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„SIGURANȚA PUBLICĂ ȘI NEVOIA DE CAPITAL SOCIAL RIDICAT”

*

"PUBLIC SECURITY AND THE NEED FOR HIGH SOCIAL CAPITAL"

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RIGHTS OF WORKERS TO DISCONNECT GLOBALLY

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Abstract

The rights and principles for the digital decade, published by the EU Commission, Parliament and Council (European Declaration, 2023) are part of the statement that explicitly mentions the right to disconnection in its section on fair and just working conditions, where it is mentioned that the EU pledged to "ensure that everyone will be able to disconnect and benefit from guarantees of work-life balance in a digital environment".

However, in my opinion, it is a little too much to include this legislative power in the universal rule of law, because the rule of law is the highest general rule that summarizes social practice and guarantees the balance between the observance of rights and the fulfillment of rights. of duties. or if they are professions that require self-discipline, such as a investigating magistrate and a judicial police officer, they must complete an on-site investigation as quickly as possible, or a transparent agent to ensure that they are out. business hours.

Key words: *law, principle, program, professions.*

INTRODUCTION

The world of work is facing a digital revolution. The increasing use of digital and technological tools in recent decades has made it possible to work anywhere, anytime. The Covid-19 pandemic has only increased the pace of this development. While the digitization of work and the expansion of remote working present potential advantages in terms of flexibility, productivity and reconciliation, these trends can also lead to work intensification, long working hours, blurring the lines between work and rest or increased stress. from continuous supervision and monitoring of performance and productivity. These

factors can, in turn, negatively affect the physical and psychological health of employees.

Consequently, it seems necessary to regulate some aspects of the new digital work environment with the aim of compensating at least some of the negative impacts arising from the frequent use of digital work tools. In this context, the right to disconnect (R2D) becomes relevant. The ten fundamental principles (Guiding Principles) here establish a regulatory basis for R2D in Europe. They cover issues that should be considered when developing standards to ensure a balanced regulation of the right to disconnect.

The right to disconnect must be seen as a concrete measure to ensure that "[e]veryone has the right to fair, fair, healthy and safe working conditions and adequate protection in the digital environment at the physical workplace, regardless of their employment status , of their manner or duration"; as can be read in the statement, last but not least, this statement also offers interesting elements to be considered with the following guiding principles, especially on how to deal with data protection.

This is part of an EU-wide regulatory intervention under the 2023 Digital European Declaration.

Are we discussing this right as a principle or as an obligation at the level of the Member States of the European Union extrapolated to the global level?.

I. ABOUT THE PRINCIPLES OF LAW

Etymologically, the concept of principle comes from the Latin principium, which means beginning, origin or basic element. Each principle is a starting point, a source of action at the conceptual level. General principles of law are creative prescriptions that define the architecture and application of law.

The third source of international law, as listed in Article 38, is the "general principles of law" recognized by "civilized" nations. The Guide to International Legal Research states that "this traditional naturalistic approach provides a basis for decision when other sources provide no guidance, but it is not clear what these general principles of law are. Thus, locating these general principles in the course of legal research is extremely difficult. They can be general principles of justice, natural law, analogies with private law, principles of comparative law or general concepts of international law."

General principles of law are primarily used as "gap fillers" when treaties or customary international law do not provide a rule of decision. Scholars have suggested that as new treaties and customary law develop to address areas of international concern not previously covered, the significance of general principles will fade as these gaps in international law are filled.

After becoming parties to a human rights treaty, states must comply with the obligations enshrined therein. Furthermore, when applying human rights

treaties, it is important to consider the existence of general principles that are embedded in international human rights law and that guide their application.

General principles are not human rights, but there is a certain degree of overlap, as some general principles, such as the principle of non-discrimination and non bis in idem, have gradually evolved into substantive human rights, being sufficiently precise and fulfilling the existing conditions for human rights, as it results from Resolution no. 41/120 of December 1986 of the UN Commission on Human Rights:

• be consistent with the existing body of international human rights law.

• have a fundamental character and come from the inherent dignity and value of the human person.

• be precise enough to give rise to identifiable and enforceable rights and obligations.

• provide, where appropriate, realistic, and effective implementation mechanisms, including reporting systems; and

• attracting international support wide.

In addition, Article 38.1.c of the Statute of the International Court of Justice considers the principles of common law, together with international customs and international treaties, as official sources of international law, so the court is obliged to use them unnecessarily, so that there are some gaps within these last two sources; that is, it works independently, not as an auxiliary source. *(Riofrío Martínez-Villalba, Juan Carlos, 2016, p. 283–309)*

The old Civil Code of the Argentine nation, written by Dalmacio Vélez Sarsfield, from 1871, stated the following in Article 16: "If a civil matter cannot be settled either by words or by law, the principles of law shall be respected as well." ; if the question is still in doubt, it will be settled by the common law, having regard to the circumstances of the case. "Many of the national philosophical doctrines have understood these words as a sign of denying the legal gaps in Argentine law, while other doctrines see it as an instruction to judges to fill the gaps in laws based on natural law, where there is no law to regulate. the case. *(Ione Stuessy Wright; Lisa M. Nekhom, 1978, pp. 458-498)*

The Political Constitution of Colombia of 1991, in article 230, indicates that the legal principles of the anti-formalist position are auxiliary criteria in cases of inadequacy of the law, that is, in case of ambiguity or normative gaps. Since 1936, the Columbia case - the "Golden Court" period - in the new interpretation of Article 8 of Law 153 of 1887, under the influence of free scientific research and the school of German conceptualism, equality and others have been accepted. General principles of law for the fair resolution of legal conflicts. *(National Center for State Courts, 2012, p. 131-135)*

According to Article 1.1 of the Spanish Civil Code, the sources of the legal order are the law, customs, and general principles of law. Article 1.4 states: "The general principles of the law apply without prejudice to the nature of the

information to the legal system when the law or custom is absent." *(Riofrío Martínez-Villalba, Juan Carlos, 2016, p. 283-309)*

In Mexican law, Article 14 of the Constitution provides that civil actions must be resolved in accordance with the letter or interpretation of the law and, failing that, on the general principles of the law. According to Rafael Preciado Hernández, this reference links Mexican law with the best natural law traditions of Western civilization. However, the Federal Labor Law, Article 17, refers to the general principles of law and equity as one of them. They are also enshrined in the Federal Civil Code, the Commercial Code, the General Elections and Procedures Act, the General Health Act, the General Education Act, and virtually all federal agencies and local statutes, to name a few. or adjectives. *(Plottka J, Müller M, 2020, p. 34)*

A principle can be presented in several ways: axioms, deductions or generalizations of concrete facts. *(Von Ondarza N, Ålander M, 2021, p. 201-235)*

The general principles of law ensure unity, homogeneity, harmony, and the ability to develop certain associative relationships. A principle of law is the result of social experience, and the practical utility of knowledge of general principles lies in its expression of guidelines for the entire legal system and constructive action that guides the activity of the legislature.

On the other hand, general principles play an important role in the administration of justice, because those who have the power to apply the law must know not only the legal rules, but also its spirit, and must precisely define the spirit of the law. laws. In other words, in some cases legal principles supersede the regulatory standard. Finally, a judge cannot refuse to judge a case citing the absence of a legal text that could open the case, as he would be guilty of a judicial error and decide the case based on the principles of the law. *(Schutser J., 2020, pp. 45-49)*

The movement of legal principles leads to the unpredictability of coercive norms and the guarantee of right in guaranteeing agreement and conformity to laws.

Legal principles are derived from constitutional provisions or derived from the interpretation of other norms that have the function of guaranteeing the balance of the legal system with social evolution.

II. THE RIGHT TO DISCONNECT IN THE EU AND WORLDWIDE

The Guiding Principles, which cover all European legal systems, are intentionally broad in scope. *(Le Galès P, 2014, p. 303)* To the extent that the problem of excessive connectivity extends throughout Europe, it seems restrictive to limit the analysis to the EU. Both national legislation and EU legislative and policy documents are important sources of inspiration. The debates that u took place during the drafting process highlights the particular difficulties accompanying a regulation on R2D in Europe. *(Jaworyska, K, 2022, p. 51-55)*

Particularly challenging is the level to which the rules on disconnection should be applied and the people who should target them. Subsidiarity, articulation of sources and scope are therefore key issues to consider. *(Kochenov D., 2016, p. 11)*

The tension between a regulation that is broadly applicable and the need to adapt R2D to the specifics of each country, sector, and company to ensure effective and smooth enforcement is reflected in these Guidelines. Particular attention has been paid to carefully articulating the regulatory sources to combine flexibility and adaptability with clear protective principles. *(Kaiser, Lena, 2023, p.377-289)* Thus, while R2D is intended to be uniformly applied throughout Europe, the specific rules, and modalities for implementing R2D are mainly left to collective bargaining or, failing this option, to be regulated at company or employee level. The idea is to respond to the realities of each workplace. However, this does not prevent the introduction of clear rules to guarantee the effective implementation of R2D. The result is, in our view, a delicate balance between principles and implementation. *(Duez D., 2011, p. 90)*

In terms of scope, the Guidelines propose research and development that applies to all workers as defined in EU and national law. This is consistent with its goals: protecting the health of workers and achieving a better balance between work and private life. *(Pech, Kochenov, 2021, p. 146)* This assumes that R2D is not limited to certain categories of employees: it applies to all those who carry out their activities under conditions of control and subordination, which will critically include the false self-employed. On the other hand, we propose to include, with limitations, management staff when they are in a position comparable to that of workers. The inclusion of management staff is balanced by the adaptation of R2D to their particular position: even if a manager should enjoy R2D in principle in the same way as their subordinates, the scope, and terms of such a right will not be the same, due to the responsibilities and activities of the first. (De Witte B, 2018, p. 227-242)

Finally, special attention must be paid to the correspondence between the requirements and expectations imposed on employers and the reality on the ground. Thus, it is necessary to consider the size of the companies in question and to ensure that their obligations do not represent an excessive burden. The adaptation of their obligations, as well as the collective negotiations regarding R2D are likely to protect the interests of employers, regardless of their size and resources.

These Guiding Principles are the result of collective reflection and discussion, which led to certain proposals and choices. The overall aim is to reconcile the interests of all parties and, in particular, the imperatives of protection and flexibility, while guaranteeing a broad application of R2D to all those who need it. *(Giegerich, 2019, p. 61)*

It would also be an EU-wide regulatory intervention under the 2023 Digital European Declaration

The rights and principles for the digital decade, published by the EU Commission, Parliament and Council (European Declaration, 2023) are part of the statement that explicitly mentions the right to disconnection in its section on fair and just working conditions, where it is mentioned that the EU is committed to "ensuring that everyone will be able to disconnect and benefit from guarantees of work-life balance in a digital environment". The right to disconnect must be seen as a concrete measure to ensure that "[a]nyone has the right to fair, fair, healthy and safe working conditions and adequate protection in the digital environment at the physical workplace, regardless of their employment status , of their manner or duration"; as can be read in the statement, last but not least, this statement also offers interesting elements to be considered with the following guiding principles, especially on how to deal with data protection.

In addition, R2D, as a specific right, helps to define the boundaries between working time and rest time.

Respect for working time and its predictability is considered essential to ensure the health and safety of workers and their families. In this sense, the R2D aims to protect the health and safety of workers at work, as well as to achieve a better balance between professional life and private life, which, in turn, it has a gender impact.

A prerequisite for a correct understanding and application of the R2D, therefore, involves a consistency in the regulation of working time, including, in particular, maximum working hours, minimum rest periods and clear definitions of working arrangements, such as "stand- by' and 'on-call' periods. In accordance with Directive 2003/88/EC, EU employees have the right to minimum health and safety requirements regarding certain aspects of the organization of working time. In this context, *(Anagnostou, D., Mungiu-Pippidi A., 2009, p. 44)* The Directive provides for daily rest breaks, weekly rest, maximum weekly working time and paid annual leave and regulates certain aspects of night work, shift work and work patterns. According to the Court of Justice of the European Union (CJEU), on-call time, in which a worker is obliged to be physically present in a place specified by the employer, must be regarded as "full working time [...], regardless of the fact that, during the periods of on-call time, the person in question is not continuously carrying out any professional activity". Waiting time, in the sense that a worker is obliged to be available to the employer and does not have the ability to freely dispose of their time, is also to be considered as working time. *(Smith, M., 2019, p. 561-576).*

Moreover, the CJEU interpreted the minimum rest periods as "community social rules of particular importance which every worker must benefit from as a minimum requirement to ensure the protection of his safety and health". Thus, Directive 2003/88/EC does not contain any express provision for a worker's R2D, nor does it require workers to be available outside working hours, during rest periods or other off-duty time, but it does provide for the right to a daily rest,

weekly and yearly uninterrupted periods, during which the worker must not be touched or accessible *(EP, 2021).*

The guiding principles contained in this document seek to outline the main building blocks for a set of regulations on research and development across Europe, including at EU level. These Principles are the result of an analysis of existing regulations at the national level. To a greater extent, they also correspond to those underlying the European Parliament's proposal for 2021 *(EP, 2021).* However, on specific issues, the Guide to the Principles provides more extensive reflections or more comprehensive analyses, with national examples, including from non-EU states. The illustrations that accompany each Principle do everything possible to relate to the proposed new standards, to existing national practices. The national or subnational jurisdictions analyzed for this purpose are Belgium, France, *(Bertrand C., 2013, p. 6)* Germany, Greece, Ireland, Italy, Luxembourg, Spain, Sweden, Switzerland, Poland, and Portugal, some of which have no rules express laws in force regarding R2D. Outside of Europe, Canada (Ontario, Quebec) was also considered due to its innovative and recent position on legislation covering R2D.

For example, in Poland there is no specific regulation for R2D or any plan to adopt a specific regulation. Explicitly regulating R2D is perceived as unnecessary. The existing working time regulation is considered to adequately protect workers' rest time, including the possible negative effects of "wrong" use of digital tools *(Jaworyska, K, 2022, p. 51-55*). In addition, the widespread application of task-based work systems would hinder the implementation of R2D in Poland. Furthermore, a large proportion of employment in Poland is based on civil law contracts, with no statutory guarantees related to the right to rest. The German Working Time Act (Arbeitszeitgesetz, ArbZG) defines working time and rest time as mutually exclusive. Enshrining DD in law was debated as part of the global reflection between authorities and social partners on the future of work. However, more specific legislation appeared to be undesired, mainly because employers' organizations saw it as a brake on flexibility. There is some debate over the interpretation of the law and the question arises as to whether an employee's short connections outside of working hours should not be considered as such. The lack of precision in the Aegean is compensated in practice by the social partners: the big companies have taken measures (BMW, VW, Audi, Telekom) such as Codes of Conduct or disconnecting the servers at certain times. There is no legal provision in Switzerland that specifically addresses R2D. Although there have been many debates in the Federal Assembly over the past five years, none have resulted in a bill. A strong majority in the legislature as well as in executively, considers that the rules on working time are sufficient to enshrine R2D and that it is not necessary or desirable to regulate it specifically. On the contrary, a movement that supports a relaxation of working time, which would not consider as such the occasional connection of the employee outside the

working hours, has submitted several legislative initiatives, which will be followed by the Parliament in 2023. Ireland has no specific legislation. rules regarding R2D. *(Abbott, F. M., 2005. P. 317)* However, a code of practice has been adopted by the Workplace Relations Commission, which is an independent, statutory body established by law. The code of practice is recognized as not having the force of law but can be used to support claims by employees against their employer for non-compliance with working time and health and safety.

CONCLUSION

In the context of the massive digitization that gives both the employer and the employee unrestricted access to remote communication devices (telephone, email, social media platforms, etc.), but also the increase in the number of employees who carry out their work in a telework regime, the Parliament European adopted the Resolution of January 21, 2021 by which it addressed a series of recommendations to the European Commission regarding the need to regulate the employee's right to disconnect at the level of the member states.

When adopting the Resolution, the European Parliament took into account the fact that: - digitization and the use of digital tools presented countless disadvantages that created several ethical, legal and work challenges, such as the intensification of work and the extension of the work schedule, beyond the legally, thereby blurring the lines between professional and private life; - the increasing use of digital tools for professional purposes has led to the emergence of a new culture such as being ``always connected'', ``always online'' or ``always on duty'', which has the possibility violation of the fundamental rights of workers and fair working conditions, including fair salary, limitation of working time, balance between professional and personal life, physical and mental health, safety at work and well-being.

Unfortunately, the discussions did not take into account the exceptional professional situations, regulated by special laws, which require a different program, adaptable to the provisions of the administration of justice, or the rescue of fellow human beings, which require a permanent connection with specialist professionals, whose activity is based on the deadlines provided in the procedures and which, for example, relate to the freedom of the individual, to an efficient and timely investigation of the crime scene, as in cases of murder. Limiting the taking of custodial measures in time requires a quick and efficient preparation of the evidentiary material.

Or, these situations can be rewarded in an efficient legislative system, as a result of a Directive that would impose a legislative obligation on the member states.

Legislative regulation was also the initial suggestion, but the imposition of a principle of law would lead to dissatisfaction of these categories of professional employees, who would demand their right which would become fundamental.

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LEGISLATIVE ASPECTS AND DOCTRINAL OPINIONS REGARDING LEGISLATIVE EVENTS

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Abstract

Through this study, we want to bring back to attention the legislative events provided by law 24/2000, as a result of the appearance in their list of consolidation, which is regulated by law as not having legal effects. There is a similar legal institution in the Union legislation which has the value of republication in domestic law.

That's why we have briefly analysed the legislative events provided by the law and the effects they have produced, comparing them to the new technical procedure called consolidation.

Key words: *modification, completion, republication, consolidation, repeal, rectification, legislative events*

INTRODUCTION

After its entry into force and until it expires, i.e. for the entire duration of the existence of a normative act, the legislator can intervene on his/her text to rectify, modify, complete, republish, suspend, derogate or abrogate it, procedures that bear the legal name of "events legislation" (*I. Boghirnea, 2022, pp. 13-19*). These fall within the competence of the issuing body of the normative act or of a body issuing a normative act with a higher legal force.

As an exception to this rule, only in situations that are thoroughly justified, Law no. 24/2000 provides in art. 58 para.2 that only normative acts that have a special "importance and complexity" can be modified, supplemented or repealed by the issuing body in the time interval between the date of publication in the Official Gazette of Romania (Part I) and the date indicated for the entry into force

of the respective normative act, respecting the imperative requirement that the entry into force of the proposed interventions should occur at the same time, simultaneously, with the normative act that was subjected to those legislative events. Although the mentioned law enumerates in Chapter VI a series of legislative events, apparently the legislator limits this exception to only three of them: modification, completion and repeal.

All these legislative events must be produced in the same register in compliance with the principles of the entry into force of a normative act and the *nemo censetur ignorare legem* the Latin adage, therefore any new intervention by the legislator on the normative act in force must be brought to public knowledge , by publishing them in the Official Gazette of Romania, Part I, or in the Local Official Gazette, as the case may be *(N. Popa, 2020, pp.160-161, M. Bădescu, 2022, p.143, M. Niemesch, 2019, p.112, I. Boghirnea, 2023, p.122).*

I. MODIFICATION

In the opinion of Professor I. Mrejeru, the amendment represents the express partial replacement of a *lato sensu* law, which is imperatively necessary due to the finding of new legislative solutions for a new social requirement, without the amended normative act needing to be replaced in its entirety (*I. Mrejeru, 1979, p. 136; for the same idea see also L. Barac, 2009, p. 196).*

I. Vida and M. Enache are of the opinion that the amendment or other legislative events appear inevitable also as a result of non-compliance with the rules for the elaboration and drafting of normative acts that have a certain complexity *(I. Vida, M. Nicolae, 2012, p. 134).*

It is worth noting that the amendment, as well as other legislative events, could not intervene in the period between the publication of the normative act and its entry into force, but through the adoption of O.U.G. no. 61/2009 for the amendment and completion of Law no. 24/2000, a new paragraph of art.58 was introduced, which stipulates that in thoroughly justified situations, normative acts of great complexity can be both supplemented and repealed. This ordinance was approved by Parliament through Law no. 60/2010, which added, in addition to these two events, a third one, namely the amendment. This was the legal basis on the basis of which, since the publication of the new Civil Code in 2009, it could be amended by Law no. 71/2011, although it had not entered into force *(I. Vida, E. Enache, 2012, p. 134).*

The legislator defines the modification of a normative act as the replacement of a text of an article or some articles or paragraphs and their rewriting in a new form (art. 59 of Law 24/2000 republished).

An important aspect will be noted, namely that the amendment can only be carried out through an act with the same legal force as the amended one, which must be naturally integrated into the amended act because it is necessary to ensure a uniform style and terminology, but also a harmonious succession of articles.

The author M. Grigore shows that sometimes, for efficiency and economy of means of expression, the legislator can, through a normative act, amend several normative acts *(M. Grigore, 2009, p. 230).*

Regarding the effects from the entry into force of the amending regulations, they will be incorporated into the amended act, becoming a unitary whole. The provisions that have been modified act only for the future, with the exception of the milder criminal or contraventional rules (*mitior lex*), which, according to this principle, retroactive to the moment of the criminal or contravention act, as the case may be. Art. 62, sentence two, from Law no. 24/2000 provides that if other amending texts are subsequently introduced, they will refer to the basic act.

II. COMPLETION

Regarding the completion, as a legislative event, there is a legal definition according to which it consists in adding some regulations to the existing ones, which include additional assumptions and new legislative solutions, the legislator using the formula: "After the article ... a new article is inserted ... with the following content".

What should be remembered is that the articles or paragraphs that are added to the text in force, will gain the number of the corresponding structures in the text to be completed, to be introduced with a numerical index, so that they can be differentiated. In other words, the old numbering of the normative act will not be changed, as these added indexes will be used *(N. Popa, 2020, p. 207).*

Professor V.-D. Zlătescu shows that this completion of the text can be understood as a modification since the completed normative text becomes different after this addition of new provisions, in some cases the addition affects the original text by introducing some exceptions *(V.-D. Zlătescu, 1996, p. 104).*

The legal doctrine lists several rules that must be taken into account by the legislator *(M. Bădescu, 2012, p. 11):*

The legal doctrine lists several rules that must be taken into account by the legislator *(M. Bădescu, 2012, p. 11):*

a) Supplements will be made only through an act with the same legal force, or through a normative legal act with a higher legal force (for example: an organic law can supplement an ordinary law), thus not changing the nature of the completed law;
b) The texts that are newly introduced must be compatible in order to fit harmoniously into the entire completed normative act.

And the legislator provides in art. 61 of Law no. 24/2000 that the provisions which are to be amended or supplemented would affect the general concept or the unitary nature of a normative act, or if these provisions do not concern the entire regulation or a large part of it, then he /she will proceed to

replace with a new regulation of the regulation in question, the latter being necessary to be repealed.

- With regard to the effects of the new regulations that modify or supplement, from the date of their entry into force, they will be incorporated into the modified or supplemented act, as the case may be, being identified with it, i.e. together they form a "common body" and other subsequent interventions to complete them will refer to the basic act, as provided by art. 62, sentence two, from Law no. 24/2000. These newly introduced provisions have effects only for the future, except for more favourable criminal or misdemeanour law.

III. REPUBLICATION

Republishing is a legislative event, which can occur as a result of the legislator's express will, during the activity of a regulation, as a result of the fact that it has been modified and supplemented "*substantially*". Therefore, the republication will only occur as a result of a provision expressly provided by the legislator, which is contained in the normative act of amendment or addition.

We are of the opinion that, if the repeal is allowed by the legislator in the period between the publication of the normative act and its entry into force (art. 58 para. 2 of Law no. 24/2000), then, *a fortiori*, its republication could be allowed, at the express request of the legislator. The law expressly provides that, within this term, normative acts can be repealed (which is the legislative event with the harshest legal effect), then even more so, these normative acts could be republished, following some changes or important additions.

That is precisely why we believe that this was the rationale of the legislator who republished the Civil Code before it entered into force on October 1, 2011, a republishing that was expressly provided for by Law no. 71/03.06.2011 which entered into force on 13.06.2011, the conditions stipulated by Law no. 24/2000, namely "*the interventions proposed to enter into force on the same date as the normative act subject to the legislative event*" being met (see, on the contrary, the argument presented by *I. Vida, M. Enache, 2012, p. 136*).

Thus, the normative act is drawn up in which all the changes and additions it has had throughout its existence will be found in its "trunk", one removing the texts that were indicated by the legislator as being abrogated. By republishing, new texts cannot be added, nor can existing ones be changed *(M. Bădescu, 2012, p. 11).*

Thus, the updating of the text in a unitary body will entail a new renumbering of the normative act, only if this has been expressly ordered, and the updating of phrases that have undergone changes as well as the names of authorities and public institutions or localities.

Only the simple and emergency ordinances of the Government, which have been supplemented, amended or partially repealed, can be republished only after they have been approved by the Parliament, in order not to create possible

inadvertences with the approval law, in the situation where the latter would modify the text of the ordinance that is subject to approval.

IV. CONSOLIDATION

Recently also in our legislation, by Law no. 343/2002, the term "*consolidation*" was introduced, which is used in European Union legislation, but with a different meaning. If in the union legislation this term has the meaning of republication, in our legislation it has the meaning of an update of the text, being only a "*documentation tool*", which does not produce legal effects, which is done only by the Legislative Council.

Consolidation is a legislative event whereby the laws *stricto sensu*, ordinances and Government decisions of a normative nature, on which legislative events intervened, will be displayed in a consolidated version on the official website of the Legislative Council (http://www.clr.ro/)

We note that the legislator first refers to normative acts of amendment or completion, then he expresses himself in a general way to "on which legislative events have intervened", which means, in our opinion, that repeals are also considered partial, express and direct, republications and/or corrections.

It may be thought that it is similar to republication, however, through consolidation (art. 70^1 paragraph 2):

a) there will not be a new renumbering of the articles, paragraphs and chapters or other structures of the content of the new common body of the amended and supplemented text or containing partial repeals of the text;
b) it will not be possible to update the new names of public bodies and institutions or of the administrative-territorial units

Therefore, the consolidation is a permanent update of the text, after the occurrence of some legislative events and their publication in the Official Gazette.

V. RECTIFICATION

The legislator placed and regulated the rectification last time, after having regulated all legislative events, since, in our opinion, the rectification does not occur only after a new law enters into force, but also after modification, completion, republication, repeal, if necessary *(art. 71 of Law no. 24/2000).*

In the opinion of S. Popescu, rectification is an official legal operation, which aims to correct a material error in the content of a normative act, which is ascertained after it has been published in the Official Gazette, by publishing the corrected text in the Gazette *(S. Popescu, 2008, p. 150).*

After the publication or re-publication of the normative act, material errors may be discovered in its content that require rectification. This is done at the request of the issuing authority of the respective act, with the approval of the Legislative Council, request addressed to the Secretary General of the Chamber of

Deputies and what must be included in the act to be corrected, the identification elements of the Official Monitor in which it was published (number and date), the material error accompanied by explanations.

Thus, a note will be published that will include the rectifications that are necessary, not correcting them leading to difficulties, ambiguities or inadvertences in the phase of their interpretation and application.

M. Grigore in his work *Normative Technique* describes an atypical situation that happened in the case of an omission from the publication of a bilateral Treaty to which the Joint Declaration had to be annexed. After only the treaty was published, the correction of the omission was not made through a note, as required by law, but the two documents were published in a new Official Gazette, which had the same identification data as the one in which it was published only the Treaty, which contained a note explaining the fact that the official Monitor was being reprinted "due to" some mistakes that were found later, this one being distributed free of charge to subscribers *(M. Grigore, 2009, p. 257).*

One must take into account that the law prohibits, under the penalty of nullity, that through the rectification procedure, changes are made to the provisions of the text of the normative act, which means that only material errors must be corrected or corrected *(art. 71 par. 2 from Law no. 24/2000; art. 17 paragraph 3 from Law no. 202/1998).*

Therefore, those errors whose correction would lead to the change of the original meaning of the provisions that are subject to rectification cannot be the subject of the request, but only material errors that may consist of technical editing mistakes or may have complex sources such as *(M. Grigore, 2011, pp. 265-267):*

- the change of some addresses of offices, the published ones being actually indexical;
- replacing some phrases with correct ones, in the case of international documents, because they were not faithfully translated;
- grammar and spelling mistakes, which can make it difficult to understand the text, etc.

VI. REPEAL

Repeal is a legislative event by which the provisions of a normative act are suppressed as a result of the appearance of a new regulation, of the same level or of a higher level, which contains other provisions than the old regulation that has contrary provisions *(art. 64 of Law no. 24/ 2000).*

Repeal can only be done by the legislator through a normative act of the same level or a higher level. However, if a normative legal act with higher legal force has not expressly abrogated a normative legal act with lower legal force and it contains contrary provisions, then this task will fall to the authority that first adopted the normative legal act.

It is worth noting that the Romanian legislator gave expression to the principle of *lex posterior derogat priori* or *lex superior derogat priori* through its regulation in that it decreed that it is inadmissible to re-enforce the old (previous), regulation the repeal being definitive, with one exception, the provisions of those emergency ordinances by which normative acts were repealed, but were rejected by the Parliament, as provided by art. 64 para. 3 of Law no. 24/2000.

However, these provisions do not fall under the scope of other situations of the termination of a normative act[1], as such in the situation where the Constitutional Court declares as unconstitutional the provisions from which certain regulations were repealed, the latter re-enter into force[2].

As for the classification of abrogation, in the specialized literature it was stated that it is divided into (*M. Grigore, S. Ionescu, D. Gună, D. Barbu, 2015, p. 525):*

a) Express or explicit repeal (direct and indirect) - we encounter it in the situation where the legislator expressly provides which normative acts, chapters, articles come out of force by the formula "On the date of entry into force of this law, art. . [...], chapter [...] or Law no. [...]" or it is expressed in the formula "*on the date of entry into force of Law no. [...] any contrary provision is repealed*", as the case may be.
b) Tacit or implicit repeal when the legislator does not provide anything in this sense but leaves it up to the interpreter to find that the new law contains contrary provisions, different from the old law (in this sense see, as a comparative study, also *A. Hameed, 2023, pp. 429-455)*

Repeal can also be classified into total repeal (the case in which the entire normative act is suppressed) and partial repeal.

The partial repeal is assimilated by the legislator to another legislative event, namely the amendment, since the first one does not affect the provisions remaining in force and they continue to apply as such / *tale quale*.

Until the entry into force of O.U.G no. 60/2009, in the logic of the activity of a normative act, it was that from the moment it entered into force until the moment it came into force, it could have been subject to legislative events regarding its rectification, completion, modification, republication, derogation or repeal, i.e. after its adoption, publication and entry into force of the normative act.

[1] Not to reduce as the only way of leaving a legal rule out of force only to repeal, knowing that legal rules cease to have their effects and as a result of reaching the term, obsolescence, unconstitutional declaration by the Constitutional Court of a provision or regulation (art. 147 of the revised and republished Constitution of Romania) or by cancelling it, if it has an administrative nature, by the administrative court (according to Law no. 554/2004)

[2] It is the situation in which the provisions of art. were declared unconstitutional. I, point 56, from Law no. 278/2006 which repealed art. 205-207 of the Criminal Code in force, the dissociations that have re-entered into force

This emergency ordinance, we believe, was issued as a result of a situation that arose in 2004, with the adoption and publication of Law no. 301/2004 by which the entry into force of a new Criminal Code was desired.

This law stipulated in its content that it would come into force within one year *(i.e. June 29, 2005).* After the completion of this term and until its repeal, the following legislative events took place:

a) was amended art. 512 by O.U.G. no. 58/2005[3], which stipulated that the normative act will enter into force on September 1, 2006, and expressly ordered its republishing;

b) by O.U.G. no. 50/2006 one extended the term provided for in art. 512 on September 1, 2008;

c) by O.U.G. no. 73/2008 extended, again, the term provided for in art. 512 until September 1, 2009;

d) by Law no. 286/2009, as such, this normative act was repealed and Law no. 301/2004 did not enter into force even for a single day, being finally repealed.

In order to be able to appeal to the repeal, Law no. 24/2000 was amended and supplemented in June 2009 by O.U.G no. 60, and thus additions, changes and repeals can be made since then and in the period between the publication of the normative act and its entry into force *(art. 58 paragraph 2 of Law no. 24/2000).*

CONCLUSION

In conclusion, as the entire doctrine states, the legislative process must be considered as an activity that aims to create, modify, complete or abrogate legal norms, actions of the legislator determined by the need to ensure the satisfaction of society's needs and to protect the rights and citizens' liberties (L. D. Chulyukin, V. V. Guryanova, 2018, pp. 38-44).

Only the normative acts that are affected by the legislative events and that are published in the Official Gazette of Romania produce legal effects and can be used as reference texts for legal purposes.

So that through the new texts introduced in Law 24/2000 regulating the consolidation, it does not produce legal effects and must be understood as a "documentation tool" as provided by art. 70[1] paragraph 3 of the aforementioned law.

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ROMANIAN MEDIA AND PUBLIC'S SAFETY DURING INFORMATION WARFARE

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Abstract

Nowadays, wars are no longer fought exclusively on the front, but often, even more effectively, behind the front line, in a hybrid way, in the information environment. The Romanian mass media, like the international media, is recently more and more frequently assaulted by examples of disinformation, propaganda, cybernetic attacks. Is there information security for the Romanian reader during the international war? How sure is the reader that the data he has read is correct, credible, or truthful information? We will try to see the answer reflected in the case study regarding the media in current Romania, comparing a national newspaper, Adevarul, and a local one, Jurnal bihorean, on the use and definition of the chimera-phrase "hybrid war".

Key words: *media, public, information warfare, disinformation, propaganda.*

INTRODUCTION

In the last two years, Romania has been surrounded by several armed and not only armed conflicts, reproduced in the pages of newspapers and magazines, in online publications and in the audio-visual environment. We must bear in mind that the modern battlefield is also a complex one *(Cîrmaciu D., Smit. I., 2008, p. 411).* The Romanian public is directly influenced by the media messages regarding the war, but especially by the "hybrid war", a different one, but difficult to define one, facing fears and questions related to the possibility of similar conflicts in our country.

The national and local media are also trying to find out what this war is about and how it works. We will encounter different ways to describe the phrase,

in various journalistic genres, from news, to reports, to interviews, analyses, features or comments, editorials.

The citizen has the right to be informed, without being restricted, as established by the Constitution of Romania, in article 31. The article has an observation regarding national security and protective measures that involve young people. Mass media have the obligation to inform correctly the public opinion. Article 30 mentions the framework for freedom of expression, an inviolable right, which, however, cannot prejudice honor, private life, dignity, the right to one's image. The civil liability for the information transmitted to the public rests with the journalist and the editor, according to the law[1].

I. EXPLAINING THE "HYBRID WAR" IN THE NATIONAL PRESS

"Hybrid war" sums up several techniques of power, strong and weak ("hard power" and "soft power") that interact with each other, with the aim of achieving certain strategic, geopolitical goals, to undermine the security of a state through conventional destabilization actions, military and non-conventional, non-military (EU Joint Framework to Counter Hybrid Threats, NATO Capstone Concept for the Military Contribution to Countering Hybrid Threats), the target being this time winning minds and not enemy territories *(Nicolescu F.M., 2017).* Among these we list some of the most used in the mass media: disinformation, fake news, propaganda campaigns, cyber attacks *(C.Ungur-Brehoi, 2022).*

The Romanian press started to refer in its materials to the term "hybrid war" from the beginning of 2014[2]. At national level, the number of materials on the topic of hybrid aggression or war is much higher compared to that of local newspapers, for example we find almost 200 materials in *Adevarul* with mentions of these phrases[3], 114 in *Libertatea,* while in the newspapers in Bihor county there are less: in the same period, there are ten in *Crisana,* six in *Jurnal bihorean*, four in the weekly *Bihoreanul (F. Ardelean, 2022).*

In the first years when the phrase appeared in media, we notice that the journalistic genres treat the subject with a certain amount of mystery, of curiosity, in an attempt to define "hybrid war". The first material that mentions "hybrid war" from *Adevarul* appears on September 2nd, 2014, in the title - "NATO Summit and Vladimir Putin's «Hybrid War»"[4]. It is an analysis made by the political-military analyst[5] on the Wales NATO Summit at Celtic Manor and the

[1] https://www.constitutiaromaniei.ro/, accessed on 30.10.2023
[2] The researched period was 2014-2023.
[3] More precisely, 191 specifications.
[4] https://adevarul.ro/blogurile-adevarul/summitul-nato-si-razboiul-hibrid-al-lui-vladimir-1561294.html, accessed on 02.11.2023
[5] The same analyst produces two other analysis materials – in November 2014, "The fifth military domain, the Internet. Virtual space and the East-West war" and in December 2014, "The Spy Game in Europe" in which he writes about the transformation of conventional wars into hybrid wars, fought in the world of the Internet, on social networks or in invisible wars, in "the realm of

topics of discussion, including rapid force response in the event of a crisis on a NATO member state and ensuring the security of members. "Hybrid war" is synonymous with "Putin's war", totally different (although without clear details) compared to any previous armed conflict, namely a fifth military dimension – "cyber war", after land, air, naval and cosmic.

On the same day, also in *Adevarul* appears the material-synthesis "Infographic Putin's «hybrid war» began a long time ago. Russia raised the bar and brought war to the level of art"[6]. Here "hybrid war" appears six times and encompasses all possible evils. First as a "new indicator of the art of war", based on "unorthodox tactics" - from political, economic, to humanitarian, informational, and especially non-military ones, being the central point that led to the organization of a summit. Also, this type of war showed NATO's military weakness, being a turning point, with the aim of "genocide, irredentism, military aggression", achieved through new and very powerful means of demonstration: economic interdependence and communication technologies, with long term goals. The gas pipeline game is part of this hybrid war. There are also elements of espionage - electronic viruses that attack government and diplomatic systems; one such virus is Snake, which penetrated the deep secrets of Kiev. The most worrying remark refers to manipulation and was made in the material of the Russian media, which is in a "stunning" disinformation campaign.

The expectation of such a "hybrid attack" that can expand, produces terror. In the news Baltic countries, prepared for a "hybrid war" it is shown how countries such as Latvia, Estonia and Lithuania are preparing for a possible scenario modelled on the occupation of Crimea: Estonia has built a defense plan, and Lithuania has even printed an invasion survival manual for its citizens[7]. The article catalogues the term "hybrid war" as "armed actions" without belonging to the troops of a state, but accompanied by cyberspace attacks and disinformation campaigns. Their purpose, according to US representatives, would be to test the guarantee of NATO's military support.

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espionage", infiltrated into the countries the former Soviet bloc, with the aim of destabilizing them. "The Ukrainian Crisis, between Matrioshka and Intermarium" (February 2015), signed by the same author, is on the same theme-espionage and hybrid war.

[6] https://adevarul.ro/stiri-externe/rusia/infografie-razboiul-hibrid-al-lui-putin-a-1561354.html, accessed on 01.11.2023. In the same period, other press materials appeared on the topic of hybrid war, such as the reply of the former president of Romania at the NATO Summit in 2014 - "Traian Băsescu: Romania is a country that will be defended in any scenario in case it is attacked".

[7] The material dated 10.02.2015 is signed by Viorica Marin, and the mention of the phrase appears four times, the first time in the title; there is a fifth usage with a synonym "hybrid attack". https://adevarul.ro/stiri-externe/europa/tarile-baltice-pregatite-pentru-un-razboi-1599465.html, accessed on 02.11.2023.

II. PUTIN'S HYBRID WAR

"Putin's hybrid war threatens Moldova, warns the Pentagon and NATO" is a news from 2015 that underlines the danger of such a hybrid war in Moldova and Montenegro, non-EU states, which are not part of NATO, but have a risk of destabilization very high and corrupt political, legal and media sectors[8]. Another news shows us that the war is no longer only Putin's, and more states are borrowing Russian techniques towards other countries, through economic blockades, information warfare and trade restrictions[9].

In the 2018 editorial, "Hybrid world war. Ukraine in the front line", Iulian Chifu[10] signals the entry into a new "world" war, where Russia is the aggressor, putting the military component on the same level as the external diplomatic component, through an impressive number of strategies such as delaying tactic, pressure techniques, postponement, interpretation, information gathering, relativization of norms negotiations, distortions, denial, counter-arguments, intrigues, conspiracies, substitution, sowing doubt, distraction[11].

III. FROM THE HYBRID MYTH TO CONCRETE EXAMPLES

During 2021-2022, *Adevarul* brings more and more concrete news about what hybrid warfare means. Thus in the news that "Russia would have launched more than 4,500 cyber attacks on Ukraine in 2022", we find out some succulent details about the thousands of cyber attacks that Ukrainians stop every day.[12]

Closer to the date of the Russian offensive, the press materials focus on facts, on information related to armed actions, and no longer deal with the definition of other types of war. During the fightings of 2022, hybrid warfare becomes an apocalyptic phenomenon, foreshadowed, a fatality that could not be avoided[13]. Due to these topics that are so appealing to the public, *Adevarul* creates

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[8] We find out which are the causes for such practices – disinformation, corruption. https://adevarul.ro/stiri-externe/europa/razboiul-hibrid-al-lui-putin-ameninta-moldova-1603567.html. accessed on 02.11.2023.

[9] "Accusation from Tiraspol: Moldova and Ukraine are waging a hybrid war against Transnistria", signed by Alexandru Filimon. https://adevarul.ro/stiri-externe/republica-moldova/acuzatie-de-la-tiraspol-moldova-si-ucraina-poarta-1630227.html , accessed on 03.11.2023.

[10] Professor at SPSPA Bucharest and president of The Center for Conflict Prevention and Early Warning Bucharest.

[11] https://adevarul.ro/blogurile-adevarul/razboiul-mondial-hibrid-ucraina-in-linia-intai-1858287.html, accessed on 03.11.2023.

[12] According to the material, 800 cyber attacks took place in 2020, over 1,400 in 2021, and in 2022 around 4,000. With all the accurate data, the use of a conditional tense in the title makes us question the information authenticity.https://adevarul.ro/stiri-externe/rusia/rusii-ar-fi-lansat-peste-4500-de-atacuri-2230605.html, accessed on 02.11.2023.

[13] We come across materials such as "How Putin's regime achieved the impossible, turning a hybrid war into a real one. Analyst: Hostages are Russians, not Ukraine," or "Third Empire: Russia

a column "War in Ukraine" which includes external news about different countries directly or indirectly involved in the conflict, opinions of politicians, Romanian political analysts or university professors who research the facets of the subject.

In the equation of the hybrid war, other more accurate data appear, such as, in addition to cyber attacks and the migratory phenomenon between Africa, as part of the strategy of the mercenaries paid by Putin - in the media material, "Russia is accused of using migration on the Mediterranean route as a tactic «hybrid warfare»"[14].

As soon as the temporal proximity distances us from the outbreak of the first Ukrainian-Russian war, the search for the initial mystery, of the undefined "hybrid war", returns. A year and a half after the start of the war in Ukraine, the idea of hybrid warfare is becoming a topic for research, public analysis, even for scientific session. In 2023, a material announced the opening of an international conference in Galați – "«The hybrid war reflected in the media» - the hot topic launched into debate by the Romanian Association of Press History[15], with specialists present from several European countries, in order to expose together the facets of a new kind of war.

IV. A MORE RELAXED PERSPECTIVE

In the same period of time, Oradea press register fewer references to the phrase "hybrid war", as expected due to the distribution, the area of the publications, the readership (the physiological principle)[16].

In *Jurnal bihorean,* the first material is entitled "Ex-minister Teodor Baconschi believes that our country should prepare to receive a massive wave of refugees from Ukraine", dated 08.05.2014. The former minister's statements are related to the March 2014 forced annexation of Crimea, which in the politician's opinion was to attract an extremely large number of Ukrainian refugees to Romania. There is only one connection with the "hybrid war", which was possible in violation of all the rules of international law[17].

From a totally different point of view compared to the analyzed national newspaper- *Adevarul, Jurnal bihorean* does not make any reference to the "hybrid war" until the period of the Russian-Ukrainian pre-outbreak war. In May 2022, the same phrase reappears. "Dan Dungaciu: «For us, now, NATO is more

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as it should be, The Kremlin leader is just following the plan" or "«The Strategy of Chaos», the weapon Putin wants to use to scare the West, The hybrid war, explained by General Dan Grecu".

[14] Appears at "international new" heading. https://adevarul.ro/stiri-externe/europa/rusia-e-acuzata-ca-foloseste-migratia-pe-ruta-2249785.html, accessed on 01.11.2023.

[15] https://adevarul.ro/stiri-interne/educatie/razboiul-hibrid-reflectat-in-media-tema-2305110.html, accessed on 03.11.2023

[16] Both newspapers are dailies, both printed and online.

[17] https://www.bihon.ro/stirile-judetului-bihor/350-000-de-posibili-refugiati-din-bucovina-de-nord-301165/, accessed ons 06.11.2023

important than the European Union»" is a news about the seminar "The Security of South East Europe and the importance of the transatlantic component in the context of the conflict in Ukraine" held at Tarii Crisurilor Museum in Oradea. The professionals who led the seminar defined the paradigm as "hybrid actions" that also include actions of intimidation in seaports, blocking the construction of the national energy infrastructure in the Black Sea area, preventing the export of Ukraine to the Black Sea, all actions that directly influence our country[18]. One conclusion of the debate was that security was more important than prosperity for Romania at that time.

In June 2022, another material on the new forms of war is printed in *Jurnal bihorean*: "Strategic debates held at the sixth edition of the international conference «Security challenges in the Balkans"', organized by UVT and NSC. Also this time the event is a planned one - the sixth edition of the conference on security and "hybrid threats" and classics from the Balkan area. The spatial proximity of the subject distances the reader from the event, because the conference takes place in Timisoara, and not in Oradea. The material does not have a direct reference to hybrid warfare, it presents the conference panels, the prominent people who attended and their studies. At the end of the material we learn that it was an advertorial[19].

The following media material that brings up the phrase "hybrid war" appears one year after the start of the Russian-Ukrainian war, on February 20th, 2023. With the title "Massive PROTESTS in Chisinau. Putin forces a coup d'état against Maia Sandu", the news presents the protests of the pro-Russian population of Chisinau against the president Maia Sandu. The article mentions these terms only once, paraphrasing Maia Sandu, who signaled at the Munich conference that Russia is waging a hybrid war against the state she represents, asking for NATO air support[20].

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[18]The event was organized due to public appetite for such a dialogue, in 2022. Russian aggression against Ukraine was in full swing. The seminar was prepared by the Faculty of History, International Relations, Political Sciences and Communication Sciences of the University of Oradea, by the New Strategy Center Bucharest and Tarii Crisurilor Museum of Oradea, in partnership with the Bihor County Council and the Oradea City Hall.https://www.bihon.ro/stirile-judetului-bihor/dan-dungaciu-pentru-noi-acum-nato-e-mai-importanta-decat-uniunea-europeana-3991919/, accessed on 05.11.2023.

[19] https://www.bihon.ro/stirile-judetului-bihor/dezbateri-strategice-desfasurate-la-cea-de-a-sasea-editie-a-conferintei-internationale-security-challenges-in-the-balkans-organizata-de-uvt-si-nsc-4021185/, accessed on 05.11.2023.

[20] The material develops the idea of discoveries made by Ukraine regarding Russia's war plans against the Republic of Moldova and the warnings of the Russian Foreign Minister, Sergey Lavrov, that Moldova could have the fate of Ukraine.. https://www.bihon.ro/stiri-internationale/mapamond/proteste-masive-la-chisinau-putin-forteaza-o-lovitura-de-stat-impotriva-maiei-sandu-4215786/, accesat la 05.11.2023.

The next day, on February 21st, 2023, a new material ("Romania suspended the activity of the Russian Center for Culture and Science in Bucharest" [21]) refers to "hybrid attacks", "manipulation of reality" in a premeditated way and "disinformation through truncation", developed by the Russian Center for Culture and Science in Romania. Through its actions of propaganda, disinformation and excusing war crimes, the center would have moved away from the achievement of the objectives for which it served, hence the categorical decision to suspend the activity.

"Freedom", in TIFF Oradea. «Let's analyze the vomit from the past if we want to have some kind of chance for rehabilitation, as a nation»" is the story from *Jurnalul bihorean* which makes only one reference to the "hybrid war", but related to the reinterpretation of the actions of confusion within the 1989 Revolution, by using modern terms. The rest of the material tells about the atmosphere on the night of the premiere, at the Queen Maria Theater in Oradea and the reasons why the film could not be seen at the cinema in the city[22].

CONCLUSION

The phrase "hybrid war" is still unclear for both the media and the reading public, after almost a decade since it has been used, due to the inclusion in its meaning of more and more elements at every usage.

The comparative analysis of the two dailies - one national, the other local - shows us how different the media coverage of this phenomenon was, both numerically and as a varied typology of journalistic genres, sizes of materials, constancy of appearances.

Related to the safety of the reading public, the media can no longer offer a single direction, a single explanation regarding this phrase, but uses a media pluralism, many data that sometimes have the purpose of confusing the reader, making him feel unsure of the information received, circumspect, distrustful. The

[21] https://www.bihon.ro/stiri-internationale/romania/romania-a-suspendat-activitatea-centrului-rus-de-cultura-si-stiinta-la-bucuresti-4217152/, accessed on 05.11.2023. A news n the same topic also appears in *Adevarul*, with the same citations about hybrid attacks. Similar articles appeared in the national newspaper in the following days. We recall their headlines: "Romania shuts down the Russian Cultural Center. The Russian ambassador, summoned to the MFA", "The reaction of the Russian Center for Culture and Science, after Romania decided to close the institution: «As before, we are waiting for you»!" (both on 21.02.2023), "What messages do Romanians send to the Russian Center, accused of distorting the truth: «Bring back the gold before you leave»", "Behind the scenes of the establishment of the Russian Culture Center in Romania, which has become a propaganda tool of the Kremlin" (both 22.02.2023) , "MFA in Moscow, about the closure of the Russian Center: «Bucharest's initiative will not go unanswered»"(23.02.2023), "The Russian Science and Culture Center in Chisinau, vandalized with red paint" (24.02.2023). Only in three of the materials does the phrase "hybrid attacks" appear, as the reply used by Russian representatives to the situation cited by Romanian diplomats.

[22] https://www.bihon.ro/stirile-judetului-bihor/libertate-in-tiff-oradea-sa-analizam-voma-din-trecut-daca-vrem-sa-avem-un-fel-de-sansa-la-reabilitare-ca-neam-4411880/, accessed on 02.11.2023

positive side of this situation is that a large part of the public opinion will also seek the information from other sources (usually online), check it and only then form their own opinion related to the subject.

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IMPLEMENTATION OF UNION DIRECTIVES IN THE MATTER OF ROMANIAN CRIMINAL LAW. STUDY ON EXTENDED CONFISCATION

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Abstract

Through this paper we propose to analyze a very controversial subject in the matter of criminal law institutions, extended confiscation, a mechanism of substantial law that was not found in the original form of the Criminal Code, but which has raised a legal discussion since its implementation.

In this context, the paper analyzes issues that have been interpreted differently by judicial doctrine and practice, the correctness of the transposition of the directive on extended confiscation in relation to European Union standards, the interference of this sanction with the guarantees of European Convention of Human Rights, the issue of the application of this sanction in relation to the application in time of the criminal law and with regard to certain crimes, but also the interference with other extra-criminal institutions that have a reparative role in the patrimonial plan.

Key words: *extended confiscation, European Directives, Criminal Code, guarantees of European Convention of Human Rights.*

INTRODUCTION

Many litigants have wondered over time what the role of this security measure would be, which would complement the special confiscation in the conditions where there would be at the same time the mechanism of the protective measures in the context where the suspect or the defendant would squander his wealth during the criminal process. We believe that at a conceptual level this measure is necessary and proportionate so that society can have confidence in the efficiency of judicial institutions.

If the persons about whom there is certainty that they would illegally obtain goods or values and the state would be in an objective impossibility to react, the preventive character that criminal law enshrines as a principle would be lost with certainty.

Thus, if the effects of the extended confiscation would not be perpetuated, most likely that at the national and union level, the crimes in the field of tax evasion, drug trafficking, or those in the field of defrauding the financial interests of the European Union would be perpetuated dramatic. Thus, the need for high social capital that continues to be enjoyed by judicial institutions, has grown considerably with the reassurance of citizens, that any wealth against which there is a legitimate suspicion that it might come from an act of a criminal nature will be repressed by means of the power judicial.

I. CONFISCATION EXTINCT IN THE CONFIGURATION OF THE ROMANIAN PENAL CODE

I.1 The history of the institution of extended confiscation in the Romanian criminal architecture

Even if the legislator did not concern himself with defining or integrating the nature of the safety measures, which are applicable in most criminal cases in Romania, the doctrine represented a landmark on which the judicial practice was based in the application of these sanctions both in terms of the Old Criminal Code, as well as the New Criminal Code.

Thus, safety measures are part of the category of criminal law sanctions, representing legitimate means by which the state constrains a person (adult, minor or even a legal entity) with a preventive character, with the aim of removing the possibility of committing new acts provided for by the criminal law (L.V. Leferache, 2021, p.336). The legal nature of these institutions, in accordance with the principle of the legality of criminal sanctions, is found in article 2 paragraph 2 of the current Criminal Code (A penalty cannot be applied or a security measure cannot be taken if it was not provided for by the criminal law at the date when it was committed.), and in the doctrine (L. M. Stănilă, 2021, p.230) another particularity was found that strengthens the argument that places safety measures in the category of criminal law sanctions, through the integration by the legislator of the measures of security in the material element of the offense provided for by art 288 of the Criminal Code (Non-compliance with criminal sanctions). However, the issue of the interference of this crime still remains under discussion regarding the inclusion or not of safety measures within the objective typicality of the act, following Decision 2/2019 of the Romanian High Court of Cassation and Justice issued through a mandatory Preliminary Judgment for the courts.

In the current legislative configuration, security measures are regulated in articles 107-112[1] of the Penal Code, being limited in number, unable to be applied by analogy, and each of them has a different legal regime, which makes it typical

in relation to the other security measures or complementary or accessory punishments.

In accordance with the provisions of the article 107 of the Law 287/2009 the purpose of security measures is different from that of punishments. If in the case of punishments, we will refer to the repressive, sanctioning, educational, preventive effect, safety measures aim at two levels: removing a state of danger (characterized in the doctrine and as an immediate goal) but also preventing other criminal acts (characterized in the doctrine and as a mediated goal) (L.M. Stănilă, 2021, p. 231).

In the configuration presented by the drafting college of the Penal Code and assumed by the Parliament, the essence that the last Penal Code impregnated as an indissoluble source of the new legislative configuration was preserved. In other words, in the initial form of Law no. 286/2009 the main safety measures were kept: the obligation to undergo medical treatment, medical admission, the prohibition of occupying a position or exercising a profession as well as the ubiquitous special confiscation (with applicability in almost all criminal cases).

We note that, however, the legislator abandoned the transposition of two security measures from the old code into the same category of criminal sanctions, choosing to transpose them into the category of complementary measures (The security measure provided for in art. 112 paragraph 1 letter d of the Criminal Code 1969 can be found in art. 66 paragraph 1 letter l Penal Code; The safety measure provided for in article 112 paragraph 1 letter e CP 1969 can be found in article 66 paragraph 1 letter c Penal Code), thus we find that there is no perfect symmetry between the principles of applying this institution in the new approach promoted by the Romanian criminal law doctrine, which reduced this category of sanctions, still giving a realistic note. We can say that it is fully justified to integrate these sanctions into the category of complementary punishments for a logical reason: the safety measures are non-prescriptive and in principle are not applied for a fixed term (M.Udroiu,*General Penal Law* 2023, p.919), and in the case of complementary punishments, the judge is obliged to order a certain complementary punishment for a period of time. Moreover, safety measures can only be revoked by praetorian means, the judge being the exponent of the application and termination of these sanctions, or in the case of complementary punishments, they cease by the simple passage of time.

I.2 Extended confiscation – origins and applicability in the Romanian criminal law

As we stated, in the legislator's initial perspective, the extended confiscation was not included in the category of security measures. Thus, the notion of confiscation from my point of view could be seen in a narrow sense, only from the perspective of special confiscation, operating only with regard to the transfer into the state's patrimony only of goods intended or used or acquired

as a result or to facilitate a foreseen deed by criminal law, but also in a broad sense, including both special confiscation and extended confiscation. We could say that the place of extended confiscation in this category is justified because it also refers to the other factual situations of acquiring the patrimony illegally, not being conditioned only by the assets that were related to the commission of the respective act. Thus, the commission of a criminal act (obviously followed by the cumulative and necessary fulfillment of the other necessary conditions) is only a first step in being able to apply the institution regulated in art. 112^1 CP, unlike the unique condition of the application of the measure of special confiscation.

The origin of the institution of extended confiscation is a long line of binding Union acts for the member which forced the legislator to integrate this particularly important mechanism in the matter of criminal law substantial. The multitude of legal norms aimed at preventing and combating this criminal phenomenon encountered mainly in the matter of organized criminalized groups and white-collar criminality has led the European legislator to act accordingly and to mobilize both the European institutions by creating support bodies (Europol; OLAF; Eurojust; EPPO) but also of the member states to prevent this problem from perpetuating itself.

Even if each mentioned directive could represent a different topic of study, I think it is imperative to address a defining rule in this regard: Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instruments and proceeds of crimes committed in the European Union.

In the matter of Union acts, directives follow regulations in terms of importance, the significant difference being the possibility of the national legislator to make certain changes in the case of directives, once the effective implementation, they cannot be invoked before the courts as a sole legal basis, only after integration into the national legislation. In contrast to this, the regulations have a much more favorable framework that the Treaty of the European Union offered (in this sense art. 288 TEU). The regulations have direct applicability in national legislation (M.Pătrăuș, 2021, p.309; G.Fabian, 2023, p.188); they cannot undergo any kind of changes from the member states and can be invoked as direct rules before the courts (the most frequent case being Regulation 679/2016 on the Protection of Personal Data - GDPR of April 27, 2016 published in the Official Journal of the Union of Europe on 04.05.2016 through L119/1).

Therefore, we can identify a first deficiency that the legislative bodies showed in relation to the numerous directives and framework directives that themselves regulated the issue of extended confiscation. In other words: it was not fairer in relation to the provisions of art. 6 of the European Convention on Human Rights regarding the right to a fair trial, for the European Union to resolve this issue through a Regulation, which would be binding for all states and which

would be transposed without the implementation procedure into national law? We believe that, by lege ferenda, the Union legislator could rethink this concept, especially in situations where new challenges in the field of criminal procedure and judicial cooperation in criminal matters lead to a rethinking of this concept, even under the control of a single body, given the fact that along with technological progress, cybercrime can converge towards the hiding or even the definitive theft of assets that the person referred to justice may "lose" to the detriment of the state, in the event that the prosecutor's office does not order the insurance measure in time of confiscation.

I.3 Implementation of extended confiscation in the new Penal Code

Given the fact that under the armor of special confiscation, the courts (including the judge of the preliminary chamber) could irreversibly pass into the state's patrimony certain assets that were intended, were used or were obtained as a result of the commission of crimes, there was no question of introducing in the General Part of the Criminal Code of an institution that has the character of restriction on the patrimony of persons about whom there is a minimal suspicion of the lawful character of the acquisition of wealth. Following the adoption of Law no. 286/2009 which initially did not provide for the place of extended confiscation in the category of safety measures, the legislator implemented through Law 63/2012 of April 17, 2012 a new article (112^1 in the configuration of the future Penal Code) thus transposing Council Directive 2005/212/JAI of February 24, 2005 regarding the confiscation of products, instruments and assets related to the crime (J.O.U.E series L no. 68 of March 15, 2005). We must not exclude, de facto, the repressive character of this safety measure, which can be very well analyzed from the perspective of a genuine punishment, as a result of the restrictions on property rights. (Silviu Daniel Socol, 2012, p.108).

Initially, the most significant debate in the doctrine regarding the initial form of article 112^1 was related to the fact that within it, the crimes that could be the subject of the application of this institution, were strictly and limitedly provided by law or not all the time the role of this safety measure was fulfilled. For example, in the case of a crime against bodily integrity, which was aimed at obtaining sums of money from third parties, from which it follows that the perpetrator was not the first offender, and the court is convinced that he is part of an organized criminal group, and the assets acquired cannot be justified, the application of this institution could not be possible, due to the condition of the type of crime.

Together with the amendments made by Law 228/2020, as a result of the transposition of Directive 2014/42/EU of the Parliament and the Council of April 3, 2014 on the freezing and confiscation of instruments and proceeds of crimes committed in the European Union (J.O.U.E L127/39 of 29.04. 2014), the conditions for the application of extended confiscation have changed, giving a

much more realistic tone to the interest of applying European norms. However, it is of interest to observe the proportionality that the intrusion into the fundamental rights of individuals could have from the implementation of a directive at the level of a national state (Elise-Nicoleta Vâlcu, 2022,369)

Thus, in the doctrine (M.Udroiu, 2023 *Penal General Law*, pp. 979-982) the new legislative set transposed by the mentioned norm was structured very correctly. The first condition that the judge must analyze is the special maximum of the punishment against which the legal classification was made in the case. This must be four years or older (aspects provided both in art. 5 paragraph 2 of Directive 2014/42 of the European Parliament and of the Council on the freezing and confiscation of instruments and proceeds of crimes committed in the European Union series L 127/39 of 29.04.2014 and in art 112^1 paragraph 1 of the Criminal Code). Obviously, the notion of punishment refers to the provisions of art. 187 of the current Penal Code which refers to the punishment in the basic form, the reasons for reducing or increasing the limits not being discussed. Even if there are not many articles that have a maximum of 4 years in the special part of the criminal code, this hypothesis should not be excluded out of hand since the extended confiscation is applied in all categories of criminal or non-criminal laws that contain criminal provisions.

The second cumulative condition in the case of establishing the incidence of this security measure is related to the material benefit that the offender could obtain or has obtained by committing the act in question.

Thus, the condition of classifying the crime in one of the 17 categories of crimes mentioned in the original form is replaced, the condition being that in essence the act provides the perpetrator with a material benefit. We believe that we could start two important discussions: on the one hand, the analysis of the purpose / motive of committing the act, and secondly, the situation of crimes with anticipated consummation.

In most cases, crimes do not require proof of a motive or a special purpose to commit the crime in order to retain the typicality of the act. However, we should not exclude the possibility of investigating the purpose for which a crime was committed (committing a crime against the person in order to obtain some sums of money), thus, we consider that the requirements are satisfied in the matter of including this condition and regarding the case history of crimes that through itself does not give the perpetrator an actual material benefit (as in the case of crimes against patrimony).

The second particularly interesting situation is related to the situation of crimes that are consummated in advance (M.Udroiu,**Special Penal Law**, 2023, p.1023; S.Bogdan/D.A.Șerban, 2023, p.313) such as giving/taking bribes or trafficking/buying influence, when the mere acceptance or claim of patrimonial benefits even if they are not followed by the actual remittance of the bribe,

consumes the crime in advance, so that liability can be incurred criminal charge against that person.

In appearance, the impossibility of applying extended confiscation alongside the special one, given the specificity of the two safety measures that cannot overlap, would converge towards the application of only special confiscation due to the legal provisions (for example, art. 289 paragraph 3 Criminal code provides that any goods or values received are subject to confiscation). However, we could say that the subsequent analysis by the court of the proportionality of the value of the assets of the public official or of the briber or trafficker of influence or third parties connected with them in relation to their income should not be excluded in order to determine whether it would be possible to apply the extended confiscation mechanism . Even if the crimes of corruption are not crimes of result, but only of danger to the good development of service relations (B.Bodea/R.Bodea, 2018, p.408), it can be found that in in the event that there would be a clear disproportion between the earnings of the respective official and his patrimony, the court can relatively presume that they were obtained as a result of the defective performance of the service relations.

Based on the above, we appreciate that the provisions of art. 5 paragraph 2 of the directive (which rules in the category of crimes and active and passive corruption in the public/private environment).The third condition in the analysis of the admissibility of the application of extended confiscation, is the condition of the existence of a conviction. This criterion represents a unique exception in relation to the other safety measures present in the criminal code, against which not even a solution to establish the guilt of the person should be necessary, as they can be ordered even after a solution of classification or acquittal .

Thus, the condition of conviction is a criterion taken from Article 4 of Directive 2014/42/EU that allows the establishment of this measure even in the case of conviction in absentia. At the same time, the solution of renouncing the application of the penalty or postponing the application of the penalty is not considered a conviction, situations in which it is not possible to order this safety measure (L.V. Lefterache, 2021, pp.357).

The problem that Article 5 paragraph 1 of the Directive constituted a real challenge for the legislator, since the rules provided for in that article stipulated that the court can apply the measure of extended confiscation when it has based on the circumstances of the case, including the factual elements and the available evidence, has the certainty that the assets that could be subject to extended confiscation are produced through criminal activities. This should not link the court to the crime or the legal object protected by the incrimination norm, but to refer strictly to the causal relationship between the obvious difference in the value of the goods and the existence of criminal acts that represented the method of acquiring them. The exposed aspect is even better concretized by a fairly recent

case supported at the High Court of Cassation and Justice, Criminal Section by Decision 129/A/2019 of March 30, 2019. In the case, the defendant, who was convicted on the basis of art. 367 of the Criminal Code (Creation of an organized criminal group), was given the security measure of extended confiscation because the court, in relation to the goods he owned, concluded that they were obtained as a result of the commission of crimes, since he did not have a job that would produce the income in order to legally obtain them. From here we can conclude a very important aspect: that the burden of proof, provided for in art. 99 Code of Criminal Procedure belongs in the first phase to the prosecutor's office, which will have to prove that there is no legal connection between the income and the assets in the patrimony, subsequently the defendant must reverse the burden in his favor by proving that the assets were obtained lawfully, even if he would not currently have income (accepting an inheritance, receiving donations, selling real estate, etc.).Last but not least, and perhaps the aspect that caused the most problems in the application of these institutions, is the temporal criterion of obtaining goods.

Thus, with the transposition of the directive into the Romanian Criminal Code, it was necessary for it to also refer to the Old Penal Code because, in order to respect the constitutional principle of the application of the more favorable criminal law, in the cases judged under the empire of the old Penal Code, the legislator had to to insert this new security measure in the old Code, there was a chance that many assets that were likely to be obtained illegally would not be capitalized due to the lack of provision in the criminal law.

From here, a precedent was created that was ultimately cut by two particularly important decisions of the Constitutional Court, which later represented an important support to be able to establish for which goods the matter of extended confiscation would be incidental, but especially for the date of the commission of the acts.

Starting from the principle that criminal law cannot retroactively apply to new facts or institutions, by Decision 356/2014 of the Constitutional Court, which ruled that the institution introduced by Law 63/2012 can only be applied to assets acquired after 22 April 2012, the date when the modification of the Old Penal Code and the New Penal Code entered into force (entered into force on February 1, 2014).

In other words, the judges from the CCR correctly established an aspect that escaped the legislator: what would be the predictability and accessibility of a criminal law under the conditions of art. 7 of ConvEDO to the extent that it would also have been applied to situations in which this institution was not regulated.

Following this decision, in the doctrine (M.Udroiu,*Penal General Law*, 2023, p.979) 3 hypotheses for the application of extended confiscation were highlighted: (i) for crimes committed and for assets acquired before April 22, 2012, this institution not applicable. (ii) for the acts committed and the assets acquired between April 22, 2012 and February 1, 2014, the extended confiscation

will be applied only if the maximum penalty limit would be over 5 years, according to the original form of the law (iii) for the acts committed and assets acquired after February 1, 2014, the matter of extended confiscation will apply only if the legal framework of the act will concern an act with a maximum limit of 4 years or more.

Thus, the last condition to be able to apply the sanction of extended confiscation is that the assets that are presumed to have been obtained following the commission of crimes are those obtained no more than 5 years before the date of the commission of the crime or even after the date of its commission. until the date of notification to the court.

II. EXTENDED CONFISCATION ORDERED ON THIRD PARTIES IN THE JURISDICTION OF THE EUROPEAN COURT OF HUMAN RIGHTS

Directive 2014/42/EU on the freezing and confiscation of instruments and proceeds of crimes committed in the European Union deals in particular with the issue of extended confiscation ordered against third parties.

In the regulation of special confiscation, this was possible in respect of cases where the goods either belonged to or were acquired by third parties, who either knew or could foresee the nature of their use. It is the case of the crime of concealment, regulated by art. 270 of the Criminal Code, which, however, does not provide, as in the case of corruption crimes, their special confiscation. Thus, we can consider that the special confiscation of said assets, in kind or equivalent, should necessarily be ordered by praetorian means.The issue of extended confiscation of third-party property, which we find in article 6, also addresses a right protected by art. 1 of Additional Protocol 1 of ConvEDO regarding the guarantee of the protection of property rights.

The ECtHR's jurisprudence in the matter gives a margin of appreciation in favor of the states, which can legislate in favor of the confiscation of some assets by the simple presumption that they would result from the commission of certain crimes (https://www.echr.coe.int/documents/d/echr/Guide_Art_1_Protocol_1_RONpoint334). However, a solution that the Court promotes in this regard, Gogitidze and others v. Georgia, is relevant, the court in The Hague reiterating in paragraph 105 the legitimate right of states to confiscate not only the assets acquired following the commission of the crime but also those transformed afterwards, with the purpose of rendering a membership of legality. Thus, the judges from Strasbourg reiterated the possibility of confiscating assets not only from the patrimony of the suspects in question but also from the patrimony of other persons without the need to use the criterion called bona fide (or good faith) in dispelling and masking their illicit role in the assets of those persons.

In fact, the ECtHR jurisprudence itself, otherwise quite permissive in my opinion, states that it is not necessary to have a criminal charge in order to prove

the illicit character of the origin of a person's assets. Thus, in several cases (Raimondo v. Italy; Riela and others v. Italy; Sun v. Russia or Air Canada v. the United Kingdom) the judges from Strasbourg kept its red line of presumption that in the absence of clear evidence from the plaintiffs, to prevail over the suspicions of the courts in relation to the manifestly disproportionate character of the acquisition of wealth, the states did not violate the provisions of the Convention, rejecting their requests.

The reasons that make us notice that all the courts that guarantee the respect of all fundamental human rights in Europe are quite permissive in this regard is the content of Article 6 paragraph 1 of the Directive which provides that "based on certain elements of fact and concrete circumstances, including of the fact that the transfer or acquisition took place free of charge or in exchange for an amount of money significantly lower than the market value of the goods" member states have the right to order the extended confiscation of the goods of a third person suspected of concealed or would have helped to lose the traces of the respective illegally acquired goods. Given the fact that the provisions of the Criminal Code do not impose a certain minimum standard of appreciation of the national judge, the question arises as to what would be the standard according to the Code of Criminal Procedure that would be effective in this case since we are talking about two different perspectives: the condition of the sufficiency of the evidence, promoted by ECtHR jurisprudence or the in dubio pro reo criterion towards which the union provisions provided in the doctrine would converge.

We consider that in this sense the rules provided by the directive should prevail, for several reasons: (i) on the one hand, the institution of extended confiscation is related to Directive 2014/42/EU, which represents the basis for its application in Romanian legislation; (ii) At the level tolerated by the ECHR, the state could have many more lost lawsuits, if there was a very loose margin of appreciation in the praetorian way, or in the situation where the judge would appreciate the standard imposed by the directive much more restrictively, automatically not there would be just as many complaints pending before the Court.

In the related cases C-845/19 and C-863/19, the Court of Justice of the European Union maintained the need to establish a strict criterion for assessing the proportionality of the intrusion of the extended confiscation matter in relation to possible third parties. The Court of Justice of the European Union recognizes (paragraph 33 of the mentioned decision) that by its essence, the directive represents an infringement on the fundamental rights and freedoms of the person, or such a sanction must be regarded with maximum speed and attention by the member states. In addition, it is necessary for the state to grant the right to an appeal to which the third party can appeal in the case of the disposition of this safety measure, as a concretization of the observance of the right to a fair trial and the right to an effective appeal. However, it is particularly important that the

jurisprudence of the Court of Justice of the European Union remains constant both in terms of the interests of the European Union, and especially of the fundamental rights of the citizens of the member states. (Ioana-Nely Militaru, 2022, p.195).

CONCLUSION

Safeguards are necessary sanctions in any rule of law. In the case of extended confiscation, the legislator, even if he was late in applying Directive 2014/42, judiciously transposed the provisions stipulated by the European normative act, not choosing to insert other provisions or amendments that could have changed the content and created new divergences in this matter.

It is essential for any state to find compensatory mechanisms to suppress and prevent criminal or illegal practices that violate the law, given that the need for high social capital and public trust in judicial institutions must remain as high as possible, in - a society in which criminal-economic groups find more and more methods of defrauding public interests. The ECtHR jurisprudence in this sense is very permissive, recognizing the fact that criminalizing and confiscating assets that are certain to come from criminal activities, does not represent a violation of the principles that defend fundamental human rights.

We consider that it would be appreciated at the level of the European Union, that all the directives and framework decisions implemented in the matter of extended confiscation be divided by a regulation that has similar content in all member states and that is not susceptible to interpretations, especially in the multitude of jurisprudence that comprised the Court of Justice of the European Union on this subject.

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TRENDS IN THE ROMANIAN TAXATION

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Abstract

Taxation is an essential element in making investment decisions, as it is a cost of the business regardless of its type or size, of the geographical location in which it occurs. Taxation should be seen as an attribute of sovereignty, but for a high tax yield, it is necessary to take into account the aspect of tax consent on the part of the taxpayer.

In the current context, the question arises as to what is the best tax formula for public power to obtain the revenues necessary to cover public expenses.

Key words: *tax, fiscal policy, vulnerability, fiscal reform.*

INTRODUCTION

The object of our analysis concerns aspects regarding the state of public finances in the current period, the focus being on the fiscal policy of the Romanian state.

It is considered that we are living in moments in which the problems in the public financial field become easier to identify and conceptualize. It must be taken into account that the fiscal policies and measures applied by the authorities can generate both sustainable benefits, an increase in public resources, but also adverse effects such as tax evasion. The behavior of the taxpayer is also a response to the fiscal policies promoted by the governors, therefore, for the taxation compliance of the former, the maxims of convenience, economy and yield of taxes, respectively the principle of individuality of taxation are required to be applied and respected not only at the declarative level (Boța Anton Florin, 2002, p.162).

Tax authorities must also keep pace with taxpayers' expectations, promptly responding to the challenges facing society. Thus, the adoption and implementation of measures to ensure the necessary level of tax revenues must be considered, respecting the principle of legal security and compliance.

In a difficult period, in which resources for the budget must be secured, guaranteeing the taxpayer's trust in the transparency, integrity and impartiality of the tax administration is essential. Respect for the taxpayer and his rights are important components in the continuous evolution of the tax authorities and ensure the credibility of the measures ordered.

I. ACTUAL STATE

During the period of 2007-2009, marked by the effects of the economic crisis, several member states of the European Union entered the excessive deficit procedure (such as Spain, Greece[1] etc).

On April 3, 2020, Council Decision (EU) 2020/509 was adopted regarding the existence of an excessive deficit in Romania[2] as a result of non-compliance with the criterion regarding the deficit in 2019. On the same date, a recommendation was formulated for our country, in order to end the excessive public deficit situation by 2022. The budget policies of the Romanian state had to follow and support the recovery of the economic activity that suffered during the COVID-19 pandemic, so that, on June 18, 2021, the Council of issued a new recommendation[3] addressed to Romania by which the year 2024 was foreseen to put an end to the excessive deficit situation. Also in this document, the Council mentioned that the success of the medium-term fiscal-budgetary strategy will play an important role, thus supporting the consolidation of public finances through reforms.

Through the measures adopted in Romania during the years 2021-2023, it was pursued:

- fighting against the effects of the crisis generated by COVID 19,
-sustainable economic growth,
-fiscal consolidation and reaching the deficit target provided by the European Union,
- implementation of a predictable fiscal policy.

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[1] https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Governmentfinancestatistics/ro&oldid=143851, accessed on 04.09.2023, time 17.00;

[2] https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32020D0 509, accessed on 04.09.2023, time 17.30;

[3] https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32021H0729 (23)&from=EN, accessed on 04.09.2023, time 17.30;

This year, the EU Council[4] issued a new recommendation, which calls for Romania to take measures to:

- adopt fiscal-budgetary policies in accordance with the Council Recommendation of June 18, 2021 in order to resolve the excessive public deficit situation in 2024;
- ensure the absorption of funds in conditions of efficiency;
-implement the recovery and resilience plan, etc.

Fiscal policy aimed during this period and must continue to aim at measures that will facilitate the reduction of the budget deficit. Otherwise, Romania could face serious sanctions that would even consist in the suspension of the granting of the allocated European funds.

II. LEGAL FRAMEWORK. THE NEW TAX MEASURES IN ROMANIA

In the context in which the European regulations that contain provisions regarding the use of various external funds allocated to the states, charge the latter to comply with certain measures, otherwise specific sanctions are established, such as: the total or partial suspension of payments for a state that does not takes measures to reduce the budget deficit[5].

The Romanian government was and is in permanent contact with European officials, who note the progress made by our country. Moreover, the government pledged its responsibility in the parliament for increases in taxes, fees, measures aimed at reducing the budget deficit[6].

During the negotiations carried out by the Government of Romania with the representatives of the European Commission, (mainly between July and September 2023), the Romanian authorities were proposed to develop and adopt fiscal measures (in fact, fiscal-budgetary) through which:

- to be able to return to the budget deficit targets;
- to achieve the sustainability of public finances;
- to realize the fiscal-budgetary consolidation of Romania (besides, this is established as a general objective).

As a result, in order to return as quickly as possible to the budget deficit targets, Law no. 296/2023[7] which aims, among other things, at the efficient use of tax revenues, the promotion of prudent fiscal policies as well as increasing the

[4] https://eur-lex.europa.eu/legalcontent/RO/TXT/PDF/?uri=CELEX:52023DC0623&qid=1699102274383, accessed on 04.09.2023, time 18.00;

[5] The procedure for suspending the payment of funds is complex, laborious, and in the case of suspension of cohesion funds, even the vote of the Council is required, therefore it seems less likely to take such a sanction against Romania, which has cooperated with the Commission in order to reduce the excessive deficit.

[6] Let us bear in mind that the recovery and resilience plan includes requirements to adopt reforms that should be implemented by 2026.

[7] Law no. 296/2023 regarding some fiscal-budgetary measures to ensure the long-term financial sustainability of Romania published in the Official Gazette of Romania no. 977/27.10.2023.

degree of fiscal compliance, fighting against and sanctioning illegal acts, thus strengthening financial-fiscal discipline was adopted. Regarding the prevention and sanctioning of tax evasion (Miheș Cristian, 2019, p. 450) (Popoviciu Laura Roxana, 2014, p. 132) in the context where tax control remains an important lever in order to ensure tax compliance, especially tax compliance, it was assessed that the new measures introduced by Law no. 296/2023 will be able to fill the legislative vacuum created by the repeal of Law no. 12/1990[8]. The new fiscal measures concern taxation on return, on the income of micro-enterprises, taxation on income, mandatory social contributions, tax on high value immovables and movables, VAT (Mirișan Valentin, Mirișan Ligia Valentina, 2019, pp. 188-189).

Starting from January 1, 2024, a minimum turnover tax will be introduced for taxpayers (other than credit institutions and legal entities that carry out activities in the oil and natural gas sectors - for which special rules, provided in the provisions of the law, apply) that records a turnover of over EUR 50,000,000 in the previous year[9].

From January 1, 2024, the additional tax is predicted for the credit institutions - Romanian legal entities and Romanian branches of credit institutions - foreign legal entities. Thus, the credit institutions will have to pay, in addition to the tax on return, a turnover tax calculated by applying the following quotas to the turnover:

-2% for the period January 1, 2024 – December 31, 2025 inclusive;

-1% starting from January 1, 2026[10].

It is considered that this measure of levying a minimum or additional tax on the turnover generates the minimum taxation of some taxpayers who frequently appear with losses in the accounting.

Considering the fact that nowadays the rate of 1% is predicted for the taxation of all taxpayers paying the tax on the income of micro-enterprises, without taking into account their differentiation according to the profit margin, through the package of fiscal measures it was established that starting from January 2024 the tax rates be [11]:

-a percentage of 1% for taxable subject (micro-enterprises) that generate revenues that do not exceed EUR 60,000 inclusive (equivalent in lei) and do not generate revenues according to the CAEN codes below;

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[8]Law no. 12/1990 regarding the protection of the population against illicit production, trade or provision of services republished in the Official Gazette of Romania no. 121/18.02.2014 and repealed by Law no. 222/2020.

Also, we take into consideration the fact that ”the offence” (in this case tax fraud) is the only basis of engaging criminal liability.

[9]Art. 18^1 of Law no. 227/2015 Fiscal Code published in the Official Gazette of Romania no. 688/10.09.2015, with subsequent amendments and additions;

[10]Art. 18^2 of Law no. 227/2015 Fiscal Code;

[11]Art. 51 para. 1 of Law no. 227/2015 Fiscal Code;

-a percentage of 3% for taxable subject (micro-enterprises) that achieve revenues of over EUR 60,000 (equivalent in lei) or carry out activities, main or secondary, corresponding to the express and limited activities provided by the legislator, namely: software development, software editing, information technology service activities, HoReCa (*catering industry n.t.)* activities, activities legal, medical assistance activities, dental assistance.

Other fiscal measures aim to standardize and align the fiscal facilities enjoyed by natural persons who obtain incomes of the nature of wages or those assimilated to wages in the IT field (for computer programs creating activities), in the construction sector, in the agricultural sector and in the food industry.

For the income from independent activities that will be made in 2024, the possibility of deducting the social health insurance contribution when determining the taxable base is introduced. Also, a new ceiling is regulated in the amount of 60 gross minimum wages per country to which the social health insurance contribution is due.

The current regulation provides a rate of 16% for the taxation of incomes whose source has not been identified. The amendment, which will take effect from January 1, 2024) establishes a quota of 70% applied to income whose source has not been identified[12].

Regarding the VAT, the rate for certain operations is changed. For example, from January 1, 2024, instead of the reduced rate of 5%, the rate of 9% will be charged for the delivery of housing as part of the social policy (adding conditions that these homes must meet at the time of delivery); delivery and installation of photovoltaic panels, solar panels, heat pumps; access to sporting events. Also from January 1, 2024, instead of the reduced rate of 9%, only the standard rate of 19% will be applied for deliveries of goods such as: beer without alcohol, foods with added sugar, etc. Also a facility introduced in 2021 that had in mind tax exemption with the right of deduction for certain deliveries of goods and services performed to hospitals in the public system, as well as to non-profit entities will undergo changes. Thus, from January 1, 2024, the facility can only be applied if the operations are carried out by non-profit entities registered in the Register of religious entities and units for which tax deductions are granted, managed at ANAF level[13].

Last but not least, Law no. 296/2023 envisages special taxation in the situation where high value immovables or movables are owned. Thus, if the taxable value of a residential building exceeds 2,500.00 lei, a quota of 0.3% will also be applied on the difference between the taxable value of the building (as it

[12]Art. 117 of Law no. 227/2015 Fiscal Code. Through this increased quota, we could consider that a doctrinal principle of taxation is being considered, namely the principle of legitimacy enunciated by the French economist Maurice Allais. See also Diana Cîrmaciu, *Dreptul finanțelor publice*, Editura Universității din Oradea, 2010, p.100.

[13]The National Agency for Fiscal Administration

was established by the competent fiscal body through the tax decision) and the previously indicated ceiling. In the case of a car registered in our country, whose purchase value exceeds 375,000 lei, a quota of 0.3% will be applied on the difference between the purchase price and the mentioned ceiling.

CONCLUSION

Analyzing these changes in terms of the current economic context, of the imperatives of the European Commission, we can say that we needed a fiscal reform. All the problems, the legislative deficiencies definitely have an impact on the collection of tax revenues, make it difficult to fight tax evasion, voluntary compliance with the payment of taxes. Even if the presented fiscal measures will enter into force from 2024, there are opinions that claim that the real fiscal reform will begin in Romania in 2025, with the governors already preparing substantial measures to support economic development, job creation and the dynamism of the labor market (Teaca Mihaela, Mihăilă Carmen Oana, 2013, p. 200), attracting investments. Let's not forget that in the near future resources must also be secured for the effects that the law on general pensions and the single salary law will have.

It remains to be seen in the coming period how much the newly adopted package of fiscal measures will contribute to reducing the budget deficit, but we will expect additional measures to reach the threshold of the deficit below 3% of GDP.

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PUBLIC SERVICES AT THE SERVICE OF CITIZENS – CASE-STUDY: CLEANING SERVICES

M.C. CLIZA

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Abstract

Public services are unquestionably a pillar of society. The society develops and blooms on their importance, on the way they are organized, on their efficiency. This is why we could devote a case study to each public service that a nation, through its government representatives, organizes and operates, in order to analyze its efficiency and impact on the quality of life of its citizens. However, this article is focused on public cleaning service, as currently regulated in the legislation. The importance of public cleaning service cannot be denied, by being a comfort factor and the criterion indicating the level of civilization.

Key words: *public service; public authorities; cleaning service; local authorities; cleaning.*

INTRODUCTION

In the modern state, the entire responsibility for the quality of life of citizens falls on the administration, which should be able to organize itself in such a way as to ensure a perfectly functional economic and social climate. The society as a whole must meet the needs of its members, both globally and individually. The society must therefore organize itself legally and politically in such a way as to satisfy as many citizens as possible. Only then will we be able to talk about a functional state, functional administration, efficient public services, a population that is satisfied with what it is offered.

"*The scope of the state is (or should be) the protection of the general interest, the happiness of the citizens"* (N. Popa (coord.), E. Anghel, C. Ene-Dinu, L.C. Spătaru-Negură, 2017, p. 57). This is why, this scope of the state also integrates public services, meant, as we will show further on, to satisfy the citizens' interests of comfort.

From the etymological point of view, the word *service* comes from the Latin *servitum,* namely "*to be at the service of someone*".

"*From the organic point of view, public service shall mean a set of agents and means that a natural person or a private agent authorized by a public person uses in order to meet a need of public interest.*

*The functional meaning entails an activity of general interest, carried out by the administration, the mission of which is to satisfy a general interest." (*V. Vedinaș, 2020, p. 559)

Of all the public services, we have chosen to deal with the local cleaning service (hereinafter referred to as the "**Cleaning service**"). This is one of the community public services and includes all the activities regulated by special laws that ensure the satisfaction of the needs of local communities of the territorial and administrative divisions regarding the cleaning of localities.

The realities of recent years (see waste scandal in District 1) have shown how important this service is in the life of each of us, how much it affects the quality of life and what disputes can generate within the local authorities empowered by the law to deal with this issue. This is why we have chosen to present the legal framework governing this niche area and to analyze the implications of this legal framework for the way in which this public service is awarded and subsequently provided.

I. LEGISLATION IN THE FIELD OF CLEANING

1.1 Law no. 51/2006 on public services ("Law no. 51/2006").[1][2]

Law no. 51/2006 establishes the unitary legal and institutional framework, objectives, powers, duties and specific instruments necessary for the establishment, organization, management, financing, operation, monitoring and control of the regulated provision of community public services. Law no. 51/2006 applies to public services established, organized and provided within each territorial and administrative division and territorial and administrative subdivisions of municipalities or within the intercommunity development associations. The whole management, as well as any elements regarding the coordination and control of these services shall fall under the responsibility of the local public authorities.

In other words, Law no. 51/2006 is the general legal framework in the field of public services, being the general law which also covers the cleaning services.

Public services (including cleaning services) are therefore regulated by the

[1] Law no. 51/2006 on public services was published in the Official Journal of Romania, Part I no. 254 of 21.03.2006 and republished in the Official Journal of Romania, Part I no. 121 of 05.03.2013

legislation as a duty and dimension of the **local public authorities or**, as the case may be, **of the intercommunity development associations** (hereinafter referred to as "**IDA**"). However, they will not work in a discretionary manner, but they will fulfill the powers granted by means of the resolutions of the decisions making authorities of the member territorial and administrative divisions. It is self-evident that actions will be taken in order to comply exactly with what was decided by the decision-making authorities, starting with the purchase of the service until its execution, even if only in terms of the follow-up of this execution.

The particularization of the organization, development, financing, operation and management of each public service shall be performed by: **"a)** special laws, **b)** by sectoral rules and regulations adopted by means of Government resolutions, **c)** by orders of competent regulatory authorities, as well as **d)** by resolutions of the local public authorities of the territorial and administrative divisions." It is thus obvious that we cannot conceive of the existence of this service outside of an organized legal framework, as long as we are talking about regulatory acts with the power of a normative act, regardless of whether it is a law or an act of a public authority.

The main entities involved in ensuring and providing public services (including cleaning service) are **a)** local public authorities (the mayor and local council), **b)** intercommunity development associations (IDA), **c)** operators of public services, **d)** competent regulatory authorities and **e)** users, namely the beneficiaries of these services.

Local public authorities have exclusive authority in what concerns the establishment, organization, management and operation of public services, thus delegating powers to the authorities directly concerned, as the central authorities are not involved in this matter. The same local public authorities shall maintain their powers in what concerns the creation, development, modernization and utilization of all public and private goods of territorial and administrative divisions that make up the public service systems. (In what concerns local public authorities of Romania, see: Maria Ureche, *Autoritățile publice în dreptul statelor europene (Public authorities under the law of the European States)*, Altip Publishing House, Alba Iulia, 2011, p.286-306).

All legal relations between the main actors involved in the performance of the cleaning service, respectively public authorities or intercommunity development associations, on the one hand **and users**, on the other hand, based on the provisions of Law no. 51/2006, shall be administrative legal relations, **subject to the legal regulations of public law**.

At the other end of the spectrum, the legal relations between local public authorities **and operators**, shall be **subject to the legal regulations of public or private law, as the case may be,** according to the relation to be established between them.

Depending on the two main branches of law, public law and private law, the legal relations were divided according to the two dimensions of the law, which are significantly different. (Cliza, 2022, p. 73)

The intercommunity development associations (ADI) consist of two or more territorial and administrative divisions. They establish associations in order to jointly supply or provide all matters relating to community public services or to the establishment, modernization, rehabilitation and/or development of public service systems.

The cleaning service shall be performed by means of the **public service operators.** They are defined as legal entities of public or private law with public, private or mixed capital, registered in Romania, in a member state of the European Union or in another state. They shall be held liable for the provision of a public service or of one or more activities within the scope of public services.

The legal relations between public service operators and users of such services shall be regulated on a contractual basis, based on the **public service contract.** This contract shall be concluded by observing the provisions of the public service framework contract, the legal provisions in force, service regulations and their specific tender books.

For cleaning service, the National Regulatory Authority for Public Services ("**NRAPS**") **is the competent regulatory authority**. We shall come back and detail some of the powers of this authority in order to outline and justify its role in the appropriate performance of this public service.

Given that local public authorities have exclusive powers in this field, they shall decide, on their discretion, on the management of public services on their responsibility.

In this respect, public authorities can **directly manage** public services **based on a contracting out resolution** or can **entrust the management** thereof, **based on a delegated management contract**.

1.2 Law no. 101/2006 on localities cleaning service ("Law no. 101/2006")[3]

Law no. 101/2006, special law in the field of public cleaning service, regulated the unitary legal framework on the establishment, organization, management, utilization, financing and control of the operation of localities cleaning service.

Therefore, Law no. 101/2006 is the **special law** applicable to the cleaning service, which is supplemented by Law no. 51/2006.

According to the provisions of this law, the powers of the **local public authorities** of all the territorial and administrative divisions consist in the **establishment and organization** of the public cleaning service.

[3] Law no. 101/2006 on localities cleaning service was published in the Official Journal of Romania, Part I no. 393 of 08.05.2006 and republished in the Official Journal of Romania, Part I no. 920 of 12.10.2023

Public cleaning service **falls under the scope of the public services** and shall be performed **under the control, management or coordination** of the local public authorities or of IDA, for the cleaning of the localities.

What is very important to clarify is that this law clearly establishes who is the **legal owner** of municipal waste and similar waste, stored in containers located in their territorial area, respectively it shows us that this waste is the property of the territorial and administrative divisions.

Local public authorities are once again involved in the matter of cleaning by issuing, approving and controlling the application of the local strategies on the medium and long-term development and operation of the cleaning service, including the Waste Management Plan for the Municipality of Bucharest. All these plans and programs are drawn up based on the legal provisions in force, in compliance with urban planning documentation, territorial development and environmental protection, by reference to the economic and social development programs of the territorial and administrative divisions (Regarding rural communities, see: Maria Ureche, *Social and economic role of the local administrative authorities in rural development in their community*, in Fiat Iustitia no.1/2015, p. 165-172).

II. THE IMPLICATIONS OF LEGISLATIVE AMENDMENTS IN THE FIELD OF CLEANING SERVICE IN BUCHAREST MUNICIPALITY

In this analysis, we have to take into account the provisions of Law no**. 99/2014** for the amendment and supplementation of Law. 101/2006[4] on localities cleaning service and of Emergency Ordinance no**. 38/2022** for the amendment and supplementation of certain normative acts in order to improve waste management[5] on cleaning services of Bucharest Municipality.

Furthermore, this analysis also starts from the provisions of the Administrative Code[6], art. 164: "*Bucharest Municipality and its districts have a Mayor General, respectively one Mayor and two Deputy Mayors each.".*"

"The local public authorities of Bucharest Municipality are the General Council of Bucharest Municipality and the local councils of the districts, as decision-making authorities, as well as the Mayor General of Bucharest and the Mayors of districts, as executive authorities."

The Administrative Code adopted for the first time in Romania in 2019 regulates the general framework for the organization and functioning of public administration authorities and institutions, staff status within them, administrative

[4] Law no. 99/2014 was published in the Official Journal of Romania, Part I no. 505 of 08.07.2014

[5] Emergency Ordinance no. 38/2022 for the amendment and supplementation of certain normative acts in order to improve waste management was published in the Official Journal of Romania, Part I no. 344 of 07.04.2022

[6] The Administrative Code was published in the Official Journal of Romania, Part I no. 555 of 05.07.2019

responsibility, and public services, as well as some specific rules regarding public and private property of the state and of the administrative-territorial units. (Săraru, 2022, p. 4)

The importance of this normative act consists in that the **decision-making authorities of the districts of Bucharest Municipality** have **exclusive** powers in what concerns the establishment, organization, assignment and performance of the cleaning service activities.

There are also certain operations **which do not fall under the competence of the territorial and administrative division of Bucharest Municipality**, such as: pest control, disinfection, organization of processing, neutralization and material and energy recovery of waste, organization of mechano-biological treatment of municipal waste and similar waste, management of waste storage facilities and/or municipal and similar waste disposal facilities.

Given these normative acts, we can conclude that the decision-making authorities of the districts of Bucharest shall be **bound to comply with the local strategy on the medium and long term development of cleaning service**, approved by the General Council of Bucharest, which shows a general competence at the strategic level of the General Council, transposed at the district level by the Local Councils.

As an exception, by means of the **resolution of the General Council of Bucharest Municipality**, the decision-making authority of Bucharest Municipality can take over, in full or in part, the powers of the decision-making authorities of the districts of Bucharest municipality on the establishment, organization, assignment and performance of cleaning service activities, upon their substantiated request.

Notwithstanding, the provisions of GEO no. 38/2022 established that, in order to avoid abandonment and illegal storage of waste, **the decision-making authorities of the districts of Bucharest can take over the powers of the territorial and administrative divisions of Bucharest** on the organization of material and energy recovery of waste, organization of mechano-biological treatment of municipal waste and similar waste, management of waste storage facilities and/or municipal and similar waste disposal facilities. Therefore, over time, we had a transfer of responsibility from the Municipality to the districts. The solution of passing these responsibilities to the districts aimed to lead to an efficiency of this public service, considering that the territorial radius of the municipality of Bucharest is much wider, and the districts could be more effective in local waste management, through a proper organization.

The decision-making authorities of the districts of Bucharest can take over these powers by means of the resolution of the local council, which shall be notified to the General Council of Bucharest within 15 days as of the adoption thereof.

Provided that these powers are taken over by the districts, such taken over

shall apply on a definite term, provided by the resolution of the local council, without exceeding the term provided by the Waste Management Plan of Bucharest Municipality, approved by Resolution no. 260 of the General Council of Bucharest Municipality of 01.09.2021 (respectively **year 2025**).

The importance of the cleaning service in Bucharest is undeniable as this city, given its specifics, is the largest producer of household waste in Romania. The expansion of the city, both vertically and horizontally, also affected cleaning, as this expansion generated waste (especially construction waste with a large volume and difficult to destroy), as well as other types of waste generated by an increasing population. This is why, the regulation of this service entails specific discussions at the level of Bucharest Municipality, an administrative and territorial division that failed to find a solution regarding waste collection and recovery.

III. SUBSEQUENT NORMATIVE ACTS RELEVANT IN THIS FIELD

3.1. Regulation on the granting of licenses in the field of community public services, approved by Government Resolution no. 745/2007[7]

As mentioned above, in order to operate in the cleaning sector, an economic operator has to hold a license in this respect from the regulatory authority, respectively NRAPS.

The Regulation is issued in accordance with the provisions of art. 21 para. (3) of Law no. 51/2006 and shall apply to all Romanian legal entities, to legal entities registered in other Member States of the European Union or non-EU foreign legal entities that request the issuance of a license for a public service or for one or more of its specific activities.

The Regulation establishes the following:

a) the general terms on the granting of licenses which are under the competence of NRAPS;

b) the procedure on the requesting and granting of the licenses;

c) the terms under which the licenses and their conditions are modified;

d) the procedure for suspending and withdrawing licenses, as well as withdrawing the permission to provide the service or to render an activity within a territorial and administrative division;

e) the fees for granting licenses and the annual fees for maintaining licenses, charged by NRAPS from applicants, respectively license holders.

The provisions of the Government Resolution are quiet clear and, in addition to the other normative acts, complete the applicable legal framework.

[7] Government Resolution no. 745 of 2007 was published in the Official Journal of Romania, Part I no. 531 of 06.08.2007

3.2 Regulation on the granting of licenses in the field of public services falling under the regulatory scope of the National Regulatory Authority for Public Services, approved by Order no. 100/2023[8] of the President of NRAPS

The merit of this order is to judiciously list the activities specific to the public cleaning service of localities, for which NRAPS grants licenses:

a) "separate collection and transport of household waste and similar waste from commercial activities in industry and institutions, including separately collected fractions;

b) operation of collection centers, through voluntary contribution, of waste from natural persons;

c) the transfer of municipal waste to transfer stations, including separate transport of residual waste to non-hazardous waste storage facilities and/or to integrated treatment facilities, of paper, metal, plastic and glass waste collected separately to sorting facilities and of biowaste to composting facilities and/and or anaerobic digestion systems;

d) sorting of paper, cardboard, metal, plastic and glass waste collected separately from municipal waste in sorting facilities, including the transport of residues resulting from sorting to waste storage facilities and/or to energy recovery facilities;

e) aerobic treatment of biowaste collected separately in composting facilities, including the transport of residues to waste storage facilities and/or to energy recovery facilities;

f) anaerobic treatment of biowaste collected separately in anaerobic digestion systems, including the transport of sanitized and stabilized semi-solid material to waste storage facilities and/or energy recovery facilities;

g) treatment of municipal waste with energy potential in incineration installations with high energy efficiency, including transport of residues resulting from incineration at waste storage facilities;

h) mechanical biological treatment of residual waste in integrated treatment facilities, including the transport of biologically stabilized waste to waste storage facilities and/or energy recovery facilities;

i) disposal, by storage, of residual waste, street waste, soil and stone waste from public roads, residues from municipal waste treatment facilities, as well as waste that cannot be recovered, from interior and/or exterior remodeling and rehabilitation activities of homes, to non-hazardous waste storage facilities;

j) sweeping, washing and sprinkling of public roads in the locality, including the collection and transport of soil and stone waste from public roads to waste storage facilities, as well as waste from street bins to waste storage facilities and/or treatment facilities;

[8] Order no. 100/2023 of the President of NRAPS was published in the Official Journal of Romania, Part I no. 181 of 03.03.2023

k) cleaning and transporting snow from the public roads in the locality and keeping them in operation during snow or frost;

l) pest control and disinfection within public and private facilities of the territorial and administrative divisions."

As can be noted, the above list indicates all the activities required in order for a community to ensure cleanliness and a civilized standard of living in relation to this qualitative indicator. That is why, we felt that it was necessary to present it, in order to demonstrate that in terms of legislation we have a fairly well defined legal framework, going as far as clear enumerations, but implementation is sometimes cumbersome.

CONCLUSION

The issue of the cleaning service is of utmost importance, being an undeniable fact.

As proposals for actual improvement of this activity, with particular reference to Bucharest Municipality, we would like to list the following:

1) To track MBT tender performance and carefully monitor all fractions and their composition to find the best option to divert from landfill;

2) To implement measures to maximize diversion from landfill during the execution of delegation contracts. To implement dynamic waste management, i.e. encouraging exceeding the minimum targets, according to the offers presented in tenders, with the aim of reducing the amount of waste sent to landfill in accordance with the cleaning law;

3) To launch tenders for the rest of the cleaning activities, in order to reduce the amount of waste disposed of by landfill, based on the legal provisions referred to in this article;

4) To implement measures (to allow the exceeding of undertaken targets for recycling, recovery, total diversion from landfill) in order to stimulate investment and improve recycling and diversion from landfill.

Starting from what prof. Virginia Vedinas claims "regardless of the form in which it is carried out, public or private, the provision of a public service implies the existence of a public authority, which either provides the public service, or exercises a right of supervision over the legal entity it has authorized for the provision of the respective public service" *(V. Vedinas, 2020, p. 562), we can conclude that in what concerns cleaning, public authorities remain fully involved in the assignment of this service and subsequently in the supervision of the way in which it is carried out.*

The new regulations in the field tried to put this service in a new light, transferring as many powers as possible to the local authorities, in the awarding of cleaning contracts. Notwithstanding, at least at the level of Bucharest Municipality, this issue is still very topical.

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CONSTITUTIONAL PROVISIONS REGARDING THE JUDICIAL CONTROL EXERCISED UPON THE ADMINISTRATIVE ACTS ISSUED / ADOPTED IN EXCEPTIONAL SITUATIONS

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Abstract

Conditions of admissibility of an action in administrative Litigation having as object the administrative acts issued/adopted in exceptional situations, we find them regulated in the Law no. 554/2004 of the administrative Litigation, while in other works we cand find analyzed these problems under the form of the administrative Litigation, on the basis of the Law no. 554/2004, and on the basis of the constitution which is completed with the provisions of the special legislation appliable to the special situations.

In the specialty doctrine are identified, as rule, the following conditions of admissibility of an action in the administrative Litigation: the condition that the attacked act to be an administrative act; the condition that that act to affects a right recognized by law or a legitimate interest; the condition that the issued act to emanate from a public authority; the condition of the fulfillment the preliminary administrative procedure; the condition that the action to be introduced within a certain term.

In the light of these reasons detached form the constant jurisprudence of the Court from Strasbourg, the Romanian Constitutional Court ruled in the sense that providing a right of effective access to justice, it has to be analyzed also by considering the effects that a judicial decision has upon the right of the person who addressed the justice.

Key words: *administrative act, administrative Litigation, judicial control, public authority.*

Dumitru Ştefan COMAN

INTRODUCTION

I. THE CONSTITUTIONAL AND LEGAL GROUNDS OF THE JUDICIAL CONTROL EXERCISED UPON THE ADMINISTRATIVE ACTS ISSUED IN EXCEPTIONAL SITUATIONS

The constitutional grounds referring to the judicial control exercised upon the administrative acts issued/adopted in exceptional situations, are the same with those regarding the control exercised by the juridical courts upon all the administrative acts. We say *in general*, because there are some particularities, which are going to strive to highlight.

A *first constitutional source* it is represented by the art. 52 that rules the *right of the persons affected by a public authority*. This one represents, at it is admitted by the specialty doctrine, both constitutional right and administrative right, a fundamental right that, together with the right to petition that is ruled by the art. 53 from the Fundamental Law, they for the category of the guarantees-rights (*Tănăsescu, 2004, p. 106).*

Why this constitutional ground does constitute a ground, for the judicial control exercised upon the administrative acts issued in special situations? That is because a person can be harmed also by an administrative act issued/adopted or concluded in exceptional situations, and act that is submitted to the judicial control in the conditions of the Law no. 544/2004, that institutes some particularities issued in this field. We owe to notice that art. 52 from the Romanian Constitution "*does not refer only to the acts issued by the executive (administrative) authorities, but it refers to all the acts issued by the public authorities, without discerning upon their juridical nature" (Muraru, Tănăsescu, 2016, p.187).*

The *second constitutional ground* is represented by art. 126 para. 2 (6), an article having a relatively recent history, an article that was introduced by the Law no. 429/2003 in order to revise the Constitution, by which three fundamental theses are consecrated, theses which are appliable also in the field of the administrative Litigation, to the administrative acts of the public authorities issued or adopted in exceptional situations:

- it is guaranteed the control of legality of all administrative acts of the public authorities, including those acts emanated from the public authorities in exceptional situations, and we can say that that is the rule. The Constitutional Court of Romania ruled in the sense that "*art. 126 para. 2 (6) does not exclude the possibility of exercising the judicial control of the administrative acts of the public authorities on other ways than that of the administrative Litigation, but it only guarantees such a control and it delimitates its sphere of applicability*"[1];

- are mentioned the administrative acts exempted from this control, namely *those acts which regard the reports with the Parliament* and *those acts having a*

[1] Decizia CCR nr. 1330/2010, publicată în M. Of. nr. 795/29 noiembrie 2010.

military character. The regulation of the acts which are exempted it is comprised in art. 5 from the Law no. 554/2004 of the administrative Litigation, whose constitutionality has been confirmed by the Constitutional Court of Romania, through the Decision no. 946/2007[2], being ruled in the sense that art. 126 para. (6) "*it is limited only to the constitutional ruling of guaranteeing the judicial control of the administrative acts of the public authorities on the way of the administrative Litigation, from which are exempted in an absolute mode only two categories of acts, those of military command and those regarding the reports with the Parliament, which, by their nature, they are not submitted in any way to the judicial control*". The Court also ruled upon the constitutionality of the provisions of the art. 5 para (2) from the Law of the Administrative Litigation no. 554/2004, also through the Decision no. 182 from 2nd of March 2006[3], which the Court ascertained through, among other aspects, that "*The law text criticized doesn't exempt of judicial control, in an absolute mode, the administrative acts which it refers to, because of being obvious that the respective administrative acts are submitted, through the provision of the criticized law, to another judicial procedure, so that their judicial control is accomplished according to another procedure established through organic law.*";

- it is admitted, through the second thesis of the text, the competence of the courts of administrative Litigation, to solve the requests of the persons who have been harmed by ordinances and dispositions which have been declared as unconstitutional.

The regime of this constitutional norm it developed by art. 9 from the Law no. 554/2004.

We appreciate that to these express constitutional texts there can be added the followings:

- art. 21 which consecrated the free access to justice for defending the fundamental rights, freedoms, and duties, through which it is instituted "*the presumption that any legitimate right or interest can be defended and, eventually, reestablished by an independent and impartial court, according to the rules established by law" (Sălăjan-Guțan în Muraru, Tănăsescu, 2022, p. 157);*

- the whole chapter VI of the title III form the Romanian Constitution referring to the judicial power, given the fact that this one is that which exercises the legality control upon the administrative acts issued/adopted/concluded in exceptional situations, the administrative Litigation being a component of the judicial power;

- art. 146, para. d) and e) which regulate the ulterior control (a posteriori) upon the Government Ordinances and, respectively, the solving of some judicial

[2] Decizia CCR nr. 946/2007, publicată în M. Of. nr. 782/19 noiembrie 2007.

[3] Published in the M. Of. no. 366 from 26th of April 2006.

conflicts of constitutional nature among the public institutions, given the fact that these ones can have as object acts issued in exceptional situations, including constitutional conflicts occurring in exceptional situations, as there was that one regarding the question if the Parliament has or not the competence of approving the Government Decisions of declaring the state of alert[4].

II. THE JUDICIAL CONTROL EXERCISED UPON THE ADMINISTRATIVE ACTS ISSUED IN EXCEPTIONAL SITUATIONS IN THE INFRA-CONSTITUTIONAL LEGISLATION

2.1. Determining the Legal Frame

A) The first normative act that we are relating to, it is the Law no. 554?2004 of the administrative Litigation, that consecrates express provisions regarding the acts issued in exceptional situations. It is about art. 5, that consecrates what the doctrine qualifies as *relative exceptions (Dragoş, 2009, p.186)* .

