on which it is based.

Judges deliver judgments on the basis of human intelligence. This obviousness is relevant when considering that the application of AI in judicial decision-making involves a set of necessary legal realities such as the sources of law, models of legal argumentation, types of interpretation, the burden of proof or the legal theories that the human judge assumes to address a legal consequence. The figure of the robot judge will never be able to take into consideration the personal convictions that the human judge may incorporate in the exercise of his function. These aspects have to do not only with knowledge of the legal regulations in force, but also with "his capacity for analysis, his powers of observation, his respect for the given word, his greater or lesser ingenuity or perspicacity, his conformist or enterprising spirit, and, most fundamentally, with his own system of values" (Ara Pinilla, 2005, p. 467). This approach goes beyond the mere objective framework of the legal system to include aspects of the inner self of the human being, which relates neuro-rights to AI (Yuste, Genser & Herrmann, 2021, pp. 154-155) & (Viega, 2022, p. 492).

It is important to bear in mind that the human decision is based on subjective elements that cannot be framed in a single pattern through a legal algorithm. Not surprisingly, this is one of the key ideas regarding the gradual implementation of technology in justice, proposed as a way to improve its effectiveness and efficiency in relation to the need for agile and timely processes that allow access to justice in an effective manner. In the past, the administration of justice has been criticised for its lack of speed and the need for models that allow for the resolution of disputes in a reasonable amount of time (Battelli, 2021, p. 47).

In this sense, it is stressed that AI differs from other systems used in the field of law in that it is spontaneously self-determined, whereas expert systems are based on induced self-determination. That is, their algorithms used in judicial decision-making, it is considered, should only take into account the ratio decidendi, discarding any obiter dicta that could influence the application of a jurisprudential rule. So it is noteworthy to highlight this because any judicial decision based on sources other than the rule or norm, such as the application of principles, customs or doctrines, may generate an indeterminate decision; hence, a greater risk of legal uncertainty.

It is possible to use AI to make decisions in cases involving quantitative rules such as the liquidation of sentences, the payment in executive proceedings, the declaration of forfeitures or statutes of limitation, as these cases do not involve a qualitative interpretation of the sources of law. However, in cases where a qualitative interpretation is required, the IA cannot guarantee legal certainty. In this case, any weighting exercise of principles by AI would only correspond to an algorithmic factor where its human creator gave more preponderance to one

principle than to another, which implies a limitation in the AI's ability to make decisions in these cases.

It is important to note that AI may be more feasible than legal rules when it comes to quantitative parameters. However, AI is less resolute in those aspects related to legal reasoning (qualitative parameters). Therefore, the administration of justice requires tools that are not only algorithmic, but that also analyse social and economic circumstances in context. In doing so, it is essential to recognise that a human judge can deduce the presence of obscure agreements between parties or determine the intention behind a crime or civil liability, situations that algorithmic programming would not be able to understand. Moreover, the interpretation of the norm may vary depending on who is doing the interpreting, making law and justice constantly changing systems. If a single AI system were to interpret the law, it would be merely a closed perspective.

The ideas raised in this debate linking pressing AI and hermeneutics to the legal decision, one of the fundamental prerogatives in the field of justice is the existence of a second instance together with the principle of double conformity, which allows a judicial decision to be challenged on both procedural and substantive grounds, including questions of evidence. However, if such decisions were to be taken by an AI system, the essence of these guarantees would be lost as it would be recognised in advance that even first instance decisions could be wrong. Moreover, the decision of a collegial court represented by the courts would also be affected, as the use of AI would entail the disappearance of the judges' ability to save their vote and, consequently, the undermining of judicial collegiality. The absence of truth in judicial decisions, especially in collegial criminal courts, is also reflected in the principle of in dubio pro reo, which recognises the possibility that evidence may be insufficient and doubts may arise that rule out certainty in criminal liability. In a system of judicial decision-making based on AI, this structure would not be applicable and judicial controls and collegial decisions with dissenting votes would be eliminated.

4. Big data: a key element in legal decision making

AI systems face several challenges, one of which is to organise information and knowledge in a way that computers can understand. To overcome this difficulty, two AI tools have been developed: knowledge structuring through ontologies and the semantic web (Casanovas, 2010, p. 210). The use of these tools can be fundamental in the construction of decision support systems.

In another section, we will discuss the tools that confer the obtaining of information and knowledge from unstructured data, which is the majority of the data that is perceived on the Internet. In this sense, it is possible to see how Big Data applications that seek to capture as much data as possible and then extract patterns and information from them using statistical techniques work. After that, the core runs through the two fundamental techniques of AI that seek to make

computers reason and make judgements as a human being with intelligence would.

The first step in making a legal decision is to make sure that you have knowledge about all relevant aspects. In a hierarchy that facilitates study, knowledge is at the top, and below it are information, facts and data. Therefore, in order to make intelligent decisions, it is necessary to process the available information into knowledge. This is where a process of transforming information into knowledge is a challenge for AI.

The way knowledge is structured differs between humans and computers. Humans seek a representation that is easy to understand, makes sense and is coherent, while computers seek a representation that can take advantage of computational capacity, such as processing speed and memory. To achieve a knowledge representation, systems often combine a data structure and different interpretative procedures.

Within the field of law, the organisation of information for processing in computer systems has been the subject of study for some time. The search for information in legal databases is an arduous task and the development of legal information systems is a central focus in legal informatics. Thus, it is possible to consider how to re-engineer the fabric of the legal psyche for efficient searches and how to formalise facts and procedures in a way that can be understood by computers. However, meeting this objective is not an easy task due to multiple factors, such as the complexity of legal epistemology, its relation to common sense, the different existing legal theories and the jurisdictional differences between different legal systems. Currently, there is a variety of research focused on addressing these challenges.

The field of law is a suitable scenario for the creation of models and the implementation of knowledge due to its intrinsic difficulty and the large volume of data generated. In recapitulation, legal ontologies are organised structures that limit the size of such concepts, connections and instances within a specific field of law, allowing programmes to extend and apply these structures through reasonable inferences. The use of specialised semantic tools can improve access to information for both legal professionals and citizens, facilitating the use and storage of knowledge, improving human-machine interaction, and also contributing to the improvement of autonomous reasoning and the ability to draw inferences.

Alongside this, mention should be made of the rise of Big Data, which, together with AI, is projected in all public and private sectors, in business, medicine, human resources, law, commerce, transport, etc...(Cotino Hueso, 2017, pp. 133-134). Big Data is based on the use of mathematics to analyse large amounts of information and, by inferring probabilities, allow data to establish evidence. In this way, it is possible to divert an email to the spam folder, correct incorrect words on predictive keyboards or determine the time it takes a pedestrian to cross a street so that an autonomous vehicle can brake in time. Big

Data relies on exhaustive data analysis to make these predictions, which means that the more data available, the better the accuracy of the predictions.

Knowledge representation through ontologies and the semantic web is a complex task that requires a specific structure. In contrast, the Big Data approach is based on the collection of a large amount of data, even if it is not structured. Big Data systems do not focus on finding causes, but on discovering patterns and correlations.

In some cases, it will be desirable for these ontologies and the semantic web to have something in common, while in other cases it may be sufficient to know that something is happening, even if the specific reason is not obvious. Although Big Data approaches and semantic applications are different, they could be seen as complementary rather than mutually exclusive, as both can be useful depending on the desired outcome.

In the legal field, the amount of data generated by the administration has increased considerably, which means that legal professionals have to spend a lot of time analysing it. In this context, Big Data tools present themselves as a useful solution. For example, using such tools it is possible to obtain a sample of how each judge behaves in a given litigation. However, it could also be argued that these practices can distort the practice of law, allowing the selection of tailor-made arguments based on the results provided by each individual judge's analysis.

All in all, it is possible to infer how the world is constantly evolving and the use of AI tools is advancing even faster. Machine Learning techniques are being applied in the field of law and are improving the efficiency, effectiveness and accuracy of legal processes and decisions. It is currently being used in court management, the creation of search engines and the prediction of judgments, which would enable the incorporation of robot judges in the future. AI has the potential to transform the legal system and improve its efficiency, but it also brings with it ethical, legal and social challenges that must be adequately addressed to ensure responsible and equitable use of this technology in the legal sphere.

5. Conclusions

AI can be used as a tool in judicial decision-making, especially in cases of a quantitative nature. However, it cannot replace the capacity of human intelligence in the resolution of qualitative issues. Reliability in the use of AI will be subject to careful analysis of the legal system and critical appraisal of the body of evidence. While AI can provide valuable information, it is crucial that legal interpretation and human understanding remain central to ensuring fair and equitable justice.