B) O.U.G. no. 21 from 21st of April 2004 regarding the National System of Management of Emergency Situations[5] contains express dispositions regarding the legality control exercised upon the administrative acts issued in exceptional situations.

Art. 42 provides in para. (1) rules regarding the mode of making known, by publishing it, the decisions regarding the state of alert[6]. In para. (3) we find the express disposition according to which "*The decisions mentioned by para. (1) can be attacked in the conditions of the Law no. 554/2004 regarding the administrative Litigation.*"[7].

Art. 42 ^ 1 provides, in the first two paragraphs, rules for publicity regarding the decisions made by the National Committee for Emergency Situations, with normative character, issued for applying the provisions of the art.

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[4] To be seen the Decision of CCR no. 457 from 25th of June 2020, published in M. Of. no. 578/ 01st of July 2020.

[5] Published in M. Of. No. 361 from 26th of April 2004.

[6] Art. 42. "*(1) The decisions which it is declared through, it is prolonged through, or it ceases through the state of alert, on national level or on the territories of several counties, they are published in the Official Monitory of Romania, Part I, and those decisions which it is declared through, it is prolonged through, or it stops through, the state of alert, as also those decisions which it is established through, the application of some measures during the state of alert, on county level or of Bucharest Municipality, they are published in the Official Monitory of the respective territorial-administrative authority, and they come into force on the date of their publishing. (2) The decisions mentioned by the para. (1) are announced to the population, without any delay, through mass media, are broadcasted on radio and on TV, no more than two hours late form their adoption, and they are repeatedly retransmitted during the first 24 hours form the moment of declaring the state of alert.*"

[7] On 30th of June 2021, Chapter VI of OUG no. 21/2004, it has been completed the Point II, Art. II from OUG no. 63 from 29th of June 2021, published of M. Of. No. 643 from 30th of June 2021.

20[8], and in the para (3) it consecrates a norm that is similar to that provided by art 42, according to which "*The Decisions of the National Committee specified by para (1) and (2)* [9] *can be contested in the conditions of the Law of the administrative Litigation no. 554/2004, with the ulterior modifications and completions*.".

C) O.U.G. no. 1/1999 regarding the regime of the state of siege and of the state of emergency [10] contains, at its turn, dispositions which uphold, on an implicit manner, the judicial control exercised upon the administrative acts issued in exceptional situations.

We are mentioning, in the first place, the provisions regarding the *acts issued in exceptional situations*, which, in their quality as administrative acts, they are submitted to the legality control, by the judicial courts of administrative Litigation, in specific conditions, as consecrated by art. 5 form the Law no. 554/2004. We are referring both the acts issued or adopted by the public authorities in exercising their attributions aiming the exceptional states, ads there would be art. 14 regarding the *decree of instituting the siege state of the emergency state* or those comprised by the Chapter IV regarding the *military ordinances and orders of other public authorities*, as also art. 30 that refers to the contraventions ascertained through contraventional minutes-report, which are appliable to, the dispositions of the Government Ordinance no. 2/2001 regarding the judicial regime of the contraventions[11].

All these acts are submitted to the legality control in the conditions of the frame-law in the field of the administrative Litigation and in the field of the contraventions.

D) The Law no. 55/2020 provides aspects aiming to the legality control of some acts issued in exceptional situations and we are referring here the

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[8] Art. 20 provides the main attributions of the National Committee for Emergency Situations.

[9] Art. 42 ^1 "*(1) The decisions of the National Committee having a normative character and issued for applying the provisions of art. 20, they will be immediately published in the Official Monitory of Romania, Part I. (2) Exempted from the provisions of the para. (1), in special situations which do not allow any delay, when the publishing flow cannot be fulfilled as specified by art. 12-14 from the Law no. 202/1998 regarding the organization of the Official Monitor of Romania, republished, with the ulterior modifications and completions, the decisions of the National Committee having normative character issued for applying the provisions of the art. 20, they will be immediately applied and they will be published in the Official Monitory of Romania, Part I, immediately that publishing will be possible. The special situations which do not allow any delay, as also the immediate applying, they are recorded in the content of the decision of the National Committee*."

[10] Published in the M. Of. No. 22nd/21st of January 1999.

[11] Published in the M. Of. No. 410 / 25th of July 2001, approved with modifications and completions through the Law no. 180/2002, published in M. Of. No. 268/22nd of April 2002, with the ulterior modifications.

contraventional minutes-reports. Thus, art. 68 provides, by para. (1), the application, for the contraventions it mentions, of the dispositions of Government Ordinance no. 2/2001, and by para. (2) it provides a derogation from the dispositions of art. 32 para. (3) from G. O. no. 2/2001, in the sense that the complaint against the *minutes-reports of ascertaining the contravention and of applying the sanction it won't suspend the fulfilling of the complementary contraventions sanctions applied according to art. 66^1*[12].

Art. 72 para. (1) from the Law no. 55/2020, it sends us, in completion, to the *common law regulations appliable in the field, on the measure that these lasts ones do not contravene to the present law*.

This text was declared as unconstitutional by the Decision of CCR no. 392 from 8th of June 2021 [13], by which it was admitted the exception of unconstitutionality and it was ascertained that the dispositions of art. 72 para. (2) from the Law no. 55/2020, regarding some measures for preventing and combating the effects of the COVID-19 pandemic, referring to art. 42 para. (3) from the Government Ordinance no. 21/2004 regarding the National System for Management of the Emergency Situations, as also the legislative solution from the art. 72 para. (1) from the Law no. 55/2020, according to which the dispositions of this law are completed by the provisions of common law applicable in the field, in what regards the solving of the actions formulated against the Government's decisions by which it is instituted, it is prolonged, or it ceases the alert state, as also the orders and the instructions which establish the application of some measures during the alert state, they are unconstitutional. We are again mentioning here that art. 42 para. (3) from O.U.G. no. 21/2004, it provides that "*The decisions specified by para. (1) can be attacked in the conditions of the Law no. 554/2004 regarding the administrative Litigation*".

Through the mentioned decision, the Constitutional Court argues in the sense that the decisions which the alert state is declared by, or it is prolonged by, or it ceases by, as also those which the application of some measures it is established by, on the duration of the alert state, on national level or on the level of several counties, they cannot be attacked in the conditions of the law of the administrative Litigation, given the fact that they are adopted for only one month, and the procedure instituted by the Law no. 554/2004 does not cerate the frame for, within the limits of one month, to be judged a process on such a subject.

We are considering as very interesting the reasons formulated by the Constitutional Court in the paragraphs 43-48, and this is because they not only that rule an actual state of the law, which they reckon as unconstitutional, but the

[12] On 24th of December 2021, art. 68 was completed by the Point no. 3, Art I of the Law no. 295 from 13th of December 2021, as published in M. Of. No. 1183/14th of December 2021.
[13] Published in M. Of. No. 688 / 12th of July 2021.

contour a certain perspective for logification, which we reckon that the lawmaker should have it in sight, in the future.

Thus, the Court started their reasoning from certain constants of the jurisprudence of the European Court of the Human Rights in the field of the free access to justice, which the European Court deliberated through, upon the tight connection between the exigencies regarding the clarity and the predictability of the procedural juridical norms and the exercising of the right of free access to justice. Through the Decision from 21st of February 1975, pronounced on Golder Cause against the United Kingdom of Great Britain and of North Ireland, the Court highlighted the special importance it attributes to the principle of free access to justice for the very existence of a democratic society.

Through this decision, as it is impropriated also by the court for constitutional Litigation, the Court from Strasbourg achieved two objectives: a first aspect is that of clarifying the matter regarding the sphere of applicability of the art. 6 para. 1 from the European Convention for Defending the Human Rights and for Defending the Fundamental Liberties, in the sense that this one regulates not only the conditions necessary for having a fair trial, but also the right to accede to such a process for defending the rights mentioned by the law.

A second aspect aims to highlight the importance of exercising such a right in the context of a democratic society and of the rule of law, in the sense that its simple legal consecration, even on the supreme level, through Constitution, it does not necessarily mean that it is ensured its real efficacity too, as long as in practice, exercising it, it is hindered by obstacles. The access to justice must be provided, consequently, effectively and efficiently. And the purpose of the Convention for the Defending of the Human Right and of the Fundamental Liberties it is "to defend not theoretical or illusory right, but concrete and effective"[14].

The European Court also stated, in another decision concerning a cause which Romania was processual part to[15], that the principle of free access to justice implies also to be adopted, by the lawmaker, some clear procedural rules, which to comprise, with precision, the conditions and the terms which the litigants can exercise their processual rights. And a norm is "predictable" only when it is worded with sufficient precision, so that it allows any person to correct her/his conduct.

In the light of these grounds detached from the constant jurisprudence of the Court from Strasbourg, the Constitutional Court of Romania ruled in the sense

[14] In this sense, it has been ruled by the Decision from 12th of July 2001, pronounced in the case of Prince Hans-Adam II of Lichtenstein against Germany, and the pilot-Decision from 12th October 2010, pronounced in the Cause Maria Atanasiu and others against Romania, quoted in the commented decision.

[15] It is about the Decision from 29th of March 2000, pronounced in the Cause Rotaru against Romania.

that ensuring a right of effective access to justice, it must be analyzed form the point of view of the effects the judicial decision has upon the right of the person who addressed the justice.

Revealing in this sense it is the Decision no. 17 / 17th January 2017[16], which it was argued by, that an effective right to justice "*it is not characterized only by the possibility of the court of justice to examine the ensemble of the presented means, arguments, and proofs, but it consists also of the fact that the pronounced solution determines the removal of the denounced transgression and of its consequences for the owner of the transgressed right*".

The Constitutional Court of Romania mentions further on, in the paragraph no. 44, concerning the attacking in justice the Government's decisions, the orders, or the instructions issued in order to set in place of some measures, during the alert state, the ensuring of an effective access to justice would be accomplished only on the measure that the pronounced decision determined, once the non-legality of the attacked administrative act it was ascertained, there were removed also the consequences of the respective act. Or, these effects of the judicial decision could not be obtained but on the measure that pronouncing that decision took place within the term of applicability of those administrative acts, which is at most 30 days from entering into force, as it is provided by the dispositions of art. 3 para. (1) and (2) and of the art. 4 para. (1) from the Law no. 55/2020.

Analyzing the dispositions of the Law no. 55/2020, the Constitutional Cour ascertained that those do not contain any procedural dispositions which to guarantee the solving of the causes referring to the administrative acts for declaring or prolonging the alert state in a short term, which to ensure an affective right to access to justice (paragraph 45).

For edification, it is necessary to have in sight also the dispositions of the Law of the Administrative Litigation no. 554/2004, which themselves to not correspond either to such exigencies. Admitting that the court of justice would proceed to speeding up the solving of the actions which have as object the normative acts which the alert state is instituted by, it would still be held back to fulfill the requirements referring to the legal summoning of the parts and of the right of the opposing party to file a counterclaim, which must be communicated then to the plaintiff at least 15 days before the first court term[17]. Then the court has sat its disposal, at most 30 days which the which the decisions can be drafted in, as also the right to recurse in 15 days once the decision has been communicated[18].

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[16] Published in M. Of. Of Romania, Part I, no. 261 from 13th of April 2017, paragraph 42.

[17] According to art. 17 para. (1) from the Law no. 554/2004.

[18] According to art. 20 para. (1) from the Law no. 554/2004. The Court also mentioned that, though the rule is that of suspending the execution of the attacked administrative act until the urgent solving of the recourse, in what concerns the administrative acts issued for removing the

That is why, the Court reached the conclusion, (para. 47), that *applying the judging procedure as regulated by the Law of the Administrative Litigation, it would make impossible the pronouncing of a decision in such an interval shorter than 30 days,* so that *the effects of this decision would not be able to concretely remove the consequences of the administrative acts issued on the ground of the Law no. 55/2020.*

Due to these reasons, the constitutional court concluded (para. 48) that the dispositions of the art. 72 para. (2) form the Law no. 55/2020, referring to the art. 42 para. (3) from the Government's Emergency Ordinance no. 21/2004, as also the legislative solution from art. 72 para. (1) from the Law no. 55/2020, according to which the dispositions of this law are completed with the provision of common law applicable in the field in what concerns solving the actions filed against the decisions of the Government which it is instituted through, it is prolonged through, or it ceases through, the alert state, as also the orders and instructions which it is established through, the application of some measures during the alert state, they are unconstitutional, because of being contrary to the provisions of art. 1 para. (5), art. 21, and art. 52 para. (1) from Constitution.

Very interesting for the analyzed problem, it is the thesis according to which (para. 49), in order to remove the ascertained vice of unconstitutionality, and in order to ensure a clear regulation, which to effectively and efficiently guarantee the access to justice of the persons whose right or interests have bene transgressed through adopting some Government's decisions, or by some orders or instructions issued by ministers for applying some measures during the alert state, on the ground of the Law no. 55/2020, the lawmaker it called to regulate a procedure whose content to be easily identifiable, clear and predictable, concerning the consequences, and which to ensure the possibility of solving the causes in an emergency regime, in a very short time, so that the pronounced decisions to be able to remove, concretely and efficiently, the consequences of the attacked administrative acts, within the period which those acts produce effects.

2.2. The Evolution of the Regulation Concerning the Legality Control of the Administrative Acts Issued/Adopted in Exceptional Situations, after the Year 1990.

The first regulation referring to this category of administrative acts it was the former Law no. 29/1990[19].

According to art. 2 para. a) of that law, among the acts which could not be attacked at all in the administrative litigation, there were also *the measures taken*

consequences of epidemics, their suspension is not possible, according to art. 5 para. (3) from the Law no. 554/2004.

[19] Published in M. Of. No. 122/8th of November 1990.

by the organs of the executive power for avoiding or removing the effects of some events which present public danger, as there are those issued consequently to a state of necessity or for combating the natural calamities, the forest fires, the epidemics, the epizooties, and other events of same graveness.

The syntagm *executive power* it referred to its extended acceptation, which included the public administration too, which represents a *system of organs of the state composed of the President of Romania, Government, ministries, and the other organs of the central specialty public administration organs, their deconcentrated services from counties and the authorities of the local public administration (Trăilescu, 2010, p. 2)* .

In the specialty doctrine elaborated under the incidence of that law, it was established that "*though exempted from the Law of the administrative litigation, the judge still remains competent to verify their legality, by analyzing if they were issued in the conditions prescribed by the law" (Negoiță, 1996, p. 246).*

The Law no. 554/2004 of the administrative litigation, it abolished the former regulation[20] and it recorded an evolution concerning the regulation of the judicial control upon administrative acts issued/concluded in exceptional situations.

We are appreciating here that there can be identified two big stages:

a) A first stage is represented by the initial form of the law, which provides, in art. 5 para. (3) that "*the administrative acts issued for applying the regime of the state of war, of the state of siege, or of the state of emergency, those regarding the national security and defense, or those issued for reestablishing the public order, as also those for removing the consequences of the natural calamities, epidemics, and epizooties, they could be attacked only regarding the excess of power*". Through para. (4) it was provided that "*in the litigations mentioned by para. (3) are not applicable the provisions of art. 14 and 21".*

We are ascertaining here that, in that first stage, the control regime of the legality of the acts issued/adopted in exceptional situations had two strong points:

- The action could be filed only if there was manifested excess of power, as it is defined by art. 2 para. (1) let. n) form the Law no. 554/2004, respectively "*exercising the appreciation right belonging to the public authorities by transgressing the limits of the competence provided by the law or by transgressing the citizens' right and liberties*";
- To the judicial control of the acts issued or adopted in exceptional situations it cannot be applied the procedure of the suspension based on art. 14, neither the provisions of the art. 21 that, at that time, they regulated the *recourse in special situations*, which has been abolished by the modification brought to the law in the year 2007.

[20] Art. 31 para. (2).

From the doctrine elaborated under the incidence of the Law no. 554/2004, in the respective form, we retain that one according to which "*the relative exceptions – in the sense that these acts are exempted from the administrative litigation only if their illegality is subjective, referring to legitimate rights and interests of the juridical persons, based on the law, and not also when (a) the non-legality if objective, related to the laws regulating the issuing, or (b) their subjective illegality derives out of their issuing, with «excess of power», namely by transgressing the citizens' right and liberties (art. 2 let. n)*"[21].

b) a second stage, in which to the judicial control of the acts issued or adopted in exceptional situations it is imposed only one restriction, namely that of not being applicable the provisions of the art. 14[22].

CONCLUSION

Here we have the "gravitational point" of the theme which we have approached, namely the control of some of the acts issued or adopted in exceptional situations, respectively the Government's decisions which it is instituted by, it is prolonged by, or it ceases by, the alert state, as also the orders and the instructions which it is established by, to be applied some measures during the alert state: the fact that there is not in the legislation of the administrative litigation or in any other regulation of organic character, procedural norms which to allow the solving of those litigations within a reasonable term, in such a manner to be ensured the efficiency of the decision, because, otherwise, there are pronounced decisions which no longer have practical efficiency, in the sense that they cannot be effectively applied. And this is because the period of time which they have been adopted or issued for, it has elapsed and, meanwhile, there have been issued/adopted other administrative acts of the same kind, but different in content and characteristics, or, simply, the exceptional situation consequently to which they have been elaborated it does no longer subsists.

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NATO AND EUROPEAN SECURITY IN THE CONTEXT OF THE DETERIORATING SITUATION IN THE BLACK SEA AREA

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Abstract

Euro-Atlantic security has always been a priority for the North Atlantic Alliance, especially at the beginning of the 21st century, when mankind is facing a complex, dynamic and unpredictable security environment, one of profound economic and social imbalances. The conflict in Ukraine is and will remain a hot topic of the utmost interest, due to its political-military and economic-social implications, both regionally and internationally. For some years now, the entire Black Sea region has been boiling over from a geostrategic point of view, thus becoming Europe's new powder keg. Romania is deeply interested in a stable, democratic Black Sea region, closely linked to Euro-Atlantic structures.

Key words: *NATO, security, military conflict, war*.

INTRODUCTION

Euro-Atlantic security has been and will remain a highly topical issue of real interest to all major international players, not just those in Europe and North America. In this context, the Black Sea region and the Western Balkans, which in recent decades have been areas of politico-military instability and economic and social uncertainty, real sources of conflict, occupy a special place.

Although NATO is an international security organisation of a defensive nature, the major challenges posed by the post-Cold War security environment,

coupled with the dissolution of the Warsaw Pact and the unprecedented technological advances of recent decades, have led to the initiation of profound and rapid changes at the conceptual-strategic level of the North Atlantic Alliance.

The political and military approaches specific to the beginning of the millennium are reflected in the NATO Strategic Concept adopted in Washington in 1999, which gave the Alliance the necessary tools to meet the new security challenges and prospects of the 21st century and to guide its future political and military development. It starts from the premise that NATO must protect common security interests in a changing environment, maintain collective defence, strengthen the transatlantic relationship and ensure a balance that allows European Allies to promote greater responsibility.

While during the Cold War security was ensured by deterring a Soviet attack on Western Europe, the 'age of Jihad' and terror, which is typical of the early 21st century, has required a more active preventive approach to security, especially after the blow dealt by international terrorism to the most important democracy, the United States, on 11 September 2001. This has been a real milestone in the transformation of Euro-Atlantic structures and their adaptation to the realities of the new international security environment, which is dynamic, fluid and highly unpredictable.

However, with the NATO Summit in Bucharest[1] in April 2008, the largest foreign policy event organised by Romania and the largest summit in NATO's history, international security seemed to be moving in the right direction, towards normal international relations.

But the first big question mark for the allies came with Russia's unilateral decision to annex Crimea in 2014, in defiance of virtually all international opinion.

[1] The Summit was attended by 26 member states, 23 partner states, senior representatives of international organisations and states contributing to NATO operations in Afghanistan, at the level of President (23 states), Prime Minister (22 states), Foreign Minister (7 states), Defence Minister (Kazakhstan) and Political Director (Ireland). The Summit was a unique event not only for Romania but also for NATO. It was the largest Summit of the Alliance, both in terms of number of participants (over 6500) and format. For the first time in the history of the Alliance, in addition to the established meetings (North Atlantic Council, Euro-Atlantic Partnership Council, NATO-Ukraine Commission and NATO-Russia Council), there was an enlarged meeting of the states and organisations participating in the Alliance's operation in Afghanistan, attended by the UN Secretary General, the President of the European Commission, the Secretary General of the EU Council, the Director of the World Bank, together with Afghan President Hamid Karzai and senior officials from the contact states (Australia, Japan, New Zealand, Jordan). The President-in-Office of the Russian Federation, Vladimir Putin, attended the first NATO-Russia Council Summit since its creation in 2002.

Image nr.1: Annexation of Crimea by the Russian Federation/2014
(https://www.romania-actualitati.ro/stiri/in-lume/id175222.html)

Moreover, Russia's recent illegal, brutal, unprovoked and unjustified military aggression against sovereign and independent Ukraine has shattered peace in Europe and fundamentally changed the vision of Euro-Atlantic security, demonstrating once again that the unpredictable never ceases to surprise us.

To the Kremlin's surprise, the war in Ukraine has confirmed that the Alliance is a strong united Alliance, acting in solidarity. It has also dispelled criticism that NATO no longer has a place in the context of current international relations. Its existence not only guarantees peace and stability in member countries, but also the importance of cooperation between states. Even in this case, we note that NATO has enough problems in the Balkans, problems which can very quickly turn into a hot conflict. Frustrations among members can easily be exploited by other international actors pursuing interests in the area or simply looking for a way to divide the Alliance. This is also confirmed by the growing presence of Chinese investors in Serbia, Greece and Turkey in particular. The Balkans remains Europe's powder keg, but also a potential loophole where other states can gain geopolitical advantages and influence in the area.

I. CONFLICT IN UKRAINE AND REGIONAL SECURITY IN THE BLACK SEA AREA

Throughout history, the Black Sea basin has been an area of cooperation and trade, but also an area of military and political confrontation. The Wider Black Sea Area (BSMA) has been and will remain an area of *systemic tensions between the Russian Federation and the West*.

The world changed after the Russian Federation unleashed its illegal aggression in Ukraine on 24 February 2022 and everything has been rewritten in terms of security and needs to be revisited in the Black Sea region where much of Russia's war in Ukraine is being fought.

The Black Sea region, whether we refer to the riparian countries or to the wider area, has a long and rich history of conflicts and diverging interests,

becoming in recent years an area where three major players are vying for influence: NATO, the EU and Russia (Dincă, 2012, p.95). In addition to the six riparian states, Russia, Ukraine, Romania, Bulgaria, Turkey and Georgia, the NMSA also includes Armenia and Azerbaijan (Image 2).

Today, the Black Sea is a border area between the European Union and NATO on the one hand and the Caucasus region on the other. As a geopolitical area, the Black Sea basin is characterised by frozen conflicts, prolonged by the persistence in the region of Soviet cultural, social and politico-military remnants, the rivalry between Turkey and the Russian Federation for naval supremacy, and attempts by the littoral states and the European Union to develop economic cooperation and strengthen democracy.

The Black Sea region has been and will remain a conflict zone, an area of permanent disputes and systemic tensions between the Russian Federation and the West.

Image nr. 2 Wider Black Sea Area

The Black Sea is a special region in terms of regional security, marked over the last decades in its extended region [2], a series of frozen conflicts such as Transnistria, Abkhazia and South Ossetia or Nagorno-Karabakh.

[2] The Wider Black Sea Area (WNSA) is an economic and political area that includes not only the states bordering the Black Sea (Bulgaria, Romania, Ukraine, Russia, Georgia and Turkey) but also states in relatively close proximity to it - the Republic of Moldova, Armenia, Azerbaijan - and is a convergence area of distinct regions in terms of their own characteristics. From a geographical perspective, the Black Sea area is a region circumscribed by the Pontic Basin located in Eurasia, in the contact zone between the European and Asian continents. From a geopolitical point of view,

Moreover, the annexation of Crimea by the Russian Federation in 2014 and Moscow's support for separatist forces in eastern Ukraine has brought the Black Sea back into the international media spotlight, particularly from the perspective of areas controlled by the littoral states (Image 3). But the security risks are far from over. Although NATO had envisaged the Baltic Sea as the main potential future theatre of escalating tensions in its relationship with Moscow, the reality of recent years has contradicted and surprised us all, bringing the Black Sea area back into the world's attention.

The fears are due to the fact that Russia has turned Crimea into a gigantic military base that calls into question the security of the entire Black Sea area, which is also highlighted in Romania's new Military Strategy, where it is stated that "the main military risks and threats to national security are determined by the further strengthening of the military potential in Romania's neighbourhood (militarisation of Crimea and the Black Sea basin by the Russian Federation), the conduct of military exercises (especially those with short notice) and the development of offensive and defensive capabilities on NATO's eastern flank".

Image nr. 3 Areas controlled by Black Sea littoral states

The war in Ukraine directly affects security in the Black Sea region, where Romania is also located. A return to a reasonable level of regional security depends, of course, on the restoration of peace. But not just any peace. A peace with your hand on the trigger or, worse still, on the nuclear button, is not security. From this point of view, it matters less who wins the war, what matters more is the ability of regional and global actors to return to peace while building a new regional security architecture.

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the region includes the Black Sea area where the strategic interests of geopolitical actors, be they littoral states or other actors whose interests lie in the area and who have the capacity to support them, are manifested..

The issue of security in the Black Sea region also raises the question of the presence of non-neighbouring powers in the region. The principle that should be followed is that "the Black Sea must be a sea of riparians". The more actors from outside the region want to consolidate their positions of strength in the region, the greater the regional insecurity will be.

As an alliance, NATO is already legitimately present here through Romania, Bulgaria and Turkey. The EU, for its part, as a union of states and citizens operating on a federal basis, has reached the Black Sea through Romania and Bulgaria. Strengthening these states militarily and economically, under the conditions of their political association, must be the way to guarantee regional security directly and thereby the security of these entities in their entirety.

" A stable and prosperous Black Sea region will generate security and economic benefits for Europe, the Euro-Atlantic region and the whole world" – said Foreign Minister Bogdan Aurescu at the end of the Conference on Black Sea Security under the auspices of *Crimea International Platform.*[3]

The freedom of navigation in the Black Sea is being abused by the Russian Federation and that is why there is a need for a reinforced NATO presence in the region, Prime Minister Nicolae Ciucă said at the opening of the seventh edition of the "Black Sea and Balkans Security Forum", an event held on 18-19 May 2023 in Bucharest.

More than a year after the invasion of Ukraine, Russia has not changed much in its approach to the conflict. Russia is doing what it has done before: bombing targets indiscriminately, civilian and military targets. And it certainly wants to prove that it still has offensive potential.

One of the most important reflections on the war in Ukraine is to always distinguish between hope and reality. At this time in Russia it is one of the most vulnerable situations for Putin. Not just militarily, not just economically, but more importantly politically.

At the moment in Russia we are dealing with an accelerated accumulation of conditions that will lead to the overthrow of the regime. First, there is increasingly explicit and clear pressure from all the elites who supported this regime. There are privileged people whose wealth has increased during this period, but they are far fewer than they were before.

[3] Minister of Foreign Affairs Bogdan Aurescu hosted on Thursday, 13 April 2023, together with the Minister of Defence of Romania Angel Tîlvăr, the first Conference on Black Sea Security under the aegis of the International Crimean Platform, organized by the Ministry of Foreign Affairs of Romania, the Ministry of National Defence of Romania, together with the Ministry of Foreign Affairs of Ukraine and the Ministry of Defence of Ukraine, in partnership with the Centre for Defence Strategies of Ukraine. This was the first event of this scale dedicated to the Black Sea co-organised by Romania and Ukraine under the aegis of the International Crimean Platform. (https://www.mae.ro/node/61634 and https://www.mae.ro/node/61634).

Moreover, most of those who committed war crimes in Ukraine are former prisoners recruited by Wagner. They committed the crimes on Prigojin's direct orders and were later, after the contracts were completed, personally decorated by Putin, which makes it possible to establish responsibility, a direct link between Prigojin, Putin, Wagner and the war crimes.

Most of the world's political leaders will no longer be able to contextualise these crimes in the overall context of relations between Russia and the West, this is about the direct responsibility of the President of the Russian Federation for committing war crimes, and they are heinous war crimes, starting from prisoners collectively executed by throwing grenades into the pits where they were being held to the deliberate execution of entire families in areas occupied by Wagner troops.

Possible scenarios in the evolution of the conflict in Ukraine

On the possible evolution of the conflict in Ukraine, in an analysis published by The Conversation, Natasha Kuhrt, senior lecturer at Kings College London, and Marcin Kaczmarski, lecturer at the University of Glasgow, attempt to provide *three possible scenarios for the end of the Russian-Ukrainian conflict* and an analysis of the international context from China's perspective. As the war drags on, Russia's ties with China will be tested more than ever. Whether Russia wins or loses, or the war becomes a frozen one, the scenarios China faces are problematic, write the two British authors..

Scenario 1: Ukraine wins.

Russia's defeat on the Ukrainian front would send a very strong signal, confirming both the resilience of the West and the vulnerabilities of the authoritarian regime in the Kremlin. Such a development would deal a serious blow to the mainstream narrative within the Chinese Communist Party, developed since the 2008 financial crisis, that the West is in decline and its rivals - especially China - are on an upward trend..

If Russia were defeated, the consequences would depend on the nature of the defeat. If defeat meant ousting not only President Vladimir Putin but also his inner circle, a new Russian government could weaken relations with China and reprioritise good relations with the West, which would be a blow to Beijing.

Of course, a weakened or defeated Russia could mean an opportunity for China. For example, it could take a more active role in Central Asia or force Moscow to accept a more dependent relationship with China in the economic and financial sector.

Scenario 2: the war is won by Russia.

If Russia were to win because western support for Ukraine would erode, this would empower other big players such as China. Beijing might be tempted to move to more risky and aggressive behaviour, especially in its neighbourhood.

Under these circumstances, Taiwan would face immense pressure from the Chinese military, forcing the US to decide whether to respond militarily, given its pledge of support to the island nation.

In addition, China's position vis-à-vis Europe will be greatly strengthened, allowing Beijing to discourage European states from siding with America both globally and in East Asia.

Scenario 3: the war enters a frozen phase.

The war is likely to go on for some time, with no clear winner in sight. In a way, this would suit China, as it can continue to benefit from Russian goods sold cheaply.

Russia's dependence on China, which has continued to grow since 2014 when it illegally annexed Crimea, will only increase - leading Moscow to rely permanently on Chinese raw materials. This scenario, which could now become reality, has been one that Russian politicians have constantly feared since the 1990s.

The frozen conflict scenario allows Beijing to continue its policy of supposed neutrality while promoting its role as peacemaker without having to make difficult choices.

On the other hand, China sees the Russian invasion of Ukraine as a war against the West, as does Russia. A Russian victory or defeat is not just a problem for the Kremlin, but rather could represent either victory or defeat for the liberal international order.

For Beijing, however, it is important to avoid a complete Russian failure in Ukraine. The role of peacemaker is one way to prevent such a development. To this end, it may decide to increase support for Moscow, from financial assistance to arms deliveries.

However, the long-awaited Ukrainian counteroffensive, which began in June with the support of Western-supplied heavy weaponry, is progressing rather slowly against Russian troops, who have had sufficient time to build solid defences on successive alignments, including formidable minefields, and who still have sufficient firepower to hit Ukrainian forces.

Under these circumstances, we can say without fear of being wrong, that for several years, the entire Black Sea area has been boiling from a geostrategic point of view, thus becoming the new powder keg of Europe, the very essence of the interests of the most relevant geopolitical actors, globally.

Romania - an important pawn for Black Sea security

The major international players have long understood that whoever controls the Black Sea controls the Middle East, whose democratisation implies the formation of a secure, prosperous and democratic region in BSEZ.

In this context, Romania will have a particularly important role, having the necessary political quality, as a full member of the European and Euro-Atlantic security structures, but also in terms of political-military, economic-social and

demographic sources and resources, not to mention its geostrategic position (particularly important) at the gates of the Balkans, from where practically all crisis situations in the Near and Middle East can be managed. This has always been one of the most decisive aspects.

The fact that Romania is today the outpost of the North Atlantic Alliance at the Black Sea and that the US has decided to place a military base in our country, as well as some land components of the missile defense system developed by the US in Eastern Europe (in the location of the former military air base at Deveselu, Olt county), shows very clearly that the chess game for the domination of this area is in full swing, and Romania is a really important piece of it, but also the eastern border for both NATO and the EU.

Thus, the Black Sea and the Danube River can provide Romania with one of the main conditions for development and a very favourable and friendly economic perspective. Our country is also deeply interested in a stable, democratic and closely linked BSEZ with European and Euro-Atlantic structures.

CONCLUSION

In conclusion, regional security in the Black Sea area remains a subject of major interest for the littoral states and their strategic partners. In order to face the security challenges, close cooperation and strengthening of defence and security capabilities in the region is necessary.

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SOME OF THE TRAITS OF THE INVESTIGATOR IN RELATION TO THE ROMANIAN WAY OF BEING

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Abstract

The article aims to address, in a juxtaposed manner, certain personality traits of the international investigator and the personality characteristics extracted from the psychological profile of the Romanian population. The traits exhibited by the judicial body comes from manuals and interrogation techniques from the perspective of accusatory and non-accusatory styles of interviewing individuals within the criminal process. The resulting characteristics are placed alongside the personality traits emerging from the psychological profile of Romanians, with the purpose of drawing some conclusions regarding the alignment between the suggested behaviours of the person involved in the interrogation process and the Romanians way of being.

From the combined analysis of these two aspects, a certain incongruity has emerged between the Romanian way of being and the expectations attributed to the modern investigator.

Key words: *investigator, interviewer, hearing, interview, interrogation, psychological profile.*

INTRODUCTION

Whether we talk about interrogating individuals suspected of committing a crime, about people who have suffered damage, or about interviewing those who can provide information regarding the commission of a criminal act, the hearing of individuals in the criminal process represents one of the most dynamic and complex activities, which has at its centre the human being itself.

Research directions on the investigator/investigated pair have expanded primarily towards the investigated person through analysing the inner motives behind the commission of an act, or by identifying different ways in which a person is determined to confess after being categorized as sincere or insincere following behavioural evaluations.

At the national level, research on the personality attributes of the judicial body has been conducted through some studies in judicial psychology and forensic tactics, and the criminal procedural norms have been and are the main benchmark on the legal way of approaching a hearing. For tactical rules to be effective, they require permanent attention and continuous research on how they fulfil the purpose of the criminal process, in the same way that criminal procedural legislation is subject to changes and receives proposals for improvement.

In a paper addressing the theme of tactical and procedural elements regarding the hearing of witnesses, the author from Romania points out some deficiencies in the criminal procedural norm regarding the possibility of assistance by a psychologist for the persons heard and recommends the hearing of children up to 6 years old by a person specialized in child psychology and who possesses specific knowledge of child cognitive development *(Sologon, 2021*)."

Studies focusing on the behaviour of investigators in other countries have revealed important aspects for the entire hearing activity. Thus, by applying a questionnaire regarding the perceptions of Slovenian police officers about the basic characteristics of an investigation and the degree of practical use of the interrogation manual, the following was concluded: some coercive techniques are still used, the manual requires revision, and audio-video recordings represent the solution for directing interrogations towards investigative interviews *(Areh; Walsh; Bull, 2015).*

This article will present certain specific behaviours of investigators from other countries and some personality traits from the profile of Romanians, with the purpose of identifying certain concordances or discrepancies between the internationally proposed investigator profile and the psychological profile of Romanians. The motivation for choosing this topic lies in the need to understand the usefulness of a hearing manual dedicated to the judicial bodies in Romania.

To provide a brief legislative and terminological context, the first section addresses the theme of hearing in the criminal process in Romania, coupled with some elements of judicial psychology found also in the rules of forensic tactics.

The traits of the investigator are highlighted from the perspective of the accusatory and non-accusatory style that marks most of the hearing techniques mentioned in specialized studies, and in the section dedicated to the Romanian way of being, certain personality traits are presented resulting from the shaping of the psychological profile of the Romanian population.

The conclusions aim to draw attention to certain areas of development within the personality structure of Romanians and to raise awareness of the optimal behaviour that an investigator can adopt during a hearing".

I. INTERNAL ASPECTS

The traits of the investigator that will be referenced in the article will be taken from the international bibliography, as they emerge from various manuals and hearing techniques. Even though the characteristics of the investigator are not taken from Romanian specialized literature, we consider it useful to briefly present the context of the criminal procedural process within which hearings are conducted in Romania, primarily to understand the terminological differences, to which notions of judicial psychology will also contribute.

In accordance with the regulations of the Code of Criminal Procedure *(Law no. 255/2013 for the implementation of Law no.135/2010*), no explicitly significant distinctions are established between the concepts of 'hearing' and 'listening', as an activity that defines the evidentiary process through which a statement is obtained. Article 106 paragraph (1) of the Code of Criminal Procedure shows the alternative application of these terms, without a clear conceptual difference between the two notions being deduced from the legal text. In doctrine *(Neagu; Damaschin, 2020, p. 483*), there emerges an opinion that supports the absence of any procedural differences between the activities of hearing and listening, both encompassing the phase of free exposition and the interrogation stage. Contrary to this approach, another doctrinal position *(Mateuț, 2019, p. 505)* proposes a clear distinction between the two notions, attributing exclusivity to the term 'hearing' in the sphere of the criminal process, while 'listening' would be reserved for judicial approaches external to the substance of the case.

The Code of Criminal Procedure provides for a phased approach regarding the manner of listening to the suspect or the accused. It begins with a preliminary interrogation about personal data and continues with informing about the rights and obligations that come with the status of the person being heard, followed by subsequently offering the suspect or the accused the opportunity for a free narration regarding the crime that has been attributed to them. Later, the participant in the criminal process is likely to be subjected to a set of questions in the interrogation stage. Even though the mention is only about the suspect or accused, this structure of the hearing procedure, consisting of a phase of free narration and one designated for questioning, represents the rule in the matter of hearings. To make a connection with the next section of the article, we can state that the free narration is synonymous with the interview, and the questioning stage represents the interrogation, similar to how the phases of hearing are named and described in various international approaches, especially those from the United States of America and the United Kingdom.

The notion of inquiry, although used in the Code of Criminal Procedure, is limited exclusively to references concerning special methods of surveillance or investigation, and the term 'interrogatory' does not exist in any form. The term 'investigator' or 'interrogator' does not exist either, and to designate the person conducting the hearing, the term 'judicial body' is used, as part of the tableau of participants in the criminal process, alongside the lawyer, the parties in the criminal process, the main procedural subjects, and other procedural subjects, such as the witness and others.

Despite this, from the perspective of judicial psychology and forensic tactics, the notion of inquiry exists in a relative indistinction with hearing, listening, investigation and interrogation. The judicial inquiry, as a procedure carried out both in the phase of criminal investigation and that of trial, is defined *[Mitrofan; Zdrenghea; Butoi, 1994, p. 148*] as a cumulation of relationships that the investigator has with other participants in the process. Characterized by the presence of a certain emotional tension and conducted in a systematic way, the interrogation represents the contact between the state representative and the person suspected of committing a crime, in which context the judicial body is later also called an investigator *[Butoi, 2004, p. 85]*.

Since the term 'judicial body' is used throughout the criminal process, in all phases and criminal procedural activities, we consider it too generic to exclusively designate the person conducting the hearing, which is why the notion of investigator seems more appropriate. Even though it has a transient character, it better responds to the need for synonymy with terms like detective, investigator, interviewer, and interrogator. The terms will be used as such to maintain the sense the authors intended to attribute in their original works, differently, depending on the legal and conceptual approach.

II. TRAITS OF THE INVESTIGATOR

Subsequently, certain traits of the investigator will be highlighted as they emerge from the interrogation techniques used internationally, starting with the infamous Reid technique, as well-known as it is controversial, and then moving on to non-accusatory techniques, such as the investigative interview. Despite the fact that these are different approaches, certain characteristics are common and serve to create a comprehensive picture of the behaviour and competencies of the investigator.

2.1 Accusatory style

The dominant characteristic of the Reid technique lies in accusing the person being heard after an interview has been conducted, and the interviewer has formed a belief regarding the person's insincerity. Based on this approach, several hearing techniques have been developed, largely built on the basis of conducting an interview in the initial part and then applying knowledge acquired by the investigator for detecting simulated behaviour. The second major stage is the

actual interrogation and is applied to individuals suspected of being insincere and having a hidden involvement in the investigated act.

In the 5th edition, the most recent of the interrogation manual proposed by the Reid Institute *(John E. Reid & Associates, Inc., reid.co*m), the authors of the work approach the investigator's competencies differently depending on the two stages, the interview and the interrogation, and do not exclude the possibility of being the same person. On the contrary, it is recommended that the interviewer continue the interrogation because the trust relationship built with the investigated person is particularly useful in the persuasion process. *(Inbau; Reid; Buckley; Jayne, 2013, p. 64).* From this point, we understand that the investigator proposed by this technique must feel comfortable when manipulating a person they consider guilty, in order to obtain a confession. In addition, it is recommended that the investigator's flexible attitude goes even further so that they can display, in the most authentic way, an apparent sympathy even towards a person suspected of committing the most heinous acts. They must be able to lie about the strength of the evidence in the case and be capable of treating with respect an arrogant or provocative person, all to access the truthful part of the interrogated person.

We understand that a good investigator must possess high confidence in their ability to detect truth or lies, the capacity to discern between them, and the strength to support their decision. This advocacy for behaviour is not out of obstinacy, but from confidence in their capabilities, and a successful interrogation is not driven by passion or resentment, with the emotional control of the investigator being essential. The manual suggests that communication ability is the most important at this stage, where the investigator must be able to maintain a sustained pace of interrogation for a long period of time and not lose the attention or interest of the person being heard. This aspect does not translate into the investigator getting absorbed in a long monologue and losing attention to the suspect's behaviour.

Returning to the stage preceding the interrogation, even within this technique, the conduct of the interview is done in a non-accusatory manner and aims at gathering information. The authors of the manual believe that the personality and attitude of the interviewer play an important role and only those who are authentically concerned about people are successful. The investigator must feel comfortable asking questions and be able to approach sensitive subjects in a relaxed and confident manner, despite the traumatic context and the behavior of the person in front of them. An investigator who feels uncomfortable asking questions creates more nervous tension in the case of a sincere subject and more confidence in the case of an insincere subject *(Inbau; Reid; Buckley; Jayne, 2013, pp. 56-57).*

Because we preferred an inverse approach to the natural stages of hearing, from interrogation back to interviewing, the second part of the subsection dedicated to the accusatory style will develop some elements within the interview

stage, such as the importance of establishing rapport and self-evaluation of activity.

In the second edition of the book for law enforcement forces, John E Hess defines rapport as a state of mind characterized by empathy, sympathy, and comfort *(John E Hess, 2010, p. 11).* To create such a state, the former FBI Academy instructor recommends that the investigator adopt behaviour aimed at reducing the interviewee's anxiety. At the same time, he suggests offering compliments and using mirroring techniques from neuro-linguistic programming to increase the comfort level of individuals in a hearing context. The mirroring technique of Bandler and Grinder contributes to creating good rapport, but overly obvious or unnatural mirroring can create a sense of manipulation and lack of authenticity. The author discovered that flattery is meant to make people feel better about themselves and they will attribute this feeling to the person who initiated the compliment. We understand that the investigator must be able to create a state of reduced anxiety and as much connection as possible with the person being heard, starting from the objective that most interviewed people want to cooperate.

Self-evaluation of activity, or the interview critique made by the interviewer, consists of asking a question regarding how they would do something differently if they were to start the same interview again. Hess argues that most interviewers who are willing to ask themselves this question often have difficulty in answering or are left with a vague feeling of insufficiency, unable to name exactly what they would change specifically. Most often, this happens because of a holistic evaluation of the interview, sufficient to provide an assessment, but not enough to objectively improve performance.

2.2 Non-accusatory style

The purpose of this article is not to conduct a comparative process between the different approaches of hearing techniques used internationally. However, one of the main criticisms brought against the accusatory style is that the adversarial system, even though it is specific to the Anglo-Saxon legal system, should be removed from the interrogation room *(Leo, 2009, p 327).* To support this proposal, the example of the English is given, who proceeded in this way to improve the quality of interrogation practices and the quality of the evidence obtained in the hearing process. In a more recent opinion of the same author and based on the most comprehensive research currently available, police hearings should have an investigative function, carried out through an investigative interview, and not an accusatory one, as is the Reid technique, with the objective residing in finding out the truth, even if it means cancelling the opinions initially formed *(Leo, 2018, p 38).*

To continue along the line of finding the truth, we retain some elements that resulted from studies on the obstacles faced by investigators when they need to accurately assess the veracity of statements. The analysis of these studies was

carried out within a manual on the psychology of investigative interviewing, as a technique of the non-accusatory style *(Bull, Valentine, Williamson, 2009).*

Thus, the lack of knowledge based on scientific evidence and specific skills for evaluating truth will incline the investigator towards custom and will create a blind trust in their own experience, very close to the popular myths and those of the organization they work in. On the other hand, without training grounded on the latest findings in the field of judicial psychology, it is very difficult to know what lying looks like, and the most convenient is to presume. The lack of critical thinking is considered the main obstacle in accurately assessing the truth, and the lack of objectivity can be observed through internal or external factors. Mental, physical health, and ego, as internal factors, have a very large impact on the decisions of evaluators, and in terms of external factors, investigators may feel the pressure of heavy tasks and unreasonable deadlines *(Bull, Valentine, Williamson, 2009, p. 308).*

In the same work, it is recommended that training for assessing a person's sincerity should focus on four major areas. Firstly, it is necessary to abandon bad habits, then to acquire knowledge based on scientific evidence and to implement scientifically validated tools. The last and most difficult major area consists of using methods that emphasize critical thinking in the evaluation of sincerity.

American psychologist Paul Ekman's research is relevant, according to which most people rely in the process of evaluating sincerity on what has been termed 'my theory' of behavioural evaluation. Myths fuelled by society reflect common beliefs about the 'signs' of sincerity and insincerity, without there being in reality a 'Pinocchio's nose' as an indicator of lying *(Ekman, 1991, p. 80).*

Through a questionnaire administered to a large sample of police investigators in Singapore, a recent study (Chin; Milne; Bull, 2022) also examined the behaviours investigators claim to have during hearings, and the results reinforce previous research recommending caution towards the use of interview behaviours associated with an accusatory approach and an openness to communication based on rapport. The same article notes that the cultural structure of the population in Singapore tends to be collectivist, the same inclination that the population in Romania has, as we will see in the next part of the article.

III. HOW ROMANIANS ARE

In 2015, Professor Daniel David managed to obtain certain psychological attributes of Romanians based on evidence-based research and published the book 'The Psychology of the Romanian People: The Psychological Profile of Romanians in a Cognitive-Experimental Monograph' *(David, 2015),* from which I have extracted certain traits that outline the psychological profile of Romanians through the prism of personality traits.

The personality profile addresses the subject of the general abilities of the population in Romania and it was found that the intellectual potential is at a level

close to that of other countries in Western Europe or the United States of America. However, it can be observed that intelligence, whether fluid or crystallized, does not fully reflect the latent potential of Romanian intelligence. The same observation is valid for creativity, which at a deep level is similar to that of other developed societies, but shows notable differences to the detriment of Romanians at the surface level. Also, we note that the emotional intelligence of Romanians is inferior to other nations, both at the depth and surface level, from which we can deduce our difficulty in understanding and managing our own emotions, as well as understanding and managing those of others.

Regarding personal intelligence as a personality indicator, no significant variations are noted, except for the fact that Romanians tend to create a more pronounced positive impression compared to Americans. Regarding the character and temperament of Romanians, the lower level of agreeableness can manifest through stronger ambition, but also through a higher level of suspicion. The motivation for work among Romanians is of an extrinsic nature, seeking to satisfy the need for social affirmation, but due to a reduced self-esteem, the style of personality and relating remains a defensive one.

Romanians are also deficient in managing emotional and relational aspects, which is why they have developed various coping mechanisms such as a superiority complex to cope with states of psychological discomfort. Also, regarding interpersonal relationships, personality tests have highlighted high scores in distrust of people, scepticism, controlled hostility, and indifference, traits that make us seem more reserved in reality than we think we are. Mainly supported by a gregarious spirit and low conscientiousness, Romanians have recorded high values in terms of indiscipline, an aspect that also emerged from self-assessment tests, which means that we are aware of this behavioural deficit.

As a synthesis of the personality profile outlined following research that spanned over ten years on the population of Romania, we can assert that despite a good level of intelligence, the psychological profile of Romanians is marked by distrust, cynicism, and scepticism. There are strong tendencies to accentuate both the positive and negative, and the high level of competitiveness acquires unfavourable connotations when confronted with indiscipline and tends to turn into frustration.

Also, within a Romanian research study, which does not claim to conduct a comparative examination with other nations, the five factors of the Big Five model - emotionality, extraversion, openness, agreeableness, and conscientiousness - were used to identify the grouping of the Romanian population according to these factors *(Albu, 2016, pp. 73-83).* The conclusions of the work positioned the Autonomy and Conscientiousness factors at a low or very low level, which can be interpreted as a lack of personal opinions and high indiscipline. The lack of opinions is characteristic of the gregarious spirit, and indiscipline specifically concerns the way we relate to tasks.

SOME OF THE TRAITS OF THE INVESTIGATOR IN RELATION TO THE ROMANIAN WAY OF BEING

The gregarious spirit and collectivist structure do not seem to be anything new for the personality profile of Romanians; the person of character has always been the one who followed 'the bell of the herd' and did not step out of the group's word *(Rădulescu-Motru, 1998, p. 36).* In the same work, first published in 1937, the academician Constantin Rădulescu-Motru noted the Romanian tendency towards individualism and wasting time on unimportant things, and the belief that we are hospitable was present then as well. This latter trait, viewed from the perspective of modern research, seems to be more about how we see ourselves and not how we are in reality. It should also be noted that at that time, the current psychometric tests validated on the Romanian population were not used, with most opinions being expressed on emic bases.

We conclude the approach to personality attributes with a reference to recent research on the psychological profile of candidates for police schools in Romania and the Republic of Moldova. The common attributes in the two populations were sociability, activism, and intelligence, with the note that there was a tendency towards desirability among candidates from Romania, a factor that can distort the personality profile *(Olaru; Anton, 2023).* The research once again confirms the tendency to present ourselves in a better light and the belief that we are sociable, active, and intelligent people.

CONCLUSION

Regardless of the accusatory or non-accusatory style of hearing, the investigator is presented as a person capable of creating an authentic rapport. This rapport is based on attributes that involve high communication skills and the ability to feel empathy, sympathy, and comfort in the relationship with the person being heard. Even without the application of interrogation techniques, known for their clarity of steps to follow, hearing requires organization and during the interview stage, a certain structure is useful for the process of self-evaluation.

Creating a state of comfort for the person investigated for committing a crime may seem counterintuitive, but a state of high anxiety is not even useful for liars. Manipulation-based techniques include behaviours of validation through sympathy and respect, even towards the authors of repugnant acts.

Using the non-accusatory style calls for the need to abandon old hearing habits and to use only those methods and techniques that are scientifically proven. Critical thinking is highly valued and aims not only to evaluate the behaviour and words of the interviewee but to question one's own behaviour. The interrogation of the way of thinking and organizing the interview is encouraged, and the investigator must understand and admit wrong research directions.

Presenting the personality attributes of Romanians highlighted the latent potential in the intelligent approach of all tasks, but also deficiencies in emotional intelligence, so important in the hearing process.

It is difficult to assume an easy and authentic rapport of the investigator in the context of the Romanian profile, marked by distrust in people, cynicism, and scepticism. A high score in self-confidence does not mean confidence in one's own decisions, and these values must be correlated with the existence of a superiority complex and an external motivation to receive appreciation from others. It is difficult for a person with high scores in indiscipline to resist the frustration during a hearing and to be able to objectively analyse where they went wrong and where adjustments are needed.

Although we have observed that Romanians tend to present themselves in a positive light, the purpose of the article is to highlight those behavioural areas that need to be developed in the context of interviews and interrogations, as well as to point out the need for a manual or hearing techniques that consider the internal psychological profile.

The need for concrete training in the direction of being aware of the advantages and dangers of hearing techniques is also claimed in international studies, relevant being the position of Spanish investigators who highlighted the almost complete lack of specific training regarding the conduct of interviews (Schell-Leugers; Masip; Gonzales; Vanderhallen; Kassin, 2023).

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THE ECONOMY OF SAFETY POLICY IMPLEMENTATION IN SCHOOLS. CASE STUDY: INTERNATIONAL SCHOOL OF ORADEA

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Abstract

"Prevention is always better than cure" is a concept that fits perfectly when it comes to safeguarding in schools. In the last few years, schools have been challenged deeply because of different incidents, especially after Coronavirus, with serious consequences. One regards the economical side of institutions. The present paper tries to show why it is a must to have a Safeguarding Policy in schools, and the case study reflects such documents in an international school in Romania: International School of Oradea.

Key words: *economy, safety, policy, implementation, school.*

INTRODUCTION

School safety is crucial for the well-being and success of students. In recent years many countries have started taking this issue even more seriously as the pandemic period displayed the importance of safety and wellbeing in the schools.

Ignoring safety measures can lead to serious consequences, both financially and emotionally. The economy of safety in school is no longer limited to financial investments and requires the schools to have strong communities working together to create a safe and secure environment which fosters learning and growth. Addressing these safety measures within a plan has many positive results which will be described in this paper.

I. A SYSTEM IN CRISIS

The current situation of school safety shows very high numbers in certain areas. In the United States of America in a study performed in 2019 22.2% of bullying incidents have been reported by 12-18-year-old students. (*Report on Indicators of School Crime and Safety: 2021).*

With the rapid development in the field of technology and mobile devices, cyberbullying is also another type of risk which is common in many schools. Bullying is not the only type of risk existing in the schools. The high crime rates and physical aspects need careful planning and organization of the resources.

To create a safe and secure learning environment all the aspects from playground injuries to bullying, all the safety elements need to be addressed to create a safe and secure learning environment.

One of the biggest benefits of investing in school safety therefore having a safe environment is the fact that a safe and secure school environment promotes better physical and mental health, leading to improved academic performance and overall success. As it enhances the performance and well-being of the students, students are more eager to be in the school and this results in them developing nicely. Regarding the economical development of the countries there is a 2010 study in which economists Eric Hanshek and Ludger Woessmann states “if the UK could halve 50 point gap with Finland on the international PISA student assessment, this could eventually boost the annual GDP growth rate by around 20 per cent. *(Hanushek and Woessmann, 2010).*

There is also a long-term financial benefit to investing in school safety. By investing in safety measures, schools can avoid the financial burden caused by accidents, such as medical expenses and lawsuits. Positive impact on school reputation is another result as schools with a strong commitment to safety build trust with parents, students, and the community, enhancing their reputation as an educational institution.

II. SECURE ENVIRONMENT, SAFE SCHOOL

To improve school safety first strategy would be the implementation of safety protocols and procedures addressing specific issues like playground expectations, school access policies, antibullying policies, health and safety policies.etc. Developing clear protocols and procedures that address potential hazards and emergencies ensures a proactive and efficient response to any safety situation.

Installing safety equipment, like surveillance cameras, secure entrances, and well-maintained facilities, creates a secure environment for students and staff. Here although the initial investment can be significant considering the long term benefits it is very important that all institutions take this into account. Utilizing advanced technology,such as smart security systems and real-time monitoring, strengthens school safety measures and enhances emergency preparedness.

Besides having all these measures another essential factor is the collaboration among the stakeholders. It is very important that everybody working in school acknowledges their responsibility and there is a systemic approach to continuous training.

III. SAFETY MEASURES-BEST PRACTICE

International School of Oradea is a private institution, created in 2017, in the city of Oradea (in the North-West side of Romania, at the border with Hungary), by both Lumina Educational Institutions, the Municipality of Oradea and Oradea Local Development Agency. It is a non-profit school that offers two lines of education: a British Curriculum education (based on the National Curriculum of England), where the language of instruction is English and since the last three years, it is providing also a Romanian Curriculum education, with an intensive English programme, where the language of instruction is Romanian. At the moment there are almost 200 students learning in both sections, with ages between 2 and 12 years old. There are more than 30 teachers that work at Interntional School of Oradea.

The values of International School of Oradea are "Learn, Respect, Succeed", promoting a safe and supportive learning environment for each child, which nurtures a joy for learning, creativity and excellence in all fields of development, in direct connection with the local community, in order to develop in our students skills that will enable them to be in the near future independent, successful and respectful adults, givind back to the global society the things they were initially taught.

The school's mission and philosophy are based on democratic values such as truth, freedom, justice, human rights, the law and collective effort for the common good, stating that each school pupil and member of staff is a unique human being that is capable of growth and development, spiritual, moral, but also intellectual and physical. ISO celebrates and recognises achievement and believes that relationships are fundamental for all individuals' fulfilment. Families are the basis of a society in which people care for others, a sources of love and support for all their members, and they are essential to be involved in all the learning and pastoral sectors of our students' interests.

In order to accomplish all these, the ISO community needed to be organised and informed about the ways all community, together, build the school's objectives. A series of policies were written and created in order to prevent any situation or harm that can appear, and the process is still an on going one, evaluated and reedited annualy. Everybody has access to some of ISO policies, even before registering to our school, which are published on the site of the school and that regards different sectors, such as teaching, learning, assessment and recording, positive behaviour, playtime, cookies, admissions, complaints, confidentiality.

At the International School of Oradea, through several policies such as the Health and Safety Policy and Safeguarding Policy the safety measures are implemented and made known to everyone involved in the activity of the school[1].

Regarding the safeguarding policy having the necessary checks before hiring new staff members, controlling access to the building and having strict rules such as staff members not being allowed to take photos of the students with their personal devices, or parents not being allowed to remain alone with any student unsupervised in the school premises are just some of the examples. All the CCTV cameras and collaboration with professional security companies also add an extra layer of security for the school community.

Other than these measure, the risk assessments are being made for any external school event and in acquisition of new school equipment such as playground items, their compliance for the children use are checked.

There is an active role named Health and Safety officer and this person is in charge for the regular maintenance of the site, planning and practice of regular drills for different emergency situations so the students are aware of the expectations and trained in this regard.

Although it is an essential factor, there can still be some challenges such as lack of funding and resources. Referring back to the safety in schools being a collaborative responsibility, the part of the governing bodies is to ensure that the schools allocate a significant part of their budget for the safety. Postponing any regular maintenance work might result in a bigger financial loss on a long term. Limited training or access to expertise might be another challenge for which the schools can collaborate with other schools to create some common resources or some online platforms might be referred as they are usually more cost effective.

If all these safety measures have not been considered from the beginning, when some new measures would like to be introduces there might be some resistance from different stakeholders. Therefore it is impotant, informing all the parties with the importance of these measures and offering training for them to raise awareness. Finally the procedures should be supported with strict policies to make sure everbody understands that it is not an optional matter. Other than this there is also an annual week which is celebrated as a Safety Week where the school collaborating with some of the parents organizes focused activities to improve the understanding of the students in different matters such as food safety, road safety etc.

The school regularly invests for different training and implementation procedures either through some online platforms or working directly with professional partners.

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[1] www.isor.ro

CONCLUSION

As a conclusion creating safe schools benefits students, schools and communities, leading to improved well-being, financial savings, and a positive reputation.

Therefore it is important for any community to prioritize school safety through a collective effort and the educational stakeholders to invest in resources, training and sustained commitment.

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PROMOTING SOCIAL EQUITY AND PREVENTING TEACHERS' MALADAPTIVE SCHEMES

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Abstract

Through this article we aim to highlight the importance of social and educational policies for promoting equity in the Romanian educational system. The paper also contains an investigative study aimed at evaluating the personality traits of teachers and their level of anxiety and the role that certain maladaptive cognitive mechanisms have in the manifestation of counterproductive professional behaviors. *The data* of *the study were collected based on online questionnaires from 31 teachers from the "Kemal Ataturk" National College in Medgidia, Constanta County, Romania.*

Key words:*social equity, educational system, adaptive and maladaptive professional behaviors of teachers.*

INTRODUCTION

The problematic aspects of the entire educational system in Romania, which particularly affect the students in disadvantaged social categories, are the insufficiency of the material resources, the poor motivation, the school dropout and the discrimination to which are added some dysfunctional attitudes of the teachers. These inequalities also derive from the ethnic, economic, social background and the students' residency environment.

Numerous studies point to the existence of inequalities in accessing and participating Romanian students in a quality education. Belonging to the Roma ethnicity, residence in poor rural or urban areas, low economic resources are the

variables that in Romania are negatively associated with access to education, as well as with the quality of education.

Social inclusion is one of the desiderata of educational programs and policies promoted at all levels of schooling. It is based on equal opportunities and aims to facilitate access to education granted to all young people regardless of background, health status, ethnic, religious or biological gender.

Through the Education 2030 Declaration "For inclusive education and quality equitable education for all, throughout life", at the World Education Forum in Incheon *(Republic of Korea, May 2015)* it was claimed that the recognition of the right to education is interconnected with all human fundamental rights.

Social exclusion has been recognized within the EU and the UN as one of the main barriers to economic growth and sustainable development *(Vrăsmaş T., 2014).*

Discrimination is identified as one of the reasons why equal opportunities are not respected as a social principle. The many aspects of discrimination show that it manifests itself in exclusion, restriction and differentiated treatment towards people, groups, community to the disadvantage of some of them.

The present work aims at evaluating the personality traits of teachers and their level of anxiety and the role that certain maladaptive cognitive mechanisms have in the manifestation of professional behaviors. The data were collected based on online questionnaires from 31 teachers from the "Kemal Ataturk" National College in Medgidia, Constanta County, Romania and were processed using statistical processing methods.

The complexity of the concept of psychological health in organizations makes it difficult to operationalize in a unitary, consensual form at the level of the international scientific community.

Psychological health relates to life experiences (life satisfaction, joy, happiness, etc.), and in the organizational field, it includes general work-related experiences (job satisfaction, attachment to the professional organization, etc.) and specific experiences (satisfaction in the relationship with colleagues).

Teachers need to outline a set of personality traits that will support them in multiple tasks and in various teaching activities. At the same time, a continuous emotional regulation is needed so that the wear and exhaustion of the physical and mental due to the excessive consumption of energy, forces and individual resources, do not disturb the teaching activity and the action potential.

Multiple researches on the topic of anxiety have shown that many factors affect the level and forms of anxiety perceived by teachers. The professional experience, the type of school, the physical condition of the class and school, the personality of the teacher, the characteristics of the students, the relationship with the students' parents, the context, the level of teaching of the class, the family concerns, the changes in the national or local curriculum are some of the factors

that contribute to the level of stress and its consequences. Shillingford, Patel and Ngazimbi (2012) point out that teachers face a multitude of challenges, for example, legislation, school reform policies, teacher-parent relationships, conflict with other teachers, etc. that could induce symptoms of anxiety.

Studies in the international psychological literature highlight the link between personality traits and the level of anxiety felt by teachers during classes. Houlihan, Fraser, Fenwick and Fish (2009) investigated what are those personality traits that are associated with anxiety at a sample of teachers at an educational institution in Canada. The results indicate positive correlations between the trait of neuroticism and the high level of anxiety in teaching at the classroom. Considering that neuroticism includes emotional instability and self-awareness, the authors would expect such results. *(Houlihan, Fraser, Fenwick and Fish, 2009).*

International studies show various results as they consider higher seniority in work as a protective factor against anxiety in the workplace. Morteza and Morteza (2014) investigated differences between participants young teachers vs. teachers with work experience, indicating a higher level of anxiety as being present in young teachers compared to older ones *(Morteza and Morteza, 2014).*

The study conducted by Samfira and Paloș (2021) on a sample of 284 teachers in Romania, identified conscientiousness and openness as predictors for coping strategies based on functional cognitive schemes as personal resources, these focusing on reflectivity, projection, strategic planning and preventive adaptation. *(Samfira and Palos, 2021).*

Considering the specifics of the institution in which we carried out the psycho-pedagogical research, it is important to mention the importance of ensuring a cohesive climate of cooperation between teachers and students belonging to different ethnic minorities. As Tusa E. (2020) notes, "ethnic minorities have a fundamental role in building social capital due to the contribution they bring to the societies in which they coexist together with social and political majorities. The accumulation of social capital also includes the set of political and cultural rights that minorities can enjoy. There is a direct relationship between the granting of minority rights and the social balance that makes a direct contribution to the construction of social capital."

1. INVESTIGATIVE STUDY: THE INFLUENCE OF TEACHERS' MALADAPTIVE COGNITIVE MECHANISMS ON STUDENTS

1.1. Research objectives

The aim of the research is to evaluate the dimensions of the teaching staff's personality and the relationship with the level of anxiety, the maladaptive cognitive mechanisms that could influence this level of anxiety, as well as other individual factors (level of enrollment in education, age group).

The objectives of the research were aimed at evaluating the dimensions of the teaching staff's personality in relation to the level of anxiety, as well as at evaluating the influence of the professional experience as a factor of mental stability in the teachers with seniority in work.

1.2. Study design

This study is a transversal, correlational and comparative one that aims to study the relationships between the described variables.

1.3. Lot of participants. Procedure

The population included in this research consists of teachers (N = 31) selected according to levels of professional experience: the first group 1 is made up of teachers with up to 5 years of experience (N = 12); the second group comprises teachers with experience between 6 and 14 years (N = 9) and the third group includes teachers with professional experience of more than 15 years (N = 10)

Of the total teachers, we have $N_{women} = 27$ and $N_{men} = 4$. A non-probabilistic method of sampling was used, namely sampling by convenience and identification, as these populations were available at the time of distribution of the questionnaires. The research was carried out at the "Kemal Ataturk" National College in Medgidia between 15.02-2022-15.05.2022.

1.4. Research methods. Tools

For the purpose of collecting and interpreting the research data, the CP5F Personality Questionnaire, the Beck Anxiety Inventory and the Young Test for the evaluation of maladaptive cognitive schemes were used. The data collected is processed through IBM SPSS Statistics 20.

The Personality Questionnaire with 5 Factors (CP5F Questionnaire), adapted and calibrated on the Romanian population and provided by Cognitrom Romania Cluj-Napoca is intended to evaluate the five factors of the Big Five model (Extraversion, Emotional Stability, Conscientiousness, Kindness and Openness to Experience). It can be used for the diagnosis of personality, in the educational field, in the clinical field and in the field of health psychology.

The J. Young YSQ test evaluates early maladaptive schemes and examines them as vast themes about oneself and one's own relationships with others that develop in childhood, develop throughout life, and can come dysfunctional to some extent in adulthood. They were classified into five types of counterproductive attitudes in professional relationships: separation and rejection, autonomy and diminished professional performance associated with a sense of vulnerability.

The Beck Anxiety Inventory developed by Beck and collaborators (1988, 1990) aims to identify the severity of anxiety symptoms in adults.

1.5. Hypothesis testing

Hypothesis no. 1: It is presumed that there are correlations between the dimensions of the personality and the level of anxiety of the teachers.

In order to test this hypothesis we would check if the scores obtained are normally distributed. From the Kolmogorov-Smirnov test, the statistical threshold at Extraversion, Conscientiousness and Courtesy was $p = 0.15$, $p = 0.03$, respectively $p = 0.003$ ($p < 0.05$), so the distributions of the scores at these dimensions do not meet the position of normality. That's why we used the Spearman correlation coefficient to verify the association between the dimensions to be investigated (personality traits and anxiety) in the study. The Spearman rho coefficient indicates a significant negative correlation between ***the professional opening*** variable and the ***teacher anxiety*** variable (rho = -0.638, p = 0.001).

Openness to experience represents the personality dimension of teachers that reflects their predisposition and motivation for the activity of cognitive exploration in the field of profession l. It is associated with the openness to fantasy dimension that involves didactic innovation, based on the ability to see new possibilities, solutions, unexpected and innovative combinations of active-participatory and problem-solving didactic elements and strategies.

Education professionals identify new possibilities for the development of personal and professional resources. Taking into account the last period, the pandemic one, when teachers have made lessons in the online environment, they have been open to the use of methods and procedures specific to digital education, different software and materials compared to those frequently used in the teaching activity. The dimension of the evasion towards the acceptance and awareness of their feelings represents the ability to differentiate a large range of emotions, a permanent contact with their own inner feelings. Teachers have this inclination to identify, differentiate the complexity of emotional experiences and to accept this important side of life. Openness to action involves an inner motivation to always do new things, to bring new teaching strategies to students, to do various activities, to spend time in a pleasant way putting into practice hobbies, various activities of students, promoting project-based learning. The openness of teachers' values highlights the need to re-examine social, political, religious values, promoting interculturalism and the values of democracy.

Hypothesis no. 2

It is presumed that the level of anxiety differs depending on the age groups; young teachers (ages 25 to 39) have a higher level of anxiety compared to older ones (40 and 65 years).

In order to test this hypothesis, we divided the sample represented by teachers into two age groups: group 1 comprising teachers aged between 25 and 39 years (35.48%) and group 2 comprising teachers aged between 40 and 65 years (64.52%).

Since the distribution of scores in the variable "Anxiety" meets the assumption of normality, we will use the student t test to compare the two age groups to the anxiety variable. The 25-39 age group obtained a higher average of anxiety scores ($M = 33.73$, $SD = 2,284$) compared to the average score of the age

group 40 – 65 years (M = 23.00, SD = 1.806) The student test t for comparing age groups indicates a statistically significant difference between the two groups (t(29) = 14,402, p = 0.001. Hypothesis 2 is confirmed – younger teachers have a higher level of anxiety compared to older ones, in other words, the experience gained in work is one of the factors of mental stability in teachers who have more seniority.

Anxiety refers to subjective feelings of nervousness, fear, panic, turmoil and worry (Spielberger, 1966, 1983). "This arises in response to the uncertainty of a future event/assessment and/or to the concern about the consequence of an event." Spielberger (1966) proposed and differentiated her anxiety as a state of anxiety and a personality trait.

Anxiety as a state engages the feeling of fear as a result of activities in the autonomic nervous system triggered as a result of concrete circumstances perceived as threatening, while anxiety as a trait is an "acquired behavioral disposition that predisposes an individual to perceive a wide range of objectively non-hazardous circumstances as threatening" (Spielberger, 1966, p. 17). So, the age of teachers influences the level of anxiety. The process of training as professionals in the educational system is extensive and continuous. As the years go by, adult teachers regulate their emotional state much better, identify their emotions more easily and manage them successfully in front of students, so that the lessons or the presence of the teacher in front of the class are at the level of their expectations, but also that of the students, and anxiety is only an easily manageable emotional state.

This aspect can be explained from the point of view of how to manage emotions, by a better knowledge of one's own personality. Also, the level of communication and relationship with other important factors of the educational process is developed, and the management of one's own emotions is much more effective.

As for hypothesis 2, a weak level of association between maladaptive cognitive patterns (failure, vulnerability, addiction and protectionism) and the level of anxiety of teachers was obtained.

Personal emotional regulation is a skill that allows the teacher to develop and assimilate approaches and strategies to manage stress, thus leading to satisfaction in the educational process.The teaching profession really involves aspects of patience, empathy, adaptability. The multiple transformations of the last period within the education system have increased the resistance to stress of teachers.

The context of Romanian education is a great challenge. Continuous changes, multiple requirements lead to increased anxiety levels of younger teachers. But over time, career development, professional satisfaction, time spent at work, performances obtained are aspects that influence the well-being of adult

teachers. The multiple transformations of the last period within the education system have increased the resistance to stress and anxiety of teachers.

In recent years, education has undergone a number of transformations. The training courses have the role of training the teachers from a professional point of view. In parallel with these courses, it would be interesting to carry out some programs of mindfulness in order to improve well-being, diminish anxiety and find an inner balance, as an important resource of life.

CONCLUSION

Openness to experience is the personality dimension of teachers that reflects their predisposition and motivation for cognitive exploration, both in the perceptual and in the rational field. The questionnaires were applied in an educational institution that promotes multiculturalism and equity in education.

Multiculturalism takes into account the simple recognition of the existence of the cultural variety of the contemporary society and refers to the totality of the steps taken in order to preserve and value this variety individually, respectively the differences that characterize the various cultural areas. From this perspective, multicultural education has the role of allowing each culture to promote, through adequate instructive-formative actions, its own values and cultural specificity. In other words, multicultural education "involves a restructuring of the educational phenomenon in the sense of multiplying the activities it subsumes according to the typology of the various cultural identities specific to a particular society" (Stan C., 2010)

Multicultural education focuses on promoting the rights to education of all citizens regardless of ethnic or religious affiliation and plays an important role in ensuring fairness for learning opportunities and mitigating the effects of racism. It is based on the convergence of three educational practices: group diversity, interactive training and practicing the effectiveness of teaching-learning styles in different cultural contexts.

What kind of social change do we want from teachers? We want them to promote humanistic values: participation in social and cultural life, empowerment of, and dependence and belonging to national and ethnic values, acceptance of cooperation, positivism, valorization of empathy, his respect and dignity. We encourage teachers to implement an educational curriculum centered on moral and social values, to value the realistic personal and professional development of young people and to encourage them to achieve rational law based on critical thinking.

In order to promote the values of social solidarity, Professor Văideanu G. (1996) stated: "We consider that one of the main objectives of modern education must be to prepare children and adolescents to participate in a conscious and active way in building a world community rich in different aspects but united in

the pursuit of common goals such as peace, security and a more harmonious life for all human beings".

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THE PRESENCE OF CUSTOM AS A LEGAL SOURCE FROM "COUNTRY LAW" TO MODERN CIVIL LAW

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Abstract

Custom has been one of the most important formal sources of law in the legal history of many societies. It refers to the rules of conduct and practices that have been developed and followed by a community over time, without being codified in written laws. However, the importance of custom in legal systems has changed over time, and it no longer occupies the same central place in many jurisdictions today. The customs and traditions of a society play a significant role in determining the norms and rules that are adopted as part of positive law. The study of custom can help shape not only specific legal norms but also the general legal concepts and principles that guide a community. Each society has its own traditions and customs that influence the form and content of its positive law. The study of custom can therefore help to identify the distinctive features of a national or cultural legal system. Understanding and analysing a community's customs, customs and traditions are crucial to revealing the roots and values of its legal system, thus contributing to a better understanding of positive law and its national specificity.

Key words: *custom, formal source, Country Law, law, modern law.*

INTRODUCTION

Custom is the oldest formal source of law; it precedes positive law and underpins its normative construction. Custom is an ancient practice considered socially just, but it is not as formalised as jurisprudence, which is based on court decisions and interpretations of written law, often characterised as "*an immemorial practice, considered as law from the ancestors*" *(Djuvara M., 1999, p. 422).*

The literature distinguishes between *custom secundum legem*, *custom praeter legem* and *custom contra legem (Dogaru I., Dănişor D.C., Dănişor Gh., 2007, p 40-42).*

Custom secundum legem refers to situations where customary rules can become part of the law when they are taken over and sanctioned by state authorities with legislative powers. This is the situation that we find in the provisions of Article 1 of the new Civil Code, which establishes a very clear hierarchy of sources of civil law, in which customs are mentioned second. The legislator has defined the concept of customs in the meaning of the Code, specifying in paragraph 6 of the same article, which states that *custom means custom and professional usage*. The legislator himself gives practitioners the legal possibility of using three concepts that designate the oldest source of law: custom and usage.

Custom praeter legem acts in the absence of a law (legislative gap) and supplements or replaces legal norms in an area. When the law does not cover a specific situation, *custom praeter legem* can become a source of law. However, *custom praeter legem* cannot contradict or override existing legal rules; it fills gaps in the law or provides rules for situations not explicitly covered by the law.

Custom contra legem refers to custom that is in opposition to an existing legal rule or an interpretative law. In general, custom cannot contradict or override legal provisions. However, in certain cases, *custom contra legem* may be valid, but only if the law is not mandatory and if the custom is not contrary to fundamental principles of law or public policy.

As far as Romanian law is concerned, custom as a primary rule of conduct has appeared since the period of Geto-Dacian law, being inextricably linked to the existence of society at that time. Subsequently, during the period of the Dacian-Roman coexistence, a period when Geto-Dacian customary law was combined with Roman law, custom, as a rule for organising community life, was applied only insofar as it did not contravene the provisions of Roman law, in particular the rules of public order.

I. LEGAL CUSTOM – SOURCE OF LAW IN THE FEUDAL AGE

During the Middle Ages, the law applied in the Romanian Countries was based on two main formal sources: customary law, and written law, consisting of canon law and Byzantine nomocanonical law, contained in the pravile (rules).

Feudalism was the period of maximum normative power of custom, in the form of Jus Valachicum or the Law of the Country, a regulation recognised both in the Romanian Countries and in the legal systems of neighbouring states where we find Romanian communities. These rules originate from a practice of social life that has been established over several centuries, based on the basic occupations that covered the entire territory inhabited by Romanians. These laws of ancient origin, with elements of customary law, are the culmination of a long

evolution of territorial and political organisation. Such laws, mainly of an agrarian and pastoral nature, are proof of the fact that the institution of Romanian law was deeply rooted in the consciousness of the people of the time in terms of its age, its spread, and its logic.

This customary law also bears some characteristics, first, it is a unitary law from a geographical point of view, a Romanian law common to all Romanians who lived on the territory of the Geto-Dacian kingdom or on the territories of neighbouring states (south of the Danube, in the Carpathians, Serbia, Moravia, Poland). We also consider that the County Law is a unitary law from a social point of view because it is about applying customary law equally to all social categories. The most significant differences in legal treatment are to be found in criminal law, where the death penalty (manner of death) varies according to the social status of the offender. For the noble class the punishment was the cutting from the head, and for the common people it was hanging *(Ene-Dinu C., 2023, p. 44).*

The law of the Land also contains a territorial and real estate character of the law because the old Romanian law was formed in the rural settlements, those that kept continuity even after the withdrawal of the Roman rule from Dacia. In the right of possession and use of land we find the genesis of all the institutions of unwritten Romanian law. The territorial and immovable character of the law expresses the link between the law and a territory inhabited by a population politically organized on a certain territory *(Cernea E., Molcuţ E., 2013, p. 57).*

The originality of the County Law as a Romanian creation can indeed be supported by the fact that it was formed on the Daco-Roman legal background, which laid the foundations of some distinctive features of this legal system. After the Aurelian retreat, the territory of Dacia was inhabited by Dacian-Romans, who brought with them elements of Roman law. The amalgamation of Roman law and indigenous Dacian traditions created a unique basis for the further development of Dacian law. As the Roman Empire went into decline, Dacian-Roman legal institutions were taken over by the village communities and adapted to new living conditions. This process led to an organic development of the legal system according to local needs and traditions. With the disappearance of the state institutions imposed by the Roman Empire in the region, the Dacian-Roman legal rules lost their binding value. They were no longer imposed by state coercion. When the Romanian feudal states were founded, these rules regained their legal value and binding character. This was due to their sanctioning by the state authorities, who took over and developed the legal system. The County Law evolved in an original way in the historical and legal context of Romania, rooted in the daco-Roman traditions and adapted to the new historical realities. It contributed to the formation of a distinct legal system and to the development of a Romanian legal identity.

With the passage of time and the diversification of social relations, the need for codification along Byzantine lines arose. This type of codification was imposed on the territory of the Romanian Lands due to several factors: social-political, ecclesiastical, geographical, and cultural. However, when the Byzantine law transposed by pravile (rules) conflicted with the customary regulation, the custom was applied with priority: "*the judge sometimes judges against the pravile, for this custom of the place. Things are done according to the custom of the place, at least if it is against the custom of the pravile ...*" (*Cartea românească de învățătură 1646. Ediție critică. Adunarea izvoarelor vechiului drept românesc, 1960, p. 35).* Until the adoption of the law codes, Byzantine law manuals and collections of nomocanoane were used in the Romanian Countries, works that influenced the old Romanian law until the 19th century.

Terminologically, customary law is expressed differently in the feudal law system. In documents written in Romanian, the Slavic term "*zakon*" is rendered as "*law*", "*leage*", but does not have the "*meaning of written law*" *(Hanga Vl., 1980, p. 202)* Later, in developed feudalism, a clear distinction was made between custom (*zakon*) and law (*written law*) *(Mititelu, 2014, p. 17).*

Here are some examples of the existence of custom as the main source of law, together with written law, whether in the form of pravile (rules) or in the form of "*royal law*":

- Matei Vlastares's alphabetical syntagma was applied in the Romanian Lands around the middle of the 15th century. In 1451, the oldest manuscript of the Syntagma was written by the grammarian Dragomir and edited in Targoviste by order of the ruler John Vladislav II. Two more reproductions were made in Moldavia, one by a monk in 1474 at the Neamt monastery and the second in Iasi in 1495 by the grammarian Damian.

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- For Dimitrie Cantemir "*...custom and Byzantine law, with their different historical individuality, formed a duplex jus, a double system of law, of Moldavia, and not the two formal sources of a historically and technically unique system of law*" *(Georgescu Vl. Al., 1980, p. 226).*

- In his Reforms, the ruler Constantin Mavrocordat often invoked the existence of two main formal sources: customary law and written law.

- In the Pravilniceasca Condică, the reforming work of the phanariot ruler Alexander Ipsilanti, the custom of the land appears as a formal source, together with the provisions of Byzantine law. Customary law is the main source of this law. Although it is a feudal legislative work, the content of its regulations reflects the ideas of the new principles of law circulating in Europe at the time, in particular the ideology promoted by Montesquieu and Beccaria. Regarding the presence of customary law in this code, it was regulated that, in accordance with the custom of the land, the surviving spouse received, as heir, part of the estate of the deceased, both in Moldavia and in Wallachia.

- The Caragea Law is the normative act that abrogated the Pravilniceasca Condică of Alexandru Ipsilanti. In this piece of legislation too, customary law merges with Byzantine law and, from a legal point of view, marks the end of the feudal legal period. There is a superficial regulation of some legal institutions, which fully reflects the mentality of the time and can also be explained by the fact that, in essence, these matters were known by custom.

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II. LEGAL CUSTOM – SOURCE OF LAW IN THE FEUDAL AGE

During the Middle Ages, the law applied in the Romanian Countries was based on two main formal sources: customary law, and written law, consisting of canon law and Byzantine nomocanonical law, contained in the pravile (rules).

Feudalism was the period of maximum normative power of custom, in the form of Jus Valachicum or the Law of the Country, a regulation recognised both in the Romanian Countries and in the legal systems of neighbouring states where we find Romanian communities. These rules originate from a practice of social life that has been established over several centuries, based on the basic occupations that covered the entire territory inhabited by Romanians. These laws of ancient origin, with elements of customary law, are the culmination of a long evolution of territorial and political organisation. Such laws, mainly of an agrarian and pastoral nature, are proof of the fact that the institution of Romanian law was deeply rooted in the consciousness of the people of the time in terms of its age, its spread, and its logic.

This customary law also bears some characteristics, first, it is a unitary law from a geographical point of view, a Romanian law common to all Romanians who lived on the territory of the Geto-Dacian kingdom or on the territories of

neighbouring states (south of the Danube, in the Carpathians, Serbia, Moravia, Poland). We also consider that the County Law is a unitary law from a social point of view because it is about applying customary law equally to all social categories. The most significant differences in legal treatment are to be found in criminal law, where the death penalty (manner of death) varies according to the social status of the offender. For the noble class the punishment was the cutting from the head, and for the common people it was hanging *(Ene-Dinu C., 2023, p. 44).*

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CONCLUSION

The quality of custom as a source of law must be analysed only by relating the system of law to the various historical periods of the development of society, in the light of the criterion proposed by Poirier - dependence on the typology of systems of social organisation (Popa N., 2020, p. 174-175). In terms of legal force, it cannot be argued that custom is inferior to law. However, in the modern era, the scope of customary regulation has narrowed in comparison with the law. This restriction of the application of custom as a source of law in certain branches of law or fields of activity is due to express regulations, according to which custom is excluded from creating rules derogating from the law.

These rules are imposed by the legislator precisely out of a desire to meet the needs of modern societies for precise rules, strictly determined in content and duration, and for uniformity in the legal system. The content of custom is often uncertain, or different from one geographical area of a state to another. In contrast, the law gives subjects of law precision and certainty in content and interpretation. These characteristics of the law are not absolute, and it is also subject to different types of interpretation or unconstitutionality. The supremacy of the law in the state is also conferred by the continuous nature of legislative creation, unlike in the past, when the legislative function was intermittent.

Although we cannot deny the role and importance of custom in the system of sources of law, society's need for normative speed is satisfied by the law, which, unlike custom, does not need a long period of time to acquire normative force..

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CREATION OF A NEW GROUND FOR REFUSAL OF EXECUTION OF THE EUROPEAN ARREST WARRANT BY CASE-LAW: THE EXISTENCE OF A SERIOUS, CHRONIC AND POTENTIALLY INCURABLE DISEASE - A POSSIBLE IMPUNITY? EFFECTS ON PUBLIC SAFETY

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Abstract

In the Advocate General's view, the executing court must in principle respect the (exhaustive) grounds for non-execution expressly provided for in Framework Decision 2002/584 (Articles 3, 4 and 4a), i.e. grounds strictly related to the offences prosecuted and the progress of the criminal proceedings against them and only in exceptional circumstances, where there are sufficient grounds for assessing a serious risk of a breach of Articles 3 or 4 of the Charter for reasons inherent in the state of health of the sought person, which endangers his life, the executing court may, after receiving relevant information from the issuing court and insofar as the serious risk persists, suspend the execution of the EAW (European Arrest Warrant) already decided, but not lead to its refusal. The exceptional character would result not so much from the general conditions of detention or medical care in the issuing Member State itself, but from the surrender itself, in so far as it could, as such, imminently endanger the life, physical integrity or health of the sought person. Likewise, the circumstances of the case do not allow the surrender to be classified as inhuman treatment, since there are no indications to date to suggest that the wanted person will not receive the necessary medical care in the issuing State.

Key words: *Union law; European arrest warrant; Risk of impunity; Public safety.*

INTRODUCTION

The importance of international judicial cooperation, particularly between Member States, is of paramount importance, especially in the enforcement of the European Arrest Warrant, as a streamlined form of extradition, and also has an impact on the principle of social security, in terms of legal certainty. The grounds for refusing to execute a European arrest warrant are expressly and exhaustively specified in the Framework Decision, to which the Court of Justice of the European Union has added other grounds. The present scientific approach aims to analyze the latest ground for refusal of execution added by the European Court, which has major implications for public security and safety through the new ground added which could lead in practice to the risk of impunity and inefficiency of the criminal process, including the sentencing decision.

I. THE FACTS AND THE PRELIMINARY QUESTION

The opinion of Advocate General Manuel Campos Sanchez Bordona presented on 1 December 2022[1], which is of high scientific value, once again provides us with a brief analysis not only of the grounds for refusing to execute a European arrest warrant, but also an analysis of the possibility of extending the mandatory grounds for non-execution of a EAW not provided for in the FD by means of case law, as the CJEU did in this case[2].This analysis, in the view of the grounds relied on by the referral court, without attempting to substitute ourselves for the European court which ruled in the case and without criticizing the solution handed down, obliges us to carry out an analytical exercise from the perspective of the possibility of impunity, but also from the point in view of the public safety implications, which would contravene the very aim for which the EAW mechanism was created - the fight against impunity and the simplification of the surrender procedures between Member States[3] for the expedited return from another MS of a person who has committed a serious crime, whether for the purpose of prosecution or execution of a sentence, subject to the requirement of proportionate use of the EAW.

The factual situation giving birth to the litigation and the preliminary question: in essence *(Excerpt from AG opinion, idem supra 1),* on 9 September 2019, the Municipal Court of Zadar, Croatia, issued an EAW for the purpose of

[1] https://curia.europa.eu/juris/document/documen t.jsf?docid=268241&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=3122885

[2] ttps://curia.europa.eu/juris/document/document.jsf;jsessionid=CDACAD4C9C3CA3FEFF2A8C686F8607F1?text=&docid=272583&pageIndex=0&doclang=RO&mode=req&dir=&occ=first&part=1&cid=1863728

[3] Recitals 1, 5 of Council FD 2002/584 on the EAW and the surrender proceedings between MS, as amended by Council FD 2009/299/JHA, https://eur-lex. europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02002F0584-20090328&from=EN

criminal prosecution against E. D. L., who was charged with an offence of possession of narcotic substances for the purpose of sale and distribution, committed on Croatian territory in 2014. E. D. L. presented medical documents before the Court of Appeal in Milan, Italy, attesting to the existence of psychiatric disorders related to past drug abuse. Following a medical expert's report, he found with regard to the applicant E. D. L. – "the existence of a psychotic disorder requiring continued medical and psychotherapeutic treatment to avoid probable episodes of mental decompensation. As well it was found a significant risk of suicide in the event of incarceration." This expert opinion concluded that, "in view of the need for and continuation of the therapeutic course, E. D. L. would be an individual unadapted to prison life." On the basis of this expert opinion, the Milan Court of Appeal found that the transfer of E. D. L. to Croatia, in execution of the EAW, would interrupt the treatment, which would result in a worsening of the general state of health of the person concerned and a definite risk to his health. However, the court pointed out that the obligation to execute an EAW can be limited only by the grounds for refusal set out exhaustively in Articles 18 and 18a of Act No 69 of 2005, which do not include the need to avoid infringements of the fundamental rights of the person sought, such as the right to health. That court therefore stayed the proceedings and initiated proceedings on constitutionality before the Italian Constitutional Court. Having taken into account that neither the Italian law *(Legge no. 69 of 2005, https://www.gazzettaufficiale.it/eli/id/2005/04/29/005G0081/sg)* transposing the FD nor the Framework Decision provides for such a ground for refusing to hand over the wanted person, it referred the question to the ECJ as follows:

"Must Article 1(3) of Framework Decision 2002/584/JHA [...], read in the light of Articles 3, 4 and 35 of [the Charter], be interpreted as meaning that the executing judicial authority, where it considers that the surrender of a person suffering from a serious, chronic and potentially irreversible illness may expose that person to the risk of suffering serious harm to his or her health, must ask the issuing judicial authority for information enabling the existence of that risk to be excluded and is obliged to refuse surrender where it does not obtain assurances to that effect within a reasonable time?"

The referring court itself raised the question *"whether it would be possible to adequately remove the risk of harm to the health of the requested person by suspending surrender under Article 23(4) of Framework Decision 2002/584. However, that solution does not appear to be suitable for chronic conditions of indefinite duration such as those from which E.D.L. suffers"*.

II. ANALYSIS OF THE SOLUTION PROPOSED BY THE GENERAL ADVOCATE: TEMPORARY SUSPENSION OF THE EXECUTION OF THE EAW

Having carried out an extremely thorough, rigorous and clear analysis of the EU and national legal provisions applicable to the case, the General Advocate proposed to the European Court a response which was not only relevant and balanced but also of great legal value, starting from an understanding of the fears expressed by the referring court of the possible unconstitutionality of certain provisions of the law which transposed FD 2002/584/JHA into Italian law, which might be contrary to the right to health guaranteed by the Italian Constitution, and which requested the CJEU to rule on the case.

However, the European Court departed from the AG's view and extended the possibility of temporary suspending the enforcement of the warrant to the refusal to execute, thus adding a new ground for refusal to those already provided for in the FD, consisting of "a real risk of a significant reduction in his or her life expectancy; or of a rapid, significant and irremediable deterioration in the health of the requested person" which cannot be removed within a reasonable time. However, the Court added, if that risk "can be removed within such a time-limit, a new surrender date must be agreed with the issuing judicial authority." (Recital 55). In our view, this extension of the list of grounds for refusal could lead to the emergence of a risk of impunity and, implicitly, to the emergence of a risk to public safety, since it could be considered that if a person who is being prosecuted or sentenced cannot be surrendered on the grounds that he or she cannot tolerate the prison environment because of drug use, and there would be such a risk, a high risk of suicide, i.e. the 'real risk of a significant reduction in his life expectancy or of a rapid, significant and irreparable deterioration in his state of health', especially since it is well known that drug use has increased significantly among people of all ages, particularly young people. However, the requested person would have to be seriously ill in order to benefit from this exception to the execution of the warrant, as a result of the impossibility of proving the removal of this risk within a reasonable time.

Without going back to the legal provisions applicable to the case, analyzed by the AG, but also by the European Court (recital 7), the interpretation appears to be necessary in the light of Italian law which provides in Article 23(3) of Law No 69 of 22 April 2005: *"If there are humanitarian reasons or serious grounds for considering that surrender would jeopardize the person's life or health, the President of the Court of Appeal or the magistrate delegated by him may, by reasoned order, suspend the execution of the surrender decision, immediately informing the Minister of Justice of this circumstance"*.

Although at first glance the issue may seem quite simple, from the perspective of the application of the EU Charter of Fundamental Rights, which has the same value as the Treaties, the issue at stake is a combination of issues on which the enforcing court must make checks: the conditions of detention in the

issuing State, the possibilities of treatment (including in prison or detention) for the condition of the requested person with the correct assessment of the seriousness of the condition, the reference standards (including medical standards) which may be considered by the executing State and, last but not least, the supremacy of Union law over national rules of law, even if they are constitutional. All of this is based on the need included in the very aim of the FD, namely the avoidance of impunity.

Since entering fully into application of the EAW mechanism, and in particular since the decision of the CJEU in the Aranyosi and Căldăraru cases (*Joined Cases C-404/15 and C-659/15 PPU, details Pătrăuș, 2021, p. 95-99*), the judicial enforcement authorities have in some cases been faced with opposition to the surrender of the requested person on medical grounds. In these cases, the executing authority has initiated consultations with the issuing State to determine whether, in view of the medical situation (usually very serious, as the person concerned suffers from conditions that make him or her non-removable), the sentencing State maintains its request for surrender or would agree to take over enforcement of the sentence. Thus, consultations were initiated between judicial authorities and specific questions were asked about the possibilities of treatment and rehabilitation in prisons/other medical facilities in the issuing State, in relation to the specific conditions invoked in each case, which the AG also took into account when drafting the opinion.

Therefore, in the context of the present scientific approach, we consider that the preliminary question requires a more in-depth analysis on multiple levels which, in our opinion, supports the legitimacy of the solution proposed by the AG, starting from the basic principle of loyal judicial cooperation, i.e. the system of Mutual Recognition, reflected in Article 1(2) of FD 2002/584, according to which Member States are obliged to execute the EAW based on this principle and in compliance with the rules of the FD. In principle, their national judicial authorities may decline to enforce an EAW only on the grounds listed exhaustively in the Framework Decision itself, including respect for the procedural rights of the wanted person (*Bitanga, M; Franguloiu, S.; Sanchez-Hermosilla, F., 2018, p. 27-32*).

First of all, it is necessary to have a correspondence, by the way of additional information, between the enforcing State and the sending State-conditions of detention and confirmed medical conditions/illnesses and medical treatment adapted to the needs of the requested person (*As underlined by the AG both in paragraph 83 of the opinion and in the proposed reply*).

The precarious state of health invoked by the requested person's lawyers is closely linked to the possibilities of treatment that he would benefit from during his detention in the executing State as a result of his surrender. We therefore

consider that the CJEU's case-law is applicable, leading to the application of the mechanism established by the judgment in Joined Cases C-404/15 and C-659/15 Aranyosi - Caldararu, paragraphs 92, 93 and 94.

Thus, once the existence of such a risk has been established, it is then necessary for the executing judicial authority to assess, specifically and precisely, whether there are serious and well-founded reasons to believe that the person concerned will face that risk as a result of the conditions of his detention envisaged in the issuing Member State.

The mere existence of evidence of shortcomings, whether systemic or generalized, affecting certain groups of persons or even certain detention units, in the conditions of detention in the issuing Member State does not necessarily imply that in a specific case the person concerned would be subjected to inhuman or degrading treatment if he were surrendered to the authorities of that Member State. Consequently, in order to ensure compliance with Article 4 of the Charter in the individual case of the person who is the subject of the European arrest warrant, the executing judicial authority, faced with objective, reliable, accurate and duly updated evidence of such deficiencies, is required to verify whether, in the circumstances of the case, there are serious and substantial grounds for believing that, following his surrender to the issuing Member State, that person would face a real risk of being subjected in that Member State to inhuman or degrading treatment within the meaning of that article.

III. DETENTION CONDITIONS AND MEDICAL TREATMENT POSSIBILITIES. SUICIDE RISK DUE TO MALADJUSTMENT TO THE PRISON ENVIRONMENT

If the requested person opposes surrender on grounds relating to detention conditions and implicitly to the possibilities of treatment during detention for the requested person's proven illnesses, the executing authority is to clarify the merits and veracity of the allegations by requesting further information from the executing authority on these matters, a step which is mentioned in the jurisprudence of the CJEU. The mutual trust Principle precludes, in our view, a judicial executing authority from automatically presuming, of its own motion and without carrying out minimum checks, the precariousness of the custodial arrangements in the issuing State, without carrying out mandatory consultations with the issuing State. The consultation stage is laid down as mandatory in the CJEU jurisprudence, as mentioned above.

It emerges from the application for a Preliminary Ruling, as submitted by the requesting court, according to which the Italian referring court assumed that the transfer to Croatia of the person concerned would interrupt the treatment, resulting in a worsening of the general state of health of the concerned person, and that this decision was adopted on the legal expert opinion presented by the defenders of the requested person (page 3 points 2 and 3 of the application for a Preliminary Ruling).

According to the operative part of the CJEU decision in Aranyosi and Căldăraru cases C-404/15 and C-659/15 „*the enforcing judicial authority shall verify specifically and precisely whether there are serious and well-founded reasons for believing that the person concerned by a EAW issued for the purpose of the prosecution or the enforcement of a custodial penalty will as a result of the conditions of his detention in the Member State concerned be subject to a real risk of suffering torture or cruel, inhuman or degrading treatment*".

As is clear from the AG's opinion and the European Court's judgment, it appears that the Italian authority took a decision without giving both parties (including the issuing authority) the opportunity to present their position on the evidence and decided that the surrender of the requested person would present a concrete risk to his health, on the premise that the treatment he was allegedly currently undergoing could not be continued in Croatia, without asking the issuing authority for its views specifying in concrete terms what treatment possibilities it could offer the requested person.

We allow ourselves to consider that this exchange of information was absolutely mandatory, and that the illness from which the requested person is allegedly suffering is quite common, representing the consequences of drug use.

Nor are the elements which led the Italian court to take this decision without consulting the Croatian issuing authority, especially as it is unreasonable to assume that this treatment cannot be continued in Croatia, a point which also emerges from the AG's opinion and which was taken up in part by the European court.

From this perspective, it seems fully justified to note that according to the World Health Organization, chronic diseases have been divided into four categories: cardiovascular diseases; cancer; chronic respiratory diseases (including asthma); diabetes[4]. As can be seen, conditions caused by drug abuse do not fall under the WHO classification.

However, as the Advocate General rightly observed, the key issue in this case is whether the risk of suicide caused by detention, whether due to drug or alcohol abuse or for reasons unrelated to the existence of systemic deficiencies in the prison system of the issuing State, is likely to trigger a denial of execution of the EAW by extending the mandatory grounds for refusal on a preliminary basis, given the nature of the right to be protected.

The question also arises as to what extent the existence of this risk of suicide could lead to impunity, given that the experience of a prison environment is, in itself, an unpleasant experience, given that it involves the execution of a

[4] https://www.who.int/news-room/fact-sheets/detail /noncommunicable-diseases

custodial sentence or security measure for any person, and we would like to express the opinion that no person is suited to a prison environment.

If we were to accept this idea, it suggests that the very idea of imprisoning a person becomes irreconcilable with the detention regime, leading to impunity for any person, which is against the purpose of the relevant Union legislation.

Of course, this obviously does not involve abdicating respect for fundamental rights in the sense of the ECHR, but also respect for the due process rights of the suspected or accused person in criminal proceedings as defined in the Roadmap under the Stockholm Programme [5] and ensuring the fairness of proceedings as a whole.

It is also apparent from the application for a reference for a preliminary ruling on this matter whether the serious, chronic and potentially irreversible illnesses referred to in the present case, from which the applicant suffers, according to the documentation provided by his lawyers, as also noted in the judgment at issue, and are caused by drug use. In addition, the presence of a "high risk of suicide linked to possible imprisonment. The conclusion was reached that the person concerned was not adapted to life in prison".

The way in which this expert report was interpreted by the Milan Court of Appeal and the conclusions reached by the executing authority is contradicted by the President of the Council of Ministers in the proceedings before the Italian Constitutional Court as the referring court (point 8 of the request for a preliminary reference). He pointed out that "the results of the expert opinion ordered by the Corte d'appello di Milani reveal neither the irreversibility of the mental illness from which the person concerned allegedly suffers, nor elements likely to confirm the risk of suicide".

Consequently, two courts in the same State were unable to reach a consensus on the conclusions of the same expert's report, and the manner in which one of them understood the conclusions of that forensic report was presented to the European Court as a reason for imposing, by way of a preliminary ruling, a mandatory ground for refusing the European arrest warrant. In view of the implications of this finding, which is contested even at national level, we consider that clear criteria are needed which leave no room for discretionary judgments, as pointed out by the AG. The judge is free (within the legal margin of discretion) to assess the evidence and its importance and value for the outcome of the case.

Nor does it appear in this case that the Croatian authorities were consulted on the programmes envisaged to reduce the risk of suicide during detention, although in our view the referring court was under an obligation to do so, a point also stressed by the AG.

[5] https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32009G1204(01)

In addition, the incompatibility with the detention regime and the fact that "the person in question is not adapted to imprisonment" (as stated in the psychiatric expert report submitted to the Milan Court of Appeal), can be invoked with regard to any person who is imprisoned at least for the first time. We consider that such a statement, for a better understanding, should also mention the objective arguments taken into account to determine whether or not a person is suitable for life in prison, as an argument to be taken into account to determine the need for a custodial measure, given that this circumstance is not a criterion for the individualization of criminal treatment in any legislation of any Member State or third country.

IV. FAILURE TO ADAPT TO THE PRISON ENVIRONMENT. PURPOSE OF PUNISHMENT. RISK OF IMPUNITY. CONSEQUENCES FOR LEGAL CERTAINTY

With regard to the referring court's assertion that the applicant is not adapted to life in prison, we would like to make a few observations, starting from the premise that the majority of persons who are subject to criminal liability through the enforcement of custodial sentences (as a last resort) are not prepared to experience the prison environment.

Without entering into a debate on the history of the political and legal foundations of the state's right to punish, on which jurists, philosophers and theologians have offered many explanations, of a more or less progressive nature, it is necessary to note the moral nature of punishment as a means of ensuring balance in society, social defence and avoiding social chaos, preventing the commission of new offences while reintegrating the offender into society, aspects which have been stressed many times in doctrine and judicial practice.

In this regard, it is worth mentioning that the founder of the classical school of criminal law (*Beccaria C., 1965*) argued that "in the interests of strengthening the important connection between the criminal act and the punishment" it is necessary "that the penalty be as consonant as possible with the essence of the offence", so that "punishment is the symmetry of the crime", without being predominantly retributive in character, with the interests of the individual harmoniously combined with those of society, and respect for the law by all persons is the major desideratum of the rule of law.

Thus, in any democracy governed by the separation of state powers and compliance with the rule of law, the judge has the power to determine the individual punishment, in accordance with the individualization criteria common to democratic states, while respecting all the rights of the presumed or charged person in criminal proceedings (according to the Stockholm Programme - Roadmap for the work of the European Union in the area of justice, freedom and security, cited above).

Therefore, the system of penalties in force in the European area has marked a progress in the evolution of criminal law and highlights, on critical examination, the sufficient number of main penalties and especially their strong re-educational character, which explains the current concern of the legislator that basic penalties be doubled by alternative sanctions, and the means of individualization and execution of penalties be diversified, according to European standards.

From this point of view, the primary role of punishment is to prevent new crimes and not to repress them (It should be emphasized that the beginning of "penology" coincides with the movement to humanize prisons, started in the 18th century thanks to the English philanthropist John Howard who, through his writings, drew attention to the physical and moral misery in which prisoners lived at that time. It is true that even before this movement the horrors of European prisons had been reported (Mabillon, Krausold) and even sporadic measures were taken to correct them. However, it is to the credit of Howard and those who embraced the movement he started (Bentham, Brissot de Warvill and Wagniz in Europe, but also William Penn and B. Francklin in America) that he "lifted the penitentiary problem to the rank of a problem of humanity", emphasizing the predominantly educational role of punishment and not the retributive one, in *Dongoroz, V., reprint of the 1939 edition, 2000, p. 482*), because only preventive action can have beneficial effects in terms of adapting the conduct of the recipients of the criminal law, in developing the legal and moral awareness of the members of society and only if, objectively, the harm to the social values protected by the criminal law could be repeated, should coercion be used.

From the perspective of the role and purpose of the penalty, it is important to point out that in order to fulfil its role as an inhibiting factor in the triggering of criminal activities, the penalty must have a certain degree of severity (as recommended by the European legislator itself in the provisions of some normative acts, stating that for certain types of offences there shall be "effective, proportionate and dissuasive penalties": e.g. recital 3 of Directive 2014/42/EU of the EP and of the Council on the freezing and confiscation of instrumentalities and the proceeds of offences committed within the EU; Report from the Commission to the EP and the Council on the implementation of Directive (EU) 2017/1371 of the EP and of the Council of 5 July 2017 on combating fraud to the Union's financial interests by criminal law means, COM(2022) 466 final[6] bearing in mind also that, in order to act on the convicted person's conscience, to induce him to change his behaviour, to consciously adopt a different attitude to the rules of social coexistence, the constraint must be rational and fair, proportionate to the social danger of the offence, and only exercised in the forms and within the limits

[6] Accessible https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX: 52022DC0466

necessary for the punishment to fulfil its main function, that of re-education, of social rehabilitation of the person.

This can solely be reached by promoting the ECHR and the ECFR, which incorporate comprehensive and rational principles, concerning both the offender and the person who has committed a punishable conduct, and in relation to other members of society who have complied with the law, and the defence of protected social values does not mean applying punishments with the same intransigence, only with firmness, by firmness we mean whether a particular punishment is capable of achieving its main purpose, not a severe punishment; the concept and requirement of firmness in criminal law requires that offences be discovered and offenders prosecuted promptly, without undermining the imperative of discovering the truth and rigorously observing the law.

Nor can it be maintained, as the referring court held, that the impact of the prison environment could constitute a ground for refusal in the procedure for the execution of the European arrest warrant, since that would lead to impunity and would open the way for persons who have been definitively sentenced to be held criminally unaccountable for their acts, which is contrary to the very principles of European Union law, since for any person in the world the experience of that environment is neither pleasant nor a happy experience, but quite the opposite.

Moreover, as has often been pointed out in the doctrine, if society does not react and "does not immediately apply the appropriate sanction, this attitude of passivity, of indifference, will mean that no one in the future will take any notice of the rule of law that has been violated. If the public authorities do not react to the offender, the person who has suffered as a result of the offence will consider the law to be a mere lie and will take the law into his own hands, causing a new disturbance of public order. Likewise, members of the social group, dissatisfied with the inertia of the public authorities who do not apply sanctions, will seek to react themselves. Even those members of the social group who will stand aside in the face of the passive attitude of the public authorities will lose confidence in the law, will lose the sense of security and peace of mind without which the legal order is an empty word, and will seek to leave the social group or resort to their own defensive measures" (Dongoroz, 2000, p. 462-463). Although these ideas were expressed almost 100 years ago by one of the most valuable professors of his time, they are still fully valid today, because the European court's solution is tantamount to the dissolution of Rule of Law and the optional observance of the law, which runs counter to the Rule of Law principle itself.

It should also be noted that any sentenced person serving a sentence enjoys respect for all legal rights, in compliance with the laws of each MS and in accordance with the rights laid down in the ECHR, in particular Article 7,

according to the rich case law of the ECtHR, which is binding on all contracting states.

Most prisons have programmes designed for the adaptation of persons deprived of their liberty to the prison regime which should be considered by the Italian court, in concrete terms, according to the opportunities available in Croatian prisons.

In addition, the issuing court was not given the opportunity to present the possibilities offered by Croatian national law regarding the possibility of suspending the trial, suspending or interrupting the execution of any sentence for medical reasons. We consider that such an assessment can only be made by the court in which the case is pending and which still has jurisdiction to deal with the case arising from the commission of a criminal offence (possession of narcotic products for the purpose of sale and distribution).