However, when it comes to legislative decision-making, AI is not suitable due to political diversity and human needs that cannot be reduced in algorithms. Therefore, the responsibility of the state would be twofold: on the one hand, it

would have to define the direction of AI developments and application following a regulated and self-regulated system, and on the other hand, it will have to avoid applying any control mechanisms in the application of AI systems that may lead to violations in the exercise of citizens' rights (Miraut Martín, 2021, pp. 24-25). It will be necessary to ensure that human intelligence prevails and takes precedence over AI, ensuring that human values and aspirations are preserved at all times.

Despite the limitations that AI brings with it, its significant contribution to the interpretation of legal rules is inevitable. Although algorithms cannot determine the most appropriate interpretative criteria for specific cases, they can provide useful tools to guide jurists in their interpretations.

The aim of intelligent systems used to perform legal interpretations is not to mimic human argumentative behaviour, but to support human tasks in this area. However, it is important to note that in order to achieve an interpretation that is more faithful and closer to human reality, a knowledge base and understanding is required that resides only in the minds of jurists, and computer models, to date, can only serve to support human thinking (Battelli, 2021, p. 47).

AI can be used to create a repository of arguments based on judicial precedents and doctrinal reflections to support the legal practitioner. Far from becoming a resource considered as an expert opinion, AI offers a range of options that will help jurists to find a possible solution. Ultimately, it will be the legal professional who will decide, when the time comes, how to use AI.

References

Ara Pinilla, I. (2005). *Teoría del Derecho* (2nd ed.). Ediciones JB.

Atienza, M. (1994). Las razones del derecho. Sobre la justificación de las decisiones judiciales. Isonomía. *Revista de teoría y filosofía del derecho, 1, 52-69.*

Battelli, E. (2021). La decisión robótica algoritmos, interpretación y justicia predictiva, *Revista de Derecho Privado, 40*, 45-86.

Casanovas, P. (2010). Inteligencia Artificial y derecho: a vuelapluma, Teoría & Derecho. *Revista de pensamiento jurídico, 7*, 203-222.

Castells I Marquès, M. (2017). Vehículos autónomos y semiautónomos. In S. Navas Navarro (Dir.) *Inteligencia Artificial, Tecnología. Derecho, Tirant lo Blanch*, 101-121.

Cotino Hueso, L. (2017). Big Data e Inteligencia Artificial. Una aproximación a su tratamiento jurídico desde los derechos fundamentales. *Dilemata, 24*, 131-150.

Ezquiaga F.J. (1994). Argumentos interpretativos y postulado del legislador racional. Isonomía. *Revista de teoría y filosofía del derecho, 1*, 70-99.

García Mexia, P. (2022). *Claves de inteligencia artificial y derecho*. Wolters Kluwer.

Herrera de las Heras, R. (2022). *Aspectos legales de la inteligencia artificial. Personalidad jurídica de los robots, protección de datos y responsabilidad civil.* Dykinson.

Lacruz Mantecón, C. (2022). *Inteligencia Artificial y Derecho de autor.* Reus.

López De Mantarás Badía, R. & Meseguer González, P. (2017). *Inteligencia Artificial*. Catarata.

López Oneto, M. (2020). *Fundamentos para un derecho de la Inteligencia Artificial. Queremos seguir siendo humanos?*. Tirant lo Blanch.

McCarthy, J, Minsky, M., Rochester, N., & Shannon. (august 31, 1955). *A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence.* Text of the conference at the following link: http://wwwformal.stanford.edu/jmc/history/dartmouth/dartmouth.html

Miraut Martín, L. (2021). New realities, new rights. Some reflections on the need to safeguard personal data. In L. Miraut Martín y M. Zalucki (eds.), *Artificial intelligence and human rights*. Dykinson, 24-47.

Solar Cayón, J.I. (2019). *La Inteligencia Artificial Jurídica. El impacto de la innovación tecnológica en la práctica del Derecho y el mercado de servicios jurídicos*. Thomson Reuters Aranzadi.

Velázquez, H.J.F. (2015). *Sistema estándar de lógica deóntica*, Versiones, 7. 100-112.

Viega, M.J. (2022). Inteligencia Artificial, Neuroderechos y protección de datos personales, en *Semper Sapiens*. Libro Homenaje al profesor Dr. Felipe Rotondo Tornaría, Alma mater, 483-496.

Yuste, R., Genser, J. and Herrmann, S. (2021). It's time for neuro-rights. Horizons: *Journal of International Relations and Sustainable Development*, *18*, 154-164.