Finally, as the Advocate General pointed out, starting from the absoluteness of the ban on cruel, inhuman or degrading treatment, which is directly related to compliance with respecting human dignity, according to the Charter, the executing court should verify *"if there are reasonable grounds for considering that the person involved, after his or her handing over to the issuing MS, will run a genuine threat of being deprived of his/her fundamental rights"*. In the case under analysis, the risk to the person's health does not arise from a situation which is plausible only in a context of generalized deficiencies which would in principle be inconceivable in a Member State (Recital 41 of the AG opinion), but may result from the possibility that a specific disease cannot be treated (also specifically) in the Member State where the EAW was issued. In this respect, we fully endorse the AG's opinion which pointed out: *"in order to assess the scale and extent of this risk, it is not necessarily necessary to examine the entire health or prison system of the issuing Member State. What is important is to check whether the requested person will be guaranteed the medical care he or she might need. In order to carry out this verification, it is not indispensable to assess ex ante the health/prison system as a whole. Rather, it should assess the possibilities of care for the requested person that can reasonably be anticipated"*. Otherwise, accepting a "new" ground for refusal to execute an EAW on health grounds *"could create a loophole in the whole EAW system and mechanism. This would lead to a multitude of requests from the affected persons, which would subsequently hamper the system of surrender to the issuing Member State. The consequence will lead to a lack of efficiency of international judicial cooperation and to the ineffectiveness of European legislation underpinned by the principle of Mutual Trust and Mutual Recognition of judgments delivered in Member States."*

Therefore, in line with the AG's opinion, we express the view that such a situation cannot lead to an extension of the list of mandatory grounds for refusal, but could possibly suspend, exceptionally and provisionally, the surrender of the person concerned for as long as there is still a serious risk to his/her health.

Unfortunately, the CJEU has decided that the catalogue of possible grounds for non-execution of EAWs should be extended, which will, in our view, lead to the situations already described by the AG in his opinion mentioned above.

The doubt of the referring court could be eliminated by a teleological approach and interpretation of the Framework Decision in the sense observed and exploited by the AG, that of exchange of information, the executing judicial authority being able to obtain from the issuing judicial authority explanations on the medical treatment available in the detention or custody centres, adapted to the medical needs of the requested person, and at the same time, the executing authority having the possibility to reassess the adequacy of the EAW, as the European Court itself pointed out.

CONCLUSION

We would like to note that we agree with the decision of the Court of Justice of the European Union, with the critical note concerning the extension not only of the preliminary questions, but also of the grounds for refusing to execute the European arrest warrant. We note that the "real risk of a significant reduction in his life expectancy or of a rapid, significant and irremediable deterioration in his state of health" and that this risk cannot be removed within a reasonable time and that it is "subsumed by a risk of violation of fundamental rights may allow the executing judicial authority to refrain, by way of exception and following an appropriate examination, from executing a European arrest warrant". In our view, the consequence is the weakening of judicial cooperation in the MS, founded on the removal of the concept of mutual trust and loyal cooperation.

The grounds for non-execution of an EAW are expressly and restrictively listed in the FD; they refer only to objective grounds, which relate to the offences on that basis, their severity as well as the course of criminal proceedings arising from those offences.

By adding a further ground for refusal of execution, by way of a preliminary ruling, the Court has created the way for obvious difficulties and disparities to arise in the framework of non-execution based on the legal structure of the Member State's criminal systems, since it is a subjective ground for refusal of execution which will be invoked by the majority of the persons requested and could lead to an assessment of the entire medical system, as a whole, in the issuing Member State, which would be likely to result in huge delays in the procedure established by the Framework Decision. Our allegation is based on the fact that the procedure was conceived by the European Legislator as a flexible, fast, efficient and effective procedure which should be completed within a few days, of course respecting all the rights and guarantees offered by law to the

person sought. However, extensive forensic psychiatric expertise (which can only be carried out with the person's admission to a specialist hospital) confirming that the person's lack of adaptation to the prison environment, the risk of suicide (as this was the risk exposed in this case and defined by the European court as "a realistic risk of a considerable shortening of average life expectancy" which could be caused either by the impact of the prison environment, or drug use (as in the present case) or other personal reasons, might require an assessment of the medical system of the issuing MS itself and, consequently, a number of other difficulties, given that there are significant differences between such systems in the EU and in the world.

It is particularly important to point out that the European Court failed to note that the referring court did not carry out minimal checks, by way of a request for additional information, on the possibility of providing the necessary medical assistance and treatment in the issuing State, and we are convinced that the Croatian State would have responded promptly to such a request. Thus, a presumption of the referring court has been raised to the level of a proven fact, which in our opinion, is contrary to the rules of due process and all rules of Union law and undermines the legitimacy of this solution.

Moreover, the conditions of detention in general, including the medical care provided by the prisons in all Member States, are available to all courts and any interested person on the website of the European Agency for Fundamental Rights.[7]

Not least, it is worth pointing out that, where such a risk is real, all Member States also have alternatives to detention available (for those situations where they may be applicable[8] *including electronic monitoring.*

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BENCHMARKS ON THE INTERVENTION OF THE OMBUDSMAN IN ENSURING THE SAFETY AND PROTECTION OF THE CITIZEN

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Abstract

In recent decades, on the European continent, the Ombudsman (also known as Ombusman, Defender, Mediator, etc) is organized and operates as an autonomous institution that acts independently, impartially and transparently against maladministration, human rights violations affecting individuals or legal entities.

Key words: *ombudsman, citizens' rights, transparent administration, European guarantee.*

INTRODUCTION

Today, interest in the institution of the Omdudsman is growing because of its close connection with the protection of human rights.

It is easy to provide for citizens' rights and freedoms in fundamental law. It is more difficult, however, to establish the necessary conditions to guarantee that every citizen can exercise his or her rights properly. It is also necessary to lay down the legal procedures that citizens can invoke if their rights are not respected by the state authorities.

In the light of the above, a means of defending citizens' rights has been created in European countries by the national institution of the Ombudsman. The purpose of this body is to strike a balance in the exercise and manifestation of state power. In concrete terms, the Ombudsman's role is to act as an impartial mediator between the public authorities and the people who address them about

their rights, acting as an impartial mediator between the individual who considers himself or herself to have been wronged and the administration.

This institution constitutes a form of independent and depoliticized control of public authorities or at least of their administrative operations.

I. THE OMBUDSMAN, GUARANTEE AND SECURITY IN THE EXERCISE OF CITIZENS' RIGHTS

The social and economic contexts to which the European countries have been subjected have favoured the expansion of the involvement of central and local public administration institutions in the activity of citizens, a situation which has also created the need to regulate appropriate means of counteracting their unjust or unlawful actions, including the creation of bodies with such a role.

Ombudsman, in common terminology, means mandate, power of attorney, and the institution of ombudsman is vested (in general) by Parliament. It examines petitions in regard to Constitutional guaranteed rights. The institution with this name has spread in European countries under different names, and in Romania it is enshrined in the 1991 Constitution.

I.1 The role of the Ombudsman institution in the rule of law.

After the end of the Second World War, more and more countries introduced the institution of Ombudsman into their national legal system, with the aim of dealing with complaints from citizens who claim that their rights have been violated by officials or public administration bodies. Originally, the institution was formed in Sweden in 1809. In Swedish, ombud means mandate, power of attorney, empowerment (for an overview of the origin of the Ombudsman, see *Dragoș D.C, Neamțu B, 2011, p. 3-5; Hossu L.A, 2013, p.16-23*).

It is mentioned in the literature that the real guarantee, through constitutional legal norms, of the rights and freedoms of citizens depends on the nature of the political regime enshrined at the constitutional level *(C. Ionescu, 2017, p.169).* However, we believe, in principle, that nothing prevented the former socialist states from refining ombudsmen. Moreover, in Romania, ideologically and politically in the sphere of power exercised by the Communist Party, there were formal structures to which citizens could address complaints, petitions, claims for violation of rights recognized by national law. Decision of the Council of Ministers no. 4012/1953 regulated the rights of citizens to address complaints and petitions to party and state bodies *(Ionescu C., Dumitrescu C.A, 2017, p. 602-603).*

Given that, in the past, in every state (socialist or not) there were mechanisms to which citizens could appeal if they claimed that their rights had been violated or that they had not obtained satisfactory answers to their

complaints to the public administration, the question arose whether it was still necessary to set up a specialised institution to investigate citizens' complaints against the administration. The question is pertinent, as both criminal and administrative proceedings have proved their worth. The answer is simple: the Ombudsman has the capacity to resolve legitimate complaints much more quickly, at no extra cost to those who turn to it.

The Ombudsman is at the interface between the three powers in the state, i.e. between the powers of the state and civil society. It cannot be denied that the Ombudsman's authority is essentially state-based, and the acts emanating from the Ombudsman carry state force, being legally and morally invested with the power of execution. This institution appointed by parliament (and accountable to it for its activities and acts) appears as an intermediary between the people, as the holder of sovereign power, and parliament as the representative of the electorate, which also has the task of controlling executive power. Civil society, in any type of state to which we could refer, perceives the Ombudsman as a protector, invested with moral power but also with legal means to defend the rights allegedly infringed by abusive, negligent, bad faith acts or manifestations of the executive power officials *(Goia S., 2021, p.442-443).*

According to the recent constitutional doctrine and practice outlined at the level of each European state, the importance of this institution for guaranteeing and protecting citizens' rights and freedoms is constantly stressed.

By analysing the constitutional and legal provisions on the status and role of the Ombudsman in different European countries, some common conclusions can be drawn, which are valid in terms of the organisation and competences of this institution, and these will be analysed in the following lines.

A. The importance of the role and functions of the Ombudsman has led to the institution being accepted by the European Parliament *(Rules 219-221 of the Rules of Procedure of the European Parliament).*

B. The Ombudsman's powers are limited to the right to make recommendations to public authorities guilty of violating the rights of individuals, to monitor the work of public administrative bodies responsible for human rights, to inspect detention facilities (prisons, re-education schools, juvenile detention centres, etc.). In some countries, however, the Ombudsman has the right to take legal action, under the conditions laid down by law, against officials guilty of violating the rights of individuals or to conduct investigations. The Ombudsman has the right to take legal action in Sweden, Denmark and Finland *(see The Danish Ombudsman, DJOF pulishing, Copenhagen, 2000).*

C. The Ombudsman is appointed by Parliament for a term of office which varies from one State to another. Parliament also has the right to dismiss him or her before the end of his or her term of office if he or she is guilty of violating the fundamental law or the laws in force, or if he or she behaves in a manner incompatible with his or her status. There are European countries, namely France and the United Kingdom, where the ombudsman is appointed by the government.

D. In exercising its powers, the Ombudsman does not replace other institutions with powers to protect human rights.

E. This institution is separated from all powers of state, including the authorities appointing him or her to office, and no interference in his or her work is permitted. Although its independence is recognised, the Ombudsman is obliged to submit an annual report to Parliament in the cases it has investigated the solutions found, the measures taken, etc. An important aspect of the Ombudsman's independence is that it is able to make recommendations to Parliament and the Government on the improvement of the relevant legislation or of the activities of central or local administrative authorities which affect human rights.

F. As a rule, the Ombudsman operates at national level, but there are a large number of ombudsmen in some EU countries, municipalities or even in private institutions and companies. There are also ombudsmen with specialised jurisdiction (social welfare, university life).

G. The institution carries out its duties at the request of persons whose rights have been violated or on its own initiative, when it has information or data on the violation of citizens' rights or when, following investigations, it finds such violations itself. It should be noted that the national legislation of the Member States expressly provides for certain derogations in the power of this institution to investigate the activities of certain categories of public officials or dignitaries. The reason for the derogation is simple: parliamentarians and mayors are representatives of the people or local communities and ministers are politically accountable to parliament.

H. In order to carry out its work properly, the Ombudsman needs the assistance of the other public authorities, and it is essential that they provide him or her with the data, information and documents it needs to carry out his or her duties.

I. Confidentiality may be requested in relation to the complaint, the Ombudsman may also decide on its own initiative to keep his/her work secret for justified reasons (defence of military secrets, public order, etc.).

J. Most of the legislation of the Member States on the organisation and functioning of the Ombudsman institution provides that anonymous complaints or

complaints from citizens whose rights have been violated one or, as the case may be, two years before the complaint is submitted to the Ombudsman, shall not be taken into consideration for examination and settlement. Among the fundamental features of the institution, neutrality and the power to act on behalf of another have also been identified, pointing out that in fact, its very neutrality legitimises it to intervene on behalf of another *(Vlad, 2006, p.70)* . The institution acts for the public good, by protecting the rights of the citizen, defending him/her against abuses. In the current context, at European level, due to the large number of complaints submitted to this institution and the increase in their complexity and subject matter, ombudsmen specialising in certain areas of state activity (parliamentary ombudsman, equal opportunities ombudsman, minority ombudsman, competition ombudsman, etc.) have been set up in some countries.

I.2 Brief historical background to the origin and development of the Ombudsman

It should be noted that the Ombudsman institution, which exists in its present form, with different names and functions, in more than 140 countries on different continents, originated more than 200 years ago in Sweden at the beginning of the 19th century. In view of this, in its present form, the Ombudsman (both in terms of organisation, powers and purpose) has absorbed the quintessence of its origins, but also of the specific nature of the countries in which it has been established.

The Swedish Ombudsman

The institution of the Ombudsman was established in Sweden in 1809 by the Parliament, which implemented the Office of the Parliamentary Ombudsman in its constitutional provisions, as an instrument that would enable the legislature to exercise a certain control over the exercise of power by the executive, by assessing the way in which the public authorities comply with the law. Right from the outset, the Swedish constitutional provisions stipulated that the legislature should appoint to the office of Parliamentary Ombudsman a citizen recognised for his or her judicial competence and exemplary integrity.

The original purpose of establishing this institution was to verify the correct application of laws by judges and civil servants in order to encourage the uniform application of legislation and to clarify legislative inaccuracies. Subsequently, the Ombudsman's role also extended to the protection of citizens' rights. The Ombudsman's work took the form of inspections and investigations. Citizens' complaints played a relatively insignificant role in the early period.

Today, the Swedish Parliamentary Ombudsmen carry out their task of supervising compliance with Swedish law by assessing and dealing with complaints received from citizens, i.e. by carrying out inspections and inquiries at various public authorities.

The executive is not allowed to interfere in the work of the ombudsmen, who exercise their profession independently. However, if it considers that legislation needs to be changed because of human rights violations, it can propose this to parliament or the government for study and decision. The most common situations in which the ombudsman intervenes are when he finds that an agency or court has not complied with the legal rules in force.

As a result of this finding, it can write a report, criticising the person who has acted incorrectly, specifying the solutions for correcting the mistakes and at the same time issuing decisions. Although the ombudsman's decisions are not binding, only recommendations, they are respected.

What is representative for this institution is the possibility for it to act as a prosecutor, taking the person concerned to court, when it considers that a representative of the public authority has committed a serious error in his or her work, harming the rights of the citizen. If, following an investigation, he finds that there has been a minor error or mistake, he may propose that the person concerned be punished by a warning or a reduction in salary. Parliamentary ombudsmen also have the right to initiate disciplinary proceedings against an official for proven misconduct. In most cases of this kind, however, the most common outcome is merely a critical advisory comment or a recommendation without legal effect.

The next Parliamentary Ombudsman was created in Finland by the 1919 Constitution. The idea of an ombudsman institution attracted attention outside Scandinavia after it was regulated in Denmark. After 1960, the ombudsman concept spread rapidly, so that today there are more than 200 ombudsman institutions (national, regional, municipal, specialised ombudsmen) worldwide.

The Danish Ombudsman.

The undeniable pioneer of this institution worldwide was the Danish Ombudsman (1953), who succeeded in making this institution extraordinarily malleable to the various existing political and legal systems. Modelled on the Swedish Ombudsman, but many years later, the Danish Ombudsman marks the beginning of the great expansion of this institution beyond Scandinavia.

According to the Law on the Ombudsman and the Constitution (art.55) the Ombudsman (represented by one or two persons elected by the Parliament) is competent to control the civil and military administration. The following are included in this control: ministers, civil servants, any person working in the service of the Government, local administration. A constant complaint of Danish citizens is the delay of the authorities in responding to a request. Its competence extends to all public administration institutions, as well as to the conditions of detention of citizens deprived of their liberty in penitentiary institutions. However, the Ombudsman's powers of action do not extend to the courts.

The institution is now established in many countries: the United Kingdom, France, Spain, Hungary, Portugal, the Netherlands, Italy, Poland, Germany, Austria, etc.

In Austria, the institution consists of three members elected by the National Council, each representing the three main political parties. Their competence is limited to the federal administration and autonomous authorities.

In France, a single ombudsman is appointed by the President of the Republic and his/her role is to ensure that public rights and freedoms are respected by state administrations, local and regional authorities, public institutions and any body entrusted with a public service mission or to which the organic law assigns powers.

The Spanish Ombudsman is elected by the Cortes Generales, as their chief representative, and is assisted by two deputies. He/she enjoys inviolability (he/she cannot be arrested, fined, prosecuted, tried for the opinions he/she expresses or for the acts he/she issues in the exercise of his/her powers) except for flagrant offences *(Deaconu, 2015, p. 19).*

II. MILESTONES IN THE EVOLUTION OF THE EUROPEAN OMBUDSMAN

II.1 Regulation.

The institution of the European Ombudsman is governed by Articles 20, 24 and 228 of the Treaty on the Functioning of the European Union (TFEU) and Article 43 of the Charter of Fundamental Rights of the European Union.The regulations and duties of the Ombudsman were laid down in a European Parliament Decision of 9 March 1994. The procedures for the election and dismissal of the Ombudsman are laid down in Rules 219 to 221 of Parliament's Rules of Procedure.

II.2 General considerations

The notion and concept of the Ombudsman has expanded during the 20th century, the constitutional idea of independent, easily accessible and balanced supervision of public administration by persons of good repute being today clearly linked to the principles of democracy and the rule of law, since it is an essential contribution to the effectiveness of these principles. The disintegration of the totalitarian regimes in Central and Eastern Europe, Portugal, Spain and Greece, as well as the new democratisation process, have been confirmed as a turning point in the realisation of the ombudsman idea.

Also, the institution of the Ombudsman has experienced new evolutions, as a reaction to the introduction of new states in the Council of Europe, by combining the two concepts of rule of law and human rights *(Alexandru, 2016,*

p.84). Since then, EU member states have established national ombudsman institutions. The appointment of the European Ombudsman is carried out according to the provisions of the Treaty on the Functioning of the Union (Art. 227, 228) and Article 194 of the Rules of Procedure of the Parliament. The Ombudsman is elected by Parliament for a term of office equal in length to that of Members of Parliament. He may be removed from office only by the Court of Justice at Parliament's request. It is also obliged to report to Parliament about its work.

The European Ombudsman is a parliamentary ombudsman. This is why Article 228 TFEU is cited in Chapter 1, which refers to the European Parliament. The European Ombudsman has very close links with the European Parliament, which is solely responsible for electing the Ombudsman, laying down the rules governing the performance of its duties, assisting in inquiries and receiving the Ombudsman's reports.

In accordance with the Rules of Procedure (Rule 232), the European Parliament's Committee on Petitions draws up an annual report outlining the activities of the European Ombudsman. The European Committee on Petitions has repeatedly expressed support for the work of the European Ombudsman and stressed that the EU institutions should work closely with him to enhance EU transparency and accountability, in particular by implementing its recommendations. On 12 February 2019, the European Parliament adopted a resolution on a draft regulation proposing an updated statute for the European Ombudsman, with a view to enhancing its transparency, independence and prerogatives (*Patrăuș M., 2021*). Having obtained the opinion of the European Commission and the agreement of the Council of the European Union, the European Parliament adopted, on 24 June 2021, the Regulation establishing a new Statute of the European Ombudsman, which normalises the working practices of this institution, such as the prerogative to launch own-initiative inquiries.

II.3 Recent areas of activity of the European Ombudsman.

Guaranteeing fundamental rights is one of the basic objectives which the European Union has set itself, and to this end the meeting between the Presidents of the three fundamental institutions of the Union (Commission, Parliament and Council) in Nice in December 2000 ended with the proclamation of the European Charter of Human Rights. The aim in drawing up this Charter was to ensure that all citizens were aware of all the fundamental rights that the EU institutions and bodies must respect and to make it easier for people to access these rights. The Ombudsman monitors, through the work it undertakes, whether the provisions

enshrined in the Charter are respected by the very institutions that proclaimed it. The Ombudsman's main task is, on the one hand, to constantly implement the promises made to EU citizens and, on the other hand, to provide support for their implementation by public authorities.

The institution was invested to ensure the desideratum of efficient organization and functioning. This objective was introduced at the proposal of the European Ombudsman, who justified his objective on the grounds that citizens are entitled to transparent and efficient administration. In order to give substance to this principle, the European Code of Good Administrative Behaviour was developed and adopted by the Parliament in September 2001 *(Bălan, 2008, p. 32).*

The involvement of this institution has also been constantly observed with regard to the protection of citizens' rights during the pantheon period *(Pătrăuș M.*, 2020).* An important part of the Ombudsman's work is to improve the services provided by community institutions, motivated by the fact that citizens have the right to a functional and fair public administration. Also, transparency being a constant desideratum of democracy, as a European citizen, everyone has the right to know how and for what purpose decisions are taken. European authorities are obliged to protect and promote the principle of transparency. However, although Article 1 of the Treaty establishing the European Community stipulates that decisions shall be taken as openly as possible, this obligation has not always been respected, in a context where many of the complaints to the European Ombudsman relate to a lack of transparency in some of the European institutions. The European Ombudsman has taken measures to ensure that the European institutions provide access to information. Thus, its inquiries into public access to European Union documents have favoured the adoption and publication by almost all Community bodies of rules to this effect *(Vida, 1999, p. 56).*

The European Ombudsman also manages its resources on the analysis and the gradual resolution of unforeseen situations that may arise in relations between public administration and European citizens (for details on contractual unforeseen situations, see *Pătrăuș M, Pătrăuș I.M.**, *2022*).

The fight against discrimination is one of the priorities of the institution's work. Thus, after observing that many of the cases analysed concerned the issue of age limits in recruitment examinations (limits considered discriminatory by some people), an inquiry was launched in 1998, asking each institution to justify their recruitment policy. After an intensive analysis of the relevant national legislation and international documents on the protection of fundamental rights, it found that certain age limits could not be legitimate. The reasoning was based on the stipulations of the Treaties and secondary regulations on the prohibition of

discrimination and the case law of the Court of Justice of the European Union *(Pătrăuș M., 2022*).

In the same way, it initiated another inquiry in the same year. It used the same method of action, reiterating the formula of good administration. It gradually created a code of conduct to follow in public administration through case studies. At the same time, it drew up a list of rules, drawn from the regulations of conduct in public law and administration. These include: taking cognisance, receiving all requests, responding to requests and actions, recording all documents in registers and archives, explaining decisions. It has also used survey analysis when systematising its own case law in the form of a code of good administrative behaviour. Through this code, it established the basic rules for its work and that of the public administration, namely: legality, equal treatment, proportionality, legal certainty, largely inspired by the case law of the Court of Justice of the European Union. It has also developed formal principles that should govern all relations between the public administration and the citizen. This Code of Good Administrative Behaviour has become one of the Ombudsman's favourite concerns, and in less than five years it has succeeded in codifying the doctrine of good administration and incorporating it into a Charter that is an expression of the fundamental values of the European Union.

CONCLUSION

The substance and role of the European Ombudsman and the national Ombudsmen are broadly similar, both institutions being aimed at an independent person with professional and moral authority, empowered by Parliament or the Government to protect fundamental human rights and freedoms. The powers of national ombudsmen are limited territorially, to the level of national institutions, whereas the powers of the European Ombudsman are quite broad in terms of its right to hold institutions suspected of human rights violations accountable. It has the legal possibility to investigate complaints of maladministration in the European Union institutions and bodies, such as the European Commission, the Council of the European Union and the European Parliament, the European Environment Agency and the European Agency for Safety and Health at Work. The regulatory anchor for the good functioning of the institutions is the European Code of Good Behaviour, which lays down essential practices of conduct, binding on all public officials, highlighting a way of behaving that has not, until now, been formalised or respected, such as avoiding conflict of interest and using office for self-interest. The Code is primarily a tool to raise awareness of the professional conduct that citizens are entitled to expect from public officials. On the other hand, it is a means of creating a framework of mutual trust and respect between citizens and public officials, i.e. between citizens and public authorities.

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BENCHMARKS ON THE INTERVENTION OF THE OMBUDSMAN IN ENSURING THE SAFETY AND PROTECTION OF THE CITIZEN

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IMPACT OF THE COVID-19 PANDEMIC ON THE PROCESS OF MAKING PUBLIC FINANCE LAW NORMS IN POLAND

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Abstract

The article analyses and evaluates the legislative changes introduced to provide public funding to combat the effects of the COVID-19 pandemic. Therefore, regulations on the budgetary procedure and multi-annual financial planning required during the state of epidemic threat or the state of epidemic have been analysed. The study verified the assumption that the performance of financial activities at the time of epidemic threat consisting in collecting and disbursement of funds by bodies governed by public law under new conditions entailed fundamental changes in the design, adoption and implementation and auditing the central state budget and budgets of local government units. The aim of the work is to show that the episodic solutions introduced due to the effects of the COVID-19 pandemic in the area of collecting public funds and their disbursement by public law entities are conducive to more flexibility in public financial management. To the necessary extent, justified by the need to finance tasks to counteract the COVID-19 pandemic, the regulations analysed herein have ensured the protection of the stability of public finance.

Key words: *COVID-19, public finance law, budgetary procedure, public financial management, stability public finance.*

JEL Classification: *H71, H72, G01, K39*

INTRODUCTION

The pandemic of COVID-19 has significantly affected the functioning of society, including the legal order. In the pandemic-caused situation, it was first and foremost necessary to introduce restrictions on the exercise of certain freedoms and rights. At the same time, a need has arisen to finance public tasks to counter the negative health and economic effects associated with the spread of COVID-19. This study addresses the legislative changes introduced to provide public funding to combat the effects of the COVID-19 pandemic. Therefore, regulations on the budgetary procedure and multi-annual financial planning required during the state of epidemic threat or the state of epidemic have been analysed. The study verified the assumption that the performance of financial activities at the time of epidemic threat consisting in collecting and disbursement of funds by bodies governed by public law under new conditions entailed fundamental changes in the design, adoption and implementation and auditing the central state budget and budgets of local government units. Exceptional legislative changes should primarily aim at ensuring the proper implementation of extraordinary tasks, i.e. those addressing the effects of the pandemic in question.

The changes made to the financial legislation include numerous rights and obligations in terms of the budgetary procedure and multi-annual financial planning. These changes are, in principle, of an episodic character. By nature, therefore, they should apply for a predetermined period of time. In fact, episodic provisions contain derogations from certain provisions, while their duration is clearly defined[1]. The period of applicability of episodic regulations is usually determined in particular by specifying the calendar year or calendar years[2]. For this reason, it appears that episodic provisions are therefore linked to *ad hoc* normative amendments to be in force in a clearly defined period[3]. In accordance with § 29c of the Rules of legislative technique, episodic provisions may be included in a separate law. The provisions of an episodic nature governing exceptional rights and obligations in respect of the budgetary procedure and multi-annual financial planning at the time of the epidemic threat are mostly included in a separate law.

The paper therefore presents an analysis of selected provisions of the Act on special solutions related to the prevention, countering and fight against

[1] See § 29a of the Rules of legislative technique.

[2] See § 29b (1) item 1 of the Rules of legislative technique, as well as M. Moras, P. Kroczek, *Nowelizacja „Zasad techniki prawodawczej": przepisy epizodyczne,* „Forum Prawnicze" 2016, no. 2, p. 34.

[3] For more detail on the concept of episodic provisions, see M. Kłodawski, *"Regulacje" na tle ujęcia przepisów epizodycznych w "Zasadach techniki prawodawczej",* „Przegląd Legislacyjny" 2016, no. 4, p. 26; M. Moras, P. Kroczek, *Nowelizacja…,* p. 36, as well as G. Wierczyński, *Redagowanie i ogłaszanie aktów normatywnych. Komentarz,* Warszawa 2016, pp. 222-224.

COVID-19, other infectious diseases and crisis situations caused by them[4]. The Act entered into force on 8 March 2020. As regards public finance law, it should be noted that that the Act was substantially amended on 31 March 2020[5]. In addition to this normative act, selected episodic provisions introduced in the Public Finance Act have been examined[6].

The study has been prepared in this field according to the scientific methodology adopted in the legal sciences. It was therefore not necessary to describe all the phenomena that occur in social and economic life and the data available on them. The method of study required a dogmatic analysis of selected provisions and an evaluation thereof, taking into account, in particular, the criterion of protection of the public interest. As regards the rules of public finance law, the public interest mainly consists in the benefits which the state and local authorities derive from collecting and disposing of funds, so that they can carry out their public tasks[7]. At the same time, it is also in the public interest to properly dispose of the funds collected. It should be noted that the issue of the impact of the COVID-19 pandemic on the process of creating norms of public finance law in Poland has not received sufficient attention in the literature. However, most publications available include studies that focus on assessing the state of public finances from the perspective of economic sciences[8].

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[4] Ustawa z dnia 2 marca 2020 r. o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych (Dz.U. z 2020 r. poz. 1842 ze zm.) [Act on special solutions related to the prevention, countering and fight against COVID-19, other infectious diseases and crisis situations caused by them (Journal of Laws of 2020, item 1842 as amended], hereinafter referred to as: "the Act on special solutions related to COVID-19".

[5] Ustawa z dnia 31 marca 2020 r. o zmianie ustawy o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych oraz niektórych innych ustaw (Dz. U. z 2020 r. poz. 568 ze zm.) [Act of 31 March 2020 amending the Act on special solutions related to the prevention, countering and fight against COVID-19, other infectious diseases and crisis situations caused by them (Journal of Laws of 2020, item 568], hereinafter referred to as: "the Act amending the Act on special solutions related to COVID-19".

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[8] Cf. W. Misiąg, *Wpływ pandemii COVID-19 na polskie finanse publiczne – źródła finansowania, wydatki, procedury,* "Kwartalnik Prawno-Finansowy" 2020, no. 1, p. 7 et seq.; K. Kostyk-Siekierska, *Wpływ pandemii COVID-19 na sytuację finansową i funkcjonowanie jednostek samorządu terytorialnego,* "Zeszyty Naukowe Małopolskiej Wyższej Szkoły Ekonomicznej w Tarnowie" 2021, no. 3, p. 29 et seq.; M. Zioło, B. Z. Filipiak, *Finanse zrównoważone wobec ryzyka zdrowotnego kreowanego przez COVID-19 i jego skutków społeczno-gospodarczych,* [in:] *Wpływ COVID-19 na finanse. Polska perspektywa,* ed. M. Zaleska, Warszawa 2021, p. 105 et seq.;

I. DRAFTING AND ADOPTING THE STATE BUDGET AND THE BUDGETS OF LOCAL GOVERNMENT UNITS, TAKING INTO ACCOUNT THE EPISODIC PROVISIONS APPLICABLE DURING THE COVID-19 PANDEMIC

As indicated by scholars in the field, the budgetary procedure consists of a number of legal and factual activities governed by law, which relate to budget-making, implementation of the budget and review of its implementation[9]. The initial stage of the budgetary procedure thus understood consists of activities related to drafting and adopting the budget. It is worth noting that the stage of drafting the state budget and budgets of local government units is preceded by multi-annual financial planning. In accordance with the provision of Article 105(1) PFA, the basis for the preparation of the draft budget act for the next financial year is the State's Multi-Annual Financial Plan. The obligation to adopt that plan by 30 April each year is the responsibility of the Council of Ministers[10]. The State's Multi-Annual Financial Plan is to be drawn up for the financial year concerned and three consecutive years[11]. However, in accordance with Article 76 of the Act amending the Act on special solutions related to COVID-19, it was assumed that in 2020, the Council of Ministers was not required to draw up the State's Multi-Annual Financial Plan. In the legislature's view, the adoption of a multi-annual financial plan covering 2020 and the subsequent three years would not be advisable given the dynamics of the social and economic changes resulting from the outbreak. It has been assumed that in this timeframe it is not possible to determine sustainable social and economic policy objectives and planned measures affecting the level of revenue and expenditure of the public finance sector.

Apart from the state financial sector, the obligation of multi-annual financial planning also rests with local government units. The initiative for drawing up a draft resolution on the multi-annual financial forecast and amending it is solely up to the executive body of the local government unit[12]. A resolution on this matter must be adopted by the legislative body of the local government unit concerned[13]. The legislative body of the local government unit, like the

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S. Franek, *Konsekwencje kryzysu COVID-19 dla finansów jednostek samorządu terytorialnego w krajach UE,* "Optimum. Economic Studies" 2022, no. 3, p. 55 et seq.; M. D. Bordo, J. V. Duca, *How the new fed municipal bond facility capped municipal-treasury yield spreads in the Covid-19 recession,* "Journal of the Japanese and International Economies" 2023, vol. 67, p. 1 et seq.; P. Csanyi, R. Kucharčík, *Slovakia and the Slovak local goverments response to COVID-19 challenges,* "Zhurnal Issledovanii Sotsial'noi Politiki" 2023, vol. 21, no. 1, p. 107 et seq.; J. Kubíček, P. Morda, *Fiscal Deficit and Money Issuance in Czech Republic during COVID-19 Pandemic,* "Politicka Ekonomie" 2023, vol. 71, no. 1, p. 68 et seq.

[9] Cf. A. Hanusz, *Procedura budżetowa,* [in:] *Prawo finansowe,* ed. *idem,* Warszawa 2022, p. 127.

[10] See Article 106 (2) PFA.

[11] See Article 103 PFA

[12] See Article 230 (1) PFA.

[13] See Article 230 (6) PFA.

Council of Ministers, adopts a multi-annual financial forecast every year, thus in the perspective of one financial year. According to Article 227(1) PFA, the multi-annual financial forecast covers not only the period of the financial year concerned but at least three consecutive financial years[14]. On the other hand, the debt forecast, which forms part of the multi-annual financial forecast, must be drawn up for the period for which commitments are made and are planned to be made[15]. Generally speaking, the Council of Ministers' obligation of multi-annual financial planning, like the same obligation of the authorities of the local government unit, is regulated in a similar way. The difference boils down to the obligation incumbent on local authorities to draw up a debt forecast for the period for which financial commitments have been made and are planned to be made. In view of this, it seems understandable why the executive and legislative bodies of local government were not exempted in 2020 from the obligation to draw up and adopt a multi-annual financial forecast, as was done for the central government sector.

However, in accordance with Article 15zn (3) of the Act on special solutions related to COVID-19, it is possible to amend the local government unit's multi-annual financial forecast. However, the general condition for such changes is the need to ensure that the tasks related to combating COVID-19 are properly fulfilled. The body entitled to amend the resolution on the multi-annual financial forecast is the executive body of the local government unit, i.e. the village mayor, mayor, president of the city, district executive board or voivodeship executive board. This is the way the legislature granted resolution-making powers to the executive authorities, which constitutes a development of the powers previously conferred on them. In the light of the provisions of the Public Finance Act, the power to make amendments to the multi-annual financial forecast, excluding changes in the limits of commitments and amounts of expenditure on projects, is conferred on the executive body of the local government unit[16]. However, the legislative body of the local government unit may authorise the executive body to amend the limits of commitments and sums of expenditure for the implementation of a project financed with EU funds or from other non-returnable foreign sources. The norm resulting from Article 15zn (3) of the Act on special solutions related to COVID-19 is a development of the co-competence of the legislative and executive bodies to amend the multi-annual financial forecast of the local government unit, justified by the protection of the public interest. Hence, the need to fulfil tasks related to counteracting COVID-19 makes it possible for the

[14] On the multi-annual financial forecast of the local government unit, see: K. Sawicka, *Gwarancje prawne stabilności finansowej jednostek samorządu terytorialnego – wybrane instytucje systemu budżetowego,* [in:] *Problemy finansów i prawa finansowego. Księga jubileuszowa dedykowana profesor Elżbiecie Chojna-Duch,* ed. M. Bitner, Wrocław 2021, p. 269.

[15] See Article 227 (2) PFA.

[16] See Article 232 (1) PFA.

executive body to amend the multi-annual financial forecast of the local government unit adopted by the legislative body of that unit.

The rules related to the drafting of the State budget and budgets of local government units are still included almost exclusively in the provisions of the Public Finance Act. The assumptions of the draft state budget for the following year, taking into account the arrangements and directions contained in the State's Multi-Annual Financial Plan, in accordance with Article 138(1) PFA, shall be presented to the Council of Ministers by the Minister of Finance. Due to the absence of an obligation to adopt the State's Multi-Annual Financial Plan in 2020, the Minister of Finance is authorised to present the assumptions of the State's draft budget in 2021 without having to take into account the arrangements and directions of action contained in the State's Multi-Annual Financial Plan.

However, the norms restricting sovereign public debt should be taken into account when drafting and adopting a budget act. This concerns in particular the constitutional rule under Article 216(5) of the Polish Constitution[17]. Indeed, the maximum permissible limit on the sovereign debt may not exceed 60% of the annual gross domestic product[18]. It is worth emphasizing that the legislature, despite the effects of the COVID-19 pandemic, has not changed the regulation laid down in the Public Finance Act concerning the limit of sovereign debt. Consequently, the legal norms which provide for the consequences in cases where the ratio of the amount of government debt to gross domestic product is greater than 55% and less than 60% continue to apply[19]. The failure to repeal a norm under the Public Finance Act regulating the debt limit should be considered as a measure conducive to the sustainability of public finance. However, this can be a barrier to investment spending in both the short and long term[20].

However, the declaration of the state of epidemic in the entire territory of the Republic of Poland is a condition for non-application of the provisions covering the stabilising expenditure rule[21]. The rule in question is intended to

[17] Cf. P. Kucharski, *Konstytucyjny zakaz finansowania deficytu budżetowego przez NBP a prawo Unii Europejskiej*, „Państwo i Prawo" 2011, no. 3, p. 19 et seq.

[18] For more detail, see A. Hanusz, P. Szczęśniak, *The reduction of excessive government debt in the European Union law and its impact on the Polish legal system,* "Nihon University Comparative Law" 2018, vol. 35, p. 65 et seq.

[19] See Article 86 (1) point 2 PFA.

[20] It is worth mentioning the role of the standard resulting from Art. 220 sec. 2 of the Constitution. The possibility of increasing the state's public debt was significantly limited by the ban on incurring liabilities in the central bank of the state. Cf. R. Rybski, *Zakaz pokrywania deficytu budżetowego w centralnym banku państwa a sytuacje kryzysowe,* [in:] *Finanse publiczne w sytuacjach kryzysowych. Zagadnienia prawno-finansowe*, ed. G. Kuca, Kraków 2022, p. 231 et seq.

See Article 148 (5) of the Polish Constitution.

[21] For more on the expenditure stabilisation rule. see R. Mroczkowski, *Numeryczne reguły wydatkowe jako instrumenty wzmacniające stabilność fiskalną,* [in:] *Instytucje prawnofinansowe w warunkach kryzysu gospodarczego,* eds. W. Miemiec, K. Sawicka, Warszawa 2016, p. 319 et seq.

limit the rate of growth of public expenditure. When adopting the budget, the spending limit established pursuant to Article 112aa(1) PFA may not be exceeded. The stabilisation expenditure rule determined in the provisions of the Public Finance Act affects the level of expenditure of public authorities, including central government authorities, state auditing and law protection authorities, courts and tribunals, as well as local government units and their associations and metropolitan unions. The stabilising expenditure rule continues to include the National Health Fund, the Bank Guarantee Fund and funds established, entrusted or transferred to the Bank Gospodarstwa Krajowego under separate laws.

In accordance with Article 112d(1) PFA, the stabilising expenditure rule does not apply in cases of declaration of martial law, emergency law in the entire territory of the Republic of Poland and state of natural disaster in the entire territory of the Republic of Poland. Apart from the above mentioned states of emergency, the second condition which entitles the non-application of the stabilising expenditure rule is a decrease in annual growth in the value of gross domestic product. This should be more than two percentage points below the medium-term rate of change in the value of gross domestic product at constant prices. As has been said, the provision of Article 112aa (1) governing the rules limiting the amount of public expenditure, does not apply in the case of declaring the state of epidemic in the entire territory of the Republic of Poland. The competent authority for declaring the state of epidemic throughout the whole territory of the Republic of Poland is the Minister competent for health matters. The state of epidemic is declared by the Minister competent for health matters by regulation in consultation with the Minister responsible for public administration, at the request of the Chief Sanitary Inspector[22].

It should be noted that the suspension of the application of the maximum expenditure limit allowed the Bank Gospodarstwa Krajowego to spend funds to counter the economic impact of the COVID-19 pandemic. In accordance with Article 65(1) of the Act amending the Act on special solutions related to COVID-19, a COVID-19 Response Fund was established in the Bank Gospodarstwa Krajowego. This fund is intended for financing the tasks related to countering the effects of the pandemic. The Fund's resources may also be used for the redemption and payment of interest on bonds issued by the Bank Gospodarstwa Krajowego in Poland and abroad and the costs of their issuance, as well as expenditure incurred in carrying out tasks related to the prevention of COVID-19[23]. Disbursements from the COVID-19 Response Fund are made on the basis of

[22] See Article 46 (2) of the Act of 5 December 2008 on the prevention and combating infections and infectious deceases in humans (Journal of Laws of 2020 item 1845 as amended) [ustawa z dnia 5 grudnia 2008 r. o zapobieganiu oraz zwalczaniu zakażeń i chorób zakaźnych u ludzi (Dz. U. z 2020 r. poz. 1845 ze zm.)].

[23] For more detail, see Article 65 (5) of the Act amending the Act on special solutions related to COVID-19.

a payout order submitted to the Bank Gospodarstwa Krajowego by the President of the Council of Ministers. The Fund's resources derive from the cash contributions of certain public finance entities[24] and from the State budget, including European funds and proceeds from the sale of Treasury securities. The Fund, established at the Bank Gospodarstwa Krajowego, is also fed with financial resources from the budget of the European Union, which, with the agreement of the European Commission, can be used to support the implementation of tasks related to countering the pandemic effects[25]. All such financial resources should be classified as public funds. In 2020, the total disbursements from the COVID-19 Response Fund amounted to over a hundred billion PLN.

Some changes in the area of adopting the budget have also been made to concern local government units. According to Article 239 PFA, the local government unit's legislative body is obliged to adopt a budget resolution before the beginning of the financial year. In particularly justified cases, the legislative body may adopt the budget of the local government unit no later than on 31 January of the financial year. However, the provisions of the Act on special solutions related to COVID-19 modified the date of adoption of the budget resolution of the local government unit. Pursuant to Article15zoaa of that law, the local government unit's legislative body could, in particularly justified cases, adopt the budget resolution for the financial year 2021 no later than on 31 March 2021. Until the adoption of the budget resolution for the financial year 2021, but not later than 31 March 2021, the financial management of the local government unit was based on the draft budget resolution submitted to the local government unit's legislative body. As can be seen, in 2021 the final time limit for the adoption of the budget resolution was extended from 31 January to 31 March[26]. This constitutes a significant departure from the principle of budgetary antecedence, which can be inferred from Article 239 PFA. However, the full respect of the principle of budgetary antecedence seems justified in view of the substantive and formal difficulties involved in adopting a budget resolution during the COVID-19 pandemic. The need to adopt a budget resolution before the beginning of the financial year would require the budgetary resolution to be amended during the financial year in the light of growing epidemic problems.

When adopting the budget of a local government unit, as well as in the case of adopting the budget act, the statutory rules limiting the budget deficit

[24] This regards, inter alia, executive agencies, budgetary institutions, state special-purpose funds, the Social Insurance Institution and other central-government or local-government legal persons established under separate laws.

[25] For more detail, see Article 65 (4) of the Act amending the Act on special solutions related to COVID-19.

[26] In view of the above, it is only after 31 March of the budgetary year when the powers of the Regional Audit Office referred to in Article 240(3) PFA, consisting in a substitute adoption of the budget of a local government unit in the field of its own tasks and outsourced tasks, become valid..

remain in force. Pursuant to Article 242(1) PFA, the local government unit's legislative body may not adopt a budget in which the planned current expenditure is higher than the planned running revenue plus the budget surplus from previous years and the appropriations available[27]. However, the provisions of an episodic nature provide for a derogation from the principle of balancing the budget of the local government unit in its running part. Pursuant to Article 15zoa(1) of the Act on special solutions related to COVID-19, the local government unit, when amending the budget, is authorized in 2020 to adopt a budget in which the planned current expenditure is higher than the planned current revenue plus the budget surplus from previous years and free appropriations. A derogation from the principle of balancing the local government unit's budget in the current part is therefore exceptionally permissible[28]. This may occur when the running costs have been incurred to carry out the tasks of countering COVID-19 in so far as they have been financed by property income or repayable funds[29]. Likewise, running expenditure may exceed running revenue if there has been a loss of revenue due to the COVID-19 pandemic[30]. The loss of revenue for the local government unit due to COVID-19 is a reduction in revenue, calculated as the difference between the unit's planned revenue in the amended budget and the planned revenue reported by the unit in the first quarter of 2020. Importantly, the assessment of whether the principle of balancing the budget of the local government unit in its running part in the financial year 2020 is fulfilled should take into account the running expenditure incurred to perform the tasks related to COVID-19 response and the loss in revenue generated as a result of the outbreak of the pandemic[31]. It should be noted that the proposed legislative amendment of an incidental nature is aimed only at temporarily relaxing the restrictions on the obligation to balance the budgets of local government units. Thus, the derogation from the principle of balancing the budget of the local government unit in its running part enables public financial activities to be carried out in accordance with the law in a manner undisturbed by the impact of the COVID-19 pandemic.

Moreover, during the adoption of the budget for the local government unit the application of the norm resulting from Article 243(1) PFA was excluded by of the Act on special solutions related to COVID-19. This provision regulates the so-called individual debt ratio set for each local government unit. According to it, the

[27] For more detail on this topic, see: P. Szczęśniak, *Prawne ograniczenia pozyskiwania środków zwrotnych przez jednostki samorządu terytorialnego,* [in:] *Źródła finansowania samorządu terytorialnego,* ed. A. Hanusz, Warszawa 2015, pp. 384-385.

[28] For more detail on this topic, see: J. Łubina, *Oddziaływanie pandemii COVID-19 na finanse jednostek samorządu terytorialnego,* "Prawo Budżetowe Państwa i Samorządu" 2021, no. 4, p. 112-113.

[29] See Article 15zoa (1) item 1 of the Act on special solutions related to COVID-19.

[30] See Article 15zoa (1) item 2 of the Act on special solutions related to COVID-19.

[31] See Article 15zoa (4) of the Act on special solutions related to COVID-19.

local government unit's legislative body may not adopt a budget the implementation of which will result, in the budget year concerned and each subsequent year, in the ratio of the total amount of repayments of loans and credits and redemptions of securities issued, together with interest and discount due from them, to the planned revenue exceeds the individual debt ratio in question [32] . This indicator shall be determined separately for each local government unit. The individual debt ratio shall be calculated as the arithmetic average of the running income ratio calculated for the last seven years, less running expenditure.

However, the individual debt ratio referred to under Article 15zob (1) of the Act on special solutions related to COVID-19 will not be applicable for securities redemptions, repayment of instalments of loans and credits, including interest due and discount, issued or incurred in 2020 respectively, up to the amount of loss in the unit's income resulting from the COVID-19 pandemic. On the other hand, running expenditure incurred in 2020 for the implementation of tasks counter the COVID-19 pandemic will not be included in running expenditure for the purpose of calculating the individual debt ratio in 2021 and beyond. This is another solution not applied before to protect the financial stability of local government. Otherwise, the expenditure incurred to combat the effects of the COVID-19 pandemic would limit the possibility of acquiring refundable funds for the basic objectives pursued by local authorities.

II. IMPLEMENTATION AND AUDITING THE IMPLEMENTATION OF THE STATE BUDGET AND THE BUDGETS OF LOCAL GOVERNMENT UNITS, TAKING INTO ACCOUNT THE EPISODIC PROVISIONS APPLICABLE DURING THE COVID-19 PANDEMIC

It should be assumed that the implementation of the budget of the State or a local government unit is the entirety of activities consisting in the collection of revenue and the execution of budgetary expenditure, the execution of operations relating to the collection and repayment of public debt, therefore the collection of budgetary revenue and the execution of budgetary expenditure, as well as operations relating to the closure of bank accounts[33]. In addition, changes to this plan are sometimes needed at the budget implementation stage. This is the case when legally various events that are unforeseen from the point of view of the financial management occur in the course of the financial year. The changes due to the effects of the COVID-19 pandemic have significantly influenced the rules governing the implementation of the State budget and local government budgets.

Some of them met the criteria set out in the legal norms governing the implementation of budget. Others went beyond the previous conditions defining the use of rules contained in legal norms. For this reason, they had to be

[32] Cf. P. Szczęśniak, *Prawne ograniczenia…,* [in:] *Źródła...,* ed. A. Hanusz, pp. 385-386.
[33] Cf. A. Hanusz, *Procedura…,* [in:] *Prawo…,* ed. *idem,* p. 136.

supplemented, either by amending the existing legal provisions or by creating new ones. As regards the rules for the implementation of the state budget, the systemic position of the President of the Council of Ministers as a body of executive branch has become particularly important. This body has been granted new powers which fundamentally change the existing rules for the implementation of the State budget. First of all, the President of the Council of Ministers was granted under the Act on special solutions related to COVID-19 extensive powers to reallocate planned budget expenses between the different subdivisions of the budgetary classification. Prior to these amendments, the President of the Council of Ministers could, by regulation, reallocate the planned budgetary revenue and expenditure between parts of the State budget only when a ministry was dissolved or transformed[34]. The same power also applied to cases of dissolution or transformation of budgetary parts holding bodies, offices and agencies reporting to or supervised by the President of the Council of Ministers[35].

Currently, the powers of the President of the Council of Ministers, including the reallocation of planned budget expenses, are also based on Article 31(1) of Act on special solutions related to COVID-19. Pursuant to that provision, in order to prevent the COVID-19 pandemic, the President of the Council of Ministers is empowered to reallocate, by an ordinance, the planned budget expenditure between parts and sections of the State budget. In doing so, account shall be taken of the amount and type of necessary support for budget implementing entities and the current implementation of expenditure for the different parts and sections of the State budget. It should therefore be noted that the President of the Council of Ministers, as an executive body, has acquired the previously non-existent right to modify the State's revenue and expenditure plan on his own. Such substantial amendments to the budget, without the need to amend the budget act, could previously only be made by the Council of Ministers. The existing scope of such powers was provided for in Article 180 PFA. In the event of declaration of an emergency on the territory of the State or a part thereof, the Council of Ministers is empowered, by regulation, to reallocate the planned budgetary expenditure between parts and sections of the State budget in order to carry out the tasks arising from the provisions on the introduction of that emergency. On the other hand, the powers of the President of the Council of Ministers under Article 31(1) of the Act on special solutions related to COVID-19 have not been limited to the period during which an the state of epidemic threat or state of epidemic persists. The only reason that entitles the President of the Council of Ministers to reallocate the planned budget expenditure between parts and sections of the national budget is the need to counteract the COVID-19 pandemic. This wording may raise doubts as to the scope of the norm arising from

[34] See Article 172 (1) PFA.
[35] See Article 172 (3) PFA.

Article 31(1) of the Act on special solutions related to COVID-19. The duration of applicability of the regulation, which entitles the President of the Council of Ministers to reallocate planned budget expenses between parts and sections of the state budget, has not been clearly established. Therefore, such a regulation may contradict the provision of Article 219(1) of the Polish Constitution, which provides for the obligation to adopt the state budget for the financial year in the form of a budget act. On the other hand, the making of significant changes to the budget by the President of the Council of Ministers limits the role of the Sejm as the body authorizing the basic financial plan of the state, which must be adopted in the form of a budget act in the form determined by the Sejm. Any deviation from this principle must be justified in axiological terms. It is only the state of epidemic as the *ultima ratio* of the solutions in question.

The President of the Council of Ministers is also entitled, pursuant to Article 31 (2) of the Act on special solutions related to COVID-19, to decide on blocking the planned expenditure with regard to the entire state budget, specifying the part of the state budget and the total amount of expenditure that is subject to blocking. Such normative solution is a novelty in the Polish financial legislation. The power to block expenditure with regard to the entire budget has hitherto been vested in the Minister of Finance and the Council of Ministers by virtue of the provisions of Articles 177 and 179 PFA. According to them, the Minister of Finance is entitled to block expenditure in the scope of the entire budget in the case of finding mismanagement in certain units, delays in the performance of tasks, excess of funds held and breach of the rules of financial management[36]. However, the power to block expenditure regarding the entire budget does not extend to public finance entities referred to in Article 139(2) PFA, i.e. the Chancellery of the Sejm, the Chancellery of the Senate, the Chancellery of the President of the Republic of Poland, the Constitutional Tribunal, the Supreme Audit Office, the Supreme Court, the Supreme Administrative Court together with regional administrative courts, the National Council of the Judiciary, common courts and the Commissioner for Human Rights. However, the Council of Ministers, pursuant to Article 179(4) PFA, decides on blocking the planned expenditure of the state budget for a determined period of time. However, it may do so upon obtaining a positive opinion of the Sejm's committee responsible for the budget[37]. It therefore appears that, in the light of the rules contained in the Act on special solutions related to COVID-19, the President of the Council of Ministers has been given the power to block expenditure within the entire state budget by administrative decision. This competence is limited only by the condition in the form of the objective of countering COVID-19. Like in the case of reallocation of planned expenditure, the power to block expenditure is not

[36] See Article 177 (1) PFA.
[37] See Article 179 (1) PFA.

temporally limited to the period of the state of epidemic threat or state of epidemic. This means, as stated above, strengthening the position of the President of the Council of Ministers in the implementation of the state budget and further restricting the role of parliament as the body adopting the norms of financial law.

Implementation of the decision to block expenditure with regard to the whole budget, however, the President of the Council of Ministers is obliged to entrust the Minister of Finance, sharing in this respect the powers specific to this body[38]. Importantly, the funds blocked by the President of the Council of Ministers may form a new special-purpose reserve to counter COVID-19. The allocation of this reserve must be carried out by the Minister of Finance at the request of the budgetary part administrator carrying out the task of countering COVID-19[39]. However, the administrator's request must be accepted by the President of the Council of Ministers.

The impact of the COVID-19 pandemic is also seen with regard to the norms governing budget amendments based on carry-overs from budgetary reserves. This is a reallocation of expenditure from the classification provided for the budgetary reserve to the appropriate classification of other expenditure[40]. Under Article 15zm(1) of the Act on special solutions related to COVID-19, the President of the Council of Ministers is authorized to issue binding instructions to the Minister of Finance to change the intended use of the special-purpose reserve, together with an indication of its position and amount, in order to finance the tasks related to countering the pandemic. Changing the intended use of the special-purpose reserve by the Minister of Finance does not require obtaining the opinion of the Sejm's committee responsible for budgetary matters[41]. It is therefore a derogation from the obligation under Article 154(9) PFA. In accordance with the norm derived from this provision, the change of the intended use of the special-purpose reserve requires the Minister of Finance to obtain a positive opinion of the Sejm's committee responsible for budgetary matters. The new normative solutions should be assessed positively, taking into account the possibility of the flexible and rapid spending of budget reserves, adapted to changes resulting from unforeseeable needs related to countering the COVID-19 pandemic[42]. At the same time, it should be noted that equipping the President of the Council of Ministers with the power to issue binding instructions to the Minister of Finance constitutes a derogation from the norm expressed in Article 146(4) point 6 of the Constitution. According to this provision, the Council of Ministers, as a

[38] See Article 31 (3) of the Act on special solutions related to COVID-19.
[39] See Article 31 (5) of the Act on special solutions related to COVID-19.
[40] Cf. A. Hanusz, *Procedura…,* [in:] *Prawo…,* ed. *idem*, p. 145.
[41] See Article 15zm (2) of the Act on special solutions related to COVID-19.
[42] Cf. G. Kuca, *Formy elastycznego wykonywania budżetu państwa w dobie pandemii COVID-19*, [in:] *Finanse publiczne w sytuacjach kryzysowych. Zagadnienia prawno-finansowe*, ed. G. Kuca, Kraków 2022, p. 151 et seq.

constitutional body which shapes the State's policy, is obliged to direct the implementation of the state budget. The President of the Council of Ministers is not empowered by constitutional norms to direct the implementation of the state budget, but only to coordinate and control the work of the members of the Council of Ministers[43]. The power of the President of the Council of Ministers to issue binding instructions to the Minister of Finance regarding the changes in the allocation of the special-purpose reserve thus limits the role of the Council of Ministers as the authority in charge of the implementation of the State budget. This also constitutes, in the light of Article 149(1) of the Constitution, a limitation of the political role of the Minister of Finance. This provision makes it clear that ministers are in charge of certain sections of government administration.

At the same time, under episodic provisions, the time limit for the distribution of specific-purpose reserves was extended in 2020 from October 15 to December 31 of that year[44]. On the other hand, funds included in the specific reserves of the state budget through 2020 could be spent for the implementation of tasks related to countering COVID-19, regardless of the intended use of the reserves[45]. Therefore, the distribution of the special-purpose reserve for the implementation of tasks did not require a change in the intended use of the reserve in 2020. The distribution of the specific-purpose reserve for tasks related to countering COVID-19, even when these tasks have not been in line with the intended use of the reserve, was carried out by the Minister of Finance at the request of the competent administrator implementing the task, but with the prior approval of the President of the Council of Ministers[46]. This demonstrates, on the one hand, that the management of budget funds has become more flexible, while on the other hand, it increases the powers of the executive branch in relation to the legislative branch.

The impact of the COVID pandemic is also seen in relation to the rules for the implementation of budgets of local government units. Due to the need to counteract the effects of the pandemic, the legislature broadened the powers of the village mayor, mayor, city president, the district executive board and the voivodeship executive board as entities implementing the budgets of local government units. Pursuant to Article 15zo(1) of the Act on special solutions related to COVID-19, the executive body of the local government unit has been given the power to reallocate expenditure between budgetary subdivisions. The reallocation of expenditure between budgetary subdivisions can only be made in order to ensure the proper execution of the tasks of countering the COVID-19. The norm resulting from Article 15z (1) of the Act on special solutions related to

[43] See Article 148 (5) of the Polish Constitution.
[44] See Article 31n (1) of the Act on special solutions related to COVID-19 in conjunction with Article 154 (1) PFA.
[45] See Article 31o (1) of the Act on special solutions related to COVID-19.
[46] See Article 31o (3) of the Act on special solutions related to COVID-19.

COVID-19 constitutes a derogation from the general prohibition on reallocation of expenditure between budget sections referred to in Article 258(1) point 1 PFA. The executive body of a local government unit is, as a rule, entitled to make changes to the expenditure plan, but excluding reallocation of expenditure between sections of budgetary classification. In addition, the village mayor, mayor, president of the city, the district executive board or the voivodeship executive board are entitled to delegate certain powers to other organizational units of the local government unit to reallocate the planned expenditure. To this end, the executive body is not obliged to obtain authorization from the legislative body of the local government units, which is an exception to the norm resulting from Article 258(1) points (2) to (4) PFA and weakens the scope of the powers of legislative bodies of local government units[47]. In such cases, that provision obligates the legislative body to authorise the executive authority, however, to delegate certain powers to reallocate the planned expenditure to other organisational units of the local government unit. However, the proposed extension of the executive body's powers to reallocate planned expenditure is limited in time, which should be assessed positively, taking into account the protection of the financial stability of local government units. The provisions of the Act on special solutions related to COVID-19 indicate that reallocation of expenditure between budget classification sections and the transfer of these powers to other organizational units may take place during the period of the state of epidemic threat or state of epidemic and the associated risk of significant breach of the deadlines and conditions for the performance of the tasks of local government units.

Moreover, the municipality's executive body, in accordance with Article 15zo of the Act on special solutions related to COVID-19, is entitled to obtain returnable funds by way of a a loan or credit or the issue of securities, without having to obtain the opinion of the Regional Audit Office. This solution is a deviation from the general obligation laid down in Article 91(2) PFA. Under that provision, the assuming by a local government unit of a debt arising out of a loan, credit or issue of securities shall require the executive body of the local government unit to obtain the opinion of the Regional Audit Office on the possibility to repay the debt. Like the powers relating to the reallocation of expenditure, the power to raise repayable funds without having to obtain the opinion of the Regional Audit Office can only be exercised during the period of a state of epidemic threat or state of epidemic. The temporal limitation of the derogation must be assessed positively. Otherwise, the Regional Audit Offices would be deprived of the possibility to supervise the financial affairs of local government units in the long term.

[47] See Article 15zo point 1 of the Act on special solutions related to COVID-19.

The impact of the COVID-19 pandemic on the financial activities of local government units is also seen in the norms on granting subsidies to local government budgetary establishments. Such public finance entities carry out the local government's own tasks for consideration, covering the costs of their activities from their own revenues[48]. However, sometimes the operating costs of a local government budgetary establishment may exceed the revenues it earns. Therefore, the legislature generally permits the granting of various forms of subsidies to a local government budgetary establishment. The amount of specific subsidies granted from the budget of a local government unit shall not exceed 50% of its operating costs[49]. However, in accordance with the provisions of the Act on special solutions related to COVID-19, a local government budget establishment which carried out tasks related to countering COVID-19 is entitled in 2020 and 2021 to receive from the local government unit's budget a specific subsidy in excess of 50% of its operating costs[50]. Such an episodic solution gives local authorities more flexibility in conducting financial management, which should be approved.

The more flexible financial management by the local government unit is also the purpose of Article 15zzzf of the Act on special solutions related to COVID-19. According to that provision, the legislative body of a local government unit may decide by a resolution not to pursue claims of a civil-law nature accruing to the local government unit or to its organizational units against entities whose liquidity has deteriorated due to the negative economic consequences of COVID-19. Basing the reasoning on the principle of linguistic interpretation *lege non distinguente nec nostrum is distinguere* [where the law does not distinguish, neither should we distinguish], the concept of entities whose liquidity has deteriorated due to the negative economic consequences of COVID-19 must be understood as both private-law entities and public-law entities. Entities, regardless of their legal form, should be obliged to fulfil a monetary performance of a civil law nature to local government units or their organizational units. Entities whose liquidity deteriorated due to COVID-19, are obliged to submit a request to waive the claim. To limit expenditure and the loss of own revenue resulting from it, the legislature provided for limiting the local government body running into debt. According to Article 15zc(1) of the Act on special solutions related to COVID-19, the total amount of debt of a local government unit as of the end of the financial year 2020 may not exceed 80% of the total income of that unit in that financial year.

Under the applicable legal provisions, the implementation of the state budget and budgets of local government units is subject to initial and subsequent

[48] See Article 15 (1) PFA.
[49] See Article 15 (6) PFA.
[50] See Article 31p and Article 31pa of the Act on special solutions related to COVID-19.

review by the bodies which have adopted the budget. It should be noted that the COVID-19 pandemic did not result in the need to make substantial changes to the rules governing the exercise of scrutiny by the Sejm and the legislative body of the local government unit respectively. The provisions of the Act on special solutions related to COVID-19 provide for the possibility of changing the time limit for adopting a resolution on granting discharge to the executive body of the local government unit[51]. The institution of discharge constitutes a statutory control of a body responsible for the implementation of the budget by the executive body. Therefore, the consideration of the report on the implementation of the budget act or budget resolution requires taking into account the episodic provisions.

CONCLUSION

In conclusion, it should be assumed that the episodic solutions introduced due to the effects of the COVID-19 pandemic in the area of collecting public funds and their disbursement by public law entities are conducive to more flexibility in public financial management. To the necessary extent, justified by the need to finance tasks to counteract the COVID-19 pandemic, the regulations analysed herein have ensured the protection of the stability of public finance. The rights and obligations related to the budgetary procedure and multi-year financial planning were subject to significant modification. First and foremost, the obligation to adopt the State's Multi-Annual Financial Plan was abandoned, but local government units were not exempted from the obligation of multi-annual financial planning. However, the executive body of the local government unit is authorised to make changes to the multi-annual financial forecast due to the need to ensure the proper implementation of tasks related to the prevention of COVID-19. The new normative solutions were introduced in two ways. First, by amending the provisions of the Public Finance Act, and second, by introducing a completely new law. These laws contain both episodic provisions and provisions without a predetermined duration.

However, the state of epidemic has not affected constitutional and statutory regulations on the limit of State's sovereign debt. On the other hand, the state of epidemic is a prerequisite for non-application of rules covering a stabilising expenditure rule. However, the suspension of the application of the maximum expenditure limit allowed the Bank Gospodarstwa Krajowego to spend public funds to counter the economic impact of COVID-19.

The impact of the COVID-19 pandemic has been the most visible in the rules governing the implementation of the state budget and budgets of local government units. This resulted in a fundamental change in the systemic position of the President of the Council of Ministers. In order to counter the COVID-19 pandemic, the President of the Council of Ministers was granted powers to

[51] See Article 15zzh (1) of the Act on special solutions related to COVID-19.

reallocate planned budget expenditure between parts and sections of the state budget. Similar powers had so far been conferred on the Council of Ministers in certain cases. However, the powers of the President of the Council of Ministers were not temporally limited due to the duration of the state of epidemic threat or state of epidemic. This may give rise to constitutional doubts under currently applicable law. The only reason that entitles the President of the Council of Ministers to reallocate the planned budget expenditure between parts and sections of the national budget is the need to counteract the COVID-19 pandemic. Moreover, the President of the Council of Ministers was granted the right to block planned expenditure within the entire state budget because of the need to counter the pandemic. The exercise of this power has been temporally limited. A form of strengthening the cooperation between bodies of the executive branch is the issuance of binding instructions to the Minister of Finance by the President of the Council of Ministers. These instructions concern changes in the use of the special-purpose reserve due to the need to finance pandemic prevention tasks. The President of the Council of Ministers has therefore obtained the powers to manage, to a statutorily defined extent, the implementation of the state's budget, which until now could only be constitutionally exercised by the Council of Ministers. These powers may interfere with the constitutional powers of other ministers, including the Minister of Finance.

The COVID-19 pandemic has also resulted in changes in the rules of implementing the budgets of local government units. The legislature extended the powers of the village mayor, mayor, city president, the district executive board and the voivodeship executive board as entities implementing the budgets of local government units. The executive body of the local government unit has acquired under applicable law the power to reallocate expenditure between budget subdivisions. Unlike the powers of the President of the Council of Ministers, the power to reallocate expenditure between budget subdivisions may be exercised during the state of epidemic threat or state of epidemic. In the case of local government units, during the period of an epidemic or epidemic situation, derogations from the principle of balancing the budget in its running part and the supervision exercised by regional audit offices over acquiring funds of a returnable nature have been relaxed. All these solutions should be assessed not only from the perspective of the current epidemic situation, but also at the systemic level, the framework of which is determined primarily by the constitution.

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THE CRIME OF DOMESTIC VIOLENCE AND THE CRIME OF CHILD ABUSE. LINK, PROBATION STANDARD

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Abstract

The significant increase in the number of crimes of domestic violence, maltreatment of a child, particularly and unfortunately in general and especially during the SARSCOV-2 pandemic, affecting one in three women in the European Union (Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence, COM (2022) 105 final[1], requires these types of crimes to be tackled from different perspectives. The same is true of child abuse offences, which in practice often raises the question of the standard of probation and the judge's margin of discretion. From this perspective, this study aims to analyse the link between these offences, as well as the fulfilment of the condition of proving the offence "beyond any resonable doubt", within the meaning of criminal procedural law and the requirements of the European Convention on Human Rights and Fundamental Freedoms, without dealing with this standard of proof in particular, the concept being the subject of future studies.

Key words: *domestic violence, child abuse, joint offences, probation.*

[1] https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:52022PC0105

INTRODUCTION

From the outset, it should be stressed that the subject of this study is part of a broad, recurrent and highly topical theme. Recent studies carried out by European bodies have shown a significant increase in violence against women and domestic violence during the SARSCOV-2 pandemic, affecting one in three women in the European Union (Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence[2]). The Commission's report pointed out that when analysing types of violence, statistics showed that at European level, one in five women has been a victim of domestic violence, which is considered by experts to be a form of torture (*Coomaraswamy, V., Radika,* apud ABA- CEELI USAID Final Report "Domestic Violence in Romania: Legislation and the Judicial System", *2007, p. 5).*

Although there are other widely recognized international instruments, such as, for example, the Istanbul Convention[3], as well as Directives protecting victims of violent crimes (for example, Directive 2011/92 of the European Parliament and of the Council on combating the sexual abuse of children and child pornography and replacing Council Framework Decision 2004/68/JHA - https://eur-lex. europa.eu/legal-content/RO/TXT/HTML/?uri= CELEX:32011L0093; Directive 2012/29 of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime and replacing Framework Decision 2001/220/JHA[4]) transposed into the national legislation of the Member States, there has been an excessive increase in crime in this sector.

Thus, in 2022, there was a noticeable growth in crime, 13.4% compared to 2021, according to statistics provided by the Romanian Police[5]: there was an increase in the number of domestic violence offences (including the crimes of assault or other violence, bodily harm and threat, from 44,522 to 50,531), but a decrease in the number of offences of ill-treatment of minors (from 441 to 396).

In practice, the question often arises as to how to distinguish the offence of domestic violence from other offences, such as maltreatment of minors, which are closely linked.

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[2] COM(2022) 105 final, https://eur-lex. europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:52022PC0105

[3] Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No 210; COM(2016) 111, https://rm.coe.int/168046253e

[4] https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32012L0029

[5] https://www.politiaromana.ro/ro/stiri/violenta-domestica-in-atentia-politistilor 1671870616

THE CRIME OF DOMESTIC VIOLENCE AND THE CRIME OF CHILD ABUSE. LINK, PROBATION STANDARD

1. THE RELATIONSHIP BETWEEN DOMESTIC VIOLENCE OFFENCES AND MALTREATMENT OF MINORS

The two offences analyzed are regulated in Title I of the Criminal Code, with the denomination "Offences against the person", but in separate chapters: the offence of domestic violence is included in Chapter III, "Offences committed against a family member", in art. 199 with the marginal denomination "Domestic violence", while the offence of ill-treatment of a minor is provided for in Chapter II, "Offences against bodily integrity and health" in art. 197 of the Criminal Code.

Without wishing to analyze the essential characteristics of these offences, we shall confine ourselves to a few general observations which are necessary for this study.

Some authors have expressed opinions of great scientific value to the effect that the offence of ill-treatment of a minor falls outside the scope of homogeneity of offences against bodily integrity and health on the grounds that the latter "punishes actual and effective results on the person's bodily integrity and health", while the offence of ill-treatment of a minor "punishes the potential damage to these values in a dynamic sense" *(S. Bogdan, D.A. Şerban, 2020, pp. 162-163).*

In the same sense, it has been stated that bringing the offence of ill-treatment of a minor "from the sphere of offences that harm relations relating to social coexistence to the sphere of offences that harm the physical integrity and health of the person, was motivated by the legal object, by the fact that, in reality, the offence endangers, first of all, the physical integrity or health of the person and only subsidiarily family relations or social coexistence" *(V. Cioclei, 2020, p. 87).*

The typical requirement of the offence of maltreatment of a minor is fulfilled when the physical, intellectual or moral development of the minor is put in serious danger by measures or treatment of any kind, by parents or any person who has the minor in their care - Art. 197 of the Criminal Code. Doctrine has stressed that verbum regens is achieved through any actions or inactions that seriously endanger the child's development, and if these ill-treatments are accompanied by physical violence, bodily harm or unlawful deprivation of liberty, there is concurrence of offences *(V. Cioclei, 2020, p. 88; S. Bogdan, D.A. Şerban, 2020, pp. 164-165).*

Doctrine has rightly stressed the legitimacy of the solution of the ideal concurrence of offences offered by the Supreme Court in Decision no. 37/2008 delivered in the appeal in the interest of the law, which remains valid, the essential argument being the heterogeneous nature of the special legal object *(S. Bogdan, D.A. Şerban, 2020, p. 165).* Thus, the court ruled in the above mentioned decision that in the case of the offence of ill-treatment of a minor "the main special legal object is constituted by the social relations relating to the family and the protection within it of the minor whose training, education and physical and moral

growth are closely linked to and conditioned by the care, responsibility and affection of the persons obliged to do so".

The same author pointed out that the argument offered by the Supreme Court remains valid only in the hypothesis where the act of ill-treatment of the minor is committed "through typical acts protecting other social values, such as the physical freedom of the minor, in which case the typical act is deprivation of liberty, or the mental freedom of the minor, in which case the typical act would be the crime of threat" (*ibid*.).

However, the author has stated that "the repositioning of the offence may call into question the fairness of the solution of concurrence in the hypothesis where the ill-treatment is composed of acts of hitting or bodily harm to the minor" *(S. Bogdan, D.A. Șerban, 2020, p. 165).* The author stated that "the appearance of overlapping social values protected by the two types of acts is removed by the specific way in which the offence of ill-treatment protects the physical integrity and health of the minor". In this hypothesis, what is penalized, in his view, is the real and concrete possibility of the occurrence over time of consequences on the physical, intellectual or moral development of the minor which could be irreversible (ibid.).

The argument brought forward by the author is considering that by retaining the concurrent offence, the principle of *non bis in idem* would not be violated, since both offences value the occurrence of consequences likely to harm the child "on different levels, present (for the offence of battery or other violence or bodily harm) and future (the offence of maltreatment of a minor)" *(S. Bogdan, D.A. Șerban, 2020, p. 166).*

The author also expressed the view, which we share, that in this case absorption cannot operate, in the sense that the offence of maltreatment that would absorb the offence of assault or other violence or bodily harm, on the grounds that the essential requirement for absorption is not met, namely the act of execution of the offence of maltreatment consisting of measures or treatment of any kind. Consequently, taking into account other considerations, such as the subjective nature of the offences, the time of their commission, the differences in the penalty regime, justifies the legitimacy of the Supreme Court's decision to establish the concurrence of offences *(S. Bogdan, D.A. Șerban, 2020, p. 166).*

2. PERSON IN WHOSE CARE THE MINOR IS PLACED

The law imposes the condition that the active subject of the offence of maltreatment of a minor must be a parent or a person in whose care the minor is. Consequently, the absence of such a person entails the non-existence of the offence. While no comments are necessary as regards the status of parent, as regards the person in whose care the minor is, we consider that it is not necessary for this legal relationship to be established by an act or decision of any authority, since the requirement of the law is also met if the minor is actually in the care of

another person for the purpose of upbringing and education. However, the de facto entrustment of a minor to another person for the purpose of prostitution does not meet the legal requirement, and the act must be classified in a different legal context, depending on the factual situation. The Supreme Court has ruled in this regard[6]. Thus, the Supreme Court ruled that the prerequisite for this offence is either the existence of a parental relationship or a relationship deriving from a special task relating to the upbringing and education of a minor, which is a legal entitlement. If this condition is missing, the offence will not constitute the offence of maltreatment of a minor, but possibly another offence such as assault or other violence, bodily harm, unlawful deprivation of liberty. Consequently, the act of the defendant who maltreated the victim, who had been entrusted to him by her father to bring her to Italy in order to make her work, hitting her with his hands, feet and fists, repeatedly insulting her, forcing her to work at the market and taking her earnings; forcing her to have sexual intercourse, acts committed on Italian territory, abusing her mental inferiority (she was in Italy, far from her own family, without knowing anyone and entrusted to him by her own father), does not constitute the offence of ill-treatment of a minor, but of assault or other violence and sexual intercourse with a minor, as provided for in Article 6(1) of the Italian Criminal Code. 193 and 200 of the Criminal Code respectively.

3. REQUIREMENT OF SERIOUS JEOPARDY TO THE MINOR'S PHYSICAL, INTELLECTUAL AND MORAL DEVELOPMENT

This condition of the typicity of the act requires the possible or potential occurrence of serious harm to the child's physical, intellectual and moral development. The legislator does not define the concept of "serious jeopardy", so in practice there may be difficulties in meeting the requirement of dangerous prosecution of this offence.

In this regard, we agree with the opinion expressed in the doctrine *(S. Bogdan, D.A. Șerban, 2020, p.164)* which criticized the ambiguity of the phrase from the perspective of the principle of legality of the incrimination, with the clarification that although the Constitutional Court has shown great reluctance to consider compliance with the principle of foreseeability of the text in conditions where the wording is ambiguous, we believe that the fulfilment of the requirement is left to the light and wisdom of the judge who, within the margin of appreciation of the evidence, will assess to what extent the requirement of the law is met.

Thus, by criminal decision no. 860/2017 delivered by the Court of Appeal of Brasov (unpublished), the appeal filed by the Public Prosecutor's Office was admitted and the defendant was convicted for the offence of maltreatment of the minor, although the first instance had ordered acquittal.

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[6] Criminal Decision No 657/2018, ÎCCJ, https://www.universuljuridic.ro /infractiunea-de-rele-tratamente-aplicate-minorului-respingerea-contestatiei-ca-nefondata-vcp-ncpp/

Thus, the trial court found that the requirement of endangering the child's development was not met, that the evidence did not reveal any abnormality related to the child's development, but on the contrary, that the defendant had adequately taken care of his upbringing, that they had a close relationship. Also, the fact that the father took him off when he came home sweaty did not mean the opposite, he took him to kindergarten, to school, he stayed with him, they played, they went out to the park, he did not beat him, the child was happy, well cared for and clean. Basically, the defendant was taking care of the child's upbringing, even though the mother was abroad because she was in a relationship with another man and wanted a divorce. In these circumstances, being troubled by the idea of divorce, the defendant started consuming alcohol together with antidepressant medication and minimally involved the child in emotional blackmail of the mother whom he wanted to persuade to give up the extramarital relationship, return to the country and restart living together. The forensic expert report established that the defendant had a personality disorder of the impulsive unstable type and ethyl abuse, but retained the mental capacity to critically assess the consequences and content of his actions.

Contrary to the first instance, the Court of Appeal found that the moral development of the minor, namely the development of his mental faculties, was seriously endangered by his father, who, through the actions of shooting on 27 October 2016, of the child - aged 6 years and 10 months - with a cord around his neck, while blackmailing the mother to return to the country because otherwise he would hang the child, actions which take the form of physical and emotional abuse and fall within the scope of psychological and physical violence as regulated in art. 4 of Law No. 217/2003, an act that meets the requirement of typicality of the offence of maltreatment of minors, provided for in Article 197 of the Criminal Code, given that the actions were not repeated, being a single criminal activity, committed in a single circumstance. The judicial supervisory court also found that the contents of the audio files showed that: The defendant, who lived alone with the minor, tells his wife that if she does not return home, he will not find them, that he has a knife handy and not to notify the family or the police, that when the door is broken down they will both die and two corpses will be found, he threatens to slit his wrists, there are references to slitting his throat and a slaughter, that he'll come out ugly, with TV, with blood, with his head cut off, with his hands, he refers to the noose hanging on the wall, which they both hang from. In one of the conversations the defendant tells his wife that he puts the noose on and they both hang themselves, that he has two ropes ready. At the same time, he tells his son that they are going to play a game with the rope, and that he will send the photograph to his mother, he refers to cutting the child to pieces if she comes with her boyfriend, that he will cut the child to pieces just to see her suffer, that he has the knife and the noose in his hand, that he's cutting up the child and sending her pictures, that he swears he'll pull the rope out and if she doesn't

come back, the child will be cut to pieces, pieces, that he's cutting up her child that night, asks her if she wants to start working and if she wants to do the murder now. It is clear from the recording how the child witnessed this discussion, with the defendant addressing in a high and extremely raised tone telling her that "this minute I'm cutting your child, I'm going to get the rope out, wait I'll send them on Facebook", that he is playing with the child and tying the rope, the child even continuing this discussion with his mother on the phone. Therefore, the court found that the moral development of the minor, namely the development of his mental faculties, was seriously endangered by his father, the defendant X., by the actions of photographing the minor aged 6 years and 10 months, with a cord around his neck, while blackmailing the child's mother to return to the country because otherwise he would hang the child, actions that take the form of physical and emotional abuse and that fall under psychological and physical violence as regulated in Article 4 of Law No. 217/2003.

On the contrary, it was held that the requirement of typicity of the crime is not met in the hypothesis where the child was diagnosed with a genetic disease, inherited on the paternal line, which results in the production of multiple fractures, the child having been monitored and medically investigated on several occasions[7]. Therefore, the child's health problems were not caused by measures or treatments of the maternal grandparents that endangered the child's development, but by the disease from which his father suffered, namely Lobstein's disease (an autosomal dominant connective tissue disorder manifested by multiple fractures, blue sclera and late-onset hypoacusis); the child's father had fractures in childhood, blue sclera (the disease of the bones of glass and hypoacusis. This disease is genetic and as further evidence, the father's own brother suffered from the same condition. Consequently, the court found that the fact that the minor was classified as severely disabled was not due to physical or emotional abuse of the minor, but to his medically proven illness.

4. THE LIMITING NATURE OF THE EVIDENCE IN THE CASE OF FFENCES OF DOMESTIC VIOLENCE AND MALTREATMENT OF THE MINOR. MARGIN OF APPRECIATION OF THE COURT

Given the specific nature of these crimes, the fact that they are usually committed in the privacy of the home, without the presence of other persons who could be witnesses, and that there is rarely direct evidence (except for forensic documents), both doctrine and judicial practice, have agreed that the standard of probation is lower than in the case of other offences (although there may be those who would understand the concept of "standard of probation" in an unduly limited manner, with particular reference to the concept enshrined in the probation system

[7] Criminal sentence no. 2774/2010 of the Iasi District Court http://www.rolii.ro/hotarari/589f143ae49009a01e00007f

{and probation services} characteristic of restorative justice, we point out that this concept, specific to the adversarial law system and adopted in the continental system, including in the Romanian system in the provision enshrined in Art. 100 para. 2 and art. 103 of the Criminal Procedure Code, considers the probatory value and strength of certain evidence, means of proof and evidence procedures in the sense conferred by art. 6 par. 3 of the ECHR on the fairness of proceedings). This is also because, as a rule, the accused person does not recognize the crime or naturally tries to minimize both the crime and its consequences, to seek justifications for criminal behavior, which is an absolutely normal tendency and stems from the inherent self-preservation instinct of each person and is an intrinsic part of the right of defense (these aspects will be the subject of a future study).

Therefore, in the case of these offences, the standard of proof is lower than the standard normally required in criminal proceedings, as the existence of indirect evidence is sufficient, corroborated by other evidence or clues that can outline the state of facts (criminal sentence no. 223/2017 of the Făgăraș Court, unpublished). In this judgment, the court found that when the injured person returned home from work, the defendant accused her of having a relationship with another man and reproached her about her work schedule, in which context they had an adversarial discussion, and the defendant hit her in the face and ribs, causing traumatic injuries that required 11-12 days of medical care to heal.

Thus, the court considered that particular importance in such a case, which involves aggression against a person in a state of obvious vulnerability to the aggressor, with a significant psychological history between the parties involved, must be given to the statement of the injured person. This is because these offences involve specific evidence, material evidence sometimes being non-existent, and the testimony of witnesses being, as a rule, indirect evidence - they relate aspects that they have heard from the victim. In such cases, when the defendant denies, even if only in part, his involvement in the crime, the statements of the victim must be considered in relation to the rest of the evidence and clues that may lead to the conclusion that the facts presented by the victim are not a fabrication or an attempt at revenge. Accordingly, the court found that the statements of the injured person had a stronger probative value than the defendant's statement denying that he had committed the crime. The credibility of the victim's statements can also be deduced from the fact that she left the common residence and from the testimony of the witnesses who saw the injured person come to work with a crooked nose and bruises on her face. The forensic certificate confirmed that the injured person had traumatic injuries and a deformed nasal pyramid, which required 11-12 days of medical care to heal.

Consequently, given that such acts are usually committed in the home of the persons involved, it is clear that direct evidence are scarce and that the judge is entitled to a margin of appreciation in their evaluation, under Article 103 of the Criminal Procedure Code. It is well known that the perpetrators do not mainly

admit to committing these acts, so the main challenge for the court is to establish the truth on the basis of the main statements - those of the injured party and the accused. Of course, the principles of the criminal trial must be respected, in which respect for the presumption of innocence is one of the most important, and which complements the fairness of the proceedings as a whole, as stated in Article 6(6) of the Criminal Procedure Code. 2 of the ECHR, but also Art. 48 para. 1 of the Charter of Fundamental Rights of the European Union. It should also be noted that the Romanian legislator has also transposed Directive (E.U.) 2016/343 of the E.P. and of the Council on the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings[8], as part of the enshrinement of procedural rights proposed to guarantee the right to a fair trial[9] in the provision enshrined in Art. 4 of the Criminal Procedure Code.

The resolution was included in the Stockholm Programme and the European Council underlined the non-exhaustive nature of the roadmap, inviting to study, analyze and assess the need to address other issues such as the presumption of innocence *(M. Bitanga, S. Franguloiu, F. Sanchez-Hermosilla, 2018, p. 34).*

In order to increase the guarantees of a state of facts based on a fully proven legal state, in relation to the content of the Constitutional Court Decision no. 2/2017, if the prosecutor discovers facts or circumstances that were not known during the resolution of the case and that prove the unreasonableness of the acquittal decision, he shall issue an ordinance, according to the provisions of art. 286 of Criminal Procedure Code, which will be attached to the request for review formulated in favor of the convicted person, and will be submitted to the competent court *(M. Pătrăuș, D.-D. Pătrăuș, 2017).*

Given the obligation of the court to apply both decisions rendered by European courts (ECtHR and ECJ) and legislation (European and national), it remains for the judge to evaluate and assess the evidence to what extent it has the ability to overturn the presumption of innocence. We allow ourselves to state that in the case of these offences, the judge's margin of appreciation is more permissive than the normal standard, "beyond reasonable doubt" (Art. 396(2) with special reference to Art. 103 of the Criminal Procedure Code), it being known that the rule is that a conviction cannot be ordered solely on the basis of indirect evidence. Both in doctrine and in practice there has been much debate as to whether this indirect evidence is sufficient to establish the judicial truth. The view has been expressed in the literature, and accepted by most authors, that it is possible to base a conviction on evidence, but only as an exception. This is

[8] Published in OJ L 65/1 of 11 March 2016, https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32016L0343

[9] Recital 3 of the EU Council Resolution of 30 November 2009 https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009 :295:0001:0003:ro:PDF

because, in such a case, the evidence must be very carefully and thoroughly checked by the court and is subject to clear and strict rules. In this respect, the doctrine has shown that: "First of all, a single piece of indirect evidence proves a single fact, but this fact can only be in a casual relationship with the main fact; for example, the enmity between the victim and the defendant, taken in isolation, cannot convince that the defendant committed the murder; therefore, in evidence with indirect evidence, several pieces of indirect evidence are always necessary. Secondly, what matters is not so much the number of indirect evidence as the totality of the indirect evidence, each piece of indirect evidence being part of a chain of indirect evidence, so that the removal of a single piece of indirect evidence as inaccurate entails the disintegration of the chain of indirect evidence. Thirdly, it is not necessary that the totality of the circumstantial evidence leads to a single conclusion as to the existence of the main fact (X killed Y). When the conclusion is an alternative one (Y was killed either by X or by Z), the circumstantial evidence cannot lead to a conviction and the evidence must be continued until only one version remains." *(Gr. Theodoru, 2013, p. 291).* It has also been expressed in the doctrine the opinion, of great scientific value, still being valid today, that regarding the mediated evidence "the following rule can be formulated: the degree of veracity and conclusiveness of the mediated evidence is inversely proportional to its distance from the object of the evidence; the greater the distance, the lower the conclusiveness of the evidence". *(V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N. Iliescu, R. Stănoiu, 2003, p. 174).*

It is established in the jurisprudence that the absence of a report of a contravention cannot constitute proof of the guilt of the two accused police officers, for the same reason as stated above, considering that negative facts/actions cannot constitute evidence or proof in support of a criminal charge.

In addition, the evidence and the method of proof consisting of the transcript of the interception of the conversation between two persons with reference to another person is not sufficient if it is not corroborated with other evidence, because a single piece of evidence cannot be able to support a conviction, and the mere suspicion that the conversations outline is not sufficient to order a conviction[10] .

CONCLUSION

In the matter of the offences analyzed, domestic violence and maltreatment of minors, as previously stated, the standard of probation suffers an exception to the common rule, precisely because of the fact that such acts occur in privacy, without the presence of witnesses who can directly perceive the events that take

[10] S.p. no. 61/ F/ 21 July 2009 of the Court of Appeal Brașov, def. by decision no. 3516 of 8 October 2010 of the Court of Cassation and Justice, not published.

place, sometimes the injured person does not even want to report what happened (either out of fear of the aggressor, out of feelings of shame) so that it is difficult to achieve the standard imposed by the criminal procedure law. These circumstances make the judge's margin of appreciation wider than in other cases.

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ABOUT THE LAW-CREATING POWER OF JURISPRUDENCE. NEW DIMENSIONS, NEW MEANINGS

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Abstract

The present study takes up in its analysis an older concern. The "force" of jurisprudence to create law – whether formally recognised or not – is still a theme of scientific interest, especially from the perspective of the original meaning and substance of the notion of jurisprudence, and less from that which sees jurisprudence as a sum of solutions, an inventory of court practice, an indicator in a report with statistical content.

We are confident of the usefulness of our approach, based on a legal reality that needs to be constantly diagnosed, the study comes as an "update" of a documentation exercise that we carried out a decade and more ago, a context in which the concern for placing jurisprudence in the general picture of the sources that inspire law needed to be verified in a necessary relationship with the exercise of power, the quality of the act of justice being an important parameter for realistically measuring the state's chances of being a state where law reigns.

Thus (briefly) reiterating some of the issues raised at the time[1]*, keeping the treatment established by the general theory of law and circumscribed to our legal reality, the study captures, in a sum of reflections, the recent line of thought on the question of whether jurisprudence, always called upon to keep up with the times, has or does not have the power to create law.*

[1] On the issue, S. Ionescu, *La jurisprudence – source de droit*, in the Annals of the Faculty of Legal Sciences – French edition, no. 2/2004, Bibliotheca Publ.-house, Târgoviște, ISSN 1584-4056; S. Ionescu, *The Significance of the Jurisprudence and the Authority of the Justice and the Great Doctrines regarding the Rule of Law*, in Studii de Drept Românesc, Year 21 (54), Nr. 1, 2009;

Key words: *law, source of law, law-creating power, jurisprudence, relevant jurisprudence.*

INTRODUCTION

Traditionally, when talking about jurisprudence, the general theory of law seems to devote a category of analysis to the problem, circumscribed by the question – *is jurisprudence a source of law or not* – thus claiming, seductively but not realistically enough, that the question requires or at least lends itself to a clear-cut answer.

On this basis, the researcher, the teacher and, later, the learner approach the problem almost arithmetically, grating into patterns a much more complex issue that generates concern, asks for clarification, seeks solutions. Because the problem starts from the abundance of meanings, the need to delimit them, the necessary circumscription of the problem to a geographical space or historical time, variables that necessarily broaden and ramify the content of the treatment.

Because, as Ihering says, "in the field of law (...) history never stands still", over time, the qualification given to the problem of the judge's power to create law takes over from this dynamic and periodically demands an answer, the discussion being usually conducted in the realm of the relationship of pre-eminence between law and jurisprudence, as important forms of expression of law. History has shown that *law* and *jurisprudence* have disputed their role as primary creators of law, the arguments for the primacy of jurisprudence in its relationship with the law being summarized, as a rule, as follows: the *jurisprudence* is more responsive than the law, and its ability to respond more rapidly to the ever-changing needs of social life is indisputable. In antithesis, the law has been criticized for its slow, slow and often inconsistent pace with social dynamics and the variety and complexity of concrete situations, some of which are difficult to anticipate and regulate.

Traditionally, the doctrinal solution, which has been imposed and has endured over time, has looked at the problem by circumscribing it to the two great families of law: in systems of Romano-Germanic law, which are devoted to the written rule, the weight and importance of normative acts in general has increased considerably, thus minimizing the role of case law; in Anglo-Saxon systems, the role of judicial precedent has seemed unquestionable, being considered to this day the primary source of law. Undoubtedly, the notes of differentiation correspond to patterns of cultural experience (*M. Bădescu, 2002*).

Knowing that the work of judging is not limited to a purely mechanical application of the text of the law but requires clarification and adaptation to the new circumstances that arise daily in practice, the task of the judge is not easy. Prima facie or not, it is a certainty that the significance of case law cannot be

ignored, the research effort devoted to the subject in the constructive search for new and new meanings being obvious[2].

Thus, an analysis of the phenomenon, brought up to date, is useful, as the challenges of the historical time in which we find ourselves generate mutations, paradigm shifts or mitigation of some radical approaches to the problem. Despite its particularities, at least one common feature recognized in case law is its compensatory function, a quality that cannot be denied[3].

The approach to which the title invites is a sum of reflections. Following three levels of treatment, the topic first fixes the accepted meaning of the concept, which sees jurisprudence as the study of a social phenomenon, in the sense of the science or knowledge of law, the judgement and/or skill in judging, the exercise of good judgement, of common sense, even of prudence in solving the practical problems that law proposes. Arguments are then brought together that underpin the way in which the role of case law was to be perceived, tracing the evolution of the conception of its place in the table of sources of law and then capturing its precedential value, with a close look at the relevant case law.

If we admit that even today for the law jurisprudence is the source of youth (*H. Mazeaud, L. Mazeaud, J. Mazeaud, 1967, p. 112*) the work of judging remains unquestionably the extent to which the law can be captured in its dynamics. Committed to the premise that jurisprudence is not just "a matter of statistics", it must remain a "criterion – (...) perhaps the most relevant, most convincing and most objective – of the quality of the law" (*I. Deleanu, S. Deleanu, 2013, p. 144, apud M. Hotca, 2019*).

I. LAW, RULES, JURISPRUDENCE – A NECESSARY PLEA FOR A CAREFUL UNDERSTANDING OF THE TERMS

1.1. All too often and undesirably, the notions of law and law are lumped together in a synonymity that is not always proven.

As we pointed out in a recent study (*S. Ionescu, M. Niță, 2022, pp. 33 et seq.*), the reasons for such an approach are (only) partially justified, if we take into account the traditional, majority view, which, when the question of the qualification of the notion of law arises, is still dependent on placing the concept in an established pattern: law as a set of general and binding rules of conduct that

[2] A confirmation of the concern for the topicality of the subject is the research coordinated under the care of the "Andrei Rădulescu" Legal Research Institute of the Romanian Academy, which would dedicate two consecutive annual scientific sessions to the issue, suggestively titled: *The role of jurisprudence in the development of the new Romanian law* (2019) and *The role of the Constitutional Court and the High Court of Cassation and Justice in the configuration of Romanian law after the entry into force of the new codes* (2020).

[3] Either it is called to give elasticity to the law that has become too rigid through written laws and not flexible (in the continental systems), or to limit the freedom of the judge (in the Anglo-Saxon systems).

govern relations between people and whose effectiveness is given by their being charged with legal force, with the power of coercion (*I. Boghirnea, 2023, pp. 29-33*[4]) or any general rule imposed by the public authorities (*Miguel Reale, 1993, pp. 23 et seq.*)[5]. The temptation to look at the concepts together must be sought in the fact that rights and law have the same purpose. But the sign of unconditional equality between them remains reprehensible. The forced synonymy of the concepts is a limitation of what is to be understood by law and, inherently, a distortion of its genetic meaning. Hence the negative consequences that the social environment has signaled and recorded over time (*S. Popescu, 1998*)[6], and unfortunately still does.

Originally, the law was characterized by being a consolidation of customs (practices) and habits of the people; in general, it was not distinguished from custom except by being written down. It was only when it was discovered to be known by all that the anonymous power of custom could be revealed, which presupposed the appearance of law. At the same time, with the formation of law as a legal norm, united with custom, jurisdiction (in the sense of *juris – dictio*). With the passage of time, the law acquires value in and of itself, reflecting the intentional will to order conduct(s) or to structure society in a general, impersonal and objective way.

For our system of law, the treatment of the subject becomes topical in relation to the observation that the Romanian legal reality admits confusion between the two concepts and often slips into the extreme of creating contradictions between them. Confirming such an association as restrictive and, implicitly, harmful, the phenomenon has become even more visible in recent years, and the lack of harmony between law (in the sense of law, of objective law) and rights has become notorious in the context of the pandemic, public discourse reminding us that man enjoys rights prior to any law (as the Greek thinkers used to say) or – as our literature was to say at the beginning of the 1980s – the core of any law are the (...) fundamental rights of man (*D. Mazilu, 1972, p. 32*).

By anticipating the relationship with jurisprudence, it is therefore clear that law must and can only be considered to a certain extent an equivalent of the notion of law, because law – as Mircea Djuvara says – is not a reality in itself, but the life of the people seen from a certain perspective, and the law is realized as positive law only through the filter of jurisprudence (*M. Djuvara, 1995, p. 304*); only understood in this way, the issuance of court decisions in the name of law acquires its proper meaning. The acceptance that is considered relevant to our

[4] The first meaning of the notion, that of *norma agendi* (as an objective). However, the work examines several meanings of the notion of law, established by the legal language.

[5] Qualified as such from the perspective of the process of realizing the right in the form of law.

[6] Relevant in this sense are the examinations regarding the instrumentalization of law and other phenomena circumscribed to the pathology of the rule of law.

approach is only that which sees in law all the forms that the idea of social order can take.

Recent scientific research in the field of general legal theory reaffirms this when, in defining the notion of law, it sees it as a permanent attempt to discipline and coordinate human behavior in order to promote widely accepted values – human dignity, legal security, property, the rule of law (...) the ultimate aim of the intervention of law being to ensure the coexistence of freedoms and to restrict actions that endanger the social balance (*N. Popa, 2020, I. Boghirnea, 2023, p. 15*). More convincingly, the new ideal of law – says Prof. Nicolae Popa – should no longer intervene only post festum but, through the content of its prescriptions, law should be able to contribute to the foundation of a responsible attitude of the individual towards the values defended by law. In other words, the law is required to slowly detach itself from its eminently punitive role and return, as is natural, to its educational role.

This way of looking at things, compared to law, which must be considered the goal, the value parameter, the law remains the means of satisfaction, of bringing about the former, a *juris instrumentum* which, as a natural extension, the work of lawmaking must make available to the addressees.

1.2. Keeping the register of treatment and correlating the concepts, it is useful to talk about jurisprudence from the perspective of its historical age, which must be sought before the birth of the law, because law also existed in primary societal forms (*S. Ionescu, 2004, pp. 22-24*).

It is necessary to recall that, originally, law was manifested either as an emanation of the people, expressed by custom, or as an expression of the ruling authority which created law by means of jurisprudence. Thus, from the perspective of Roman law, this process was to evolve over time, from the confusion between legal, religious and moral norms to the distinction between jus and lex (*E. Molcuț, D. Oancea, 1993, p. 5*), culminating in the birth of *praetorian law*[7] and the establishment of *jus dicere*. Roman law was then to be refined as doctrinal and jurisprudential law par excellence, its experimental character being defining (*M. Reale, 1993, p. 121*), judges being called upon to judge according to the *ratio juris* (*M. Reale, 1993, p. 121*). Even in Greek antiquity, the king had the power to create and apply law, and the latter could only be elaborated by jurisprudence, the solutions given – called *themistes* – being considered divinely inspired.

[7] The role of the praetor was to, when the king fell, take over his judicial powers. In order to avoid arbitrariness, prior to the act of judging, he had to publish an edict containing substantive and procedural rules, which he would consider as applicable law during the exercise of his work of *jurisdictio*. His powers increase starting with the 7th century (Law of Aebutia), and a few centuries later, Emperor Hadrian (129 AD) would bring together the *Edictum perpetuuam*, declaring its provisions binding on all praetors and thus ensuring a constant and uninterrupted jurisprudence. This is how the concept of praetorian law was born.

At a more evolved stage of civilization, the first organs appear, whose specific purpose is known and declared by law. They are called organs of jurisdiction. Unlike other peoples, jurisdiction (jurisprudence) appears in a clear and concrete manner among the Romans, linked to an objective system of rules and powers, and this is when the science of law showed signs of really existing, proceeding to elaborate a law of its own, beyond the creative work of jurisconsults. The history of Roman law also offers an evolutionary path in matters of court procedure, the greatness of its institutions being felt here too[8].

Beyond the mutations occurred in the Roman law, the experimental feature remains essential, which makes it impossible to understand without the value given to practice. In this sense, it has been argued that the *Roman legal institutions evolved in a confrontation with the requirements of practice* (*E. Molcuț, D. Oancea, 1993, p.7*). The most striking example was the fact that the scientific research of the jurisconsults began with the presentation of practical cases, in whose physiognomy they noted the existence of common elements, on the basis of which they then formulated principles of law or general rules.

Jurisprudence also plays an important role in feudalism, regardless of the system of law in which we are placed.

In France, the former Parliaments had the right to draw up so-called "arrêts de règlement" (regulatory decisions), general and permanent provisions with the force of law. Collections of decisions were binding for judges. But the Revolution severely limited the judge's power to make law and dogmatically established the thesis that the *law was supreme*. The authority to create law is now transferred exclusively to the legislature as the representative of the people. The judge is thus recognized as having only the power to interpret and apply the law, for, as Montesquieu says, he remains only *the voice through which the law is pronounced*. This was the historic moment when the principle of the separation of powers was expressly enshrined (Art. 5 of the Napoleonic Code), a principle which rapidly became an indisputable feature of most continental legal systems.

Later, it was concluded that the system of positive law is defined by the fact that the written law is the main source of law, and the judge, established to "judge", is bound by the letter of the law and acts according to "*da mibi facto, tibi dabo jus*". However, it remains debatable to what extent this corresponds absolutely to reality. The work of judging is not limited – nor can it be – to a mimetic application of the text of the law, but requires prior clarification, its adaptation to the concrete situation, through circumstance (*A. Serban, 1996, p. 41*).

[8] From a chronological point of view, the three types of procedure enshrined in Roman law are: the legal action procedure (specific to the ancient era), the formal procedure (specific to the classical era) and the extraordinary procedure (specific to the post-classical era).

1.3. Talking about the relationship between law and jurisprudence and their ability to create law, our more recent doctrine attributed some defining notes to jurisprudence (*V. Hanga, 2000, p. 80*). Starting from the thesis that *jurisprudence fixes positive law*, the law remains abstract, but jurisprudence makes it living law, because the judge ensures the ultimate purpose of the law: *suum cuique tribuere*.

Later (*M. Duțu, 2015*[9]), in the same note and associated with the urge to return to the meaning that "law" has in Romanian[10], it was said that the courts interpret the law and pronounce judgment based on and not in the name of the law. The Constitution reinforces the idea that the judge's task is not exhausted by interpreting the law in the context of the case before the court but involves achieving justice. Because, if the *law and the right are* (...) *indispensable,* so is the application of the law intended to serve the realization of the right in a concrete case.

A concurring view (*A. Gamper, 2023, p. 13*), adds critically that over time no attention has been paid to the subtle distinction between *suum cuique tribuere* and *iustitia est constants et perpetua voluntas ius suum cuique tribuendi*. Therefore, it is not just a matter of "giving to each his own" but also of "giving to each his own law". Putting both sentences in context, jurisprudence is a constant and perpetual will to give everyone the law, and the law itself must give everyone what is his. This does not mean that the law does not change, is not modified, but that there can be no (real – n. ns.) justice without a continuous analysis of the attention that the law must give to the individual, in order to understand and apply it in the way that is most useful to him. The quoted context is about a *suum* understood as equality, an equality perceived not in terms of egalitarianism but of proportionality, based on reasonable justification, based on facts and evidence.

Originally understood in terms of *giving to each his own*, the Roman precept has survived time, its current meaning being circumscribed by a social value associated with the idea of fairness, justice, equity, the necessary link with justice, with the doing of justice. Refined over time, *suum cuique tribuere* will have imposed itself, at least declaratively, as the basis for (probably) one of the

[9] In the speech held during the scientific debates "The Role of Justice in the System of State Powers", organized by the Romanian Magistrates' Association in partnership with the "Acad. Andrei Rădulescu" Legal Research Institute of the Romanian Academy and with the Legal Commission of the Chamber of Deputies.

[10] More than welcomed, the context evokes the necessary distinction between *nomos* (the Greek that denotes the law, in the sense of the law that brings justice) and *lex* (of Latin origin and that rather brings the sum of norms that order society) and, evoking his criticism Constantin Noica – "I took the word from the Romans and gave it the Greek meaning" - attention is drawn to the need to distinguish between law and right, thus emphasizing that "law understood as lex, has no name; as nomos, it acquires (...) the name of the people to which it belongs – and in relation to which the judge (...) can appear as a representative body in the fullest possible sense".

most *vocal* fundamental rights, present in the public discourse of recent years, often claimed as disrespected, constantly reaffirmed.

Initially only applied to criminal proceedings[11], the requirement of a fair trial was later extended to civil proceedings, as confirmed by European normative documents[12]. And our law, both in the fundamental law[13] and in the framework law on the organization of the judiciary[14], expressly regulates the right to a fair trial. By confirming its feature as a veritable *sum divisio*, our procedural codes adopted in 2010[15] confirm its *equitable character*, qualifying the corresponding attribute as a fundamental principle of the process (civil, where appropriate, criminal).

Whereas, today both meanings are accepted: judicial practice and/or judicial precedent, as the totality of the solutions given by the authorities that make jurisdiction, particularly the courts (*I. Boghirnea, 2023, p. 154*) but also that

[11] In the Universal Declaration of Human Rights, a document adopted by the UN General Assembly on December 10, 1948, an attribute of the judicial procedure, in addition to equality, publicity, independence and impartiality of (the tribunal – the so-called court), is the fairness, both in terms of legality and the soundness of the judicial solution.

[12] The Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights, a catalog of fundamental rights developed by the Council of Europe, entered into force on September 3, 1953, in its text periodically amended by Protocols (16 in number until today) honors the principle of the fairness of the process – Art. 6 Para 1 of the ECHR – Every person has the right to a fair trial, (...), which will decide either on the violation of his civil rights and obligations, or on the merits of any criminal charge against him. And at the level of the European Union, the Charter of Fundamental Rights of the European Union (signed and proclaimed within the European Council in Nice, from December 2000) takes over the rights enshrined in texts already established or in other European documents, as well as those produced in the jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights. In its Art. 47, the Charter regulates the right to an effective remedy and to a fair trial.

[13] The Constitution of Romania from 1991, revised in 2003, affirming free access to justice (Art. 21) states in Para. 3 the right of the parties "to a fair trial and to the resolution of cases within a reasonable time".

[14] On the same note, the recently amended framework law on judicial organization (Law no. 304/2022, published in the Official Gazette of Romania, Part 1, no. 1104/16 November 2022) provides in Art. 8 (1) that "Any person may apply to justice for the defense of his rights, freedoms and legitimate interests in the exercise of his right to a fair trial".

[15] In the matter of judicial procedure, the new procedural codes – important components of the reform process that would mark the year 2010 – the right to a fair trial is among the fundamental principles of the process, the same attention being shown both in the matter of civil procedure and in the matter of the procedure criminal. In the civil process, the principle of the right to a fair trial with an optimal and predictable term is regulated for the first time with an express title in 2013 – by the entry into force of the new civil procedure code (Law no. 134/2010, Preliminary Title, provisions of Art. 6 of the Code); the fairness and reasonable term of the criminal process (current wording), a principle reaffirmed in 2014 – by the entry into force of the new Code of Criminal Procedure (Law no. 135/2010, provisions of Art. 8 of the Code).

of jurisprudence (*M. Niemesch, 2019, p. 133 et seq.*) seen also in a comparative and necessary relationship with custom, as a source of law.

1.4. We have deemed it necessary and insisted on the importance of clarifying and understanding the terms used in the analysis, so that we can then argue whether the judge contributes to the legal order and, if so, to what extent and by what means. Although it may seem like academic pedantry, the exhortation to understand and make proper use of the notions of law, law, rule of law, jurisprudence, judicial practice, precedent is rather a scientific and didactic manifesto.

In a reality where communication – often described as a *communicative phenomenon* – is pushed to its limits, often too rushed and without emphasis on the careful expression of the message, attention to putting words in their place seems a waste of time. The influence of the widespread use, without assumption, of digital tools, the quasi-anonymity under which opinions are hidden, the lack of responsibility for the message generates a chain effect, definitely worrying, especially for the field of law, where attention to detail is required more than anywhere else, the cult of rigor derived from the specificity of legal language and the relationships involved.

If law expresses order, the science of law as a science whose object is "the research of concepts, categories, basic notions (...)" (*I. Boghirnea, 2023, p. 21*) must claim an equivalent condition, constantly and firmly recalling the need for qualification and clarification.

We will not refer in what follows to examples of pseudo-scientific discourse being promoted in the public space, often without the endorsement of professionals in the field, but we go closer to the school environment and point out that, not at all beneficial, legal education today lacks the proper leaning towards finding meaning. Whether intended or not, there seems to be an increasing cultivation of a superficial or ignorant approach resulting in a truncated understanding of concepts as important tools of legal language, a language defined by rigor and concision.

Contributing decisively to this state of affairs, the era of digitization was to catalyze it in the last three years. The concern for clarifying concepts is completely outweighed by the so-called quick explanations, most of which are offered on online information/communication channels, a medium that is also more than preferred in school documentation. Without discernment and attention to the source, information comes at first hand and the filtering effort remains absent.

From the perspective of our theme, eloquent is, for example, the proposed "explanation" of the concept of jurisprudence on which an official website (Romanian version), frequently viewed (*https://e-justice.europa.eu/11/EN/case law?init=true, accessed on 4 September 2023*), qualifies jurisprudence with

reference to rules and principles developed in judgments and opinions (...)[16]. These interpret the law, and the interpretations may subsequently be cited by other courts or authorities as "precedents" and/or case law. It is also pointed out in the context that the influence of case law can be important in areas that are not sufficiently regulated or that are unregulated. This means that, *in certain circumstances, courts can also create legal rules*.

Subject to a literal and, implicitly, lacking translation of the text, which shows its shortcomings, in the basic information posted on the portal, it is also stated that "in some countries, case law is a major source of law and the decisions of higher courts of appeal – i.e. appeals n.n. – are considered normative, i.e. they lay down rules that should be applied (especially in countries whose legal system is based on common law n.n.). In many other countries (especially those following the civil law tradition derived from Roman law), courts are not obliged to apply the rules and principles of case law".

Beyond the problem of dividing the issue according to the delimitation between the two great families of law in which the pre-eminence of the law and/or, as the case may be, of case law as a source of law is disputed, such a synthesis seems like a play on words. To the uninitiated (even as a law student), the proposed definition guarantees confusion and fuels a dangerous superficiality in the study. However, a commitment to conceptualization must be the first prerequisite for research, even desk research.

Given the notorious appetite of the learner of an (including) university legal school program (student or doctoral candidate), and equally of the young practitioner for documentation of this kind, a supposedly "enlightening" piece of information on the problem, offered only a click away will deepen the superficiality, overshadow or postpone, with certainty, the necessary need for reflection, which should accompany its study.

The issue under discussion is part of a broader process, because the crisis manifested on many levels of social construction means, for the Romanian environment, also a crisis of concern for study (in school and later), for science in general, for the science of law in particular, which is today – as has been said – far from being appreciated as it once was, at its fundamental value. From this perspective it is realistically stated[17] (*M. Duțu, 2022*) that simply observing the quality of legal reactions to the challenges of reality on current big issues (the Covid-19 pandemic, European integration or the accommodation to the challenges of globalisation) shows a deficit of legal knowledge. It is also pointed out in the context that, reduced to the role of an appendix of technical evaluation (...), legal research is far from the required level of scientific research.

[16] It is also stated in the context that, when judging a case, the courts interpret the law, which contributes to the creation of jurisprudence.

[17] Prof. Mircea Duțu – Director of the "Acad. Andrei Rădulescu" Legal Research Institute of the Romanian Academy

In the same context, invoking our interwar doctrine (*M. Cantacuzino, 1921, pp. 14-16*), it is stated that it is necessary to return the science of law to fundamental research, to return to those social realities that constitute the ultimate reason and foundation for the rules of law (...)[18].

In the same spirit, Prof. Nicolae Popa, in the *Foreword* to the most recent edition of the work dedicated to the general theory of law (modestly qualified, university course), letting it be understood that the school of law has its sublimity only if it is accompanied by tenacity and effort, formulates an exhortation when he states that young students, understanding that per aspera ad astra, know that the study of law requires method, system and sagacity, because the study of general theory will mean a beginning in learning the legal profession (...), in such a way as to make the exercise of the profession a lesson of life and truth (*N. Popa, 2022*).

Although it is superfluous to argue further, in line with the above opinions, we also argue that it is important to define and understand the notions in order to be able to work with them adequately.

II. THE PLACE OF CASE LAW IN THE SOURCES OF LAW, BETWEEN YESTERDAY AND TODAY

2.1 We do not propose in what follows a treatment in terms of historical development, nor a detailed incursion into the current of thought[19] that have sought to order and even prioritize, one by one, the sources of law, seeking its place in jurisprudence.

We appreciate of interest a careful look at how the subject has been approached, particularly in our (but not only) relatively recent and recent literature in order to then reveal the current state of affairs.

Starting from the common language, which attributes to the expression "source" the meaning of origin, which serves something, (the place) from which something arises, legal theory uses the term to designate in particular those modes of formation of legal norms, those forms of expression of law (*S. Popescu, 2000, p. 143*), forms that the reality from which law "springs" takes on. The delimitation

[18] From this understanding, four essential requirements or features and – we would say - four guarantees for a genuine scientific research can be derived: the requirement to be critical ("since for each norm science has to ask whether it corresponds to the true needs and intentions as they manifest in the collective consciousness of society"), historical ("since customs and laws are or must be the product of the experience of past generations, increased by the capital of thought and experience of the current generation"), comparative ("for so that from the examination of the norms adopted by the various civilized peoples one can recognize what is somewhat universal") and, above all, positive ("for the exact knowledge of the norms") – Ibidem.

[19] Correlated with interpretation techniques and representing great schools and currents of thought, the conceptions regarding the issue were centered around several theories: *the finalist school* - Ihering, *the current of free research* – François Gény, *the movement of free law* – Ehrlich, Fuchs, *the existentialist current* – G. Cohn.

also corresponds to a distinction, established doctrinally, according to which there are two important meanings of the notion of source: material (or source in the material sense) and formal (or source in the formal sense). In a more nuanced orientation, material source means the study of ethical motives and economic facts that condition transformations in society and require a new normativity (*M. Reale, 1993, p. 119*). Calling it open to criticism, Reale blames the harsh distinction between the formal and the material source, arguing that, instead of clarifying, it gives rise to great points of ambiguity in legal science.

About the material sources, often called real sources, it has been said that they sum up the factors of configuration of law that determine the emergence of law (*Gh. Mihai, 2002, p. 183*)[20], those that correspond to the needs of social life in the elaboration of positive law, or, in other words, that condition the orientation and content of law (*S. Popescu, 1999, p. 199*).

The identification of the sources of law is linked to the process of its elaboration, being considered as decisive the moment of its establishment or recognition by the state in a certain form, a way of determination which would in fact allow a distinction between direct and indirect sources of law; the former – direct sources – being particularized by the fact that they are directly elaborated by the state organs designated with these attributions, and indirect sources being those recognized or sanctioned by the public power, in this second class being also included jurisprudence.

It can thus be argued that, from the point of view of the substance of the law, of its value, the sources are the means by which the law is produced and known in practice. It is precisely for this reason that the current equivalence between the sources of law (even formal ones) and normative acts seems forced. In other words, in the legal system there are, in addition to sources and acts, other phenomena which produce normative effects, but which are not normally classified as sources[21].

From the perspective of its traditional examination and qualification, jurisprudence has been consistently listed among the sources of law, its quality of being or not being a formal source being, however, received differently depending on whether we are in the Anglo-Saxon or the Romano-Germanic basin of civilization.

2.2 The premise from which we start is that the problem of the study of sources cannot and must not be confined to a rigid system of definition, being

[20] The author gives a generous definition to the concept when he understands by material sources "the sum of *natural conditions* (climate, relief, soil and subsoil wealth, population, density, life expectancy index, ethnicity, race) and *socio-psychological* (occupational structure, social cohesion, mentality)".

[21] They are brought as examples, beyond the judge's decision, legal contracts that bind the parties with the power of a law – established principle and unanimously known as *pacta sunt servanda*.

convinced of the truth of the statement that the study of the sources of law is dependent on the dynamics of the legal order.

In our doctrine, the debate on the qualification of jurisprudence as a formal source of law was to be accentuated in the years after 1990, in the historical context in which the former socialist countries, tending to reclaim their original specificity, tried to return to the matrix and, implicitly, their conceptual repositioning in the Romano-Germanic family of law. It goes without saying that in socialist law systems judicial practice was not recognized as a source of law. Our specialist literature (*V. Negru, D. Radu, 1972, p. 17; A. Naschitz, I. Fodor, 1961, pp. 71-92*) has stated that the question of whether or not judicial practice is one of the sources of law is settled – analyzed n.n. – in the negative. The solution given to this problem in our socialist civil procedural law is based on the principle that judges obey only the law and decide according to their inner conviction and guided by the laws in force and their socialist legal conscience.

In the context in which Romanian law was looking for improvement after the change of political regime, the subject is in the attention of research in the field causing great scientific interest (*B. Diamant, 1999; S. Popescu, 1999; I. Deleanu, 2004*). On this occasion, the concept of the formal source of law claimed a redefinition. In a broad vision, it was associated with (...) that legal provision, custom, case law or legal doctrine taken into account by the court in resolving a dispute (*B. Diamant, 1999, p. 197 et seq.*). In reply (*S. Popescu, 1999*), it was considered that such a pronounced re-dimensioning risk losing sight of the fact that, in essence, the sources of law cannot be understood otherwise than as forms in which positive law manifests itself.

In the years that followed, the issue of knowing the extent to which case law is or is not a source of law from the perspective of the classical scheme of springs was offered a unitary solution, legal theorists enter the case law in the inventory of sources, when they speak of the broadest meaning of the term and, in particular, when they do not report their qualification to a family and/or to a system or other of law (*M. Djuvara, 1995, p. 453 et seq.*). The qualification as a formal source, however, would provoke – and still do – interrogations, worries, conditions.

From this perspective, the theory of the sources of law has constantly shown that it is essential to identify them only in relation to the historical, social circumstances of various countries that determine the processes of law-creating. It is thus understood why, although in general the same lines, the sources of law have known an evolutionary path and are indisputably suitable for circumstantiation (*I. Craiovan, 2001, pp. 70*) because they "view the legal systems in different eras and countries".

The explanation for the existence of this "plurality" of the sources must be sought in the multitude of social relations it implies and, later, in the variety of ways of organizing and governing society. And this is because the formation of

large families of law is the answer given to a path, centered around several fundamental sources whose purpose was to model the different legal systems (*M. Bădescu, 2001, p. 10*).

Claiming his membership of the Roman-Germanic family of law and seeing its similarities as a philonist, contemporary French doctrine re-evaluated the question of whether the case-law could not be considered a source of law, against the background of the phenomenon felt at the end of the 19th century, that of the aging of European civil codes. Speaking of the riot of the facts against the codes, the courts of the time would be forced to rule on unregulated matters in the code or to order where the code was obsolete[22].

The debate on the subject[23] would bring together, in a collection dedicated to the issue *("Archives de la philosophie du droit", 2007*)[24], several points of view that supported the need to re-evaluate the radical option, conservative until then, in favor of recognizing "the innovative activity of the courts". Reunited under the heading "*La création du droit par le juge*"[25], the communications presented issue opinions, most of which support the recognition of the normative value of the jurisprudence.

Thus, the coordinator of the works (*Guy Canivet*[26]*, 2007, pp. 7-32*), constantly concerned with the position and role of the judge in current law, it oscillates between the purely interpretative role of jurisprudence and the creative role of law, finally opting for the corroboration between the activity of the legislator and that of the judge, but giving the first word. From the same perspective, supporting the need to mitigate the current that took the jurisprudence out of the area of formal sources, seeks a solution to the heated debates in France

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[22] In order to compensate for the lack of review of the codes, Prof. Henri Capitant brought arguments in the sense of considering jurisprudence as a source of law; François Gény was able to lay the theoretical foundations of the method of free interpretation, which later gave rise to the "school of free law" in Germany. In the second half of the 20th century, to this phenomenon was added the reference to and the increasingly frequent comparison with the common law system, where judicial precedent had its indisputable recognition in the hierarchy of sources of law.

[23] Colloquium organized by the Academy of Moral and Political Sciences, Paris XIII University, Center for Research in the General Theory of Law and the French Association for the Philosophy of Law, January 25-26, 2006 – details in the review tab signed Mircea Dan Bob, ****La création du droit par le juge*, in «Archives de la philosophie du droit» (50) 2006 Dalloz, Paris, 2007, published in Studia Universitatis Babeș Bolyai, Jurisprudentia, no. 2/2007.

[24] Volume coordinated by Guy Canivet, former president of the French Court of Cassation, currently member of the Council of State, passionate researcher of jurisprudence, its role and possibilities for its evolution and improvement. Recent research is of a comparative nature, with a special emphasis on the Anglo-Saxon system.

[25] Two of the three sections of the event are dedicated to the issue, the titles speak for themselves: *The general theory of the creation of law by the judge* and *The law-creating role of the French courts*.

[26] In the communication entitled *Activisme judiciaire et prudence interprétative. Introduction Générale*.

on changes in case law and argues that, although legal certainty is being challenged, the Praetorian power of judges should not be limited (*X. Lagarde, 2007, pp. 77-88*). Although with majority, the views expressed show openness to reconsider the creative power of the judge in his work of judgment, thus confirming the shaping of a current of thought.

A radical paradigm shift is not unanimously welcomed in our literature either, but here the problem is nuanced. Thus, Professor Nicolae Popa, faithful to the separation of powers in the state and concerned with the balance that role-taking must actually make, exercise caution when stating that the recognition of the right to direct normative elaboration as a pre-rogative of the courts would mean forcing the door of legislative creation, thus disturbing the balance of powers (*N. Popa, 2022*).

More than a decade ago, the opinion – which we share – was supported in our doctrine that in the systems of Roman-Germanic law, without prejudice to the binding nature of the law, the case law, however, has the character of a persuasive source of law (*D.C. Dănișor, I. Dogaru, Gh. Dănișor, 2006, p. 147*). Decisions in principle issued by the supreme court were taken into account. In the same matter, referring to solutions of the same nature, but called decisions of general value, it is then invited to mitigate the rule that case law does not have a creative role in law (*N. Popa, M.C. Eremia, S. Cristea, 2005, p. 45*).

We also advance as necessary (*S. Ionescu, 2009*), giving up the sharp way of dealing with the problem from the perspective of its qualification as a formal source of law, considering that it was neither constructive nor realistic, given that the power of case-law to create law was a certainty, without absolutizing its importance and without proposing another line of hierarchy. Nor could the insistence on the different valorization option caused by the delimitation between the two large families of law be supported in the same way, whereas there is already a slowdown in this delimitation. We did not then support the absolutization of the valorization of case-law, in terms of the exclusion of other established sources of law, for admitting that there is only case-law practice, the right would be reduced to a simple case study and would lack legal certainty (*V. Hanga, 2000, p. 27*).

In recent years, opposed to the traditionalist conclusion that the case law is not a formal source of law, opinions that do not share "the manifest distrust" have been expressed, motivating that the modern trend is one of approach and interconnection between the two major legal systems (Germanic and Anglo-Saxon). On this basis and reaffirming as necessary the exit from the rigid labeling promoted by the classical scheme of the sources of law, resonating with the spirit of a necessary revival of the case law (*I. Deleanu, S. Deleanu, 2013*) the immediate exhortation is "to leave behind prejudices and to see the fact that even in the Romanian judicial reality the jurisprudence has acquired an increasingly

important role (...)", anticipating the necessary reconsideration of the jurisprudence as a source of law (*B. Oglindă, 2015, pp. 120-121*).

Confirming the above, today, in the face of a reality in a more accelerated dynamic than ever and crushed by turmoil, we reiterate with even more conviction the point of view, convinced that a balanced view of the issue is only that of complementarity and usefulness not only of law and case law, but of all sources of law, historically consecrated and still manifested[27].

Examples, eloquent for the problem-solving line is the relationship between jurisprudence and doctrine (except for the differentiation note given by the character of the interpretation[28]). In practice, the arguments of authority are to be of particular importance when the opinion can help the judge, thus being the dominant doctrine. In other words, it is essential to ensure the relationship between jurisprudence and doctrine because the interpretation of the law belongs to the judiciary, but the discernment of the texts of law and the specification of the exact meaning in which they must be understood are essential attributes of the specialized literature. Hence the necessary complementary character of the two forms of expression of law.

In a summary attempt and from the perspective of the difficult-to-contest virtues of the case-law, promoting an argument to support our view, we reaffirm that: jurisprudence gives life to abstract law (which often takes the form of the law); jurisprudence interprets law, thereby ensuring the unitary law enforcement; the jurisprudence is called to "fill in the gaps" of the text of law, thus filling in the gaps through the use of analogy; jurisprudence creates new legal constructions and contributes to the implicit abrogation of provisions that have become contradictory or obsolete; jurisprudence can legitimize the promotion of new legal actions, even in the absence of normative provisions to regulate them (as the judge is not allowed not to pronounce on the actions referred to him); jurisprudence inspires the legislator and guides his line of legislation.

III. JURISDICTION AND AUTHORITY OF JUDICIAL PRECEDENT. RELEVANT JURISPRUDENCE SOLUTIONS

3.1 As we have already shown, the legal and judicial geography of the world still today bears the imprint of the compartmentalization into large families of law, having in their content large systems of law. Two of these are of particular interest for our approach: the family of the Romano-Germanic law and that of the Anglo-Saxon law. Current works on the general theory of law reaffirm through

[27] The law (today in a broader sense, bringing together both domestic and European normative acts), jurisprudence, custom, doctrine, principles of law.

[28] This is explained by the fact that the mandatory interpretation is only that reserved for jurisprudence. In contrast, the doctrinal interpretation does not have an imposed character, but its theoretical value cannot be diminished because, although "it does not oblige the judge, it can guide and enlighten him".

their thematic content and propose for study the delimitation of the great families/systems of law (*N. Popa, 2020, pp. 46 et seq.*; *M. Bădescu, 2022, pp. 52-68*; *I. Boghirnea, 2023, pp. 62-93; Cornelia Ene-Dinu, 2022, pp. 16-35*). In accordance with this delimitation, it is proposed not only the circumstantial examination of the issue of the qualification of jurisprudence as a source of law – which has already been examined – but also of the authority of the judicial precedent.

The problem of the normative value of the jurisprudence is to deal with the precedent both from the perspective of the common law system and from the perspective of the new orientation of the Romano-German law systems.

3.2 Thus, in the family of Romano-Germanic law systems[29], also called Latino-continental[30] (*M. Reale, op. cit., p. 119*), are included the legal systems of countries such as France, Spain, Italy, Germany, Greece, Romania. What is promoted in these systems is a legal order characterized by the primacy of the legislative process (*B. Stark, H. Roland, L. Boyer, 2002, pp. 328 et seq.*), the source of law with the highest legal significance being here the law.

In civil law systems (Romano-Germanic, written, codified) the doctrine of *stare decisis* is not recognized. Nevertheless, the practice is widespread here too, according to which solutions given in similar cases are often invoked in the resolution and reasoning of jurisprudential solutions.

Moreover, in relatively recent works our legal literature proposes to treat the issue and the force of precedent in continental legal systems as well.

Thus, the problem of the law-creating power of jurisprudence is that promoted by French-language literature (*B. Stark, H. Roland, L. Boyer, 2002, pp. 332-337*; *L.J. Constantinesco, 1998, pp. 183 et seq.*), which places jurisprudence between: *de jure* denial and *de facto* recognition. Approaches that resonate with this can also be found in the Romanian legal doctrine of the last decades (*D.C. Dănișor, I. Dogaru, Gh. Dănișor, 2006, pp. 146 et seq.*; *I. Deleanu, 2004, pp. 12-36*).

On the one hand, the arguments that support the de jure denial of the normative value of jurisprudence aim, among other things, at the impossibility for the judge to rule through general solutions and regulation, the principle of separation of powers and the independence of judges (*I. Deleanu, 2004, p. 15*)[31].

[29] From a historical perspective, it should be recalled that the Romano-German legal system went through several significant stages in its evolution: the first one is qualified as the period of the adoption of the Constitutions, a specific stage of the 18th century, which was followed by the period of codifications (civil, commercial codes), specific stage of the 19th century; a third stage would be that of the adoption of International Treaties, specific to the 20th century, so that, at present, the system would go through the period of globalization in all its aspects (spatial, legal, economic).

[30] Expression frequently used in Hispanic literature.

[31] In relation to the last two statements, Prof. Ion Deleanu also adds arguments regarding the text that regulates a ground for civil appeal (Art. 304 Para. 4), based on exceeding the powers of the

On the other hand, the *de facto* recognition of the normative value of jurisprudence is supported by at least two arguments: the role that the law confers on the judge, that of filling the gaps[32], and the recognition of the role of the judge to eliminate possible antinomies, contradictions, means intended to give the coherence of the legal order (*I. Deleanu, 2004, p. 25*).

Beyond these, however, above all, the judge is called to adapt the law to the (always new) needs of life. And this prerogative would make possible jurisprudential creations, commonly known today[33].

3.3 It has been said about jurisprudence that, insofar as it contains judicial arguments, it can be an optional source of law that can be imposed on the subsequent judge, primarily through the power of argument, through the judicial reasoning it contains, but also through the authority of the court from which it originates (*B. Oglindă, 2015, pp. 124 et seq.*).

Evoking the authority of a court and, implicitly, the power of judicial precedent of the solutions it pronounces, thus charging them with a binding character, we can dimension the problem known as relevant jurisprudence. The qualification is not general but corresponds to a specific category of judicial practice solutions, derived both from the nature of the case and especially from the nature of the jurisdictional entity that issues them.

In our legal system, the category brings together jurisprudential solutions viewed as exceptions to the rule that excludes jurisprudence from among the formal sources of law. Producing binding jurisprudence for the courts and having only *ex nunc* effects, intended to guide the practice of the courts (lower, as the case may be), the solutions in this category are limited to the following:

- the solutions given by the supreme court of the country (the High Court of Cassation and Justice), by virtue of its power to ensure the Romanian cassation (appeal in the interest of the law (RIL) and the preliminary ruling for resolving a matter/problems of law (HP)) i.e., in the work of standardizing judicial practice at the level of the entire system, assigned exclusively to the supreme court of the country (*Cornelia Ene-Dinu, 2022, pp. 47 -141)*;
- the solutions given by the Constitutional Court of Romania, a special jurisdiction with exclusive competence in the matter of constitutionality control of laws;
- the solutions given by the European Court of Human Rights, the European jurisdiction under the auspices of the Council of Europe, with specialized competence in human rights issues;

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judiciary, as well as the nature qualified as "illogical, even bizarre" – relatively to "merging in one and the same authority – the court – the prerogative to create the legal norm".

[32] As an example, the judge is called upon to choose between various possible definitions of notions of a general nature and with an insufficiently determined or even undetermined content – expressions such as "good morals", "public order", "good faith" "equity" are commonly known.

[33] Significant are the examples that concern shared property or the issue of tort liability.

- the solutions given by the Court of Justice of the European Union, a jurisdiction under the auspices of the European Union, in the issue of preliminary references.

The essence of the problem is that of the standardization of judicial practice (*D. Lupașcu, M.A. Hotca, 2009, pp. 222-223*), which does not need to be demonstrated, the trust of citizens in the act of justice being based, among other things, on the constancy of the solutions that the judges adopt in similar cases. *Per a contrario*, a non-unitary practice is a negative signal, a real source of dissatisfaction for the litigant and a big question mark in terms of predictability in justice (*S. Ionescu, C. Mătușescu, 2010, p. 117*).

Speaking about the need to unify the jurisprudence and the obstacles that make it difficult to achieve, judicial Romania of the first decade of the 21st century was illustrated in gloomy colors: normative inflation, the questionable quality of some laws, the large number of pending litigations, the insufficient specialization of some magistrates, the absence of effective means for the unified interpretation and application of the law, the organization of courts and the distribution of powers are some of the possible causes of non-unitary practice (*D. Lupașcu, M. A. Hotca, 2009, p. 222-223*)p. In the time that has passed since then, some of these are manifested in the same way or more acutely, others have been mitigated, and others have been added to the list, being hardly predictable at the time of the above "inventory".

An adequate treatment of the problem in terms of the meaning of the relevant jurisprudence involves a multidisciplinary look since the relevance of the judicial practice with authority cannot be viewed in isolation but only by reference to the factors that configure it. That being the case, the examination framework should follow at least several coordinates, some being challenges to which justice must respond, other difficulties that it must overcome. They are hard to ignore: an unbalanced, (quasi) permanent and implicitly harmful legislative reform in the matter of the organization of the judicial system and court procedures, a real problem of allocation and use of resources (especially human) in the current Romanian judicial system[34], an uncertain balancing of the risks and benefits that the digitization of the judicial system (can) bring with it, associated with the increasingly present tendency to capitalize on AI (artificial intelligence) in justice (*S. Stănilă, 2020, pp. 111-127*), the pressure exerted as effect of the monitoring of the Romanian justice process until recently[35]. This if we refer to the most visible

[34] Notoriously, the current personnel crisis in the Romanian justice system would deepen worryingly in recent years, in the context of the adoption of some measures whose effects, in the short and medium term, do not seem to have been anticipated and, implicitly, assumed. Today, they are trying to respond to such a reality with a rapid infusion of personnel (for details, https://inm-lex.ro – the official website of the National Institute of Magistracy).

[35] Through the Cooperation and Verification Mechanism (MCV) – established by the European Commission in 2007.

and which concern the authoritative jurisprudence issued by the supreme court. No less important are the challenges posed to the constitutional jurisdiction and its role as a negative legislator, as well as those aimed at the inherent judicial dialogue between our national law and European norms, whose jurisdictional protection is provided by the ECHR and the CJEU (*C. Mătușescu, 2020, pp. 35-37*; *C. Mătușescu, S. Ionescu, 2018, p. 155*).

Since the size of the analysis so far would not allow the necessary developments in the present study, the aspects indicated here will constitute as many treatment points in a future scientific project.

CONCLUSION

Starting from the idea that an important part of law is of jurisprudential origin, the prerogatives of jurisprudence must be recognized today as being much greater.

Viewed historically and from the perspective of belonging to the Roman-German family of law, the traditional location of jurisprudence in the picture of the sources of law is an expression of fidelity to the requirements of the principle of separation of powers. Absolutizing the law's truth value or its fiction hidden behind the thesis that only it – the so-called law – it is the expression of the will of the people, jurisprudence cannot claim to be a formal source of law, nor must it precede the law that has this character. Still, even its placement under the law cannot be accepted without reservations.

Bringing the issue up to date, in the context of normative inflation that cannot guarantee the quality of the law – because the value criterion of the legal norm must be the quality and not the quantity in which it is produced – and when the legislator appointed by the people and having the immediate legitimacy of the law (the Parliament - n.n.) too often delegates its powers to the executive power, and the latter assumes too quickly (motivated by "emergency" and legislating hastily, sometimes without sufficient consultation) the judge of the country, whoever he may be, although not creates legal norms in the sense of the law, being held to give an answer to the litigant, creates law called to make juris dictio.

Arguing that it is essential to place the problem in a correctly understood conceptual framework, our study dedicates space to the problem of the demarcation between law and right, emphasizing the need to get out of the cliché register in which things are often viewed. Hoping not to have fallen into criticism, the discourse is located in the realm of the general theory of law, a science that claims the accuracy of law and which has the task of opposing the majority tendency that finds attention to clarification, for careful definition of terms.

Paraphrasing a recent diagnosis of the reality we live in (M. Duțu, 2023), which observes – quite rightly – that today the world is on the threshold of a civilizational transition (...) which involves the transformation of the model of

thinking (...), of existing individually and collectively, scientific research is called to ensure the translation of "transition" and "transitions" into the language of specific legal concepts, we join the opinions that invite a radical paradigm shift in the issue of the role of jurisprudence within the sources of law.

Without insistently looking for which of the sources should be given preeminence, in the current context, the way could be their necessary complementarity (in particular, law and jurisprudence), a complementarity doubled by the need for proportional assumption of responsibility for a fair placement the law in its position, having the conviction more fully than ever that, although it is not law/legal-making, jurisprudence is, without a doubt, law-creating.

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MORE THAN WORDPLAY: HUMAN GEOGRAPHY AND HUMAN INTELLIGENCE

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Abstract

This article delves into the critical role of geography in military operations and intelligence, examining the significance of geographical features in military strategies and engagements. The focus is directed towards human geography and its intricate connection with intelligence operations. Population demographics, cultural diversity, and societal dynamics play a pivotal role in shaping intelligence collection and analysis.

The final part of the paper takes a forward-looking perspective, exploring the evolving landscape of Human Intelligence (HUMINT) within the anthroposphere of the future. It delves into how intelligence agencies adapt to an ever-changing world, where geography remains a constant but is coupled with digital advancements, global connectivity, and emerging threats.

Key words: *Human Geography, Intelligence, HUMINT, society, culture.*

INTRODUCTION

I. THE IMPORTANCE OF GEOGRAPHY IN THE MILITARY

Geography plays a crucial role in military operations, with a significant impact on how militaries plan, prepare, execute, and adapt their campaigns. It shapes the battlefield, impacts logistics, and influences the overall strategy.

The physical features of the land, such as mountains, valleys, rivers, forests, deserts, and coastlines, greatly influence military actions. Terrain can provide natural barriers or obstacles[1] and defensive positions, or create challenges

[1] Certain geographic features, such as narrow straits or mountain passes, can be strategically important chokepoints. Control over these chokepoints can exert influence over trade routes, maritime traffic, and regional stability.

for troop movement, facilitating or impeding maneuvers. Based on the distance and proximity of its features, the terrain conditions the distance between military assets, bases[2], and military engagement areas, affecting the speed of deployment and logistics. Proximity to potential adversaries can influence readiness and response times. Geopolitical considerations, such as the proximity of friendly or hostile nations, also play a role in military planning.

Further, climate conditions can have a profound effect on military operations. Extreme temperatures, precipitation, fog, and other weather-related factors can impact visibility, mobility, and the performance of equipment. Military planners must consider seasonal variations and weather patterns in their strategies.

The network of communication is essential for combat support and services support. The availability of roads, railways, ports, and airports influences the movement of troops and supplies. Inaccessible or hostile terrain can disrupt supply lines and make operations more challenging. In many circumstances, accurate maps and navigation tools are essential for operations. Geographical information systems (GIS) and satellite imagery help military planners and commanders make informed decisions.

Understanding the natural features of the terrain is crucial for camouflage and concealment tactics. Military units can use the terrain to hide and minimize their visibility to the enemy, even though the extensive use of drones equipped with various sensors requires a more sophisticated mix of passive and active cover and concealment measures.

Ultimately, understanding the cultural and human geography of a region is important for military operations, particularly in counterinsurgency and stability operations, but also in the light of hybrid warfare. Factors like population density, ethnic composition, religious distribution, history, local customs, mass-media coverage, social media preferences, and political affinities can impact strategy.

As we have shown, all the geographical features matter in a military campaign. The focus on various factors is determined by the level of reference[3] *(Mattelaer, 2018, pp. 339-356)*, the military objectives, and their impact on the military decision-making process. Even more, in a comprehensive approach scenario, military and civilian planners may approach differently the importance of geography to their objectives *(Shetler-Jones, 2016)* even though seeking a common end state in a designated area of responsibility; anyway, this is an

[2] Bases may be situated in strategic locations to project power, defend against potential threats, or support operations in specific regions.

[3] As an example, throughout history, the relevance of geography in NATO defense planning registered a pendulum movement, from treating geography as the central organizing principle within the Alliance to downplaying its role in favor of functional considerations, as Mattelaer demonstrates (Alexander Mattelaer, *Rediscovering geography in NATO defense planning*, in Defence Studies, issue no. 3, pp. 339-356, 2018)

opportunity for best practices sharing and learning, with tangible benefits for both parties.

Eikmeier and Iova advocate NATO's approach to factor analysis [4] *(Eikmeier, Iova, 2021, pp. 65-72)* , outlining an effective design for analyzing the "*what*" (statement with operational implications), in order to conclude with a "*therefore*" (figure 1) – achieving understanding and promoting a follow-up action associated with intended effects.

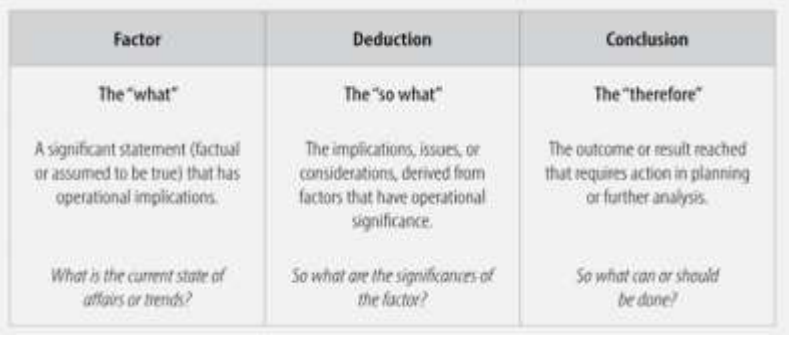

Figure 1 The "What," "So What," and "Therefore" (Joint Operation Planning Group Handbook, 2019, apud Eikmeier and Iova)

Understanding is defined as *the perception and interpretation of a particular situation to provide the context, insight, and foresight required for effective decision-making*[5]*;* in the military context, this is based on knowledge, where Intelligence has a significant stake. Commanders must articulate coherent intelligence requirements to develop understanding, but the evolving nature of the assessed factors makes understanding perishable[6]. The continuous analytical cycle builds on clarifying intelligence leads in the whole spectrum of interest and updates the common operational picture, a real-time situational awareness.

As aspects related to the human security of the population and local communities gained weight in assessing the outcome of an operation (*Kis, 2022, pp. 56-65),* pointing out the populace either as a disruptor of the military action (through opposition, actions to protect communities, etc.) or a facilitator (friendly atmospherics, support provided, etc.), civil considerations are paramount in any planning activity, alongside the physical terrain. If, at the tactical level, the METT-TC analytical model (figure 2) is the most relevant, the civil

[4] https://www.armyupress.army.mil/Portals/7/military-review/Archives/English/SO-21/eikmeier-factor-analysis/eikmeier.pdf
[5] Concise Oxford English Dictionary, 12th edition, 2011
[6] UK MOD Development, Concepts and Doctrine Centre, Joint Doctrine Publication 04, *Understanding and Decision-making*, second edition, December 2016, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/584177/doctrine_uk_understanding_jdp_04.pdf, p. 11

considerations analysis becomes more scientifically oriented at the operational level, where another model has prevalence – the ASCOPE[7]-PMESII(PT)[8] matrix.

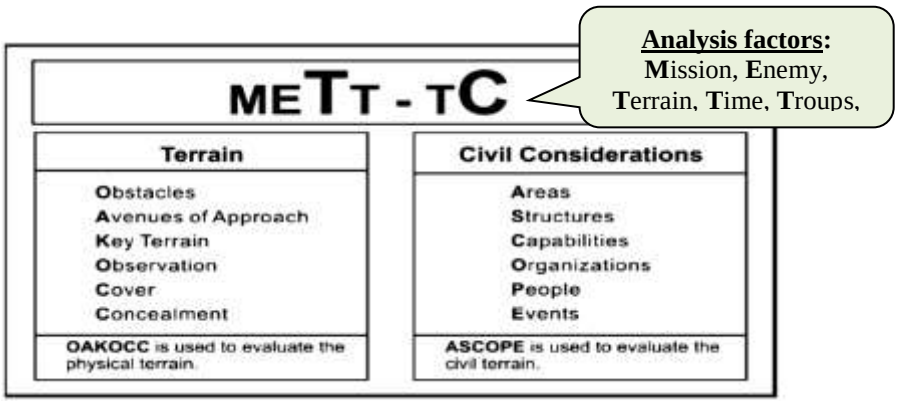

Figure 2 Analysis factors: physical terrain vs. civil considerations (human terrain)
(apud FM 3-05.40 (FM 41-10) 2006, fig. 1-3, 1-4)

Civil considerations through the ASCOPE lenses consist of a series of queries on the PMESII(PT) operational variables, identifying the key factors („*What are the factors in the Civil Environment that will significantly affect friendly forces - positively and negatively?*") and their relevance („*How will each factor affect the friendly forces?*")[9]. A human geography approach may offer effective answers to these questions.

2. HUMAN GEOGRAPHY AND INTELLIGENCE

NATO understands the intrinsic relation between territorial systems and communities and analyzes human geography features that may become a threat to the Alliance's values and *modus operandi*, at various levels. Technically, human geography encompasses a series of categories that contribute to shaping a complex landscape of a reference area: cultural geography, development geography, economic geography, geography of health, history geography, geopolitics and political geography, religion geography, social geography, transportation geography, tourism geography, urban geography, and contributes to other connected reference systems, like human security geography *(Kis, 2012).*

Huggett and collaborators *(Huggett, Lindley, Gavin, Richardson, 2004)* show that physical geography, from the human perspective, is focused on three main areas: *the natural sphere* (the ecosphere unaffected by human activities), with its biological and physical structures and processes; *the mental sphere*

[7] area, structure, capabilities, organization, people, and events
[8] political, military, economic, social, infrastructure, and information (physical terrain and time)
[9] https://www.trngcmd.marines.mil/Portals/207/Docs/wtbn/MCCMOS/Planning Templates Oct 2017.pdf?ver=2017-10-19-131249-187

(noosphere); and the *anthroposphere* (the ecosphere influenced by humans), as a product of the first two categories. Based on this taxonomy, human geography operates several fundamental concepts: space, region, regionalization, place, location, territory, territoriality, and nation *(Neguț, 2011)* that support mapping cultures, behaviors, and interactions with the environment, and ultimately identifying ASCOPE/ PMESII dynamics (elements of socio-cultural design) in a given area. The anthroposphere mediates the interrelations between individual actions and evolving ASCOPE/ PMESII patterns and arrangements, but also how spatial configurations are themselves constructed through such processes.

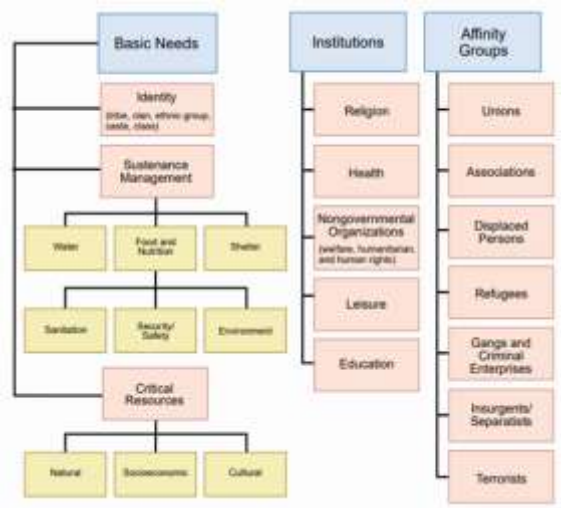

Figure 3 Social subsystems (J.P. 2-01.3, p. D-13)

In this spectrum, a selection of key elements will be represented in the joint intelligence preparation of the operational environment (JIPOE [10]) as features of the physical terrain, but several research areas and topics will shape key aspects of the civil considerations. Joint Publications 2-01.3 provides, in Appendix B, Section D, a comprehensive model detailing PMESII subsystems; the social subsystem (figure 3) is illustrative of the complexity and dimension of the Intelligence support provided to the operational planning. This is just a cluster of problems from the **spatial organization of human activities** and the relationships between people and their environment, designed under the aegis of human geography. Imagery (especially in a GIS layered representation of various overlays that reconstruct the key aspects for analysis – figure 4) critically supports a clear geo-visualization of the operational environment. A digital representation of JIPOE is of great support for planners, who can make customized selections of the overlays to detect/ depict specific situations and develop analytic tools and various models of the so-called "*human terrain*". Simulations of the models, based on the incorporation of the human dimension (social & behavioral sciences) into security analysis, operations, and

[10] JIPOE process provides a disciplined methodology for analyzing the operational environment and assessing the impact of that environment on the adversary and friendly courses of action. (Joint Publications 2-01.3, *Joint Intelligence Preparation of the Operational Environment*, 21 May 2014, https://irp.fas.org/doddir/dod/jp2-01-3.pdf, Appendix E)

policy development, serve to improve the identification and analysis of threats and to enhance societal resilience *(Rausch, 2011, slide 6 .)*

In this respect, human geography capitalizes on studying **population geography**, by investigating the spatial distribution, composition, and dynamics of human populations. It examines factors such as migration, fertility rates, mortality rates, population growth, and demographic transitions. Research areas within population geography can include migration patterns (to include economic migrations or war refugees' flows), population aging, urbanization effects on population distribution, and spatial patterns of health and disease.

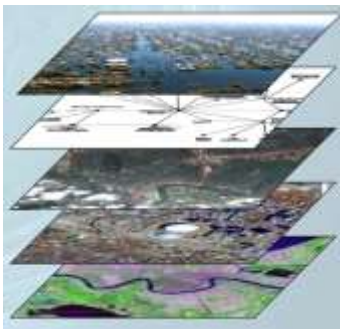

Figure 4 Representation of JIPOE overlays

Further, the study of poorly inhabited areas vs. urban agglomerations (**urbanization** planning and development, the spatial organization of urban areas, urban governance and social inequalities, the impact of urbanization on the environment, etc.) corroborated with **economic geography** (that explores the spatial distribution of economic activities, such as industries, trade, and globalization, and examines the relationships between economic processes, resources, markets, and the location of economic activities) delivers a powerful insight to the regional development, industrial clusters, mobility infrastructure, supply chains, innovation, etc. **Political geography** analyzes the spatial organization of political systems, power relations, and the impact of politics on the distribution of resources and decision-making processes. Research areas within political geography can include geopolitics, territorial conflicts, political boundaries, electoral geography, power brokers, and the geography of governance (including aspects related to integrity vs. corruption).

In human geography, the analysis of the **cultural dimensions** in a territorial system examines the relationship between culture and space. It investigates how culture shapes the landscapes, identities, and behaviors of individuals and groups. Research topics in cultural geography may include the study of cultural landscapes, cultural diversity, cultural heritage and values, place attachment, the view and stereotypes related to other cultures, sentiment analysis, the spatial dimensions of cultural practices, etc.

Not the last, **environmental geography** studies the interactions between humans and the natural environment. It examines issues such as climate change, natural resource management, environmental degradation, and the impacts of human activities on ecosystems. Research topics in environmental geography may include environmental conservation, sustainable development, the spatial analysis of environmental risks, the effects of natural disasters on populations, etc.

Some tangible (and distinct) examples of NATO's approach to human geography are illustrated by research programs like the urbanization project[11], the concerns regarding the environment and climate change[12], military mobility and transportation[13] (in the context of collective defense on the Eastern flank), human security (from a cross-cutting perspective)[14], the interest in lessons learned in cultural awareness[15], etc.

All these examples carry the imprint of Intelligence collection (all sensors, including HUMINT) and analysis at different levels; the variables raise questions about the nature and significance of particular political and territorial structures, the role of boundaries, the character of flows between places of influence and control, and the role of the physical environment in shaping conflict and cooperation, or the dynamics of the conflict (including the degree of legitimacy accorded to particular territorial arrangements by different populations, how economic and social arrangements are at odds with dominant territorial structures, the implications of territorial arrangements for intergroup relations and understandings, the effects of regional inequalities on political and social stability[16], or the attitude towards the NATO presence on the host nation's territory *(Simion, Surdu -coordinators, 2014).*

[11] NATO's Strategic Foresight Analysis identified urbanization as a key security trend of potentially significantly impacts the way the Alliance is operating; as a result, based on the NATO Military Committee task to the two Strategic Commands, a series of workshops and wargames have been dedicated to developing a conceptual study on urbanization, concluding with the issue in 2018 of the overarching Bi-Strategic Command Joint Military Operations in an Urban Environment Capstone Concept (covering all domains and NATO's core tasks). (https://www.act.nato.int/activities/nato-urbanisation-project/) Intelligence has its stake in the urban operational environment, recording both opportunities and challenges and driving its transformation to meet the uncertainties of the future.

[12] NATO's interest in the environmental security issues that can lead to humanitarian disasters, regional tensions, and violence has already a history (see NATO's disaster response operations) and culminated with highlighting this challenge (and the need to understand and adapt to it) in the 2022 NATO Strategic Concept, followed by the establishment of the NATO Centre of Excellence for Climate Change and Security in Montreal, Canada. (https://www.nato.int/cps/en/natohq/topics_91048.htm)

[13] https://www.act.nato.int/article/nato-innovation-challenge-military-mobility-transportation/

[14] Alexandru Kis, *Human Security – a cross-cutting topic in military operations. A study case for HUMINT in NATO*, under evaluation for participation in the international conference "*Human Security. Theoretical approaches and practical applications*", organized by "Lucian Blaga" University, Sibiu, 27 October 2023

[15] https://www.nato.int/cps/en/natolive/news_105304.htm

[16] National Research Council, *Rediscovering Geography: New Relevance for Science and Society*, Washington, DC, The National Academies Press, https://doi.org/10.17226/4913., 1997, pp. 19-20

3. HUMAN INTELLIGENCE (HUMINT) IN THE ANTHROPOSPHERE OF THE FUTURE

The anthroposphere of the future is a concept that envisions the human-influenced or human-shaped part of the Earth's environment in the years and decades to come. It encompasses various aspects of human activity, development, and interaction with the natural world. While it's challenging to predict the future with absolute certainty, we can speculate on some potential characteristics of the anthroposphere in the future based on current societal trends and emerging technologies.

We will also try to anticipate the way these changes will affect the current HUMINT tradecraft, raising challenges and driving the prospective transformation of this single-source collection capability. Please note the strong interconnection between the presented features, which influence and depend on each other.

3.1. Urbanization and Megacities: The future anthroposphere is likely to be increasingly urbanized, with more people living in large cities and megacities. Urban areas may continue to expand, placing pressure on land use, infrastructure, and resources.

With a diversity of sizes, shapes, demographic settings, and development, the cities of the future are foreseen as representing a huge challenge for the way NATO operates. In the Intelligence area, as technical sensors can be obstructed in densely built-up areas, HUMINT remains a valuable asset through its ability to access information in the military „no-go" areas. Anyway, future urbanization brings additional challenges to HUMINT operators in the field, especially related to operational security: freedom of movement, surveillance, personal identification, etc.

3.2. Technological Advancements: Rapid advancements in technology will shape the anthroposphere. This could include the proliferation of smart cities, the widespread adoption of automation and artificial intelligence, and the integration of digital technologies into everyday life. The anthroposphere will be characterized by **digital connectivity**, with the proliferation of the Internet of Things, 5G networks, and high-speed internet access in even remote areas. This will impact communication, commerce, and information exchange, but not only.

NATO addresses emerging and disruptive technologies (EDTs) through responsible, innovative, and agile policies developed in cooperation with relevant partners in academia and the private sector, intending to maintain its technological edge and military superiority, helping deter aggression and defend Allied countries.[17]

In the HUMINT methodology, secured presence and active collection in social media becomes a necessary feature, requiring upskilling of the HUMINT

[17] https://www.nato.int/cps/en/natohq/topics_184303.htm

experts and specialization of the organization, with a strong cybersecurity policy. Chatbots will be largely used to collect data, and smart applications will transform the loyal population into the largest human sensor possible.

Additionally, smart devices and wearable sensors will enable concealed capture of audio and video, and live streaming from the field; at the same time, the myriad of gadgets readily available on the market will represent a consistent operational security risk.

Persistent surveillance (upgraded with biometrical recognition systems) and the large availability of drones will affect mobility and concealment for both, operators in the field and human sources, presenting a serious security risk (this is an additional reason to opt for more digital presence and interaction).

3.3. Climate Change Mitigation: The anthroposphere of the future will likely be heavily influenced by efforts to mitigate and adapt to climate change. This may involve the widespread adoption of clean energy technologies, carbon capture and storage, and climate-resilient infrastructure. Connected to this, sustainable **Resource Management** is becoming increasingly critical. Innovations in agriculture, water management, and resource-efficient technologies are expected to play a crucial role in sustaining the anthroposphere.

NATO acknowledges a range of environmental challenges, with a particular focus on the threats stemming from climate change. Over the years, NATO has been actively addressing these challenges through its involvement in civil preparedness and emergency response efforts[18]. These endeavors encompass various issues, including but not limited to severe weather events, rising sea levels, flood risks, scarcity of, or exclusive access to natural resources, land and geological deterioration, pollution, or aspects of economic conflict as part of the hybrid warfare. These factors have the potential to escalate into humanitarian crises, regional conflicts, and acts of violence, where it is likely that military elements will be involved.

3.4. Sustainable Development: There is growing awareness of the need for sustainability in the anthroposphere. Future cities and infrastructure projects may prioritize eco-friendly design, renewable energy sources, efficient transportation, and reduced waste to mitigate environmental impact. Additionally, recognizing the importance of protecting ecosystems, there may be increased efforts to restore and rehabilitate damaged environments, such as reforestation, wetland restoration, and urban green spaces.

NATO also considers “green military operations”[19], with no sizeable effect on Intelligence collection and analysis.

[18] https://www.nato.int/cps/en/natohq/topics_91048.htm

[19] https://www.climatechangenews.com/2021/06/15/nato-considers-net-zero-2050-target-move-green-military-operations/

3.5. Demographic Shifts: Changes in population demographics, including aging populations and changing birth rates, will have implications for healthcare, social services, the labor force, and urban planning.

Demography is a permanent concern for HUMINT. Population density, education, mobility, sentiment, employment, political affiliation, criminal activity, etc. are variables that may determine the strength of the HUMINT element in terrain, influence the types and frequency of HUMINT activities, and affect their effectiveness.

3.6. Cultural and Social Diversity: As global connectivity continues to grow, the anthroposphere will be characterized by cultural and social diversity. Multiculturalism, globalized trade, and increased mobility will shape the cultural landscape. It doesn't mean that cultural particularities will not be preserved to a certain extent, specific to determined territorial systems or specific to social groups segregated by race, ethnicity, or religion.

The need for cultural awareness/ sensitiveness will gradually evolve to answer identified needs in HUMINT, with an accent on mindfulness and empathy in engagement. The interaction between collectors and sources will be facilitated by real-time translation devices, diminishing the role of the interpreter and enhancing rapport building. Anyway, some cultural sensitivities will be largely preserved, based on location (distinct territorial systems) or communities' features related to ethnicity, race, religion, social customs, etc[20].

3.7. Cognitive confrontation: Cognitive warfare represents a modern form of conflict that extends beyond traditional kinetic battles. In cognitive warfare, the primary battleground is the human mind, where the objective is to manipulate, influence, or disrupt an adversary's perception, decision-making, and behavior. This warfare often leverages advanced technologies, including social media, disinformation campaigns, and cyberattacks, to spread propaganda, sow discord, and create confusion. Cognitive warfare recognizes the power of information and psychology, seeking to exploit vulnerabilities in an opponent's cognitive processes.

It poses unique challenges for governments and organizations in defending against these non-physical but highly impactful forms of aggression, requiring a comprehensive approach that combines cybersecurity, media literacy, and strategic communication strategies.

In HUMINT, a discipline where engagement with human sources is the key, we recognize the need to increase the cognitive competence of the collectors and analysts *(Kis,2023).*

[20] NATO STANDARD Allied Joint Publication-10.1 *Allied Joint Doctrine for Information Operations*, Edition A Version 1 with UK national elements, January 2023, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1175076/20230724-AJP_10_1_Info_Ops_web.pdf, p. 40

3.8. Governance and Policy: The future anthroposphere will require innovative governance structures and policies to address complex challenges, such as cyber threats, data privacy, and the ethical use of emerging technologies.

HUMINT will also face legal and ethical dilemmas in capability development, especially in a multinational environment (like NATO), where harmonization of national reservations and caveats is a complex process.

It's important to note that the exact characteristics of the anthroposphere in the future will depend on a range of factors, including technological breakthroughs, policy decisions, societal choices, and responses to global challenges like climate change and resource scarcity. The path we take will determine whether the anthroposphere of the future is sustainable, equitable, and conducive to a new system of values and lifestyle.

HUMINT evolves at the pace of societal change, mirroring and adapting to the changes in interpersonal communication based on the lessons learned processes. Additionally, it foresees future challenges, develops models, and simulates various scenarios of the future operational environment, developing prospective tactics, techniques, and procedures.

CONCLUSION

Human geography is an essential domain of study in Human Intelligence. HUMINT experts deal with assigned areas of responsibility where they have to ensure access to relevant information in support of knowledge development and decision-making processes. The contribution to HUMINT estimates, JIPOE, and the overall operational planning is based on a comprehensive understanding of the area of interest. In this context, geo-visualization is a powerful tool in supporting the staff processes and provisions of mission planning and preparation.

Acquaintance of the intrinsic relation and interdependence between local populations and the terrain's features provides awareness of valuable indicators' dynamics. Furthermore, the consideration of communities' cultural traits is paramount in facilitating the interaction between the HUMINT collectors and the human sources. The approach, rapport building, effective communication, and empathy are always conditioned by cultural sensitiveness. Understanding different cultures, their values, beliefs, and social norms can enhance our cultural intelligence, which is the ability to interact and work effectively across cultures. Cultural intelligence is an important aspect of HUMINT as it enables individuals to navigate diverse social contexts and adapt to different cultural settings.

The anthroposphere of the future will bring certain evolutions in the developmental visions, political priorities, and lifestyle. The societal changes (including emerging technologies) will engage adaptation of HUMINT techniques, tactics, and procedures to the new realities.

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A GAP IN CRIMINAL LAW HARMONIZATION: DIFFERENT REACTIONS TO ILLEGAL GAMBLING IN DIFFERENT LEGAL CULTURES

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Abstract

Substantive criminal law regulation of European countries share major similarities. The reason behind this phenomenon is the fact that certain cultural aspects have had their influence on most of the societies of the continent. Discussing the roots of the common European culture, we have to emphasize the role of Christianity, the legacy of Greek philosophers and the reception of Roman law.

Nevertheless, the concept of certain criminal offences may diverge because of the different legal approaches of the same problems. Taking a simple example, the system of public education is probably regulated in detail by the majority of countries. However, the way of regulation highly depends on the values followed by the specific society. Sticking to our example, at what age should a child start to attend elementary school? Obviously, there is no universally acceptable answer to this question. If we imagined a legal system where the failure of making our children attend school is considered a crime, then the rules of compulsory school attendance would be, implicitly, a fundamental part of the definition of this offence.

This absurd experiment of thought clarifies that a comparative analysis in the field of criminal law may reveal considerable differences even between

resembling legal systems whenever a criminal offence is based on administrative law regulation. That is why the examination of the concept of illegal gambling is a promising field of research: due to a variety of reasons, it is without a doubt that each country has its own instruments to punish this kind of activity, but legal definitions and applied methods are most likely not alike.

In the present paper, we introduce a Western, a Central and an Eastern European example to demonstrate diverse approaches. After that, we attempt to outline the essential characteristics of a globally significant, serious social problem, the compulsive gambling to see which strategy proves to be the most suitable to treat it.

Key words: *illegal gambling, gambling disorder, criminal law, administrative criminal law, comparative analysis.*

INTRODUCTION

As Perry *(2006, p. 1171)* summarized Hart's interpretation, „*[a] rule is […] a certain kind of complex social practice that consists of a general and regular pattern of behavior among some group of persons, together with a widely shared attitude within the group that this pattern is a common standard of conduct to which all members of the group are required to conform.*" If we accept this statement, we can assume that the creation and the acceptance of any (legal) rule are highly influenced by the society in which it exists. Consequently, cultural differences between countries will imply non-negligible differences in their legal systems. Nonetheless, (substantive) criminal law is a branch of law where the applied theoretical concepts, usually contained by the general part of criminal codes, and the definitions of the majority of criminal offences are quite similar throughout Europe.

This observation might sound surprising at first sight, though the reasons behind the phenomenon are pretty obvious. In fact, the nations of the continent share common cultural roots: the moral principles of Christianity, the theoretical progress of Greek philosophers and the results of the Roman law all form part of the legacy of Europe, thus the different societies have a common core concept of values that also outlines the basic ideas of legal regulation.

The first 'layer' of the identically interpreted delicts is the one that is derived from the laws of nature or, in other words, is based on *naturalis ratio*. These conducts are considered unacceptable in not only Europe, but in each community around the world. Such prohibitions tend to appear in the teachings of the major world religions, thus being part of *lex divina* which is included in the concept of natural law. Concentrating on the European cultural heritage, we shall highlight the importance of the Ten Commandments in which the orders „*you shall not murder*" *(Exod. 20.13)* and „*you shall not steal*" *(Exod. 20.15)* appear.

The concepts of homicide and theft can be found with the same content, although not with the exact same wording, in each national criminal law regulation.

On the other hand, the foundation of the first states and the creation of legal systems also provoked the appearance of a new series of unlawful acts related to the violation of the established legal order. A number of behaviors that belong to this category are described similarly in different legal regimes as well. For instance, the expression 'perjury' holds the same basic meaning everywhere: a witness who, in front of the authorities, gives false testimony (or suppresses evidence) regarding an essential circumstance of a case, thus realizing a violation of a procedural code. Another great example is bribery, when the perpetrator gives or promises some kind of illegal advantage to another person, in order to influence that person's way of acting. Even though the exact definitions of criminal codes may differ in terms of the legal quality of the passive subject or the result of the unlawful conduct, this type of corruption has a universally accepted core content. These delicts already existed in the Roman Empire, therefore modern European countries inherited and improved the same basics.

In the third place, while discussing the harmonization of criminal law regulation, we must not ignore the role of the European Union in our continent, which is capable of creating minimum rules in this field via directives. We are able to observe the impact of EU legislation through money laundering or environmental crimes. In both cases, the supranational legislator prescribes the essentials of the definitions for the member states; that being the case, a comparative analysis is not desireable at this point either.

We have mentioned quite a few examples where national rules prove to be more or less equivalent. To make use of comparative approach, it is logical to study behaviors that constitute a violation of such detailed national regulation where the exact rules of different countries surely differ from each other and there is no relevant EU harmonization. Furthermore, it is also essential for the examined unlawful act to be severe enough to justify the use of criminal law instruments in all countries taken into account. Since the regulation of gambling is not influenced by EU legislation and the activity in question may be harmful to society from several points of view, which will be described below, it seems promising to scrutinise the definition of illegal gambling in different legal systems.

1. REASONS TO FIGHT AGAINST ILLEGAL GAMBLING

Before the introduction of the three chosen regulations, we strive to summarize the main reasons why the organization of gambling ought to be, and in most countries is, a strictly supervised area of services. Accordingly, we have delimited four groups of causes.

From a moral point of view, frequent participation in gambling is usually considered problematic: a non-negligible amount of the European societies look down on those people who are involved in such activities on a regular basis.

Despite this fact, gambling has ultimately become a form of socialization. At this point, it seems difficult to decide whether the lifestyle of the gambler offends the unwritten rules of ethics and should be treated as a form of deviance. Of course, the answer depends on many factors like the historical roots and the attitude of the society in which the gambler lives or the exact amount of time and financial sources spent on this kind of activity. In a recently published study, such a lifestyle is aptly called a 'deviant leisure', later being stated that „*the normalised 'socialisation' of gambling requires a more critical criminological eye that extends beyond the limited notions of 'crime' and 'deviance' and instead contextualises these issues through the more ontologically robust notion of harm*" *(Raymen, Smith, 2020, pp. 381-383).*

In addition, taking into consideration the Christian teaching, gambling is not explicitly categorized as a sin, however it can be interpreted as the manifestation of the desire to get wealthy easily, in other words, it is an activity motivated by the love of money. In this topic, the Gospel states that „*[n]o one can serve two masters; for either he will hate the one and love the other, or he will stand by and be devoted to the one and despise and be against the other. You cannot serve God and mammon*" *(Matt. 6.24).* Mammon, a name of the evil spirit represents here deceitful riches, money and possessions. So we can conclude that compulsive gambling and the constant chase of enrichment is immoral according to the Holy Bible.

Concerning the impact on health, we have to mention both physical and mental risks. It is proved that those who show the signs of gambling addiction usually experience a great variety of physical symptoms like insomnia, regular headache, hypertension, gastrointestinal and cardiac problems etc. *(Balázs, Demetrovic, Kun, 2010, p. 51).* Moreover, such patients frequently fall victim to some type of chemical addiction (mainly drug or alcohol) or suffer from maniac depression or antisocial personality disorder as well *(Fekete, Grád, 2020, pp. 330-331).* Cause-and-effect relation has been discovered between the mentioned mental disorders, though it is not evident that which one tends to be the core reason of the other psychological issues. A German survey published a few years ago records that while substance-related addictions usually develop after the onset of pathological gambling behavior, anxiety and mood disorders were present first in the 74,3% of the analyzed cases *(Romanczuk-Seiferth, Mörsen, Heinz, 2016, p. 157).*

Discussing the main criminological aspects, we should understand how the life of the people living with such a disorder is affected. Actually, the desperate desire to gamble makes the patient more likely to become the perpetrator or the victim of certain criminal offences. The link between the commission of crime and gambling addiction has been scrutinized by several authors, in many different countries. For example, a Spanish survey demonstrated that people concerned usually commit crimes against property: except robbery, these are non-violent acts

(Germán Mancebo, 2010, pp. 6-7). Nevertheless, another study based on a sample of more than 1800 Canadian high school students showed that the rate of gambling addicts is higher among the perpetrators of both crimes against property and crimes against the person *(Brunelle, Leclerc, Cousineau, Dufour, Gendron, 2012, pp. 116-117, 120-121).* Another problematic point is that in the case of the descendants of a person involved, the risk of experiencing psychosocial disorder increases because of the harmful effect of the addiction on family life *(Németh, Demetrovics, Kun, 2018, p. 173).* Besides the situation of pathological gamblers, we must also notice that the unregulated gambling industry could be the hotbed of white-collar crime.

Finally, it is necessary to emphasize the economic reasons, or rather the budgetary interests of the state. On the one hand, a proper system of taxation regarding the gambling industry provides a significant revenue. On the other hand, compulsive gamblers, in many cases, lose their job, thus the once useful members of the society, the taxpayers may become people who need financial help from the state which means a serious loss of revenue and a new source of expenditure.

As we may conclude, it is not a possibility, but rather a quasi-obligation of the national legislator to create a sufficiently detailed regulation in this area.

2. THE REGULATION OF ILLEGAL GAMBLING IN CERTAIN EUROPEAN COUNTRIES

Having demonstrated that national legislators necessarily regulate illegal gambling in different ways and that such a regulation can necessarily be found in all developed countries, the last key element of the current study was to determine a group of European countries in which each member has a significantly different concept of law compared to the others.

As we have already stated, in our continent the majority of legal systems share a common core, namely the legacy of the Roman law. For this reason, the selection method was based purely on the geographical location of the countries: we have realized the analysis of a Western (Spanish), a Central (Hungarian) and an Eastern (Russian) European legal regime.

In order to make a meaningful comparison between the three systems, the following aspects have been examined in each case:

- the definition of illegal gambling,
- the list of unlawful conducts and
- the sanctions prescribed in connection with illegal gambling in the field of criminal law and administrative criminal law.

2.1. Spain

In Spain, a decriminalization process has taken place during the past decades. Before the 20th century, games based on pure luck were strictly forbidden in the peninsula and the perpetrators of such crimes could be sentenced

to death. The norms existing back then sanctioned both the organizers and the participants. The mentioned process started in the 70s, having triggered serious debates among practitioners. Finally, the last relevant criminal offence was repealed by an amendment of the Spanish Criminal Code then in force (the current Spanish Criminal Code: *Ley Órganica 10/1995, de 23 de noviembre, del Código Penal*; henceforward: CóP) in 1983 *(Pino, 2014, pp. 16-17, 27-31).*

Today, there is no criminal offence named illegal gambling in the CóP, however the aim of influencing games of gambling or betting is a qualifying circumstance of a certain type of corruption *(Cóp art. 286 quater.)*. The discussed delict *(Cóp art. 286 bis. 4.)* can be committed by the „*executives, directors, employees or collaborators of a sporting company, whatever its legal status, as well as sportspersons, referees or judges, regarding conduct aimed at deliberately and fraudulently predetermining or altering the result of a match, game or competition of particular economic or sporting importance*" (official translation by the Ministry of Justice).

The term 'special economic or sporting relevance' is described by the CóP in the same place: a sports competition of special economic relevance shall be considered to be one in which the majority of the participants receives any type of remuneration, compensation or economic income for their participation in the activity; and a sports competition of special sporting relevance shall be considered to be one that is classified in the annual sports calendar approved by the corresponding sports federation as an official competition of the highest category of the modality, speciality or discipline in question. Applicable sanctions prescribed in this provision are imprisonment (*pena de prisión*) and special disqualification from engaging in trade or commerce (*inhabilitación especial para el ejercicio de industria o comercio*).

The other essential source of law in our topic is the Act on gambling (*Ley 13/2011, de 27 de mayo, de regulación del juego*; henceforward: Rdj). This code gives us the definition of game of gambling *(Rdj art. 3. a))*: „*any activity in which sums of money or objects that are economically assessable in any form are at risk on future and uncertain results, dependent to some extent on chance, and which allow their transfer between participants, regardless of whether the degree of skill of the players predominates in them or whether they are exclusively or fundamentally based on luck or chance*" (translation of the author). As the notion implies, a game has to fulfill three conjunctive criteria to be considered as a type of gambling falling under the scope of the Rdj:

- the participation fee,
- the potentially obtainable prize and
- the element of chance.

Lottery and betting have their own specific rules and own concepts as well *(Rdj art. 3. b)-c)).*

The legislator has not formulated a separate definition for illegal gambling; with a view to fill this gap, we can state that illegal gambling is any kind of game that falls under the scope of the Rdj, but does not comply with its rules. The Rdj itself describes several possible infringements, distinguishing three groups of them: very serious (*muy grave*), serious (*grave*) and light (*leve*) *(Rdj art. 39-41.)*. It shall be noted here that other related sources of law that develop the regulation of the Rdj may also define further infringements *(Rdj. art. 37.)*.

Among very serious infringements *(Rdj art. 39.)*, there are numerous that are qualified as criminal offences in other legal systems like the organization of gambling without authorization, illegal promotion of gambling, acquisition of authorization with the use of fake documents, repeated and unjustified refusal to pay the prize, manipulation or alteration of technical systems to the depriment of participants etc.

16 cases of serious infringement are defined in the *(Rdj art. 40.)*. These include, but are not limited to, the violation of conditions prescribed in the authorization or of the gamer protection rules, provision of loans or any other form of credit to participants by operators, usage of non-authorized technical systems etc.

Light infringements *(Rdj art. 41.)* are not defined exhaustively: besides a few specified conducts like not cooperating with the agents of gambling authorities or insufficient communication to the public concerning the prohibition on the participation of children, every failures to comply with the obligations of the Rdj that are not qualified as serious or very serious infringements belong to this group.

The act describes the potentially applicable sanctions for each group (Rdj art. 42.):

- light: written warning and fine up to 100.000 euros;
- serious: fine of 100.000-1.000.000 euros and suspension of activity in Spain for a maximum of 6 months;
- very serious: fine of 1.000.000-50.000.000 euros, loss of the authorization, disqualification from carrying out activities related to gambling for a maximum period of four years and closure of the means by which information society services supporting gambling activities are provided.

Finally, it should also be noted that the perpetration of two light infringements within two years is qualified as a serious one, while the realization of two serious infringements within two years is considered a very serious one.

2.2. Hungary

Discussing Hungarian criminal (and administrative criminal) law, we usually evoke the result of the first successful codification process of the 19th century that is considered the first criminal code of the country. Act V of 1878, regularly referred to as Code Csemegi, did not have any provision in connection with illegal gambling. However Act XL of 1879, the first code of administrative

criminal law contained a whole chapter called ‘offences committed by gambling’ (*szerencsejáték által elkövetett kihágások*). This set of rules prohibited the organization of-, the provision of premise for- and the participation in illegal gambling.

Nowadays, the regulation of the area is much stricter. The main rules are laid down in Act XXXIV of 1991 (henceforward: Gambling Act) that has been amended more than fifty times during the past three decades. As article 1. follows, „*gambling is any game in which the player is entitled to win money or other prizes of pecuniary value in return for the payment of money or the provision of property, if certain conditions are met or if they are fulfilled. Winning or losing depends solely or predominantly on chance*” (translation of the author). The article also states that betting and slot machines fall under the scope of this definition as well. We can declare that the Hungarian wording is also made up of three conceptual elements, similarly to the Spanish example:

- the participation fee,
- the potentially obtainable prize,
- the result depending on solely or predominantly on chance.

The Gambling Act provides us a specific definition for illegal gambling too *(art. 37. 14.).* „*Games of chance which are subject to authorization under this Act and which are organized without a licence from the gambling supervisory authority*” (translation by the author). Therefore a game would be considered unlawful, under any circumstances, if the organizer did not possess the mandatory permission provided by the gambling authority. This definition is applied in the field of criminal law too.

The Gambling Act, like the Rdj, also defines numerous possible violations of gambling regulation that can be committed by the legal persons lawfully organizing gambling, yet we will focus on the relevant rules of Act C of 2012 *(Hungarian Criminal Code; henceforward: HCC)* and Act II of 2012 *(Code of Infringements; henceforward: CI).*

The criminal offence named ‘Unlawful Gambling Operations’ (*tiltott szerencsejáték szervezése*) *(HCC art. 360.)* describes three ways of perpetration (the current wording is in force since the promulgation of the Amending Act LXXVI of 2015):

- organizing unlawful gambling activities on a regular basis
- making available premises or instruments for the purpose of unlawful gambling activities,
- inviting to participate in unlawful gambling activity before the public at large.

The active subject is specific in each case: regarding organization, the perpetrator can only be someone who does not have the mandatory license, while the other two conducts can only be committed by those who are not qualified as organizers in accordance with this provision.

Organizing refers to the control over the game or making others participate in the game, however the participation of the organizer is not required to become perpetrator. The meaning of the term 'on a regular basis' was a subject of debate in Hungarian jurisprudence for a long time and was concluded by the Supreme Court of Hungary: this element can be realized with at least two consecutive perpetration *(EBH.2017.B.17.).*

In the second case, the premise in question is not required to be the property of the perpetrator and its provision constitutes the offence, irrespective of whether there is a compensation. Instrument, in practice, usually refers to an electronic device that makes possible the participation in games that are organized outside Hungary.

Invitation is a *sui generis* preperation-like offence, meaning that the fulfillment of this conduct does not require the actual participation of the person invited *(Katona, 2019, p. 834; Görgényi, 2020, p. 650).*

The respective sanction prescribed by the HCC is deprivation of liberty up to three years, which is the most severe possible sanction compared to the past two criminal codes of Hungary *(Act V of 1961, Act IV of 1978)* that had criminalized this delict as well. Prohibition from residing in a particular area is also possible *(HCC art. 364.)*

CI contains an infringement called 'illegal gambling' (*tiltott szerencsejáték*) *(CI art. 191.)*, which on the one hand penalizes the organization of gambling in public places (*közterület vagy nyilvános hely*), on the other hand, it also orders to punish the participation in such a game. The main difference between the first part of the infringement and the criminal offence is that the perpetration of the prior can be realized by organizing only one illegal occasion too. Public place is defined *(CI art. 29. (2)* a)) as a place for public use which is accessible by everyone under the same conditions, irrespective of its owner or form of property. The Hungarian term '*nyilvános hely*' *(CI art. 29. (2) b))* also appears in the relevant article in order to broaden the meaning of public place.

2.3. Russia

The main source of law on gambling in Russia is the Federal law of December 29, 2006 No. 244-FZ *(henceforward: Russian Gambling Act)*. According to this law, the organization of gambling is only lawful in the regions exhaustively listed in it *(Russian Gambling Act art. 9. 2.)*; these administrative areas are referred to as gambling zones (*игорная зона*). It must be emphasized that bookmakers and totalizators do not fall under the scope of this restriction *(Seryogina, Zaytseva, Ryabko, Serogodskaya, 2018, p. 955)* and the organization of lottery does not fall under the scope of Russian Gambling Act, therefore the gambling zone system mainly affects the operation of casinos.

The same act also gives us the legal definition of gambling: „*an agreement between two or more parties or an agreement with a gambling operator in view to win based on an assumption of risk, in accordance with rules set by the gambling*

operator" (translation of the author) (Russian Gambling Act art. 4. 1)). This approach, unlike the others, highlights other conceptual elements:

- the game is treated as an agreement between two or more parties,
- this agreement can be concluded between a minimum of two players or between a player and the organizer,
- the rules are set by the organizer.

Besides, the chance to win and the dominant role of luck also appear explicitly, albeit there is only an implicit reference to the participation fee. This term for gambling is used in the field of criminal and administrative criminal law jurisprudence too.

The delict called 'illegal organization and conduct of gambling' (*Незаконные организация и проведение азартных игр*) was introduced into the Criminal Code of the Russian Federation (*Уголовный кодекс*, Federal law of June 13, 1996, No. 63-FZ; henceforward: RCC) in 2011 *(RCC art. 171.2.)* and since has been amended several times *(in details see: Kathaev, Margieva, 2020, pp. 402-403)*. Due to the administrative regulation based on gambling zones, five different unlawful behaviors are defined within the definition of this crime *(translation available in: Seryogina, Zaytseva, Ryabko, Serogodskaya, 2018, p. 957):*

- „*gambling organization and (or) conduction with use of the gaming equipment out of gambling zones,*
- *gambling organization and (or) conduction without Gaming License obtained in accordance with the established procedure in bookmaker offices and totalizators out of gambling zones,*
- *gambling organization and (or) conduction without a permission to implementation of gambling activities,*
- *gambling organization and (or) conduction with use of information and telecommunication networks, including Internet networks, or means of communication, including mobile communication, except for cases of interactive rates reception by gambling organizers in bookmaker offices and (or) totalizators,*
- *systematic space granting for illegal gambling organization and (or) conduction.*"

Through the first three cases, we are able to observe the relevance of gambling zones in criminal law: the organization of 'classic' gambling like the operation of a casino can prove to be illegal in two ways: if it is realized outside the gambling zones, it surely is against the law; if it is realized inside one of the gambling zones, the lack of permission makes it unlawful. In the case of bookmakers and totalizators, only the acquisition of the so-called 'game license' matters. In addition, the organization via any electronic or telecommunication device is strictly prohibited, except for the interactive rates reception (usually as part of sports betting). Systematic space granting refers to the provision of

premise for the organizer at least two times consecutively *(RCC art. 171.2. Note 1.)*

Later on, the provision in question formalizes five qualifying circumstances:

- commission by a group of persons by previous concert,
- commission accompanied by the commercialization in a large size,
- commission by an organized group,
- commission by the person with the use of official position and
- commission accompanied by the commercialization in especially large size.

The latter three are the especially qualified cases with the most severe potential sanctions. The definition of commission by a group of persons by previous concert or by an organized group are defined in the General Part of the RCC *(art. 35.).* The terms commercialization in a large and especially large size are also determined in the code *(RCC art. 171.2. Note 2.)*: the prior refers to an income exceeding 1.500.000 rubles, the latter is an income exceeding 6.000.000 rubles.

In connection with this crime, the possibility of application of a large scale of sanctions is prescribed. As we have seen, in accordance with the details of the commission, three 'categories of severity' are distinguished: basic, qualified and especially qualified perpetration. In all three cases, fine and deprivation of liberty are applicable. It shall be noted that the limit of the amount of fine is described in two ways in every cases. There is an objectively defined frame (300.000-500.000; 500.000-1.000.000; 1.000.000-1.500.000 rubles) and also a subjective one based on the wages or other income of the person convicted, acquired in a certain period of time. In the case of basic perpetration, the convicted may also be sentenced to compulsory work. Moreover, in the scenario of especially qualified perpetration, the loss of the right to hold certain positions or engage in certain activities for a period of up to five years is also probable.

Included by the Russian Federal Code of Administrative Offences (*Кодекс Российской Федерации об административных правонарушениях,* Federal law of December 30, 2001, No. 195-FZ; henceforward: CAO), three relevant infringements have to be mentioned.

The criminal offence of illegal organization that has been analyzed above, has its less severe counterpart under the same name *(CAO art. 14.1.1.).* The first paragraph of the examined article describes almost the same possible offences that we have encountered in the RCC; a slight difference compared to the previously seen wording is the introduction of the term 'duly obtained license'. Russian scientific literature states that in practice, the definitions used by the RCC and the CAO cause serious uncertainty and the interpretation in the actual cases highly depends on the evaluation of the investigative authority *(Kathaev, Margieva, 2020, p. 404).* As a consequence, we expect a new amendment in the near future.

Furthermore paragraph three and four of the article in question penalizes the violation of conditions stipulated by the permission (in the case of casinos) or by the license (in the case of bookmakers' office and totalizators).

Finally, paragraph five prohibits the presence and the employment of people under the age of eighteen years in gambling establishments.

Regarding sanctions, a fine can be imposed in connection with the violation of each paragraph. In general, the fine must be paid by the operator legal entity, albeit, based on paragraph five, the official who lets the underaged person enter the gambling establishment can be punished as well. If the infringement described in the first paragraph is fulfilled, the confiscation of the gaming equipment is also prescribed. Last but not least, in the case of 'gross' violation of conditions contained by the license, in addition to the fine, the suspension of activity for a maximum of ninety days shall be imposed too.

A separate infringement applies to the violation of sports betting administrative regulation by omission *(CAO art. 14.1.1-1.)*. The perpetrators of these unlawful actions can only be organizers related to bookmakers' offices and totalizators. Defined conducts are:

- failure to comply with the identification procedure,
- failure to comply with information obligations towards the All-Russian Sports Federation (*Общероссийская спортивная федерация*) and the executive body performing state supervision,
- failure to comply with the procedure of registration of the participants.

Here the CAO only prescribes the imposition of administrative fine.

Lastly, a rather special provision *(CAO art. 5.49.)* bans the organization of lottery and other risk-based games in connection with the result of the elections or a referendum.

3. SOME CHARACTERISTICS OF COMPULSIVE GAMBLING

In view to gain a better insight into the health and criminological aspects of our issue and thus be able to make a suggestion to ameliorate the presented legal regulations, it is desirable to summarize here some essential information on compulsive gambling. In a few words, we strive to introduce the conceptual evolution of the psychiatric term, the reasons behind the development and the course of the disease.

3.1. Evolution of the concept

Today, the phenomenon of compulsive gambling is officially recognized as a mental disorder by experts. This status became widely accepted due to the American Psychiatric Association (APA) which published the third version of the 'Diagnostic and Statistical Manual of Mental Disorders' (henceforward: DSM) in 1980, in which the term 'pathological gambling' appeared for the first time. Back then, it was placed among 'impulse-control disorders not elsewhere classified'. In the fourth version of DSM (1994), the terminology and the categorization did not

change. Two conjunctive conditions were required for diagnosis *(DSM-IV-TR, 312.31, pp. 671-674):*

- „*Persistent and recurrent maladaptive gambling behavior as indicated by five (or more) of the following:*

(1) *is preoccupied with gambling […]*

(2) *needs to gamble with increasing amounts of money in order to achieve the desired excitement*

(3) *has repeated unsuccessful efforts to control, cut back, or stop gambling*

(4) *is restless or irritable when attempting to cut down or stop gambling*

(5) *gambles as a way of escaping from problems or of relieving a dysphoric mood […]*

(6) *after losing money gambling, often returns another day to get even […]*

(7) *lies to family members, therapist, or others to conceal the extent of involvement with gambling*

(8) *has committed illegal acts such as forgery, fraud, theft or embezzlement to finance gambling*

(9) *has jeopardized or lost a significant relationship, job, or educational or career opportunity because of gambling*

(10) *relies on others to provide money to relieve a desperate financial situation caused by gambling*

- *The gambling behavior is not better accounted by a Maniac Episode.*"

As we can see, the first condition focuses on the potential symptoms, consisting of a list of ten elements, of the disorder in question, albeit it is sufficient for the patient to present half of the clinical signs in order to be diagnosed. The negative criterion refers to the possible presence of other mental disorders that 'absorb' the diagnosis of pathological gambling.

In 2013, due to the pressure of the most widely accepted scientific approach, the interpretation of pathological gambling changed radically. The fifth edition of DSM, currently in use, describes the characteristics of 'gambling disorder', being part of the category 'non-substance-related disorders' *(DSM-5, 312.31, pp. 585-589).* The reform of DSM was motivated by the fact that chemical or substance-related and behavioral or non-substance-related addictions have a significantly similar development and course *(for more details see: Fekete, Grád, 2020, pp. 288-289).*

Concerning the definitional elements, we have to underline some fundamental changes that took place in DSM-5. Each modification mainly affected the first condition, that had also been part of the definition of pathological gambling. According to the current handbook, only the last 12-month period shall

be examined in terms of the exhibition of the symptoms by the patient. Furthermore, the commission of illegal acts was eliminated from the list of symptoms, thus nine elements have remained, from which the exhibition of at least four is required for diagnosis. Another novelty is that the patients can be categorized in accordance with the severity of their mental problem. The three categories are defined based on the number of symptoms presented (mild: 4-5 criteria; moderate: 6-7 criteria; severe: 8-9 criteria).

The other important manual worth mentioning, produced by the World Health Organization, that is used to classify not only mental, but all types of diseases is called 'International Classification of Diseases' (henceforward: ICD). In our case, it seems that the current eleventh edition, published in 2022, has followed the conceptual development seen in DSM: the phenomenon is referred to as gambling disorder here as well, being defined as a 'disorder due to addictive behaviour' (ICD-11, 6C50). Nevertheless, ICD uses two subcategories that does not appear in the American handbook, having introduced gambling disorder predominantly online and predominantly offline. This distinction is probably justified by the fact that nowadays online casinos have been gaining more and more popularity.

3.2. Reasons behind the development of the disorder

According to Fekete and Grád *(2020, p. 323)* behavioral addictions are multifactorial diseases that require biological-psychological-sociocultural influences to develop. Accumulation within families implies biological determinacy, while psychological and sociocultural reasons may vary.

Regarding biological factors, we have to discuss a genetical and a neurobiological cause. The prior is known as the phenomenon of 'genetical vulnerability'. A survey that took place almost twenty years ago in Canada demonstrated that, compared to normal population, a person suffering from gambling disorder is more likely to have a first-degree relative with the same condition. Moreover, alcoholism, bipolar disorder, depression and drug problems were also more frequent in the families concerned *(Cox, Enns, Michaud, 2004, p. 261).* Besides sociological reasons, it is proved that a certain genetic trait contributes to increased vulnerability *(Németh, Demetrovics, Kun, 2018, p. 164).* The other explanation from the field of neurobiology is the following: physiological functions such as arousal, impulse-control, reward and pleasure are regulated through the so-called neurotransmitter systems. Addictions, even behavioral addictions, can upset the physiological hormonal balance of the body, so that hormones such as dopamine, noradrenaline or serotonin begin to concentrate in the body when the pathological activity is pursued.

Internationally recognized psychologists have set up different, concurrent explanatory models for a better understanding of gambling disorder. As it is not our intention to introduce all of them, we just highlight the general addiction theory of Jacobs *(in details see: Fekete, Grád, 2020, pp. 332-333)* that is

seemingly a great description of the mental state of the gambler. This approach states that sick people strive to reach a different identity state. During the game, a so-called 'self-induced dissociative state' is reached, i.e. the player is able to dissociate from everyday reality artificially. This mental condition is characterized by:

- the narrowing of consciousness,
- a change in personality,
- the loss of reality control and
- a drastic change in the experience of space-time.

Probably the most interesting group of causes for the experts of social sciences is the sociocultural one. Although we are convinced that the list of risk factors appearing in scientific literature is not yet exhaustive, several ones are widely accepted among scholars. Male sex, adolescence, low socio-economic status, belonging to a minority group, psychiatric problems (including psychoactive substance use) and predisposition to crime are cited as risk factors frequently. The results of Hungarian surveys identified low education level and unmarried family status as potential causes too. *(Németh, Demetrovics, Kun, 2018, pp. 159, 162-163).* In the topic, there can be found references to migration background, unemployment *(Romanczuk-Seiferth, Mörsen, Heinz, 2016, p. 158),* old age and being a casino employee *(Balázs, Demetrovics, Kun, 2010, p. 48)* as well.

3.3. Course of the disease

It goes without saying that like any other diseases, addictions have stages or phases too. The determination of the phase in which the patient is found at the beginning of the treatment is essential to plan the ideal therapy.

Blume separates four phases of pathological gambling *(in details see: Balázs, Demetrovics, Kun, 2010, p. 50; Németh, Demetrovics, Kun, 2018, pp. 157-158)*:

- Phase of winning: initially, patients often win, causing the illusion of omnipotence. Losses may take place in this stage too, however they seem insignificant next to the 'big gains'. Tolerance and loss of control already show up.
- Phase of losing: usually starts with a major loss. The addicted person experiences this as a severe blow, since the illusion of omnipotence is shattered. The denial of addiction, the demand of loans and the waste of family reserves begin.
- Phase of desperation: at this point, financial resources get exhausted and can only be provided by illegal means. This is where the patient hits rock bottom, though the unrealistic belief in a big payoff is still present.
- Phase of hopelessness: the player abandons the myth of 'winning it all back', however the feeling provided by the participation remains indispensable. The course ends in burnout and sometimes with suicide.

Another interpretation describes only three stages: phase of winning (*fase vincente*), phase of loosing (*fase perdente*) and phase of desperation (*fase della disperazione*) *(Vico, 2011, p. 111)*. The two approaches are almost identical; in the latter, the phase of desperation contains all the elements of the last stage of Blume's description as well.

Possible outcomes of the process may be suicide, confrontation with the authorities and request for (professional) help.

CONCLUSION

Since there is no mandatory supranational source of law created by the EU in the area, gambling has to be regulated by national legislators. The need for state control can be justified with many arguments. The violation of administrative rules shall be punished by criminal law instruments.

European examples have shown that the problem can be treated in a variety of ways. While in Spain the code of criminal law does not contain a prohibition regarding the problem, the act on gambling defines a complex system of possible infringements. On the other hand, a detailed criminal offence with an elaborate system of qualification appears in Russian criminal law regulation in addition to the delicts described in the code of infringements. In Hungary, the act on gambling is a thorough piece of legislation, having been amended several times, thus the issue of illegal gambling receives less attention in the examined branches of law.

Although the analyzed approaches have shown significant differences, a common conceptual basis can be observed. In each country, the definitional elements of gambling are more or less identical, as well as the description of the main punishable conducts like the organization of gambling without permission or the provision of premise for gambling purposes.

Possible sanctions are quite diverse, however it seems that all the examined countries prefer the penalty of fine. Logically, if the expected financial sanction in the event of a breach of the law is significantly higher than the benefits of the breach, then it is not worth committing the offence. By implementing this idea, the legislator will be able to remarkably increase the general preventive effect.

Nonetheless, gambling disorder can not be effectively treated by using only legal instruments. A person suffering from this addiction needs a professional therapist to be cured, or at least to become asymptomatic in the long run. The purpose of legal regulation shall rather be prevention.

As we have noticed, illegal gambling is a criminal offence of high latency rate because there is no victim in the classic sense. Therefore it would be reasonable to introduce a special ground for exemption from criminal responsibility for those perpetrators who choose to uncover the circumstances of the crime and to cooperate with the authorities.

Finally, addicted people should be protected from not only the unlawful organization of gambling, but also from themselves. Many players with low socio-economic status spend all their financial resources on legal forms of gambling. A possible solution regarding this side of the problem could be the introduction of a mandatory entry system which denies the right to enter, if the player receives any type of state aid on a regular basis.

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REOPENING THE CRIMINAL PROSECUTION TO ENSURE AN EFFECTIVE INVESTIGATION

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Abstract

The respect of the fundamental rights of the person during the criminal judicial proceedings is also conditional on the performance of an effective investigation.

Although, in the current Romanian Code of Criminal Procedure, the principle of the active role of judicial bodies in the conduct of the criminal process is no longer expressly provided for, the need to manifest such an active role, in the sense of carrying out a real, complete, therefore effective criminal investigation, emerges from the content of the provisions art. 5 ("Finding the truth") and art. 306 ("Obligations of criminal prosecution bodies").

The requirement of the effectiveness of the criminal investigation is also reflected in the jurisprudence of the European Court of Human Rights (even if, for now, mainly in relation to articles 2 and 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms).

In this context, the present study addresses the issue of resuming the criminal prosecution by reopening it, in the situation where the case closure solution was ordered without conducting an effective criminal investigation.

The paper also brings to attention some aspects of judicial practice regarding the confirmation, by the judge of the preliminary chamber, of the ordinance to reopen the criminal prosecution.

The study uses, as research methods: documentation, interpretation and scientific analysis.

The conclusion consists in emphasizing the active role of the criminal prosecution bodies in carrying out, respectively in ensuring the conduct of an effective criminal investigation, in order to avoid the prolongation of the criminal

process as a result of the resumption of the criminal prosecution through the reopening confirmed by the preliminary chamber judge.

Key words: *reopening the criminal prosecution, effective criminal investigation, unitary judicial practice, the active role of criminal prosecution bodies.*

INTRODUCTION

Starting from the European standard, enshrined in the jurisprudence of the European Court of Human Rights, regarding the effective character of the criminal investigation, the present study addresses the issue of resuming the criminal prosecution by reopening it, in the event that the judicial bodies have not carried out a real, effective investigation, in compliance with all the provisions that guarantee the discovery of the truth in the criminal process.

The research methods used in the work are: documentation, interpretation and comparative scientific analysis (including by analyzing jurisprudential solutions from the Romanian judicial practice, related to the jurisprudence of the Strasbourg Court).

This study aims to contribute to the unified interpretation and application of the provisions of the Romanian Code of Criminal Procedure regarding the reopening of the criminal prosecution, drawing attention to the need for an active role of the criminal prosecution bodies (criminal investigation bodies and prosecutor) in carrying out, respectively supervising criminal prosecution activity.

Thus, the first section, after the introductory one, presents the way in which the requirement of the effectiveness of the criminal investigation is reflected in the jurisprudence of the European Court of Human Rights, noting that the practice of the European Court refers to this requirement, especially in relation to the conventional provisions of art. 2 ("Right to life") and art. 3 ("Prohibition of torture").

At the same time, a comparative presentation is made between the approach of the concept of "effectiveness" in the field of legal protection of human rights at the European level and the use of this concept in the field of international law.

In the following section, the importance of conducting an effective investigation is highlighted, as a procedural guarantee of the application of two fundamental principles of the criminal process, expressly provided for in the Romanian Code of Criminal Procedure (the principle of finding the truth and the principle of ensuring the fairness of the process). It is also shown that, with regard to ensuring the fairness of the criminal process, attention has been drawn, both at the international and European level, to the need to comply with this requirement not only in the trial phase, but also during the criminal prosecution (that is, of the procedures carried out prior to the trial phase).

In the section intended to analyze the provisions of the Romanian Code of Criminal Procedure regarding the resumption of the criminal prosecution by reopening it, the emphasis is placed on the procedure of submitting to the

preliminary chamber judge's confirmation of the ordinance by which the prosecutor orders the reopening of the prosecution.

The penultimate section is devoted to the analysis of some situations that have arisen in judicial practice regarding the confirmation of the ordinance to reopen the criminal prosecution.

The conclusions section emphasizes the need to exercise the active role of criminal prosecution bodies (even if this active role is no longer provided for, as a distinct fundamental principle, in the current Romanian Code of Criminal Procedure), so as to ensure from the initial phase of the criminal prosecution a real, effective investigation.

I. THE EFFECTIVENESS OF THE CRIMINAL INVESTIGATION, ACCORDING TO THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

The requirement of the effectiveness of the criminal investigation (in the sense of the necessity of carrying out a real, complete, thorough, effective investigation) is highlighted, in the jurisprudence of the European Court of Human Rights, especially regarding compliance with art. 2 ("Right to life") and art. 3 ("Prohibition of torture") of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Romanian state being convicted in several cases judged by the European Court, as a result of the violation of this requirement.

Thus, in the *Rupa case against Romania* (Judgment of December 16, 2008)[1], the Court held that it was violated art. 3 of the Convention "due to the lack of effective nature of the investigation" and that, to be considered effective, the inquest should have included detailed investigations, leading to the identification and punishment of the perpetrators, and should have allowed the complainant effective access to the investigative procedure. The Court also found that the solution of not starting the criminal prosecution, given in the case under analysis, was based exclusively on the statement of the interested party and on evidence not identified in the procedural act by which this solution was ordered, such an investigation "being far from to comply with the efficiency and effectiveness requirements imposed by art. 3 of the Convention".

In the *Case of Mocanu and others against Romania* (Judgment of September 17, 2014)[2], the European court assessed that the complainants did not benefit from an effective investigation, in the sense of art. 2 and 3 of the Convention, being "difficult to consider that the procedural obligations arising from art. 2 and 3 of the Convention have been respected if an investigation ends, as in the present

[1] The ECtHR Judgment of December 16, 2008, published in the Official Gazette of Romania no. 562 of August 10, 2010.

[2] The ECtHR Judgment of September 17, 2014, published in the Official Gazette of Romania no. 944 of December 23, 2014.

case, as a result of the intervention of the prescription of criminal liability, due to the inactivity of the authorities".

The Court also noted in the *Case of Poede against Romania* (Judgment of September 15, 2015)[3], a procedural violation of art. 3 of the Convention, appreciating that "the national authorities did not carry out an adequate investigation, which could allow clarifying the issue of whether the use of force by state agents against the applicant was proportionate". Also in this case, the Strasbourg Court emphasized that, in the case of serious allegations of ill-treatment, the investigation must be quick, but also thorough, requiring that the national authorities make real efforts to clarify the factual situation and not "to rely on hasty or unfounded conclusions to conclude the investigation or to base its decision".

In the *Case of Gheorghiță and Alexe against Romania* (Judgment of May 31, 2016)[4], the Court recalled that when an individual states that he suffered, from the authorities, treatment contrary to art. 3 of the Convention, it is necessary to carry out an effective official investigation, which "should be carried out quickly and at the same time be thorough".

And in the *Vereș Case against Romania* (Judgment of March 24, 2020)[5], the Court found a violation of art. 3 of the Convention, considering that "the authorities did not carry out an in-depth and effective investigation regarding the applicant's credible accusation". At the same time, the European Court reminded that the requirement of the effectiveness of the investigation assumes that it "can lead to the identification and punishment of the persons responsible" and that, since it is not "about an obligation of result, but of an obligation of means", it is required that the investigation not be unreasonably hindered by the acts or omissions of the national authorities.

In the field of legal protection of fundamental human rights and the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the concept of "effectiveness" is also used in a more generic framework than that of the expression "effective investigation". Thus, in the legal literature (*Rietiker, 2010, pp.245-277, quoted by Mendez-Pinedo, 2021, p.8*) it has been appreciated that "the Strasbourg Court has developed a specific set of interpretation methods with the aim of making effective the rights enshrined in the European Convention for the Protection of Human Rights"; this means that the provisions of the Convention are to be interpreted in a manner which seeks to ensure that the fundamental rights and freedoms of the individual 'are applied in

[3] The ECtHR Judgment of September 15, 2015, published in the Official Gazette of Romania no. 372 of May 16, 2016.
[4] The ECtHR Judgment of May 31, 2016, published in the Official Gazette of Romania no. 318 of May 4, 2017.
[5] The ECtHR Judgment of March 24, 2020, published in the Official Gazette of Romania no. 1121 of November 23, 2020.

ways that are of "practical and effective" use to complainants' (*Rietiker, 2010, pp.245-277, quoted by Mendez-Pinedo, 2021, p.8*), complainants who, in some cases, are even the victims of crimes. In this sense, some authors (*Diaconu, 2022, p.114*) drew attention to the fact that, in the European Union, crime victims cannot yet fully exercise their rights, "although legislative and institutional progress has been made" in the field of legal protection of these victims.

The concept of "effectiveness" is also addressed in the doctrine of international law, in relation to the application of European Union legislation, in the sense of the principle applied by the Court of Justice of the European Union "to ensure the authority of European Union law over national law" (*Mendez-Pinedo, 2021, p.5*). We note that, in this context, the use of the concept of "effectiveness" started from the meaning of "efficiency, effectiveness", i.e. "useful effect" ("*effet util*"/"*practical effect*") (*Mayr, 2012, pp.8-21*), reaching to transcend this meaning (*Mendez-Pinedo, 2021, p.12*) by acquiring new valences; thus, in recent legal literature (*Mendez-Pinedo, 2021, p.27*) it has been shown that "effectiveness" must be examined from several perspectives, one of the meanings being that of a distinct principle, but at the same time, interconnected with other fundamental principles of European law (such as, the protection of the fundamental rights of the person or the principle of legal certainty).

II. CARRYING OUT AN EFFECTIVE INVESTIGATION - GUARANTEE OF THE APPLICATION OF THE PRINCIPLE OF FINDING THE TRUTH AND THE PRINCIPLE OF ENSURING THE FAIRNESS OF THE ROMANIAN CRIMINAL PROCESS

Although, in the jurisprudence of the European Court of Human Rights, the requirement to carry out an effective criminal investigation is mentioned, especially, in relation to the observance of the provisions on the protection of the right to life (art. 2 of the Convention) and those on the prohibition of torture (art. 3 of the Convention), in our more recent jurisprudence it has been appreciated that there is an obligation of the state to carry out an effective investigation also in the case of investigating other types of crimes than those against life or torture or subjecting to ill-treatment.

Thus, in a file submitted to the judge of the preliminary chamber of the High Court of Cassation and Justice[6] for the confirmation of the order to reopen the criminal investigation, it was decided that, "taking into account the shortcomings of the investigation", it is necessary to resume investigations in a case whose object is the commission of crimes compromising the interests of justice [art. 277 para. (1) Penal Code], influencing statements (art. 272 Penal Code), perjury (art. 273 Penal Code) and misleading judicial bodies (art. 268 Penal Code). The judge of the

[6] Conclusion no. 211 of June 11, 2020, High Court of Cassation and Justice, Criminal Section, preliminary chamber judge, document available online at http://www.euroavocatura.ro/jurisprudenta/5337/Redeschiderea_urmaririi_penale__Confirmare__Lipsa_unei_anchete_efective, accessed on 01.12.2022.

preliminary chamber found that "the reasons that were the basis of the case closure ordinance are summarized in the presentation of some aspects that do not correspond to the elements stated in the referral, in the absence of an effective verification of the petitioner's claims"; the judge also noted the "laconic, superficial, incomplete, almost formal character of the investigations" that led to the issuance of the case closure ordinance, as well as "the lack of an effective, necessary and absolutely mandatory investigation, which required the identification of the factual elements and the conditions in which it is assumed that an act provided for by the criminal law has been committed".

Emphasizing the importance of the effectiveness of investigations, including in *common-law* systems, some authors (*Lippke, 2019, p.54*) have shown that effectiveness could even be advanced as a fundamental value of criminal procedure.

We note the fact that the requirement to carry out an effective investigation presupposes the manifestation of an active role of the criminal prosecution bodies, in the sense of filing the necessary diligences to clarify, based on evidence, all aspects of the case, therefore, to find out the truth.

Although, in the current Romanian Code of Criminal Procedure (CCP)[7], the principle of the active role of the judicial bodies in the conduct of the criminal process is no longer expressly enshrined[8], not being sure whether the change of vision of the legislator regarding the reduction of the active role of the court was an option towards the transition to adversarial reporting to the notion of "truth"[9] (*Ghigheci, 2014, pp.91-92, p.96*), the need for an active role of criminal investigation bodies emerges from the content of art. 5 ("Finding the truth") and art. 306 ("Obligations of criminal prosecution bodies").

Moreover, in the legal literature (*Mateuț, 2019, p.75*) it has been appreciated that the renunciation by the legislator of the regulation of the active role of the judge also means a reduction of the importance given to the principle of finding the truth.

In art. 5 CCP the principle of finding out the truth is regulated, with the following statement:

"*(1) Judicial bodies have the obligation to ensure, on the basis of evidence, the truth about the facts and circumstances of the case, as well as about the person of the suspect or defendant.*

[7] Law no. 135/2010, published in the Official Gazette of Romania no. 486 of July 15, 2010, with subsequent amendments and additions (entered into force on February 1, 2014).

[8] In the Code of Criminal Procedure from 1968, at art. 4 was expressly provided that "*Criminal prosecution bodies and courts are obliged to play an active role in the conduct of the criminal process*".

[9] in the sense that, in the criminal process, the aim is to find out the "judicial truth", and not the "objective truth"

(2) Criminal prosecution bodies have the obligation to collect and administer evidence both in favor and against the suspect or defendant. The rejection or non-recording in bad faith of the evidence proposed in favor of the suspect or the defendant is sanctioned according to the provisions of this code".

Therefore, all categories of judicial bodies have the obligation to ensure, on the basis of evidence, the discovery of the truth, but as regards the activity of administering evidence both in favor and against the suspect or the defendant, the obligation rests mainly with the bodies of prosecution (*Lorincz, 2015, p.36*).

This obligation, provided as a principle in art. 5 CCP, is reiterated in the Special Part of the Code of Criminal Procedure (art. 306), among the obligations that the criminal prosecution bodies have to achieve the object of the criminal prosecution. Thus, according to para. (1) of art. 306 CCP, "*the criminal investigation bodies have the obligation, after notification, to search and collect data or information regarding the existence of crimes and the identification of persons who have committed crimes, to take measures to limit their consequences, to collect and administer the evidence*" in compliance with the legal provisions.

Also, "*after the start of the criminal investigation, the criminal investigation bodies collect and administer the evidence, both in favor and against the suspect or defendant*" [art. 306 para. (3) CCP].

Therefore, whenever the criminal prosecution bodies are notified in connection with the commission of a possible crime, they have the obligation to carry out, ex officio, an effective investigation for the timely and complete ascertainment of the respective fact, with a view to drawing to the criminal liability of the guilty persons (*Udroiu, Predescu, 2008, p.336*).

In the same sense, and in the older doctrine (*Pop, 1948, p.49*) it was shown that the discovery of both the crimes and the criminals, following the investigation carried out by the state bodies, is a first necessary condition of social defense.

Also as a principle of the application of the criminal procedural law, in art. 8 CCP the fairness (along with the reasonable term) of the criminal process is enshrined: "*The judicial bodies have the obligation to carry out the criminal investigation and the trial respecting the procedural guarantees and the rights of the parties and the procedural subjects, so that the facts that constitute crimes are ascertained in time and completely, no innocent person is held criminally liable, and any person who has committed a crime be punished according to law, within a reasonable time*".

Therefore, carrying out an effective investigation, by ascertaining in time (quickly) and completely the facts that constitute crimes and identifying the perpetrators in order to bring them to criminal responsibility, is also a guarantee of the application of the principle of ensuring the fairness of the Romanian criminal process.

In other words, achieving the objective of the judicial bodies requires "a judicial confrontation of two equally important interests: the interest of society, which

seeks the prompt discovery and punishment of persons who have committed crimes, by fully establishing the facts committed and the guilt of their authors, (...) and the individual interest, which requires that the criminal investigation activity (...) be carried out in accordance with the law, abuses are avoided and rights are guaranteed, the respect of which is likely to guarantee a fair criminal trial" (*Volonciu, Vasiliu, 2007, p.1*).

At the international level, the importance of ensuring the fairness of the process, including in the prosecution phase, was also emphasized at the XVIII International Congress of Criminal Law (Istanbul, Turkey, September 20-27, 2009), the participants of this meeting reiterating the idea that the notion of "fair trial" does not refer only to the trial phase, but to the entire criminal process (*De La Cuesta, Cordero – editors, 2012, p.244*).

And on a European level, in the context of recognizing the relevance of the procedures carried out prior to the trial phase (*pretrial proceedings*), attention was drawn (*Weisser, 2019, p.132*) to the need for a "reinterpretation of the conventional guarantees", in the sense of aligning the jurisprudence of the Strasbourg Court with the "living instrument" character of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The need to adapt the jurisprudence of the European Court of Human Rights to the current requirements is all the more obvious, the more recently theorists (*Ruszkowski, 2020, pp.131-146*) discussed the concept of "multifinality" ("*multifinalité*") to define the future of the European Union; "multifinality" is seen as that multiple and diverse form of the final stage of the European Union (*Ruszkowski, 2020, p.143*), which will certainly entail a unification of the general legislative framework that guarantees respect for fundamental rights and freedoms at the level of the member states; this, given that respect for fundamental human rights (in this case, the right to a fair trial) is an obligation of all states, not only at the domestic level, but also in the context of international judicial cooperation, including with regard to judicial cooperation between the member states of the European Union (*Lorincz, Stancu, 2022, p.413*) *a*. Besides, the uniform interpretation and application of the provisions in the field of judicial cooperation in criminal matters must be based on the mutual trust of the Member States in their national criminal justice systems (*Lorincz, Stancu, 2022, p.122*) *b.*

Since, in the doctrine (*Bogdan, Selegean, 2005, p.117*) it was shown that in the European Convention for the Protection of Human Rights and Fundamental Freedoms, "two types of guarantees are provided: some of a material nature and others of a procedural nature", we therefore consider that carrying out an effective criminal investigation represents a guarantee of procedural nature, intended to ensure both the exercise of the material rights enshrined in this convention, as well as the application of the principles of finding the truth and the fairness of the criminal process, as regulated in the current Romanian Code of Criminal Procedure.

III. THE RESUMPTION OF THE CRIMINAL PROSECUTION BY REOPENING IT IN ORDER TO CARRY OUT AN EFFECTIVE INVESTIGATION

From the content of art. 335 para. (1) and (2) CCP it appears that, in the situation where, after ordering the case closure solution, it is found that the circumstance on the basis of which that solution was given did not exist or has disappeared, the resumption of the criminal prosecution will be ordered by reopening it.

As it was appreciated in the doctrine (*Volonciu, Uzlău – coordinators, 2014, p.833*), the "reopening of the criminal prosecution" should not be confused with the "infirming of the criminal prosecution acts", although there are similarities between the two institutions; while the institution of infirming has a broader content, representing a general way of exercising hierarchical control in relation to any procedural act or procedural measure, the institution of reopening criminal prosecution refers only to the disposition of non-referral to the court.

Therefore, the criminal prosecution is ordered to be reopened:

- if the prosecutor hierarchically superior to the one who ordered the solution finds, later, that the circumstance on which the case closure solution was based did not exist and infirm the case closure ordinance;

- in the event that new facts or circumstances have appeared from which it follows that the circumstance on which the case closure solution was based has disappeared and the prosecutor who ordered the respective solution revokes the case closure ordinance.

In both situations, according to art. 335 para. (4) CCP, the reopening of the criminal prosecution is subject to the confirmation of the judge of the preliminary chamber, within no more than 3 days, under sanction of nullity. The judge of the preliminary chamber decides by final reasoned conclusion, in the council chamber, with the participation of the prosecutor and with the summons of the suspect or, as the case may be, the defendant[10], on the legality and validity of the ordinance by which the reopening of the criminal prosecution was ordered.

The term of no more than 3 days, provided in art. 335 para. (4) CCP under the sanction of nullity, it is a peremptory term, which does not include the duration of the procedure for resolving the confirmation request (*Voicu, Uzlău, Tudor, Văduva, 2014, p.379*); this term is only the time interval in which the prosecutor must notify the judge of the preliminary chamber with the request to confirm the order to reopen the criminal prosecution.

[10] The provisions "without the participation of the prosecutor and the suspect or, as the case may be, the defendant" contained in art. 335 para. (4) CCP (prior to its amendment by The Government's Emergency Ordinance no. 18/2016, published in the Official Gazette of Romania no. 389 of May 23, 2016) were declared unconstitutional by the Decision of the Constitutional Court no. 496/2015 (published in the Official Gazette of Romania no. 708 of September 22, 2015), considering that it violates the provisions of art. 21 para. (3) and of art. 24 of the Constitution.

At the same time, in the situation where the case closure solution was ordered, the reopening of the criminal prosecution also takes place when the judge of the preliminary chamber admits the complaint against the solution of not sending to court and sends the case to the prosecutor in order to complete the criminal prosecution[11]; in such a case, the dispositions of the judge of the preliminary chamber are binding for the criminal prosecution body (*Lorincz, 2016, pp.47-48*), and no further confirmation is required.

Also, according to the provisions of art. 335 para. (6) CCP[12], if the prosecutor hierarchically superior to the one who ordered the closing case infirm this solution and orders the reopening of the criminal prosecution prior to the communication of the ordinance containing the solution of not sending to court, the reopening of the prosecution is no longer subject to the confirmation of the judge of the preliminary chamber. Therefore, in order for the disposition to reopen the criminal prosecution to not be subject to the confirmation of the preliminary chamber judge, it is necessary that the infirming of the case closure solution be prior to the communication by the prosecutor of this solution, and not prior to the receipt of the communication by the addressee (*Udroiu, 2014, p.109*).

In the confirmation procedure regulated in art. 335 para. (4) and para. (4^1) CCP, the control carried out by the judge of the preliminary chamber refers to the legality and validity of the ordinance by which it was ordered the infirming or, as the case may be, the revocation of the case closure solution and the reopening of the criminal prosecution. In this procedure, the judge of the preliminary chamber does not have to rule on the merits of the case, by establishing a juridical framing or a concrete guilt, but to ascertain whether a complete, effective criminal investigation was carried out, which led to the resolution of the case by not sending in trial. If the judge finds that the criminal investigation is incomplete, the criminal prosecution must be resumed to establish the existence of evidence or, on the contrary, its lack or insufficiency[13].

Only as a result of conducting an effective, complete investigation, in compliance with all legal provisions that guarantee the discovery of the truth and the administration of all existing evidence, it is possible to complete the criminal prosecution and resolve the case by the prosecutor (as it appears from the content of art. 327 CCP).

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[11] Under this aspect, the Decision of the High Court of Cassation and Justice no. 11/2009 (published in the Official Gazette of Romania no. 691 of October 14, 2009) by which it was established that there is no incompatibility of the person who carried out the criminal prosecution, in the event that the case is sent to the prosecutor in order to reopen the criminal prosecution, maintains its validity.

[12] provisions introduced by The Government's Emergency Ordinance no. 18/2016

[13] Conclusion no. 211 of June 11, 2020, High Court of Cassation and Justice, Criminal Section, preliminary chamber judge, document available online at http://www.euroavocatura.ro/jurisprudenta/5337/Redeschiderea_urmaririi_penale__Confirmare__Lipsa_unei_anchete_efective, accessed on 01.12.2022.

Moreover, regarding the completion of the criminal prosecution, in the doctrine (*Dongoroz et al., 1976, p.61*) a distinction was made between the "presumptive termination" of the criminal prosecution - which means the assessment of the criminal investigation body that this investigation is finished and that it can pronounce on its results, and "effective termination" of the criminal prosecution - which consists in the assessment made by the prosecutor in order to resolve the case by ordering the legal solution that is required.

IV. ASPECTS OF JUDICIAL PRACTICE REGARDING THE CONFIRMATION OF THE ORDINANCE TO REOPEN THE CRIMINAL PROSECUTION

However, in continental or Romano-Germanic legal systems, jurisprudence is not considered a source of law, although, we are witnessing to a "change of paradigm regarding the role of jurisprudence within the formal sources of Romanian law" (*Oglindă, 2015, p.129*), the importance of judicial practice in the interpretation and application of the law, including in criminal matters, cannot be denied.

In relation to the necessity of submission to the preliminary chamber judge for the confirmation of the solution to reopen the criminal prosecution, in the judicial practice there were different opinions, some prosecutor's offices appreciating that, in the situation where the first prosecutor admits the petitioner's complaint in the procedure provided for in art. 339 CCP (complaint against the acts of the prosecutor), the referral to the preliminary chamber judge to confirm the reopening of the criminal prosecution is inadmissible[14]. This problem was discussed on the occasion of several meetings of practitioners[15], the opinion agreed by all participants being that, in the event that the reopening of the criminal prosecution (by infirming the case closure solution) was ordered by the superior hierarchical prosecutor, since the text of art. 335 para. (1) CCP does not distinguish according to the method of reopening, confirmation of the reopening of the criminal prosecution by the judge of the preliminary chamber is mandatory, both in the situation where the case closure solution was infirmed ex officio,

[14] Minutes of the meeting of the chief prosecutors of the criminal prosecution section at the level of the Prosecutor's Office attached to the High Court of Cassation and Justice and the prosecutor's offices attached to the courts (Prosecution Office attached to the High Court of Cassation and Justice, 14-15 May 2015), document available online at address https://inm-lex.ro/wp-content/uploads/2021/04/repertoriu-drept-procesual-penal.pdf, accessed on 03.12.2022.

[15] Minutes of the meeting of the representatives of the High Court of Cassation and Justice with the presidents of the criminal sections of the appeal courts (Brașov, June 4-5, 2015), document available online at https://inm-lex.ro/wp-content/uploads/2021/04/repertoriu-drept-procesual-penal.pdf, accessed on 03.12.2022; Minutes of the meeting of the representatives of the Superior Council of the Magistracy with the presidents of the criminal sections of the High Court of Cassation and Justice and the appeal courts (Sibiu, 24-25 September 2015), document available online at https://inm-lex.ro/wp-content/uploads/2021/04/repertoriu-drept-procesual-penal.pdf, accessed on 03.12.2022.

within the hierarchical control of legality, and in the situation where the infirming of the case closure solution and, implicitly, the reopening of the criminal prosecution were ordered by the superior hierarchical prosecutor following the admission of a complaint formulated against the case closure solution.

In fact, this issue was settled by the supreme court in Romania[16], which, in order to ensure a uniform judicial practice, by issuing a preliminary decision to resolve the question of law in criminal matters, established that: "*The reopening of the criminal prosecution provided for by art. 335 of the Code of Criminal Procedure is subject to the confirmation of the judge of the preliminary chamber, both as a result of the infirming of the prosecutor's solution by the superior hierarchical prosecutor in the procedure provided for by art. 336 et seq. from the Code of Criminal Procedure, as well as in the case of the infirming ordered ex officio*".

In conclusion, only in situations where the referral of the case to the prosecutor in order to resume the criminal prosecution was ordered by the preliminary chamber judge himself (either as a result of the admission of the petitioner's complaint against the case closure solution, or as a result of the rejection of the plea agreement, either as a result of the return of the case to the public prosecutor's office after completing the preliminary chamber procedure), as well as in the situation where the prosecutor hierarchically superior to the one who ordered the case closure solution infirm this solution and orders the reopening of the criminal prosecution prior to the communication of the order that includes the solution of not sending to court, the confirmation of the preliminary chamber judge is no longer necessary.

In this sense, and in the jurisprudence of the European Court of Human Rights (*The case of Stoianova and Nedelcu against Romania, quoted by Rus, 2017, p.262*) it was ruled that the criminal prosecution cannot be reopened unless the reopening is authorized by a judge, who intervenes as a guarantor of the respect of the rights and freedoms of the person, including in the aspect of ensuring the application of the principle of legal certainty, a principle which is closely related to the right to a fair trial (*Rus, 2017, p.262*).

Another interesting aspect reported in practice concerns the solutions that the judge of the preliminary chamber referred to can pronounce in order to confirm the ordinance to reopen the criminal prosecution in the situation where the resumption of the criminal prosecution by reopening it was ordered by an incompetent prosecutor, according to the law, in that cause. Specifically, the hypothesis was put into question[17] in which the chief prosecutor of the public

[16] Decision of the High Court of Cassation and Justice no. 27/2015, published in the Official Gazette of Romania no. 919 of December 11, 2015.

[17] Minutes of the meeting of the representatives of the Superior Council of the Magistracy with the presidents of the criminal sections of the High Court of Cassation and Justice and the appeal courts (Sibiu, 24-25

prosecutor's office attached to the court ordered the reopening of the criminal prosecution in a case whose object was the commission of a crime by a defendant who, based on the criterion of the quality of the person, attracts the jurisdiction in first instance of the court of appeal.

In a first orientation, it was assessed that the judge of the preliminary chamber of the court of appeal referred to, as the competent court to resolve the case on the merits, must submit the file to the competent prosecutor's office, i.e. the prosecutor's office attached to the court of appeal, in order to dispose of the case.

According to the second orientation, majority, the solution that the judge of the preliminary chamber must pronounce is to infirm the ordinance to reopen the criminal prosecution, in accordance with the provisions of art. 335 para. (4) CCP.

In the unanimous opinion, expressed on the occasion of the meeting of the representatives of the Superior Council of the Magistracy with the presidents of the criminal sections of the High Court of Cassation and Justice and the courts of appeal (Sibiu, September 24-25, 2015), it was considered that the correct solution is to infirm the ordinance of reopening of the criminal prosecution issued by the chief prosecutor of the public prosecutor's office attached to the court, since the only solutions that the judge of the preliminary chamber can pronounce, in application of art. 335 para. (4) CCP, are the confirmation and the infirming of the order to reopen the criminal prosecution, not providing for the solution of returning the case to the prosecutor or forwarding it to the prosecutor's office competent to carry out/supervise the criminal prosecution. At the same time, it was also invoked the fact that the violation of the imperative provisions regarding the competence according to the quality of the person attracts the sanction of the absolute nullity of the acts carried out by an incompetent prosecutor under this aspect.

We consider that the infirming solution is correct, to the extent that the incompetence of the prosecutor's office that ordered the reopening of the criminal prosecution is evident from the works and material of the criminal prosecution file submitted to the court referred to confirm the resumption of the criminal prosecution. If the incompetence of the prosecutor's office that supervised/conducted the criminal investigation emerges in the procedure for resolving the request for confirmation of the ordinance to reopen the criminal investigation, based on the new documents presented according to art. 335 para. (4^1) CCP, we appreciate that the judge of the preliminary chamber should confirm the reopening of the criminal investigation, if it is justified, and then the prosecutor who resumes the criminal investigation should decline his jurisdiction in favor of the competent prosecutor's office in the report with the new aspects of the case.

September 2015), document available online at https://inm-lex.ro/wp-content/uploads/2021/04/repertoriu-drept-procesual-penal.pdf, accessed on 03.12.2022.

CONCLUSION

In conclusion, as it emerges from the interpretation of the provisions of art. 327 CCP, the prosecutor can give a solution to solve the case (either by sending to court, or by closing the case or giving up to the criminal prosecution), only when he finds that "the criminal prosecution is complete and there is the necessary and legal evidence administered", being "respected the legal provisions that guarantee finding out the truth", in other words, when an effective criminal investigation was carried out.

If the case prosecutor ordered the closing case in violation of the provisions of art. 327 CCP, the reopening of the criminal prosecution and its resumption is required, precisely to ensure the conduct of an effective investigation by exercising the active role of the criminal prosecution bodies (both criminal investigation bodies and the prosecutor), in application of art. 5 and art. 306 CCP. Such a resumption of the criminal prosecution will, however, have to be subject to the confirmation of the preliminary chamber judge, who will verify the legality and validity of the ordinance to reopen the criminal investigation issued by the superior hierarchical prosecutor, resulting in a prolongation of the criminal process that could have been avoided by carrying out an effective, real, non-formal investigation, from the initial phase of the criminal prosecution.

The active role of the criminal investigation bodies should be manifested both in the cases in which the competence to carry out the criminal investigation rests with them, and in the cases in which the criminal investigation must be carried out by the prosecutor, in the conditions in which, pursuant to art. 324 para. (3) CCP, the performance of some criminal prosecution acts can be delegated to them.

It is also required that the case prosecutor exercise his active role both in the cases in which he is obliged by law (art. 324 CCP) to carry out the criminal prosecution, as well as in the cases in which he has, as the main assignment, supervision of criminal prosecution activity. For example, in situations where the criminal investigation body proposes to close the case, the case prosecutor should not limit himself to a formal check of the report with the proposal of the solution of not sending to court, but it is necessary to establish, in real terms, that this proposal it is motivated and well founded.

Last but not least, the superior hierarchical prosecutor (the head of the prosecutor's office) should have an "active role" not only in the procedure for solving the complaint against the case closure solution, if such a complaint has been formulated, but also by exercising hierarchical control, in the sense of verifying the procedural acts of the lower prosecutor [pursuant to art. 304 para. (2) CCP].

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THE PROTECTION OFFERED BY EUROPEAN UNION CONSUMER LAW AS AN AREA OF DIALOGUE BETWEEN THE COURT OF JUSTICE OF THE EUROPEAN UNION AND NATIONAL COURTS

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Abstract

Consumer protection is not the only area of EU law in which significant progress has been made both through the adoption of formal legal instruments and through the interpretation of existing rules by the Court of Justice of the European Union, mostly on the initiative of national courts through the preliminary reference procedure provided for in Article 267 of the Treaty on the Functioning of the European Union. However, EU consumer law is unique in that the Court of Justice, with the assistance of national judges, has developed what can be described as a surprising interpretation of the secondary legislation in this area, going beyond the substantive aspects which it seeks to regulate and touching on important procedural aspects relating to the procedural position of consumers seeking to enforce their rights under European law and the remedies which can be used within the national legal systems of the Member States to promote more effective enforcement of consumer protection law..

The article begins by highlighting the approach taken by the Court of Justice in this decision and the implications of this approach, and then goes on to highlight two of the main mechanisms used in this approach - the progressive development of a broad concept of consumer in its procedural dimension and the principle of ex officio action by the national judge in consumer cases. The case-law relating to these mechanisms is presented in terms of its dynamics, including the most recent developments and a reading grid is proposed for each of them, which goes beyond the issue of consumer protection in order to identify the implications from an institutional perspective of the relationship between the

European Union and the Member States. The final part of the paper brings the two sets of jurisprudence together in order to draw some conclusions on the growing role of European jurisprudence.

Key words: *consumer, consumer protection, judicial dialogue, vulnerability, ex officio control*

INTRODUCTION

The development of a broad substantive consumer right at the level of the European Union (EU) is an obvious trend, stemming from its connection with the internal market, to the good functioning of which it contributes (as a counterweight to free competition, since the consumer is the final recipient of the products or services circulating in this market), but also in the developments that have led to the affirmation of consumer protection as a distinct area of law (*Weatherill, 2021, pp. 874-901*) and as a common standard of protection for the definition and implementation of the "other policies and actions of the Union", an idea that is reflected in Article 12 of the Treaty on the Functioning of the European Union (TFEU)[1].

Enshrined in Art. 169 of the TFEU as intended by which the Union contributes to protecting, inter alia, the economic interests of consumers, as well as to promoting their right to information, education and to organise themselves to protect their interests, promoting the interests of consumers and ensuring a high level of their protection was reflected in the adoption, on the basis of Art. 4(2) lit. f. TFEU, which establishes the shared competence of the Union and the Member States in this field, an impressive number of instruments of secondary law, mostly directives for the approximation of legislative or administrative acts of the Member States, which directly affect the establishment or functioning of the internal market, in accordance with Art. 114 of the TFEU[2].

A second dimension in which the objective of consumer protection is reflected in the Union's primary law can be found in the Charter of Fundamental Rights of the European Union (CFREU), which dedicates a special provision to it in Art. 38, where "a high level of consumer protection" appears as an objective that must be "ensured" by the policies of the Union (therefore, it is not registered as a subjective right that calls for the adoption of concrete measures). However, as noted in a collective study (*European University Institute, 2016, p.7*), other

[1] Consolidated version of the Treaty on the Functioning of the European Union, published in the Official Journal of the European Union (OJ) C 202 of June 7, 2016, pp. 47-388.

[2] Among the most relevant, can be included: Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, published in OJ L 95, 21.4.1993, p. 29, amended by Directive 2011/83/EU of the European Parliament and the Council, published in OJ L 304, 22.11.2011, p. 64; Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149, 11.6.2005, p. 22-39; Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJ L 304, 22.11.2011, pp. 64-88.

provisions of the CFREU that enshrine subjective rights, such as, among others, Art. 1 regarding human dignity, Art. 3 regarding the right to the integrity of the person, Art. 8 on data protection or Art. 47 which refer to access to justice, may be relevant for the promotion of consumer interests.

In this dimension, in which the protection offered to consumers by EU law has developed in close connection with fundamental rights, consumer protection is presented as representing both a "quintessence" of fundamental rights and a practical circumstance of these fundamental rights "in every situation of daily (...) life" (*Buz, 2022, p.71*), arguments which, among others, could even support a constitutional consecration at national level of the principle of consumer protection (*Bercea, 2011, p.35*).

I. GENERAL FRAMEWORK FOR IMPLEMENTATION OF EU CONSUMER LAW. "JUDICIAL DIALOGUE" IN CONTEXT

The implementation of the consumer protection rules established at Union level is the responsibility of the Member States, which may determine a different level of realisation of the rights and obligations generated by the European rules, with consequences for the effectiveness of the protection of consumer rights and the uniform application of the Union's legal order, a requirement demanded by the uniqueness of the internal market. Moreover, this difference in the degree of concretisation may be due not only to the existence of substantive national rules on the matter, but also to the differences in the guarantees that the rules of national procedural law may offer to consumers, the states benefiting from this point of view of procedural autonomy (competence to determine the means of redress), with the limits arising from the Court of Justice's evolving case-law on the requirements that national procedural means should not be less favourable than those applicable to similar national procedures (principle of equivalence) and should not create excessive difficulties in the exercise of the rights conferred by the Union rules (principle of effectiveness)[3].

The area of consumer protection is in certain cases the subject of measures to harmonise national procedural rules, either contained in the substantive legislation itself or in the form of separate procedural measures[4], which, according to some authors, reflects a process of "proceduralisation" of EU consumer law (*Tulibacka, 2015, pp. 51-74*). This process is not limited to cross-border aspects, but also covers cases of application in national contexts, simultaneously covering not only access to courts and procedural rules before them, but also administrative

[3] For an illustration of these requirements, see the Judgment of 6 October 2015, Târsia, C-69/14, EU:C:2015:662, paragraph 27.

[4] As is the case, for example, of Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4.12.2020, p. 1-27.

regulatory bodies, actions before public authorities, alternative dispute resolution mechanisms and collective action procedures. However, the development of harmonised procedural rules is still at an early stage and does not cover the whole field of consumer protection, as the application of European legislation in this area continues to be based on national institutional and procedural frameworks.

Taking into account the division of powers regarding the exercise of the judicial function in the EU, which I described in a previous work using the term "judicial subsidiarity" (*Mătușescu, 2018, pp. 57-67*), the protection of consumer rights derived from Union legislation is primarily the responsibility of national courts[5], but under the control of the Court of Justice of the European Union (CJEU), which remains the final interpreter of this legislation. Through the preliminary referral procedure provided for by art. 267 of the TFEU establishes a procedural mechanism that allows a constant and concrete interaction between the CJEU and national courts, a form of "judicial dialogue" between the courts of the member states called to ensure the application of Union law and the Luxembourg Court (*Mătușescu, 2020, pp. 38-40*), in which the national judge requests support from the European judge for the interpretation and assessment of the validity of a Union rule. In principle, national courts enjoy a wide discretion to address questions to the CJEU, and the answers that the Court offers are mandatory when it comes to the interpretation of European law, the application of this interpretation to the specific litigation situation in question remaining within the competence of the national judge.

Considering the dynamics and specificity of the consumer protection rules established at the EU level, but also the diversity of the existing implementation mechanisms at the level of the member states (as long as a good part of the European rules in the field are of minimum harmonisation), the national systems of consumer protection often appear as "a mixture between the transposition rules of European derivative law and existing national law (either general contractual law or specific rules aimed at consumer protection)" (*Twigg-Flesner, 2011, p.240*). In this context, and given that consumer rights require a particular focus on access to justice, it was inevitable that national courts would face problems related to the conflict between national and European rules, for which the available options are to interpret national law in conformity with EU law and to disapply any provision of national law that is contrary to EU law. As the latter option is generally approached by the courts with reservations due to its implications for the constitutional separation of legislative and judicial functions, and as the consistent interpretation of national law by reference to the incidental European norm is not always easily discernible (especially in the case of divergent

[5] CJEU Opinion of 8 March 2011, Avis 1/09 - Accord sur la création d'un système unifié de règlement des litiges en matière de brevets, EU:C:2011:123, paragraph 80.

national jurisprudence), access to the ECJ for guidance through the use of the preliminary reference mechanism has become an increasingly common option.

The considerable number of preliminary questions formulated by national courts in the particular field of consumer protection (among the most active being Romanian courts), a reflection of the many obstacles faced by judges in the member states when implementing consumer protection legislation, it gave the Union jurisdiction the possibility to interpret, in certain cases in a highly creative manner, the basic obligations imposed by Union law. With the competition of national judges, the CJEU achieved an, if not revolutionary, at least unusual interpretation of secondary law provisions, which goes beyond the material law aspects that they seek to regulate, to reach important procedural law aspects, related to the procedural position of the consumer trying to claim their rights under European law and the remedies that can be used within the national legal systems of the member states to promote a more effective application of consumer protection legislation.

In essence, the Court's approach starts from the consideration of specific consumer protection rules contained in secondary EU legislation, which takes, for example, the recognition of a non-binding nature of unfair clauses, the right to withdraw from a contract concluded at a distance or outside the commercial premises or the remedy of price reduction or termination of a sales contract in case of non-conformity of the delivered consumer goods, as imperative provisions that aim " to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them"[6]. Or, the effectiveness of this protection against abuse in contract law could only be ensured if the consumer has a real possibility from a procedural point of view to invoke the fact that a clause is abusive. From this point, it becomes apparent to the Court that it is necessary to assess the effectiveness of the remedies available to the consumer under domestic law. The requirement of the existence of fair contractual conditions thus entails the requirement of a fair procedure, which has been widely appreciated in the doctrine as a rather surprising effect of the Directive on unfair terms, since "one could hardly foresee that a European directive dealing with unfair contract terms suddenly might be used by the CJEU to reshape national procedural laws" (*Howells, Twigg-Flesne, Wilhelmsson, 2018, pp.156-157*). Without being isolated, the Court's approach has been used in a long line of cases to test the remedies available to the consumer to allege that a term is unfair, and these at all stages of the proceedings, including enforcement proceedings. The result of this incursion of the Court into national procedural law and its implications for the procedural

[6] For a recent affirmation, see the Judgment of 17 May 2022, Ibercaja Banco, C-600/19, EU:C:2022:394, paragraph 36.

autonomy of the Member States became evident when the Court established that a national law which does not allow the debtor in a loan agreement to invoke in mortgage enforcement proceedings the existence of an abusive clause in the contract, such a possibility existing only in separate (substantive) declaratory procedures, is incompatible with the Directive on abusive clauses, as long as it does not allow the court referred to the substantive procedure, competent to assess the abusive nature of such a clause, to adopt provisional measures, in particular the suspension of the enforcement procedure[7]. In fact, the Court requests the existence of a new remedy that allows the real assessment by the judge of the possible abusive nature of the clauses in the enforced execution phase, which, in a short time, was reflected in the modification by the national (Spanish) legislator in question of the incident domestic law (*Jerez Delgado, 2023, p. 80*).

The extensive dialogue between the Court of Justice of Luxembourg and the national courts on the application of the Unfair Contract Terms Directive has also made it possible to identify the main mechanisms by which the Union's case law can contribute to strengthening the procedural position of the consumer: the gradual development of a broad concept of the consumer in its procedural dimension and the principle of *ex officio* action by national judges in consumer cases. Both are based on a minimisation of national requirements for consumer procedural activism. Once accepted and applied by national judges, they became the basis of a high standard of consumer rights protection at EU level, outlining a uniform vision aimed at ensuring real and effective legal protection, but at the same time having a significant impact on most systems of national protection.

"Judicial dialogue", as a distinctive feature of the EU's legal system, is thus at the origin of a process of "Europeanization" of procedural law in the matter of consumer protection" (*Beka, 2018, p.9*). For example, referring to the influence of European law on national law in the matter, a legal practitioner from Romania asks rhetorically "how our law regarding the protection against abusive clauses of credit consumers could have been understood and applied correctly, without the interpretive support of the Luxembourg Court regarding the European directives in this matter?" (*Buz, 2022, p.67*). At the same time, a Spanish author sees in European law regarding abusive clauses "a real Trojan horse in Spanish formal (procedural) law, altering its classic principles, to the astonishment of the proceduralist doctrine" (*Jerez Delgado, 2023, p.76*).

In the following, the main milestones of the evolving jurisprudence of the European Court of Justice will be highlighted with regard to the definition of the concept of consumer in its procedural dimension, on the one hand, and with regard to the active role of the national court in consumer disputes, on the other hand, proposing for each of these lines of jurisprudence a reading grid that goes beyond the issue of consumer protection to identify meanings from an

[7] Judgment of 1 March 2013, Aziz, C-415/11, EU:C:2013:164,

institutional perspective of the relationship between the European Union and the Member States.

II. THE FUNCTIONAL APPROACH OF THE CONSUMER CONCEPT IN THE CASE LAW OF THE CJEU

The first line of case-law of the Court of Justice to which we shall refer concerns the determination of the persons who fall within the scope of the concept of 'consumer' or, more precisely, given that it relates to the procedural dimension, the determination of the conditions under which a party to a national civil dispute is or is not in fact a 'consumer' and thus entitled to the protection offered by EU law.

Although European Union substantive law generally defines the consumer as a natural person acting for purposes which are outside his or her professional activity[8] (an objective concept which sets the consumer in opposition to the professional), some of its provisions establish, without defining, a more nuanced dimension of the consumer, which takes into account certain characteristics that are his own and in relation to which the benefit of the protection offered by the regulation in question is granted - that of the "average consumer", which could be, as the Court of Justice held, the consumer "well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors"[9].

Beyond the difficulties inherent in establishing a uniform concept of the European consumer based on elements which, by their very nature, could be subjective, the introduction of such elements would make it possible to calibrate the level of protection according to the typology of the consumer protected, certain personal or situational characteristics of the person concerned (*Ungureanu, 2021, pp.16-17; Niță, 2023, pp.38-39*). However, the Court of Justice, which has often been asked by national courts to clarify the concept of consumer, has, particularly in recent years and with particular reference to consumer contracts, imposed a purely objective concept of consumer. Thus, from the point of view of the functioning of the consumer market, it refers in certain cases to the concept of the average consumer, who must be "a reasonably well-informed and reasonably observant and circumspect consumer"[10], which implies an objective concept that does not in fact measure the behaviour of the average consumer on the basis of these requirements, but rather prescribes a certain prior behaviour and allows for subsequent verification by the court on the basis of the requirements of

[8] See, for example, art. 2 (b) of Directive 93/13/EEC on unfair terms in consumer contracts.

[9] Judgment of 16 July 1998, Gut Springenheide and Tusky, C-210/96, EU:C:1998:369. See also Recital 18 of Directive 2005/29 on unfair commercial practices.

[10] See, for example, Judgment of 20 September 2017, Ruxandra Paula Andriciuc and others c. Băncii Românești SA, C-186/16, EU:C:2017:703, paragraph 47.

information and diligence. As noted in the doctrine (*Bercea, 2018, p.30*), this verification is, in fact, rarely present in the activity of national courts. In procedural matters, however, the consumer is protected regardless of the situation in which he finds himself, and "the idea of the average consumer from material law is not taken into account" (*Ungureanu, 2021, p.15*). The only condition for a natural person to be qualified as a consumer and to benefit from the level of protection provided by the European regulations is to conclude a contract with an economic operator for a purpose that is outside his professional field.

Most often, the general argument used by the Court is that the provisions (from case to case) of European secondary law aim to guarantee a high level of consumer protection and that they create a protection system based "on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge", and "[t]his leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms"[11]. As such, Member States are required to provide strong guarantees that the protection offered by European law cannot be circumvented and that it is guaranteed "to all natural persons finding themselves in the weaker position" to that of the professional[12]. Consequently, the notion of consumer has an objective character and is independent of the knowledge and information that the person in question actually has[13], his skills, the risks he assumes or the large sums he transfers. In addition, after establishing that only contracts concluded "outside and independently of any trade or professional activity or purpose, solely for the purpose of satisfying an individual's own needs in terms of private consumption" are subject to the special protection provided for in terms of consumer protection[14], recently the Court offered an even broader interpretation of the notion of consumer, showing that it also covers the situation when a person "has concluded a loan contract intended for a purpose in part within and in part outside his or her trade, business or profession, together with a joint-borrower who did not act within his or her trade, business or profession, where the trade, business or professional purpose is so limited as not to be predominant in the overall context of that contract"[15].

Although at the origin of this approach, arguments related to ensuring a high level of consumer protection could be identified, the broad interpretation of the concept of "consumer" offered by the CJEU has been criticised in the doctrine and considered unfair because, based on an "irrefutable" presumption of the vulnerability of the consumer and not taking into account the real situation of the

[11] Judgment of 3 September 2015, Costea, C-110/14, EU:C:2015:538, paragraph 18 and the jurisprudence quoted.
[12] Judgment of 21 March 2019, Pouvin and Dijoux, C-590/17, EU:C:2019:232, paragraph 28.
[13] Ibidem, paragraph 24.
[14] Judgment of 25 January 2018, Schrems, C-498/16, EU:C:2018:37, paragraph 30.
[15] Judgment of 08 June 2023, YYY., C-570/21, EU:C:2023:456.

person in question, it can lead to privileging the consumer who is not vulnerable (*Ungureanu, 2011, p.17-18*), to an "over-protection" of him (*Bercea, 2018, p.35*), with the consequence that, instead of the claimed objective, it rather brings a disservice to consumers who, feeling protected in any situation, become irresponsible, at the same time allowing the abuse of this quality by people who are not really vulnerable.

Another reading grid, in which this jurisprudence of the CJEU regarding the notion of consumer in its procedural dimension could be read, is an institutional one, related to the context in which it was pronounced in all these cases - preliminary referrals from national courts. The interpretation offered by the Court can be seen as a sign of goodwill and support given by the Court to national judges, an expression of its desire to secure its privileged relations with the national courts on whose activism it depends in the exercise of its own role, exempting them from the difficult obligation to check and decide, in each individual case, based on subjective criteria, who is a consumer and who is not. Thus, the phrase "in order to provide the national court with a useful answer", which appears in the text of many judgments to announce the instructions given to the national court in question, instructions which in most cases boil down to determining whether or not the person concerned is acting for purposes outside his professional activity, seems to convey such an idea.

On the other hand, the Court recently tried to impose a transversal concept of the consumer at the EU level, in order "to ensure compliance with the objectives pursued by the EU legislature (...), and the consistency of EU law", in this sense being necessary to take into account "in particular, of the definition of 'consumer' in other rules of EU law"[16]. An equally recent development[17], stemming from a preliminary reference made by a Romanian court (Tribunalul Olt), shows that this transversal concept of the consumer also extends beyond the borders of the Union, in order to protect the consumer who has his habitual residence in a Member State, even when he becomes active and goes to a third country to purchase products and services there. Thus, despite the existence of a clause designating the law of a third country as the law applicable to the contract concluded by the consumer for this purpose, such a contract falls within the material scope of application of the Unfair Contract Terms Directive (Directive 93/13) and the national court "must" apply the provisions transposing this Directive into the legal order of the Member State concerned and "has the task" of determining whether the trader is acting for purposes outside his professional activity. This interpretation, which we see as an excessive of the existing

[16] Ibidem, paragraph 40.

[17] Judgment of 8 June 2023, Lyoness Europe, C-455/21, EU:C:2023:455, in particular paragraphs 45-47.

provisions of the Directive in question (mainly, of the condition provided for in art. 6(2) of the Directive to exist "a close connection with the territory of the member states"), seems to conveys that the CJEU is willing even to neglect the legal coherence, the predictability of the applicable law and to sacrifice the uniformity of the level of protection provided to consumers at the EU level (as long as, in a case like the one under discussion, their judicial protection depends on the way in which the Directive is transposed at national level), in the name of the desired to maintain the European consumer, in whatever situation he may find himself, within the scope of EU law and within the scope of competence of the national courts, a component part of the Union judicial system, the only ones that can address with a preliminary reference to the Luxembourg Court, allowing it to rule in the last instance on the application or interpretation of EU law.

The concept of consumer in its procedural dimension, as an autonomous, functional notion, based on the role of the parties with regard to the contract in question, is therefore put at the service of ensuring the coherence of EU law and the functioning of the Union judicial system. However, it is questionable to what extent it also serves the objective of strengthening the protection of the rights of the European consumer, which should imply a special protection granted to those who are truly vulnerable. In fact, the Court's approach is insufficiently articulated, leading to situations that can hardly be justified from this perspective. Thus, the doctrine notes that in certain cases where the consumer is "neither ill-informed, nor inexperienced, nor in a state of economic inferiority", it is difficult to justify the distinction between consumer contracts concluded for professional purposes and those concluded for private purposes, as long as both situations are adhesion contracts, the conclusion of which places the adherent in the same position of inferiority, regardless of the professional or private purpose for which it is concluded (*Ungureanu, 2021, p.19*). In this context, the example of a lawyer is given (with reference to the Case Costea, C-110/14, in which the Court of Justice held that he fell within the definition of consumer because the contract he concluded was not related to the activity of his office) who, for professional purposes, took out a loan to equip his law office, a situation in which "he would no longer have been considered a consumer but a professional and would no longer have benefited from the protection rules. Or, even in this case, he would have been in the same inferior position, since he would also have concluded a contract of adhesion" (*Ungureanu, 2021, p.19*).

III. THE ACTIVE ROLE OF NATIONAL COURTS IN CONSUMER CASES: THE OBLIGATION TO ASSESS UNFAIR CONTRACT TERMS OF THEIR OWN MOTION (EX OFFICIO)

A second line of jurisprudence of the CJEU in the matter of consumer protection resulting from its interaction with national courts concerns the effectiveness of the special protection conferred on consumers by secondary EU

legislation. With arguments also related to the consumer's vulnerability (the need to protect the "weaker party"), which, according to one author, is becoming a principle of EU civil law (*Reich, 2013, p.37*), the CJEU has established that the consumer is in a weak position not only in contractual relations, but also as a party to the proceedings, and that this must be compensated by the courts. Consequently, national courts are obliged to analyse of their own motion the potentially unfair nature of contractual terms contained in contracts concluded with consumers, and are therefore bound by this obligation even if the unfair nature of the contractual terms is not invoked by the consumer.

Thus, although a provision to this effect is not included in any legal instrument of the Union, the Court first established that the European system of consumer protection (in this case, that provided for by Directive 93/13 on unfair terms[18]) "entails the national court being able to determine of its own motion whether a term of a contract before it is unfair"[19], in order to later clearly provide that the national court has "the obligation to examine that issue of its own motion, where it has available to it the legal and factual elements necessary for that task"[20]. The obligation to ensure ex officio control is also imposed in the situation where the domestic law does not provide for the ex officio examination of abusive contractual clauses or even prevents it, the courts of the member states being called upon to interpret the national rules in accordance with EU law (as it has been interpreted of the Court) or, if this is not possible, remove from application the contradictory national rules and rely directly on Union law[21]. Finally, the Court also specified the concrete implications for the courts of the failure to fulfill this obligation, which reflect "the role assigned by EU law to national courts"[22], namely the possibility that, if it acts as the ultimate jurisdiction, "that court committed a sufficiently serious breach of EU law by manifestly disregarding the provisions of Directive 93/13 or the Court's case-law relating thereto"[23], thereby making the Member State liable for the damages caused to consumers.

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[18] In particular, art. 7 para. (1) of the Directive, according to which "Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers".

[19] Judgment of 27 June 2000, Océano Grupo Editorial and Salvat Editores, C-240/98-C-244/98, EU:C:2000:346, paragraphs 26, 28 și 29.

[20] Judgment of 4 June 2009, Pannon GSM, C-243/08, EU:C:2009:350, paragraph 32.

[21] See the Judgments of the Court in cases C-168/15, Milena Tomášová or C-176/17, Profi Credit Polska. See also Commission Communication - Guidelines on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts, 2019/C 323/04, published in OJ C 323/4 of 27.09.2019.

[22] Judgment of 28 July 2016, Tomášová, C-168/15, EU:C:2016:602, paragraph 30.

[23] Ibidem, paragraph 27.

The foundations of this jurisprudence can be found in the Court's broader conception of the principles of effectiveness and equivalence as limits to the procedural autonomy of the Member States, determined by the need to ensure the useful effect and uniform application of EU law[24], in order to subsequently bring to the arsenal of arguments legal provisions from which this procedural requirement specific to consumer law is derived, effective jurisdictional protection[25], recognized as a general principle of EU law (*Mătușescu, Ionescu, 2018, p.157*). More recently, the Charter of Fundamental Rights is also brought into play (in a non-specific manner), the obligation of ex officio examination appearing as a condition of the effectiveness of remedies, more precisely, of the fundamental right to an effective remedy, in accordance with Article 47 of the Charter, which "must apply both as regards the designation of courts having jurisdiction to hear and determine actions based on EU law and as regards the detailed procedural rules relating to such actions"[26]. Since not only procedural obstacles, but also the limited knowledge or information possessed by consumers present a significant risk that they will not benefit from effective protection, such protection "can be guaranteed only if the national procedural system allows the court (...) to check of its own motion whether terms of the contract concerned are unfair (...)"[27].”

Although the Court did not expressly state this, it could be inferred from here, in accordance with the obligation of the national judge, the existence of a special procedural right of the consumer to benefit from an ex officio examination by the court of the contractual clauses in the consumer contracts on which concludes them, with the consequence of the withdrawal of all the procedural guarantees that art. 47 of the Charter establish them. Thus, although consumer protection is inscribed in the Charter (Art. 38) not as a subjective right, but as a legal principle, as has also been noted, "[t]his does not exclude the possibility that principles may evolve into a subjective right through the development of jurisprudence" (*European University Institute, 2016, p.8*). The increasingly frequent use, in this context, of Art. 47 of the Charter, which enshrines a subjective right, may suggest such a possible evolution.

The concrete implications of this case law have been extensively analysed in the doctrine, being summarised as representing "perhaps the strongest instance of the 'Jack-in-the-box' effect of EU consumer law – few anticipated the emergence of strong procedural requirements out of a basic duty to ensure the

[24] Judgment of 16 December 1976, Rewe, C-33/76, EU:C:1976:188.
[25] Judgment of 18 March 2010, Alassini, C-317/08, C-318/08, C-319/08 and C-320/08, EU:C:2010:146, paragraph 49.
[26] Judgment of 13 September 2018, Profi Credit Polska, C-176/17, EU:C:2018:711, paragraph 59. See also Judgment of 10 June 2021, BNP Paribas Personal Finance, C-776/19-C-782/19, EU:C:2021:470, paragraph 29.
[27] Paragraph 44 of Judgment Profi Credit Polska, C-176/17.

enforcement of the Directive. Indeed, this doctrine has developed beyond the area of unfair contract terms to apply to most areas of consumer law now" (*Howells, Twigg-Flesne, Wilhelmsson, 2018, p.333*). Since a detailed evaluation of these cases is beyond the scope of this approach, we shall confine ourselves to noting that, although they have been highlighted in subsequent case law (both in the countries of origin of the preliminary reference and in general), particularly in the sense of changing the assessment of the possible remedies in national law to ensure the protection of consumer rights in accordance with the requirements laid down by the CJEU, the case law of the Court of Justice has in some cases provided the argument for drafting legislative proposals (*Jerez Delgado, 2023, pp.76-91*)[28].

At least in certain legal systems, such as the case of Romania, the jurisprudence of the CJEU has determined a major reconceptualisation of individual consumer disputes (*Buz, 2022, pp.68-69*) by accepting the principle of ex officio examination even in the context of a passivity of the claimant, which previously seemed to be unthinkable and having the potential to demolish the foundations of the civil procedure and its guiding principle of the availability of the parties (*Ionescu, 2010, pp.103-109 and pp. 140 et seq.*). If we add to this the Court's more recent interpretations of important procedural principles, such as the authority of *res judicata* or the prohibition of *reformatio in pejus*, which cannot, under certain conditions (mainly related to the availability of effective remedies), prevent ex officio review of contractual clauses[29], the picture of the impact of the European Court's jurisprudence on national legal systems seems to be quite complete.

Thus, in addition to contributing to the objective of ensuring a high level of consumer protection, including through a possible deterrent effect on the use of unfair contractual terms in general, the principle of *ex officio* control, as established and refined over time by the ECJ, based on the presumed vulnerability of the consumer, had to be translated into the national legal systems (*Grochowski, Taborowski, 2022, p.235-256*), becoming a standard against which the adequacy of national standards of effective judicial protection is measured, a source of judicial innovations. As this translation overlaps with the long-settled principles of the national civil procedure, with which it sometimes contradicts, it was inevitable that more and more judges, from various member states, would request clarifications from the Court, thus giving it the opportunity to expand the theory in as many aspects of the consumer union law as possible. If this has considerably

[28] See, for example, in the case of Romania, the statement of reasons for the Draft Law on the protection of consumers against abusive or untimely foreclosures, PL-X 663/16-12.2019, adopted by the Senate and under debate, at the time of drafting this article, at the Chamber of Deputies.

[29] Judgment of 13 September 2018, Profi Credit Polska, C-176/17, Judgment of 17 May 2022, Unicaja Banco, C-869/19, EU:C:2022:397.

strengthened the authority of the ECJ, it is no less true that the Court's interpretation of European rules in particular national contexts has generated a body of case-law through which national judges find it difficult to navigate. In the face of the Court's dynamism in interpreting the provisions of EU law as giving rise to an obligation to review *ex officio,* when such an obligation could hardly be implied from the provisions in question, it is quite difficult for a national judge to assume that he does not have such an obligation, especially in a situation not fully covered by the Court's interpretation. A new preliminary question is therefore almost inevitable. This situation is fully illustrated by the successive preliminary references formulated by the Romanian courts regarding the possibility of invoking, by way of objection to the enforcement, the abusive nature of some clauses included in the contract concluded between a consumer and a professional[30], in the context of the particularities Romanian enforcement law, in which the objection to the enforcement procedure and the common law annulment action coexist (*Briciu, 2021*). Asked about the attitude to be adopted by the national court in the event that "it is not possible to interpret the rules of national law relating to enforcement in a manner consistent with EU law", the CJEU answered rather bluntly that the national court which is responsible for the enforcement proceedings and which hears an objection to the enforcement of a contract that is concluded between a consumer and a seller or supplier and constitutes an enforceable instrument "is obliged to examine of its own motion whether the terms of that contract are unfair, and, where necessary, is to disapply any national provisions which preclude such an examination"[31].

CONCLUSIONS

The mechanism that ensures the functioning of the Union's judicial system (the preliminary reference procedure, described as a form of judicial dialogue) has allowed the ECJ not only to define a broad scope of European consumer protection rules, but also to establish an autonomous concept of the effectiveness that must be given to the rights granted to consumers by EU law. Thus, "the procedural protection of consumers in their individual capacity in domestic disputes has been Europeanized and considerably strengthened" (Beka, 2018, p.7), making it clearer that this also implies an exception from the classical principles of procedural law, a result that can be explained "by alluding to the generation of a specific branch - "European consumer procedural law" - which is

[30] Order of 6 November 2019, BNP Paribas Personal Finance SA Paris Sucursala București and Secapital, C-75/19, EU:C:2019:950; Judgment of 17 May 2022, Impuls Leasing România (C-725/19, EU:C:2022:396); Judgment of 4 May 2023, BRD Groupe Société Générale SA and Next Capital Solutions Ltd, C-200/21, EU:C:2023:380.

[31] Paragraph 42 of Judgment in case BRD Groupe Société Générale SA and Next Capital Solutions Ltd.

detached from general procedural law (as consumer law also abandons the "general part or theory" in matters of contracts)" (Jerez Delgado, 2023, p.86).

From the perspective of this result, the activism of the Court manifested through this jurisprudence can be seen as an attempt to compensate for an imbalance between the requirements of the single market (Vâlcu, 2023, pp. 90-98) and consumer protection, which the substantive rules perpetuate. By anchoring fundamental rights in the field of European consumer law, the Court could respond to the requirement that the main objective of Union legislation in this field be consumer protection rather than reasons related to the functioning of the market (Howells, Twigg-Flesne, Wilhelmsson, 2018, p. 343). However, the rather timid inclusion (at least so far) of the fundamental rights enshrined in the Charter in the set of arguments that would justify such increased consumer protection at the EU level entitles us to express doubts as to whether such an objective is pursued as a matter of priority by the Court.

If we bring together the two lines of case-law highlighted throughout the paper, we can see that consumer protection, which is primarily the responsibility of the Member States and to which the European Union merely "contributes" according to the Treaties, rather becomes an important instrument of the Court of Justice's "judicial policy", related to the preservation of the autonomy of EU law and the system of judicial remedies through which this objective is achieved (at the head of which the Court itself is, alongside the national courts) (Arnull, 2019, pp 439-454). The Court's broad interpretation, both of the concept of consumer and of the national judge's obligation to invoke ex officio EU law, can thus be seen as a two-step reasoning: first, it strengthens the private application of EU law by bringing before national courts ("common law" courts of EU law) a wide category of individuals who can now rely on EU law to protect their rights and economic interests, in order to later compel national judges to fully manifest themselves in their capacity of component part of the EU jurisdictional system and to apply ex officio the provisions of this law regarding them. Moreover, the obligation to examine ex officio also requires a proactive attitude of the court, which must itself qualify a person as a consumer, in the absence of a claim of this quality by the party in question, in the situation in which it is referred to a dispute having as its object a contract that "seems to fall within the scope" of EU law[32]*. If we also take into account the jurisprudence related to the obligation of the courts acting at the last level of jurisdiction to refer preliminary questions to the Court of Justice whenever they have the slightest doubt regarding the interpretation of European norms (Mătușescu, 2020, pp.41-46), the place of national judges in the European judicial pyramid is secured. As one author notes (Beka, 2018, p.8), given the willingness shown by the courts of the Member States to engage in*

[32] Judgment of 4 June 2015, Faber, C-497/13, EU:C:2015:357, paragraph 46.

dialogue with the Luxembourg Court and to implement its guidelines, "[in] the field of consumer contract law, national courts fully assume their competence as Union law judges".

If, as I have emphasised throughout the paper, the jurisprudence analysed raises questions as to the extent to which it really protects consumers in need of protection[33], such questions can also be expressed in terms of the relationship between the jurisdiction of the Union and the national courts thus constructed, and the idea of cooperation and dialogue that should characterise this relationship (Mătușescu, 2020, pp. 38-40), but also, more broadly, of the implications for the relationship between EU law and the internal law of the Member States. In essence, by empowering national judges to autonomously examine the application of EU law as it has been interpreted by itself, giving them increasingly precise and authoritative instructions to do so, the Luxembourg Court in fact gives them a rather weak in the interpretation of European consumer protection law. Without accepting national variations, in consideration of the different legal traditions that may exist, the interpretation of the CJEU is clearly imposed on them, but it is quite unclear to what extent this interpretation is the result of a real dialogue between the courts. On the other hand, from the perspective of national law, the implications are far from negligible. National judges are empowered by the CJEU to overturn national normative and judicial hierarchies, leaving unapplied provisions of national law or the jurisprudence of higher courts that contradict their interpretation. European jurisprudence is becoming, at least in the area of unfair terms, a genuine source of EU law (Jerez Delgado, 2023, p.87), reflecting the fact that legislative intervention is not always necessary for the progress of European integration, sometimes a reorientation of jurisprudence is sufficient.

Although the doctrine expresses some doubts related to the absence of any resistance on the part of the national courts to accept the Court's theory without reservation (Howells, Twigg-Flesne, Wilhelmsson, 2018, p.334), we could say that the way in which the CJEU decided (with the competition of national judges) the issue of protecting the rights that EU legislation confers on consumers, described as "a paradigm of the institutional game between the Member States and the European Union" (Jerez Delgado, 2023, p.76), set the stage for even more ambitious interpretations, related, for example, to the issue of the rule of law and the independence of the judiciary, as an indispensable condition for it (Mătușescu, 2022). Looking only at the Romanian courts, the number of preliminary references they have made to the Luxembourg Court in the matter of consumer protection can be compared, until now, only with the activism shown in

[33] The European Commission itself suggests that, although the Court has not provided much guidance in this regard, in assessing the effectiveness of remedies it "should take into account the perspective of more vulnerable consumers" - paragraph 5.4.2. of its 2019 Guidelines on the interpretation and application of Directive 93/13, 2019/C 323/04.

recent years in matters relating to the rule of law and the independence of the judiciary, which has allowed the CJEU to analyse various components of the organisation and functioning of the judicial system in Romania[34]*. This joining could also suggest another question: would it be possible to fully incorporate the "triad" of Art. 2 TEU, which establishes the rule of law as a value of the Union - Art. 19(1) TEU on the obligation of the Member States to establish the means of redress necessary for the protection of rights deriving from EU law - Art. 47 of the Charter on the right to an effective remedy - in the field of consumer protection? Although it is difficult to foresee such a development, it cannot be completely excluded.*

However, we can observe that what links these two unprecedented jurisprudential developments (the protection of consumer rights and the rule of law) is the fact that the more authoritative tone of the Court of Justice seems to be related not only to the general context in which the respective judgments were pronounced (the financial crisis or the crisis of the rule of law, generating problems for European citizens), but also to the specificities or perceived weaknesses of certain legal systems. If this is the case, and if Romania continues to be perceived as being in a "grey zone" in terms of available remedies and the general functioning of the judicial system, it can be expected that, depending on the opportunities offered by the Romanian courts, this authoritarian tone will continue and further adjustments at the national level will be deemed necessary. From such a perspective, the "harmonising" effect of the CJEU jurisprudence is questionable as long as it is not certain that all national legal systems will be equally affected

A statement by the European Commission in the document that aims to "guide" the application of the directive on unfair terms suggests a solution to this problem: "(...) the principles of ex officio control and effectiveness may require the Member States to make certain adaptations or corrections in their legislation insofar as national rules of procedure and substance are in conflict with these principles (...).The Member States are, therefore, invited to examine all national provisions that may be in conflict with the guarantees required by the UCTD as interpreted by the Court"[35]*. However, such a voluntary examination of the compatibility of national provisions with the case law of the CEJU is rather illusory.*

[34] Starting with Judgment of 18 May 2021, *Asociația „Forumul Judecătorilor din România”,* Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, C-397/19, EU:C:2021:393.

[35] Paragraph 5.6. from the 2019 Commission Guidelines on the interpretation and application of Directive 93/13, 2019/C 323/04.

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THE PLACE AND ROLE OF THE COMPARATIVE LAW METHOD WITHIN THE INTERPRETATION OF THE COURT OF JUSTICE OF THE EU

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Abstract

The term „interpretation" was left in shades by The EU Functioning Treaty, but it shows the communication of the content and applicability limits in space and time of that particular legal norm. All the methods used for descovering the content of the legal norms in order to proceed to its practical enforcement is what interpretation is all about. The European Court of Justice of the EU provides the only official interpretation of the European legal norms, using at this extent several ways to accomplish that, such as grammatical interpretation which, most of the time, needs to be completed by the teleological one. The teleological interpretation ensures the fact that the main purpose of the EU legislation is to recourse to the general principles of the EU Law, but also to the interpretation of the secondary law according to the Founding Treaties. In this generous frame of interpretation, the comparative law method applied by the European Court of Justice enables the hand- in -hand relation between this particular method of interpretation and the constitutional traditions common to the member states.

Key words: *The Court of Justice of the European Union, comparative law method, common member states constitutional traditions, teleological interpretation.*

INTRODUCTION

One of the most crucial roles of the Court of Justice of the European Union (CJEU) is to interpret European Union law through preliminary rulings, ensuring the proper application of European legislation and eliminating the risk of

divergent interpretations among different countries' courts. This occurs when a national court handling a specific case has doubts about the interpretation and application of a EU legislative act or simply wishes to know whether a legislative act or national practice complies with EU law. In both situations, the court utilizes the mechanism by which it requests the opinion of the CJEU. The response of the CJEU takes the form of a judgment rather than a mere opinion. Consequently, the receiving national court is bound by the interpretation when resolving the case on its docket, and the preliminary ruling becomes mandatory for other national courts facing a similar issue. Article 267 of the Treaty on the Functioning of the European Union (TFEU) "does not define the term interpretation, which, however, in its usual sense, means communicating the content and material scope of the legal norm in question in space and time. Union legal norms, due to the terminology used, their objectives, and the high level of abstraction, are often unclear, confusing, and challenging to understand, even for a specialist" *(Gyula 2023, p. 417).*

"Law reflects social evolution" *(Popoviciu, 2014, p. 20).* Member states are the ones responsible for ensuring the effectiveness of European Union law, especially through preliminary questions addressed by the national judge of the supreme union court. "Considering the importance of combating all forms of discrimination, it has become necessary over time to adopt a coherent legal framework to establish and implement efficient mechanisms to promote equality and prevent, eliminate, and sanction discrimination" *(Cîrmaciu, 2018, p. 42).*

In its interpretative activity, the methods used by the Court of Justice can take the form of grammatical interpretation, often complemented by the systematic-teleological interpretation method, oriented towards the basic objectives of the Union. This latter interpretative typology exists in the principles of Union law and fundamental ideas from treaties. Thus, the systematic-teleological interpretation method implies an autonomous interpretation of Union law, without reference or similarity to domestic law, precisely to ensure uniform application of EU law in all member states. The interpretation is oriented towards the useful effect of regulations, aiming to achieve optimal conditions for the functioning of the EU. As an example, in the Euro Box judgment[1] "the national court that has exercised the option or met the obligation to refer to the Court with a request for a preliminary ruling under Article 267 TFEU cannot be prevented from immediately applying Union law in accordance with the decision or the Court's case law; otherwise, the useful effect of this provision is diminished[2]. Last but not least, the interpretation of secondary law is always done in accordance

[1] cauzele conexate C-357/19, C-379/19, C-547/19, C-811/19 și C-840/19

[2] Cristina-Maria Florescu, *Note la Hotărârea CJUE din 21 decembrie 2021 pronunţată în cauzele conexate Euro Box Promotion și alții. Soluționarea litigiilor de contencios administrativ şi fiscal: între obligativitatea deciziilor Curţii Constituţionale a României şi supremaţia dreptului UE,* pe www.juridice.ro.

with the primary law of the European Union. Acting as a Supreme Court of Justice, the CJEU faces a challenging task when called upon to formulate the clearest interpretation while leaving the main dispute on the docket of the national court untouched. Following the preliminary ruling issued by the Union judge, the national court will apply, in a concrete manner in the case brought before it, the interpretation provided by the Court of Justice. In this process, the national judge must ensure that the full effect of Union law is fully respected in the main dispute, leaving unapplied, ex officio, any national regulation or practice that proves to be incompatible with Union requirements expressed in a legal norm benefiting from direct effect.

I. THE COMPARATIVE LAW METHOD

The term "interpretation," left undefined by the Treaty on the Functioning of the European Union, terminologically designates the communication of the content and limits of material application in space and time of the legal norm in question. The entirety of methods used to discover the content of legal norms, for the purpose of applying them to concrete cases, constitutes the action of interpretation. The Court of Justice of the European Union (CJEU) provides the sole official interpretation of Union legal norms, employing various methods, including the grammatical method, focusing on the "interpretation of the word," often complemented and corrected by a systematic-teleological interpretation method. The latter aims at the primary union goal, involving recourse to the principles of Union law and guiding ideas from primary EU law to ensure the functioning capacity of the EU, and the interpretation of secondary law in accordance with primary law. In this generous framework of interpretation, the application of the method of comparative law by the Court of Justice appears conclusive, intertwining it as a method of interpretation with the common constitutional traditions of the member states.

"The method of comparative law can be defined as an interpretative tool serving the Court of Justice in resolving certain constitutional or legislative gaps, conflicts, and ambiguities. While the method of comparative law focuses primarily on the legislation of member states, it does not exclude international law or even the law of third countries, such as that of the USA." (Koen Lenaerts and K. Gutman, Oxford, 2015, p. 37).

The legitimacy of the Court of Justice's use of this interpretation method arises from several provisions of the Treaty on European Union, specifically Article 6(3), which mandates the Union to respect "fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the common constitutional

traditions of the Member States, as general principles of Union law"[3]. Assimilated to the primary law of the European Union, as a legal force, after the Lisbon moment in 2009, the Charter of Fundamental Rights of the European Union states that fundamental rights recognized in the Charter and resulting from the common constitutional traditions of the member states will be interpreted in accordance with their respective traditions.

Regarding the full effect of EU law, the Court of Justice has emphasized the prevalence of Union law in the power balance between a national court and the Court of Justice. The preliminary ruling procedure is particularly important, and the Union court holds the exclusive interpretative power of EU law. In exercising this exclusive competence, the Union judge specifies "the extent of the principle of the supremacy of Union law over the relevant provisions of that law, regardless of the interpretation of national law or Union law provisions retained by a national court that does not correspond to the interpretation of the CJEU."[4]. In this context, recent case law of the CJEU reinforces the principle of the supremacy of Union law, in the sense that it must be interpreted in such a way that any national regulation or practice according to which the common law courts of a member state are obliged to respect the decisions of the constitutional court or the Supreme Court of that state, "cannot, for this reason and at the risk of disciplinary liability of the judges concerned, leave unapplied ex officio the case law resulting from the mentioned decisions, even if they consider, in light of a decision of the Court, that this case law is contrary to provisions of Union law which have direct effect"[5].

In the scope of the application of the method of comparative law, not only does the primary law of the EU come into play, but also secondary law that can offer a useful framework for clarifying certain provisions of derivative law. Called upon to interpret the notion of "spouse" in Directive 2004/38, the Court of Justice adopted a neutral attitude, considering the legal recognition of same-sex marriage had changed since the adoption of the Directive, as noted by the Advocate General in the Coman case and others[6].

In fact, the application of the method of comparative law entails the Court of Justice finding a common denominator in the convergence of the legal systems

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[3] *Tratatul asupra Uniunii Europene*, publicat în Jurnalul Oficial al Uniunii Europene nr. C 326/19/26.10.2012.

[4] Cristina-Maria Florescu, *Note la Hotărârea CJUE din 21 decembrie 2021 pronunţată în cauzele conexate Euro Box Promotion și alții. Soluţionarea litigiilor de contencios administrativ şi fiscal: între obligativitatea deciziilor Curţii Constituţionale a României şi supremația dreptului UE*, pe www.juridice.ro.

[5] Hotărârea CJUE pronunțată de Marea Cameră din 24 iulie 2023 privind cererea de decizie preliminară formulată de Curtea de Apel Brașov – România, Cauza C-107/23, publicată în JOUE nr. C 321/16).

[6] Hotărârea din 5 iunie 2018, *Coman și alții,* C-673/16, EU:C:2018:385.

of member states. The deeper this convergence, the more the Union court tends to follow it. Temporally, the method of comparative law seems to have been present in the interpretative activity of the Court of Justice since the 1960s, when Advocate General Lagrange presented the idea on June 4, 1962, that when applying this method, the Court of Justice "chooses from those solutions of the member states which, taking into account the objectives of the treaty, seem to be the best."[7]. In situations where it has to rule on the compatibility of a national measure with Union law, the European court will gauge the diversity of legal systems to know exactly how reliable and accepted its decision will be at the level of the member states. Thus, "to the extent that there is no harmonization at the EU level, and national diversity does not undermine one of the principles on which the EU is based, the absence of consensus militates in favor of finding a solution that does not risk generating misunderstanding or resistance in certain member states, which could affect the effectiveness and uniform application of EU law." *(Koen Lenaerts, 2022, p.17).*

CONCLUSION

The application of the comparative law method by the Court of Justice of the European Union, especially in the context of major social changes leading to a spontaneous convergence of the legislations of member states, brings a new dynamic. It allows the legal order of the EU to naturally address these changes, aligning the legal culture of the EU with that of the member states. The EU's established motto, "Unity in Diversity," takes on new meanings in the context of the Court of Justice's application of the comparative law method, ensuring "mutual influence between the EU and national legal orders, thus creating a common space of law." (Koen Lenaerts, 2022, p.18).

The legal order of the European Union and its foundation on the two pillars represented by the direct applicability of Union law and its supremacy over national law are fully defended when the Court of Justice ensures the uniform and prioritized application of Union law in all member states. Even though it is not a perfect concept, the legal order of the European Union has an invaluable contribution to resolving the political, economic, and social issues of the member states.

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THE EUROPEAN UNION STRATEGY IN THE FIELD OF CYBER-SECURITY

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Abstract

Cyber-attacks and cybercrime are increasing in number and sophistication across Europe.

The article presents and analyzes the European Union strategy for the period 2020-2025 in the field of cyber-security, as well as the most important legal instruments and bodies that have concerns in the field of cyber-security. The aim of the European Union's cyber-security strategy is to strengthen Europe's resilience to cyber threats and ensure that all citizens and businesses can fully benefit from reliable and trustworthy digital services and tools. The European Union strategy in the field of cyber-security contains concrete proposals for the implementation of regulatory, investment and policy instruments.

Keywords: *cyber-security, European Union strategy, legal instruments, cyber threats.*

INTRODUCTION

At the level of the European Union, there are several normative acts and bodies that address cyber security.

As early as 2013, the European Commission developed the first document entitled Cyber-security Strategy of the European Union: an open, safe and secure cyberspace that presents the point of view of the European Union and the specific actions that must be taken to have a protected cyberspace at the European level. The specific actions are planned both in the short term and in the long term and include a series of instruments and actors, such as, for example, the institutions of the European Union, the component states of the European Union and the relevant industrial activities.

The strategy at the European level in the field of cyber security from 2013 was defined by means of five priorities: obtaining a resilience of cyber infrastructures; the drastic reduction of computer crime; the development of policies and cyber defensive capabilities regarding the common security and defense policies; increasing cyber-security industry and technology resources; the creation of coherent international policy strategies by the European Union regarding cyber space and the promotion of the fundamental values of the European Union..

Cyber-attacks and cybercrime are increasing in number and sophistication across Europe. This trend is expected to continue to grow in the future, given the predictions that 41 billion devices worldwide will be connected to the Internet of Things by 2025.

In October 2020, EU leaders called for strengthening the EU's capacity to: defend itself against new cyber-attacks; create a more secure communication space that uses encryption; allows access to computer data in compliance with criminal procedural laws and for these computer data to be used only in judicial proceedings.

In December 2020, the European Commission and the European External Action Service (EEAS) revealed a new European Union cyber-security plan for the period 2020-2025.

The aim of this 2020-2025 strategy is to strengthen Europe's resilience to cyber threats and ensure that all citizens and businesses can fully benefit from reliable and trustworthy digital services and tools. The new strategy contains concrete proposals for the implementation of regulatory, investment and policy instruments.

The strategy shows how the EU can highlight and improve all its tools and resources to have access to all technological resources. It also shows how the EU can improve its European collaboration activities with other global allies who support the same value system, such as respect for democracy, fundamental human rights and freedoms and a modern rule of law.

The technological sovereignty of the European Union must be based on the resilience of all connected services and products. All four cyber communities, those dealing with the domestic market, law enforcement, diplomacy and defence need to work more closely for a common threat awareness. They should be ready to respond collectively when an attack materializes so that the EU can be greater than the sum of its parts.

The Cyber-Security Strategy 2020-2025 targets some security measures in the field of important services, such as medical services, energy-related services, the railway transport system and some factories and industries. The strategy wants to develop some collective plans to respond to major cyber attacks. The EU strategy also reveals some collaborative partnerships with member states, as well as with allied states worldwide to more effectively secure cyberspace.

Moreover, the strategy sheds light on how a common cyber system can respond promptly to cyber threats using the common resources and expertise in cyber-security of the Member States and the EU.

The new strategy wants to ensure an Internet that is used worldwide and open, to present some sustainable guarantees, in areas where there are risks of violation of fundamental human rights and freedoms in the online environment for the inhabitants of the European Union. Due to the new progress made in previous strategies, this new strategy contains concrete objectives for the implementation of three main points. These three points represent legislative initiatives and investment policies. These three points will consider three areas of EU action: resilience capacity, technological sovereignty and leadership; operational capability to prevent, deter and respond; collaboration to promote a global and open cyberspace.

The EU aims to support this new European strategy with new digital investments over a period of years. This target would greatly increase previous investments made by the EU. Also, this objective signifies the real involvement of the EU in new industrial policies and new technologies and in a recovery agenda.

I. EUROPEAN UNION LEGAL INSTRUMENTS IN THE FIELD OF CYBER SECURITY

The European Union Cybersecurity Regulation entered into force in June 2019 and introduced: an European Union wide certification system; a new, stronger mandate for the European Union Cyber-Security Agency.

On 18 April 2023, the European Commission proposed a specific amendment to the European Union Cyber-security Act, which refers to the Regulation (EU) 2019/881 as regards managed security services. The proposed change will allow the future adoption of European certification schemes for managed security services covering areas such as incident response, penetration testing, security audits and consulting. We underline that the proposed specific amendment aims to enable, through Commission implementing acts, the adoption of European cybersecurity certification systems for "managed security services, in addition to information and communication technology (ICT) products, ICT services and ICT processes, which are already covered by the Cyber Security Regulation (proposal for a regulation amending Regulation (EU) 2019/881 as regards managed security services, 2023, p. 1). Managed security services are playing an increasingly important role in preventing and mitigating cybersecurity incidents.

The proposed changes are limited to what is strictly necessary and do not change the operation or features of the Cyber-security Regulation.

Through the Cybersecurity Regulation, the European Union has introduced a unique EU-wide certification framework, which: builds trust; further drives the growth of the cyber security market; facilitates trade across the European Union.

The certification framework will convey certification policies at European level similar to a grouping of procedural norms, rules, and guidelines and standardization. The new regulatory framework will have as its central point an EU-level agreement on the possibility to evaluate the security features of ICT-based products or services. It will certify that ICT products and services that have been certified under such a scheme comply with specified requirements.

We would like to highlight that each European system should specify: the categories of products and services covered; cybersecurity requirements, such as standards or technical specifications; the type of assessment, such as self-assessment or third-party; desired insurance level.

Moreover, the single certification framework provides a comprehensive set of rules, technical requirements, standards and procedures.

A body that has a decisive par in cyber-security at the level of the European Union is the European Union Agency for Cyber-Security. The new European Union Cyber-Security Agency is based on the same structural system of its predecessor, the European Union Agency for Network and Information Security, now having a stronger part and a stronger mandate that is characterized by permanence. In addition, the agency has the same abbreviation, ENISA (Regulation EU 2019/881 of 17 April 2019 on ENISA and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013, 2019, pp. 3-21). The European Union Agency for Cyber-Security supports Member States, European Union institutions and other stakeholders to manage cyber-attacks.

The European Union Cyber-Security Agency's target is to obtain a powerful and efficient level regarding the securing of network system and information within the EU. The agency, together with the bodies of the EU and the member states of the EU, aims to develop a culture of cyber security for the benefit of citizens, consumers, public sector organizations and businesses within the EU. The agency also helps the European Commission, the member states of the EU and the business community to address, respond to and prevent cyber-security issues (Dupré, 2014, p. 2). The European Union Cyber-Security Agency supports the Member States of EU to implement the relevant legislation at the level of EU and to improve the resilience of the critical information infrastructure in the European Union.

Therefore, the European Union Cyber-Security Agency aims to strengthen the existing expertise in the national countries of the EU by supporting the development of cross-border communities, obliged to improve the security of networks and information in Europe.

At the level of the European Union, in addition to the the European Union Cyber-Security Agency, we emphasize that there are also other actors involved in the field of cyber security, such as: Europol and the Digital Agenda for Europe.

THE EUROPEAN UNION STRATEGY IN THE FIELD OF CYBER-SECURITY

At the Europol level, the European Center for Combating Cybercrime has been operating since 2013. The European Center for Combating Cybercrime aims to track illegal online activities carried out by organized crime groups, in particular attacks on electronic banking and other online financial activities, online sexual exploitation of children and those crimes affecting critical infrastructure and IT systems within the European Union. In order to dismantle more cybercrime networks and to prosecute more suspects, the European Center for Combating Cybercrime collects and processes cybercrime data and provides a support service for law enforcement bodies in the Union countries European. It provides operational support to European Union countries. e.g. against intrusion, fraud, online child sexual abuse and high-level technical, analytical and forensic expertise in joint investigations within the European Union.

The European Center for Combating Cybercrime enables research, development and capacity-building for law enforcement and conducts threat assessments, including trend analyses, forecasts and early warnings.

The Digital Agenda for Europe represents one the key points of the Europe 2020 Strategy developed by the European Commission and aims to elaborate the essential driving part, that the utilization of information and communications technology will have to play in achieving the objectives of the Europe 2020 Strategy. The objective of the Digital Agenda for Europe refers to exploiting to the maximum the potential of information and communications technology to encourage scientific discovery, the development and economic progress. It also supports the development of a digital single market to deliver smart, sustainable and inclusive growth in Europe. We highlight the fact that the Digital Agenda for Europe also has concerns in the field of cyber security. As the Internet has now become such an important information infrastructure for citizens and for the European economy in general, the Digital Agenda for Europe believes that IT systems and networks must be secured and made to withstand a multitude of new threats.

By Regulation (EU) 2019/1020, known as Cyber Resilience Act, which is another important legal instrument in cyber-security field, ensures that businesses and consumers are effectively protected against cyber-threats.

In order to ensure that products with digital components, such as home cameras, refrigerators, TVs and smart connected toys, are safe before they enter the market, representatives of Member States have reached a common position on legislative proposal of 15 September 2022 on horizontal cybersecurity requirements for products with digital elements, such as the proposal for a regulation on horizontal cybersecurity requirements for products with digital elements digital and amendment elements of Regulation (EU) 2019/1020.

The proposed regulation introduces mandatory cybersecurity requirements for the design, development, production and making available on the market of hardware and software products to avoid overlapping requirements arising from

different pieces of legislation in European Union Member States (Proposal for a regulation on horizontal cybersecurity requirements for products with digital elements and amending Regulation (EU) 2019/1020, 2022, pp. 1-40) .

II. DIRECTIVE ON THE SECURITY OF NETWORKS AND INFORMATION SYSTEMS

One of the most important legal instruments at the European level in the field of cyber-security is the Directive on the security of networks and information systems (NIS), which entered in force in 2016, being the first legal tool ever adopted at European Union level with the aim of development of collaboration between national countries from EU in the field of cyber-security.

Through this legal instrument, the NIS Directive, we emphasize that security duties have been established for service providers of services in the following areas, such as energy, transport, medical and sanitary and public finances and for providers of digital services (digital markets and cloud services) (Directive EU 2016/1148 of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union, 2016, pp. 3-10) .

In 2022, the European Union adopted a revised NIS Directive, the Directive EU 2022/2555 of 14 December 2022 on measures for a high common level of cybersecurity across the Union (NIS 2) to replace the 2016 directive NIS.

We noticed that the new rules ensure a high degree of cyber-security at European level, in response to the new cyber-attacks that are constantly increasing and considering the transformations in the digital world, which has been energized and influenced by the worldwide problem of infections with the Covid 19 virus.

The new European Union legislation, such as the NIS 2 Directive (Directive EU 2022/2555 of 14 December 2022 on measures for a high common level of cybersecurity across the Union, 2022, pp. 1-10): identifies new standards at a minimum level for a legal framework; defines effective collaboration mechanisms between law enforcement bodies in each EU member state; reviews the actions and areas that are included in the category of IT security obligations.

The NIS 2 Directive entered into force on 16 January 2023 at the level of the European Union.

The European Union wants to introduce mandatory cyber-security requirements for hardware and software products with a connected digital element, such as smart TVs or other household appliances, baby monitors, toys.

CONCLUSIONS

In conclusion, the development and regulation of a strategy at the level of EU in the field of cyber-security represents an important objective for the the national security policy of each national country from EU.

The European security political actors have highlighted the need to regulate an adequate European framework in the field of cyber-security, which must be effective against the numerous threats in cyberspace.

Moreover, the elaboration of the Cyber-Security Strategy 2020-2025 requires respect for fundamental human rights and freedoms, such as, for example, the right to private life or the protection of personal data in the electronic communications sector.

We believe that the national countries of EU must adopt as quickly as possible a national strategy on the security of Internet networks and IT systems that defines the strategic objectives and the appropriate political and regulatory measures and contained in the Cyber-Security Strategy 2020-2025 at the level of the European Union, in order to obtain and allow maintaining a high level of security of Internet networks and IT systems.

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ASSESSMENTS ON THE METHODS OF ACHIEVING THE CONSUMER'S RIGHT TO INFORMATION FROM THE PERSPECTIVE OF REGULATION (EU) 2023/988

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Abstract

The right to information is a fundamental right of the consumer for which there must be a constant concern of the authorities to update its components and the methods of realization. The diversity of issues raised by respecting and ensuring the right to information, in the context of the accelerated evolution of commerce, determined a review of the existing rules to achieve the general objective of consumer security and health, with a predilection for vulnerable categories, especially minors and people with disabilities.

The present study follows these changes, carrying out an analysis of the impact of the recently legislated rules, on consumers but also on economic operators.

Keywords: *information, consumer, safe product, safety warning, risk of injury.*

INTRODUCTION

Consumer rights, like human rights for democratic political societies, represent for business law, fundamental values for which the states of the world and international bodies undertake firm measures to ensure their respect.

The right to information is among the main rights of consumers, and it, as a complex right, consists of a comprehensive, clear, precise presentation, made by economic operators (manufacturers, importers, distributors, suppliers, providers) regarding the properties/characteristics of the products and services, which are the basis of the consumer's choice from a multitude of offers.

At the same time, the existence of this right, leads to achivement of a an education of the consumer who is more and more demanding and careful in his choices, giving the possibility of the complete and safe use/utilization of goods and services (*Niță, 2023, pp .43-44*).

The increase in the level of the consumer's education, who is more and more connected to the new technological realities, causes his choices to be more demanding, to much higher standards. Basically, increasing the quality of the consumer has a direct effect on increasing the quality of the product. Competitors can no longer manipulate the consumer through various marketing strategies that used to be effective. Now they appeal to an informed, educated public that knows its rights very well and reacts knowingly when it is harmed.

The diversity of offers, the way of presentation, especially in the online environment, expose the consumer more and more (*Dumitru, 2021, pp-63-65; Vâlcu, 2023, pp. 90-98*).

Regulation (EU) 2023/988 of the European Parliament and of the Council of 10 May 2023[1] aims to contribute to the harmonization of European Union legislation and the achievement of the objective provided for in art. 169 of the Treaty on the Functioning of the European Union (TFEU), which aims to ensure the health and safety of consumers[2] (*for a summary of the legislative evolution J. Ruohonen, 2022, 351-152*).

The solution chosen to regulate, through the regulation, is justified by the desire to have a European normative act that has clear and detailed rules, with direct application, eliminating the risk of different transposition of a directive at the level of the member states, existing at this moment, in certain cases, transposition divergences.

This regulation on general product safety applies to products supplied to the market, if with regard to the safety of the products concerned, there are no specific provisions or if there is the intervention of its rules is necessary to complete the gaps found in the provisions of the Union's sectoral harmonization legislation. Thus, it applies to new, used, repaired or refurbished products, under the condition shown above.

This regulatory framework appears as a necessity in view of the evolution of the online market, the development of new technologies and at the same time the approach to the recall of unsafe products, the reporting of unsafe products and

[1] Regulation (EU) 2023/988 on general product safety, amending Regulation (EU) no. 1025/2012 of the European Parliament and of the Council and Directive (EU) 2020/1828 of the European Parliament and of the Council and repealing Directive 2001/95/EC of the European Parliament and of the Council and Council Directive 87/357/EEC

[2] Regulation (EU) 2023/988 entered into force on June 13, 2023 and will apply from December 13, 2024, an 18-month transition period being necessary to organize the application of its provisions, especially regarding the two "Safety" portals Gate" and "Safety Business Gateway";

a better collaboration regarding the exchange of information between supervisory authorities had to be changed .

At the same time, the regulation updates a number of concepts used in the field of consumer protection, providing clarity and a better understanding of the legislation, implicitly in terms of consumer information.

By product, we understand according to art. 3 of the regulation "*any article, whether or not it is interconnected with other articles, provided or made available, for a fee or free of charge, including in the context of the provision of a service, which is intended for consumers or which is susceptible, under conditions that may be provided reasonably, to be used by consumers even if it is not intended for them*". In addition, the provisions of the regulation make substantial clarifications regarding the product safety assessment, including for products that imitate food, children being the most exposed.

In the following, we will focus on the presentation of the elements regarding consumer information that fall under the responsibility of all parties involved in putting a product on the market, but also the tools specially created to facilitate the information of any interested person, including here also the more exposed people, with vulnerabilities and we mean children, the elderly and people with disabilities.

I. THE OBLIGATION TO INFORM THE PARTIES INVOLVED IN THE COMMERCE OF A PRODUCT

I.1 Producers' obligations to inform

Producers are the first economic operators involved in the circuit of goods on the market, assuming the obligation to provide consumers with information on the characteristics of the product but also data certifying the safety of the product, following as during the circuit of the goods, whether we refer to the importer, distributor, supplier, those should complete the information with their specific elements. The content of the information is transmitted by labeling, by handing over the product accompanied by the technical book, instructions for use and other such documents, with visible text, in an unequivocal, easy-to-read form, by displaying prices and tariffs and by demonstrations of use. As we also find in our legislation[3], art 6 and 9 of Regulation (EU) 2023/988, reinforce this, emphasizing the protection of vulnerable people.

[3] According to art. 19 of the O.G. no. 21/1992" Informing consumers about the products and services offered is carried out, obligatorily, through their identification and characterization elements, which are registered visibly, legibly, easily understood, in a form that does not allow deletion and not to be inscribed in obscure places, not to be interrupted by drawings or images, as the case may be, on the product, label, sales packaging or in the technical book, contract, instructions for use or others similar, accompanying the product or service, depending of its nature".

As for the technical documentation, it is essentially a certification of the safety of the product based on a general presentation of it and its essential characteristics. Depending on the situation, if there is the possibility of a risk occurring, the documentation will refer, as appropriate, to: (1) the likely risk, the measures taken to eliminate or limit it and the results of the tests performed; (2) the list of all national and international documents complied with (specifying whether partially or fully) to ensure the safety of the product.

The technical documentation is periodically updated and kept so that it can be made available to the authorities, for a period of 10 years from the moment the product is introduced to the market.

As far as labeling is concerned, the differentiation between products is made by mentions of type, series, batch or other such elements. Other information concerns the identification of producers: name, name/registered trademark, postal address, email address. This information will be written on the product, on the packaging or on a separate document, as the case may be.

All information, instructions provided will be communicated in principle, in a language established by the legislation of each state, so that it is easily understood. If there are no such instructions and the product can be used safely and as intended by the manufacturer, the requirement does not apply.

If, after placing a product on the market, the manufacturer considers that it has a degree of danger, he has the obligation to inform, on the one hand, consumers and, on the other hand, the authorities of the Member State where the product is on the market, through the "Safety Business Gateway" portal. The information does not exclude the adoption of urgent measures regarding the safety of the product, these measures being mandatory and may even consist in the withdrawal or recall of the product as the case may be (*Marin Lopez, 2023, 87-104*).

According to the regulation (art. 33) we must remember that producers must not have any reservations, reluctance to communicate information to the supervisory authorities and the commission fearing the disclosure of professional secrets, confidential information, since the provisions of the regulation protect this information, the authorities making available to the public only that information in accordance with transparency requirements. The regulation under review envisages for the general public, in particular, information on the identification of products, the nature of the risk and the measures taken.

The responsibility for informing the consumer rests mainly with the manufacturers, together with the national market surveillance authorities and the commission which must ensure that the information has been passed on to the consumers. In this sense, producers can use, among others, several means: telephone, email, a section within their website. They must ensure that these information levers are also accessible to people with disabilities.

The natural or legal person who introduces a product to the market under the name or brand of the manufacturer is assimilated to the manufacturer, returning to him the specific obligations. Also, the natural or legal person who substantially modifies the product is assimilated to the manufacturer, taking over the manufacturer's obligations regarding "the part of the product affected by the modification or for the entire product if the substantial modification has an impact on the safety of the product" (art. 13 paragraph 2).

I.2 Specific obligations of representatives authorized to inform

The authorized representative is that person specially empowered by prodecer through a written mandate to fulfill the obligations of the mandate, among which the following tasks must be found:

- to provide at the request of a supervisory authority the information and documentation that certifies the safety of the product, drawn up in an official language[4];

- to inform the manufacturer if he has indications that a product is dangerous;

- to notify on the "Safety Business Gateway" portal, any steps taken to reduce the risks of a product for which it has competence according to the mandate, so that the national authorities with powers in this regard take note, if there is no such information;

- to cooperate with the national supervisory authorities to eliminate any risk regarding the products referred to in the mandate.

I.3 Obligations of importers and distributors to inform

The importer will notify an alert on the "Safety Business Gateway" portal if they are aware that a product has a potential risk and immediately notify the manufacturer. Moreover, regardless of the situation, they have specific obligations regarding information. Thus, they will mention on the product, on the packaging or in a document that accompanies it, their name, their registered trade name or their registered trademark, their postal and e-mail address and if they have designated a single point of contact, his postal or e-mail address.

At the same time, they will ensure that the imported products have clear safety instructions and information, in the language provided by the legislation of the state where the product is placed on the market, if such instructions and information are necessary. In addition, they will ensure that they have a copy of the technical documentation, for a period of 10 years[5], in case the supervisory authorities request this document.

[4] The text of art 10 paragraph 2, point a provides that the chosen official language must be understood by the respective authority.

[5] The term begins to run from the moment the respective product is placed on the market

Also, importers will have a cooperative attitude with the authorities and the manufacturer, aiming at the safety of the product, and if it has information regarding a danger for a product that it has introduced on the market, it informs the manufacturers, consumers and supervisory authorities about the risk, the corrective measures and the quantity of the products concerned in each Member State, using the "Safety Business Gateway" portal.

If a complaint is made, the importer shall inform the manufacturer, distributors and logistics service providers, online marketplace providers, as applicable, of the status of the investigation and its outcome as soon as possible.

The distributor will also inform the importer, on the "Safety Business Gateway" portal, of any risk regarding a product that is in circulation on the market through it, will inform the manufacturer and the importer and will take all necessary remedial measures.

I.4 The obligation to inform, what is incumbent on economic operators in the case of distance sales

Regulation (EU) 2023/988 stipulates the obligation to comply with certain minimum information requirements for economic operators who offer products on the market online or through other means of distance selling, consisting of: manufacturer identification elements and contact data[6], and if it is from a state outside the Union, the economic operator in the Union, declared responsible; elements leading to the identification of the product, including a picture of it; any other information, including product safety warning, posted in a visible place: on the product, packaging or in an attached document.

It is to be appreciated that this regulation pays special attention to the qualification of the notion of economic operator, defining this concept in a comprehensive manner including several categories: "the manufacturer, the authorized representative, the importer, the distributor, the logistics service provider or any other natural person or legal entity that is the subject of the obligations related to the manufacture of the products or making them available on the market" [7](art. 3 point 13).

I.5 The obligation to inform online market providers

The providers of online markets have the obligation to designate a single point of contact for the purpose of providing information on product safety, a single point that will be communicated both to the authorities and to consumers through the "Safety Gate" portal.

Regulation (EU) 2023/988, leaves to the member states the competence to regulate the content of offers of dangerous products, and if they are not compliant, based on an order of the supervisory authorities to order "the removal of that content from their online interface, block access to it or display an explicit

[6] Art 19 point of "the name, registered trade name or registered trade mark of the manufacturer, as well as the postal and e-mail address at which he can be contacted";

[7] Europe publishes new Regulation on General Products Safety (sgs.com)

warning". The providers of online markets will inform the competent authorities in electronic format, on the portal, about the fulfillment of the requirements of the order.

Also, they have the obligation to constantly follow the notifications uploaded on the portal and, if necessary, to adopt measures, in order to comply with the notifications, if those dangerous products are found on their markets, informing the authorities of the measures taken.

Online marketplace providers will create an easy-to-use interface so that traders will provide the general public with all the information required by Regulation (EU) 2022/2065 and Regulation (EU) 2023/988.

II. TOOLS USED FOR INFORMATION ASSURANCE

II.1 "Safety Gate" rapid alert system

"Safety Gate" is a portal managed by the European Commission through which any interested person has free access to certain notified information. This portal is intended to be designed in a simple manner, being easy and accessible to people with disabilities.

Information can also be sent by consumers and other interested parties through a special section of the portal, regarding products that they consider likely to present a serious risk and for which Member States have not sent a notification through this system. The Commission verifies the data received, and if confirmed, it is quickly forwarded to the relevant Member States for action[8].

According to article 35 of the regulation, the "safety warning" regardless of whether it is a recall or an information is sent, must target as many consumers as possible and the information provider must take all measures in this regard, in particular by using personal data, if there is an agreement to this effect and, last but not least, it must also be concerned with informing people with disabilities. Likewise, they can also use other general means of information, provided that the announcement is clear and visible, such as: the company's own website, newsletters, announcements at retail outlets, in the mass media, other communication channels.

The written safety warning in the event of a product recall must meet the following requirements[9]:

1. Be clearly titled as "Product Safety Recall";

2. To include an explicit description of the recalled product, including: the image, name and brand of the product; the identification numbers of the product and possibly the indication of the place where they are found on the product

[8] Further details on the possibility of extending this portal see Fourteenth Report of Session 2022–23 - European Scrutiny Committee (parliament.uk)

[9]The recall notice model will be made available by the Commission depending on the evolution of scientific data and market requirements (art. 36 last paragraph):

(graphical aspect), as the case may be; data on when and where the product was sold and by whom, if possible;

3. A clear presentation of the risk associated with the product, avoiding expressions that would diminish the risk[10];

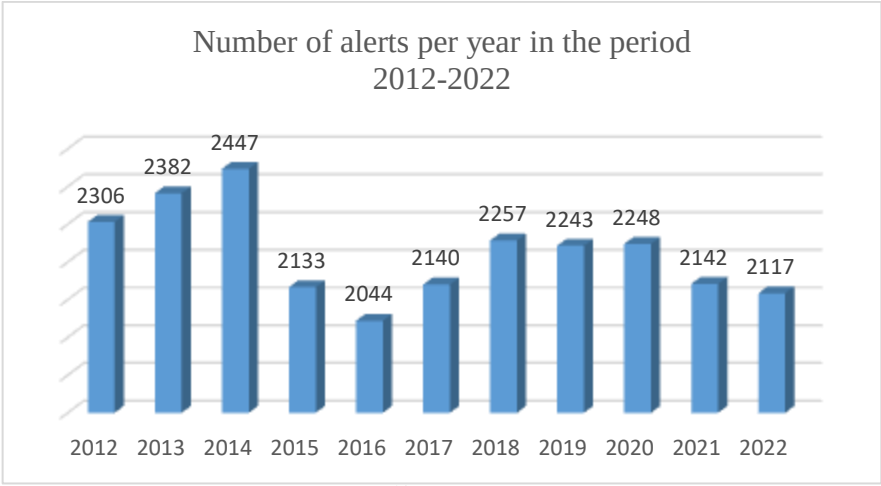
4. Explicit presentation of the action that the consumer must follow, including to stop using the product;

5. Presentation of remedial measures available to the consumer;

6. Indication of a free telephone numbe or an online service available in one or more of the Union's official languages;

7. An encouragement to disseminate information to other people.

A presentation of the number of alerts in the period 2012-2022, based on the data provided in the Annual reports Safety Gate 2022, shows us that at this moment the warnings have a downward trend starting from 2018, compared to the period 2012-2014 when the trend was growth, peaking in 2014, followed by a sharp decline between 2015-2017[11].



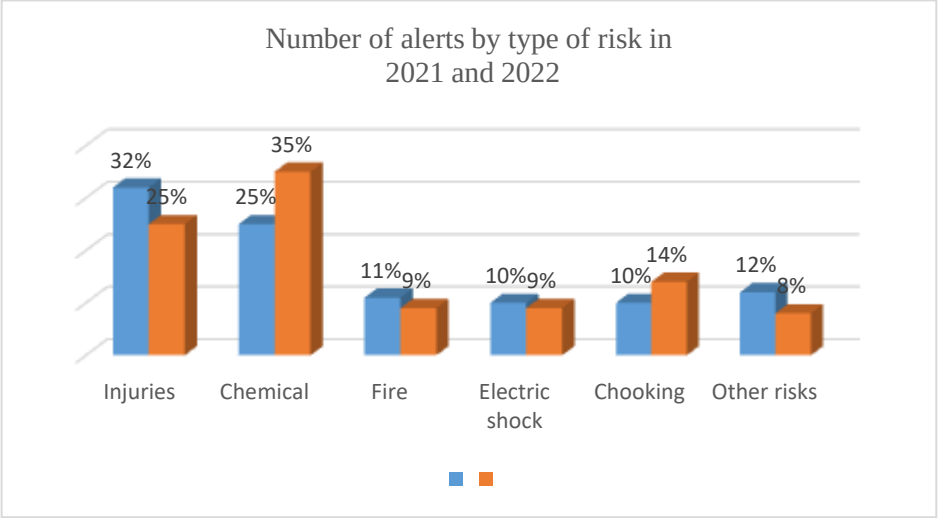
source: *Annual reports Safety Gate 2022*[12]

Regarding a statistical presentation of the risks to which consumers are subjected, referring to the years 2021-2022, we note that the chemical risks are the highest in the year 2022, increasing by 10% compared to the year 2021, followed by the risks of accident, the other risk categories being at a relatively close level.

[10] The text of the regulation identifies several ways of presenting the hazard that would violate the recall warning requirements, such as: "voluntary", "preventive", "discretionary", "in rare situations" or "in specific situations", or indicating that no accidents were reported;

[11] According to Annual reports Safety Gate 2022, the lowest number of alerts, 139, was recorded in 2003, compared to the highest number of alerts so far, 2447, in 2014;

[12] RAPEX_2022_report_EN (1).pdf



source: *Annual reports Safety Gate 2022*[13]

II.2 The "Safety Business Gateway" rapid alert system

"Safety Business Gateway" is the second portal managed by the European Commission through which economic operators and online market providers can easily communicate the information provided for in Regulation (EU) 2023/988[14], both to authorities with powers in market surveillance and to consumers, when there are indications that a certain product is dangerous or an accident has occurred caused by the use of a product (or events associated with the use of a product) and the alert must be issued quickly together with the measures taken.

III. EUROPEAN NETWORK OF MARKET SURVEILLANCE AUTHORITIES

Also called the "Network for Consumer Safety", the network of competent authorities in European states aims to create the necessary framework for coordination and cooperation between the authorities and the commission to achieve the objective of improving product safety in the Union, the commission assuming the role of coordinating cooperation administrative.

We note among the responsibilities of this network and attributions aimed at information on product security, especially those that hold the control activity of the authorities, but also common activities that lead to the increase of the authority's performance, such as: joint surveillance and testing projects, exchange of best practices, of specialized knowledge, tracing the traceability of products at risk, cooperation regarding the withdrawal and recall of dangerous products.

[13] RAPEX_2022_report_EN (1).pdf

[14] Provided in Article 9 paragraphs (8) and (9), Article 10 paragraph (2) letter (c), Article 11 paragraphs (2) and (8), Article 12 paragraph (4) and Articles 20 and 22;

CONCLUSIONS

The solutions adopted by Regulation (EU) 2023/988 appeared as a necessity in the conditions where product safety was regulated dispersedly in several directives, sometimes unevenly transposed into the legislation of the member states and the market is characterized by an increase in online sales and the use large scale of new technologies. Moreover, the marketing of various products coming both from the European space and from outside the european union, including products imitating food products, led to the revision of the rules on product safety, with an emphasis on the protection of vulnerable people. Informing the consumer makes him less vulnerable. He becomes an educated consumer and is a regulator of market mechanisms. It is the responsibility of the authorities to create the mechanisms, the legal instruments through which the right to information is realized and respected. The two portals "Safety Gate" and "Safety Business Gateway", in the manner in which they are now regulated, and with substantial improvements after December 2024, have the role of ensuring a high level of product safety.

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9. Europe publishes new Regulation on General Products Safety (sgs.com) Fourteenth Report of Session 2022–23 - European Scrutiny Committee (parliament.uk) RAPEX_2022_report_EN (1).pdf

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COMPLIANCE WITH THE PRINCIPLE OF EQUAL TREATMENT IN PUBLIC PROCUREMENT LAW THROUGH THE PROTECTION OF PERSONAL DATA

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Abstract

This study aims to summarize the application of the principle of equal treatment in public procurement law within the legislation of the European Union and in the legal system in Romania and also the fair processing of personal data as an expression of the principle of equal treatment by actors involved in public procurement in Romania and in public procurement litigation as reflected in doctrine, legislation and judicial practice.

The research method chosen is epistemological and empirical analysis, whilst highlighting legislation incidents pertaining to the chosen subject and of the judicial practice, resulting in the improvement of the research topic addressed, for a better understanding and application of the legal provisions in the matter of respecting the principle of equal treatment and that of protection personal data in public procurement law. In the end, the study highlights the conclusions reported to the analysis of the topic dealt with.

Keywords:*public procurement, equal treatment, personal data.*

INTRODUCTION

I. THEORETICAL ASPECTS OF THE PRINCIPLE OF EQUAL TREATMENT IN PUBLIC PROCUREMENT LAW

The legal significance of public procurement regulation has been well applied and interpreted by the case law of the Court of Justice of the European Union (hereafter CJEU). The liberalization of public procurement underlines the need to eliminate preferential and discriminatory patterns in the public sector and to create direct business models between the public and private sectors. Procurement by Member States and their contracting authorities was often susceptible to an approach and policy that tended to favor indigenous companies and national champions (*Bovis, 2012, p.6*). Although the principle of equal treatment was unequivocally derived from the Treaty on the Functioning of the European Union[1] (hereafter TFEU), subsequent public procurement directives have strengthened and clarified its provisions.

Over time, the approach of EU public procurement regulations and directives[2] reflect ways to facilitate the functioning of the common market, alongside economic arguments, legal arguments have emerged in support of public procurement regulation as a necessary ingredient of the fundamental principles of the Treaties, such as the free movement of goods and services, the right to stability and the prohibition of discrimination. Thus, no tenderer can be restricted in his right to participate in procurement procedures, regardless of his country of origin.

Among the principles of European administration applicable to administrative decisions at EU level**,** the European Parliament's 2012 report[3] mentions the principle of non-discrimination and equal treatment, according to which the EU administration avoids unfounded discrimination between people based on nationality, race, color or motivated by social origin, political beliefs, sexual orientation or other such criteria. Thus, similar situations will be treated in a similar way, only the objective characteristics of the matter in question being able to justify the differentiated treatment. *"The implementation of the aforesaid principles makes it possible to achieve one of the fundamental goals of the procurement procedures, which is to remain competitive"* (*Stankiewicz, p. 361*).

In the field of public procurement, the respect for the principle of equality between tenderers and, also, the concern to ensure effective competition must be taken into account, the implementation and fulfilment of the objective of favouring openness to the widest possible competition can only be achieved if economic

[1] Treaty on the Functioning of the European Union (OJEU No C 326 of 26 October 2012).
[2] Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC (OJEU No L94 of 28 March 2014); Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJEU No L94 of 28 March 2014).
[3] European Parliament, Committee on Legal Affairs, Report with recommendations to the Commission on European Union administrative procedural law, 2012/2024 (INI).

operators participating in the procurement procedure are treated equally, without the shadow of any discrimination[4].

According to the general views on the matter, the application of the principle in question in public procurement procedures must be approached from the perspective of the objectives it pursues, it is not a concrete goal, it is a desideratum to be achieved through the correct management of procedures[5] and *"the main purpose of public procurement is not the protection of human or fundamental rights, but the efficient use of public funds. However, by adopting the new concept of procurement, there is room for the penetration of such rights in public procurement"(Blažo, Kováčiková, 2019, p. 135).*

II. THE PRINCIPLE OF EQUAL TREATMENT IN PUBLIC PROCUREMENT LAW

II.1. The principle of equal treatment in EU law

The principle of transparency, equal treatment and non-discrimination derives from Articles 18, 56 and 64 TFEU and is referred to in Articles 18 and 76 of Directive 2014/24/EU, according to which Member States impose their own stipulations for the award of contracts in order to treat all economic operators equally and are free to establish the applicable procedural rules, ensuring that these rules allow the contracting authorities to take account of the specific nature of the services concerned[6].

Named the principle of equal treatment, such principle is established in Article 18 of Directive 2014/24/EU and contains both the general principle of non-discrimination and the general requirement to treat economic operators equally. Although the principle of non-discrimination on grounds of nationality is found in the TFEU, CJEU case law has held that this principle is rather an expression of the general principle of equal treatment (*Risvig Hamer, Andhov, 2021, p. 189*).

According to Article 18 of Directive 2014/24/EU[7] authorities are obliged to treat all economic operators equally and Recital (90) of the same Directive

[4] Opinion of Advocate General Mengozzi, Mt Højgaard and Züblin, Case C-396/14, ECLI:EU:C:2015:774 .

[5] Judgment of the CJEU of 10 October 2013 Ministeriet for Forskning, Innovation og Videregående Uddannelser and Manova A/S, Case C-336/12, EU:C:2013:647.

[6] Directive 2014/24/EU, Article 76, Principles for the award of contracts.

[7] (1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner. The concept of procurement may not be made with the intention of excluding it from the scope of this Directive or artificially restricting competition. It shall be considered an artificial restriction of competition if the concept of acquisition is made with the intention of unduly favouring or disadvantaging certain economic operators.

(2) Member States shall take appropriate measures to ensure that, when performing public contracts, economic operators comply with the applicable environmental, social and labour law

provides that when awarding contracts Member States must take into account objective criteria ensuring compliance with the principles in order to select, under conditions of effective competition, the tender which presents best value for money.

The CJEU has defined the principle as follows: *"the principle of equal treatment requires that comparable situations should not be treated differently and that different situations should not be treated in the same way unless such treatment is objectively justified"*[8]. In its other decisions the Court has made a number of clarifications, showing that the principle applies not only to firms which have actually participated in a tendering procedure but also to those which hope to participate, and the idea of equal treatment does not only mean that other tenderers in the European Union must be treated equally with domestic tenderers but that all tenderers must be treated equally.

As a condition for compliance with the principle of equal treatment Directive 2014/24/EU establishes the obligation for contracting authorities to inform all tenderers of the award criteria to be applied and their weighting in the procurement in paragraph (90) of the preamble, with derogation from the obligation to indicate the weighting of criteria in justified cases, when the descending order of importance of the criteria shall be indicated.

Under EU law the qualification criteria must be limited to an assessment of whether the grounds for exclusion have been met and an assessment of the economic operator's ability to provide services, its economic and financial situation and its technical and/or professional capacity. Over time various qualification criteria have been considered by the CJEU in its case law, depending on the situation, such as giving preference to economic operators having their principal place of business in the region where the works to be procured are to be carried out, excluding tenderers from the procedure simply because they receive a public subsidy, the condition that the tenderer must have an office open to the public in the area where the service is to be provided, or requirements which are unrelated to the products, services or works to be procured or requirements which are disproportionate and cannot be met by only a limited number of economic operators.

Another situation arises when participation in the procurement procedure is restricted because the tenderer has has committed serious professional misconduct likely to call into question the integrity or reliability of the tenderer, without the misconduct being confirmed following the outcome of a process[9].

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obligations established by Union law, national law, collective agreements or international environmental, social and labour law provisions listed in Annex X.

[8] Case C-434/02, Arnold André GmbH & Co KG v. Landrat des Kreises Herford, https://curia.europa.eu/juris/liste.jsf?language=en&num=C-434/02

[9] Order of 20 November 2019 (Case C-552/18) ECLI:EU:C:2019:997, which orders that:- *Article 57(4)(c) and (g) of Directive 2014/24/EU of the European Parliament and of the Council of 26*

Infringement of the principle of equal treatment also occurs where there is no legal and material identity between the shortlisted economic operators and those submitting tenders in a restricted procedure. However, if a pre-selected candidate undertakes to absorb another pre-selected candidate, it may submit a tender with certain conditions: only the respective economic operator fulfills the requirements initially established by the contracting authority and its continued participation in the respective procedure does not entail a deterioration in the competitive situation of the other tenderers. Thus, the CJEU has held that, in the context of a negotiated procedure, in the event of the dissolution of a group preselected as such, of which two economic operators were members, one of them can continue the procedure in question by replacing the initial group without infringing the principle of equality[10].

II.2. The principle of equal treatment in national law

First of all, the principle derives from the provisions of the fundamental law: ”*all citizens are equal before the law and the public authorities, without privileges and without discrimination”*, according to Article 16, para. (1) of the Constitution[11].

Also, the principle of equal treatment is generally provided for in Article 7 of The Government's Emergency Ordinance (GEO) No. 57/2019 on the Administrative Code[12], according to which the beneficiaries of the activity of public administration authorities have the right to be treated equally and in a non-discriminatory manner. Also, public administration authorities and institutions have the obligation to treat all beneficiaries without discrimination based on nationality, gender, social origin, language, religion or belief, political opinion, disability, age, sexual orientation or other criteria provided by law.

For Member States, the European Union has imposed the transposition of the public procurement directives, which is monitored by the European Commission and sanctioned by the CJEU for non-implementation or late implementation. The strict public procurement rules laid down in the directives are reflected in the procedures for awarding, concluding, amending and terminating public procurement contracts. The notion of a public procurement

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February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as precluding national legislation under which legal action may be brought against a decision to terminate a public procurement contract adopted by a contracting authority on grounds of 'grave professional misconduct', which occurred at the time of performance of that contract, prevents the contracting authority which launches a new call for tenders from excluding an operator, at the stage of the selection of tenderers, on the basis of an assessment of the reliability of that operator.

[10] Judgment of the CJEU of 11 July 2029, Telecom Italia SpA AND Ministero dello Sviluppo Economico, Case C-697/17, ECLI:EU:C:2019:599.

[11] Constitution of Romania, published in M. of., Part I no. 767 of 31 October 2003.

[12] GEO No 57/2019 on the Administrative Code, published in the M. of., Part I No 555 of 05 July 2019.

contract and its amendment was not adequately regulated in the first generations of directives, as they focused on award procedures, but in the following generations of directives, and as a result of multiple rulings by the CJEU, the entire field of public procurement has been legislated.

2016 brought the adoption in Romania of two legal acts transposing Directive 2014/24/EU: Law no. 98/2016 on public procurement and The Government Decision (GD) no. 395/2016[13]. "*In order to fulfil the object of Law 98/2016, this normative document specifies that the purposes of this law are to promote competition between economic operators, to guarantee equal treatment and lack of discrimination, to ensure the transparency and integrity of the public procurement process and to ensure that public funds are efficiently used by applying awarding procedures"* (*Franc, Cătană, 2023, p.101).*

GEO No 25/2021[14] transposes the provisions of Article 25 of Directive 2014/24/ EU and Article 43 of Directive 2014/25/EU. The amendments aim to define the categories of economic operators that may take part in tendering procedures according to their State of origin, by including, inter alia, even those non-EU operators from countries that have ratified the World Trade Organisation Agreement on Government Procurement.

Also, those economic operators who are not included in the list provided for in the Ordinance will be automatically excluded from the tender procedure.

The amendments introduced by GEO no. 25/2021 aims to extend the definition of "economic operator" so that they can come from a Member State of the EU, a member of the EEA[15], from third countries that have ratified the GPA[16], to the extent that the sector contract awarded is specifically covered by the Annexes set out in Appendix I of the European Union to that Agreement, from third countries in the process of accession to the EU or from third countries which are not covered by the GPA but which are signatories to other international agreements for open market access in the field of public procurement.

GEO 25/2021 stipulates the obligation of contracting authorities and entities to treat all economic operators as defined above equally, transparently and proportionately, and to grant *"equal treatment with works, products, services and economic operators in the European Union"*.

[13] Government Decision No 395/2016 approving the Methodological Rules for the application of the provisions on the award of the public procurement contract/framework agreement of Law No 98/2016 on public procurement.

[14] GEO no. 25/2021 on the amendment and completion of some normative acts in the field of public procurement, published in M. of., Part I, no. 346 of 5 April 2021.

[15] European Economic Area

[16] World Trade Organisation Agreement on Government Procurement

III. FAIR PROCESSING OF PERSONAL DATA IN PUBLIC PROCUREMENT LAW- EXPRESSION OF THE PRINCIPLE OF EQUAL TREATMENT

The right to the fair processing of personal data and the protection of individuals regarding it is a fundamental right. Provided for in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[17] and Article 16(1) TFEU, this right is also guaranteed under Article 8(1) of the Charter of Fundamental Rights of the European Union[18].

While Regulation (EU) 2016/679 [19] (hereafter GDPR), lays down general rules regarding the processing and the free flow of personal data, Directive (EU) 2016/680[20] lays down specific rules to protect individuals and to ensure the free communication of such data within the Union in the areas of judicial and police cooperation and in criminal matters.

Regulation (EU) 2018/1725[21] applies to the processing of personal data by all Union institutions and bodies excepting Chapter IX of the Regulation which refers to ”operational personal data” done by offices and agencies when they carry out specific activities[22].

According to Regulation (EU) 2018/1725 personal data means information that leads to the identification of a natural person. A person who can be identified by a specific element, as a name or an identification number is an identifiable natural person. Also, location data or an online identifier can be identification elements, any element of the physical, mental or economic identity of the respective person also falling into the same category.

For European Union public procurement, the European Commission uses a model privacy statement for all data processing operations related to calls for

[17] Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950 in Rome and entered into force on 3 September 1953.

[18] Charter of Fundamental Rights of the European Union (OJEU No C83 of 3 March 2010).

[19] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC EC - General Data Protection Regulation - (OJEU No L119 of 27 April 2016).

[20] Directive (EU) 2016/680 on the protection of individuals with regard to the processing of personal data by competent authorities for the purpose of the prevention, detection, investigation or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data and repealing Council Framework Decision 2008/977/JHA (OJEU No L119 of 27 April).

[21] Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of individuals with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJEU No L295 of 23 October 2018).

[22] The Chapter 4 or Chapter 5 of Title V of Part Three of the TFEU - The chapters deal with judicial cooperation in criminal matters and police cooperation.

expression of interest for the selection of experts and tender/grant procedures[23]. The European Commission also uses a standard contractual clause ensuring that personal data included in public procurement contracts, grant agreements and grant award decisions signed by the European Commission are protected as provided for in Regulation (EU) 2018/1725[24].

But the right in question is not an absolute right, according to GDPR, and must be evaluated in relation to its role in society and in accordance with fundamental rights, also respecting the principle of proportionality. Thus we can say that fair processing of data of all those involved in the public procurement process is also in line with art. 18 of Directive 2014/24/EU in the sense that contracting authorities must grant equal treatment to economic operators and act in a transparent, fair and proportionate manner.

III.1. Fair processing of personal data by contracting authorities

The principles are of major importance in the field of public procurement, in particular because any situation which cannot be resolved by a concrete regulation could be analysed by reference to the principles underlying the public procurement contracts. Thus, according to Article 1 of GD no. 395/2016[25] : *"In the process of carrying out public procurement, any situation for which there is no explicit regulation shall be interpreted in the light of the principles set out in Article 2 para. (2) of Law No. 98/2016 on public procurement".* There is also the reverse situation, when a specific legal provision is not violated but a principle is violated. Some of the fundamental principles of public procurement are transparency and equal treatment, regulated at Union level by paragraph (1) of Directive 2014/24/EU and at national level by Article 2, para. (2) (b) and (d) of Law no. 98/2016[26].

However, the legislation has limitations in the situation in which persons involved in procurement procedures (officials, representatives of economic operators, experts, etc.), with the principle of transparency for example provided for by the legislation sometimes appearing as the complete opposite of data protection as far as such persons are concerned.

According to Article 217, para. (4) of Law 98/2016, after completion of the award procedure, the public procurement file is a public document, but access to this information is subject to the deadlines and procedures laid down by the legal regulations on unrestricted access to information of public interest, and may

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[23] https://commission.europa.eu/funding-tenders/procedures-guidelines-tenders/data-protection-public-procurement-procedures_ro, accessed 11 October 2023.

[24] The clause referred to can be found at https://commission.europa.eu/system/files/2018-12/contractual_clauses_en.pdf, accessed 11 October 2023.

[25] GD no. 395/2016 for the approval of the Methodological Rules for the application of the provisions on the award of the public procurement contract/framework agreement of Law no. 98/2016 on public procurement published in the Official Gazette Part I no. 423 of 06 June 2016.

[26] Law No 98/2016 on public procurement, published in the M. of., Part I, No 390 of 23 May 2016.

be limited to the extent that this information is, according to law, confidential or protected by an intellectual property right. The personal data of the members of the evaluation committee is public data, the disclosure of the composition of the evaluation committee does not jeopardize the privacy of those persons[27], but if a contract is awarded to a natural person, certain data will be made public in accordance with the obligation to publish information on the outcome of the procurement procedure.

Although the rules do not regulate the processing of data relating to companies or other legal entities, in the case of single-person companies, they may constitute personal data if they allow identification of a natural person. The rules also apply to all personal data relating to natural persons in the course of a professional activity, such as employees of a company, such as business e-mail addresses or telephone numbers of employees. European case law provides that Member States shall lay down in specific legislation whether employees may request that, after a sufficiently long period following the dissolution of the company concerned, access to personal data relating to them recorded in this register be restricted to third parties justifying a specific interest in consulting those data[28].

EU case law also specifies how the contracting authority must communicate the essential content of the information, in a neutral form, maintaining as far as possible data confidentiality. In this respect, it may in particular communicate in a summarised form certain aspects of an application or a tender, as well as its technical characteristics, so that confidential information cannot be identified. For the same purpose, it may also ask the operator whose tender has been rejected to provide it with the confidential documents in a non-confidential version[29].

To be lawful, the processing should be based on the necessity for the Union institutions to carry out a task in the exercise of official authority vested in them or in the public interest, the need to fulfill a legal obligation incumbent on the controller or another legitimate ground under Regulation (EU) 2018/1725 (including the necessity of processing for a contract, the need to go through the stages preceding a contract) and, the most important, on the consent of the data subject.

Union law precludes national legislation requiring the disclosure of any information communicated by tenderers, with the sole exception of trade secrets, as such legislation is likely to prevent the contracting authority from withholding certain information which, although not constituting trade secrets, must remain

[27] See Judgment of the Court of First Instance of 9 September 2009, Case T-437/05, ECLI:EU:T:2009:318.
[28] Judgment of the CJEU of 9 March 2017, Case C-398/15, ECLI:EU:C:2017:197.
[29] CJEU judgment of 7 September 2021, Case C-927/19, ECLI:EU:C:2021:700.

inaccessible. Thus, with regard to information concerning natural or legal persons, including subcontractors, on whom a tenderer states that it relies for the performance of the contract, the CJEU distinguishes between data which enable such persons to be identified and those which relate solely to their professional qualifications or abilities[30].

As mentioned above, the processing of personal data is lawful only if certain conditions apply. In public procurement, in the case of contracting authorities, the condition of Article (6)(e) of GDPR is applicable, which provides for the situation where the processing is carried out in order to fulfill a task that serves a public interest or in the exercise of the public authority, but this is not a reason that measures, internal data management policies, training of employees, limitation of access to personal data, contractual and confidentiality clauses should not be developed at the authority level.

Also informing data subjects about such processing and adding contractual clauses as annexes to contracts with suppliers, defining how personal data are processed, is one of the obligations of contracting authorities.

According to Directive 2014/24/EU, when drawing up technical specifications, the contracting authorities should take into account the data protection requirements deriving from Union law, especially in relation to the data protection by design. The management of personal data submitted by all tenderers in public procurement procedures must be carried out in compliance with the principle of equal treatment, taking into account that access to the procurement file is given to both personal data and commercial data, which may be confidential, secret, etc. Personal data, e.g. CVs or even sensitive data (e.g. biometric data), must be processed with the consent or information of the data subjects (*Șandru, Alexe, 2020, p. 229*). Accordingly, the contracting authority must be prepared to carry out the information of all data subjects in accordance with Article 13 or, where applicable, Article 14 of GDPR, as well as the management of their data in an equal manner, having the same rules and requirements e for all economic operators.

GDPR defines the data subject's consent as any manifestation of free will, by which it accepts, through a statement or an unequivocal action, that the personal data concerning him be processed. Consent must be specific, informed and unequivocal, the expression of the will of the data subject, after prior information of the data subject. According to CJEU case law, a contract is not capable of demonstrating that the data subject has been informed and has validly given his consent to the collection and storage of personal data when the box referring to this clause has been ticked, prior to the signing of this contract, by the data controller. Thus consent is not validly given when the storage of information or the acquisition of access to information is authorised by means of a previously

[30] CJEU judgment of 17 November 2022, Case C-54/21, ECLI:EU:C:2022:888.

ticked box[31] or when the situation requires the data subject to fill in, in order to express his or her refusal to consent to such processing, an additional form stating such refusal[32].

In Romania, Law no. 102/2005[33], the normative act establishing the National Authority for the Supervision of Personal Data Processing, an authority whose objective is to protect the fundamental rights to private life, tangentially legislates the right to protection of personal data and the way in which compliance with this right is achieved and verified based on European legislation, and Law no. 190/2018[34] contains the actual rules implementing GDPR.

III.2. Fair processing of personal data in public procurement litigation

The preamble to GDPR, in paragraph (20) states that although it *"applies, inter alia, to the activities of courts and other judicial authorities, Union or Member State law may specify the processing operations and procedures with regard to the processing of personal data by courts and other judicial authorities. The processing of personal data should not fall within the competence of supervisory authorities when courts are exercising their judicial functions, in order to guarantee the independence of the judiciary in the performance of its judicial tasks, including decision-making. It should be possible to entrust the supervision of such data processing operations to specific bodies within the judicial system of the Member State, which should in particular ensure compliance with the rules laid down in this Regulation, raise awareness among members of the judiciary of their obligations under this Regulation and deal with complaints in relation to such data processing operations"*, so if we refer to public procurement litigation the Regulation applies to the courts as regards the processing of personal data in the exercise of their specific tasks, and a specific supervisory body is required.

In Romania, the competent authority within the meaning of Articles 51-59 of GDPR for the supervision of personal data processing operations by the courts in the exercise of their judicial functions is the Superior Council of Magistracy (SCM). On 14 September 2023, the SCM plenary approved the modification of

[31] CJEU judgment of 1 October 2019, Planet49, C-673/17, ECLI:EU:C:2019:801.
[32] CJEU judgment of 11 November 2020, Orange Romania, C-61/19, EU:C:2020:901.
[33] Law No 102/2005 on the establishment, organization and functioning of the National Authority for Personal Data Processing Supervision republished in M. of., Part I No 947 of 09 November 2018.
[34] Law No 190/2018 on measures implementing Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) published in M. of., Part I No 651 of 26 July 2018.

the organizational structure of the SCM's own apparatus by setting up the Personal Data Protection Department[35].

Any person who considers that he or she has been harmed by an act of a contracting authority or by failure to comply with a request within the legal time-limit may seek the annulment of the act, an order that the contracting authority take an act or take measures to remedy the situation, or recognition of the claimed right or legitimate interest, by administrative or judicial means in accordance with Article 2(2). (1) of Law No 101/2016[36].

The competent national administrative-jurisdictional body is the National Council for the Settlement of Complaints (hereinafter referred to as CNSC), an independent body whose organisation and functioning are regulated by Law no. 101/2016[37].

The CJEU qualifies the CNSC as a "national court" within the understanding of Article 267 TFEU[38]. As any independent body with legal personality the CNSC processes personal data pursuant to a legal obligation or insofar as necessary for the performance of its tasks carried out in the public interest and in the exercise of official authority vested in it, respecting key principles such as fair and lawful processing, purpose limitation, data minimization and data retention. When processing under the law, this law should already ensure compliance with these principles (e.g. types of data, storage period and appropriate safeguards) and obviously prior to processing personal data, individuals must be informed about the processing, its purposes, the types of data collected, the recipients and their data protection rights.

CONCLUSIONS

The general rule of direct or indirect non-discrimination in accordance with the principle of equal treatment must be respected in all public procurement. Any public procurement must be based on the relevant European and national legislation, involving evaluation according to the same set of criteria to ensure optimal use of financial resources, but also on the fair processing of personal data. Non-compliance with the principle of equal treatment may also consist in a procedural irregularity affecting the right to information of interested parties insofar as contracting authorities process personal data regarding a natural person in public procurement and in the selection and use of external experts.

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[35] SCM Decision No 139 of 14 September 2023, available at http://old.csm1909.ro/csm/index.php?cmd=0301&tc=s

[36] Law No 101/2016 on remedies and appeals in the award of public procurement contracts, sectoral contracts and works concession and service concession contracts, as well as on the organisation and functioning of the National Council for the Settlement of Disputes published in M. of. Part I Part I No 393 of 23 May 2016.

[37] Idem, Article 37 - Article 481

[38] CJEU judgment of 26 January 2023, C-403/21, ECLI:EU:C:2023:47.

Although Law no. 190/2018 has been in force for five years, the application of GDPR in Romania is not yet a general practice, especially in the field of public procurement, but we believe that the importance of fair and transparent processing of personal data will become increasingly significant, especially where bidders are individuals or in the case of experts contracted by economic operators with legal personality, any specialists involved in activities subject to public procurement.

Representatives of the contracting authorities involved in the procedures will have to acquire, possibly through internal procedures, correct guidelines for the interpretation of the GDPR provisions which interfere with specific public procurement legislation in order to apply the legal rules in both areas in a uniform manner.

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COMPLIANCE WITH THE PRINCIPLE OF EQUAL FINDING THE TRUTH IN CRIMINAL PROCEEDINGS – "SINE QUA NON" PRINCIPLE

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Abstract

Criminal procedural law includes a series of fundamental and specific principles and strict rules according to which the judicial bodies have the obligation to find out the truth in the criminal process.

Finding the truth is subject to the collection of evidence related to the facts and circumstances of the case, the suspect, the defendant, as well as the other parties and the injured person.

In order to fulfill this principle, it is necessary to comply equally with other basic rules embodied in the presumption of innocence, the right to defense, respect for human dignity, in fact all the rules that govern the conduct of the criminal process.

Searching, discovering and finding out the truth are, in essence, the elements of a knowledge process. We can conclude, therefore, that any criminal trial fundamentally represents an extensive process of knowledge.

Key words: *criminal process, fundamental principle, finding out the truth, evidence, judicial bodies.*

INTRODUCTION

The new content of the principle regulated by the provisions of art. 5 CPC, "discovering the truth" is much better articulated and provides that in the criminal process the truth can be based exclusively on the evidence administered in each case. In fact, analyzing ritos, this is the basic task with which the legislator has invested the judicial bodies.

In parallel with the judicial duel between the prosecution and the defense, which we encounter in the criminal process, the correct establishment of the factual situation, through the administration and correct assessment of the content of the entire evidentiary material, represents the constant concern and is the sine qua non condition, both in what concerns the avoidance of a judicial error as well as the support used by the magistrate in pronouncing the solution[1].

The implementation of criminal justice cannot be conceived without full knowledge of the truth regarding the criminal case that is the subject of the criminal trial, that is, the truth about the existence or non-existence of the imputed act and the innocence or guilt of the accused person, as well as about all the circumstances that serve to put in the light of this truth. The truth, in any field of human activity, is not revealed spontaneously even at the moment when the deed is done; it must always be discovered and proved, under all its aspects; only in this way can it be considered that the truth was otherwise. *(Buneci, 1975, p.44)*

I. Before being a legal category, truth is a philosophical category.

Well, delimiting truth from untruth, most philosophers over more than two millennia have emphasized the objective nature of truth, which does not depend in any way on the will of man, on humanity in general *(Volonciu, 1996, p. 93).*

It is well known that in the course of history, philosophers have looked at the notion of truth differently and hence the different approach of the institution in criminal procedural systems. Both the adversarial system and the continental system deal with the notion of truth - but from different perspectives - the adversarial system - as is well known, does not address finding out the truth - as a fundamental principle of the criminal process, while from the perspectives of the continental judicial system, the judicial truth is imperatively necessary to superimpose on the objective truth, existing in reality.

Without going into the justifying details of the mentioned legal systems, it is worth noting that "the difference between the two systems regarding the importance given to the procedure, results from their difference of vision in relation to the judicial truth. In the adversarial system, procedure is more important than substantive law, because it is what guarantees judicial truth.
In the continental system, the substantive law is more important than the procedure, because finding out the truth about the facts and circumstances of the case is a priority *(Chigheci, 2017, p.20).*

The continental procedural systems, like the Romanian one, have as their model the system adopted in France after the Revolution. In our procedural system, so that repressive justice can achieve its goal directly or indirectly, it must know the real truth, drawn from the reality of the facts, and not from their a priori

[1] Codul de Procedura Penala din 2010 - forma sintetica pentru data 2020-05-25 (snppc.ro)

and fictitious evaluation; so the material (real) truth, and not the formal (fictitious) truth *(Chigheci, 2017, p.22).*

Starting from the statements made, corroborating with the provisions of art. 5 NCPP, which stipulates that "judicial bodies have the obligation to ensure, based on evidence, the discovery of the truth regarding the facts and circumstances of the case, as well as regarding the person of the suspect or the defendant", it follows that in the Romanian legal system, from the point from a procedural point of view, the judicial bodies have the mission to find out the material (real) truth. It should be mentioned that the provisions of art. 5 refers to "judicial bodies" in the content of para. (1) and to "criminal investigation bodies", in the content of para. (2).

According to art. 5, para. (2) "criminal investigation bodies have the obligation to collect and administer evidence both in favor and against the suspect or defendant. The rejection or non-recording in bad faith of the evidence proposed in favor of the suspect or the defendant is sanctioned according to the provisions of this code."

It is necessary to clarify that the role of administering evidence to find out the truth also rests with the court, even if in the current regulations the principle of the active role of the judge is no longer expressly provided for (art. 374, paragraph 8 CPP), an activity that the court carries out then when the evidence administered during the criminal investigation was not disputed by the parties or by the injured person.

The provisions of para. (10) of art. 374 provide that "the court can ex officio order the administration of evidence necessary to find out the truth and just settlement of the case."[2]

Even if according to the provisions of art. 99 CPC, para. (1) in the criminal action, the prosecutor (as the holder of the criminal action) has the burden of proof, proving the accusation, it does not mean that the judge remains passive, only that, as it follows from the statement of reasons of the NCPP "the role of the judge is rethought in meaning that he will ensure, with the preponderance, that the procedures that take place in front of him have a fair character."[3]

Well, through the opening provisions, art. 3, paragraph (4) CPP provides that "in the exercise of the function of criminal investigation, the prosecutor and the criminal investigation bodies collect the necessary evidence to establish whether or not there are grounds for prosecution".

In the trial phase we meet again with the presence of the prosecutor, who played an active role in finding out the truth and respecting the legal provisions, having the opportunity to formulate requests, raise exceptions and put reasoned conclusions in favor of the truth.

[2] Codul de Procedura Penala din 2010 - forma sintetica pentru data 2020-05-25 (snppc.ro)
[3] Drept Penal. Partea Generală - M. Udroiu - 2019 | PDF (scribd.com)

In order to give effect to the content of the "Finding the truth" principle and to be able to eliminate judicial errors, the legislator felt the need for an express regulation contained in the provisions of art. 100 CPC - according to which the bodies during the criminal investigation have the obligation to collect and administer evidence both in favor and against the suspect or the defendant, ex officio or upon request, and in the trial phase, the court has the authority to administer the evidence requested by the prosecutor, the injured person or the parties.

The legislator also provided for the possibility of the court to administer evidence ex officio, when it deems necessary, in order to form its conviction.[4]
This is how "discovering the truth" is the cardinal principle of the criminal process because it represents its purpose, all other principles and basic rules can be considered means by which the truth will be manifested. The success of the fair process depends on whether the truth has been found out, and the components of the fair process are at the same time guarantees of finding out the truth *(Teodor Viorel Gheorghe, 2021, Foreword).*

In order to "find out the truth", we need tools for the judicial bodies to work with. Thus, the entire "crew" of the fundamental principle, but also the principles specific to the phases of criminal investigation and trial, represent support in the concretization of finding the truth. It is clear that the purpose of the criminal process - even if it is no longer expressly regulated in the current regulation - is represented by the permanent concern of the judicial bodies to ascertain in time and completely the facts that constitute crimes, so that any person who has committed a crime to end up enduring the punishment that the court pronounces and to limit judicial errors as much as possible".

We find the content of the purpose of the criminal process in the regulation contained in art. (8) CPP, "the fair nature and reasonable term of the criminal process". And here, as in the other regulations of the fundamental principles, it is stipulated the obligation of the judicial bodies to "manifest" their competence in the criminal investigation phase, as well as in the trial phase, respecting exactly all the procedural guarantees provided by the law and all the rights both of the parties and of the other procedural subjects participating in the criminal process[5].

But to be able to pursue the object of the criminal investigation - regulated by the provisions of art. 285 CPP – it is necessary for the judicial bodies (criminal investigation bodies, in the criminal investigation phase, to proceed with the collection of evidence).

The legislator "divided" their activity into three levels - evidence that helps to establish the crime; evidence that contributes to the identification of all participants in the commission of the crime; as well as evidence that leads to

[4] Codul de Procedura Penala din 2010 - forma sintetica pentru data 2020-05-25 (snppc.ro)

[5] Codul de Procedura Penala din 2010 - forma sintetica pentru data 2020-05-25 (snppc.ro)

criminal liability - that helps to set the criminal action in motion. Here - in conclusion - only in the criminal investigation phase - in order to be able to find out the truth, the activity of gathering evidence is subordinated to the reason "to be" the truth.

So, finding out the truth about the circumstances of the case means "establishing the existence or non-existence of the deed for which the criminal trial is taking place, the form of guilt, the motive and purpose, the nature and extent of the damage, as well as the aspects that influence the liability of the perpetrator.

Therefore, the rules of procedure must provide criminal justice with the opportunity to establish the real (material) truth, and not a formal truth *(Anastasiu Crisu, 2020, p.77)*

Also in support of finding the truth, in the preliminary chamber procedure - according to the competence with which he was vested, the judge of the preliminary chamber verifies whether the evidence was legally administered and the procedural documents of the criminal investigation bodies were legally carried out (art. 54, para. (b)) CPP in conjunction with art. 342 CPC. Here, then, is the constant concern of the judiciary.

The court, as I have already mentioned, has the possibility to administer or re-administer evidence during the trial phase, in order to find out the truth.

Evidence - this institution with "weight" in the criminal process is the basis of finding out the truth.

Both the judicial bodies and the main procedural subjects and the parties can use the evidence in the criminal process - but each from his own procedural position.

In the process of extinguishing and administering evidence, the Romanian legislator provided for a series of institutions whose compliance gives authority to the evidence.

Well, the "principle of the loyalty of the administration of evidence" looks after the methods of collecting it, in the sense of the prohibition to "use violence, threats or other means of coercion, as well as promises or exhortations in order to obtain evidence".

In the same spirit, the procedural provisions include regulations aimed at prohibiting the use of listening methods and techniques in order to be able to cause the person being heard to remember certain aspects, and sometimes even to answer the questions from the hearing in a certain way. The provision provided in art. is salutary. 101, para. (2), sentence II, which prohibits the use of eavesdropping methods even when the person being listened to gives his consent to the use of such methods and techniques.

Obtaining the evidence used in a criminal process is also not allowed even by determining a person to commit a crime by the judicial bodies.

We cannot ignore the fact that to be able to use evidence in a criminal process, it must be pertinent, conclusive, useful and admissible.

It is important to mention that the evidence does not have a value established in advance by law, being subject to the free assessment of the judicial bodies, following the evaluation of all the evidence administered in the case.

The obligation of the judicial bodies to exploit all the collected evidence - both in favor and against the suspect or the defendant, both ex officio and at the request of the interested parties, falls under the obligation they have, to find out the truth.

The current criminal procedural provisions provide for certain legal impediments, the existence of which leads to the impossibility of finding the truth in the case in which they appear - for example - art. 16, para. (9) - there is no prior complaint or another condition required by law, or reconciliation has taken place, or an agreement to acknowledge guilt has been concluded.

CONCLUSION

As a guarantee of compliance with the principle of "finding the truth" in the criminal process, we invoke the right to defense, which "represents a fundamental, traditional, universal right, included in the first generation of rights recognized by international documents and enshrined in the most important such of documents that proposed the affirmation of the rights and freedoms inherent to the human being and essential for respecting his dignity" (Anastasiu Crisu Crisu, 2020, p.80).

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THE STATUTE OF LIMITATION: THE EVOLVING LANDSCAPE OF CRIMINAL LIABILITY IN THE LIGHT OF THE CJUE DECISION C-107/23PPU/LIN OF 24 JULY 2023

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Abstract

Under the principle of the supremacy of Union law, a preliminary ruling of the Court of Justice is binding on the national court as regards the interpretation of Union law for the resolution of the particular dispute. The national court may not be prevented from applying Union law in a manner consistent with the decision or the case-law of the Court, if necessary by overruling national case-law which constitutes an obstacle to the full effectiveness of that law and the protection of public safety.

In this study, we will focus our attention on the institution of the statute of limitation of criminal liability and how it has been going through the national legislative architecture starting February 1, 2014, the date of entry into force of the current Penal Code and until now, analysing what is left of this institution after two decisions of admission by the Constitutional Court of Romania, a decision of the Court of Justice of the European Union and an Emergency Ordinance.

Key words: *limitation of criminal liability; legal certainty; Decision No 297 of 26 April 2018; Decision No 358 of 26 May 2022; CJEU Decision C-107/23PPU/LIN of 24 July 2023; Decision No 2/2020 of the High Court of Cassation and Justice; G.E.O. No 71/2022.*

INTRODUCTION

In order to understand exactly the institution of the prescription of criminal liability, its role and how a defective regulation of the institution act can lead to a vulnerability of the judicial system and implicitly of public safety, a historical analysis doubled by a legal analysis must be carried out.

Prescription, an institution of substantive law, has an extinguishing effect on the criminal legal relationship and intervenes at a later date after the commission of the crime, having the effect of extinguishing the right of the state to apply sanctions or to enforce them.

The institution of prescription was also regulated in the Penal Code from 1969, in article 121, being a cause of removal of criminal liability, having the practical role of sanctioning the passivity of the judicial bodies which, within the term provided by the law in relation to the crime pursued, had the obligation to finalize the procedures, the investigative activities and finally bring the accused person to criminal responsibility, otherwise, no punishment could be ordered against him in terms of the criminal side of the case.

The constitutional court by Decision no. 650/2018 defines the institution of the prescription of criminal liability as an institution with a dual role, because *primo*, its incidence makes a statute of limitations operative, which is why judicial bodies can no longer impose criminal liability against people who have committed crimes, and, *secondo*, the legislator considers that a sufficiently long term is sufficient for the committed deed and its effects to be forgotten by the members of society, the social danger being diminished. Indeed, if the punishment is not applied and executed as soon as possible after the commission of the crime, society is not given any satisfaction due to the lack of promptness and effectiveness of the action of the judicial bodies, and the safety and confidence in the way the judicial authorities the activity is carried out is called into question.

The definition of prescription in the current regulation finds its legislative precedent in the old Criminal Code. In the current regulation, however, there are elements of differentiation regarding the imprescriptibility of certain crimes, the limitation periods of criminal liability and the causes of its interruption.

If regarding the duration and calculation of the terms, things were clear in judicial practice, the application of this institution being carried out strictly on the basis of mathematical calculation rules, the same cannot be said about the causes of interruption of the prescription, as Criminal Code provided as a cause of interruption the fulfillment of any procedural act, the extension of the scope of the causes of interruption generating significant divergences in the interpretation and application of the new rules, which finally determined, relatively recently, the intervention of the legislator in the sense of changing the content of art. 155 paragraph (1) Criminal Code (*G.E.O. no. 71/2022*).

The legislator before December 1989 appreciated that only an act communicated to the accused has the ability to interrupt the course of the statute of limitations, which is why in the content of art. 123 of the Criminal Code provided, as in the current regulation, after the amendment that occurred last year, the same conditions for the incidence of the prescription, the procedural document being circumstantial to documents communicated to the suspect or the defendant during the criminal trial.

It is found that, in a paradoxical way, the post-December legislator chose a different legislative route, and from 01.02.2014, through the provisions of art. 155, the scope of causes of interruption was extended by assigning the interruptive effect to any procedural acts.

In essence, this fine but substantial difference was the trigger of a wave of legal problems and for which it was necessary to pronounce two decisions of the Constitutional Court of Romania (hereinafter C.C.R.), a C.J.U.E. decision. and publication in the Official Gazette on the date of 30.05.2022 of the above-mentioned Emergency Ordinance, and most likely things will not stop here as the current norm is not sheltered from the point of view of constitutionality criticism either.

I. DECISIONS OF THE CONSTITUTIONAL COURT OF ROMANIA REFERRING TO THE STATUTE OF LIMITATIONS FOR CRIMINAL LIABILITY

The sensitive issue of the content of the text regarding the prescription was the subject of the analysis of the Constitutional Court (CCR).

By Decision No 297 of 26 April 2018 on the objection of unconstitutionality of the provisions of Article 155 para. (1) of the Criminal Code, the Constitutional Court admitted the exception of unconstitutionality and found that the legislative provision which provides for interrupting the limitation period of criminal liability by performing *"any procedural act in question"* in the provisions of Art. 155 para. (1) of the Criminal Code, is unconstitutional, considering the lack of predictability and the violation of the principle of the legality of incrimination since the regulation is too extensive, which is why the suspect or the defendant who has not been notified of an act is unable to find out aspects related to the interruption of the limitation period, following the start of a new limitation period of his criminal liability.", which affects the safety of the persons in respect of whom legal proceedings are taking place.

Then, by Decision no. 358 of May 26, 2022 C.C.R. established that the text of art. 155 para. (1) from C. pen. is unconstitutional, in its entirety the Court ruled that, by the aforementioned decision, the "legislative solution" contained in art. 155 paragraph (1), this decision having the legal nature of a simple/extreme decision, pronounced in the absence of the legislator's obligation to legislate in order to clarify the norm.

After this moment, the question of the qualification of the institution of prescription, respectively of the rules that govern the interruptive effect of prescription of procedural acts, was raised in judicial practice, in the sense of whether in this situation we are dealing with rules of substantive law, because of the possible intervention of to them belongs the right of the state to apply a sanction and to compel the convicted person to carry out the punishment or

procedure, which implies the immediate application of the new law based on the *"tempus regit actum"* principle.

The High Court, by HP Decision no. 67/2022 held that the rules regulating the interruption of the prescription are considered rules of material (substantial) criminal law and are subject, from the point of view of their application in time, to the principle of the activity of the criminal law according to article 3 of the Penal Code, except situations in which there are more favorable provisions, in accordance with the "mitior lex" principle provided by article 15 para. (2) from the Constitution of Romania, republished, and article 5 C.pen. Therefore, the rule that leads to the removal of criminal liability must be qualified as a rule of substantive law and is subject to the principle of non-retroactivity of the criminal law.

Of course, including doctrine (*G. Bodoroncea et al., 2020, p. 573 and 589; M. Udroiu, 2020, p. 900*), as well as jurisprudence (*Criminal Sentence no. 45/2022 of 13.01.2022 pronounced by the Cluj-Napoca Court in file no. 4007/211/2020; D.P. no. 350/A/2022 of 22.06.2022 pronounced by the Oradea Court of Appeal in file no. 2440/177/P/2018; Criminal decision no. 1090/2022 dated 31.08.2022 pronounced by the Cluj Court of Appeal in file no. 13208/211/2022*), have opined since before Decision no. 67 HCCJ-HP, that the prescription has the character of substantial law, consideration for which the rules regarding the interruption of the course of the prescription of criminal liability are also of substantial criminal law. The reason why the intervention of the High Court was needed is, on the one hand, justified by the non-unitary practice (some courts appreciating that the rules governing the interruption of the limitation period are of procedural law), and on the other hand, to confer judicial stability in in the face of the wave of annulment appeals (under this aspect, there were courts that suspended the judgment of annulment appeals until the pronouncement of Decision no. 67 HCCJ-HP - as an example the Conclusion of 16.09.2022 pronounced in file no. 735/33 /2022 of the Cluj Court of Appeal and of the files that had to be resolved on the merits either by classifying the statute of limitations for criminal liability as expired, or by terminating the criminal process for the same reason.

In other words, the High Court of Cassation and Justice intervened in order to restore public security since, as we have shown, the *de facto* and *de jure* return to the old regulation destabilised legal relations, generating discussions both on the interpretation and legal nature of the Constitutional Court's Decision No 358 of 26 May 2022 and on the nature of the rules on the interruption of the limitation period for criminal liability. The phenomenon of public insecurity is very nicely analysed in order to be understood through a *per a contrario* interpretation, *"In order to perceive public safety and to have a sense of peace in the public space, and not only, it is necessary to know the concerns of specialists in several fields"*. (Elena-Ana Iancu, 2021, p. 633).

Thus, this classification of the institution of criminal statute of limitation as one of substantive law is relevant because, following Decision No 358 of 26 May 2022, until 30 May 2022, when Government Emergency Ordinance No 71/2022 was adopted, in criminal matters, the period of criminal liability was not interrupted, a legal situation which has produced effects in more favourable conditions in ongoing cases. The limitation period for criminal liability under Government Emergency Ordinance No 71/2022 is limited to crimes committed after 30 May 2022, since the principle of retroactivity is not applicable in cases where the criminal investigation is still ongoing, in other words it does not have the legal nature of a more favorable criminal law.

The European Court of Human Rights (ECHR) adopted a similar perspective, arguing that Article 7 of the Conv. The EDO absolutely forbids the "retroactive application of the criminal law to the detriment of the accused person", as it is a jurisprudential consecration of the right of any accused in this sense, correlative to the obligation of the bodies (This enshrines a fundamental right), (judiciary) to respect it. (*ECHR, Del Rio Prada v. Spain*).

II. DECISION OF THE CJUE C-107/23PPU/LIN OF 24 JULY 2023

On 22.02.2023, the Court of Appeal of Braşov made a reference for a preliminary ruling under Article 267 TFEU.

The referring court requested the interpretation of art. 325 paragraph (1) TFEU from the economy of which results the obligation of the member states to combat fraud that harms the financial interests of the EU, but also art. 49 paragraph (1) of the Charter of Fundamental Rights of the European Union (CDFEU) regarding the rule of non-retroactivity of laws and punishments, the guarantees resulting from the principle of legality and proportionality of crimes and punishments. At the same time, the national court asked the European Court of Appeal to provide clarifications regarding the scope of application of the principle of the supremacy of EU law, in the sense of whether it opposes a regulation or an internal practice according to which the courts must strictly comply with the decisions of the Constitutional Court and the Court supreme courts of the Member State concerned, even when these decisions contravene Union law.

The national court had been notified of an appeal for annulment filed by five appellants against a final judgment of conviction for the crime of tax evasion provided for by art. 9 paragraph (1) letter b) and c) and art. 9 paragraph (3) of Law no. 241/2005 and art. 7 related to art. 2 lit. b) point 16 of Law no. 39/2003, citing that he was erroneously convicted even though the termination of the criminal process should have been ordered as a result of the intervention of the prescription of criminal liability. In this context, the Court of Appeal decided to refer the CJEU, showing that it is necessary to clarify the issue of whether those invoked

by the appellants are compatible with Union law, taking into account that it would have the effect of exonerating them from criminal liability for a crime that could affect the budget and interests financial union. Moreover, the referring court revealed that if it were proven that an interpretation in accordance with Union law is not possible in relation to the defenses formulated by the appellant, it would be in a position to leave the jurisprudential solutions of the constitutional court and the High Court of Cassation and Justice of Romania unapplied, with the consequence of sanctioning the judges for this reason.

The Court's response came on 24.07.2023 through the judgment issued in case C-107/23PPU/LIN. In the interpretation of the analyzed European norms, the Court ruled the following:

1) The European legal provision on combating fraud must be interpreted in the sense that the courts of the member states do not have the obligation not to apply the decisions of the constitutional court which found the lack of predictability and clarity of the rule regarding the causes of interruption of the limitation period in criminal matters, on the grounds of violation of the principle of the legality of crimes and punishments, with all the consequences arising from this, such as the termination of a considerable number of criminal processes, even those having as their object serious fraud crimes that affect financial interests of the European Union;

2) National courts have the obligation to leave unapplied a national standard of protection relating to the principle of retroactive application of the more favorable criminal law which allows the questioning, including in extraordinary appeals, directed against definitive judgments, of the interruption of the liability limitation period criminal charges in such processes through any procedural acts that occurred prior to the decisions of the CCR;

3) The supremacy of European norms in relation to constitutional norms, without prejudice to the rights of each member state to legislate in the matter of criminal law, prohibits the adoption of national regulations or practices according to which the national common law courts of a member state are bound by the decisions The Constitutional Court or the supreme court and cannot, for this reason, with the risk of triggering the disciplinary procedure of the judges in question, leave unapplied the directly applicable European norm, as well as the jurisprudence of the CJEU.

In essence, based on the Court's decision, the following conclusions can be drawn:

- national courts can apply the decisions of the Constitutional Court regarding the prescription of criminal liability in cases that must be resolved on the merits of the case, even with the risk of pronouncing the termination of the criminal process in those cases, including in cases involving crimes affecting the financial interests of the EU;

- the courts cannot apply the decisions of the Constitutional Court when they would allow the questioning of the legality of the interruption of the prescription by acts prior to 25.06.2018, because obviously those acts were carried out in compliance with the legal provisions from that time, having an interruptive effect prescriptive;
- the decision of the Luxembourg Court refers only to the crimes that protect the financial interests of the European Union (para. 71-73 of the decision);
- the decision of the CJEU should not apply to corruption offences, as it is stated in para. 70 that the questions are admissible only if they do not concern the interpretation of the PIF Directive and the decision 2006/928 regarding the MCV, and under this aspect we hope that the judicial practice will be unanimously shaped like decision no. 1343 of 01.09.2023 pronounced in file no. 64/84/2016** of the Cluj Court of Appeal. *In this case, the request to change the legal classification of the facts was deemed irrelevant, taking into account the fact that the offense of influence peddling provided for by art. 291 Criminal Code was committed in September 2012, and the statute of limitations for this crime is 8 years, which expired in September 2020. At the same time, it was mentioned that, on June 9, 2022, the CCR decision no. 358/2022, which produces erga omnes effects, with the courts having the obligation to comply with the provisions and considerations of this decision, which is why the court of judicial control in relation to the previously mentioned aspects has the obligation to establish the intervention of the prescription of criminal liability, with the consequence of the termination of the trial criminal. It is necessary to mention the fact that in this case the prosecutor requested the conviction of the defendant and the application of CJEU jurisprudence, as it results from the judgment of July 24, 2023, and the court of judicial review ruled that the said judgment is not applicable in the case, the object of the case being corruption offences. (Criminal decision no. 1343 of 01.09.2023 pronounced in file no. 64/84/2016** of the Cluj Court of Appeal).*

Finally, in relation to how the decision of the Court of Justice will be applied and what will be the national judicial practice, it is most likely *superfluous* to hope for a unanimous practice, but we can conclude that *"(...) the judge or magistrate with jurisdictional powers must enjoy independence in relation to the executive and the parties and resolve any case impartially."* (ECHR, *Assenov vs. Bulgaria*, in M. Pătrăuș, 2019, p. 3).

III. G.E.O. NO. 71/2022

On 30.05.2022, amid media pressure and the chaos in the judicial system created by the publication of Decision no. 358 of May 26, 2022, was published in the Official Gazette a normative act, respectively G.E.O. no. 71/2022 which did nothing but take ad letteram the substance of the provisions of art. 121 Criminal Code from 1969 and introduce them to art. 155 of the current Criminal Code.

Of course, the preferred solution would have been for the Parliament to intervene either in 2018, when the first wave of public insecurity was generated, or in 2022 in order to avoid all the constitutional problems looming over the G.E.O. no. 71/2022.

Moreover, a panel of the HCCJ ordered on 03.06.2022 the referral to the constitutional court (Constitutional Courts) with the exception of the unconstitutionality of the G.E.O. no. 71/2022, on the grounds that it violates the constitutional order, the Government not having the right to regulate in the field of justice by means of emergency ordinances.

It is well known that Government ordinances can be issued in the field that is the subject of organic laws only in exceptional situations.

The whole legal discussion starts from the infamous G.E.O. no. 13/2017 of 31.01.2017, by which also G.E.O. no. 71/2022, an attempt was made to modify some provisions of the criminal codes (of substantive and procedural law), a fact that attracted public opprobrium, which is why on 02/05/2017, the Government also adopted another emergency ordinance for the repeal of G.E.O. no. 13/2017.

As a consequence, on 26.05.2019 a consultative referendum was organized, entitled Referendum on the topic of justice, and through which the population was asked whether they agree, first of all, that acts of corruption cannot be amnestied or pardoned, and secondly , if it agrees that the Government cannot intervene through emergency ordinances in the field of crimes, punishments and judicial organization, questions to which the population voted affirmatively in an overwhelming proportion, over 85%.

Here, then, that G.E.O. no. 71/2022 appears as a successor of O.U.G no. 13/2017, being not only unconstitutional in that it violates the constitutional order, but also violates the will of the population expressed by voting.

CONCLUSIONS

Therefore, it can be easily observed by a layman that all this judicial instability, that all the systemic risk of impunity are just some self-inflicted consequences of the legislator's desire to modify an institution that was extremely well settled and did not require an update under the empire the new law, an aspect also recognized through the lens of the return to the old regulation through the emergency ordinance.

At this moment, strictly from a practical analysis, we appreciate that the initial delirium has disappeared, that Decision no. 67 ICCJ-HP and CJEU Decision C-107/23PPU/LIN, although not revelatory, provide stability and clarity that was needed for practitioners and provide predictability for legal subjects.

However, we can only wonder what will be the fate of the criminal cases in the event that the Constitutional Court decides that the G.E.O. no. 71/2022 is unconstitutional and if at that moment the Parliament decides that it is time to intervene legislatively.

In conclusion, the judicial system is a living organism through all the judicial practice of the national courts, in a continuous evolution and expansion, or such legislative slips only come to destroy the work of generations of professionals who put their shoulder to the perfection of the Romanian judicial system.

From the perspective of the safety of the nationals of the member states, implicitly of the Romanian citizens that the judicial procedures are carried out in compliance with European protection standards, we must emphasize that the phrase "public security" is inextricably linked to the way in which the judicial authorities value the jurisprudence of the CJEU.

The accuracy of the national regulation and the direct applicability of the practice of the European court of contention constitute true premises that fundamental rights and freedoms are respected.

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DETAILED URBAN PLAN – BETWEEN SPECIFIC REGULATION AND UNCERTAIN LEGAL NATURE

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Abstract

Spatial planning and town planning are regulated in the provisions of Law no. 350/2001 and have as their basic purpose the establishment at a centralized level of a unitary framework for the development and planning of all construction, reconstruction and restructuring works.

The detailed urban plan is a frequently encountered urban design tool in the field of territorial planning, and obtaining it is required in some situations precisely to respect the need for public safety and security, being a concrete application of the elements of the local urban planning regulation.

Although it is classified as a specific regulation, the detailed urban plan does not enjoy a coherent and predictable legal framework, the proof of this fact being the extensive jurisprudential discussions regarding the legal nature of this administrative act, and the objective of this paper is to analyze the legal incidents and national jurisprudence provisions to answer the question of whether the determination of the legal nature of the detailed urban plan can affect the imperative of public safety and security of legal relations.

Key words: *detailed urban plan, Law no. 350/2001, individual administrative act, normative administrative act, national jurisprudence, town planning.*

INTRODUCTION

The matter of urban planning, the main component of the activity of local public administrations, enjoys extensive regulation and practical application, its purpose being described by the legislator itself, respectively, *"stimulating the complex evolution of localities, through the elaboration and implementation of*

spatial development strategies, sustainable and integrated, in the short, medium and long term".

Looking at things from the perspective of legal subjects, urban regulations become relevant with the start of a real estate project, respectively in the procedure of obtaining a building permit regulated by Law no. 51/1991 republished, a situation in which, depending on the particular aspects proposed and pursued by the beneficiary regarding the investment, as well as the manner in which these particular aspects comply or not with the general urban plan of the city, respectively the inclusion of the respective plot in the PUG norms- ul so that it is possible to directly issue the building permit, it becomes imperative to obtain an urban documentation called a detailed urban plan (DUP), which regulates the concrete situation of the plot by referring to all the rules applicable in the respective area.

I. LEGAL FRAMEWORK

Territorial planning and urban planning documents are regulated and defined in Law no. 350/2001, and according to art. 39 para. (1) of this normative act, *"territorial development and urban planning documentation means the territorial development plans, urban planning plans and the general urban planning regulation, approved and approved according to the law."*

In the same sense, the provisions of art. 44 and 45 of Law 350/2001 clarifies the need for the existence of urban planning documents, the broad perspective of the urban planning process related to the imperative of sustainable development of localities, classifying, at the same time, these urban planning documents in the general urban plan (hereinafter PUG), the zonal urban plan (hereinafter ZUP), respectively the detailed urban plan (hereinafter DUP).

For this analysis, it is particularly relevant to remember the provisions of art. 4 of the same normative act, legal provisions that give the urban planning activity a normative character, by detailing all the aspects related to the exploitation of land and the specifics of buildings, but also of infrastructure, landscaping and plantations.

The systemic analysis of the legal provisions mentioned above leads to the conclusion that all urban planning documents establish rules applicable erga omnes regarding the exploitation of immovable land, each individual document presupposing a regulation applicable at a different level.

In this sense, at the first level there is the PUG, then the ZUP, and finally the DUP, the existence of the first two documents conditioning the development and approval of the DUP, all of which are approved by the decision of the central or local deliberative body, as the case may be, and puts in application by the executive authority, respectively the mayor's institution.

Regarding the detailed urban plan, art. 48 of the same normative act provides that, *"(1) The detailed urban plan has the character of specific*

regulation for a parcel in relation to the neighboring parcels. The detailed urban plan cannot modify the higher level plans. (2) The detailed urban plan is the urban design tool that details at least: a) the specific way of building in relation to the functioning of the area and its architectural identity, based on a specialized study; b) withdrawals from the lateral and rear limits of the plot; c) the percentage of land occupation and the manner of land occupation; d) car and pedestrian accesses; e) architectural-volumetric compliance; f) compliance of public spaces. (3) The detailed urban plan is drawn up only for the detailed regulation of the provisions established by the general urban plan or the zonal urban plan", in the same sense being the provisions of art. 19 of the Methodological Norms for the application of Law no. 350/2001.

II. THE LEGAL NATURE OF THE DETAILED URBAN PLAN

The doctrine and practice of the courts has faced a problem in recent years, namely that of establishing the legal nature of this urban documentation, starting primarily from the legal regulation exposed above, by referring to the doctrinal classification of administrative acts.

While the relevant doctrine in the matter was unanimous in the sense that the detailed urban plan, along with all other urban documentation, represent genuine normative administrative acts (Ovidiu Podaru, 2020), the practice of the courts highlighted two equally well-defined opinions, the first opinion being in agreement with the doctrinal one, (Civil Settlement of 21.04.2023 of the Cluj Court, Mixed Section for Administrative and Fiscal Litigation, Labor Disputes and Social Insurance), and the second opinion being in the sense that the decision of the local Council regarding the approval DUP represents an individual unilateral administrative act (Civil Decision no. 625/2023 dated 03.05.2023 of the Cluj Court of Appeal, Section III Administrative and Fiscal Litigation).

This qualification presented, until recently, significant theoretical and practical consequences, both from the perspective of the limitation period of the action directed against the legal act, as well as regarding the period for completing the preliminary procedure.

Starting the analysis of the theme from the classification mentioned above, we note the fact that in the post-war doctrine it was appreciated that this classification into normative and individual administrative law acts starts from the different legal effect produced by the manifestations of will of the state administration bodies (Tudor Draganu, 1959, p. 85-87), while the post-communist doctrine mentioned that according to the extent of the legal effects, normative acts, individual acts and acts of an internal character are distinguished (Antonie Iorgovan, 2005, p. 39).

In the same sense, the French doctrine nuanced this distinction in the sense that the normative act creates a general and impersonal situation, while the individual act gives rise to a particular legal reality, the normative act proposing

norms of a general nature and without taking into account its addressees, and the individual act being thought only in relation to its recipient (Gaston Jèze, 1913, p. 9-17).

The more recent doctrine emphasized the fact that administrative acts are distinguished by the degree of determination of the addressees of the enacted norms, the normative act addressing an undetermined sphere of addressees, while the individual act targets a determined group of addressees (Ovidiu Podaru, 2010, p. 61).

Looking at things from a pragmatic perspective, the opinion was also expressed that an individual act represents a unilateral externalization of will having as its output the birth, modification or termination of legal relations with a determined recipient, and by exclusion, all administrative acts that do not fall under in this pattern are normative acts (Bogdan Dima, 2021, p. 29).

Returning to the matter under discussion, from the overall analysis of the provisions of Law no. 350/2001, it can be clearly observed the legislator's intention to give a normative character to these regulations, territorial development strategies and the rest of the activities exposed above, being acts issued in the organization of the execution of the law, being regulated as normative acts, according to the provisions of art. 14 of the Law.

The High Court of Cassation and Justice was recently referred to bring an important ruling in this debate, holding, by Decision no. 12/2021 pronounced by the RIL Panel (regarding the legal nature of the ZUP that: *"in the process of classifying an administrative act in one of the two categories (...), essential are the legal effects it produces, the nature of the measures ordered, and not the form or name; administrative acts of a normative nature contain provisions of a general nature, having applicability in an undefined number of situations, so they produce legal effects erga omnes against an undefined number of persons, while administrative acts of an individual character aim to achieve legal relations in a strictly determined situation and produce effects either against a single person or against a determined or determinable number of persons"*.

Even if the High Court did not rule on the legal nature of the urban planning documentation analyzed in this work, in the considerations of the mentioned decision it stated, starting from the doctrinal distinctions and the legal provisions set out above, some criteria that can be extrapolated also in what as regards the DUP, respectively the definition provided by the legislator to the urban planning documentation, the specific normative regulation, as well as the possibility of identifying the addressees of the norm, the essential aspect of the applicability of the normative administrative act from a temporal point of view with regard to any subject of law introduced in a legal report based on the town planning regulations of the area in question.

If, in the case of the General Urban Planning Plan, the normative legal nature can be easily deduced from the legal provisions *supra* mentioned, and as

regards the ZUP, the same conclusion was drawn by RIL Decision no. 12/2021 of the HCCJ, regarding the DUP, things were not so clear for legal practitioners, the two opinions set out above being expressed, with all the corresponding consequences that arose from these interpretations.

III. COURT PRACTICE

The first jurisprudential orientation that was formed in terms of the qualification of the DUP as an individual administrative act started from the considerations set forth in Decision no. 1718/2013 pronounced by the HCCJAdministrative and Fiscal Litigation Section in which the distinction between the two categories of administrative acts was emphasized from the perspective of the extent of the legal effects and the recipients of the decreed rules but also from the considerations of the RIL Decision no. 12/2021 mentioned above, in which the supreme court nuanced the importance of the determinability of the legal subjects that can fall under the ZUP regulatory norm, a sphere that can expand and rebut not only on the people who had the right of ownership over a building in their patrimony located in the area of applicability of the ZUP, but also on the owners of neighboring buildings (Civil judgment no. 1988/2022 of 15.07.2022 of the Cluj Court, Mixed Section for Administrative and Fiscal Litigation, labor conflicts and social insurance, (Civil Decision no. 625/2023 of 03.05.2023 of the Court of Appeal Cluj, Section III Administrative and Fiscal Litigation).

The courts that formulated this reasoning appreciated that by Decision no. 12/2021 of the ICCJ mentioned above, the delimitation between the two categories of administrative acts was nuanced, making a global assessment of their content, the legal effects produced, the general or determined applicability to a number of situations and to the specific recipients.

At the same time, it was appreciated that from the provisions of art. 32 and 48 of Law 350/2001 the form in force at the relevant date in the respective case, the year 2008, it unequivocally results that in the legislator's conception the detailed urban plan concerned concrete constructions, determined what was wanted to be done at a given moment on a or several adjacent plots through the use of one or more locations on these plots and for which the authorization process has begun by issuing the urban planning certificate. Therefore, unequivocally, the detailed urban plan could only be used in the process of authorizing a construction or certain constructions, and in the hypothesis that after the adoption of the DUP, the building permit was obtained for these determined objectives, and these were also actually carried out, the detailed urban plan exhausted its legal effects and could no longer produce any other legal effect, similar to a building permit. In other words, he could not establish urban regulations for any other construction that would have wanted to be carried out on the plots for which this detailed urban plan was adopted, and from this object of

regulation it unequivocally follows that the detailed urban plan it does not contain provisions with general applicability for an indefinite number of hypotheses and does not produce legal effects that are applicable to all legal subjects.

At the same time, another argument was that this administrative act approves the erection of a certain construction under certain conditions of location, dimensions, compliance by the person who was at that time the holder of a right over the plot/plots in question, which allowed him to build, and the detailed urban plan produced legal effects only for the realization of the respective construction/constructions by the person indicated above (and his successors), not for the realization of other constructions by other persons even on the plot/plots in question, resulting in the fact that it is not possible to claim, given the specific object of the detailed urban plan, that it establishes some rules of a general nature, which relate to the essence of regulation.

In support of this first jurisprudential orientation is also the Minutes of the Meeting of the presidents of the specialized sections of the High Court of Cassation and Justice and the courts of appeal dedicated to the unification of judicial practice in the field of administrative and fiscal litigation of May 5-6, 2022, during the meeting this opinion being embraced by the majority according to which, *"the decision by the local council approving the detailed urban plan has the legal nature of a unilateral administrative act with an individual character."*

The second jurisprudential orientation had in mind the qualification as a normative administrative act of the detailed urban plan, starting from the same classification of administrative acts and the same theoretical delimitations between the two categories, appreciating that the main difference between the two is not a quantitative one, namely the number of the persons concerned by the act, but a qualitative one, namely the determinability of the addressees, with the direct consequence of this distinction, i.e. normative acts do not create actual rights or obligations, but *"calls"* to certain rights or obligations, while individual acts embody one or more normative acts, attributing rights or obligations to certain persons (Civil Settlement of 21.04.2023 of the Cluj Court, Mixed Section for Administrative and Fiscal Litigation, Labor Disputes and Social Insurance, Civil Sentence no. 169/CA/2023 of 29.06.2023 of the Oradea Court of Appeal, Administrative and Fiscal Litigation Section).

In continuation of this legal reasoning, these courts appreciated that a person can be the addressee of a normative act to the extent and only as long as they meet the conditions provided by this act to be within its scope, but acquire a right or a concrete obligation exclusively when an individual administrative act is issued in their name, rights and obligations that can no longer be lost by the fact that the recipient simply leaves the scope of the act, referring to the provisions of art. 48 of Law no. 350/2001 and emphasizing that the very legal definition of the DUP specifies that it has a *"regulatory character"*, which leads to the conclusion

that it has a normative character, as long as the idea of regulation is specific to this type of acts.

Also, it was stated that from the provisions cited above it appears that the DUP regulates the way of building on a certain plot, but it does not appear that it would regulate this way of building exclusively for the benefit of a specific recipient or recipients, on the contrary, although a certain natural person can be the initiator of this urban documentation, once it is adopted its regulations are valid for any person who would like to obtain a building permit on the respective plot, and the names of the natural persons registered in the act do not mean that they are its beneficiaries, but only simple initiators, or, a normative act can have initiators, the closest example to the analyzed situation being that of ZUP which, although it has initiators in its turn, is generally considered a normative administrative act.

In reality, the logic of the urban regulation carried out through administrative acts is that PUG as well as ZUP and DUP constitute administrative acts with a normative character, to be implemented by issuing the building permit, the only administrative act with a truly individual character, which establishes in favor of a determined beneficiary the right to build and the obligations that they must comply with.

A final argument in support of this guideline is that once a DUP is adopted, its regulations are valid for any person who would like to obtain a building permit on that plot, and its effects are not limited in time until the first building permit is issued, therefore in the event that the first building permit would become ineffective, being, for example, cancelled, the same DUP can be used to issue a new building permit.

In this context, we also mention the minority practice of some courts in the sense of not ruling on the legal nature of urban planning documentation in the cases where the issue of suspension of administrative acts and the exceptions of the lack of active procedural quality and interest was raised because, as it was shown previously, art. 1 paragraph 1 and para. 2 of Administrative litigation law allow contesting (and implicitly, the request for suspension of execution) including individual administrative acts addressed to another subject of law, if the plaintiff claims an injury, and on the other hand, art. 42 letter a) from the Methodology approved by MDRT Order no. 2701/2010 does not limit the scope of interested persons, but establishes a presumption of interest in favor of the owners of neighboring plots, which does not exclude the existence of an interest arising from an alleged injury that can be invoked by a person other than an owner of a neighboring plot. Moreover, art. 48 of Law on territorial planning and urban planning does not ignore the possible consequences of the detailed urban planning plan including on other plots than the neighboring ones, because the specific building conditions specified in the DUP are to be made taking into account the particularities of the area, respectively its architectural specifics.

These courts appreciated that regardless of the analysis, such as, in the case of an action aimed at canceling/suspending a zonal urban planning plan (normative administrative act, as established with binding value by ICCJ Decision no. 12/28.06.2021, given in the resolution of an appeal in the interest of the law) or a building permit (individual administrative act), the plaintiff is not requested a certain quality arising from the possession or not of a property in the vicinity of the plot that is the subject of one of the two mentioned administrative acts, thus, even in the case of a request to suspend the execution of a HCL approving a detailed urban planning plan, the scope of the plaintiffs cannot be limited to the owners of the neighboring plots (Decision no. 207/R of 04.05.2023 of the Court of Appeal Târgu Mureş, Section II Civil, Administrative and Fiscal Litigation).

IV. APPLICATION OF THEORETICAL CRITERIA TO THE SUBJECT ANALYZED

It goes without saying that all the above analysis would not find its place in the hypothesis in which the mentioned legal texts would be clear in expressing the legal nature of all urban documents, including the detailed urban plan, but in the absence of such clarifications, we can only interpret the supposed will of the legislator.

In our opinion, from the corroboration of all the provisions mentioned above, it emerges that the detailed urban plan is also an act of normative regulation, together with the ZUP and the PUG, all these documents constituting a unitary ensemble in the urban regulation, which subsumes the local and national development strategy, having in common the fact that they are issued by the deliberative authority of a territorial administrative unit, respectively the local council and do not refer to a person or a group of persons, determined or determinable, but to a certain territory.

In analyzing the contrary opinion, it is observed that a main confusion starts from the regulatory character of the detailed documentation, since it would not establish general rules, but concrete ones for a certain plot, without having the ability to be applied to an indeterminable sphere of beneficiaries. In this context, it should be remembered that the obligations established by the detailed urban plan are *propter rem* obligations, so that in the case of the transmission of the property right or other real right over the building, the acquirer will be obliged to comply with them in the case of the completion of a construction. From this point of view, the following argument cited in support of the first opinion, namely the determinability of the beneficiary, can also be invalidated, as long as, apparently, starting from the parcel regulated by the DUP, its owner can be identified, in concrete terms, this beneficiary can change easily without affecting the validity or binding effect of those established in its contents. Also, the notion of *"beneficiary"* is improperly used for the same reasons, being rather about an initiator who at a certain moment has the interest to request this detailed documentation from the public authority.

For all these arguments, we appreciate that all considerations of Decision no. 12/2021 issued by the High Court of Cassation and Justice applies, *mutatis mutandis*, also with regard to the DUP, the two documents not being different from a legal perspective.

As we stated at the beginning of the paper, the consequences of the correct qualification of the legal nature of this administrative act subject to analysis were, until the entry into force of Law no. 151/2019, significant both from the perspective of the limitation period and the period regarding the formulation of the preliminary procedure in order to challenge in administrative litigation the decision approving the documentation.

Thus, regarding the action in administrative litigation exercised against normative acts, art. 7 para. (1^1) and art. 11 para. 4 of Law no. 554/2004 provide that a preliminary complaint can be filed at any time, while in the case of individual documents, the filing of the complaint is subject to a period of 30 days from the date of receipt.

Regarding the limitation period, however, the same legal provisions establish a limitation period of 6 months in the case of individual documents, calculated differently depending on the attitude of the administrative body towards the prior complaint, respectively the response received to the prior complaint or the lack of such answer, while in the case of normative acts, the legislator established the imprescriptibility of the action.

A last edifying argument in support of the interpretation that the legislator had in mind the qualification of all urban documentation as normative acts, was offered by amending art. 64 para. 3 of Law no. 350/2001, by Law no. 151/2019, the legislator establishing a general competence in favor of the administrative litigation courts for the resolution of all disputes generated or in connection with urban planning documents from the perspective of the competent courts, also establishing a general limitation period of 5 years for the exercise of the specific right of appeal against decisions approving urban documentation, therefore the practical importance of revealing the legal nature of the DUP has diminished at this moment.

However, another pertinent question is raised to which the legislator did not provide an answer at the time when it amended art. 64 of Law 350/2001, respectively if it correlates properly with the provisions of art. 64 para. 3 of Law 554/2004 regarding the preliminary procedure, in the absence of an answer within the law, the only logical answer would be that it can be formulated at any time within the 5-year term..

CONCLUSION

The detailed urban plan is a genuine normative administrative act with a significant importance in the matter of urban planning, the initiators striking the

necessity of obtaining it in the case of making investments in urban areas regulated in too general terms by the GUP OR ZUP.

The normative nature of this administrative act was confirmed by the legislator through Law no. 151/2019 amending Law 350/2001, by establishing this general limitation period of 5 years for all actions to annul the decisions approving land use and urban planning documentation, a genuine exception to the imprescriptibility of the actions exercised against normative acts, an exception established precisely to ensure the stability of legal relations.

All the regulations set out above attest to the fact that through the DUP(detailed urban plan) obligations are established for any land owner at a given time, the purpose of establishing these obligations is to ensure additional protection in the planning of the territory and neighborhood relations, and finally to ensure public safety, which is why it can be stated that the legal nature of this decision approving the DUP is, without a doubt, an administrative act with a normative character, with all the specific consequences arising from this qualification.

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CURRENT TRENDS IN JURISPRUDENCE REGARDING THE PROTECTION OF FUNDAMENTAL HUMAN RIGHTS IN RELATION TO THE GROUNDS FOR OPTIONAL REFUSAL OF EXTRADITION OF A PERSON TO THE RUSSIAN FEDERATION

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Abstract

The phrase "security and public safety" has multiple meanings and can be analyzed by referring to the protection of fundamental human rights during judicial proceedings, including in the field of international judicial cooperation in criminal matters.

A request for the passive extradition of a national of a member state or a third country, requires the executing state to check (if the extradition affects the rights included in the content of art. 19 paragraph (2) of the Charter of Fundamental Rights of the European Union (CFREU).

This paper aims to analyze the optional reason for refusing the extradition of a person to the Russian Federation, in the current international context, through the lens of national and European jurisprudence in the matter.

Key words: *passive extradition, European Extradition Convention of 1957, optional reason for refusal, serious risk, national and European jurisprudence.*

INTRODUCTION

From the perspective of international cooperation in criminal matters, the concept of "public security and safety" must be analyzed in all its facets, so that legal assistance mechanisms, such as extradition, constitute a genuine means of fighting crime, but are, at the same time, and a means by which the rights of persons subject to extradition are respected. Guaranteeing respect for fundamental human rights has its origin in the relationship between the state and the individual

and is an indispensable condition for the development of the rule of law (*O.M.Salomia, 2019, p.297*). The supremacy of these values is reflected, at the national level, in the provisions of article 1 paragraph (3) of the Romanian Constitution.

Subversive actions, of armed aggression against a state, violate order, safety and security and impose, among other things, coercive measures that the authorities, including the judiciary, must adopt in order to guarantee the rights and freedoms of citizens.

The realities of the contemporary world, which find their concreteness in the current tense situation, generated by the odious war started by Russia, have required the taking of firm measures on the part of international institutions and organizations, the institutions of the European Union, including the states of the Eastern Partnership. The scale of particularly dangerous military actions, for state security, the maintenance of order and respect for the law, including fundamental human rights and freedoms, at the global level, but especially at the European level, have imposed security restrictions. The escalation of the war imposed a nuanced approach, with an emphasis on humanitarian protection standards, from the judicial authorities of the member states, including the segment of international judicial cooperation.

Thus, in order to guarantee the respect of the rights and freedoms of citizens conferred by the constitutional norms, but also by the European regulations, the courts of the member states proceeded to a generous interpretation of the notion of "serious risk" to which a person requested by to a third country in order to be handed over for the purpose of judicial investigation or the execution of a sentence.

The safety of a person who is the subject of an extradition request, in the judicial procedure, finally confers the guarantee of public safety, since this notion is a form of legal security of any person participating in social and legal relations in a state of law. Last but not least, from this perspective it is necessary to specify that in the matter of international judicial cooperation the principle of moderate exercise of judicial cooperation operates, as it results from the economy of Article 3 of Law no. 302/2004, republished as it must be subsumed under the protection the interests of sovereignty, security, public order and other national constitutional interests" *(*S.I. Goia, 2021, p. 485*) Therefore, whenever an extradition request is formulated, when resolving it, the , the aforementioned interests, in particular, security and the need for public safety. Therefore, whenever an extradition request is made, the aforementioned interests, in particular, security and the need for public safety, must be taken into account when resolving it.

Obviously, looking at this concept from another angle, in correlation with the principle of respecting the fundamental rights of the person during judicial proceedings, we must emphasize that public safety also implies the restriction of the exercise of fundamental rights and freedoms, but which must be expressly

provided by law and to respect the substance of these rights and freedoms (art. 52 para. 1 of CFREU and art. 2 para. 3, 4 of Protocol no. 4 to the Convention for the Protection of Human Rights and of fundamental freedoms).

Next, we propose, within our theoretical approach, to highlight issues regarding the passive extradition of a national of a member state or a third state (the Russian Federation), insisting on the optional reason for refusal, with an emphasis on the protection standards provided by the provisions Art. 19 paragraph (2) of the Charter and national and European jurisprudence on this segment.

I. PASSIVE EXTRADITION. REGULATORY

The need for public safety and security is not a foreign concept to the segment of judicial cooperation, since extradition is an institution that works directly in the interest of the requesting state, but indirectly supports the interests of other states, because the prevention and combating of crimes is a subject of collective interest *(C.Bassiouni,1974,p.134).*

In the international conventions and bilateral treaties regarding the extradition procedure, it is mentioned that the handover will be done ("the contracting parties undertake to hand over each other") on a reciprocal basis, based on the rules and conditions expressly included in these international legal instruments (*M.Pătrăuș, 2021, p.30-31).*

The seat of the matter is, at the international level, the European Convention on Extradition (*Paris, 13.12.1957, in force since 18.04.1960*) and its Additional Protocols (*Strasbourg, 15.10.1975; 17.03.1978; 10.11.2010*), a genuine document with continental effects in the field of extradition, complied with by the ECHR Convention (art. 3), the *Treaty of Lisbon* (*art. 6 TEU,) art. 82 TFEU*), and domestically, by the fundamental law (*art. 19 paragraph 2 and art. 22 of the Constitution*), the Criminal Code (*art. 14*) and Law no. 302/2004, republished (*art. 18*).

Since we proposed to analyze the optional reason for refusing to execute an extradition request made by the Russian Federation to a member state, it is necessary to mention that in the relationship with Romania, in the extradition segment, the provisions of the Treaty regarding the granting of legal assistance in civil, family and criminal cases of 04/03/1958 (*in force since 08/04/1958*), which is based on the rule of international courtesy and establishes the principle of reciprocity regarding surrender based on an extradition request between the contracting parties.

In the extradition procedure, both the general principles that we find in all instruments of international judicial cooperation in criminal matters are applicable, such as the guarantee and full exercise of the right to defense within the judicial procedure, respect for the procedural rights of the persons who are the

subject of a criminal trial (C.D. Miheș, 2017, p.460), but also principles specific to this procedure, namely the principle of respecting the independence and sovereignty of each state (S.I. Goia, 2020, p.46), the priority application of international legal norms in relation to domestic criminal law norms, non-extradation certain categories of persons, the performance of the international regularity examination and the respect of fundamental human rights.

The 1957 convention on extradition, art. 6 of the TEU, but also the Charter (art.52 para.3 final sentence), as well as art. 21 of Law no.302/2004, art. 20 and 24 of The Constitution provides procedural guarantees to the person requested for extradition.

In line with the need to respect fundamental values, the Court of Justice of the European Union (CJEU) has developed a body of legal principles, including in the field of human rights, deriving from national constitutional traditions, from the ECHR, as well as from international treaties signed by member states" in order to provide adequate protection standards, for the respect of human rights in the light of the provisions of the Charter of Fundamental Rights of the Union" (*P.Craig, G.de Burca, 2017, p.426*). With regard to the principle of respect for human rights, included in the content of art. 6 of the TEU, we must mention that it has binding legal value, and the fundamental rights guaranteed by the ECHR find their concreteness in this general principle of Union law. The inclusion of human rights in European Union law was achieved by the CJEU (Court of Justice of the European Union), which recognized that human rights, as defined by two sources - international law, with reference to the ECHR Convention the internal law of the member states - represent general principles of Union law and their compliance is a *sine qua non* condition for the legality of all regulations and led to the development of the theory of autonomous effective protection of Human Rights in the European Union (*ECHR Bosphorus Hava Yollari Turizm/ Irlanda, pct.73-81).*

The CJEU frequently examined the consistency of legislation adopted by the EU legislative institutions with fundamental rights (C-509/19, W.S.Bundersrepublik Deutschland pt.72,78,84,100), set rules for the protection of fundamental rights and ruled, referring to the jurisprudence The Court of Strasbourg the need to ensure effective legal protection, an element inherent in the right to a fair trial (*C-354/20, C-412/20 PPU, point 39,52,61,64; C-219/ 17 Silvio Berlusconi, points 45-46*).

The priority of Union law in relation to the internal constitutional order of each member state and the conditioning of Union law to ensure a viable protection of human rights were enshrined by the jurisprudence of the Luxembourg Court (*C-11/70, Internationale Handelsgesellschaft, pct.4).*

Extradition from Romania is carried out based on the provisions provided in Title II, Section 2 of Law no. 302/2004, the conditions for the admissibility of the request being those regarding the act, the person, the procedural provisions and the punishment. With regard to these conditions, including the mandatory

reasons for refusal, the content of the request and the judicial procedure of extradition, we do not propose to make developments, this paper giving attention and space to an impediment to the execution of the extradition request, regarding which we will make an exhaustive presentation .

Passive extradition is regulated internally in Title II, Chapter I, art. 18-60 of Law no. 302/2004.

II. IMPEDIMENT TO THE EXECUTION OF THE EXTRADITION REQUEST

From the economy of art. 22 paragraph (2) of Law no. 302/2004, it follows that Extradition to a third country can be refused if it would have consequences for the requested person" in particular, due to his age or health condition".

An ad litteram interpretation of the legal text leads us to the idea that, the substantive condition regarding the requested person is not met, interfering with the execution, when due to age or health the extradition would have particularly serious consequences for him. We believe that the expression "in particular" must be analyzed through an extensive interpretation, which includes the standard of protection conferred by the European legislator through the provisions of art.19 paragraph 2 of the Charter. Thus, an optional reason for refusing extradition is the existence of a serious risk for the requested person, which implies protection against any inhuman or degrading punishment or treatment in the requesting state. Moreover, this provision transposes at the Union level the relevant jurisprudence related to art. 3 ECHR (Ahmed/Austria, pt. 22). In other words, Romania, a contracting party to the ECHR Convention (European Convention on Human Rights), according to the provisions of art.1, has the obligation to recognize every person under its jurisdiction the rights and freedoms provided for by the Convention and must respect the jurisprudence the European Court of Justice (*for developments, see S. Franguloiu, N. Hegheș, M. Pătrăuș, 2023, p.138-140*).

Under these conditions, Romania, as a member state of the European Union, in case of passive extradition has the obligation to check whether the surrender based on the extradition request would not be likely to affect (the extradition will not affect the rights) the rights protected by the provisions of the CDFUE and European Convention on Human Rights.

The existence of serious reasons that form the conviction of the court that the extraditable person, if he will be handed over to the requesting state, risks suffering an injury to his rights, i.e. being subjected to torture, inhuman or degrading treatment or punishment, justifies the incidence of the optional reason for refusal, with the consequence of the rejection of the extradition request.

The competent court has the obligation to concretely analyze the existence of an impediment justifying the refusal of judicial cooperation.

Therefore, in the event that there are data and information regarding the requested person according to which in the requesting state there is a serious risk of violation of fundamental human rights and freedoms or that he could be subjected to inhuman or degrading punishment or treatment, the competent judicial authority from the requested state can invoke the optional reason for refusing the extradition request, for this reason. Since it is an optional reason, the court must make an assessment *in concreto*, in the case brought before the court, since the substantiation of the decision to reject the extradition request on this basis is a matter of interpretation and application of the law.

When the request for passive extradition includes the details regarding the requesting authority, all the data regarding the requested person, those regarding the final court decision, the presentation of the facts and the relevant legal norms, including those regarding the prescription of criminal liability or the execution of the sentence and after the examination of international regularity, the request of extradition is sent to the prosecutor who will notify (the court of appeals) the competent court to resolve the request, since the extradition procedure is a judicial one (*art. 36-42 of Law no. 302/2004*), the intervention of a judge providing a jurisdictional guarantee to the extradition procedure (***M. Pătrăuș, 2019, p.3)*. The appeals court within the range of which the wanted person was located does not have the competence to rule on the merits of the accusations made by the judicial authorities of the requesting state, nor on the appropriateness of extradition, but will have to quickly verify whether the conditions of extradition are met and resolve the cause for the admission or rejection of the request. If the formal and substantive conditions are met, and there are no mandatory or optional reasons for refusal, the request will be accepted, and the requested person will be extradited to the requesting state. In the situation where there are grounds for mandatory refusal of the extradition request (art. 21 of Law no. 302/2004), the judge finding the incidence of one of those expressly provided for in the 1957 Convention, transposed into the framework law at the national level, will reject the request. When there is an optional reason for refusal, such as the one included in the content of art. 22 paragraph (2) of Law no. 302/2004, the judge must analyze in relation to the particularities of the case, if there is a significant risk for the extraditable person to be subjected to degrading or inhumane treatment in the situation in which she will be handed over to the requesting state.

This impediment to the execution of an extradition request was invoked in connection with Russia's recent military aggression against Ukraine, which, as noted in the doctrine, has shaken the peace in Europe and fundamentally changed the vision of security, demonstrating that "the unpredictable never stops it surprises us" (*M. Dincă, Al.M. Dincă, 2022, p.98*).

Taking into account that, on 15.03.2022, the Russian Federation initiated the withdrawal procedure from the Council of Europe, and Russia's war against Ukraine escalated, the European institutions combined their efforts, including in

the segment of respect for human rights and fundamental freedoms by the aggressor state . We exemplify in this sense the Resolution of the European Parliament of 16.02.2023 on the anniversary of one year since the beginning of the invasion and war of aggression waged by Russia against Ukraine (2023/2558(RSP)), which affirms the negative impact of Russian aggression on the security of all countries from the Eastern Partnership of the European Union and emphasizes the need to combine the efforts of the member states in promoting solidarity and cooperation, which (*sub.ns.-M.P*) must be achieved not only at the economic, social, military level, but also at the legal level, through an innovative approach to the issue of judicial cooperation in criminal matters, in the current context.

The security and safety of the member states, but also of those in the Eastern Partnership, are of the essence of European democracy and are necessary to ensure stability and prosperity in the region, or the lack of data that outlines the conviction of the existence of an effective system to prevent torture, the uncertainty that the assurances given by the Russian Federation are real from the perspective of European protection standards regarding human rights and fundamental freedoms, Russia's constant denial of human rights violations, despite the contrary data from credible sources, currently creates serious problems with regard to the application of the mechanisms of international legal assistance in criminal matters in relation to the Russian authorities.

Additionally, the legislation of the requesting state must ensure a judicial procedure that is *sufficiently accessible, precise and predictable* in terms of the field of applicability, in order to avoid the risks that the extraditable person will be subjected to torture or other inhuman or degrading punishment or treatment, an aspect revealed by the jurisprudence Courts of Strasbourg (*Soldatenko/Ukraine; Shakurov/Russia*).

Even if the Russian Federation, in addition to the extradition request, gives assurances that, in case of surrender, the rights of the person requested in the extradition procedure will be respected, according to the provisions of art.3 and art.6 of the European Convention on Human Rights, the judge invested with the solution the case must make a rigorous assessment and evaluation in this regard, considering that from 15.03.2022, the Russian Federation initiated the withdrawal procedure from the Council of Europe. Regarding this aspect, it should be noted that immediately after the start of the war (one day after the Russian invasion), the Russian Federation decided to withdraw from the Council of Europe, an international, intergovernmental and regional organization which, through the Commissioner for Human Rights, exercises powers in regarding the verification of respect for human rights and the rule of law (*Resolution (99)50 art.1 pt.2*), thus placing itself in a position of denying the jurisdiction of the European Court of

Human Rights. Moreover, prior to the outbreak of the war between Russia and Ukraine, in the reports drawn up by international organizations on human rights, data were attested to the effect that the Russian state has real problems, the existing evidence and information revealing that in this state there are serious deficiencies in terms of the non-application of torture, inhumane or degrading treatments. Following the outbreak of the currently ongoing armed conflict, through legal documents issued by the European Parliament, the violation by the Russian Federation of its international obligations regarding human rights was found (*Resolution of the European Parliament of 16.12. 2021 regarding the continuous repression of civil society and defenders of the right of man in Russia, letter l; Resolution of the European Parliament of 1.03.2022 regarding Russia's aggression against Ukraine (2022/2564(RSP), points 14 and 45*).

The aspects we have referred to are essential elements that the judge must analyze in the context of an extradition request from the Russian Federation, through a judicious interpretation and application of the law, in order to verify the guarantees provided by art. 19 para. 2 of Charter and dispose accordingly.

III. RELEVANT EUROPEAN AND NATIONAL JURISPRUDENCE

The Court of Justice of the European Union, based on the provisions of art. 267 TFEU, was called to rule on the obligations of a member state, in the passive extradition procedure, to inform another member state of the Schengen area, when the person in question is a citizen of to the member state of the European Free Trade Association (EFTA) and to hand over the extraditable person when requested to this state, not to the third state (*C-897/19 PPU).*

In the case, the Luxembourg Court showed that the requested member state has the obligation to check with priority, in accordance with the provisions of art. 19 paragraph 2 of the Charter, if in case of extradition, if the requested person will not be subject to the risk of being subjected to a death penalty or inhuman or degrading treatment. As part of the verification of this condition, the EU court emphasized that an essential element is that the extraditable person, prior to acquiring the citizenship of the EFTA state, obtained asylum on the grounds that a criminal investigation procedure was underway in the applicant state regarding him, which, otherwise, he also motivated the extradition request. In these conditions, the Court ruled that before verifying the conditions for extradition, the requested member state has the obligation to inform the EFTA state about this situation, in order to be allowed to request the surrender of the requested person, provided that the EFTA state is competent , based on national legislation, to carry out a judicial procedure against that national for crimes committed on the territory of another state.

In essence, it was noted that onthe 20th of May 2020, a Russian citizen, who in the meantime acquired Icelandic citizenship, was arrested in Croatia on 30.06.2019, based on an international warrant issued by the Interpol Moscow

office. The court in Croatia, called to rule on the extradition request, assessed that the legal conditions were met and ordered the extradition of this person to Russia. The Supreme Court of Croatia, in the appeal filed by the extraditable person, related to the fact that he invoked the existence of a risk of torture and inhuman and degrading treatment in the event of extradition to Russia, and Iceland granted him refugee status due to the criminal prosecution launched in Russia , as well as the circumstance that the enforcement court did not respect the CJEU judgment in the case *Petruhhin (C-182/15, Bitanga, Marijan; Franguloiu, Simona; Sanchez-Hermosilla, Fernando, 2018, p.22-27),* decided to address the Luxembourg Court by way of a preliminary ruling. It is necessary to mention that, in this case, the Court ruled that in the case of an extradition request concerning a citizen of the Union, a national of another member state of the Union, the Framework Decision 2002/584 applies, if the state of which the person is a national case has the competence to prosecute him for the acts committed outside the national territory. Regarding this last aspect, the Court considered that the previously mentioned decision refers to the nationals of the member states, or in this case, the requested person is not a citizen of the Union, but a national of a third country. However, the Court revealed the need to verify the protection guarantees included in the content of art. 19 paragraph 2 of the Charter, emphasizing the usefulness of examining the case through the lens of an essential element, namely whether the handover to the requesting state will not affect the rights provided for by the Charter. Taking into account the existing information, according to which the person in question obtained asylum in Iceland precisely because a criminal prosecution procedure was initiated in Russia, the Croatian judge was entitled to thoroughly analyze the situation of the extraditable person in the light of art. 19 para. 2 of the Charter , extradition not being justified unless, following the assessment of the situation, based on "objective and proportional considerations", it is found that the objective legitimately pursued by national law is achieved. The Court underlined that the Croatian state does not extradite its own citizens, which establishes a difference in treatment with regard to nationals of other states, including EFTA states, who must benefit from the same elements of protection against extradition. In the Court's opinion, it is justified and there is a legal basis for the requested state to seek to avoid the risk of impunity for extraditable persons, which is why the regulation on extradition appears to be adequate to achieve the objective, "but the proportionality of such a restriction is debatable", and that is precisely why the solution in the *Petruhhin* case was deemed to be applied by analogy to the Icelandic citizen who was, in relation to the third country that requested extradition, in a similar position to a citizen of the Union", according to art. 3 paragraph (2) TEU . Referring to the adequate protection, the Court emphasized that it is only covered in principle, by international regulations

(declarations and treaties), the competent court in the requested state being obliged to pronounce the decision based on "objective, reliable, precise and up-to-date elements" , as it results from the judgments of the ECtHR, also taking into account judicial decisions pronounced in the requesting state, documents drawn up by bodies of the Council of Europe or those of the United Nations system (*C-404/15 and C-659/15 PPU, Aranyosi and Căldăraru, pts.88-89).*

On the domestic level, the High Court of Cassation and Justice, in a recent case, admitted the appeal of the extraditable person A. and rejected the extradition request, noting the existence of an impediment to surrender to the Russian Federation.

It was essentially held that the said A. was requested by the judicial authorities in Russia in order to be investigated for several crimes of organized crime, i.e. participation in a criminal association established for the purpose of committing serious and particularly serious crimes, smuggling by passing across borders of narcotic substances in large proportions, committed by an organized group and attempted illegal marketing of narcotic substances committed in an organized group, acts criminalized by the provisions of art. 210 paragraph (2), art. 229/1 paragraph (4) letter. a), art. 30 paragraph (3) and art. 228/1 paragraph (4) letter a) and d) Criminal Code of the Russian Federation.

Suceava Court of Appeal, by criminal sentence no. 47/10.05.2022, based on art. 52 paragraph (1) letter c) and paragraph (3) of Law no. 302/2004 ascertained the fulfillment of the conditions regarding extradition and admitted the extradition request made by the General Prosecutor's Office of Russia, ordering the surrender of the said A. to the judicial authorities of the Russian Federation.

It was found that, in this case, the provisions of the European Convention on Extradition (1957) transposed into the national regulation by art. 18-60 of Law no. 302/2004 are applicable.

The court analyzed the substantive and formal conditions of the extradition procedure, finding that the condition of double incrimination and the one related to the seriousness of the facts, provided by art. 24 and 26 of Law no. 302/2004, republished, were fulfilled, since the facts for which the extradition procedure was initiated criminal prosecution on the territory of Russia have a counterpart in the national regulation in the provisions of art. 367 paragraph (1) and (2), art. 3 paragraph (3) of Law no. 143/2002 on the prevention and combating of illicit drug trafficking, art. 32 paragraph (1) Criminal Code related to art. 2 paragraph (1) of Law no. 143/2002. At the same time, it was found that the limitation period for criminal liability has not been met, a condition imposed by the provisions of art. 18-19 of Law no. 302/2004, republished.

However, the trial court did not analyze the optional reason for refusing extradition, provided by art. 22 of Law no. 302/2004, republished, through the prism of objective, reliable criteria.

In the appeal filed by the extraditable person, the court of judicial review assessed that this impediment to execution is applicable in this case, motivated by the fact that Romania must recognize the rights and freedoms defined by the European Convention on Human Rights to any person. Thus, proceeding to the concrete examination of the information obtained and taking into account the situation of the persons requested, the High Court concluded that the inhuman or degrading conditions of preventive detention in this state are systemic and there are data relating to the violation of fundamental human rights by the requesting state. The analysis was also based on the existing situation in this state, revealing the fact that the Russian Federation has withdrawn from the Council of Europe," which calls for increased caution in assessing the consequences that extradition to the Russian Federation could have", the statements of the representative for media freedom of the Organization for Security and Cooperation in Europe from 3.03.2022, as well as on the statement of the UN High Commissioner for Human Rights regarding the latest developments in Russia and Ukraine.

It should be noted that the supreme court has ruled in this regard previously, even if in isolated case solutions, in the sense of rejecting the request for extradition to a third state when from the existing data and information it was possible to prove that the person requested by the requesting state's fundamental rights would be seriously violated. Thus, by criminal decision no. 1529/9.12.2016 pronounced by the High Court, it rejected the extradition request made by the judicial authorities of the Republic of Uzbekistan, regarding the requested person B., regarding whom the criminal investigation was carried out in the third country, the person in question being accused of committing the crimes of international murder, terrorism, attack on the constitutional order, organization of a criminal group and riots, facts provided by art. 97 part 2 letter e), g), i), art. 155 part 3 letter b), art. 242 and art. 244 Criminal Code, which have a counterpart in the Romanian regulations. It was also assessed that the provisions regarding the prescription of criminal liability are not relevant, and despite this, the extradition cannot be accepted, as there is an impediment to execution. In the considerations of the decision, it was shown that the extraditable person had refugee status in Sweden, later acquiring Swedish citizenship, and the reason why he obtained asylum was based on the real risk of suffering ill-treatment in the event that he was returned to the country of origin. origin. Consequently, in accordance with the interpretation given by the Luxembourg Court of Justice in the *Petruhhin* case, the High Court rejected the extradition request citing the incidence of the provisions of art. 19 paragraph 2 of the Charter, as well as the jurisprudence of the Strasbourg Court in the case *Ismailov and others/Russia* emphasizing that, from reliable sources, there are practices of the authorities in the requesting state clearly contrary to the principles of the ECHR Convention, the UN special rapporteurs on torture (2002,

2006) labelling "systematic" and "indiscriminate" the custody of the Uzbek police, and the police staff as a structure "that takes inadequate measures to bring those responsible to justice".

Consequently, it is easily observed that, in line with the practice of the ECHR, the jurisprudence of the Court of Justice of the European Union, at the present time, the national judicial practice reveals the need for a thorough analysis of the impediment to extradition, when the requesting state, a third state, violates the rights and fundamental human freedoms, and the assurances it gives to the requested state are either difficult to verify or clearly contrary to human rights reports, which indicate serious problems with international cooperation with the requesting state authorities in the field of human rights.

In the current context, prudence in the analysis of the case that has as its object a request for extradition to the Russian Federation requires the verification of all objective, reliable, accurate and up-to-date elements, in order to provide each person subject to judicial instruction with the standards of protection imposed by European regulations in the field of human right.

CONCLUSIONS

The current international context has generated a sense of insecurity, which justifies a thorough check by the national judicial authorities of the member states of the fulfillment/non-fulfillment of extradition conditions, when invested with the settlement of a request from a third state, in particular the Russian Federation.

The manifest tendency in matters of extradition, to renounce surrender strictly on the basis of the formal principle of reciprocity, but also the interest in analyzing an extradition request through the prism of the reason for optional refusal to surrender, in order to ensure the content of the protection conferred by art.19 paragraph 2 of the Charter, is the expression, as emphasized in the doctrine, of the paradigm and orientation more towards the concept of security and safety of the person (E.A.Iancu, 2021, p.642).

The optional reason for refusing extradition to a third state, in the conditions where the risks are known, must be judiciously analyzed by the requesting state in order to grant any extraditable person the guarantees imposed by the ECHR Covention and CFRU.

The effective judicial protection emphasized by the Luxembourg Court, an indispensable element of the right to a fair trial, demands that the judicial procedure be sufficiently accessible, precise and predictable, and that fundamental human rights are not violated. If the enforcement court considers that the optional reason for refusing to hand over the extraditable person to the third country is relevant in the case brought before the court, it is obliged to proceed to a judicious analysis of the concrete situation, based on objective and proportional considerations, in order to avoid the risk of the extraditable person

being subjected to torture or other degrading or inhuman treatment in the requesting state.

Therefore, we consider it necessary that the essential elements be examined more rigorously in the current context, in the extradition procedure in relation to a third state, when the existence of an impediment to execution is established, so that the respect of human rights finds its concreteness in the judicious, effective and unitary application of this mechanism of judicial cooperation in criminal matters.

The objective of extradition, consisting in the fact that a person who escapes on the territory of another state from the criminal justice of the requesting state to be handed over to it, avoiding the risk of impunity of the person to be extradited, is not absolute, since in each individual case , an objective and proportional analysis is required for other reasons as well, which may lead the national judge to find the incidence of an impediment to enforcement. For example, non-discrimination based on citizenship or nationality constitutes a basic principle in the European Union, enshrined in art. 18 TFEU, but it implies the non-application of some differentiations in legal treatment between nationals belonging to member states and those from third countries.

As we highlighted in the previous sections, the analysis of the data and information in the case, respectively of the specific circumstances is particularly useful (for example the evolution of the situation in the Russian Federation or elements that certify that the extraditable person is telling/concealing the truth regarding the legal situation that triggered the initiation of the judicial procedure in the third state), being able to talk about components for the examination of the "real risk" (even if the requested state cannot rule on the merits of the accusation, but only on the proportionality of the measure). These represent objective, adequate and proportional considerations from the perspective of the verification that the competent court makes in order to ensure the protection standards provided in art. 19 paragraph 2 of the Charter. Thus, in relation to the above, we appreciate that not only the declarations of the third state can be taken into account, in the sense that fundamental rights are respected and international treaties are strictly applied, but a judicious analysis, based on objective elements, is necessary, reliable, accurate and up-to-date (for example, ECHR judgments, reports of international organizations on human rights, the evolution of the situation in the third country, etc.).

The protection standards against extradition have been clarified through the interpretation of the European provisions by the CJEU, which requires their uniform application and interpretation by the member states, within the judicial procedures.

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FOOD FRAUD IN THE EUROPEAN UNION

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Abstract

EU legislation does not provide a definition of fraud in the agri-food chain.

Commission Regulation (EU) 2019/1715 defines a "fraud notification" in IRASFF and therefore indicates the key elements to consider. In this sense, agri-food fraud is "a failure to comply with any suspected intentional action by businesses or natural persons, with the aim of deceiving buyers and obtaining an undue advantage from it, in violation of the rules referred to in Article 1 paragraph (2) of Regulation (EU) 2017/625".

Keywords*: prevention, counterfeiting risk, detection, prevention, organized crime*

INTRODUCTION

Today, most modern industrial societies do not care to know much about the natural world to survive, and most of the necessities of life depend on the advice of experts and the supply of merchants. The environment we live in shapes our knowledge, preferences, and diet. Therefore, the formation of dietary habits, on the one hand, involves receiving specific, consistent, and fact-based information when determining what foods to buy, and on the other hand, requires a wider information environment formed by cultural factors, such as advertising and other information media. Perhaps the most effective way to inform consumers and support them in making healthy decisions when purchasing food and beverages is through nutrition labeling.

While hunting and gathering in the past provided the ideal diet, which is not surprising given that humans have been fed for hundreds of thousands of years and the human body is well adapted to it, today humans are limited and often unbalanced. diet

Most of the calories that fed people today came from staple crops—wheat, potatoes, rice—that lacked essential vitamins, minerals, and other nutrients. The ancients of the peasantry could eat berries and mushrooms, berries, mushrooms and turtles for breakfast and roast rabbit with wild onions for dinner. The secret that kept them from malnutrition and provided them with all the nutrients they needed was a precise, natural and varied diet. In addition, they were less likely to suffer from a lack of a specific food source rather than becoming dependent on one type of food. Instead, agriculture is devastated by famine as droughts, fires, and earthquakes wipe out annual crops.

Although the media has been obsessed with food fraud, it would be a mistake to think that it only hit consumers a few years ago, because food fraud has been around since people started selling food. Legal texts originating in ancient Rome and Athens refer to wine being adulterated by flavor or color. According to a list of malpractices maintained by administrative officials in France between 1892 and 1917, the following types of fraud were recorded - adulterated milk including melted butter, artificially colored pasta, water, coffee; contains 14% residual, fake vinegar, fake pepper, added chickpeas and olive oil.

Frederick Accum, a German chemist living in London in the 19th century, was the first to point out food adulteration and several ways to detect it.

Already at that time, many harmful chemical compounds were added to food to make it more beautiful and tastier: for example, adding lead oxide to cheese or adding sulfuric acid to vinegar. Frederick Accum's goal was to educate consumers and give them the tools to detect adulteration with his 1820 book Treatise on Food Adulteration and Culinary Poisons.

I. OF FRAUDS

Based on the counterfeiters' interests, producing more and/or cheaper products, increasing profits, improving sales, avoiding losses, unfair competition by concealing defects, in addition to the consequences of their presence, it should be noted that they deceive consumers, financial losses, and perhaps the most important and Products associated with medium and long-term effects are indicated by the risks these products pose to the body. *(Wookjin Choi, Sadegh Riyahi, Seth J. Kligerman, Chia-Ju Liu, James G. Mechalakos, Wei Lu, 2018, p. 76).*

Broken down, fraud types fall into 6 categories:

1. to melt, thicken, mix, digest (milk, butter, fruit juice, wine)
2. Mask quality defects (synthetic flavors, sugar, glycerin)

3. concealing the technological treatment of the product (refining, genetic modification, freezing)

4. Substitution with inferior product or other type

5. wrong about product name, composition (origin, label, production).

6. Labeling (false characteristics, treatment requirements)

Fair markets, economic balance and social equity are dangerous frauds and food frauds, especially affecting consumers in search of "cheap" products. *(Evelyn Souto Martins, Fernando Kuschnaroff Contreras, 2014, p. 33*).

It is not possible to create a device that combats counterfeiting, fraud, or contraband, and that guarantees integrity and genuineness, as well as access to economically viable products for all. More than 2 billion consumers worldwide suffer from problems associated with "unsafe", "fake" or counterfeit products. Studies conducted in France - INCA 2, INCA 3 - show that price is the first criterion when choosing a food product at the time of purchase (48% of respondents), followed by consumption habits (43%), taste (38%) and finally the origin of the product (36%). %). Even if a product's composition, ingredients, or other information written on the package is not among the most frequently cited criteria for justifying a food product's choice, ask When faced with a choice between two similar products, 19% of respondents consistently chose the system that included nutrition or health-related information, while 44% said they only buy these products occasionally. *(Coff C, Kemp P., 2014, p. 9)*

But what do consumers expect today? Although there are different and often conflicting expectations, they confirm the trends:

- food purchasing and consumer behavior considers sociodemographic characteristics (household type, age, number of people living alone, geographic location, education level, income).

- urbanization and women's paid work led to a decrease in the time spent preparing food and a direct decrease in family opportunities that ensure the transfer of cooking knowledge to new generations, their acquisition of quickly prepared and eaten meals, habits of eating outside the home (restaurant, restaurant).

- with increasing urbanization and food chain complexity, consumers are moving further away from products and food chain participants.

- behavior develops over time and with age - if taste was preferred in the 2000s, novelty was important in 2007, and in 2015 it gained organic importance due to the increased desire to buy products from neighboring countries (value according to French statistics enterprises related to

organic production registered 8.3 billion euros in 2017, a 17% increase compared to 2016);

- changing expectations according to events or food crisis.

- emerging consumption opportunities - the division and simplification of meals, new

Access anywhere, compare prices, etc. via internet networks.

- economic constraints - consumers try to buy products at the lowest prices, which has become a priority and strategic direction of marketing and sales policies (throughout marketing campaigns and advertisements), so consumers develop strategies to take advantage of low prices. for products and services. *(Yao Taky Alvarez Kossonou, Alain Clément, Bouchta Sahraoui, Jérémie Zoueu, 2020, p.14).*

Three areas have been identified regarding social developments:

- search for natural, safe, and ethical products (no products)

- products guaranteeing nutritional requirements ("supplement") - new purchasing and consumption practices.

II. THE RISK OF COUNTERFEITING

In addition, consumers pay more attention to the origin and traceability of products, nutritional quality, production methods, breeding and slaughtering, processing methods and proximity to the place of production.

While consumer product safety is a major challenge for all stakeholders-government agencies, producer associations, and non-governmental organizations-the problem is that in recent years, many incidents of food fraud have contributed to the rapid pace growing consumer skepticism.

The risk of counterfeiting arises from the ability to deceive the consumer by copying the appearance and branding of a product in the same manner. At the industry level, this reported fraud is high and difficult to monitor. The number of deaths around the world is a reminder of this threat to public health and safety: in 2007, the World Health Organization confirmed that 40,000 people died in Russia after drinking counterfeit vodka bought at very low prices sold in popular brands. Controversy over the addition of melamine to powdered infant formula in China caused health problems for more than 290,000 children in 2008, including 860 hospitalizations and six deaths. In 2014, a restaurant owner in the UK offered a plate of chickpeas instead of almonds to a man with a peanut allergy who died of an allergic reaction. On the other hand, there are many other cases where Mexican pepper sold under the label "Made in Quebec" does not harm the health of the consumer.[1]

[1] United States Government Accountability Office. 2008. Federal Oversight of Food Safety: FDA Has Provided Few Details on the Resources and Strategies Needed to Implement its Food Protection Plan. GAO-08-909T. http://www.gao.gov/new.items/d08909t.pdf. Accessed October

However, it is increasingly recognized that food fraud is on the rise internationally; just remember the horsemeat scandal in Europe in the reports that about 70% of extra virgin olive oil is fake! Under these the concern of shoppers who don't know what's in their shopping cart or on menu they're ordering from is understandable. Among the frauds reported month within the European Union and worldwide are:

The production of buffalo mozzarella, which uses cow's milk and adds soda to cover the acidity and shelf life of the milk.

Selling non-halal butchered turkey, but signs indicate that it is halal butchered lamb.

Ive Olive Pomace Oil has been named Extra Virgin Olive Oil.

Use of synthetic dyes in the manufacture of flavored products.

Convention organic registration of traditional food products.

Therefore, no industry is exempt from the analysis of the reports published monthly by the European Commission, and that this accident affects all countries in the world. However, most of the consumers its security is called "fantasy," and the counterfeiter refuses to falsify it with eternal accusations of "social chaos."

Companies lose money and customers lose trust because of fraud. Food waste costs the global food industry between $30 billion and $40 billion annually. But in addition to the economic cost, food fraud can harm public health and damage brands. Globalization and increasingly complex supply chains create enormous opportunities and rewards for fraudsters. The collision of megatrends - especially climate change, resource scarcity, urbanization, and demographic change - increases vulnerability and simplifies profit from fraud. Today, even the most basic foods can be attended by many suppliers from around the world. It's no wonder then that food fraud is on the rise, especially since the risk of being caught for fraud is low compared to the profit. The Economic Impact of Global Food Fraud In 2010, association members in the United States estimated economic losses caused by food fraud at $10 -15 billion per year.

However, there are many cases where fraud cases do not pose a threat to consumers' health. A research team in the United States evaluated the financial gains made by fraudsters and the resulting losses to guilty consumers by analyzing a sample of cereal bars containing wheat gluten. Wheat gluten has value because of its protein content. If a batch of wheat gluten does not have a large amount of protein, the addition of melamine compensates for this deficiency. But melamine, a chemical compound that poses a health risk to consumers when taken in high doses, has been

reported in milk formulas in China. Plus, it's super cheap. Thus, in a cereal bar sold for USD 1.91 per kilogram, wheat gluten is allocated USD 0.25. Instead of eating 100% wheat gluten, cheaters can eat 50% wheat gluten and 50% melamine. The cost of fake wheat gluten is just $0.13 instead of $0.25, and a pound of corn is selling for $1.91 instead of $1,786. Thus, for each kilogram of cereal bars, the producer earns an additional $0.13. Benefits are created at the expense of the consumer. Counterfeiting is used in both expensive foods produced in small quantities and in products produced in large quantities (generally less profit is made per product sold).

A report published in 2013 showed that about 10% of the food sold in the world is adulterated. The spread of food fraud can be seen as an iceberg. The tip of the iceberg refers to fraud cases detected by the authorities, while the tip of the iceberg refers to fraud cases that are undetected and unmonitored.

Local, national, or international food fraud incidents are widely reported by the media. Thus, the consumer is informed of these threats and can take measures against fraud.

A Canadian study reveals consumer perceptions of food fraud. The report found that 63% of respondents were concerned about food fraud in general, 74% about imported products, and 57% about products produced or processed in their own countries. Most respondents (56.6%) said they trust the authorities to detect fraud, but only 28% trust the industry to prevent it. The general results given by the authors of the study: 51% will trust the list of ingredients presented, 41% will trust the specific geographical origin of each and only 29% will trust the visual information (e.g., bio). 37% of the population believe that the risk of food fraud is high or very high; and risk-taking increases with age and decreases with education and income.

III. FRAUD DETECTION

When discussing the available methods for detecting fraud, it should be noted that the choice varies depending on what you want to detect. What should I confirm as an example? The origin can be verified (is it from the country indicated on the label?), the composition can be tested (was it diluted with low-quality wine, and if so, what dangerous compounds were added?).

Each product or composition can contain multiple frauds and even multiple frauds at the same time. So, for every fraud there must be a method and some equipment. This is a major challenge for the agri-food industry to ensure that its products are not adulterated. As a result, scientists have developed several protocols to detect food fraud. A brief introduction of them is given below.

In the 19th century, the chemist Frederic Accum offered his readers an advantage in detecting certain defects: “This product is sometimes contaminated with lead, because the oil-producing fruit is subjected to the action of the press between the lead plates. Italian olive oil is usually free of this preservative. Also,

he suggested a method for detecting lead in olive oil: "The presence of lead is determined by shaking the suspected oil in a closed bottle with two or three parts of water. Hydrogen sulphide. This agent causes the oil to turn dark brown or black if the unhealthy metal is present. In addition, another technology in development is a glucometer modified from a device that measures blood sugar levels in people with diabetes, so they can detect melamine in milk.

It is important to understand the fraud detection needs of manufacturers and regulatory agencies, to link the correct detection method to the proposed test, and to obtain a method that is inexpensive and easy to use.

When it comes to the terminology of risk associated with eating counterfeit/fake foods, it is important to note that the risk has a dual nature. An actual risk defined by statisticians as the probability of an adverse effect on the health and safety of a consumer product. The second definition is related to subjectivity: risk is assessed not according to statistical tables, but according to the probability estimated by the subject according to his own criteria.

Therefore, a question arose: how can the food industry guarantee the authenticity of products intended for consumers? For a long time, food industry standards focused on issues related to food quality and safety.

Although the problem of food adulteration is huge, the necessary measures to combat it are within the power of any processor or distributor willing to provide their customers with what is written on their product packaging. By requiring companies to assess their vulnerability to food fraud and develop control plans to reduce their vulnerabilities, fraud mitigation will become an integral part of food safety management systems and enterprise risk management frameworks.

All actors in the chain faced with the threat of food fraud must take measures to reduce the risk and guarantee the authenticity of food products. In fact, the H.A.C.C.P vulnerability assessment system and critical control points provide guidelines for identifying and measuring the likelihood of fraud for each product. Food safety and quality systems typically prevent intentional contamination with known pathogens or substances. Fraud prevention requires a different approach: it must consider the fraudster's economic incentives and fraudulent behavior. *(Arlorio M, Coisson JD, Bordiga M, Travaglia F, Garino C, Zuidmeer L, Van Ree R, Giuffrida MG, Conti A, Martelli A. 2010, p. 22).*

Therefore, current food safety management systems are not designed to reduce food fraud, which requires a different attitude and skill set than food safety or security.

Authorities, consumers, and other stakeholders expect food companies to proactively reduce the risk of food fraud. For example, socioeconomic issues and incidents of food fraud are not included in food security assessments or food security risk assessments and are not usually part of a food security audit. Food fraud vulnerabilities can also occur outside of a company's normal operations. The risk to food security has never been greater. Although food fraud is not new, the reason counterfeit or fake food is on the rise for financial gain requires new solutions.

Although current food safety management systems are not always designed to detect or reduce fraud, new food safety guidelines require it. That's why we've created a free fraud vulnerability assessment tool that companies can use to identify threats to food fraud. This is an industry solution that can help meet new requirements to reduce food fraud. *(Borda D, Mihalache OA, Dumitraşcu L, Gafițianu D, Nicolau AI. 2021, p, 12)*

This tool is based on the study of criminal behavior and decision-making. It consists of two parts. The first one analyzes the influencing factors criminal behavior, and the second is a company and its external relationships and environment (such as customers). The assessment is user-friendly and can be applied to any part of the food supply chain, from animal feed and primary production to manufacturing and catering.

There are three key elements – opportunities, incentives, and lack of anti-fraud measures – that determine and are central to assessing a company's vulnerability to food fraud. "Capabilities" and "opportunities" are defined by the company's internal and external environment and are identified as potential fraud risk factors. The risk that can arise from these two elements can be mitigated by a third element, the 'anti-fraud measures' that companies use to detect or prevent fraud.

IV. PREVENTION OF FOOD FRAUD

The development and implementation of this science-based tool allows food companies to predict and mitigate vulnerabilities is expected to help.

In fact, food fraud exists primarily because of the difference between the potential for financial gain and the risk of being caught. Fraudsters are aware of the authorities' lack of knowledge and the lack of quick and effective methods of detecting fraud. In addition, they often change their business practices and avoid taxes. *.(Jeffrey C. Moore, John Spink, Markus Lipp, 2012, p. 44).*

The meat identification test market by markets and markets is expected to reach US$ 2.22 billion by 2022, at a CAGR of 8.2% by 2022. In fact, the increase in food adulteration and adulteration in this market is due to the strengthening of religion. beliefs, strengthening labeling laws, enforcing government regulations, and increasing consumer demand for certified products.

The European market has been the most important market to date due to stricter food safety regulations. The next regulation to open will be the Asia-Pacific market, which will see increased regulation. The more stringent and enforced the regulations, the stronger the market will be to detect food fraud.

Another Markets and Markets analysis of testing trends in the agricultural sector predicts the validity of testing for rapid detection of pathogens (7.9%) and pesticide residues in raw foods, as well as in processed foods such as baby formula. Allergen testing tops the list of the fastest growing markets in North America.

As part of the European Food Production Program, it was concluded that the industry needs portable and easily transportable methods to detect suspicious products in distributors and retailers.

Part of the challenge of food adulteration is the real need to develop more sophisticated, affordable, and portable methods that can be used with smartphone devices, require no sample preparation and are less sensitive. These devices should be aimed at preventing food fraud rather than detecting it, and the results should have a very high correlation with those obtained by laboratory methods. In this regard, more sophisticated technologies should continue to be used. used in various laboratories to enrich and better interpret databases. *(Ajzen, 1991, p. 3)*

Access to information to build international trust will allow for better validation of these technologies and international consensus for products in high demand.

Harmonization of regulatory methods and systems is essential in an international environment where the exchange of goods and food factors continues to flow more easily and rapidly. Thus, regulation is not a one-size-fits-all between the structures of various interests aimed at combating food fraud.

In a global approach, we must not forget that food fraud is not only a food problem, but primarily a fraud problem, and it is necessary to use different methods to change attitudes.

V. FOOD FRAUD AND ORGANIZED CRIME

Research on food fraud prevention often makes the connection between this area and cooperation and organized crime. Following the 2012 UK horse racing scandal, the following recommendations were made to prevent fraud:

- It is important to focus on the act itself and not on the group involved in the fraud.

Therefore, the focus should be on the weaknesses or vulnerabilities of the system rather than the culprits. In relation to horse racing fraud, this

would focus on where and how it might be possible, rather than on the fraudsters.

- To divide cooperation and criminal organization into separate types.

Fraud prevention should focus on specific types of fraud within a broader crime. In the case of horsemeat, there may be weaknesses in the documentation associated with these processes.

- Explore the diversity of partnerships and criminal organizations.

In the case of food fraud, this includes determining how common fraudulent practices are different. In horse racing, all the individual relationships and opportunities that led to each act of fraud can be considered.

- To consider the minimum level of complexity of the partnership because such action is rare.

To prevent food fraud, very simple vulnerabilities and simple measures should be considered first. In the case of horsemeat, this may mean informing suppliers that species testing will be carried out. The goal is not to detect food fraud, but to prevent it in the first place.

- Physical transactions, not money (financial benefits). *(Rosalba Giacco, Beatrice De Giulio, Marilena Vitale, Rosaria Cozzolino, 2013, p. 55).*

To prevent food fraud, it is important to remember that fraudulent activities are not the end goal. The goal is to make money from fraud. A disruption at the end of the supply chain can significantly increase the risk of being caught or the costs of committing a crime. Regarding fraud related to names, it may even sometimes be the organization that conducts the standard species identification tests.

- Don't look for deep secrets but look for obvious or nearly obvious secrets.

To prevent food fraud, it is effective to start with the most basic and obvious vulnerabilities. Fighting the simplest crimes can have an impact on more complex crimes, even though they may be more covert and sophisticated. This assumes that there is a clear statement for any fraudsters who may be lurking in the supply chain and, more importantly, that the authorities are focused on detecting and strengthening control of these activities.

- Interdependence of acts - dependence of one crime on another

Each scammer relies on a different system to achieve their specific goals. In the case of horsemeat, the meat supplier needed a team that would allow them to falsify documents, and the fake company in turn needed a customer who was unaware, unconcerned, or complicit in the fraud. Despite these aspects, compared to other forms of crime, food fraud appears relatively simple. *(Acheson, 2007, p. 23)*

- Determine how crime breaks down outside of legal and extraterritorial measures.

The most difficult obstacle to preventing food fraud is the ability to mix fake products with legitimate products. A fake supplier needs a customer for his product. The biggest opportunity lies with buyers in the legal supply chain. Then there is more opportunity in marginal activities where there may be little or no control.

- Interference with relevant sequences, customer access or operation.

Preventing food fraud involves identifying and implementing effective and efficient countermeasures or control systems that target vulnerable areas.

Conclusions

The studies concluded that a joint effort to create an accessible database of food fraud cases benefiting from transparency from all actors involved at European level would constitute a justified and necessary preventive measure to build consumer confidence in the chain food.

The global impact and complexity of the issue of food fraud and authenticity make information infrastructure a critical component. The lack of compilation or grouping of useful information directly related to food fraud and the authenticity of food products, determines that the process of searching, selecting data and how to use them becomes a difficult task both for regulatory authorities and for operators, NGOs, associations and consumers. Therefore, the harmonization and coordination of relevant databases is an important driving force in laying the foundation for transparency and increasing consumer trust in the food chain, as well as enabling the dissemination of relevant information and strengthening the capacities of the various actors involved.

Most of the studies on the causes of food fraud, the ways to prevent them, the effects they can have in the short, medium and long term on the health of the population support the need for real and periodic debates between leaders in the field of science and technology in the food industry and not only , brand representatives of central public administrations, representatives of consumer interest groups, academics to address food-related issues openly and in a neutral setting. These kinds of debates will allow the identification of possible approaches to food safety issues considering the complex interactions between industry, academia, regulatory agencies and consumers.

It is also necessary to emphasize the change of paradigm, namely the interdisciplinary approach to the problem of food fraud. The objective should be to explain the problems, not to solve them, such debates are not intended to draw conclusions or make recommendations, but to reflect the diversity of opinions expressed by the participants.

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MINORITY, CAUSE OF GENERAL DIFFERENCES IN THE APPLICATION OF CRIMINAL TREATMENT

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Abstract

This article deals with the particular aspects regarding the criminal treatment that applies to a special category of offenders, namely the category of juvenile offenders.

Beyond any attempt by society to involve in educating man from the earliest age, his antisocial manifestation is a reality of contemporary society and society in general, since ancient times.

An unexpected violence on the part of a child, seemingly harmless, always produces a surprise effect, often associated with some form of misunderstanding on the part of the child of what he has manifested.

To the child, the adult associates an image of purity and innocence.

Unfortunately, at the level of objective reality, things are not always like that, so an important segment among children, minors, is drawn into a complex and extremely harmful phenomenon for society, the criminal phenomenon.

Although part of the general criminal phenomenon, the criminality of minors raises some special problems within the penal legislation, completely different from those concerning the criminality of adults. This aspect is determined by the special quality of the criminal, that of a child, a minor.

In this article, we will address the particular aspect of the quality of a minor in order to observe that minors benefit from a distinct criminal treatment compared to adults, when they intentionally or accidentally enter what is called the field of criminal law.

Key words*: juvenile offenders, crime, criminal sanction.*

INTRODUCTION

Society considers minority as the age of innocence.

But not infrequently, beneath the radiant and soothing figure of a child hides an aggressive dimension and a high level of brutality and destruction.

”In recent years, the incidence of juvenile delinquency has been increasing, posing a threat to the well-being” *(Musa A. Z., Rais H., 2003, p. 119).*

”It is known that children are capable of more heinous and violent crimes than even those committed by adults” *(Monestier, 2006, p. 11).*

Any man ”in the making”, aggressive by his nature, stands out as a possible worrisome figure of a juvenile delinquent.

Crimes committed by minors are not, contrary to popular belief, insignificant in number.

New valences appear daily that require a quick solution *(Dăgoi, Rath-Boșca, 2018, p. 3).*

In practice, there are a number of situations in witchthe competent institutions are called upon to investigate such criminal offences *(Cîrmaciu, 2020, p. 237).*

The figures that indicate over the years the continuous increase in the criminality of minors and the aggressiveness of the acts committed by them impose a disturbing question: is the minor violent by nature and carries within him the uncontrollable tendency to be a ”criminal”, or is this manifestation acquired and is there a way to suppress it in this case?

In order to understand the criminal phenomenon among minors, it is necessary to analyze the various existential and behavioral universes of minors who have ”fallen adrift”.

Some of them may be victims of repression or persecution, of the social or family environment in which they live, of the poor education they receive, of the negative environment they live in, of the influence of the media, the Internet, computer games, others are victims of their own criminal instincts.

”Many of these young people, after a dissocial or antisocial existential path, possess enough inner resources to return to a desirable behavior” *(Preda, 1998, p. 4).*

”On the other hand, other young people become real social wrecks, inserting themselves into the life of criminal groups” *(Preda, 1998, p. 4).*

The last decades have brought an impressive number of works dedicated to the study of juvenile delinquency, the causes and conditions that generate it, the method of sanctioning them, multidisciplinary works of particular importance in the field.

The permanent topicality of the phenomenon has led theorists to write continuously, also due to the fact that the recrudescence of crimes committed by minors is manifested both in urban and rural environments.

More than ever, small communities and the European citizens need guidance towards a world of continuous changes *(Mirișan, 2021, p. 411).*

The idea was emphasized that the premises of a minor's negative development ”reside in the difficulties of his socialization, in a series of contradictions, which educational factors do not always and sufficiently take into account” *(Preda, 1998, p. 6).*

The certainty is that minors present particularities compared to adults.

These particularities have required the adoption at the state level of special regulations regarding minors, both in terms of when their actions are considered to attract criminal liability, and in terms of the way in which criminal liability is actually carried out and what type of criminal sanctions apply to them.

I. THE SPECIAL PENAL REGIME OF JUVENILE DELINCVENTS

”The issue of the age of persons who can become subjects of criminal law has been the subject of discussions in the science of criminal law” *(Dongoroz and collective, 2003, p. 215).*

”Legislation in Europe knows a system based on the idea of dividing age into successive stages, the individual moving from total irresponsibility to total responsibility” (Pradel, 2002, p. 331).

Of course, they are not uniform in regulating the criminal liability of minors, the constant common to all European legislation being the division of minors into minors who are criminally liable and minors who are not criminally liable.

Regarding the first category of minors, those who are not criminally liable, the legal regulations of the European states provide for absolute irresponsibility.

The age up to which minors in the various European states are not criminally liable is established either in the Criminal Code in some states or in special criminal laws.

Astel, the age up to which minors are considered insufficiently old and physically and mentally developed to be able to commit a crime and be subject to the criminal law specific to each country varies in different European countries.

The absolute criminal irresponsibility and criminal liability of minors is manifested as follows:

In *Germany*, minors benefit from a special regulation in the field of criminal law: Jugendgerichtsgesetz (Juvenile Justice Act) (JGG) as published on 11 December 1974 and last amended by Article 21 of the law of 25 June 2021[1].

It is considered that this law is more suitable for preventing the future commission of crimes by minors and for the reintegration of young offenders.

[1] https://www.gesetze-im-internet.de/jgg/JGG.pdf

The JGG has its own regulations for the criminal justice system regarding offenses committed by minors who are at least 14 years of age at the time of the offense but have not yet turned 18.

Therefore, criminal responsibility under German law begins at 14 years of age.

The regulations relate in particular to the legal consequences, meaning the measures and sanctions that the youth court can impose, as well as the course of criminal proceedings against young defendants.

Adolescents who are at least 18 years old at the time of the crime, but who have not yet turned 21, mostly fall under the provisions of the JGG if the development of social values or their intellectual development was still at the level of a minor at the time of the crime or if the act is a typical juvenile misdemeanor (ex: shoplifting as a test of courage). Otherwise these young people will be sanctioned according to the general criminal law applicable to adults.

Minors are considered to be able to change their attitudes and behavior through appropriate measures provided for in the special law, different from those applicable to adults which are mainly limited to fines and prison sentences and are provided for in the German Penal Code, in the version published on 13 November 1998 (Federal Mo. I p. 3322) and last amended by the law of July 26, 2023 (Federal Mo. I p. 203) in force on October 1, 2023.

Penal measures applicable to minors are more about aspects of personality development and resocialization.

They include, first of all, the so-called educational measures that aim to reorganize the minor's lifestyle (for example, participation in a social training course), disciplinary measures, which are measures that are intended to educate but do not have the character of punishment (for example, doing work).

If necessary, a juvenile sentence, a form of imprisonment specially regulated and designed for young people and adolescents, of at least six months and up to ten years (or up to 15 years) can be imposed.

Although there have been claims that this law provides some general leniency with regard to the category of juvenile offenders, it should not be seen as fundamentally a softer law, but rather a law more suited to the criminal sanctioning of juveniles.

The applicable procedure in juvenile cases is also a special one, including the fundamentally planned involvement of youth legal aid (carried out by child and youth welfare providers and specifically regulated in section 38 JGG)[2].

In *France*, there has been a reform of the legislative system in the field of criminal responsibility of minors.

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2 https://www.bmj.de/DE/themen/rehabilitierung_resozialisierung/Jugendstrafrecht/jugendstrafrecht_node.html

Thus, a new criminal legislation was put into effect on September 30, 2021.

Until this date, the Ordinance of February 2, 1945 (Ordonnance no. 45-174 du 2 février 1945 relative à l'enfance délinquante) was applied in France.

Over time, in order to respond to developments in the field of juvenile delinquency, the Ordinance of February 2, 1945 was amended several times.

These changes came about because juvenile criminal justice was criticized for its lack of readability and consistency[3] .

Starting from this, the Juvenile Criminal Justice Code or CJPM came into force on 30 September 2021.

The goal of the juvenile penal reform in France was to speed up criminal proceedings and strengthen the care of juvenile offenders by establishing the so-called ”judicial protection of youth” or PJJ. For this, all the provisions specific to minors have been compiled in a single Code[4] .

In its preliminary article, the CJPM establishes the principle of the best interests of the child.

This new code also recalls the general principles applicable to minors, namely: mitigation of the minor's criminal liability depending on his age and the age of criminal majority, currently set at 18, the specifics of the minor's criminal liability, the priority of applying educational measures over repressive ones.

First of all, through the criminal reform in France regarding the criminal liability of juvenile offenders, the acceleration of the criminal procedure was pursued, with a rapid procedure for the trial of the minor being implemented.

This judgment revolves around three essential points:

- a presumption of discernment existing from the age of 13;
- a legal decision to compensate the victim in the months following the act;
- a conviction in the presence of the juvenile offender's parents within three months.

Secondly, this code promoted the conduct of the trial and the application of the criminal sanction to the minor according to his capacity and development.

The minor was given the chance to benefit from educational monitoring for 5 years, until the age of 21.

Thirdly, judges have the possibility to prioritize educational measures on young offenders.

The focus being on education, an individualized educational action was instituted that is based on the coherence of the minor's paths and the adaptability of educational responses. The specificity of this educational action concerns the fact that a unique educational measure is applied to a minor as a priority, which

[3] https://www.justifit.fr/b/guides/nouvelle-reforme-justice-penale-mineurs/

[4] https://www.justifit.fr/b/guides/nouvelle-reforme-justice-penale-mineurs/

includes modules on health, damage repair, placement and integration, as well as prohibitions and obligations, ensuring the same educator, the same lawyer and the same judge throughout the duration of the criminal proceedings, as well as a probationary period lasting between 6 and 9 months.

Through this criminal law for minors, the strengthening of the care of juvenile offenders was ensured in France by establishing the judicial protection of young people.

In *Spain*, the sanctioning regime for minors is regulated by a special law adopted, Law no. 5 of January 12, 2000, with subsequent amendments (Păvăleanu, 2012, p. 24).

The question arises as to whether minors in Spain can be sentenced to prison in the same way as adults.

The answer is also negative in the case of Spain.

A juvenile cannot go to jail like an adult would.

The Spanish Penal Code provides in Article 19: ”Minors under the age of eighteen shall not be criminally liable under this Code”.

When a minor commits a criminal act, he may be prosecuted in accordance with the provisions of the law governing the criminal liability of minors.

The commission of a criminal act by a minor entails a specific legal regime in which his age will play a determining role.

For this reason, it is said that the criminal liability of a minor who commits a crime is limited, as the measures aimed at these cases are aimed at re-education and reintegration into society.

Organic Law 5/2000, of January 12, regulating the liability of minors, establishes criminal liability and the legal regime corresponding to these cases.

In its first article it is indicated that this law shall apply to persons over fourteen years of age and under eighteen years of age for the commission of acts classified as crimes in the Penal Code or special criminal laws [5] .

In Spanish criminal law the age of criminal responsibility is set at 14 years.

From this first precept it is understood that minors under the age of 14 are not criminally liable for committing crimes, without prejudice to any civil liability that may be incurred.

The minimum age to be sentenced to prison in Spain is 18.

This does not mean that minors are not criminally liable, but rather that the penalties will be different.

Minors under the age of 14 are not criminally liable. However, their parents or guardians must face a financial penalty[6].

[5] https://www.boe.es/buscar/act.php?id=BOE-A-2000-641

[6] https://www.conceptosjuridicos.com/responsabilidad-penal-del-menor/

If the minor is under fourteen years of age, he will not be held responsible according to the organic law, but according to the provisions of the norms regarding the protection of minors provided by the Civil Code and other provisions in force.

The prosecutor's office must transmit to the public entity for the protection of minors the testimonies of the persons it deems necessary regarding the minor, in order to evaluate their situation, and the said entity must promote protective measures appropriate to the circumstances of the minor in accordance with those provided for in the Organic Law 1/ 1996, from January 15.

In turn, minors between the ages of 14 and 18 are responsible subjects who will be criminally liable for committing a criminal act depending on the type and severity of the crime.

The law regulating the responsibility of minors provides for measures ranging from economic measures to sending to a detention center, and their imposition will take into account the age of the minor, his personal circumstances and the seriousness of the crime committed.

Minors will be tried according to a special procedure.

Sanctions for the criminal liability of minors in Spain have a preventive and educational objective. For this reason, and depending on the gravity, custodial measures are applied or not.

In *Italy*, the Italian criminal system for minors is built around the concept of imputability, thus, in order to be held criminally liable, the minor had to have the capacity to be declared guilty of a crime and be subject to a punishment.

The age at which the criminal responsibility of minors begins is regulated in the Criminal Code in art. 97 and 98.

According to these articles of the law, the minor from the age of 14 to the age of 18 is criminally liable if he has the capacity to understand and will, but the punishment has been reduced.

Under the age of 14, minors are not imputable, that is, they cannot be subject to criminal proceedings.

The juvenile justice system was based on the establishment of the Juvenile Court, in response to the need to identify a specialized body that would protect the particularity of the minor.

This is the body competent to decide on the criminal liability of a minor (https://www.giustizia.it/giustizia/it/mg_1_12_1.wp?facetNode_1=0_6&facetNode_2=0_6_2&previsiousPage=mg_1_12&contentId=SPS973590).

Jurisprudence considers minors who understand and realize the gravity of their actions, their consequences and the fact that they have committed acts that are not in accordance with the social order to be responsible.

The applicable procedure is a special one, and the sanctions aim at the re-education and reintegration of minors into society.

In *Romania*, the criminal liability of minors is regulated by Title V of the general part of the Criminal Code in force, which represents a unitary system of rules regarding the age and discernment that the minor must have and the sanctions that apply to them.

These sanctions are specific, can only be applied to minors and form the legal framework of educational measures.

And in the specific legislation in Romania, minors are divided into minors who are not criminally liable and those who are criminally liable, the age up to which the presumption of absolute irresponsibility exists being 14.

From the age of 14, the minor is criminally liable if it is proven that he committed the act with discretion.

Regarding the minor, special sanctions are applied in Romania, following a special procedure, different from those applicable to the major.

The special quality of the minor that determines the regulation of a criminal legal situation different from that of the adult is his discernment, the impossibility of the natural person up to a certain age, considered the age of majority, 18 years, to be fully master of his acts and to understand their meaning social and dangerous consequences.

It must be taken into account that during the formation of a person, the stages he goes through are different, the minority stage presenting age-specific characteristics, the most representative being the fact that minors do not possess the same discernment as adults.

Although they can more easily and quickly end up committing antisocial acts, including crimes, than adults, it is no less true that they can be reeducated more easily than them (Vasiliu and collective, 1972, p. 522).

The regulation in Title V of the general part of the Criminal Code, intended for the criminal liability of minors, expresses the legislator's intention to regard minority as a general cause of differentiation that leads to an independent legal treatment, specific to minor offenders (Vasiliu and collective, 1972, p. 522).

The differentiation of the criminal legal regime of juvenile offenders from major offenders is configured by some specific features that concern: first of all, the existence of a special regulation within the general criminal regulation that is dedicated exclusively to juvenile offenders, then, the existence of a category of juveniles regarding which nor can criminal liability be engaged, namely minors under the age of 14 who benefit from an absolute presumption of lack of discernment, proof of the existence of discernment regarding the other category of juvenile offenders, those over 14 years of age, for to be able to engage their responsibility.

Last but not least, specific sanctions are applied to minors, different from those applicable to major criminals, in which priority is given to sanctions that do not affect the freedom of minors.

Romanian criminal law also provides for a special procedure for judging juvenile offenders.

CONCLUSIONS

The European criminal legislations present, with regard to juvenile offenders, special regulations that ensure a different criminal legal regime compared to the one applicable to adults.

All European criminal legislation divides minors into two categories: minors who are not criminally liable and minors who are criminally liable.

The purpose of a special, differentiated system of employment of criminal liability for minors is to represent an instrument of increased education and not of punishment of the minor who ”made a mistake”.

In fact, the minor is a subject who has a whole life ahead of him, for this reason we will always try not to definitively endanger the rest of his life because of that ”mistake”.

It has already been said that the process of judging the minor is based on a proven need for intervention on the personality and identity of the still unformed minor.

Since he is not yet considered fully "developed" from a psycho-physical point of view, the objective is to recover the minor, to return him to society as a future adult responsible for his actions.

The execution of the sanctions applied to juvenile offenders must be centered on the education of the minor, aiming at an adequate response to the deviant behavior taking into account both his personality and his context of origin, what led him to have the deviant behavior.

It must be ensured through the application of criminal sanctions and the emotional assistance of the minor, therefore the emphasis is on education and not punishment.

”Criminal sanctions against subject who committed a crime should be implemented by respecting the principles of justice without distinction of view. This is because there is a deep enough impact resulting from a criminal act”(Siregar R., Saragih F., Panjaitan P. I. Manalu Y. A., 2023, p. 142).

A specific legislative intervention also exists in terms of enforcement, so the legislators in European countries have sought through the regulations intended for minors to ensure the education and psycho-physical development of the minor in order to prepare him for a free life.

The sanctions applied to minors must prevent the commission of new crimes, so minors are engaged in education and vocational training courses.

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MINORITY, CAUSE OF GENERAL DIFFERENCES IN THE APPLICATION OF CRIMINAL TREATMENT

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THE EFFECTS OF INHERITANCE ON THE FINANCIAL–SECURITY OF PEOPLE IN CHINA AND ROMANIA

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Abstract

Mircea Eliade said that "We are all immortal, but we must die first". Man is a transitory being that perishes through death. From a legal point of view, the passing away of every man is equal to his disappearance as a subject of law. Only his heritage remains.

As M. Grimaldi also pointed out "under penalty of anarchy and immobility, it could not be said of a dead person, as of a void act, that he is considered to have never existed: his acquisitions, his obligations cannot be made tabula rasa".

Succession is a way by which an individual can ensure, after his death, the well-being of the family and beyond, thus improving the financial situation of those who are at the succession table.

Key words: *inheritance, financial security, economy, China, Romania, succession law, patrimony.*

INTRODUCTION

The source of succession law is of religious origin. The legal connotations of the transmission of goods appeared after the development of property, at first of family property, and then of individual property.

It is about the moment when the families that belonged to the same clan or tribe, start to have a heritage distinct from the heritage of other families. In fact, the principle of the unity of the family patrimony is what has animated the right of succession throughout history[1] *(Decugis, 1942, p.223).* We cannot talk about any

[1] https://gallica.bnf.fr/ark:/12148/bpt6k3411927w.image

form of human association that can function without a necessary minimum of rules *(Popoviciu, 2014, p.26).*

In current speech, heritage[2] means a person's fortune or wealth. The notion of patrimony was defined for the first time in the 19th century by two professors from the Faculty of Law in Strasbourg, C. Aubry and C. Rau, in the work "Civil law theory according to Zachariae's method"[3]. The theory of the two authors is considered to be the most famous theory of French law. This is the result of a productive mixture of French legislative art and German legal science and was inspired by the succession law regulated in the code.

Our legal literature includes several definitions of patrimony. The most well-known is the one that defines patrimony as "the totality of rights and obligations that have economic value, belonging to a person", specifying that goods are not included in the definition because in the Civil Code patrimonial rights are considered assets. In the current legislation, assets are regulated in Chapter I "About assets in general" of Title I of Book III, entitled "About goods". Art. 535 of the Civil Code states that: "...goods are tangible or intangible things, which constitute the object of a patrimonial right". "The text of the law thus defines the notion of property through the prism of the order as created by way of perception, thus moving away from the classification of the old Civil Code which gave priority to the classification of goods into movable and immovable".

I. THE RIGHT OF SUCCESSION IN ROMANIAN LEGISLATION

Regarding inheritance, the Civil Code defines it in art. 953 as "the transfer of the patrimony of a deceased person to one or more living persons". Although, art. 953 Civil Code "refers only to the meaning of the inheritance of the transmission of a patrimony, there is also another meaning, that of transmitted patrimony" *(Pătrașcu, Genoiu, 2018, p. 67).* Regarding the meanings of the notion of inheritance, a third meaning of it was brought into discussion, namely that of matter of civil law *(Uliescu, p. 568-572).* Although the definition in Article 953 of the Civil Code does not contain this meaning, the legislator takes it into account in the regulation of other legal institutions, such as: the available quota, the forced share or sesin.

After an analysis of the current legislation, it can be found that the right of succession is a right of constant application with a strong technical character. The constant application results from the fact that whatever the ideological changes

[2]The term patrimony is of Latin origin, patrimonium, which in turn derives from the pater familias, who owned the entire family fortune. Also, the notion of patrimony had a real character, because it denoted family assets, assets that were passed down from father to son.

[3]Zachariae was a prominent German jurist who studied philosophy, history, mathematics and jurisprudence at the University of Leipzig. Throughout his career, he published a succession of works covering the entire field of jurisprudence, they are philosophical, historical and practical. These refer to Roman, German, Canon, English and French law.

over time, the usefulness and application of the rules governing succession law have not been affected. The technical nature emerges from the pecuniary legal relations in which the family has a vested interest. Regarding liberties, the question that arises is: To what extent is it permissible for a person to deprive his family members of possessions? These rights are found stuck at the border between patrimony law and family law, a fact that emerges from the influence exerted by the rules governing the family regarding inheritance and liberties. In the decisions of the ECHR, it is shown that the regulations regarding succession and liberties between close relatives interfere to a great extent in family life *(Judgment of June 13, 1979, (series A no. 31), p. 23 – 24).*

It is evident that the law of succession lies at the crossroads between real rights and family law, just as it is evident that the type of personal relations between the members of a family affect the extent and nature of the pecuniary relations between them. Individual wills have an important role in determining these relationships since the law intervenes only subsidiarily.

Thus, by inheritance we mean that the movable or immovable property of a deceased person comes into the possession of one or more heirs, which more or less ensure that the persons who are entitled to come and reap the inheritance, that is the family, enjoy a certain level of protection.

According to art. 955 paragraph (1) Civil Code, "The estate of the deceased is transmitted by legal inheritance, to the extent that the defunct has not ordered otherwise by will". Thus, "depending on the source of the right of inheritance of those who acquire the patrimony of the deceased person, the inheritance can be legal or testamentary" *(Deak, Popescu, 2014, p.22).*

In national law, the inheritance is collected by the legal heirs who are, for example, the surviving spouse and relatives of the deceased in a certain order, as follows: first class, descendants, second class, privileged ascendants and collaterals, third class, ascendants ordinary and fourth class, ordinary collaterals.

The descendants and ascendants of the deceased come to the inherit regardless of the degree of kinship, and their collaterals, only up to the fourth degree.

Romanian legislation also has the mechanism of inheritance by right to representation, but this will operate only in the case of the descendants of the deceased's children and in the case of the descendants of the deceased's brothers and sisters. If we are in such a situation, the inheritance will be divided by stem. If a stem has several branches, the subdivision will be made per stem and the due portion will be divided equally.

As for the institution of the forced share, it represents half of the inheritance share due to each forced heir, a share from which they will benefit even against the will of the deceased.

"The forced share is an institution specific to continental European law, inherited as a principle from classical Roman law: the freedom to dispose of one's

own wealth is encumbered by a family affectation, being limited to an available quota" *(Bob, 2012, p. 68).*

An increasingly common question in the specialized literature, in relation to the forced share, is: should the legislator maintain it or should he give it up? There are voices that support the necessity of its existence and voices that are totally against it.

If we analyse the two situations, we find that renouncing the reservation, on the one hand, "would generate the effects of a legal anarchy", and on the other hand, "keeping the current regulation intact would be likely to place Romanian law in a dangerous area of rigid, excessive formality, and far too impervious to the will of one who, by efforts, abnegations, and privations, has been the craftsman of an estate which he should naturally be able to manage for the moment of his death as naturally and free as he could do during his life" *(Negrilă, 2014, p. 17).*

The French jurist Felix Julien Jean Bigot de Preameneu, one of the four legal authors of the Napoleonic Code, written at the request of Napoleon at the beginning of the century. of the 19th century, showed more than 200 years ago that: "The individual's will or right must yield to the need to maintain social order, which cannot subsist if there is uncertainty in the transmission of part of the patrimony of the father and mother to their children, it is the successive transmission of the reserve that establishes the rank and condition of citizens".

II. THE EFFECTS OF INHERITANCE ON THE FINANCIAL SECURITY OF CITIZENS IN ROMANIA AND CHINA

Returning to the proposed theme, it is true that inheritance can bring wealth and financial security to the inheritors, but all this depends on the value of the inheritance.

If we refer to the national economy, we can say that in recent years, Romania has faced complicated issues, because both in the past and in the present, society was and is deeply marked by uncertainty, against the background of general insecurity, lack of predictability from the economy and other factors. For example, in our country, the purchase of a home has become a real struggle, due to the increase in interest rates, the tightening of conditions for long-term loans and the increase in prices, which inevitably led to an extremely high cost of living.

We must mention the fact that the Romanians who went to work abroad have become the main external investors of Romania, because the transfer of their money represents a source of economic development. In general, the transfer of these amounts tends to be more stable than capital flows and are not cyclical, on the contrary, during economic crises, when private capital flows tend to decrease, they increase and become an important source of subsistence[4].

[4]In the last 15 years, Romanians from the diaspora have contributed over 65 billion euros to Romania's GDP.

So, as I have shown above, inheritance can indeed provide comfort and financial security, but only if it is consistent.

In Romania, no study has yet been carried out to show the correlation between obtaining an inheritance and improving the financial situation of a family or an individual.

In contrast, in the People's Republic of China, economists, jurists, sociologists, and even historians have conducted several such studies.

Asia is the largest continent on Earth[5].

Precisely because of its extent, it is difficult to analyse and present the culture and legal reasoning underlying the laws of Asian countries. Asian states have suffered, over the centuries, the influences of colonialism from states such as: Great Britain, France, Germany, Holland, Portugal, Spain, Switzerland and the United States of America. The influences of colonialism intersected with Chinese, Buddhist, Hindu, and Islamic legal traditions. However, from a legal point of view, among Asian states, there are commonalities related to religion, similar historical influences and approach to the processes of modernization and industrialization. These aspects common to Asian countries have existed since pre-colonial times.

Over time, a number of studies have been conducted that have analysed the transformation of traditional laws in controlled territories, and the unanimous conclusion is that colonial powers and indigenous elites wilfully manipulated customary laws in a manner consistent with political and economic interests that they had *(Chanock, Erni, 2014, p. 5).*

Although the colonial powers left their mark on the legislation of the conquered territories, the area of personal laws, i.e., family law and inheritance, was less affected *(Hooker, 1978, pp. 123-152).* For example, in the Asian colonies of Great Britain, legal issues related to family law and inheritance law were judged in British courts but with the help of local counsel.

Since 1980, the PRC economy has taken off, passing through several stages of development. Under the leadership of the leader of the Chinese Socialist Party, Deng Xiaoping[6], Western companies and capital were allowed to enter the Chinese economy. Due to this economic growth, Chinese citizens began to earn

[5]The population represents more than 60% of the entire world population, that is, out of about 7 billion inhabitants of the Planet, 4 billion live in Asia, and the population grows every year by 50 million inhabitants. Asia's population is multi-denominational, from Orthodox Christians, which predominate in the Russian Federation, to Islam, to Judaism in Israel, Orthodox in Armenia and Georgia, Hinduism in India, Buddhism combined with Taoism in China and Korea, and Shintoism in Japan.

[6]Deng Xiaoping is nicknamed the "Architect of Modern China". He became the leader of the Chinese Communist Party in 1978 and remained in this position until 1983. He was the de facto leader of the PRC thus starting the modernization of the Chinese economy by: denouncing the cultural revolution, reintroducing national college entrance exams (Gao Kao), sponsoring 10,000 Chinese citizens to study abroad and establishing diplomatic relations with the US

significant sums and enrich their wealth. A new level of social mobility is emerging from the ashes of the cultural revolution[7]. However, the modernization and liberalization of the Chinese economy has also brought new problems.

Due to the large influx of foreign capital and the establishment of many private businesses, an economic rift has emerged in Chinese society[8]. While some citizens were still living in poor but relatively stable conditions, other citizens, who were employed by foreign firms or started their own businesses, were beginning to lead an almost luxurious lifestyle.

At the demographic level, there have been mass migrations from the rural to the urban environment. In 1980 only 20% of China's population lived in cities, in 2022 this percentage will reach 65%[9]. This rapid urbanization has led to exponential real estate development, which has drawn criticism from the Western media *(Guanghua Chia, Yu Liub, Zhengwei Wua, Haishan Wua, 2015 p.1).* Because of these changes, corruption became a major problem during the 1990s. For example, in 1998 approximately 158,000 members of the Chinese Communist Party were punished in an exemplary manner for acts of corruption[10].

In 1985, a new law imposed the equality of female heirs with that of male heirs *(Davin, 2007, p. 54*). Although early communists in China fought for women's emancipation as early as the 1920s, there was no clear legislation on women's right to inherit until 1985. The courts and urban society still supported the need for equality between women and men. Between the 1950s and the 1980s, the law clearly stipulated the equality of spouses regarding the totality of rights and obligations arising from marriage *(Davin, 2007, p. 58).* Although the Chinese state authorities made great efforts, the status of women in society remained unfavourable. Female heirs are often forced by male heirs to give up their share in order to maintain the patrilineal family patrimony *(Davin, 2007, p. 62).* "Now that households are becoming wealthier and can own private property, something that was impossible in the past, the injustice to women in the application of inheritance law is becoming more apparent."

We observe a first big problem with regard to the economic contribution of inheritances, namely, the deprivation of female heirs from the right to inherit. Because of this, women have a clear disadvantage in terms of the financial security conferred by the right of succession. Due to outdated social prejudices, female heirs do not enjoy the same economic protection as male heirs.

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[7]The Cultural Revolution or the Great Cultural Revolution of the Proletariat was a policy adopted by Mao Zedong between 1966-1976 with the aim of reinvigorating the spirit of the Chinese revolution. In practical terms, Mao Zedong organized students into paramilitary groups called the Red Guards and encouraged the destruction of any traditional symbols or values that could be considered "bourgeois".

[8] https://www.jri.co.jp/english/periodical/rim/1999/RIMe199904threereforms/.

[9] https://www.statista.com/statistics/270162/urbanization-in-china/.

[10] https://www.jri.co.jp/english/periodical/rim/1999/RIMe199904threereforms/.

In general, the succession in the Chinese economy is a real "golden ticket". As I have shown above, the liberalization of the economy and the emergence of private property led, on the one hand, to the increase of living standards and on the other hand, to a social rupture. Because of the accumulation of private capital by certain citizens and because of the corruption that arose immediately after the liberalization of the economy, some people became extraordinarily rich, while other people remained in poor economic conditions. This social division is directly correlated with the right to inheritance. This phenomenon happened in Europe after the Second World War (*Wei & Yang, vol. 68(1), pp. 234-262, 2022, p.235).* After the adoption of the inheritance law, China went through the same situation *(Wei & Yang, vol. 68(1), pp. 234-262, 2022, p.235*).

The vast majority of inheritances are left by parents (*Wei & Yang, vol. 68(1), pp. 234-262, 2022, p.248).* In the relatively rare cases when a descendant dies, he usually leaves behind debts *(Wei & Yang, vol. 68(1), pages 234-262, 2022, p.248).* According to some studies *(Wei & Yang, vol. 68(1), pages 234-262, 2022, p.235; Foster pp.151-153, 2003),* both the economic security and the social mobility of the people who are beneficiaries of inheritances are increasing. In the case of already well off households, an inheritance will only increase the pre-existing familial patrimony *(Wei & Yang, vol. 68(1), pages 234-262, 2022, p.250).* In the case of modest households, inherited property is a significant help, as it provides a certain degree of financial security. Most of the time, this heritage is not enough to allow increased social mobility *(Wei & Yang, vol. 68(1), pages 234-262, 2022, p.250).* Although inheritance universally brings enrichment to the inheritors, it also brings a discrepancy between rich and poor people.

Although no studies have been conducted in our country regarding the correlation between inheritance and the financial security of those who inherit, we can identify an advantage of Romanian heirs compared to Chinese heirs, and this consists in the fact that Romanian women really, they can enjoy the much-discussed equality between men and women. No female person in Romania can complain about discrimination when they are in the situation of inheriting.

On the other hand, what is extremely interesting and exciting at the same time, in Chinese law is the fact that the judges of the courts in which the disputes that have the object of succession reservation are discussed, analyse the relations that the deceased had during his life with the legal heirs, taking into account both the needs of the heirs and the economic relations between the deceased and them (Brown, no. 1/2019, p. 253). The forced share model allows judges to carry out a redistribution of shares and assets of the inheritance for the benefit of heirs who present certain disadvantages or persons to whom certain moral merits are attributed[11].

[11] The case of Mr. Ping's estate. The late Yu Ping died without leaving a will, leaving behind an elderly wife and a son who is grown and financially independent. Mr. Yu learned about the

Therefore, the Chinese judge can, depending on the circumstances of the surviving spouse and other heirs of the deceased, modify as they see fit, both the shares and the persons who will benefit from the estate[12]. It is a competence that the European and implicitly the Romanian judge does not benefit from. They cannot, under any circumstances, modify, as they think it is more equitable or not, the shares due to the heirs by virtue of legal or testamentary inheritance.

CONCLUSION

After analysing the legal system of the PRC and how the Chinese legislator thinks about the distribution of a person's inheritance, we notice that this is a flexible system, in the sense that each family member who is also an heir will benefit from the inheritance which is due to him, depending on the current needs, the relationships he had during his life with the deceased and, even depending on the moral merits. Moreover, the Chinese legal system also grants the benefit of inheritance to people who have no degree of kinship with the deceased, provided that they were financially dependent on him or, during his life, provided him with financial support.

Instead, we note that in national legislation, succession law has a constant application with a strong technical character. The constant application resides in the fact that the usefulness and application of the rules governing succession law has not been affected whatever the ideological changes have been, over time, and as for the technical character, it emerges from the pecuniary legal relationships of which the family she is interested.

We can conclude by stating that succession law is closely related to property, family and, very often, the political organization in power. Also, considering the particularities of the legislation in Romania and the legislation in China, we find that succession law has developed in accordance with the historical, social, cultural and economic circumstances of each state, which has led to the existence of major differences.

We live in bizarre times when, apart from death, nothing seems certain anymore. The very idea of safety has become, to a certain extent, ephemeral, but

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precarious financial situation of an old man in the countryside near his home. He voluntarily decided to donate 10 yen each month. Mr. Yu has donated this amount for more than a decade. After his death, the court decided that the surviving wife should receive a larger share than his son, taking into account her age and needs, and the old man to whom the deceased donated 10 yen a month received 500 yen from the estate successor

[12] In 1991, Mr. Wang Weifa died of cancer. He is survived by 4 first-class heirs: his surviving wife, their 10-year-old daughter, and his parents. The deceased's parents were infirm and financially dependent on their deceased son. The Court considered the desperate circumstances of the deceased's parents and increased the shares due to the deceased's parents and daughter to the detriment of the surviving wife. The court explained that its decision reflects the basic principle of the Chinese inheritance system, to support the elderly and provide a good upbringing for children.

the theme that remains common, in any circumstances, is the status of democracy and personal freedoms (Rath Boșca, 2022, p.58).

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THE TACTICS OF TALKING THE STATEMENT OF THE PROTECTED WITNESS

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Abstract

The article introduces the main forensic tactical rules applicable to the evidentiary procedure of listening to protected witnesses during the criminal trial, through an aggregate analysis of the forensic procedures with the relevant legal norms, as well as with references to national and international jurisprudential solutions, and finally brief conclusions are expressed and Ferenda law proposals to improve the legislative framework and forensic methods in the field.

Keywords: *witness hearing, protected witness, anonymous witness, forensic tactics, forensic investigations, criminal trial*

INTRODUCTION

Throughout the history of criminal law and criminal procedure, witnesses, rightly called the eyes and ears of justice, occupied and occupy an essential role in the painstaking activity of investigators to find out the judicial truth and bring criminals to criminal responsibility.

The radiography of the European space of freedom and security, in which our country is also found, offers a rather gloomy picture of the level of crime at the beginning of the third millennium, especially of crimes of great violence or those committed by organized crime groups of the type mafia, often with transnational implications.

The evolution of legal systems at the global level has required that the evidentiary procedure of hearing to witnesses know normative regulations and adaptations of increasingly sophisticated forensic means and tactics of hearing, as the fight against criminality has acquired new values for the society based on the modern rules of the rule of law.

The emergence and development of organized crime networks, the alarming increase in corruption in the police and judicial environment, the

proliferation of vindictive actions by defendants or their relatives against witnesses in instrumentalized cases, with the inextricable consequence of obstructing justice, represented some of the most relevant arguments for the decision-makers national and international to take more effective measures to counterbalance such disruptive factors of the criminal process.

In the statement of reasons of the Romanian Code of Criminal Procedure, which entered into force on February 1, 2014, one of the objectives stated by the initiators is the establishment of an appropriate balance between the requirements for an effective criminal procedure, the protection of elementary procedural rights, but also of the fundamental ones of the person for the participants in the criminal process and the unitary observance of the principles regarding the fair conduct of the criminal process.

In order to achieve the proposed objectives, the new criminal procedural rules contain numerous rules borrowed from the panoply of forensic tactical procedures regarding the hearing of people, including witnesses and, in particular, witnesses who are in vulnerable situations and require protection from the judicial authorities.

If in the initial form adopted by the Romanian legislator, the institution of the protected witness did not benefit from a satisfactory regulation, and the success of a real protection required the adoption of ad hoc forensic tactical rules by the actors involved in criminal investigations, it can be stated that the positive experience of the judicial bodies constituted an important landmark for the creation of an adequate legal framework, covering, on the one hand, the need to obtain conclusive information for the judicial truth, ensuring the security of the providers of this data, and on the other hand, the imperative of a fair procedure for suspected persons, with special reference to respecting the right to defense in the criminal process.

I. TERMINOLOGICAL NOTIONS RELATING TO THE PROTECTED WITNESS

Evidence is defined in the criminal procedural rules as the elements of fact that serve to establish the existence or non-existence of a crime, to identify the person who committed it and to know the circumstances necessary for the fair resolution of the case and which contribute to finding out the truth in the criminal process [Art. 97 para. (1) of the Criminal Procedure Code].

One of the means by which judicial evidence can be obtained resides in the statements of witnesses, and their obtaining is achieved through the evidentiary process of hearing or hearing these persons.

The forensic investigation of increasingly complex cases required the emergence of innovative legal institutions in the criminal justice landscape, which would contribute to improving the score obtained by the judicial authorities in the action to combat and control serious criminal acts.

One of the relatively recent institutions is also that of the anonymous or protected witness, in response to the worrying trend observed in the 20th century, as individuals investigated or tried for the suspicion of being involved in criminal activities of great gravity to intimidate or even to suppress the lives of witnesses in criminal trials, in the hope of exoneration from criminal liability.

The legal instruments at the level of the European Union, such as the Resolution on the protection of witnesses in the fight against international organized crime (1995), Recommendation (1997)13 on the intimidation of witnesses and the rights of the defense, Recommendation (2005)9 on the protection of witnesses and collaborators of justice, The framework decision of the Council of Europe on the protection of witnesses in the fight against international crime of 23.11.2005, the framework decision on combating terrorism and the framework decision of the Council on the position of victims in the criminal process, provided the common terminology at European level for full understanding of the notion of anonymous witness or protected witness.

In the national law, the institution of the protected witness has undergone successive changes, so that currently the categories of persons who can benefit from protection from the judicial authorities, respectively the threatened witness and the vulnerable witness, have been clarified.

The threatened witness is the one in relation to whom there is a reasonable suspicion that the life, bodily integrity, freedom, assets or professional activity, of himself or a family member, could be endangered as a result of the data he provides to the judicial bodies or his statements.

The vulnerable witness is defined as the witness who suffered a trauma as a result of the commission of the crime or as a result of the subsequent behavior of the suspect or defendant, as well as the minor witness.

II. THE LEGAL AND TACTICAL FRAMEWORK FOR THE ADMINISTRATION OF TESTIMONY EVIDENCE

In order to ensure the reliability of the criminal process, listening to witnesses, evaluating depositions and capitalizing on them, equally presupposes the need to comply with both the legal provisions and the forensic tactical rules [E. Stancu, 2015, p. 411].

From a criminal procedural perspective, testimonial evidence is administered by hearing as a witness any person who has knowledge of facts or factual circumstances that constitute evidence in the criminal case [art. 114 para. (1) of the Criminal Procedure Code].

Title IV, entitled Evidence, means of proof and evidentiary procedures, of the Code of Criminal Procedure, in chapter II, section 4, includes the principle rules applicable to the hearing of witnesses, so that in section 5 the forms of protection are regulated of witnesses [art. 114 – 130 of the Criminal Procedure Code].

The general legal framework regarding witnesses in the criminal process establishes the categories of persons who can be heard as witnesses, the capacity to be a witness, the object and limits of the witness's statement, the persons who have the right to refuse to give statements as a witness, the witness's right to remain silent and non-self-incrimination, the questions regarding the person of the witness, the communication of rights and obligations, the oath and solemn declaration of the witness, the manner of hearing, the recording of statements and special cases of hearing the witness.

In the Romanian criminal law system, the principle of free assessment of the evidence is enshrined, in the sense that the evidence does not have a predetermined value, so that in making a decision regarding the existence of the crime and the guilt of the defendant, the courts have the obligation to analyze and evaluate all the evidence administered [art. 103 para. (1) and (2) of the Criminal Procedure Code].

From a forensic tactical point of view, the reliability of hearing witnesses in the criminal process requires compliance with the general framework for carrying out this judicial activity, by rigorously following the stages of the evidentiary procedure and the rules complementary to the legal framework [E. Stancu, 2015, pp. 422-437]. For this purpose, several aspects related to the preparation of the hearing, the actual hearing, the verification and assessment of witness statements and their recording will be taken into account.

1. Regarding the preparation of the hearing, the most important tactical rules consist of:

- studying the case file
- establishing the persons who can be heard as witnesses
- determining the hearing order
- determining the time of the hearing
- determining the place of the hearing
- obtaining data on the witnesses' personality
- drawing up the plan for listening to the witnesses

2. Regarding the actual hearing, the forensic tactical rules reside in the way of hearing and the conduct adopted by the judicial body in the three stages of the hearing:

- witness identification stage
- the stage of free narration
- the stage of asking questions

3. Regarding the recording of witness statements, the forensic tactical rules refer to:

- recording of statements
- fixing the statements by technical means.

4. Regarding the verification and evaluation of witness statements, necessary for the utilization as evidence of the information provided by the

interviewed persons, the forensic tactical rules impose, on the one hand, an inherent activity of establishing the veracity of the statements of the interviewed person, including through his additional questioning or of other people or by performing reconstructions, followed by the content, quantitative and qualitative analysis of the data made available to the investigators by the heard witness.

III. SPECIFIC HEARING OF THE PROTECTED WITNESS

The standard of fair administration of the means of evidence consisting in the statement of the protected witness was established at the European level both by the above-mentioned normative legal instruments, which, however, did not have the binding force of a convention or a treaty, but especially by the jurisprudence of the European Court of Rights Man [Guide regarding art. 6 of the European Convention on Human Rights, p. 53]. One of the most important principles emerging from the constant practice of the European Court is that, in a criminal trial, the defendant must have a real possibility to contest the accusations made against him [ECtHR, Al-Khawaja and Tahery v. the United Kingdom (MC), point 127]. In this sense, the use of statements made by anonymous witnesses to substantiate a conviction would not be incompatible with the ECHR Convention in any situation [ECtHR, Krasniki v. Czech Republic, point 76]. Although art. 6 of the Convention does not expressly require that the interests of witnesses be taken into account, however this may be required when it comes to their life, liberty or safety. The principles of a fair trial also require that, when necessary, the interests of the defense be balanced against those of the witnesses or victims who are called upon to testify [ECtHR, Doorson v. the Netherlands, § 70]. Judicial authorities must cite relevant and sufficient reasons to maintain the anonymity of certain witnesses [ECtHR, Doorson v. the Netherlands, § 71; Visser v. the Netherlands, § 47]. By maintaining the anonymity of the protected witness, the defense will face difficulties that should not normally exist in a criminal trial. However, it is necessary that the procedure followed before the judicial authorities sufficiently compensates for the obstacles faced by the defense [Doorson v. the Netherlands, § 72]. In particular, the defendant must not be prevented from challenging the reliability of obtaining the anonymous witness's statement [ECtHR, Kostovski v. the Netherlands, § 42]. In addition, in order to assess whether the methods of hearing the anonymous witness offered sufficient guarantees to compensate for the difficulties caused to the defence, due regard must be had to the extent to which the anonymous testimony was decisive in the conviction of the applicant. If the testimony was not decisive in any respect, the defense was disadvantaged to a much lesser extent [ECtHR, Krasniki v. Czech Republic, § 79].

It is obvious that the European litigation court paid special attention to the cases whose object was the use of anonymous witnesses by the criminal investigation bodies for the administration of evidence in the prosecution.

By anonymous witnesses, the European court meant people who were heard with the protection of identity or by inclusion in special protection programs and who gave statements regarding the facts of which a person is accused and whose identity is not known to the defense. Within this notion are also included the undercover agents who are representatives of investigative bodies and who, through the activity carried out under the protection of anonymity, contribute to the gathering of evidence to accuse a person. In order to ensure respect for the principle of fairness and, in particular, that of the equality of arms between the prosecution and the defense, the ECHR ruled that in such cases the impossibility for the accused to directly question the witnesses would be counterbalanced by allowing them to ask questions to these persons, at least in writing, and if such a request is rejected during the trial, the judge should analyze or at least provide detailed explanations regarding the reason for rejecting the request for administration of evidence formulated by the defendant's defense counsel [ECtHR, Bulfinski v. Romania].

At the national level, through the provisions of art. 103 para. (3) from the Code of Criminal Procedure, the Romanian legislator instituted some limitations of the principle of free assessment of evidence, stating that the decision to convict, to waive the application of the penalty or to postpone the application of the penalty cannot be based to a decisive extent on the statements of the investigator, of collaborators or protected witnesses. On the other hand, the Romanian constitutional court recently rejected an exception of unconstitutionality of the provisions of art. 103 para. (3) from the Code of Criminal Procedure referred to art. 111 and 112 of the same normative act, when the omission from the list of causes of limiting the free assessment of the evidence of the statements given by the parties and the procedural subjects, especially the statements given by the injured person and the civil party [C.C.R., decision no. 48 of February 28, 2023].

The limitation in domestic law of the probative value of the statements of protected witnesses is in line with an already classic standard of the jurisprudence of the European Court of Human Rights, in the sense that, in certain circumstances, the courts can refer to the statements given during the criminal prosecution phase, especially in the case the refusal of the people who gave them to repeat them under conditions of publicity of the criminal process, for fear of the consequences they could have for their safety. Since the imperative of protection cannot affect the substance of the right to defense, as long as the rights of defense are restricted in a way incompatible with the guarantees provided by art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, when a conviction is based entirely or to a decisive extent on the testimony of a person whom the accused could not question directly or through another person on his behalf, neither in the prosecution phase, nor in the debate phase, the court is obliged to counterbalance the difficulties of the defense in an unequivocal manner, so that the fairness of the procedure is safeguarded.

THE TACTICS OF TALKING THE STATEMENT OF THE PROTECTED WITNESS

In the light of the European standard, the Romanian legislator established that investigators can be heard as witnesses in the criminal process under the same conditions as threatened witnesses, and in exceptional situations, if the use of the undercover investigator is not sufficient to obtain data or information or is not possible, the use of a collaborator may be authorized, to whom an identity other than the real one may be assigned [art. 148 of the Criminal Procedure Code].

In the light of international regulations, European jurisprudence in the matter of fundamental human rights and the jurisprudence of the constitutional court, the Romanian legislator inserted into the content of the Code of Criminal Procedure clarifying legal norms regarding the content of protection measures for threatened and vulnerable witnesses, which are constituted in genuine forensic tactical rules applicable to the matter.

Among the most important protection measures is the protection of the identity data of the witness, by granting a pseudonym with which the witness will sign his statement.

Another protection measure provided for in the Romanian legislation is that the hearing of the protected witness can be carried out by means of audio-video means, without the witness being physically present in the place where the judicial body is located, the main procedural subjects, the parties and their lawyers being able to ask questions to the witness heard under these conditions, but the questions that could lead to the identification of the witness being rejected.

When other measures are insufficient, the voice and image of the witness heard through the closed circuit television system may be distorted so that they cannot be recognized.

For a faithful recording of the hearing, the witness's statement is recorded by video and audio technical means and is fully reproduced in written form.

During the criminal investigation, the statement will be signed by the judicial body that took it (prosecutor or judge of rights and liberties in the case of the anticipated hearing) and will be submitted to the case file. The statement will be transcribed, and the witness will sign this transcribed statement, which will be kept confidentially, at the prosecutor's office, in a special place, usually in a file, cabinet or safe to which access is restricted.

From a forensic tactical point of view, the rules of principle that must be respected when hearing a witness are applicable, mutatis mutandis, to the hearing of the protected witness, especially the anonymous one, but they will relate to the particularities conferred by the specific legal framework.

The preparation of the hearing of the anonymous protected witness does not differ substantially from the usual procedure, but special attention will be paid both to the choice of the persons who will benefit from the anonymous witness status, by granting a pseudonym, and to the time and place where the hearing will be held. If the reasons cited by the witness for granting the special status are not plausible and undeniable, it would be advisable for the judicial bodies (prosecutor

or judge) not to abuse this protective measure, especially in cases where the statement of the respective witness will be considered decisive, and other protective measures could sufficiently and adequately ensure the security of the person in question. On the other hand, the hearing of the anonymous witness should be carried out in the shortest possible time from the moment of identification of the said witness, since in this way possible fraudulent and intimidating actions on the part of the suspect or the defendant can be avoided, which could cause the witness to stop providing the conclusive information or refuse to cooperate with the judicial bodies. Also, as long as the place of hearing a person is not stipulated as an imperative legal rule, the hearing of the protected witness in the first phase can be done anywhere, so that anonymity is kept intact.

The actual hearing of the witness protected under a pseudonym will, as a rule, go through, in addition to the three known phases, two distinct stages, i.e. the first hearing will contain all the identification data of the person heard and all the information held by the witness, which will not be censored, but this statement will be kept at the prosecutor's office, in special places, with full assurance of confidentiality. In order to create the atmosphere of confession, specific to a sincere, correct and complete statement, it is imperative that the witness interacts with as few representatives of the judicial bodies as possible, so that his confidence in the preservation of anonymity remains intact.

In the phase of recording the statement under a pseudonym, if the possibilities of preserving anonymity vis-à-vis the suspect or defendant are minimal, as long as the law does not prohibit, it would be possible to hear the anonymous protected witness both with the real data, when his statement will not contain information relevant to the settlement of the case, as well as the hearing under a pseudonym, in which the conclusive information that can lead to establishing the existence of the crime and the defendant's guilt will be recorded.

The phase of verifying and assessing the statement of the anonymous protected witness can be considered the crucial moment of the hearing, since the factual elements resulting from this evidentiary procedure can represent the basis of the accusation in criminal matters or that of the conviction of the defendant to which the said statement refers.

It is indisputable that compliance with the tactical rules for listening to the protected witness must be carried out in such a way as to preserve the principle of loyalty in the administration of evidence, since, otherwise, the reliability of the procedure may be affected, with the consequence of the exclusion of the evidence thus obtained.

CONCLUSIONS AND PROPOSALS DE LEGE FERENDA

The recrudescence of the criminal phenomenon, mainly violent and organized crime, with transnational tendencies, has forced the decision-making factors at national and international level to adopt extraordinary measures, in

order to ensure for the recipients of the criminal law a space of freedom, security and justice at the higher standards.

The good performance of criminal justice requires that the administered evidence be reliable, so that it has the functional ability to lead to the discovery of the truth, by proving the existence of crimes and the guilt of those who committed them.

Among the measures to make the fight against crime more efficient is the institution of the protected witness, whose appearance in the judicial landscape came as a response to the worrying trend observed in the surrounding reality for defendants tried for alleged involvement in criminal activities of great gravity to intimidate or even suppress the lives of witnesses in criminal trials.

In order to ensure the reliability of the criminal process, listening to witnesses, assessing depositions and capitalizing on them, equally presupposes the need to comply with both the legal provisions and the forensic tactical rules.

From a forensic perspective, the general tactical framework for listening to witnesses has particularities in the case of hearing witnesses with protected identity, especially anonymous ones, who participate in the criminal process under a pseudonym. Regarding these witnesses, the specificity of the procedure requires the observance of some forensic rules regarding the preparation of the hearing, the establishment of the place and time of the hearing, so as to ensure the full security of the witness.

On the other hand, in order to create the atmosphere of confession, specific to a sincere, correct and complete statement, an imperative tactical rule is that the witness interacts with as few representatives of the judicial bodies as possible, so that his trust in the preservation of anonymity remains intact.

Ensuring the confidentiality of the identification data of the anonymous witness can be achieved in various forms, which the law does not prohibit, but the risk that the adopted procedure will be cataloged as disloyal, with the consequence of the exclusion of the evidence, as a procedural sanction, should not be overlooked.

In the light of the standard imposed by the international and domestic legal instruments, as well as the jurisprudence in the matter, the procedure of listening to the protected witness requires special attention from the judicial bodies, so that the difficulty of defending the defendant is counterbalanced by concrete and effective measures of the prosecutor or the court not to decisively affect the fundamental right to defense and, finally, the fairness of the criminal process.

By ferenda law, the Romanian legislator would be required to ensure the transposition of the most appropriate rules adopted internationally or in advanced legal systems into domestic legislation, or to adjust the legal framework to the requirements imposed by the jurisprudence of the European Court of Human Rights, with the aim of to offer litigants the most effective criminal

procedural means, through which the interests of an efficient and fair criminal justice are harmonized with the security interests of the witnesses and those of the defendants.

Next, the task of Forensic Sciences is to discover new means and tactical rules in the practice of criminal law specialists, and, by capitalizing on the positive experience of the actors involved in the investigation of crimes, to offer the most advanced answers to the questions regarding the way to increase the reliability of criminal investigations.

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HUMAN RIGHTS LAW FROM GENERAL THEORY OF LAW PERSPECTIVE

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Abstract

The current study tries to analyse the relationship between the human rights law from the general theory of law perspective. Starting from the multiple meanings of the term 'law', going through the differentiation between "human rights", "public freedoms" and citizens' rights, distinguishing the component of national law and that of international law, we propose to show the readers the perspective of human rights as revealed by the general theory of human rights.

Keywords: *citizen, general theory of law, human rights, law, protection.*

INTRODUCTION

Due to the complexity and diversity of the legal phenomena, the word "law" has several meanings, of which the most commonly used are: law as science, objective law, positive law, subjective law, natural law, law as art and technique. In general, when we use the word 'law', we mean 'the set of rules which organise and coordinate society' (*N. Popa coord., 2017, p. 24*).

Society is governed by many types of rules (e.g. social rules, legal rules, moral rules, religious rules, technical rules), the most important of which are the legal rules. The set of legal rules constitutes the objective law. These legal rules impose obligations on subjects of law, enabling them to pursue certain legally protected interests, organise the general functioning of the state as well as non-state bodies, assign statuses and roles to subjects of law (e.g. parent and child, buyer and seller, beneficiary and provider, donee and donor). From this perspective, it is argued that "law combines necessity and freedom" (*N. Popa, 2014, p. 30*).

Necessity, which is a separate area of law, is the result of the general purposes of social life that are set out in objective law. The essential condition of objective law is the coexistence of freedoms. Freedom is a relative state of man, which can be subjective (internal - the experience of the person and the theoretical

possibility of choosing something) and objective (external - the concrete possibility of acting in accordance with one's inner experience). Freedom is an innate right, which originates in the state of nature, without the need to recognise it through the rules of positive law.

We can thus conclude that "necessity is the starting point in the analysis of freedom, expressed through the state" (*N. Purdă, N. Diaconu, 2016, p. 33*), law expressing necessity as the starting point in the analysis of freedom.

The relationship between "law" and "human rights" is a relationship from the whole to the part, transposing into the legal plane the relationship between the general interests of a society and the personal interests of people. It is thus clear that law gives expression to the general interests of society, while human rights give expression to personal interests.

The internal determination of law is based on the legal quality of will and interest, which is the essential quality of the entire legal system. No matter how many changes the legal system undergoes, this quality will remain unchanged. We thus emphasise, as taught in the general theory of law, that 'the essence of law provides the foundation of the legal system and is expressed by the legal will and the legal interest" (*N. Popa coord., 2017, p. 38*)[*].

It is interesting what happens when the general interest sometimes conflicts with the personal interest. It should not be forgotten that where one person's subjective right ends, the subjective rights of others begin.

The important thing is the legal norms, i.e. the legal will of the legislator, which expresses the general will of a state expressed in official form, based on consideration of the fundamental interests of society.

The aim of the state should be to protect the general interest of citizens, their happiness. We live in a world that is becoming increasingly urban, which is why ensuring the security of citizens is an important role of states, and there is increasing talk of urban security (*F. Dieu, B. Domingo, Méthodologies de la sécurité urbaine, Ed. L'Harmattan, Paris, 2018*). Analysing the history of time, we observe that if citizens have not been happy, if their purpose has not been satisfied and if they have not perceived that the intercession of this satisfaction is the state itself, then the state has stood on weak legs, as Hegel said.

The philosophy of law presupposes a balance between the general interest of the state and the particular interests of individuals.

René Cassin, one of the most outstanding promoters of human rights, who was awarded the Nobel Prize in 1968 alongside Eleanor Roosevelt for drafting the Universal Declaration of Human Rights, believed that the main purpose of the state was to defend the inalienable rights of the state.

I. MEANING OF THE EXPRESSION „ *FUNDAMENTAL HUMAN RIGHTS*”

Human rights have always been a concern for mankind, as people, as human beings, are considered to have certain rights. Although there have been

legislators over the years who have opposed the recognition of human rights (e.g. in totalitarian states), as mankind has evolved, the term 'human rights' has been established.

Since ancient times, in all ages of history, national legislators have determined and sometimes even legally defined the rights and obligations of its members, even imposing limitations to maintain social order. Ideas about human rights have been developed since antiquity or the Middle Ages, but as pointed out in the doctrine, "the actual concept of human rights was born in the run-up to the bourgeois revolutions in Europe" (*N. Purdă, N. Diaconu, 2016, p. 17*)[*], and these rights have also become established in social practice.

The idea of natural rights was intensely promoted during that period, as witnessed by the Declaration of the Rights of Man and of the Citizen of 26 August 1789 and the Bill of Rights of the Constitution of the United States of America of 1791.

The most prolific period for the recognition of human rights, as well as their protection, was the period after the Second World War (i.e. the Universal Declaration of Human Rights adopted by the United Nations General Assembly on 16 December 1948, the Convention for the Protection of Human Rights and Fundamental Freedoms drawn up by the Council of Europe and signed on 4 November 1950).

In view of the atrocities of that period, it was increasingly emphasised that these rights were inherent in human nature, and that their denial resulted in man being impoverished by the very attributes of being human, leading to armed conflicts between states and hostilities between peoples.

As can be seen from a diachronic analysis of legal systems, human rights do not have an immutable content, evolving with the dynamics of international relations and the values enshrined therein. Moreover, when analysing the human rights enshrined at each stage of history and in the light of the progress of science, new rights emerge (e.g. the right of access to information, the right to the achievements of technology).

Legal relationships and legal situations create the legal order, which can be domestic or international, depending on the applicable law - domestic law or international law (including European Union law).

Domestic law is the law in force in a particular state, the purpose of which is to regulate the legal relationships that take place on the territory of that state. International law is the body of rules of law governing relations with other states, which are largely derived from international treaties concluded in certain areas (e.g. human rights, international trade, law of the sea, airspace).

Today, the issue of human rights has both a domestic and an international component, which gives people the confidence and power to fight against the state in defence of their fundamental rights and freedoms, believing that beyond their territory, the state or an international forum is watching over their rights.

Human rights that are essential to human beings are called fundamental rights (e.g. the right to life, the right to liberty). These fundamental rights may evolve or differ from one historical stage to another or from one state to another.

Unfortunately, there is no generally valid definition of fundamental human rights in international law, and several definitions of fundamental human rights exist in doctrine. For example, "fundamental human rights are those subjective prerogatives inherent to the human being, of an essential, unitary, indivisible and imprescriptible nature, which define the human personality, are conferred by domestic law and recognised by international law" (*N. Purdă, N. Diaconu, 2016, p. 31*)[*].

Human rights have also evolved as a result of globalisation, which has had a positive and negative impact on them (*see for instance N. Diaconu, 2021, pp. 333-342*). The positive aspect is linked to the notion of legal transplantation, since the development of the internet and trade has improved the knowledge and practice of human rights. The negative aspect, however, relates in particular to economic and social rights, which have failed to evolve with migration, as migrant workers do not enjoy better living and working conditions in the countries where they choose to work and are thus clearly disadvantaged. We can see that the environment is increasingly affected, the underdevelopment of some regions is worsening, creating great economic differences between people.

Over the years, there has been a sustained concern on the part of intergovernmental organisations to adopt a common set of rules in all areas, especially human rights. The subjects of international law are constantly seeking solutions "to establish control over economic and social developments so that the negative effects of globalisation on the exercise of fundamental human rights can be reduced" (*N. Purdă, N. Diaconu, 2016, p. 55*)[*].

II. THE RELATIONSHIP BETWEEN "RIGHTS" AND "FREEDOMS" AND BETWEEN "HUMAN RIGHTS" AND "CITIZENS' RIGHTS"

From the analysis of domestic and international legislation, when talking about human rights, we notice that two nouns are used: 'right' (of the human or citizen) and (public) 'freedom'. Although some authors might consider these two nouns to be synonymous, there are authors who consider that they do not have the same content (*C.A. Colliard, 1982; L. Richter, 1982*).

We are of the opinion that, at present, these two legal concepts are perfect synonyms, having the same content, being subjective rights recognized and protected by national legislators. A subjective right is the right of a subject of law to enforce a legally protected interest, and in the event of another subject of law disregarding the right, he may resort to the coercive force of the State.

For example, according to the Romanian Constitution, the term 'right' is used in the provisions on the right to identity (art. 6), the right to asylum (art. 18), the right to life and physical and mental integrity (art. 22), the right to defence (art.

24), the right to free movement (art. 25), while the term 'freedoms' is used in the provisions on individual freedom (art. 23), freedom of conscience (art. 29), freedom of expression (art. 30), freedom of assembly (art. 39). Please note that from a political point of view, "the Constitution is a social contract between nation and power which determines both the rights that rights (human rights and citizens' rights) and the prerogatives with which the nation which the nation also mandates, in a limited way, the power to exercise it on its behalf and for it, and the manner of exercising them, i.e. the separation of powers in the state" (*M.-C. Cliza, C.-C. Ulariu, 2023, p. 172*).

In our view, there are no legal differences between these two concepts, and it can be said that a right is a freedom and freedom is a right.

But what is the relationship between "human rights" and "citizens' rights"? Could they mean the same thing? We believe that these two notions should not be confused, as they do not overlap perfectly. The relationship is from whole to part, given that three different categories of people can be found on the territory of a state: own citizens, foreign citizens and stateless persons.

While human rights are *universally valid* and *apply regardless of nationality*, the rights of the citizen are specific to a limited group of people (i.e. citizens of that state). Human rights thus include the rights of own citizens, the rights of foreign citizens and the rights of stateless persons.

Thus, by "citizen's rights" we mean the specific rights of a person who is bound by the relation of citizenship to the respective state, while also acquiring a series of correlative obligations. The most important rights of citizenship are recognised and guaranteed by the State through the Constitution.

CONCLUSIONS

Human rights and freedoms are dynamic and sensitive to the dynamics of each state's society. We can therefore conclude that these two concepts, "human rights" and "citizens' rights", do not overlap, but are different in content.

It is interesting to point out that these rights, if violated by other subjects of law, can be enforced by the state of citizenship (e.g. through courts or ombudsmen), but also by a wide range of international actors, on the basis of international conventions (e.g. the European Court of Human Rights).

It is obvious that the legal protection of human rights must include a judicial component, otherwise they would remain on a suspended, arbitrary plane.

It is necessary to distinguish the protection of human rights from other branches of law because of the similarity of legal relationships that are subject to different branches of law. This belonging to a branch of law is important for the correct application of the law as a result of the legal qualification of the legal relationship. Thus, the legal classification of a particular legal relationship within a legal branch determines the applicable legal rule.

It should be borne in mind that in order to qualify the legal relationship properly, the enforcement body, which has fundamental and specialist legal knowledge, will perform a number of preliminary operations (i.e. naming the legal rule, verifying its authenticity and legal force, determining the exact content of the legal rule).

We consider that the legal protection of human rights combines a national law component (thus constituting a branch of national law based on national regulations on this issue) and an international component (thus constituting a branch of international law based on international regulations on this issue).

At present, several issues are raised about the relationship between national and international human rights regulations, but these will be the subject of a separate article. At the same time, we stress that the system of law is unitary, its branches of law interfering.

The separation of international human rights protection from public international law is obvious (there is a relationship from the particular to the general), as this new discipline is based on legal rules of public international law that define and protect fundamental human rights.

Treaties adopted at international level presuppose the harmonization of the requirements of international cooperation with the principle of state sovereignty, since failure to respect these two principles would lead to interference in the internal affairs of states.

For this reason, the treaties imply an obligation on States parties to adopt legislative and administrative measures to ensure the realisation of the fundamental human rights recognised by the treaties, which thus become effective. In this respect, it can be said that the international consensus is that the realisation and guarantee of human rights is based on the adoption of national legislative measures. An example of this is the Convention for the Protection of Human Rights and Fundamental Freedoms itself, which does not replace national systems for monitoring human rights, but represents an additional international guarantee to them, which intervenes only in the event of failure by the national authorities to guarantee those rights. The Convention itself requires the exhaustion of domestic remedies as the main condition of admissibility. Please note also that the dynamic and evolving interpretation of the provisions of the Convention is an important method of interpretation of the Court. The judges create law on the basis of interpretation of the Convention (I. Boghirnea, 2013, p. 108), combining elements of continental law and anglo-saxon law.

Although questions are constantly raised about the fragmentation of international law that would threaten the complex legal system created by the subjects of international law, we nevertheless believe that, at the level of human rights, we are witnessing a process of convergence, characterised by coherence and unity.

Nowadays, the unprecedented proliferation of international human rights organisations and jurisdictions is leading to a trend towards their hyper-specialisation, which should not be seen as having a negative connotation, as a human rights culture is being created... and thus a human rights education, which is essential for every individual. As the promotion of human rights becomes more effective, a real human rights education will be created that will lead to fewer human rights violations.

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DIGITAL SINGLE MARKET: CONSUMER PROTECTION RULES IN THE DIGITAL SERVICES ACT*

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Abstract

The Digital Single Market is a legal framework that aims to create a unified and harmonized digital market within the European Union. It addresses various legal issues, from data privacy and copyright to competition law and consumer rights, to promote digital inclusion and economic growth, while protecting the rights and interests of EU citizens and businesses. Legal instruments and regulation play a key role in shaping the DSM and ensuring its success in the evolving digital landscape.

The Digital Single Market has the potential to create a more integrated and efficient digital environment in the EU, but this requires close collaboration between legal and technical experts. With a balanced and collaborative approach, the digital single market can bring significant benefits for both citizens and the EU's digital economy.

Keywords: *digital single market, european consumaer law, digital services act, digital markets act, generative AI, big platforms, consumers rights.*

INTRODUCTION

I. PRELIMINARY CONSIDERATIONS. REGULATORY FRAMEWORK FOR THE DIGITAL SINGLE MARKET

The European Union (EU) Digital Single Market (DSP) is an ambitious concept and plan for EU-wide digital integration. It has been proposed to tackle digital fragmentation and facilitate the free movement of goods, services and data across Europe. This initiative has significant legal implications, as it must ensure compliance with existing EU legislation, as well as address the technological and ethical challenges associated with a digital single market.

The long-awaited regulatory reform has often been mentioned in the context of moderating content and freedom of expression, market power and

competition. However, it is still important to bear in mind the contractual nature of the relationship between users and platforms and the additional contracts concluded on the platform between users, in particular those between traders and consumers (*C. Cauffman, C. Goanta, A New Order: The Digital Services Act and Consumer Protection, European Journal of Risk Regulation, Cambridge University Press, no 12 (2021), pp. 758–774*). In addition, the monetisation offered by digital platforms has led to new economic dynamics and interests, leaving platforms as intermediaries in the provision of digital content, such as media content, which could have harmful effects on consumers without proper moderation. All of this has led in this new on content monitoring and value to new questions about the adequacy of existing regulation, and it is precisely on these issues that the DSA provides the overall regulatory framework.

The Digital Single Market involves a complex and broad legal framework, as it must address a number of cross-disciplinary issues specific to competition law, consumer rights, intellectual property rights, personal data protection, online censorship and jurisdiction. A crucial aspect is the alignment of the digital market with the General Data Protection Regulation (GDPR), which regulates the processing of personal data in the EU. The implementation of the Digital Single Market must comply with GDPR requirements to ensure data protection and privacy of citizens in the digital space. Moreover, jurisdiction is a major challenge. It must be clear who is responsible for regulating and resolving disputes in the digital environment, as it does not always respect traditional geographical boundaries. This requires a sound legal approach to avoid ambiguities and ensure access to justice for all parties. According to the European Commission, these legislative proposals have two objectives: (1) to promote fundamental rights in the area of digital services; and (2) to promote technological innovation by establishing common rules for digital service providers within the European single market system and beyond[1].

Analysing the Digital Single Market (DSM) from a legal perspective involves examining the legal framework, regulations and principles governing the digital economy and the free movement of digital goods, services and data within the European Union (EU), including:

- **General Data Protection Regulation**[2] (GDPR) - It establishes a unified framework for data protection and privacy across the EU, ensuring that data can move freely within the DSM while protecting individual rights.
- **E-commerce Directive**[3]**:** The e-Commerce Directive provides a legal framework for e-commerce in the EU. It sets out rules on the liability of online

[1] European Commission, "Proposal for a Regulation on a Single Market For Digital Services (Digital Services Act)"
COM(2020) 825 final (European Commission, December 2020), p 2 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0825&from=en
[2] https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A32016R0679

service providers, transparency and consumer protection. The Directive aims to promote cross-border e-commerce by harmonising legal requirements across Member States.

- Copyright reform: DSM strategy addresses copyright issues in the digital age through the Digital Single Market Copyright Directive[4]. This Directive aims to balance the rights of content creators and online platforms while promoting cross-border access to copyright-protected content within the EU.
- **Geo-blocking regulation:** To eliminate unjustified geo-blocking practices, the EU has adopted a regulation prohibiting discrimination based on nationality or location of customers in the DSM. This regulation ensures that consumers can access and purchase goods and services from other EU Member States without artificial barriers.
- **Competition law:** DSM promotes healthy competition through the enforcement of EU competition law, in particular antitrust and anti-competitive practices. Authorities, such as the European Commission, monitor market behaviour to ensure a level playing field for businesses operating within DSM.
- **Digital Markets Act**[5] (DMA): The DMA, proposed as part of the DSM initiative, aims to regulate the large online platforms that are considered gatekeepers. It sets rules for these platforms to prevent unfair practices and protect competition, ensuring that digital markets remain open and competitive.
- **Digital Single Markets Act**[6] **-** By setting clear and proportionate rules, the DSA protects consumers and their fundamental rights online, while encouraging innovation, growth and competitiveness and facilitating the expansion of smaller platforms, SMEs and start-ups. The responsibilities of users, platforms and public authorities are rebalanced in line with European values, putting citizens at the centre.
- **Cybersecurity: DSM also addresses cybersecurity concerns as EU implements Network and Information Security Directive**[7] (Directiva NIS). It requires critical infrastructure operators and digital service providers to take appropriate security measures and report security incidents to the relevant authorities.
- **Regulation on cross-border electronic identification and trust services**[8]**:** This regulation facilitates cross-border electronic identification and trust

[3] https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A32000L0031
[4] https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A32019L0790
[5] https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A32022R1925
[6] REGULATION (EU) 2022/2065 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 October 2022 on a single market for digital services and amending Directive 2000/31/EC (Digital Services Act)
[7] https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A32016L1148
[8] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.257.01.0073.01.ENG

services, supporting secure electronic transactions within the DSM by ensuring trust and security in digital interactions.

- **Consumer rights**[9]**:** Consumer protection is a crucial aspect of the DSM, with legal instruments such as the Consumer Rights Directive providing consumers with clear information, cancellation rights and protection against unfair commercial practices when shopping online.

II. THE PRINCIPLE OF LEGISLATIVE HARMONISATION IN THE FIELD OF CONSUMER PROTECTION. BETWEEN MINIMUM HARMONISATION AND FULL HARMONISATION

In the early days of the single market, the only legal basis for introducing EU consumer protection rules was the internal market provisions of the TFEU. Article 114 TFEU provides for the adoption of "measures for the approximation of the laws, regulations and administrative provisions of the Member States which have as their object the establishment and functioning of the internal market", this article is the basis for most EU consumer protection legislation. Article 114(3) requires these measures to be based on a high level of consumer protection. Article 169 TFEU has a specific provision on consumer protection which states that "In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests." However, when it comes to the legislative means to achieve these aims, it is content to refer to Article 114 TFEU or limit its scope to "measures which support, supplement and monitor the policy pursued by the Member States." Few EU provisions therefore rely on Article 169 TFEU as a legal basis, and it should also be noted that consumer protection also features in Article 38 of the Charter of Fundamental Rights.

Traditionally, EU consumer protection legislation has been based on directives and applies to both cross-border and domestic trade, but recently Regulations are increasingly common and preferred as a legislative tool. In fact, EU law offers little scope for enforcement and ends up becoming the only source of law due to the use of maximum harmonisation. This can be beneficial for consumers as regulations become directly applicable and therefore immediately available for consumers to invoke (*C. Barnard, Peers, European Union Law, 3rd edition, Oxford University Press, 2020, p. 706*). Experience has shown us that consumers find it difficult to benefit from the protection of their rights under directives that are not implemented or not properly enforced because most of their transactions are with private entities rather than state authorities and directives do not have "direct horizontal effect" against private entities (However, in a famous case, German consumers, relying on the principle of liability of Member States for damages for their breach of EU law, obtained compensation from the German state

[9] https://eur-lex.europa.eu/eli/dir/2011/83/oj

for losses caused by the failure to set up a compensation fund for the insolvency of package holidays as required by EU law - Case C-91/92 Paola Faccini Dori v Recreb Srl [1994] ECR 1-3325).

To make a brief inventory of the main consumer rights contained in the Directives, we mention: consumer information rights and the right of withdrawal (cooling-off period) which are regulated in the Consumer Rights Directive[10]; the seller's liability for non-conformity of the object sold, as well as guarantees, are regulated in the Directive on sales of consumer goods [11]; the legality of terms printed in a sales contract falls within the scope of the Unfair Terms Directive [12]; and the e-Commerce Directive [13] provides the legal conditions for the legal framework for online consumer transactions. In addition, the Unfair Commercial Practices Directive protects consumers from rogue traders, including those operating in the e-commerce, digital environment[14].

However, it should be borne in mind that many of these legal instruments were adopted long before the advent of online digital sales. The Unfair Terms Directive, for example, dates back to 1993, when the internet was still a rare phenomenon; and the Unfair Terms Directive dates back to 1993. The Consumer Sales Directive from 1999, when online sales were just starting to emerge. The advent of the Digital Services Act is therefore a turning point in the protection of consumer rights and in the evolution of European consumer law.

The Digital Services Act is the world's most important and ambitious regulation in the field of protecting the digital space against the spread of illegal content and protecting users' fundamental rights. There is no other piece of legislation in the world as ambitious in regulating social networks, online marketplaces, very large online platforms (VLOPs) and very large online search engines (VLOSE). The rules are asymmetrically designed: large-scale intermediary services with significant impact on society (VLOP and VLOSE) are subject to stricter rules. The DSA is structured as follows: Chapter I sets out the scope and defines the key concepts used. Chapter II deals with the liability of intermediary service providers, building on previous standards set by the e-commerce Directive.

[10] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European (OJ L 304, 22.11.2011, p. 64–88).

[11] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999, p. 12–16).

[12] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29–34).

[13] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ L 178, 17.7.2000, p. 1–16).

[14] Manko R (2015) Contract law and the Digital Single Market: Towards a new EU online consumer sales law? In-Depth Analysis, European Parliamentary Research Service

Chapter III sets out the due diligence obligations for a safe and transparent online environment, distinguishing between intermediary service providers in general, online platforms and very large online platforms. Chapter IV deals with DSA national and supranational implementation and cooperation, as well as sanctions and enforcement, by establishing new public administration bodies such as the Digital Services Coordinators Digital Authority.

In the preamble of the Digital Services Regulation (DSA), in paragraph 115, the choice of the method of legislating by means of a Regulation is justified, mentioning the respect of the two principles of proportionality and subsidiarity - since the objectives of this Regulation, namely "to contribute to the smooth functioning of the internal market and to ensure a secure, predictable and trustworthy online environment, in which the fundamental rights enshrined in the Charter are adequately protected, cannot be sufficiently achieved by the Member States because they cannot achieve the necessary harmonisation and cooperation by acting alone but, given the territorial and personal scope, can be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives". In fact, due to the complexity that the trajectory of the digital single market imposes through the elements of internationality that govern the online environment, no other way of legislating could have effectively and uniformly protected consumer rights (*Twigg-Flesner, Ch. '"Good-Bye Harmonisation by Directives, Hello Cross-Border only Regulation?" A way forward for EU Consumer Contract Law', European Review of Contract Law 7.2 (2011): 235-256*). However, it should be noted that the AVMSD is based on a horizontal approach that is complementary to a number of existing EU legislative instruments that it would not affect and would be consistent with, such as Directive (EU) 2018/1808 (Audiovisual Media Services Directive) or Directive (EU) 2019/2161 (Omnibus Directive).

In the context of consumer protection, the DSA contains several provisions that are of particular relevance and have been informed by numerous reports on how the development of the digital environment and artificial intelligence impacts consumer protection law, including the **Report on Safety and Liability Implications of Artificial Intelligence, the Internet of Things and Robotics in 2020**[15]. However, one cannot help but notice the lack of systematisation at the level

[15] AI, IoT and robotics share many common features. They can combine connectivity, autonomy and data dependence to perform tasks in the partial or total absence of human control and supervision. AI-enabled systems can also improve their own performance by learning from experience. The complexity of these systems is due both to the multiplicity of economic operators involved in the supply chain and to the multiplicity of components, parts, software components, systems and services that together make up the new technological ecosystems. In addition, they are open to updates and upgrades after their introduction on the market. Because of the large amounts

of EU legislation - thus legislative instruments such as Directive 93/13/EEC (Unfair Contract Terms Directive), Directive 2005/29/EC (Unfair Commercial Terms Directive) on unfair commercial practices; or Regulation (EU) No 524/2013 (on online litigation contain equally cross-sectoral and/or procedural provisions, rules which remain fully applicable to the unlawful content. These are just a few examples of the unsystematised legislative arial that remains applicable to infringing content, even after the advent of the DSA.

In the area of consumer protection, the EUSD imposes new regulations to systematise and increase consumer protection:

- **Transparency requirements:** the DSA imposes transparency obligations on digital service providers, including online platforms, regarding their terms and conditions. Providers are obliged to provide users with clear and easily accessible information about how their services work, including algorithms and content moderation policies. This improves consumers' understanding of the platforms they use.
- **User complaint mechanisms:** Under the DSA, platforms are required to establish effective complaint handling mechanisms, ensuring that users have a means to report harmful content or actions. This mechanism is essential for consumer protection as it gives users the possibility to seek redress when they encounter problems on online platforms.
- **Prohibition of certain practices:** the DSA includes provisions prohibiting certain harmful practices, such as the dissemination of illegal content and goods. This is to protect consumers from potentially harmful or fraudulent online activities.
- **Risk assessment and mitigation:** The DSA requires certain online platforms, known as Very Large Online Platforms (VLOPs), to conduct risk assessments to identify and mitigate systemic risks to users' rights. This is a key element of consumer protection as it helps prevent the widespread dissemination of harmful content or practices[16].

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of data involved, the reliance on algorithms and the opacity of the decision-making process of AI systems, it is more difficult to predict the behaviour of a product containing AI and the potential causes of harm are harder to understand. Finally, connectivity and openness may also make AI and IoT-related products more vulnerable to cyber threats.https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:52020DC0064#footnote48

[16] The new database will collect these statements of reasons in accordance with Article 24(5) of the EUSD. Thus, this database becomes a one-of-a-kind regulatory repository where data on content moderation decisions taken by online platform providers active in the EU are publicly accessible at an unprecedented scale and granularity, allowing for greater online accountability.

Only very large online platforms (VLOPs) are required to submit data to the database as part of their DSA compliance now. From 17 February 2024, all online platform providers, with the exception of micro, small and medium enterprises, will have to submit data on their content moderation decisions.

- **Ensuring redress for consumers:** The ASD addresses the issue of unfair commercial practices and requires online marketplaces to provide clear information on the main parameters influencing product classification. This promotes fair competition and ensures that consumers can make informed choices.
- **Supervision and enforcement:** National regulatory authorities are given enhanced supervisory and enforcement powers under the EUSD. They can impose sanctions on non-compliant service providers, including fines. This ensures that the provisions of the DSA are effectively enforced to protect consumers[17].

In conclusion, the Digital Services Act is an important piece of EU legislation aimed at strengthening consumer protection in the digital environment (*Ernst Karner Bernhard A. Koch Mark A. Geistfeld, Comparative Law Study on Civil Liability for Artificial Intelligence, november 2020 - EUROPEAN COMMISSION Directorate-General for Justice and Consumers Directorate A — Civil and commercial justice Unit A2 — Contract Law*). It does this by imposing transparency requirements, strengthening user complaint mechanisms, prohibiting harmful practices and providing surveillance and enforcement mechanisms to protect consumer rights. These provisions are based on EU law and are in line with wider consumer protection principles as enshrined in the EU legal framework.

In the context of the emergence of the EUSD, at the legislative level we see an increasing trend for the Commission to amend and adapt the main consumer protection directives. In March 2023, the European Parliament approved revised rules on the safety of non-food consumer products, designed to address the safety risks associated with new technologies and the growth of online sales. They replace the current General Product Safety Directive, which dates back to 2001. The new rules, which entered into force on 25 April 2023 through Regulation (EU)

Thanks to the transparency database, users can view summary statistics (currently in beta), search for specific motivational statements and download data. The Commission will be adding new analysis and visualisation features in the coming months and, in the meantime, welcomes any feedback on its current set-up.

The source code of the database is publicly available. Together with the Code of Practice on Misinformation, as well as additional measures to increase transparency within the DSA, the new database enables all users to take informed action against the spread of illegal and harmful content online.

[17] On 26 September 2023 - the European Commission launched the DSA Transparency Database. Under the DSA, all hosting providers are obliged to provide users with clear and specific information, so-called statements of reasons, whenever they remove or restrict access to certain content. Article 17 of the DSA requires hosting providers to provide affected recipients of the service with clear and specific reasons for restrictions on content that is alleged to be illegal or incompatible with the provider's terms and conditions. In other words, hosting providers must inform their users of the content moderation decisions they make and explain the reasons behind these decisions. A statement of reasons is an important tool to enable users to understand and possibly challenge content moderation decisions made by hosting providers.

2023/988[18], aim to ensure that all products placed on the market are safe for consumers. Vulnerable consumers, including children and people with disabilities, will be protected by stricter safety requirements for products marketed to them. Among the most important provisions, we note that these new product safety rules improve recall rules that extend the obligations of economic operators, give more power to market surveillance authorities (as was also foreseen in the DSA), oblige online marketplaces to cooperate with authorities to prevent risks associated with product sales; allow market authorities to order the recall of dangerous products within two working days; ensure that products can only be sold by an EU-based manufacturer, importer or distributor who takes responsibility for the safety of products placed on the market; and give customers the right to repair, replacement or refund in the event of a product recall.

With regard to the liability of service providers, we can make a comparative analysis between the provisions of the EUSD and those laid down in the text of the E-Commerce Directive. Thus, while the ASD deletes Articles 12-15 of the E-Commerce Directive as regards the liability of intermediary service providers, the rules it introduces instead (Articles 3-9) do not radically change the provisions of the E-Commerce Directive. They essentially codify the Court of Justice's interpretation of these rules[19]. In this respect, similarly to the E-Commerce Directive, the DSA distinguishes between intermediaries providing simple transport and caching services and intermediary providers offering hosting. According to the DSA, online platforms are a subcategory of hosting providers, which are in turn a subcategory of intermediary service providers as defined in the first chapter. It follows that, in general, intermediary online platforms benefit from the exemption from liability provided for in Article 5(1) of the DSA, which corresponds to the so-called "hosting exemption" in the e-commerce Directive. Unless the DSA provides otherwise, online platforms will not be liable for information stored at the request of a recipient of the service, provided that the provider: (a) has no actual knowledge of the illegal activity or illegal content and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or illegal content is apparent; or (b) after obtaining such knowledge or becoming aware, acts expeditiously to remove or disable access to the illegal content.

[18] REGULATION (EU) 2023/988 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 10 May 2023 on general product safety, amending Regulation (EU) No 1025/2012 of the European Parliament and of the Council and Directive (EU) 2020/1828 of the European Parliament and of the Council and repealing Directive 2001/95/EC of the European Parliament and of the Council and Council Directive 87/357/EEC, available at https://eur-lex.europa.eu/eli/reg/2023/988

[19] See, ECJ din decizia C-236/08 Google France SARL and Google Inc [2010] ECLI:EU:C:2010:159; C&x2011;324/09 L'Oréal [2011], ECLI:EU:C:2011:474.

Over the years, consumer protection in the EU has undergone significant changes: the move from minimum to full harmonisation, the emergence of public enforcement cooperation and the promotion of alternative dispute resolution (ADR) in the private sector, and the extension of consumer protection measures. The DSA's twin piece of legislation - i.e. the DMS - is in line with this, as it gives the European Commission extended investigative and enforcement powers over gatekeepers. In order to protect consumers, the European Commission has established clear operating rules for platforms, through methods to prevent *ex ante* anti-competitive practices (*Jasper van den Boom (2023) What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws, European Competition Journal, 19:1, 57-85*). The DMA is based on the EU legislators' belief that unfair practices in the digital sector are particularly common in core platform services due to certain characteristics, including extreme economies of scale, strong network effects, the ability to connect many business users with many end-users through the multilateral nature of the services, lock-in effects, lack of multi-homing, data-driven advantages and vertical integration (*Konstantina Bania (2023) Fitting the Digital Markets Act in the existing legal framework: the myth of the "without prejudice" clause, European Competition Journal, 19:1, 116-149*). However, a digital service which qualifies as a core platform service does not in itself give rise to sufficiently serious concerns about or unfair practices, Such concerns arise only where a core platform service constitutes an important gateway and is operated by an undertaking with a significant impact on the internal market and with an entrenched and durable position or by an undertaking which is likely to enjoy such a position in the foreseeable future (art 15 DMA). In order to safeguard the fairness of core platform services, the DMA introduces a set of specific harmonised rules that apply only to those undertakings that meet these criteria, which are described by detailed quantitative thresholds in Article 3 of the WFD (designation of gatekeepers) (*Anna Moskal, Digital Markets Act (DMA): A Consumer Protection Perspective, European Papers, Vol. 7, 2022, No 3, European Forum, Highlight of 31 January 2023, pp. 1113-1119*).

At first glance, the DMA appears to address competition law issues by introducing a list of obligations for gatekeepers, but its provisions remain equally important from the perspective of consumers, who are considered "end-users" in DMA terminology. According to Art. (20) of the DMA, "end-user" means any natural or legal person using the services of the underlying platform, excluding commercial users. Commercial users are defined in Art. 2 (21) DMA as any natural or legal person acting in a commercial or professional capacity who uses the services of the underlying platform for the purpose or in the course of providing goods or services to end-users.

End-users are deemed to benefit from the following provisions listed in Art. 5: i) prohibition of processing, combination and cross-use of personal data without

a specific choice offered or appropriate consent (Art. 5(1)(a), 5(1)(b) and 5(1)(c)); ii) prohibition of end-users signing up for other gatekeeper services without a specific choice offered or appropriate consent (Art. 5(1)(d)]; iii) prohibiting other commercial users from offering the same products or services to end-users (Art. 5(1)(d)); iv) allowing other commercial users, free of charge, to communicate and promote their offerings and to enter into contracts with end-users (Art. 5(4)]; v) prohibition of tying [Art. 5(5) and 5(7)]; vi) prohibition of preventing referral of non-compliance issues to a public authority [Art. 5(6)]; vii) easy and unconditional subscription [Art. 5(8)].

Moreover, Article 6 introduces the following set of obligations, relevant for consumer protection, which may need further clarification in the dialogue with gatekeepers: i) prohibition of the use of data not publicly available in competition with commercial users (Art. 6(2)); ii) allowing easy uninstallation of software applications on a gatekeeper's operating system (Art. 6(2)). 6(3)) and easy installation and effective use of third-party software applications or app stores (Art. 6(4)); iii) prohibiting self-referral practices (Art. 6(5)]; iv) ensuring easy switching between and subscriptions to different software applications and services [Art. 6(6)]; v) ensuring, free of charge, effective interoperability [Art. 6(7)]; vi) allowing, free of charge, easy data portability [Art. 6(9)].

These provisions provide additional protection for consumers' rights, giving them a real choice when selecting and using digital services and ensuring their ability to make autonomous decisions. However, these provisions need to be linked to those found in other legislation, as under the DMA consumers are passive beneficiaries in the market, not independent market players with active roles.

CONCLUSIONS

The Digital Single Market is a legal framework that aims to create a unified and harmonised digital market within the European Union. It addresses various legal issues, from data privacy and copyright to competition law and consumer rights, to promote digital inclusion and economic growth, while protecting the rights and interests of EU citizens and businesses. Legal instruments and regulation play a key role in shaping the DSM and ensuring its success in the evolving digital landscape.

The Digital Single Market has the potential to create a more integrated and efficient digital environment in the EU, but this requires close collaboration between legal and technical experts. With a balanced and collaborative approach, the UDP can bring significant benefits for both citizens and the EU's digital economy.

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THE LEGAL RELATION. A SPECIAL LOOK AT THE EMPLOYMENT RELATIONSHIP

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Abstract

A legal relationship represents the link that is established between two or more people within which they establish their rights and obligations by means of legal norms. This relationship may or may not be contractual in nature, and may involve various areas of law, including civil obligations, individual/collective contract, etc. A legal report consists of three elements: the subjects involved in the report, the rights and obligations of the parties that form the content of the report as well as its object.

The employment relationship represents an important type of legal relationship established between employers and employees. It regulates the conditions under which employees work for the employer, establishing the rights and obligations of both parties. The employment relationship represents an important type of legal relationship established between employers and employees. It regulates the conditions under which employees work for the employer, establishing the rights and obligations of both parties.

Keywords: *legal relationship; employment relationship; subjects; content; object.*

INTRODUCTION

In a society governed by legal norms, relationships between individuals and entities take the form of legal relations.

Any inter-human relationship or report assumes that it is established between two or more parties, has a content and an object.

Out of all of them, a fundamental component is labor relations, which establish the interaction between employers and employees.

Since the legal relationship is the whole, the legal employment relationship is the part, the latter having the same tripartite structure as the first, but also particularities that differentiate it from any other legal relationship.

As in the general theory of law, the elements of the legal relationship are the subjects, content and object, and the key elements of an employment relationship are the parties (subjects of the relationship), the obligations and rights of the parties materialized in the employment contract (the content of the relationship) and the activity actually carried out and payment of remuneration (object of the report).

- From the research carried out we will observe which are the particularities of a legal employment relationship.

I. DEFINING THE CONCEPTS OF LEGAL RELATIONSHIP AND EMPLOYMENT RELATIONSHIP

Not every social relationship has legal significance – *vinculus iuris* – but it is necessary for it to be provided by the rules. So, only normative regulation makes a social relationship become a legal relatioship. The legal norm is the one that provides the conduct that the persons between whom the legal relationship is concluded must have (Genoiu, 2007, p. 1).Thus, the existence of legal norms is the essential premise for the appearance of the legal relationship, a premise without which we would not be in the presence of a legal relationship.(Cliza, 2022, p. 73)

Approaching a broader definition of the legal relationship, it represents any relationship between people, which is, however, regulated by objective law. In a narrower definition, the legal relationship is the connection between a legal obligation and a subjective right, legislated by the legal norm and producing legal consequences (Nefliu, 2021, p. 105).

From the definitions presented above, it follows that the legal relationship is a relationship between people/entities, which requires a certain conduct to be followed, giving rise to certain rights and obligations towards those involved in that relationship.

But not every social relationship represents a legal relationship, but the existence of an express regulation in the legislation of that social relationship is needed.

Thus, we can talk about a legal report of civil law, a legal report of criminal law, a legal report of fiscal law, a legal report of labor law, etc., depending on the branch of law in which the norm prescribes the conduct to be followed.

According to the doctrine (Genoiu, 2007, p. 7-15), the sources of the legal relationship can be classified as follows: *based on the dependence on the will of*

the people: natural facts (events) and human actions. Events are the facts generated in the absence of any human will, to which the law assigns legal significance, once they occur, legal relations are born. In their category, by way of example, we mention the natural phenomena, the birth and conception of natural persons, the death of natural persons, their age. The law attributes to human actions the ability to issue legal effects, in the sense of creating, extinguishing or modifying legal relationships. Another classification is that of legal facts *lato sensu* (they bring together both events and human actions, both those carried out with the intention of producing legal effects and those committed without this intention) and legal facts *stricto sensu* (events and legal facts in a narrow sense, acts committed without intention). And, other classifications are presented as follows: events, human actions, states and human inactions (inaction represents the legal fact consisting of an abstinence that gives rise to, modifies or extinguishes a legal relationship); simple sources (they consist of only one element – the birth or death of the person) and complex sources (several elements brought together successively or simultaneously); sources of civil obligations and ways of acquiring property rights or other real rights, relative to the type of subjective rights, which it gives birth to.

Focusing on the legal employment relationship, its source is the legal facts, the conscious activity of the two or more involved actors that begins with the negotiation of an employment contract, continues with the fulfillment of the obligations assumed by each of them through the contract and ends with the agreement of the parties or the will unilateral of one of the parties, in the situations provided by law.

As we mentioned at the beginning, legal relations differ depending on the branch of law in which relations between persons are established.

Regarding the legal employment relationship, it is defined as a social relationship regulated by the rules of labor law (the situation of the employee) or of administrative law (the situation of the civil servant) or constitutional law (the situation of the official) that is born between a natural person and/or, a natural or a legal person, as a result of the performance of work by the first person for the benefit of the second person, who undertakes, in turn, to guarantee him the necessary conditions to work and to reward her for the work done. We are talking about such a report in the case of employees, public servants, civil or military (service reports), magistrates and other categories of personnel (Țiclea, 2023, p. 21).

Thus, if we place ourselves in the branch of labor law, we can talk about individual legal employment relationships, in the situation where they arise between a natural and a legal person (enterprise, autonomous management, etc.) in order to carry out work by the first for the benefit of the second, in exchange for a remuneration called salary, or about legal collective labor relations, which represent the social relations established between the associations of employees

and those of employers, through which they establish the working conditions, remuneration, working time, time of rest, safety and health at work, professional training, respectively, their rights and obligations.

As a conclusion, individual employment relationships are characterized by the quality of the parties, the employee being in all cases a natural person and the employer being a natural or a legal person who has the capacity to exercise and fulfills the conditions provided by law for employing natural persons, according to the individual employment contract.

II. THE ELEMENTS OF THE LEGAL RELATIONSHIP COMPARED TO THE ELEMENTS OF THE LEGAL EMPLOYMENT RELATIONSHIP

A legal report has a trichotomous structure: subjects, content and object. If any of these elements are missing, the consequence will be the non-existence of the legal relationship.

1. The subject of the legal relationship is the person who participates, individually or collectively, in the legal relationships, thus becoming the holder of rights and obligations. The attribute as subject of the legal report belongs to natural and legal persons alike (Genoiu, 2007, p. 67). The Civil Code stipulates the conditions that a person must fulfill in order to become the owner of rights and obligations.

The Civil Code stipulates the conditions that a person must fulfill in order to become the owner of rights and obligations.

Thus, with regard to the conditions that the natural person must have, as the subject of the legal relationship, the Civil Code recognizes the civil capacity of all persons, respectively, the fact that any person has the capacity to use and the capacity to exercise, except in cases where the law provides otherwise (Art. 28). Art. 34 and 35 of the same code define the capacity to use as the person's vocation to have rights and obligations, expressly specifying the ab initio moment from which this capacity begins – from birth and the final moment – the person's death. Another important provision is the one that recognizes the child's rights from conception, the only condition being that he is born alive.

As for the exercise capacity, it is defined as the person's vocation to contract civil legal acts on his own. The rule is that it is acquired at the age of 18, but the Civil Code establishes two exceptions:

- minors can acquire full exercise capacity as a result of the conclusion of the marriage, and if the marriage is annulled, only the minor who was in good faith will retain full exercise capacity, while the one in bad faith will lose all the advantages that arise from the possession of a full exercise capacity;
- to the person who has reached the age of 16, the guardianship court can recognize his full exercise capacity for good reasons, it being necessary to listen to the person's parents or guardians, and if necessary, the opinion of the family council.

Regarding the conditions that the legal entity must fulfill, as the subject of the legal relationship, the Civil Code provides that the legal entities for which registration is necessary shall benefit from legal capacity from the moment of their registration (Art. 205), but, since on the date of the act of establishment they can acquire rights and obligations, provided that they are indispensable to be established legally. The other legal entities will be entitled to rights and obligations from the date of authorization of their establishment, from their establishment or from the date of fulfillment of other conditions stipulated by law.

Thus, any legal person can have any rights and obligations, except for those that can belong only to the natural person, otherwise, the sanction involved is absolute nullity. As for legal entities that do not have a patrimonial purpose, they may have rights and obligations only to the extent that these rights and obligations are necessary for the achievement of their purpose. This purpose must be established by the legal rules, the statute or the deed of incorporation. In case of violation of these provisions, the sanction that intervenes is absolute nullity.

At the same time, the code provides for an exception, in the sense that any legal person is allowed to receive liberalities, even in the situation where they are not necessary to legally establish themselves.

Regarding the quality of the subject of an employment report, the Labor Code provides in Art. 13 that the natural person has the capacity to work from the age of 16. A natural person is allowed to enter an employment contract as an employee upon reaching the age of 15, but only with the consent of his parents or, if applicable, his legal representatives, for activities suitable to his physical development, skills and knowledge, provided that his health, development and professional training are not affected. The law also provides for two absolute prohibitions that consist of the employment of persons under the age of 15 and persons placed under judicial prohibition. At the same time, employment in hard, harmful or dangerous jobs can only be done after the person is 18 years old, and this category of jobs is determined by a decision of the Government.

A similar provision can be found in the Civil Code which stipulates in article 42, that only the natural person who has reached the age of 15 can be a party to a legal employment relationship, but the consent of the parents or guardians is required. But, although the consent of the adult under whose supervision is needed, the minor who is at least 15 years old exercises all the rights and obligations arising from the employment relationship, respectively, disposes of the income obtained by himself.

Art. 14 of the Labor Code contains the conditions that the employer must fulfil as the subject of the legal employment relationship, providing a definition of the employer as the natural or legal person who is entitled by law to employ workforce under the individual employment contract. As an employer, the legal person is allowed to conclude individual employment contracts from the moment

it acquires legal personality, while the natural person may conclude individual employment contracts only once it has acquired full capacity to exercise its rights.

2. With regard to the content of the legal relationship, it comprises the rights and obligations of the subjects of the legal relationship. The active side of the legal relationship comprises subjective rights, while the passive side comprises obligations. Each right is matched by an obligation.

Subjective right is the attribution recognized by the objective law to the active subject of the legal relationship, i.e., the natural or legal person to follow a certain conduct and to require the passive subject to follow the corresponding conduct, in the sense of giving, doing or not doing something, and, if necessary, to resort to the coercive force of the State.

In conclusion, the prerogatives granted to the holder of the subjective right are (Genoiu, 2007, p. 166):

- the possibility to behave in a certain way in relation to his right (e.g., he can keep it or dispose of it);
- the power to require the passive subject to adopt an appropriate attitude consisting in giving, doing or not doing something;
- the power to request, if his right is infringed, protection of his right through the State authorities and institutions.

The legal obligation has been defined as the commitment of the passive subject of the legal relationship to conduct himself in accordance with the corresponding subjective right, consisting in giving, doing or not doing something, conduct that can be imposed, if necessary, by the coercive force of state institutions and authorities.

The legal characteristics of the obligation are as follows (Genoiu, 2007, p. 248-249):

- the obligation is a duty, correlative to the subjective right;
- the obligation lies in the liability of the passive subject who must follow the conduct claimed by the active subject;
- the conduct of the passive subject may be an action (giving something or doing something) or an inaction (not doing something);
- if the passive subject does not fulfil his own obligation, the active subject has the possibility of having recourse to the state's coercive force.

Thus, the link between rights and obligations individualizes the form of one or other category of legal relationships. Its immediate content will be the interaction resulting from a certain configuration dictated by the rule of objective law (Bontea, 2006, p.280).

In the field of labor law, its content consists of all the subjective rights and civil obligations of the parties to the employment relationship, which are expressly identified in individual employment contracts, collective employment contracts and/or internal regulations.

Thus, Art. 16 Para. 1 of the Labor Code provides that the individual employment contract shall be concluded based on the consent of the parties, in writing, in Romanian, no later than the day before the employee starts work. The employer is obliged to conclude this contract in writing.

Art. 229 Para. 1 of the Labor Code defines the collective labor contract. It is an agreement concluded in writing between the employer or the employer's organization and the employees, represented by trade unions or otherwise provided for by law. This contract may lay down various clauses concerning working conditions, pay and any other rights and obligations arising from the employment relationship.

At the same time, the Labor Code contains the rights and obligations of each of the two parties involved, for example, Art. 39 – Rights and obligations of employees, Art. 40 – Rights and obligations of the employer.

3. With regard to the third element of the legal relationship, the object represents the totality of the elements of a material or spiritual nature by which the rights and obligations of the subjects are fixed (Genoiu, 2007, p. 264).

Thus, the objects of legal relationships can be (Bontea, 2006, p.282-283): *material goods* – typical for civil legal relations (money, assets, etc.); *non-patrimonial values* – typical for labor, criminal, administrative, procedural legal relations, etc. (life, liberty, health, dignity, etc.); *results of intellectual creation* – can be the object of labor, criminal, civil, etc. legal relations (inventions, scientific, literary, artistic works, etc.).); *services*, which are characterized by the fact that they do not exist prior to the parties entering into the relationship, which is precisely the purpose of the relationship; *documents and papers of value* – typical of procedural and administrative legal relationships (diplomas, passports, bills of exchange, cheques); *the conduct of the parties* (transport of goods and/or passengers, witness statements, etc.); *sanctions* - typical of legal relationships of constraint.

Thus, the objects of legal relationships can be (Bontea, 2006, p.282-283): material goods - typical for civil legal relations (money, things, etc.); non-patrimonial values - typical for labor, criminal, administrative, procedural legal relations, etc. (life, liberty, health, dignity, etc.); results of intellectual creation - can be the object of labor, criminal, civil, etc. legal relations (inventions, scientific, literary, artistic works, etc.).); services, which are characterized by the fact that they do not exist prior to the parties entering into the relationship, which is precisely the purpose of the relationship; documents and papers of value - typical of procedural and administrative legal relationships (diplomas, passports, bills of exchange, cheques); the conduct of the parties (transport of goods and/or passengers, witness statements, etc.); sanctions - typical of legal relationships of constraint.

As far as the employment relationship is concerned, for the employee, its object is the performance of work, while for the employer, it is the payment of

wages. Workers' compensation achieves an equation that somewhat stabilizes the sacrifices and benefits for both employers and employees. (Moran, 1987, p. 1095).

III. THE PARTICULARITIES OF THE LABOR RELATIONSHIP

According to doctrine, the legal relationship has been characterized as concrete-historical, social, volitional, value-based, immaterial, regulated by a legal norm in which its members behave as holders of rights and obligations through the realization of which the purpose of the legal norm is manifested (Craiovan, 2020, p. 486; Genoiu, 2007, p. 19-27; Nefliu, 2021, p. 107-109; Ungureanu, 2011, p. 51).

As regards the social feature, this refers to the fact that the legal relationship is established only between persons. According to the Romanian legislation in force, we consider both natural and legal persons, institutions, authorities, etc., any entity that is the holder of rights and obligations.

Considering the double volitional feature, this refers to the fact that in a legal relationship the will of the state in the form of legal rules and the will of the individual always meet. Whatever conduct the person wants to follow, he or she must adapt it to the legal rules in force. Thus, even in the case of marriage, which is a free union between a man and a woman, certain conditions expressly regulated by law must be met. This is also the case when debating an inheritance, purchasing a property/vehicle, authorizing a commercial activity and, of course, employment.

With respect to the value feature of the legal relationship, this refers to the fact that legal rules protect important values of society: life and health of the person, inviolability of the home, property, etc.

As regards the immaterial nature of the legal relationship, it is a social, immaterial relationship, not an ideological, superstructural one.

With reference to the historical feature, the legal relationship differs according to the era in which we find ourselves, being in a constant state of change, adapting to the needs of society. Thus, in Roman law, slavery was considered a thing, being considered something normal, with the evolution of society, the right to life became a fundamental right of the person regardless of race, origin, nationality, however, it was necessary the intervention of the legislator to abolish slavery, violation of the imperative rule being a crime.

In the following we will present the particularities of a legal employment relationship.

The right to work is enshrined in Art. 41 of the Romanian Constitution. This fundamental right is the constitutional guarantee that ensures citizens the ability to choose their profession and place of work and to carry out, according to their own training, an effective economic, administrative, social or cultural activity for remuneration, while respecting the appropriate conditions of safety and hygiene (Moroșteș, 2020, p. 49).

THE LEGAL RELATION. A SPECIAL LOOK AT THE EMPLOYMENT RELATIONSHIP

The legal employment relationship is characterized as bilateral, synallagmatic, commutative, social, onerous and involves relations of subordination between the two parties involved. At the same time, it enjoys stability, social protection and has a community of interests (Dorneanu, 2012, p. 96).

The legal employment relationship is always bilateral, being concluded between two persons, the one doing the work always being a natural person. Unlike the civil legal relationship, employment relationships do not involve several active and passive parties.

The legal employment relationship is synallagmatic, since both parties are at the same time both creditor and debtor, the rights and obligations of the parties being interdependent (Roș, 2023, p. 57).

The legal employment relationship is commutative because once the individual employment contract is concluded, the parties involved are aware of their rights and obligations.

The legal employment relationship is onerous, the work performed by the employee is always remunerated, one of the employee's rights is to be paid (Article 39(1) of the Labor Code) and Article 38 of the Labor Code expressly prohibits the employee from waiving his rights, so he cannot waive his salary either. Consequently, the employment relationship cannot be gratuitous.

The legal employment relationship is a legal relationship *intuitu persone*, being concluded both in consideration of the person of the employee and of the employer. It is precisely for this reason that the Labor Code also regulates the probationary period, both in favor of the employee and the employer, in order to observe whether they are compatible in the performance of the activity, i.e., the general objective of the company and the professional training of the employee. At the same time, the Labor Code prohibits forced labor.

The legal employment relationship is a relationship of subordination; during the employment contract, the employee is subordinate to the employer. At the beginning of the contractual relationship, the parties are in a certain legal equality, with the demand for work meeting the supply of work, through the conduct of contractual negotiations. Subsequently, however, the employee must be subordinated to the rules of the employer. This is different from the civil legal relationship because in the civil legal relationship the parties are equal.

The legal employment relationship is characterized by continuity and stability, the rule being the conclusion of the employment contract for an indefinite period, the exception being its conclusion for a fixed period.

The legal employment relationship is characterized by an increased protection of the state towards the employee, by regulating the employee’s rights both in the Labor Code, the Social Dialogue Law and other normative acts.

At the same time, the legal employment relationship is characterized by a community of interests between the two parties involved, through a mutual

conditionality: if the employee performs his duties properly, the employer obtains performance, which is reflected in the granting of bonuses, salary increases.

CONCLUSIONS

Following our research, we have been able to observe which are the elements of a legal employment relationship and at the same time which are its main features. Of course, the list is not exhaustive.

The main difference between a legal relationship and a legal employment relationship lies in the nature and purpose of the relationship. While a legal relationship may include a wide range of relationships, as discussed above, an employment relationship refers exclusively to the relationship between the employee and the employer.

Legal employment relationships are a vital part of the legal landscape in Romania, based on a precise legal framework that protects the rights of employees and helps employers manage their human resources.

A clear understanding of the elements and particularities of these relationships ensures effective cooperation between the parties and a significant contribution to the development of society and the economy.

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THE UNEASY CASE OF TORTIOUS INTERFERENCE WITH A CONTRACTUAL PROHIBITION OF ASSIGNMENT

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Abstract

Tortious interference with an existing contractual relation, induced by a third party, is regarded as a valid ground to impose extra-contractual liability upon the inducer. The following article aims to compare the different types of legal approach to this type of tort throughout a variety of national legislations. As it turns out, its field of application is quite broad and comprises both individuals and legal entities irrespective of their mercantile capacity. This leads to the issue about the possibility to apply the tort in case of a contractual prohibition of assignment. Despite the fact that all the necessary pre-requisites of this tort, set forth by the legislator or clarified by case law, can be established whenever there is a breach of the clause prohibiting assignment, national and supranational legislative acts seem reluctant to impose a tortious liability upon the assignee. The main reason for this circumstance is the influence, exerted by the respective provisions of the Uniform Commercial Code,that have subsequently been adopted by the United Nations Convention on Assignment in International Trade (2001). A glimpse upon various provisions of European legislations, as well as some relevant case law, reveal the lack of a uniform approach within the EU. The article puts to critical discussion the influence upon economic relations of an eventual introduction of extra-contractual liability imposed upon the assignee for inducing the breach of an anti-assignment clause.

Key words: *pactum de non cedendo; contractual prohibition of assignment; tortious interference with contracts; inducement for breach of contract; UN Convention on Assignment of Receivables in International Trade.*

INTRODUCTION

Interference with contractual relationships is widely regarded as a separate kind of tort, where a third party, stranger to a contractual relationship, induces the debtor to breach his or her contractual obligations, mainly in order to gain some lucrative advantage, e.g. to enter into a subsequent contract with the defaulting debtor or to disrupt the usual flow of the commercial affairs of the creditor. Extra-contractual liability is imposed upon those who knowingly do not respect existing contracts of other participants in civil and commercial affairs and attempt to achieve a positive result on the expense of their own immoral conduct (*McBride, N., Bagshaw, R.* p. 631 et seq).

The issue about the applicability of this tort has recently been a matter of recent discussion, given the grave implications caused by the COVID-19 pandemic upon social and economic relations worldwide. The better part of 2020 and 2021 was witness to an ever-growing demand for supplying protective masks and respirators to every continent. The short-lived, but acute struggle to obtain these products was sometimes accompanied by improper conduct, carried out by official representatives of several countries. It has been established that despite the existence of a contract to provide the said medical equipment to a certain destination, the seller has been offered a substantial amount of money to re-route this shipment to another country, thereby breaching the already concluded sales contract. Such an inducement even happened on the airport, just moments before the cargo airplane containing the goods took off[1].

Some of the affected parties even called such practice „contract theft" and even "modern piracy", since it caused not only legal and economic, but also moral and health implications to the society. A recent study of these unfortunate accidents offered to broaden the concept of tortious interference with contractual relations, so that it can encompass the civil liability of international entities, such as states, as well. It has been proposed that a normative basis for allocating this extra-contractual civil liability whenever a third party induces the breach of a sales contract can be found in the provision of art. 7 (1) of the CISG (*Fachetti Silvestre, G.(2021*). The drafters of the Convention have provided a uniform requirement to observe good faith in international trade.

As it turns out, tortious interference with contractual relations is a versatile concept capable of adapting to various circumstances and thus applicable to virtually every kind of contractual obligation. However, it would seem that there is a problem to acknowledge its applicability to the case of a contractual prohibition of assignment.

THE UNEASY CASE OF TORTIOUS INTERFERENCE WITH A CONTRACTUAL PROHIBITION OF ASSIGNMENT

I. THE CONTRACTUAL PROHIBITION OF ASSIGNMENT AND ITS INTERRELATION WITH THE TORT IN EUROPE

Also known as "*pactum de non cedendo*", this particular contractual arrangement consists of agreement between a debtor and a creditor, whereby a legal obligation is placed upon the not to transfer the receivable arising out of the contract. The clause can be bargained with respect to every otherwise transferable receivable. Therefore, it is of no surprise that there are legal provisions throughout different national legislations aimed at regulating the legal consequences of a *pactum de non cedendo*. The main legislative is whether parties can effectively exclude an asset from participating in civil and commercial affairs solely by their own volition.

I. 1. The clash between the principle of free alienability of assets and the principle of the parties' will

Despite some national differences, a comparative overview of the contractual prohibition of assignment would reveal that there are two main types of legislative approach to the institute. The former pre-supposes the free alienability of assets and rules out every possibility for contractual parties to exclude a receivable from participation in civil and commercial affairs. Usually, the legislative embodiment of this principle still retains the possibility for the debtor and the creditor to bargain a contractual prohibition of assignment; however, this arrangement may not tamper with the subsequent change of the creditor. Should the creditor dispose of the receivable at variance with the contractual prohibition, the assignment is valid.

The latter approach is to provide *pactum de non cedendo* with a legal effect *vis-à-vis* third parties, thus effectively excluding the possibility for the creditor to transfer the receivable. National legislations differ about the intensity of the contractual prohibition of assignment, i.e. whether it can be effectively held against any third party, or there must be some accompanying circumstances in the legal sphere of the assignee (such as the knowledge about the *pactum de non cedendo*) which justify the exclusion of the transfer. Therefore, the purported attempt of the creditor to transfer the receivable will either be considered outright void or the debtor may be able to assess whether it tampers with his interests.

In order to assess whether tortious interference with a contractual prohibition on assignment can be imposed whenever the assignee (or anyone else) has induced the creditor to assign a receivable in breach of a *pactum de non cedendo*, one must take into consideration some circumstances. There is no need to apply this type of tort whenever the respective national legislator has enacted the possibility to effectively exclude the transferability of a receivable via a *pactum de non cedendo* with regard to third parties. This way, the debtor enjoys a high level of legal protection and can simply refuse to pay its new creditor, stating that there is a contractual prohibition of assignment. The most categorical type of legal approach can be found in the provisions of § 399 of the **German Civil**

Code[2]. The common rule, applicable to all participants in civil transactions, provides that an assignment at variance with a *pactum de non cedendo*, should be considered void. This rigid legislative concept has been somewhat toned down by the introduction of § 354a of the **German Commerce Code** in 1994[3]. In order to promote the transfer of receivables among persons acting in a mercantile capacity, the German legislator provided that a *pactum de non cedendo*, agreed between merchants and entrepreneurs does not preclude the subsequent transfer of the receivable. At the same time, however, this provision granted the debtor with the possibility to pay its initial creditor and, ultimately, to ignore the transfer, whenever a contractual prohibition of assignment is present. Despite the fact that the German legislator has enacted the possibility to impose extracontractual liability upon any third party who deliberately damages another person (§ 826 of the German Civil Code)[4], this tort will not be applicable to the system of legal relationships arising out of a *pactum de non cedendo* under German law, due to the high level of legal protection attributed to the debtor, who can simply refuse to pay the new creditor. Thus, there is no point in bringing an action vis-à-vis the assignee, despite his intention to interfere with the contractual prohibition of assignment.

The same type of legal approach is embodied in the provisions of art. 164, para. 1 of the **Swiss Civil Code**[5], art. 3:83, para. 2 of the **Civil Code of the Netherlands**[6], art. 509, para. 1 of the **Polish Civil Code**[7] et seq.

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[2] Cf. Art. 399 BGB (translated) - *Exclusion of assignment in case of change of contents or by agreement A claim may not be assigned if the performance cannot be made to a person other than the original obligee without a change of its contents or if the assignment is excluded by agreement with the obligor*.

[3] Cf. Section 354a HGB (translated) - (1) *If the assignment of a monetary claim is excluded by agreement with the debtor pursuant to section 399 of the Civil Code and the legal transaction underlying such claim is a commercial transaction for both parties, or if the obligor is a legal person under public law or a special fund under public law, then the assignment nonetheless will be effective. The debtor may, however, render performance to the previous creditor with discharging effect. Agreements in derogation herefrom are void. (2) Subsection (1) does not apply to a claim under a loan agreement where the creditor is a credit institution within the meaning of the Banking Act.*

[4] Cf. Art. 826 BGB (translated) - *Intentional damage contrary to public policy A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage*.

[5] Cf. Art. 164 of the Swiss Civil Code (translated) – *The creditor can transfer his receivable without the consent of the debtor, as long as this effect is not hindered by a legal provision, a contractual arrangement or because of the nature of the receivable*.

[6] Cf. Art. 3:83, para. *2* of the Civil Code of the Netherlands - . *The transferability of a debt-claim may be excluded by an agreement between the creditor and debtor*".

[7] Cf. Art. 509 of the Polish Civil Code (translated) - *Assignment. § 1. A creditor can, without the debtor's consent, transfer a claim to a third party (assignment) unless the same is contrary to the law, a contractual stipulation or the nature of the obligation*

It is worth mentioning that the Belgian legislator undertook a major reform in the law of obligations, whereby the Belgian Parliament adopted a new Book 5 of the Belgian Civil Code containing legal provisions on general contract law, applicable to contracts concluded after 01. January 2023. Part of this modernization process is the introduction of art. 5:174 of the **Belgian Civil Code**, which deals with the legal effect of a contractual prohibition of assignment. As a general rule, the assignment in breach of such a restriction will be valid and can be enforced vis-à-vis the debtor. However, where the assignee acts in bad faith and intentionally induces the creditor to dispose of the receivable, the assignment cannot be enforced vis-à-vis the debtor due to the assignee's knowledge of the contractual restraint[8]. As one can deduce, the Belgian legislator considers the intentional interference with a contractual prohibition of assignment to be the very reason why a debtor cannot be expected to perform to a new creditor. Instead, the debtor retains the possibility to perform to the original creditor, as if no assignment has taken place.

Furthermore, one cannot find a model to resolve the conflict between the legal interests of the debtor and the assignee in national legislations who represent the other legal extreme – i.e. they grant an efficient legal protection of the assignee by completely excluding an extracontractual liability vis-à-vis the debtor. Among them worth mentioning are the provisions of § 166, para. 3 of the **Estonian Law on Obligations**[9], as well as art. 6:195 of the **Hungarian Civil Code**[10]. A similar approach, clearly in favour of an unhindered transfer of receivables, has been incorporated into the provision of art. L.442-3 of the **French Commercial Code** (amended as of 03. December 2020)[11], whereby contractual

[8] Cf. Art. 5:174 of the Belgian Civil Code, as follows – "*La cession d'une créance contraire à une interdiction de cession contractuelle n'est pas opposable au débiteur cédé lorsque le cessionnaire est tiers complice de la violation de cette interdiction*."

[9] Cf. art. 166 of the Estonian Law on Obligations (translated) –

(2) Agreements concluded between an obligor and an obligee whereby assignment of the claim is precluded or the right to assign the claim is restricted have no effect against third parties.

(3) The provisions of subsection (2) of this section shall not preclude or restrict the liability arising from agreements entered into between the original obligee and the obligor for violation of the prohibition to preclude or restrict the right to assign the claim. The person to whom the claim is assigned shall not be liable for violation of such agreement.

[10] Cf. art. 6:195 of the Hungarian Civil Code (translated) –

(*1) Any term excluding the assignment of a claim shall be null and void in respect of third parties.*

(2) The provision contained in Subsection (1) shall not affect the assignor's liability for any breach of the term excluding assignment. Any contract term that allows the right to terminate or stipulates the payment of a contractual penalty for non-performance shall be null and void.

[11] Cf. Article L442-3 (Modifié par LOI n°2020-1508 du 3 décembre 2020) of the French Code of Commerce:

Sont nuls les clauses ou contrats prévoyant pour toute personne exerçant des activités de production, de distribution ou de services, la possibilité :

restraints on alienation of receivables are pronounced null and void. Thus, the potential assignee cannot be held liable for inducement of breach of contract, since there is no valid legal obligation for the creditor to refrain from transferring the receivable.

I. 2. The French legal approach

On the other hand, for a period of over two centuries, spanning from its enactment in 1804 until 2016, the French Civil Code neither provides rules on the contractual prohibition of assignment, nor does it contain tortious interference with contracts[12]. *Pactum de non cedendo* was perceived as a variation of the general clause prohibiting alienation, mostly because of art. 1689 of the French Civil Code (in its version from 1804 until 2016) that regards the assignment as a type of a sale-purchase contract[13]. That is why French scholars considered a contractual prohibition of assignment to have a limited effect in a manner that it cannot lead to the exclusion of the receivable from further participation in civil and commercial affairs (*Huc, Th., p. 345-349*). At the same time, the original drafters of the Code Civil never regarded tortious interference with contracts as a separate kind of tort. Instead, they chose to enact *un régime général de la responsabilité délictuelle*, a general tort clause, that is abstract and highly applicable in various scenarios, thereby allowing the court to determine the presence of the elements necessary to impose tortious liability (art. 1382 of the French Civil Code until 2016, corresponding to art. 1240 of the French Civil Code[14]).

As it would seem, until 2016 the prevailing view amongst French scholars was in favour of a restrictive effect of any contractual prohibition of alienation in civil law. This would equally apply to pactum de non cedendo as well, so that an assignment in breach of such a restriction will be considered valid, with no possibility retained for the debtor to refuse paying the assignee. Thus the existence of the first necessary element in the form of a weakened legal position of the debtor is present. The second one should be a rule which prevents the assignee from intentionally interfering with the legal obligation of the creditor not

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a) De bénéficier rétroactivement de remises, de ristournes ou d'accords de coopération commerciale ;

b) De bénéficier automatiquement des conditions plus favorables consenties aux entreprises concurrentes par le cocontractant ;

c) D'interdire au cocontractant la cession à des tiers des créances qu'il détient sur elle.

[12] Pursuant to the major amendments of the French Civil Code in 2016, the French legislator has specifically enacted rules on the contractual prohibition of assignment (art. 1321, para. 4), as well as a general duty to "respect" the contract of other persons (art. 1200 of the French Civil Code).

[13] Cf. Art. 1689 Code Civil in its version until 2016 provides that - *Dans le transport d'un droit ou d'une action sur un tiers, la délivrance s'opère entre le cédant et le cessionnaire par la remise du titre*.

[14] Cf. Art. 1240 of the French Civil Code - *Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer*.

to dispose of the receivable. As it turns out, French case law has acknowledged such a possibility, based entirely on the general tort clause.

As early as 1905, the French Court of Cassation has acknowledged the admissibility of such a tortious action[15]. The facts of case reveal that several famous circus artists have concluded a contract with *Casino de Paris* to perform a sophisticated acrobatic trick during the grand opening ceremony of the *Casino*. The parties agreed upon a penalty clause of 18 000 French francs with regard to non-performance of the acrobatic trick. Two days prior to the grand opening the circus artists paid the penalty clause and avoided the contract. This led to postponing the date of the grand opening and the necessity to conclude new contracts with other, less popular circus artists. Ultimately, the Casino had its grand opening, however the event was rather drear and unattended, mainly because of the significant delay and the absence of the famous circus artists. It was subsequently established that the *Isola* brothers, owners of *Theatre Olympia*, offered a significant sum of money to the circus artists should they agree to terminate the contract with *Casino de Paris* and to perform their trick on the stage of the theatre instead on the grand opening of the Casino. Upon finding out, *Casino de Paris* brought an action vis-à-vis the Isola brothers. The court ruled that there is a tort, committed by the defendants, who intentionally induced the circus artists and thus prevented the performance of the previously concluded contract. The court found a legal basis for allocating liability upon the Isola brothers in the general tort clause, incorporated in art. 1382 of the French Civil Code (in the version until 2016).

Subsequent cases only affirmed the reasoning adopted by the court that such an action is admissible whenever there is an intentional interference with another person's contract, irrespective of the type of the contract and the legal obligations arising from it. The same principle applies to the obligations *non-facere* (to refrain from doing something) as well. In a case, a buyer of a machine acquires the ownership over it and takes upon himself a legal obligation not to dispose further with it. However, a competitor of the seller intentionally induces the original buyer to breach the non-alienation agreement and to resale the machine. The original seller brings a tortious action vis-à-vis his competitor, which is affirmed. The court finds that there is a breach of a *pactum de non alienando*, the general non-alienation clause (*Palmer, V., p. 323*), induced intentionally by the competitor.

Perhaps the main difference between the general tort clause, on the one hand, and the case-law-developed intentional interference with contracts, on the other, lies in the requirement of "*mal foi*", or bad faith, which French courts insist

[15] Cf. Cass Civ. S. 1905.II.284, via **Palmer, V.**, A Comparative Study (from a Common Law Perspective) of the French Action for Wrongful Interference with Contract. – The American Journal of Comparative Law, Spring 1992, vol. 40, No. 2, p. 305-306. - https://doi.org/10.2307/840563

to be proven as a fact of the case. However, scholars note that French courts adopted a broad meaning of the "bad faith" requirement that encompasses various states of mind, including fraudulent conspiracy, intention to injure and previous knowledge of the contract *(Palmer, V., p. 323)*.

To my view, this willingness of French courts to qualify an intentional interference with a contract is hardly surprising, since this particular type of behavior has long been frowned upon in France. The aforementioned court judgments from the beginning of the 20th century are actually a reverberation of a long since gone normative rule from feudal times and from the *Ancien Régime*. It is a well-known fact that the plague epidemic brought about severe consequences throughout the European continent, one of them being a considerable shortage of workforce. Perhaps in order to ensure the harvest, an Ordinance from 30. January 1350, issued by the French King John II of France (1350 – 1364), forbid the practice to convince workers to leave their current employer by offering them a higher wage. Despite the fact that the provided sanction was of a public law nature, this Ordinance testifies that even at this early feudal period, the act of intentionally convincing someone to breach an existing obligation arising out of a service contract was considered unlawful. This act, known as *débauchage*, remained prohibited and even outlived feudal times.

Several centuries later, in the time of the guilds, *débauchage* was once again prohibited by guild law. The right to compensation for damages sustained because of an inducement for breach of service contract was acknowledged by an Ordinance from 16. October 1720. Despite the abolishment of the guild system after the French revolution from 1789, the act of *débauchage* was still considered unlawful and undesired. In order to protect the interests of the good-faith employer, as early as 1803 French authorities introduced the *livret* - the predecessor of the employment record book - an official personal document recording the employment status. Every employer was supposed to enter the termination of the service contract. Should an employer hire a person despite the lack of an entry of the termination a previous service contract, civil liability was imposed upon him (*Palmer, V., p. 319 – 320*).

Despite the fact that *débauchage* did encompass the narrow sphere of service contracts, at the beginning of the 20th century French jurisprudence was well aware of the institute and thus had no trouble with is unequivocal application. What actually occurred was that French case law, using the general tort clause, stretched out the sphere of application of *débauchage* to all kinds of contracts and provided the common principle that intentional interference with another person's contractual obligation will be considered a tort.

However, it is noteworthy that there is no record of a French court judgment providing compensation for intentional interference with a contractual prohibition of assignment. This idea, however, is no stranger to modern literature (*Kämper, L., p. 957*).

I. 3. The Common Law Approach

National legislations belonging to the common law family have traditionally acknowledged the possibility to allocate extracontractual liability upon the person who intentionally interferes with another person's contract. In sharp contrast to many civil law legislations, the common law has developed a separate kind of tort, known as "*inducement for breach of contract*".

Despite some isolated views tracing the origin of the institute back to the plague epidemic of the 14th century – in a stunningly similar set of circumstances to Continental Europe (*Dobbs, D., p. 337-340*, who states that labor shortage caused by the plague epidemic in England was the reason why King Edward III prohibited enticing a laborer from his hire by his Ordinance of Labourers from 1349), most modern scholars agree that the earliest encounter of the concept can be found in the famous case of *Lumley v. Gye (1853)*[16]. The facts around the case reveal that the signer Johanna Wagner agreed with Benjamin Lumley to sing at *Her Majesty's Theatre* and to refrain from entering into other engagements for the said period of time. The opera impresario Frederick Gye convinced Ms Wagner to sing at the stage of the Royal Italian Opera and to breach her obligation to Lumley. An action was brought vis-à-vis Gye. *Crompton J* awarded damages for interfering with the contract between Ms Wagner and Mr Lumley.

It is worth pointing out that until this case, English case law did not acknowledge a general duty for third persons to avoid interfering with other person's contracts[17]. Actually, *Crompton J* did not depart from this rule, but stated that in exceptional cases such a conduct might be considered a tort, should it have been deliberately undertaken by a third party, with the intention to obstruct the contractual performance of the debtor - „ *… an instance and branch of a wider rule, or whether it be, as contended by the defendant, an anomaly and an exception from the general rule of law on such subjects, it must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant... commits a wrongful act for which he is responsible at law.*" Several decades later, the applicability of the tort vis-à-vis every contractual relationship was established by *Bowen v. Hall (1881)*[18] and by legal scholars (*McBride, N., Bagshaw, R., p. 631*).

A remarkable circumstance about *Lumley v. Gye (1853)* is that the legal dispute arises from the performance of an obligation under a service contract, just like in France. To my view, the resemblance of situations is stunning, which might suggest that there is a common principle, shared on both sides of the English Channel, entrenched in the origin of the tort. However, contemporary

[16] Cf. *Lumley v. Gye [1853] EWHC QB J73, (1853) 118 ER 749.*

[17] „*…As a general proposition of law... no action will lie for procuring a person to break a contract*."

[18] Cf. *Bowen v Hall (1881) 6 QBD 333*

scholars do not seem inclined to state that there is a historical connection between these two types of legal approach (*Palmer, V., p. 303 - These parallels follow each other so closely that one is tempted to say that there must have been some cross-fertilization of legal ideas across the Channel. Yet on closer inspection this seems highly unlikely, for all of the internal evidence – the opinions themselves, the authorities cited, the commentary and doctrine surrounding them – is devoid of any reference or allusion to a foreign law.*").

However, another similarity between French and the English law regarding the tort in case can be found in the facts of *British Motor Trade Association v. Salvadori (1949)*[19]. Just like in France, a British court ruled that the inducement to breach of an anti-alienation clause (*pactum de non alienando*) should be considered tortious. The facts are as follows: after the Second World War the demand for automobiles was substantially higher than the supply. In order to prevent speculative re-sale, the British Motor Trade Association included a non-alienation clause in every sale contract, whereby the buyer obliges himself to refrain from transferring the automobile for a period of one year after its purchase. A third party (Salvadori) induced the buyer to dispose of the newly acquired vehicle and the Association brought an action for tortious interference. The court granted damages to the Association and the principle that interference is possible even with a *pactum de non alienando* was re-affirmed in subsequent court judgments[20].

However, it should be pointed out that there is a major difference between the French and the English approach to the legal consequences of the contractual prohibition of assignment. As it has been already pointed out, prior to 2016 there was no explicit rule on *pactum de non cedendo* in the French Civil Code, which led the majority of scholars to perceive this contractual arrangement as a mere case of the general non-alienation clause. English law did adopt a more complex type of legal approach. After being witness to some shifts in the perception of *pactum de non cedendo* throughout the years, case law established the judgment on *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd (1993)*[21] *a*s the primary authority on determining the legal consequences of a contractual prohibition of assignment. The court provided that the legal effect of *pactum de non cedendo* should be construed individually, given every single case and that it depends entirely on the volition laid down by parties. This would mean that given on the mutual intention of debtor and creditor, a contractual prohibition of

[19] Cf. *British Motor Trade Association v Salvadori [1949] Ch 556.*

[20] It is interesting to contemplate on the fact that the British Motor Trade Association was plaintiff in a case regarding tortious interference with a non-alienation clause of sold vehicles on more than one occasion. The court judgment on *British Motor Trade Association v Gray [1951] SC 586* reveals that without any hesitation the judge affirmed the action and even cited *Lumley v. Gye (1853)* as applicable precedent.

[21] Cf. *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1993] UKHL 4, [1994] 1 AC 85.

assignment may either lead to the absolute exclusion of a receivable from participation in civil and commercial affairs or may simply be regarded as a personal promise not to dispose of the receivable with a limited effect[22].

Thus, English courts embraced the "principle of will" theory in its fullest expression. The same flexible approach was adopted by contemporary British scholars as well (*Leslie, N., Smith, M., p. 575-576.* However, it is acknowledged that the most desired form of a contractual prohibition of assignment is the one that produces an *erga omnes* effect and can be enforced vis-à-vis any third party - „*The aim of such a term would be to render invalid any purported assignment of the benefit of a contract. The debtor would remain obliged to render performance, not to the assignee, but only to the assignor. Such a provision would not preclude the assignor from transferring the benefit owed to him to a third party after he received this from the debtor. This sort of prohibition on assignment is likely to be the most common.* ").

Since parties are generally free to determine the exact legal consequences of a contractual prohibition of assignment, it would be possible to limit the effect of this arrangement to the parties who stipulated it. This naturally brings up the question – is it possible in this case to be held liable for intentionally interfering with the *non-facere* obligation of the creditor? At first glance it seems that all the necessary ingredients are present, since English courts acknowledge the existence of a separate tort and at the same time allow parties to attribute to their contractual prohibition of assignment the legal consequences they consider to be most suitable. This would mean that if parties have limited the effect of a *pactum de non cedendo* to a mere personal promise of the creditor, inducing the breach of the legal obligation arising thereof seems to be reasonable. While modern legal scholars have no doubt that such a malicious conduct on behalf of the assignee should be regarded as tortious (*Bridge, M.*- "*The making of this contract of assignment would amount to a breach of the first contract by the assignor and might also render liable the assignee in the tort of inducement of breach of contract.*"; the same view is expressed in *Beale, H., Louise Gullifer, Sarah Paterson, p. 203-230, footnote № 65*), they seem to be having difficulties in the estimation of the exact scope of damages that the debtor has sustained in this situation (*Beale, H., Louise Gullifer, Sarah Paterson,* p.215 - „*…however, it is*

[22] It is worth mentioning that there is a separate set of rules on assignment between partners acting in a mercantile capacity. The provision of the Business Contract Terms (Assignment of Receivables) Regulations, enacted in 2018, are aimed at facilitating the access of micro-, small- and medium-sized enterprises to financing via factoring and securitization in order to ensure their liquidity. Thus, the modern English legislator provided that „2. - (1) *Subject to regulations 3 and 4, a term in a contract has no effect to the extent that it prohibits or imposes a condition, or other restriction, on the assignment of a receivable arising under that contract or any other contract between the same parties*." By no means this provision should be regarded as the general rule, since it is aimed exclusively at business transactions.

very difficult to see that the customer has suffered quantifiable loss."). Just like in France, despite the presence of all necessary elements, there are no available English court judgments on tortious interference with a *pactum de non cedendo.*

II. IN THE SEARCH FOR A SUPRANATIONAL RULE

The evident lack of a purely national rule, aimed at resolving the conflict between the legal interests of the debtor and the assignee by allocating tortious liability upon the latter in the case of an intentional interference with a contractual prohibition of assignment leads us to the supranational acts regarding this matter. Perhaps the most resolute supranational attempt to facilitate the transferability of receivables in international business relations by limiting the legal consequences of a *pactum de non cedendo* is embodied in the provisions of ***The United Nations Convention on The Assignment of Receivables in International Trade (2001)***[23], also known as the New York Convention. Despite the fact that the Convention has not still entered into force, since it required five ratifications[24], its provisions are a clear expression of contemporary trends in transnational business law, one of them being the facilitation of access to financing for small- and medium-sized enterprises.

With regard to the contractual prohibition of assignment, the drafters of the Convention adopted a balanced approach. On the one hand, they explicitly limited the effect of such an arrangement solely to stipulating parties[25]. At the same time, perhaps in order to prevent undermining the legal nature of this contractual arrangement, they provided contractual liability of the creditor vis-à-vis the debtor for failing to comply with the promise not to transfer any receivables arising out of their contract.

However, even at a relatively early stage in the course of the preparatory work on the provisions of the Convention, conflicting views were expressed regarding the extracontractual liability of an assignee who intentionally interferes with a contractual prohibition of assignment. One view was that releasing the assignee from liability towards the debtor might result in the debtor having to pay the assignee, while being unable to recover from the assignor damages suffered by the debtor as a result of the assignment. Such a situation might arise, for example, if the assignor had, in the meantime, become insolvent. In addition, it was pointed

[23] Full text and additional recources available at - https://uncitral.un.org/en/texts/securityinterests/conventions/receivables (accessed on 10.07.2023).

[24] The current status of the ratification procedure throughout different national legislations can be observed here - https://uncitral.un.org/en/texts/securityinterests/conventions/receivables/status (accessed on 10.07.2023).

[25] Cf. Article 9. Contractual limitations on assignments

1. An assignment of a receivable is effective notwithstanding any agreement between the initial or any subsequent assignor and the debtor or any subsequent assignee limiting in any way the assignor's right to assign its receivables.

out that such an approach might unduly restrict the autonomy of the parties to agree that certain receivables arising between them were not assignable, and would, in addition, be inconsistent with the approach taken in a number of national legal systems.

The prevailing view, however, was that extending the liability of the assignor for violating an anti-assignment clause to the assignee, would result in assignees having to examine a large number of contracts in order to ascertain whether they included anti-assignment clauses or not. That is why the members of the Working Group initially decided to completely exclude any tortious liability of the assignee[26].

The tides changed in 1999, as the issue regarding the legal relationship between the debtor and the assignee was once again put up for discussion. With respect to tortious liability, once again there was a variety of perspectives. One view was that, if the aim of the draft Convention was to provide easier access to credit, it should avoid burdening the assignees, as potential financiers, with any liability in connection with the breach of an anti-assignment clause. The opposite view was that, under the laws of many countries, certain types of misconduct by the assignee might engage its tortious liability (for example, in the case of a possible inducement of the assignor by the assignee to assign receivables in violation of an anti-assignment clause with the intent to harm the interests of the debtor). It was stated that, to the extent that such tortious liability would only sanction malicious behaviour on the part of the assignee, the domestic tort law should apply. In addition, it was observed that mere knowledge by the assignee of the existence of an anti-assignment clause should not give rise to liability of the assignee, since such a possibility might deter potential assignees from entering into receivables financing transactions.

After discussion, the Working Group agreed that the final version of art. 9, para. 2 of the Convention regarding the legal consequences of a *pactum de non cedendo* should be redrafted to ensure that an assignee would have no contractual liability for breach of an anti-assignment clause by the assignor, while it would defer to domestic law to sanction manifestly improper behaviour[27].

The revised approach was ultimately adopted and on 12. December 2001, by Resolution 56/81 The General Assembly of the United Nations adopted the final version of the UN Convention on the Assignment of Receivables in International Trade. The provision of art. 9, para. 2 adopts the view that mere knowledge of the assignee regarding the existence of a *pactum de non cedendo* is not enough to constitute tortious interference. The official Explanatory Report

[26] Cf. Yearbook of the United Nations Commission on International Trade Law, 1997, Vol. XXVIII, p. 134, where these two conflicting views are being considered.

[27] Cf. "Assignment in Receivables Financing," United Nations Commission on International Trade Law Yearbook 30 (1999): 55-164, p. 63

accompanying the Convention explicitly states that the aforementioned provision does not exclude the extracontractual liability of the assignee, but merely limits its sphere of application[28].

To my view, this approach is rather self-explanatory. The Working Group's main ambition is to affirm the assignment as a means to resolve liquidity issues in small- and medium-sized enterprises. Part of this process is to facilitate the transfer of receivables in international business, which cannot be achieved if the assignee is constantly facing a possible tortious action. That is why, as a general rule, mere knowledge of the existence of a contractual prohibition of assignment shall not be enough to allocate extracontractual liability on the assignee.

However, the wording of art. 9, para. 2 of the UN Convention is to be interpreted in a sense, that it does not *prima facie* exclude tortious interference with a contractual prohibition of assignment. Actually, such a situation should be regarded as an exception. The "common rule" is that the assignor initiates the transfer, mainly because of lacking liquid funds. The assignee considers this transfer an investment, since the price paid for the receivable is lower than its nominal value. Only in exceptional cases, the initiative to dispose of a receivable originates from the assignee. Once possible reason for this conduct may be that the assignee strives to become the new creditor of this particular debtor, in order to be able to exert economic pressure. This may be the case where the assignee and the debtor may be involved in the same branch of economic activity and the assignee uses the assignment as a means to press an economic competitor. Another possible motive can be found in the case, where the prospective assignee wishes to acquire shares from the debtor, but has received a refusal. In this case, this person will be very interested to acquire a receivable vis-à-vis the debtor, so that in the case of non-performance of the debtor, he will be in a strong position to propose a *datio in solutum* – transfer of shares instead of payment of the receivable.

As these two cases suggest, the motives of the assignee are immoral and undoubtedly deviate from good faith business practice. They cannot be regarded as an expression of the "common rule" as well. Actually, the aforementioned two cases can give a rational explanation why the drafters have not dealt with tortious interference within the Convention. On the one hand, their aim is simply to boost international business transactions by removing some obstacles preventing the unhindered transfer of receivables. It goes without saying that part of this process is to provide a substantial level of legal protection of the assignee. At the same

[28] „*However, if such liability exists, the Convention narrows its scope by providing that mere knowledge of the anti-assignment agreement, on the part of the assignee that is not a party to the agreement, does not constitute sufficient ground for liability of the assignee for the breach of the agreement.*", p. 34-35 - https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ctc-assignment-convention-e.pdf (accessed on 10.07.2023).

time, however, the members of the Working Group cannot tolerate malicious conduct exercised by the assignee and provide that should national applicable law contain an explicit provision allocation extracontractual liability upon the assignee in this situation, the Convention will not prevent this to happen. The assignee cannot refer to art. 9, para. 2 of the Convention in an attempt to exclude the liability for tortious interference with *pactum de non cedendo*.

It is worth mentioning that some earlier scholars have expressed their doubts about the existence of a tortious liability in this case (*Vogt, N., Kremslehner, Fl., p. 191*). Others interpret art. 9, para. 2 of the Convention as an attempt of the drafters to exclude any liability of the assignee vis-à-vis the debtor, but to admit that such a liability may be founded on the applicable national legislation (*Sigman, H., Smith, E., p. 739-740* - „*This language of the Convention, clearly intended to protect innocent assignees from tortious interference claims by debtors, arguably may leave some residual risk of such a claim being made by a debtor under national law against an assignee who has knowledge of the anti-assignment term and nevertheless proceeds to take the assignment.*").

The prevailing view among modern scholars is that the UN Convention does not eradicate *a priori* the possibility to allocate tortious liability upon the assignee, but simply excludes mere knowledge of the assignee about the anti-assignment clause as valid grounds for an action; the possibility for a tortious action is however intact (*Schütze, E., p. 199* – „*Der Zessionar, der nicht Partei der Abtretungsbeschränkung war, kann demgegenüber nur deliktisch haften*."

To my view, the set of rules, prepared by the Working Group on the contractual prohibition of assignment, represent a fairly balanced legal approach. Drafted with the aims to promote transferability of assets and to relieve parties from burdensome litigation in mind, one should not forget that the provisions of the UN Convention deal exclusively with assignment in international trade (art. 3 of the Convention). Consumer affairs are explicitly excluded from the scope of application (art. 4 of the Convention), which is narrowed down to persons acting in a mercantile capacity *(Bazinas, S., p. 54)* - professionals who engage in every-day business affairs, often involving the assignment of receivables. These persons are in need of a rule that promotes unhindered transferability of assets, so that a wide range of objects may be used to acquire economic advantage. Thus, the provision of art. 9 does not provide them with a level of legal protection that might be considered even excessive regarding their needs. Where a consumer has a justifiable interest to deal solely with the original creditor and to prevent further transfer of the receivable, a professional does not. This liberal approach encompasses mere knowledge of the assignee as well. What is does not encompass, however, is a case of malicious conduct and intentionally tampering the contractual prohibition of assignment, since both do not fall under the definition of sound international business practice (art. 9, para. 2 of the Convention).

It is not surprising that this balanced approach, put forth by the Working Group, has served as a model for subsequent supranational attempts to harmonize the anti-assignment clause, such as art. 19, para. 3 and art. 20 of the OAS Model Inter-American Law on Secured Transactions from 2002[29], art. 13, para. 2 of the UNCITRAL's Model Law on Secured Transactions from 2016,[30] as well as the draft versions of UNIDROIT Model Law on Factoring from 2022[31].

It would seem that boosting the transferability of receivables by limiting both the effect of a *pactum de non cedendo* and the scope of application of the tortious interference with this arrangement proved to be a balanced approach. Quite logically, national legislators used it as a role model in some recent amendments of civil codes (*Gardos, P., p. 9*), such as paragraph 1396a of the Austrian Civil Code. Introduced in 2005, this provision is applicable to persons acting in a mercantile capacity and leaves consumers out. As it is evident, the Austrian legislator follows quite closely the philosophy of the UN Convention on the Assignment, as paragraph 1396a of the Austrian Civil Code not only limits the effect of a *pactum de non cedendo* solely to contracting parties, but also excludes the assignee's tortious liability for inducement of breach of contract in case of a mere knowledge of such an arrangement. Nevertheless, this provision is regarded

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[29] The provisions state the following - Article 19 - *A security interest in a receivable, other than a claim under a letter of credit, is effective notwithstanding any agreement between the account debtor and the secured debtor limiting the right of the secured debtor to grant security in or assign the receivable. Nothing in this Article affects any liability of the secured debtor to pay damages to the account debtor for breach of any such agreement.;*
Article 20 - The account debtor may not waive the following defenses: I. Those arising from fraudulent acts on the part of the secured creditor or assignee. The full text is available here - http://www.oas.org/en/sla/dil/docs/secured_transactions_book_model_law.pdf (accessed on 11.07.2023).

[30] The provisions state the following - *Article 13. Contractual limitations on the creation of security rights in receivables 1. A security right in a receivable is effective notwithstanding any agreement between the initial or any subsequent grantor and the debtor of the receivable or any secured creditor limiting in any way the grantor's right to create a security right. 2. A person that is not a party to the agreement referred to in paragraph 1 is not liable for the grantor's breach of the agreement on the sole ground that it had knowledge of the agreement*
https://uncitral.un.org/en/texts/securityinterests/modellaw/secured_transactions (accessed on 11.07.2023).

[31] Cf. Model Law on Factoring Working Group Sixth session (hybrid) Rome, 28–30 November 2022, latest version available at - https://www.unidroit.org/wp-content/uploads/2023/04/Study-LVIII-A-%E2%80%93-W.G.6-%E2%80%93-Doc.-7-Report.pdf (accessed on 11.07.2023 г.) *Article 8 — Contractual limitations on the transfer of receivables 1. A transfer of a receivable is effective notwithstanding any agreement between the debtor and a transferor limiting in any way a transferor's right to transfer the receivable. 2. Neither a transferor nor a transferee is liable for breach of an agreement referred to in paragraph 1, and the debtor may not avoid the contract giving rise to the receivable on the sole ground of the breach. A person that is not a party to an agreement referred to in paragraph 1 is not liable for the transferor's breach of the agreement on the sole ground that it had knowledge of the agreement.*

as somewhat controversial by some Austrian scholars, who consider art. 1396a ABGB as an unnecessary generalization of several supranational provisions, who have a very specific scope of application – international assignment, factoring etc. It is argued that promoting these rather specialized provisions to a general rule, applicable to all actors in mercantile relations, would not prove to be a sensible legal solution (*Spunda, A., p. 195*).

CONCLUSION

There is a good reason why, as a general rule, there are no national legislations who combine the inter partes effect of a contractual prohibition of assignment with an allocation of extracontractual liability for breach of this agreement. Usually, the legislator limits the legal consequences of a pactum de non cedendo solely between contracting parties in order to promote business. So, whenever a contractual prohibition of assignment is bargained between consumers or other persons not acting in a mercantile capacity, there are much better suited means to provide legal protection of their interests, such as nullity of the assignment in breach of this arrangement, or preserving the right of the debtor to perform to the original creditor. It is simply not prudent to subject a consumer to a limited legal protection and at the same time to encourage him to bring a tortious action vis-à-vis the assignee. The consumer has an interest to retain the original creditor and not to enter into tedious civil litigation.

On the other hand, merchants and entrepreneurs are professionals. A change of the creditor, conducted even in breach of a stipulation to refrain from an assignment, will not have such a detrimental legal and economic effect upon those persons. Therefore, a limited effect of a pactum de non cedendo should be considered reasonable. The same idea – to promote business, is the reason why, as a common rule, no extracontractual liability should be allocated upon the assignee, as this would prevent the very idea of free transferability of assets in a market economy. However, the legislator cannot turn a blind eye on a case of abuse of law and whenever an assignment is merely an instrument of the assignee to achieve an immoral or even unlawful result, it is fair to hold him liable for maliciously inducing the breach of pactum de non cedendo.

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THE SUSTAINABLE DEVELOPMENT AND LOCAL SPATIAL PLANING - CASE STUDY OF POLAND

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Abstract

The paper outlines sustainable development in the context of local spatial planning. The purpose of the considerations is to present the importance of sustainable development in the creation of spatial policy, given that it is a legal principle. The normative nature of the principle derives not only from the Constitution of the Republic of Poland, but also from substantive laws. What is more the Law on Spatial Planning and Development stipulates sustainable development as the basis of spatial policy at every level (state and local government). For these reasons, the normative analysis covered the legal anchoring of sustainable development in the Constitution, the Environmental Law and the Law on Planning and Spatial Development. The paper focuses on the effectiveness of implementing sustainable development in local spatial planning policy, since according to the principle of decentralization of public power and subsidiarity, the commune as the basic unit of local government is responsible for managing public space. The legal tools for implementing this spatial policy are presented, taking into account the changes introduced by the major reform of the spatial planning system in 2023. It also assessed whether administrative bodies that make and apply laws refer to sustainable development in their actions. In this regard, reference was also made to the case law of the Supreme Administrative Court and the direction it has recently presented for interpreting norms.

Key words: *sustainable development, local spatial plannig, spatial policy,*

INTRODUCTION

The sustainable development is a concept that has grown and evolved under the auspices of the United Nations[1]. Its role has been systematically strengthened at periodic international conferences, making its mark on international regulations, European Union law and national legislations. This idea has become firmly rooted in the general public consciousness. It has also become a permanent element of public life, both in scientific discourse (in which it is a transdisciplinary concept) and in political debates. Unfortunately, over the years, like few other ideas sustainability has become subject to manipulation. This originally noble and valuable concept has been disavowed, often becoming an empty political slogan. It is aptly pointed out that sustainable development can unite both friends and foes[2].

The failure of the sustainable development is evidenced by numerous expert reports on the progressive degradation of the environment[3]. Scientists are sounding the alarm, basically differing in their assessments only on whether humanity has already passed the limits of planetary endurance or whether we still have time. It has been rumored for some time that we are living in a new geological epoch still unofficially called the Anthropocene[4]. What went wrong? Why does this universal idea not withstand confrontation with dynamic technological progress and globalization processes? From the very beginning, sustainable development was based on three pillars (or 'capitals'): 1) society, 2) environment and 3) economy. The indicated pillars are to remain in 'balance', what should be provided by appropriate legal regulations and public policies. Today, however, one fundamental point is being forgotten. This 'balance' or ‘sustainability’ does not mean in every case the equality of the above mentioned values. Meanwhile, it is not a matter of unconditional equivalence, on the contrary. Sometimes under the given circumstances 'priority' should be given to social or economic development, but there are situations in which it is environmental protection that takes priority and is the superior value. The key challenge is to correctly interpret (or actually re-interpret, nowadays) the principle of sustainability to identify needs and values and make them relevant[5].

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[1] See more: N. Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status*, Brill 2009; J.A. du Pisani, *Sustainable Development – historical roots of the concept*, Environmental Sciences, 3:2, p. 83-96, DOI: 10.1080/15693430600688831; M.C. Cordonier Segger, A. Khalfan, *Origins of the Sustainable Development Concept*, *Sustainable Development Law: Principles, Practices, and Prospects*, Oxford 2004, https://doi.org/10.1093/acprof:oso/9780199276707.003.0002.

[2] G.S. Barbosa, P.R. Drach, O.D. Corbella, *A Conceptual Review of the Terms Sustainable Development and Sustainability*, International Journal of Social Sciences 2014, nr 3(2), p. 8.

[3] See more: https://www.ipcc.ch/ar6-syr/.

[4] S. Benner, G. Lax, P.J. Crutzen, U. Pöschl et.al. (ed.) *Paul J. Crutzen and the Anthropocene: A New Epoch in Earth’s History*, Springer International Publishing 2022.

[5] B. Rakoczy, *Elastyczność zrównoważonego rozwoju w kontekście adaptacji do zmian klimatu*, Gdańskie Studia Prawnicze 2021, vol. 3, p. 23.

The space generates specific yet diverse social, economic and environmental needs. Undoubtedly, land use issues are extremely confilctogenic, therefore they require the balancing of varied and inconsistent interests. The remedy for this should be sustainable development, which is not only an idea, but also a binding legal principle and an action directive for local spatial planning authorities. Detailed considerations are given to the legal conditions for sustainable development in local spatial planning in Poland, taking into account the latest spatial planning reform, which came into force on September 24, 2023[6]. The aim of the paper is to critically assess the current legislation in the context of the realization of the sustainable development and to present practical problems with the application of this principle. The responsibility for the implementation of sustainable development rests with representatives of public authorities at every level. The policy of sustainable development directly relates to the management of space, which in the Polish legal order is mainly managed by the communes. Therefore, following the idea of 'think globally, act locally', this paper deals with the problem of incorporating sustainable development in local spatial planning in Poland.

I. BASIC DETERMINANTS OF LOCAL SPATIAL PLANNING IN POLAND

I.1 Principles of decentralization of public power and subsidiarity

The allocation of public tasks is determined by two principles in the Polish legal system: decentralization of public power and subsidiarity. According to Article 15(1) of the Constitution[7], the territorial system of the Republic of Poland ensures the decentralization of public power. The basic subject of decentralized administration in the state is the local government, which, according to Article 16(2) of the Constitution: ‘shall participate in the exercise of public power. The substantial part of public duties which local government is empowered to discharge by statute shall be done in its own name and under its own responsibility’. In turn, the principle of subsidiarity is expressed in a very specific part of the Basic Law, since the preamble states: ‘Hereby establish this Constitution of the Republic of Poland as the basic law for the State, based on respect for freedom and justice, cooperation between the public powers, social dialogue as well as on the principle of subsidiarity in the strengthening the powers of citizens and their communities’. The principle of subsidiarity statutes local government units as the primary performers of public tasks, as long as they are carried out effectively. Among local government entities, however, the commune is of primary importance, being the only unit mentioned by name in the Constitution: ‘The commune (*gmina*) shall be

[6] Law of July 7, 2023 on amending the Law on Spatial Planning and Development and some other laws (Journal of Laws, No. 1688).
[7] Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws, No. 78, item 483).

the basic unit of local government' [art. 164 (1)] and 'The commune shall perform all tasks of local government not reserved to other units of local government' [art. 164 (3)].

There is no exception in the case of spatial planning tasks, as the primary disposer of public space is actually the commune. According to Article 3 (1) of the Spatial Planning and Development Law: 'Shaping and conducting spatial policy on the territory of a commune, including the enactment of communal spatial planning acts, with the exception of internal marine waters, the territorial sea and the exclusive economic zone, as well as closed areas established by an authority other than the minister responsible for transportation, are among the commune's own tasks'.

I. 2 The commune's planning authority

The commune, as the primary disposer of public space, is endowed by the legislator with so-called planning authority. As the most important manifestation of this power should be considered the ability to enact the general plan and local spatial development plans. Both acts have universally binding force, but differ in the degree of detail and functions. The general plan was 'restored' to the Polish spatial planning system by the reform already mentioned in this paper, in force since September 24, 2023. It is a mandatory local legal act drawn up for the entire area within the administrative boundaries of the commune. The general plan compulsorily defines planning zones and commune urban planning standards. In addition, supplementary development areas and inner city built-up areas may be defined therein. What is important, the terms of the general plan are binding in drafting detailed local spatial development plans and form the legal basis for administrative investment decisions issued in the lack of a local spatial development plan.

The basic tool of commune's planning authority is the competence to adopt local spatial development plans. From the essence of this authority follows that, in general, the adoption of these plans is optional[8]. In these acts, the communal legislature carries out the determination of site zoning, the location of public-interest investments and the conditions of land development. The provisions of the local spatial development plan shape, along with other regulations, the way in which property rights are exercised. A commune may adopt a local spatial planning act for all or part of its area (several such plans may be in effect in a commune, as well as certain municipalities may only be partially covered by plans). It is worth noting that the Law on Planning and Spatial Development distinguishes two categories of specific local zoning plans: 1) Local Revitalization

[8] According to Article 14 (7) of the Law on Planning and Development: 'A local spatial development plan shall be compulsorily prepared if required by separate regulations'.

Plan – this is a tool for the process of bringing degraded areas out of the crisis[9]; 2) Integrated Investment Plan, which the local council may provide at the request of an investor who undertakes to carry out, in addition to the main investment, so-called complementary investments[10].

I. 3 Supervision and judicial control of commune's planning authority

The commune has no autonomy in creating spatial policy. Local government units have constitutionally guaranteed independence while performing public tasks, what results in supervision of their activities. The constitutional standard for this supervision determines its following elements: 1) this is state supervision (exercised by governmental administrative bodies, i.e., the Prime Minister and provincial governor [voivode]; in financial matters exercised by regional chambers of audit); 2) the only allowed criterion for evaluating communes is legality (compliance with generally applicable law); 3) safeguarding communes against abuse of supervisory powers is judicial protection of their independence (implemented mainly in a complaint against a supervisory act to an administrative court). Remarkably, in matters of local spatial policy, the legislature provides for special rules of supervision when it comes to the annulment of the general plan and the local spatial development plan. According to Article 91(1) of the Act on Commune Self-government, the provincial governor shall claim to annul any resolution of the local council that is 'contrary to the law'[11]. In order to issue a supervisory act, it is sufficient to establish an 'ordinary' legal defect (in the case of an insignificant violation of the law, the supervisory authority is limited to pointing out that the resolution was issued in violation of the law). Meanwhile, with regard to the two most important local planning acts, Article 28(1) of the Law on Planning and Spatial Development provides for separate – more rigorous – prerequisites for issuing a supervisory act. The voivode may declare the general plan and local spatial development plans invalid only in the case of: 1) significant violation of the principles of drawing up a general plan or a local spatial development plan; 2) significant violation of the procedure for their preparation; 3) as well as violation of the competence of the authorities in this regard. In accordance with the principle of proportionality, the supervisory authority shall declare invalidity in whole or, if possible, just in part of a given spatial planning act.

[9] Article 37f of the Law of March 27, 2003 on Planning and Spatial Development (Consolidated Text Journal of Laws of 2023, item 977).
[10] Article 37ea of the Law of March 27, 2003 on Planning and Spatial Development (Consolidated Text Journal of Laws of 2023, item 977).
[11] Article 91 (1) of the Law of March 8, 1990 on commune government (consolidated text of the Journal of Laws of 2023, item 40).

The use of planning authority is also subject to review by administrative courts. According to Article 3 (2)(5) of the Administrative Court Procedure Law[12], administrative courts rule on complaints against acts of local government bodies. Judicial review is not initiated *ex officio*, but requires a complaint from an entitled party. This is the provincial governor, who can declare the invalidity of a general plan or local spatial development plan only within 30 days from the date of delivery of the resolution to him by the commune executive body. After this period, his competence expires. The provincial governor can only initiate a review of the act before an administrative court. Another possibility to initiate judicial review is the complaint of an entity external to the public administration (usually the owner of the property). This type of complaint is filed indefinitely (at any time). Legitimacy to file a complaint is regulatef by Article 101(1) of the Act on Commune Self-government: 'Anyone whose legal interest or right has been violated by a resolution or order, adopted by a commune body in a matter of public administration, may appeal the resolution or order to an administrative court'. The administrative court, when evaluating a local council resolution, is bound by the same considerations as the provincial governor. In the same way, it shall also declare the act invalid in whole or in part.

Supervision or judicial review of local spatial policy in terms of the accuracy or rationality of the adopted solutions is excluded in the Polish legal system. This does not mean, however, that the lack of consideration of sustainable development in the acts of this policy cannot constitute grounds for their invalidity. Unfortunately, the practice of the supervisory and judicial review authorities is still quite restrained in this regard, as will be discussed later in the paper.

II. THE PRINCIPLE OF THE SUSTAINABLE DEVELOPMENT IN POLISH LAW

II.1 The Constitution of the Republic of Poland of the 2nd April 1997

The Constitution, known as the Basic Law, is the most important piece of legislation on the national level. It is both a template and a point of reference for the ordinary legislator, providing a source of axiology. Some of the legal principles are expressed in the Constitution explicitly (it means *expressis verbis*), while others require 'discovery', i.e. decoding through the interpretation of legal norms.

The constitutional regulation directly uses the term 'sustainable development' in the Article 5: 'The Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, the security of the citizens, safeguard the national heritage and shall ensure the protection of the natural environment pursuant to the

[12] Law on Proceedings before Administrative Courts of August 30, 2002 (consolidated text of the Journal of Laws of 2023, item 977).

principles of sustainable development'. It should be noted that the principle of sustainable development appears at the very beginning of the constitutional regulation, in the key chapter of the Basic Law entitled 'The Republic'. Just a preliminary systemic interpretation proves that this is a principle of great legal significance for the national legislator.

The Polish legal doctrine points out that: 'the principle of sustainable development is treated in this legal [here: *constitutional* – K.Sz.] norm not as an end in itself, but as a means to achieve constitutionally protected goals. Thus, the principle of sustainable development plays the role of a specific legal instrument through which the legislator wants to achieve constitutionally protected goals and values'[13]. In the cited article, the principle of sustainable development is explicitly linked to environmental protection. The way in which the principle of sustainable development is regulated in the Basic Law raises some questions of interpretation related to:

1) does the principle of sustainable development apply only to environmental protection?

2) is it a separate principle of a systemic nature?

3) does the principle of sustainable development constitute a binding directive of action addressed to public authorities in the state?

Answering these questions is important from the perspective of the issues presented in this paper.

Firstly, the concept of sustainable development should also include the protection of social and economic capitals (it is, after all, about completeness and comprehensiveness). Secondly, its effectiveness strictly depends on its legal nature (binding force) and the subjective scope of its compulsory implementation.

Without going into detailed considerations that go beyond the scope of the issues covered in the paper, the following theses concerning the principle of sustainable development should be approved:

1) this is a separate constitutional principle within the meaning of the Constitution of the Republic of Poland;

2) it is not exclusively related to environmental protection, since, according to the purposive interpretation of Article 5 of the Constitution, its scope of meaning includes balancing, integrating and harmonizing with each other the following goals: ecological (environmental), economic and social, taking into

[13] B. Rakoczy, *Elastyczność zasady zrównoważonego rozwoju w kontekście adaptacji do zmian klimatu*, Gdańskie Studia Prawnicze 2021, vol. 3, p. 23; DOI: https://doi.org/10.26881/gsp.2021.3.02.

account their interdependence – both in the process of planning and implementation of activities aimed at further development of humanity[14];

3) this is a mandatory basis in all public policy sectors at every level of public management (from central, state-wide to local government);

4) it is binding for public authorities in both lawmaking and application's processes.

The general considerations demonstrate that sustainable development is a binding legal principle for local administrative bodies in spatial planning matters already directly under Article 5 of the polish Constitution. This is a mandatory directive in the law-making procedure of spatial planning acts, and in particular those of a local law nature that have universal binding force, namely the general plan and local spatial development plans. The local legislative bodies should take into account sustainable development while establishing planning zones and determining specific land uses, the location of public purpose investments, and the determination of development conditions. The provisions of local planning acts are binding on administrative bodies issuing administrative decisions as part of the so-called investment and construction process (building permit). Also those decisions resulting from the application of the law should be made with respect for the principle of sustainable development.

II.2 The European Union law

The sustainable development is one of the core values of the European Union, which permeates and determines the specific objectives of priority policies. The EU legislator juridizes this legal principle in treaty regulations. Although the law of the European Union does not constitute a separate legal order, but, in accordance with the Constitution, part of Polish domestic law, a separate discussion of sustainable development in regulations enacted by EU bodies is substantively justified.

Article 3(3) of the Treaty on European Union[15] specifically stipulates: 'The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich

[14] See more: K. Olzacki, J.H. Szlachetko, *Koncepcja funkcjonalności eko-osiedla - w stronę "zrównoważonej" dekoncentracji gminnych zadań, kompetencji i środków finansowych*, Samorząd Terytorialny 2022, nr 7-8, p. 163-164, together with the literature cited therein.

[15] *Official Journal C 326, 26/10/2012.*

cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced'. As indicated in the jurisprudence: 'Legal standards of the provisions of Article 3 on sustainable development of Europe point on promotion of the European integration processes somehow limited to the Union's level, what seems to be proved by the particular concept of Union's values listed in Art. 2 of the EU Treaty and well–being of its citizen and *mutatis mutandis* political ideology of Union's integration based on balanced economic growth, social market economy and a high level of protection and improvement of the environment, further described in more detail in Article 3(3)[16]. While the cited regulation deals strictly with the internal policy of the European Union, Article 3(5) of the Treaty already refers to external policy, stating that: 'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter'. The international context and the European Union's contribution to the joint transnational effort for sustainable development, in turn, is detailed in Article 21(2)(d) of the Treaty on European Union, according to which: 'The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty'. This legislation is both a manifesto of solidarity with developing countries. In turn, according to Article 21(2)(f) EU public policies are supposed to 'help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development', which confirms the European Union's shared responsibility for global sustainability.

The principle of sustainable development is also reflected in the Treaty on the Functioning of the European Union[17] in the context of environmental protection requirements: 'Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development' (Article 11). It is worth noting that Article 37 of the Charter of Fundamental Rights of the European Union[18] corresponds with the mentioned regulation, because: 'A high level of

[16] M. Kenig-Witkowska, *The Concept of Sustainable Development in the European Union Policy and Law*, Journal of Comparative Urban Law and Policy 2017, vol. 1, p. 66.
[17] *Official Journal C 326, 26/10/2012.*
[18] *Official Journal C 303, 14/12/2007.*

environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'. However, as in the case of interpreting the system norms of the Polish Constitution, the principle of sustainable development cannot be limited to environmental issues, although the EU and national legislators emphasize these aspects. Sustainable development must be taken into account in light of Article 7 of the TFEU, which statutes the principle of coherence of the various policies and actions that 'the European Union shall ensure, taking into account all its objectives and in accordance with the principle of granting competences.

The European Commission provides that EU policies include the sustainable development goals expressed in *Transforming Our World: The 2030 Agenda for Global Action*, which was adopted at the United Nations Summit in New York (on September 25, 2015). According to its assumptions, the goals agreed upon at the global level will be transferred into national and regional actions, taking into account local conditions. Also under European Union law, sustainable development has a normatively binding meaning for EU bodies and institutions, as well as Member States, which is particularly embodied in the implementation obligations of the specific directives[19]. Of great importance in the context of urban development in the European Union are two strategic documents signed by the ministers responsible for spatial policy in the Member States: 1) The New Leipzig Charter – *The transformative power of cities for the common good* and 2) the *Territorial Agenda 2030*, both documents signed by the end of 2020 at the Informal Ministerial Meetings organized under German Presidency[20]. According to the EU principle of subsidiarity, the primary responsibility for spatial policy lies with the Member States, but due to the transboundary nature of spatial problems (e.g., climate change, environmental pollution, economic and social development), joint strategies are the most appropriate approach[21].

Of particular relevance to the matter of this paper is the Territorial Agenda 2030, which promotes an inclusive and sustainable future for all places and helps achieve the Sustainable Development Goals in Europe. The document remarkably accurately identifies current challenges for spatial policies, namely: progressive climate change, threat of biodiversity loss, predatory land use (especially uncontrolled suburbanization), deteriorating air, water and soil quality, sustainable energy and equitable transformation, closed loop economy, degradation of nature, landscape and cultural heritage. The Territorial Agenda underlines the importance of and provides orientation for strategic spatial planning and calls for strengthening the territorial dimension of sector policies at all governance levels. It seeks to

[19] See: https://sdgs.un.org/2030agenda.
[20] See: https://territorialagenda.eu/pl/.
[21] Cf.: M.J. Nowak, J. Szlachta, *Agenda Terytorialna Unii Europejskiej 2030 a lokalne polityki przestrzenne w Polsce*, Samorząd Terytorialny 2021, vol. 12, pp. 7-18.

promote an inclusive and sustainable future for all places and to help achieve Sustainable Development Goals in Europe. The goals of the Territorial Agenda require – among other things – the individual commitment of Member States in the form of incorporating the principle of sustainable development into legislation at the national, regional, metropolitan and, as will be discussed further below, local spatial planning levels.

II.3 The Act of April 27, 2001 – Environmental Protection Law

In Polish legislation, the concept of sustainable development has its own legal definition, which is defined in Article 3(50) of the Environmental Protection Law[22] as: 'Such social and economic development, in which there is a process of integrating political, economic and social activities, with preservation of natural balance and sustainability of basic natural processes, in order to ensure the ability to meet the basic needs of individual communities or citizens of both the present generation and future generations'. The way sustainable development is defined in Polish law does not differ from the proposed meanings of this concept in the international legal documents and in the scientific doctrines. In general, there are doubts about the need for defining the term, which is dynamic. It changes in time and space due to new challenges. In addition, putting the definition in a law dedicated to environmental protection may systemically, unjustifiably, narrow its primary role, which is also to secure economic and social capitals. Indeed, as has been pointed out, certain values are not always in the balance, and depending on the concretized circumstances, the other two pillars may take priority. Nevertheless, a systemic interpretation cannot narrow the application of the principle of sustainable development in Polish law to environmental issues exclusively. After all, it is worth stressing already at this point that separate laws, including the Law on Planning and Spatial Development, refer directly to the way of understanding sustainable development expressed in the Environmental Protection Law[23].

In addition to the definition of sustainable development, the provisions of the Environmental Protection Law contain general norms that provide a reference point for strategic planning and programming. In accordance with Article 8 of this Law: 'Policies, strategies, plans or programs relating in particular to industry, energy, transportation, telecommunications, water management, waste management, land use, forestry, agriculture, fisheries, tourism and land use should take into account the principles of environmental protection and sustainable development'. In light of this regulation, the impact of sustainable development

[22] Environmental Protection Law of 27 April 2001 (Consolidated text Official Journal of Laws 2022, item 2556).
[23] Cf. K. Kostrzewa, R. Piasecki, *Approaches to Sustainable Development in Poland*, L'Europe en Formation, vol. 352, no. 2, 2009, pp. 181-196.

should be comprehensive: multi-level (at each level of public management) and multi-sectoral (an open catalog of detailed areas). Local spatial planning acts are used to create and implement the so-called environmental protection policy, understood as a set of related activities aimed at creating the conditions necessary for the implementation of environmental protection, in accordance with the principle of sustainable development (cf. Article 13 of the Law).

The commented law statues more detailed links between local spatial planning and sustainable development in the context of environmental protection:

- sustainable development and environmental protection are the basis for drafting and updating supra-local development strategies, municipal development strategies, general plans and local spatial development plans (Article 71 (1) of the Law);
- local planning acts should consider, in particular, the solutions necessary to prevent the formation of pollution, ensure protection against the resulting pollution, and restore the environment to its proper state, and, in addition, establish the conditions for the implementation of projects, enabling optimum results in terms of environmental protection (Article 71(2) of the Law);
- the use and development of the land should ensure, as far as possible, the preservation of landscape values (Article 71(3) of the Act).

III. THE SUSTAINABLE DEVELOPMENT IN LOCAL SPATIAL PLANNING

III.1. Sustainable development as a fundamental principle of local spatial planning

The basic act in the Polish legal system in the field of spatial planning is the Spatial Planning and Development Law, which regulates the principles of shaping spatial policy by local government units and government administration bodies, as well as the scope and methods of proceeding in matters of land use for specific purposes and determining the principles of its development and construction. The so-called state planning order is, unfortunately, being distorted by means special laws, which introduce numerous exceptions to the supreme principles of state spatial policy[24]. And very often these special laws are enacted for the realization of some individual kind of investment or the implementation of particular political goals. As a result, we have in practice a departure from systemic solutions, which is often not sufficiently justified. Instead of ensuring spatial order, they exacerbate spatial chaos by way of 'law inflation'.

The mentioned Law regulates the substantive aspects of spatial planning in Poland, but importantly it also defines the axiology of spatial policies at every level, including local ones. It is already clear from Article 1 that the cardinal planning principles are: 'spatial order' and 'sustainable development'. It may even be said that these two principles are naturally linked and condition each other. The

[24] T. Bąkowski (red.), *Specustawy inwestycyjno-budowlane*, Gdańsk 2020, *passim*.

legislator defines 'spatial order' as: ‘such shaping of space that creates a harmonious whole and takes into account in orderly relations all functional, socio-economic, environmental, cultural and compositional and aesthetic conditions and requirements’ [Article 2(1) of the Act], while with regard to 'sustainable development' it refers to its meaning described in Article 3(50) of the Environmental Protection Law [Article 2(2) of this Act].

Among detailed values to be taken into account in spatial planning, Article 1(2) of the Law indicates *ex ante* 'the requirements of spatial order, including urban planning and architecture'. In second place, the legislator mentions 'the needs of sustainable development' (Article 1(2)(1a) of the Law), which was added to the catalog of spatial planning values just on September 24, 2023 as a result of the so-called spatial planning system reform. And although the justification for the amendment bill did not refer to the newly added value at all, there is little doubt that the *ratio* of new provision was intended to strengthen sustainable development in spatial policies. In formulating a catalog of spatial planning values, state legislator most often refers to specific ‘requirements’ or just ‘needs’. Literally, ‘requirement’ means a condition or set of conditions to which someone or something must conform, while by ‘need’ is meant, among other things, that which is needed for normal existence or for proper functioning and that which ‘is essential, necessary’. Relating semantic considerations to the needs of sustainable development, it is necessary to refer to the core of this principle, namely the harmonization (balancing) of three pillars: social, economic and environmental. Each of these pillars generates differentiated needs related to people's quality of life, economic growth or preservation of natural balance and environmental protection. Specific needs are often in conflict with each other – including (perhaps especially) in the sphere of spatial planning.

Normatively, spatial policy is directly related to development policy, hence the reference to yet another Act on Principles for Carrying Out the Development Policy[25]. Article 2 of this Law states that: 'Development policy is understood as a set of interrelated activities undertaken and implemented to ensure the sustainable and balanced development of the state, socio-economic, regional and spatial cohesion, increase the competitiveness of the economy and create new jobs on a national, regional or local scale’. Spatial policy is concerned with 'management of the unique resource of each territory' , which is at the same time an extremely conflictive area, and not only in the relationship between public interest and private interest, but also in the relationship between different private interests and

[25] Consolidated text of Journal of Laws 2023, item 1259. Cf. also J.M. Nowak, *Integrated development planning and local spatial policy tools*, Journal of Economics and Management 2020, vol. 41, pp. 69-86; DOI: https://orcid.org/0000-0001-6437-3226.

different public interests[26]. Undoubtedly: 'Spatial planning has become an important measure for countries and regions to promote sustainable development'[27].

III.2 The problems with the implementation of sustainable development in local spatial planning

The local spatial development plans is considered to be the most important (basic) act of realization the principles of spatial order and sustainable development and the values considered in Article 2(1) Law on Planning and Development[28]. However, the effectiveness of this planning tool appears to be undermined by the legislator itself. A certain dissonance could be seen in the regulation of the commented Law. On the one hand, the legislator explicitly sets out the basic nature of the local spatial development plans in terms of determining the use of land, the location of public purpose investments and specifying the ways and conditions of site development, while on the other hand, with few exceptions indicated in the law, the enactment of this act is left to the sole discretion of local decision-makers.

The granting of planning authority to the commune, and consequently planning self-management, does not raise systemic questions. Such a solution is in the line with the constitutional principles of decentralization of public power and subsidiarity. The commune, as the basic unit of local government, should be the most important decision-maker on public spaces. However, the provisions of the Law on Planning and Development do not specify any premises that should guide the commune authorities in deciding whether to draw up (or 'not to draw up') a local spatial development plan. If there is no such act in the commune, then the manner and conditions for development of the land are determined 'individually' by an administrative act called 'a decision on development and land use conditions'. In light of Article 4(2) of the Law, the mentioned term includes two categories: 1) a decision on location of a public investment[29], and 2) 'a decision on

[26] See also: W.A. Gorzym-Wilkowski, *Spatial Planning as a Tool for Sustainable Development. Polish Realities*, Barometr Regionalny. Analizy i prognozy 2017, vol. 2(48), pp. 78-85; DOI: https://doi.org/10.56583/br.439.

[27] See more: J. Zhang, Q. Wang, Y. Xia, K. Furuya, *Knowledge Map of Spatial Planning and Sustainable Development: A Visual Analysis Using CiteSpace*, Land 2022, DOI: https://doi.org/10.3390/land11030331.

[28] See e.g.: G. Borys, *Rough assessment of the consideration of spatial planning tools in the municipal plans for adaptation to climate change. An example of selected Polish cities*, Economics and Environment 2020, vol. 80(1), DOI: https://doi.org/10.34659/eis.2022.80.1.427; J. Rotmans, M. van Asselt, P. Vellinga, *An integrated planning tool for sustainable cities*, Environmental Impact Assessment Review 2000, vol. 20(3), pp. 265-279; DOI: https://doi.org/10.1016/S0195-9255(00)00039-1.

[29] By 'public investment' is meant, according to Article 2(5) of the Law on Planning and Development: 'it should be understood as activities of local ('commune') and supra-local (district, provincial and national), as well as national (including international and supra-regional

the development conditions' for other investments, that is, in practice, pursuing private purposes. In an expert report prepared by the Polish Economic Institute in December 2021 titled: 'Socio-economic consequences of spatial chaos', insufficient coverage of the entire state by local spatial development plans has been identified as one of the biggest causes for spatial problems in Poland. The 2020 statistics show that 94.4% of communes in Poland had at least one local spatial development plan in force, but in total only 31.4% of the country's area was covered by valid local plans[30]. Of course, the mere coverage of space with local plans does not yet guarantee anything. The most important are the quality and effectiveness of planning acts. Experts rightly point out that it is difficult to prejudge in advance what percentage of coverage by plans is optimal[31].

The 'dissonance' mentioned at the outset is illusory, because the problem is not the *ratio legis* of regulating the administrative acts in the Law on Planning and Development. The problem is not in issuing these decisions in the lack of a local spatial development plan, but rather the way in which commune authorities make use of it. In particular, the decision on the development conditions has 'supplanted' in many communes the role of the local spatial development plan in the widely understood investment and construction process. Unconsidered and irrational in the long term, locating individual investments on the basis of administrative decisions generates negative spatial phenomena in the form of the suburbanization[32]. While the expert literature treats this concept as a 'natural stage of development and the city' and a 'development trend' of most cities, the effects of carrying out a fragmented spatial policy (either by decision or on the basis of so-called intervention plans adopted for a small area) are urban sprawl and the creation of discontinuous development (leapfrog development)[33].

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investments), and metropolitan (including the metropolitan area) importance, regardless of the status of the entity undertaking these activities and the sources of their financing, constituting the implementation of the objectives referred to in Article 6 of the Act of August 21, 1997 on Real Estate Management (Consolidated Text Journal of Laws of 2023, item 344).

[30] P. Śleszyński, P. Kukołowicz, *Społeczno-gospodarcze skutki chaosu przestrzennego*, Polski Instytut Ekonomiczny, Warszawa 2021, *passim*.

[31] P. Swianiewicz, J. Łukomska, *Pokrycie gmin miejscowymi planami zagospodarowania przestrzennego*, Wspólnota 2022, online access: https://wspolnota.org.pl/news-rankingi/pokrycie-gmin-miejscowymi-planami-zagospodarowania-przestrzennego.

[32] See also: J. Hadynski, N. Genstwa, K. Józefowicz, *Migration processes to rural areas in Polish metropolises*, Annals of the Polish Association of Agricultural and Agribusiness Economists 2021, vol. XXIII(3), pp. 20-31; DOI: 10.5604/01.3001.0015.2895. Cf: R.M. Cocheci, A-I. Petrisor, *Assessing the Negative Effects of Suburbanization: The Urban Sprawl Restrictiveness Index in Romania's Metropolitan Areas*, Land 2023, vol. 12(5), DOI: https://doi.org/10.3390/land12050966.

[33] A. Jadach-Sepioło, P. Legutko-Kobus, *Definiowanie suburbanizacji* [w:] *Suburbanizacja w Polsce jako wyzwanie dla polityki rozwoju* [w:] Studia. Cykl monografii 2021, vol. 11(203), PAN KPZK, pp. 13-16.

The 2023 spatial planning reform did not eliminate the administrative decisions form the spatial policy, but significantly reduced the possibilities of issuing them. Until the reform, the spatial planning system was missing a direct link between decisions and local spatial policy. Location and conditions for the implementation of individual investments were possible even against the spatial policy in the commune: 'One of the best identified shortcomings of the existing system is the insufficient role of the study of spatial development conditions and directions[34], particularly in terms of influencing the issuance of decisions on development conditions'[35]. As it has been already mentioned, among the most important changes introduced by the 2023 reform, is the linking decision on development conditions with the wide commune spatial policy. To this aim, the legislator replaces the study with the general plan. As a source of local law, the general plan will bind commune authorities both when adopting local spatial development plans and when issuing administrative decision on development and land use conditions.

Despite the fact that sustainable development is a principle of spatial policy, and the needs of sustainable development are the values considered in the two basic acts of spatial planning, problems with their implementation are seen in the practice of the local authorities. The limited character of space requires authoritative regulations for its optimal use, consistent with the requirements of the sustainable development[36]. Space integrates the social, economic and environmental pillars of sustainable development, so spatial planning acts (as well as administrative decisions in this regard) must ensure socio-economic development while limiting the usage of environmental resources. Sustainable development in spatial planning is a value and at the same time a binding directive to shape 'optimal conditions for living, spatial order and preservation of the environment, taking into account the principle of intergenerational justice'[37]. The following conditions for the formation and implementation of sustainable spatial policy at the local level should be distinguished:

1) adequate and comprehensive planning assessment, taking into account geographic, demographic, environmental, development, economic conditions (determining 'what is' and what 'can be achieved' in the given constraints and opportunities);

[34] The study was a framework for commune spatial policy. It did not have the character of universally binding law, so it could not provide a legal basis for administrative decisions in the investment process.

[35] See the Explanatory Memorandum to the Amendment Bill, Parliamentary Draft No. 3097.

[36] J. Parchomiuk, *Uzasadnione oczekiwania a zaniechanie prawodawcze organów gminy w sferze planowania i zagospodarowania przestrzennego*, Zeszyty Naukowe Sądów Administracyjnych 2023, vol. 1, p. 57.

[37] M. Woźniak, *Czy istnieje remedium na konflikt interesów w zagospodarowaniu przestrzennym? – uwagi na tle zrównoważonego rozwoju* [in:] B. Rakoczy, K. Karpus, M. Szalewska, M. Walas (ed.), *Zasada zrównoważonego rozwoju w wymiarze gospodarczym i ekonomicznym*, Toruń 2015, p. 94.

2) recognizing the needs of residents and users of public space with particular emphasis on accessibility to social infrastructure;

3) evaluation of the need for the development of technical infrastructure;

4) identification of opportunities to exploit production and industrial potential;

5) inventory of natural and environmental assets, cultural and landscape heritage, together with the recognition of necessary conservation measures for their preservation (especially in the context of possible pollutants);

6) to usage of the potential of spatial planning acts to combat contemporary challenges such as climate change (particularly in the scope of nature-based solutions) or countering light pollution.

One should definitely share the argument that the principle of sustainable development is a determinant of local spatial planning decisions, providing an 'axiological basis for deciding land use' and a 'signpost' in situations of conflicting interests and collision of values. As a fundamental principle of local spatial policy, it should be taken into account in the land use decision-making process in the context of environmental security and integrated approaches to social, economic and environmental problems[38]. Unfortunately, the principle of sustainability is not sufficiently implemented in the legal proceedings of investment and construction. The application of sustainable development in the local planning acts requires balancing the values subject to constitutional protection and choosing such solutions that will take into account, on the one hand, the need to protect the natural environment and the interest of the general public, and on the other hand, important individual private interests. To be honest, the latter is particularly problematic. While determining the land use or potential development of the land, the local authority shall weigh up the public interest and private interests, including those submitted in the form of applications and remarks, aiming to protect the existing condition of land use, as well as changes in the land use, plus economic, environmental and social analyses[39]. The above-mentioned regulation is of particular importance with regard to local spatial development plans, since according to Article 6 (1) of the Law: 'The provisions of the local spatial development plan shape, together with other regulations, the manner of exercising the right to property ownership. What is important, the right to property is subject to special (constitutional) protection, so any interference in such right must be well justified and proportional. The Polish Supreme Administrative Court emphasizes in its case law that the formation of local spatial policy should respect the rights of property owners, as well as realize the common

[38] D. Trzcińska, *Zasada zrównoważonego rozwoju w planowaniu i zagospodarowaniu przestrzennym* [in:] B. Jaworska-Dębska, P. Kledzik, J. Sługocki, (ed.), *Wzorce i zasady działania współczesnej administracji publicznej,* Warszawa 2020, pp. 441-442.

[39] See: Article 1(3) of the Law on Planning and Development.

welfare of the local community in accordance with sustainable development[40]. Despite its normative importance, sustainable development is not fully appreciated in local spatial planning policy. The reason is to be found in mental barriers and concerns about confronting this principle with protection of private property rights. Both commune bodies, as well as the supervisory bodies of local spatial planning acts and administrative courts still too rarely refer explicitly to sustainable development. The jurisprudence and public administration bodies rather focus on the issue of proportionality in the local spatial development plans, without reference to the axiology of the planning system[41].

A mental change is urgently needed in the approach to sustainable spatial planning policy at the local level in Poland. More recent rulings of the Supreme Administrative Court may inspire commune authorities to attach even greater importance to sustainable development in local spatial planning acts, especially in local spatial development acts. Although judicial decisions are not formally a source of universally binding law in the Polish legal system, they have a very strong influence on the practice of public administration bodies due to their 'power of authority'. Below are the main theses from the selected judgments of the Supreme Administrative Court, which can positively strengthen the role of sustainable development in local spatial planning.

The Supreme Administrative Court analyzed the legality of establishing in local spatial development plans a ban on the use of solid fuels in buildings as the primary source of heat. In conclusion, the Court held that such a ban is part of the mandatory provisions of the spatial planning act, i.e. the 'principles of environmental, nature and landscape protection. In its justification, the Court also referred to § 4(3) of the Decree of the Minister of Infrastructure of August 26, 2003 on the required scope of the draft local spatial development plan[42]. According to the cited regulation, the draft plan should contain arrangements related to the protection of the environment, nature and cultural landscape. The draft local spatial development plan should contain orders, prohibitions, permissions and restrictions on land use resulting, among others, from the needs of environmental protection, referred to in particular in the provisions of the Environmental Protection Law. Subsequently, the Court explicitly pointed out that these provisions, in conjunction with the need to apply the principle of sustainable development in the planning procedure, even impose an obligation on planning authorities to guarantee the possibility of satisfying the basic community's needs,

[40] Cf. judgment of the Supreme Administrative Court of September 18, 2021, II OSK 1575/12, Central Database of Administrative Court Jurisprudence, accessed online: https://orzeczenia.nsa.gov.pl/cbo/query.

[41] D. Trzcińska, *Zasada zrównoważonego rozwoju w planowaniu i zagospodarowaniu przestrzennym* [in:] B. Jaworska-Dębska, P. Kledzik, J. Sługocki, (ed.), *Wzorce i zasady działania współczesnej administracji publicznej,* Warszawa 2020, p. 446.

[42] Journal of Laws of 2003. No. 164, item 1587.

present and future generations. Such needs include also air protection. Conditions for maintaining natural balance and related air protection is one of the elements that must be obligatorily reflected in the content of the local spatial development plan. The referred judgment is exemplary in terms of how to 'make real' the principle of sustainable development in local spatial policy[43]. In another judgment, the Supreme Administrative Court explicitly pointed out that the establishment of land use for transportations in the local plan is 'a necessary complementary element of planned service and residential development in the context of the implementation of the principle of sustainable development.'

In another judgement, the Supreme Administrative Court explicitly stated that the inclusion of isolation greenery in the local space development plan to protect against emissions from the planned road is justified because it 'significantly contributes to the principle of sustainable development'. In the Court's opinion, also the contested provisions of the plan, which introduced non-intrusive services (such as commerce or crafts) in the proximity of residential and recreational development, as well as the introduction in this plan of isolating greenery to protect against emissions from the planned collector road, respects sustainable development to a significant extent[44]. This is another judicial decision confirming that certain solutions even limiting the way property rights are exercised can be justified by the requirements of sustainable development. Similarly, the Supreme Administrative Court ruled in the context of another investment: 'The Supreme Administrative Court made a similar statement in the context of another investment: 'the principle of sustainable development is explicitly expressed in the Polish Constitution (Article 5), as is the obligation of public authorities to protect the environment (Article 74(2) of the Polish Constitution). For the implementation of these basic constitutional principles, in the context of spatial planning, increasing the area of landscaped green areas plays a key role'[45]. As the last of the exemplary verdicts of the Supreme Administrative Court is the one in which it noted that the operation of non-obtrusive services in the vicinity of residential developments is an important element that improves the quality of life of nearby residents. This applies, for example, to such services as health centers, stores, restaurants or cafes. It is worth adding that the actual improvement of the quality of life of residents is one of the primary objectives of

[43] The judgment of the Supreme Administrative Court of January 26, 2023, II OSK 160/20; Central Database of Administrative Court Jurisprudence, accessed online: https://orzeczenia.nsa.gov.pl/cbo/query.

[44] The judgment of the Supreme Administrative Court of December 20, 2022, II OSK 2189/21; Central Database of Administrative Court Jurisprudence, accessed online: https://orzeczenia.nsa.gov.pl/cbo/query.

[45] The judgment of the Supreme Administrative Court of December 20, 2022, II OSK 2150/21; Central Database of Administrative Court Jurisprudence, accessed online: https://orzeczenia.nsa.gov.pl/cbo/query.

the principle of sustainable development' and 'does not violate the mentioned principles [of spatial order and sustainable development - note K.Sz.] the possibility of allocating part of the development (...) for residential development, including multi-family development (...) Thirdly, the drawing of the local plan shows that the service development has been located directly on the public collector road (...). Thus, the service development here performs an isolation function, important from the point of view of the principles of sustainable development, against the residential development located away from the busy road'[46].

The direction of the judicature of the highest instance is extremely important for making sustainable development a reality in practice. What is more the enrichment of the catalog of spatial policy's values with 'the needs of sustainable development' strengthens its normative significance. Hopefully, this can (and should) contribute to more frequent reference to this principle by local bodies responsible for developing and implementing spatial planning acts. Indeed, the commune's planning authority is not unlimited, but space is becoming a scarce good. The obligation to weigh the public interest and private interests may imply, in some cases, the primacy of the former, and it is sustainable development, set in a given context, that will constitute a sufficient limitation on the owner's rights. The future will show whether planning reform and the pro-sustainability line of jurisprudence will influence the practice of drafting spatial policy acts, including the local development plan. Equally important is the practice of applying the provisions of this plan through interpretation of norms in the course of issuing decisions in the investment and construction process.

CONCLUSION

Sustainable development is a constitutional principle in the Polish system, as well as a binding directive of action for the administrative bodies that make and apply laws. It permeates all cross-sectoral policies, including spatial planning policy, which is part of the broader development policy. Space is the sphere where the all pillars of sustainable development are intertwined: society, economy and environment. Not only is the principle of sustainable development explicitly expressed in the Polish Constitution, but it is additionally referred to in substantive laws. Of particular importance is the Environmental Protection Law, which defines 'sustainable development' mainly for the purposes of environmental regulations, which are also an immanent part of spatial planning policy. Importantly, sustainable development is, along with spatial order, a fundamental principle of spatial planning (at every level of policymaking). Through the prism of

[46] The judgment of the Supreme Administrative Court of March 8, 2022, II OSK 777/19; Central Database of Administrative Court Jurisprudence, accessed online: https://orzeczenia.nsa.gov.pl/cbo/query.

this principle, spatial planning acts, especially those with the nature of local laws, namely the general plan and local spatial development plans, should be legislated. Despite such a strong axiological foundation, the practice of law-making and law-applying bodies has so far inadequately implemented the sustainable development. This involves both justifying planning solutions and interpreting the norms of spatial planning acts when issuing administrative decisions. In certain situations, after a comprehensive analysis of the conditions for given areas, sustainable development may justify a restriction of ownership rights due to the public interest related to the economy, the environment or social development. Local bodies primarily responsible for spatial policy should derive from sustainable development the basis of their planning authority, always respecting the principle of proportionality, of course. This is also the intention of the Polish legislator, who confirmed this with the spatial planning reform in 2023 by enriching the catalog of values taken into account in spatial planning additionally with 'the needs of sustainable development'. The line of rulings of the Supreme Administrative Court, which increasingly refers to sustainable development when assessing the legality of controlled communal spatial planning acts, is also moving in this direction. Time will show whether this will affect a change in attitude by local decision-makers, which requires not only legal changes, but also the removal of certain mental barriers.

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RECOGNITION AND ENFORCEMENT OF JUDGMENTS DELIVERED IN MEMBER STATES OF THE EUROPEAN UNION

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Abstract

Recognition is the process by which the authority of a foreign judgment is established, i.e. the effects of a foreign judgment are allowed to take effect in the territory of the State addressed. The concept of foreign judgment includes both contentious and non-contentious acts. The authority from which it emanates is irrelevant. Foreign judgments may be court judgments, authentic instruments or court settlements (which are assimilated to authentic instruments). In Romania recognition is allowed either by operation of law or by court decision, subject to certain specific conditions. The regulations contained in the Code of Civil Procedure on the recognition of foreign judgments usually apply to judgments from non-EU countries. In order to produce legal effects, the foreign judgment must be recognized and enforced, which is not automatically done through recognition.

Keywords: *recognition, procedure, decision.*

INTRODUCTION

I. RECOGNITION OF JUDGMENTS

Analysis of the institution of recognition and enforcement of judgments rendered in Member States of the European Union implies recognition of a judgment already rendered on behalf of the sovereignty of a European State.

In Romania, the provisions of the Code of Civil Procedure[1] apply to judgments delivered in non-EU countries, while Regulation No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and

[1] https://legislatie.just.ro/ Code of Civil Procedure

the recognition and enforcement of judgments in civil and commercial matters applies to the recognition and enforcement of judgments delivered in EU countries. Regulation 1215/2012 applies from 10.01.2015, the date on which it repeals Regulation EC 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. However, Regulation (EC) No 44/2001 remains the legislative basis for judgments issued before 10.01.2015, as well as for judgments issued in actions filed before that date, which were nevertheless judged under it after 10.01.2015.

The decision to repeal Regulation 44/2001 was necessary in order to make it easier for litigants to access the procedural circuit in the Member States. The institution that created certain problems of celerity and imposed additional costs was the institution of the exequatur - the procedure that a creditor, who holds an enforceable title obtained in one Member State, must carry out in order to obtain enforcement of that title in another Member State, in addition to the procedure that any other creditor in the requested State is obliged to carry out in that State- (Sergiu Popopvici, 2014, p.142).

According to Romanian law, the exequator is the judicial procedure by which the foreign judgment is declared enforceable, through the control of a competent court in Romania. (I.P.Filipescu, A.I. Filipescu, 2008, p.451)

The area of application of Regulation 1215/2012 covers broad institutions of private law, i.e. civil law and commercial law[2] (Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations). The scope of those two Regulations has been delimited, so that the recognition of judgments relating to maintenance obligations is subject to the provisions of Regulation 4/2009[3].

Arbitration awards are also excluded from the scope of Regulation 1215/2012. It is stated in the Preamble to the Regulation that when considering a decision rendered in a State of the Union on the nullity, enforceability or unenforceability of an arbitration agreement, the provisions of the Regulation are not taken into account. The arbitral award is excluded from consideration under the Rules. It is also irrelevant how the court ruled, i.e. whether it was seised of the case by way of a writ of summons or by way of ancillary proceedings.

In Romania, the basic arbitration legislation is contained in the Code of Civil Procedure. In conjunction with the rules of the Code come the provisions of Law 335 of 2007 of the Romanian Chambers of Commerce. In the field of international arbitration, rules based on the agreement of the parties to the contract, i.e. voluntary arbitration, are common law (Ioan Macovei, 2017, p.455).

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[2] https://eur-lex.europa.eu/legal-content - Paragraph 10 of the Preamble to Regulation no. 1215/2012.

As already pointed out, the scope of the Regulation is limited to the area of civil and commercial law, without going into the analysis of the jurisdiction of the court seized of the attached cases. The following areas are exempted from the Regulation: tax, customs, arbitration and administrative law. Nor does it apply in situations where the State could be held liable as a result of acts issued in the exercise of public authority.

However, the European legislator's attention to the exclusion from the rules of certain institutions which are the subject of a separate act is noteworthy. Thus, maintenance obligations between parents and children are regulated separately, as well as those relating to other spheres of family life such as matrimonial property regimes, adoption and kinship. Also excluded from the scope of the regulation are matters relating to the property of natural persons, including those relating to death: wills, succession or pecuniary (maintenance) obligations arising from death. With regard to legal persons, the Regulation does not cover the field of re-organisation, winding-up of companies, bankruptcy or other similar proceedings[4].

As expressly provided, judgments given in the Member States concerning the capacity of natural persons are not subject to recognition under the Regulation (Ana Luisa Chelaru, Ioan Chelaru, 2022, p.152). Based on the same reasons of unitary application of the criteria for the recognition of personal status, the European Union and implicitly Romania do not subject to recognition judgments that have been pronounced outside the EU and concern the personal status of the applicant. A double condition that must however be met under Romanian law governing private international law is that the judgment must not be contrary to the rule of law and the right of defence must have been respected[5]. The effects of the foreign judgment take effect from the moment of its pronouncement. Recognition is automatic and does not require a judicial procedure.

In the case of judgments given in the Member States whose effects fall within the jurisdiction laid down by the Regulation, recognition shall be effected without any special formality being required. There are a number of conditions that a judgment given in a Member State must fulfil in order to take effect. Among the requirements is the possession of a document issued on the basis of the judgment, containing elements allowing verification of authenticity, as an alternative to the possession of a certificate drawn up in accordance with Annex I of the Regulation. The court or authority before which the judgment given in another Member State is invoked may require the party to produce a translation or transcript of the contents of the certificate (Elena Alina Oprea, Dan Andrei Popescu , 2023, p.211). You can even request a translation of the judgment. As it

3.http/revista.universuljuridic.ro/recunoasterea-hotararilor-straine-romania/oana tanasica, ISSN 2393-3445

4.Art 1095-Code of Civil Procedure

has always been done to facilitate access to justice and to simplify procedures, the form contained in Annex I is also drafted in the national languages of the Member States and in the languages of the EU. It is therefore easy for the court that has to complete the Annex to complete the form in both the national language and a language of the EU.

The main effect of recognition of a judgment given in another Member State is to confer the power of res judicata in the country where the judgment is sought to have effect. In terms of time, the effect is retroactive, from the date on which it became final in the country of origin (Flavius Baias, Eugen Chelaru, R. Constantinovici, I. Macovei, 2014, p.2672).

II. REFUSAL OF RECOGNITION

It should be noted that the Regulation provides for situations in which recognition of a foreign judgment is excluded (Claudiu Paul Buglea, 2021, p213). Refusal shall be made at the request of the person against whom the judgment was given, either as a principal claim or as an incidental claim, if it falls within one of the grounds for exclusion expressly provided for by the Regulation.

As already indicated, enforcement of the foreign judgment may be refused if recognition is contrary to public policy in the State in which recognition is sought.

Another ground for refusing recognition of the judgment is failure to comply with the procedure for service of documents, either because service was not effected and the judgment was given in default, or because service was effected but the time-limits were not complied with and the party was not given an opportunity to present his defence, but on condition that the defendant brought an action against the judgment given without recognition of the rights of the defence.

A refusal of the application for recognition will be received by the applicant who submits a judgment given in a manner irreconcilable with another judgment given in the State in which recognition is sought and which was given with identity of parties;

A fourth case of non-recognition occurs in the case of an application based on a judgment that is irreconcilable with another judgment that was issued before the judgment to be recognised was adopted. The condition is that the first judgment was given in a Member State and that the parties are identical and that the judgment relates to the same subject-matter or the same cause of action. Of course, the first judgment must itself meet the legal conditions for recognition.
Recognition of the judgment given in breach of the rules of exclusive jurisdiction will also be refused [6].

III. ENFORCEMENT OF THE JUDGMENT

[6] https://eur-lex.europa.eu/legal-content See Article 54(1) of Regulation EC1215/2012

The next stage of recognition of the judgment is its enforcement. Under the provisions of the European Regulation, it is no longer necessary to issue a declaration of enforceability in a Member State in whose territory it is to have effect, if that judgment fulfils the conditions for enforcement in the Member State in which it was issued[7]. The attribute of enforceability implies, by virtue of the law, the ability to use recognised legal means and institutions (such as protective measures), characteristic of the law of the State in which enforcement is sought.

As in the case of recognition of a judgment, a document issued on the basis of the judgment or the judgment itself is required for the enforcement of the judgment, provided the requirements for establishing authenticity are met. A certificate drawn up in accordance with the requirements of Annex I is required cumulatively and not alternatively. The certificate certifies that the judgment is enforceable. It shall be a summary of the judgment, but shall also contain particulars of the costs and expenses of the proceedings and the method of calculating interest (Şerban-Alexandru Stănescu, 2020, p.114).

There are situations where the judgment contains provisions on certain provisional or even conservation measures. And for the enforcement of provisions of this type, a copy of the judgment, with all the elements of identification for authenticity purposes, together with the certificate containing a summary of the judgment issued in accordance with the Annex indicated, is required. Information on the jurisdiction of the court, the enforceability of the document, the procedure for summoning the defendant and the fulfilment of the conditions for service of the judgment shall be provided. In order to comply accurately with the provisions contained in the judgment to be enforced, it may be necessary to translate the judgment or in certain cases the certificate or both documents. In view of the fact that under the Annex it is also possible to issue the certificate in an international language, the obligation to translate is less used and may be imposed in the event that the procedure is blocked because of translation.

It follows from the above that the enforcement of a judgment in a Member State does not require another judgment requiring a declaration of enforceability, as was also provided for in the Brussels I bis Regulation[8]. The fact that the judgment is enforceable by operation of law also automatically implies that the court in the State where enforcement is sought has jurisdiction to take protective measures.

For the enforcement of judgments containing penalty payments, the exact amount must be provided for in order to be collected by the creditor[9]. There have been cases in the practice of Romanian courts where they have ordered the award of percentage amounts of money, which makes it difficult to interpret the exact

[7] https://eur-lex.europa.eu/legal-content Art 39 of Regulation 1215/2012
[8] https://eur-lex.europa.eu/legal-content Regulation 44/2001
[9] https://eur-lex.europa.eu/legal-content Art 55 of Regulation 1215/2012

amount of the debt to be paid[10]. The Regulation prohibits the request for a bond or a guarantee by the State on whose territory the judgment is to be enforced if the criteria for requesting the guarantee concern the nationality or the domicile of the applicant.

It also takes into account the situation of inconsistency of content or the absence of a legal institution in the Member State where the judgment is enforced or in the State which delivered the judgment. In the absence of an equivalent concept, consideration will be given to a measure which is adapted to the requirements of the judgment subject to enforcement so that the effects are in balance (Gheorghe L. Zidaru , 2017, p.231) An application may be made to the competent courts against the interpretation by adaptation, challenging the adaptation or the order, in order not to go beyond the framework in which the decisions of the court of the requesting State were taken, and a translation of the decision may be required if necessary.

CONCLUSION

The procedure for the recognition and enforcement of foreign judgments delivered in the Member States of the European Union is intended to be a simplified and rapid procedure, which will make it easier for the creditor to enforce his claim and provide fluidity and efficiency to the civil circuit. In a society that is primarily focused on dynamics, with an exponential flow of information and the desire to carry out any procedure almost instantaneously, it is necessary, as a legislator, to facilitate the functioning of all mechanisms that support the needs of society and the individual, by rethinking social, economic and even legislative policies. Thus, the procedure for recognition of judgments significantly reduces the legal costs incurred in cross-border proceedings, ensures speedy commercial relations and, last but not least, removes a number of cross-border risks by shortening the time taken to implement judgments.

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TELEWORK AND WORKERS RIGHTS IN ALBANIA

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Abstract

According to Albanian legislation, the definition of working at home and teleworking is almost identical. Both jobs are done from home and the only difference relies on the fact that telework requires the use of information technology. The Albanian law, as well as the definitions of international organizations and various researchers, state that the difference is in the use of instruments of information and communication technology. Basically, if the definitions of the above issues and the definitions of the Albanian legislation are summarized, it can be said that telework is the work performed outside the premises of the organization using information technology.

Key words: *telework, legislation, rights, technology.*

INTRODUCTION

On March 11, 2020, the World Health Organization (WHO) declared a Pandemic as a result of the worldwide outbreak of the Covid-19 virus. What would actually be the factor with the strongest impact on social-economic life throughout the world would be the blocking of movement and the restriction of social-economic activities for a period of almost two years. The speed with which the Covid-19 virus spread found the vast majority of countries in the world, including Albania.

In addition to the difficulties that this massive and forced form of working from home brought, it revealed benefits and challenges for the future. In fact, working from home and especially telework have been a growing practice in the years before the Pandemic. Many European countries and beyond are making rapid improvements in legislation to regulate this form of employment and at the same time in the direction of encouraging an ever wider use of work from home and specifically telework. In Albania, some institutions, mainly financial, have

seen the benefits of telework and are expanding the use of this practice of carrying out work processes. This phenomenon is still not accompanied by state intervention in legislation in order to regulate this new work relationship, always in the direction of facilitating and encouraging its extension to as many professions and institutions as possible, where it brings benefits.

Essentially telework is a form of working from home. But, in contrast to work performed from home, which is a broader concept, telework refers to a new concept of developing work at home using information technology instruments to carry out work processes that are pushes to a new dimension the fourth stage of industrial development otherwise called "Industry 4.0 - digitalization". [1]There are many definitions related to telework which basically have little differences from each other. Some of them are presented below. According to the International Trade Union Confederation (ITUC) [2] "Telework is work performed with Information and Communication Technology (ICT) from outside the employer's premises. This may include traditional forms, such as working from home, or working from various alternative locations outside the employer's head office". According to the ITUC an essential element to classify a work process as telework is the use of information and communication technology (ICT). This means that a work process carried out from home under the direction of an employer or intermediary without the use of ICT will not be classified as telework.

The telework is currently not covered by any international statistical standards. Countries have used slightly different operational definitions, which are typically based on two different components:

I. The work is fully or partly carried out at an alternative location other than the default place of work. This criterion is based on the previous definition of remote work.

II. The use of personal electronic devices such as a computer, tablet or telephone (mobile or landline) to perform the work.

The different devices or tools can be used for communicating with colleagues, clients and so on, as well for carrying out specific job-related tasks without being directly in contact with other persons. Telework, as defined above, is a subcategory of the broader concept of remote work. It includes workers who use information and communications technology (ICT) or landline telephones to carry out the work remotely. Similar to remote work, telework can be carried out in different locations outside the default place of work. What makes telework a unique category is that the work carried out remotely includes the use of personal electronic devices.[3]

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[1] A. Kotorri , Puna dhe drejtësia sociale telepuna si produkt i digjitalizimit Tetor 2022 https://library.fes.de/pdf-files/bueros/albanien/19655.pdf

[2] ITUC LEGAL GUIDE – TELEWORK HTTPS://WWW.ITUC-CSI.ORG/ITUC-LEGAL-GUIDE-TELEWORK

[3] https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/publication/wcms_747075.pdf

Eurofound published a new report on telework during the Covid-19 pandemic in 2020 and 2021. It analyses changes in working conditions experienced by employees and regulations, addressing issues related to this working arrangement, shaping the future of remote working, and identifying challenges and opportunities for the future.

According ITUC, teleworking arrangements are expanding rapidly, but given the clear risks to working conditions outlined above, regulation through legislation and social dialogue needs to be developed urgently in order to ensure that these working arrangements improve access to decent work rather than deteriorate it. Regulatory approaches should therefore be guided by the following principles:

- Impact assessment and development of telework-place rules prior to the introduction and implementation of telework arrangements.
- Guarantee equal treatment of teleworkers.
- Respect for regular working hours and the right to disconnect.
- Work equipment and costs for remote workspace should be the employer's responsibility.
- Employers should remain responsible for the health and safety of workers.
- Equal access to training and career development. Teleworkers should receive equal treatment in career development opportunities and consideration for promotion to that of their workplace-based counterparts.
- The right to privacy must be safeguarded. Information and communication technologies can have a wide range of impacts on workers.
- Ensure respect for the rights to freedom of association and collective bargaining for teleworkers. [4]

In 2021, 2 out of 10 European employees were teleworking (a figure that would probably have reached in 2027 without the pandemic). According to report findings, 41.7 million employees teleworked across the EU in 2021, confirming the doubling of employees teleworking since 2019.[5].

I. LEGAL DEFINITION OF WORK FROM HOME AND TELEWORK IN ALBANIA

Telework and work from home are the types of employment contracts provided for in Article 15 of the Labour Code.[6] The Labour Code, article 15 in its point 2, expressly states that: "With the telework contract, the employee performs his work at home, or in another place, defined in the agreement with the

[4] https:// ituc_legal_guide_telework_en.pdf

[5] Industrial Relation and Labour Law. Newsletter, January 2023

[6] Ligj nr. 7961, datë 12.7.1995 "Kodi i punësi Republikës së Shqipërisë" (Ndryshuar me ligjet: nr. 8085, datë 13.3.1996; nr.9125, datë 29.7.2003; nr. 10 053, datë 29.12.2008; nr. 136/2015 ,datë 5.12.2015)
https://qbz.gov.al/preview/c1c18a6c5f3e-457d-b931-de505b3c7ed0

employer, use information technology, within working hours, determined by the employee, according to the conditions agreed by them in the employment contract. Thus, referring to article 15, paragraph 3 states that provisions of the code also apply to employment contracts with the exception of:

a) provisions for the regulation of weekly working time and rest, outside hours schedule, work on official holidays and night work;

b) the provisions regulating the right to compensation for work difficulties apply to the employee the same provisions that he has in his employment contract, in terms of weekly working time and rest, overtime hours as well as work on holidays.

With the telework contract, the employee is obliged to perform his work only at his home. The employee who works at home enjoys the same rights as the employee who works in the enterprise. The working conditions for telework employees cannot be less favourable, compared to other employees, who perform the same or comparable work.

For this reason, the employer must take measures:

a) to facilitate telework, by making available, installing and maintaining the necessary computer equipment for its performance, except when the employee, who performs telework, uses personal equipment;

b) to prevent the isolation of the employee, creating conditions for him to meet with other employees.

It shall not be considered that the employee performs "telework" if he works at a place of work other than the one agreed in the agreement with the employer or, in special circumstances, with his consent, or according to an agreement with him, performs a different type work, provided in the contract. Telework is potentially beneficial, but there are a number of issues to consider.

If one thing is clear when we talk about telework, it is that it avoids traveling to the workplace, either by car or public transport, and therefore definitely reduces greenhouse gas (GHG) emissions.

It seems logical to think that telework reduces commuting, but one has to consider what might happen if people stopped commuting to the office every day. If working people no longer need to live close to work, they may choose to live away from the office to avoid the high costs of rent and living in cities. Thus, the option to work remotely and avoid commuting to the office may lead them to accept a longer commute on days when face-to-face work is required.

Telework has negative effects because while commuting is compensated, it increases energy expenditure at home due to the need for workers to turn on the heat, air conditioner, turn on the lights, connect to the Internet. Another negative factor that telework can have is that travel can increase. For example, if a parent used to pick up their children from school on the way to work, they will now have to pick them up themselves and the same can happen when they go shopping at the supermarket. Finally, more remote work is also synonymous with greater use

of ICT devices (computers, screens, printers, etc.). Telework is a better option, but only if it is supported by specific measures such as, for for example, allowing people to work from home as much as possible, to save energy and avoid heating or cooling unused offices, etc.

III. RIGHTS OF THE EMPLOYEES IN ALBANIA

Employees, when working from home, naturally have to use work tools and carry out the necessary expenses for the realization of the work process. Thus, computers, work environment, desks and other office tools are needed, when it comes to providing services, or work tools, when it comes to the production of products. Also, it is necessary to make expenses for electricity, internet, maintenance of the premises, etc. In the case when the employee who works from home is self-employed, he provides himself with all the necessary tools and bears the expenses he needs to carry out the work process. In the case when this employee is contracted as an employee of an organization, logically it should be the organization that should provide the instruments with which to carry out the work process and cover the expenses that need to be incurred for the realization of work process. According to the Labour Code in the Republic of Albania, it is determined that (Article 15 point 4) "working conditions for employees who work at home or telework cannot be less favourable, compared to other employees, who perform work same or comparable". For this reason, the Code mandates that the employer must make available and maintain the necessary computer equipment for the performance of the work process. This of course, only applies to cases where the employee does not own the work equipment himself. If the employee owns the work equipment himself, then by agreement or against a compensation from the organization, the employee performs the work process with his own equipment. All these would not constitute an additional cost for the organization, since they are the same expenses that the organization carries out even when the employee performs the work from the premises of the organization.

For organizations that allow the employee to partially perform work from home and partially from the organization's premises, this could naturally lead to a duplication of costs. In such cases, a cost-benefit analysis would have to be done, which the organization has from realizing some work processes from home.

The Albanian law also provides for the care that the organization must have for the social life of the employee. The organization is obliged to take measures and commit "to prevent the isolation of the employee, creating conditions for him to meet with other employees.", which means organizations that aim to maintain and increase the employee's job satisfaction, as well as maintain his connections with colleagues.

CONCLUSION

Many European countries and beyond are making improvements at a rapid pace in their respective legislation to regulate this form of employment and at the same time in the direction of encouraging an ever wider use of work from home and specifically telework. Several collective agreements, at different levels, and some national jurisdictions have introduced some principles, there remain clear gaps in national law that need to be addressed before telework arrangements become more widespread and permanent.

In Albania, several institutions, mainly financial, have seen the benefits of telework and are expanding the use of this practice. This phenomenon, is still not accompanied by state intervention in regards to the legislation in order to regulate this new way of working in order to facilitate and encourage its extension to as many professions and institutions as possible.

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EMPLOYERS' OPENNESS TO TELEWORK

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Abstract

"Work from home" and "telework" are, according to the law, two distinct legal institutions (of labor law). Hybrid work, i.e. work performed partly from home, partly from the office is considered a new form of telework can be used by employers. If the employee requests a flexible work schedule, which could allow him to work from home, employers are obliged to give reasons for their refusal in writing, "within five working days of receiving the request". And in Romania, as in most European countries, the right to disconnection is not contemplated in the current legislation. However, it is necessary to specify that in Romania the "very restrictive duration of working time and, respectively, rest time and its limits, as well as the organization and maintenance of records of working time" are regulated.

Keywords: *home work; telecommuting; working in a hybrid regime; the workplace of the teleworker; the right to disconnect.*

INTRODUCTION

GENERAL CONSIDERATIONS

Telework activity is no longer "a niche option, but an integral component of the European labor market". Compared to other countries in Europe, "Romania currently does not offer an absolute right to telework to any category of employees, only forcing employers to justify their refusal against employees' requests". *(Voiculescu, 10 noiembrie 2023, www.avocatnet.ro)*

With the exception of Sweden, Finland, Cyprus and Denmark, all states in the European Union have regulated telework.

Although Romania is at the bottom of EU statistics in terms of frequent/occasional use of home work, according to the latest Eurostat data *(Popa,*

Lungu, 22 august 2023, www. juridice.ro), the COVID-19 pandemic has caused an exponential increase in interest in telework/home work.

"Work from home" and "telework" are, according to the law, two distinct legal institutions (of labor law). In the specialized legal literature it has been shown that, taking into account the existing similarities between the two forms of work organization, the differentiation between home work and telework, seen as distinct legal institutions, seems artificial,... between the two institutions there is, in several cases, a relationship from the whole to the part, even if, as we will show, the rights and obligations of the parties have, to some extent, a different content... the only relevant distinction, which determines the application of the legal regime of work at home, resides in the performance of the activity from home without the use of information technology" *(Vlăsceanu, Iordache, 2023, p. 36).*

As it was shown in the doctrine, in the conditions where "the place of work is the domicile of the employee, telework is sometimes identified with work at home" *(Țiclea, 2015, p. 377*), but "the object, the content, but especially the purpose of the two individual employment contracts are totally different" *(Ștefănescu, 2008, p.76),* the regulations contained in Law no. 81/2018, which was very little modified during the pandemic, when the need arose to resort to this form of work on a large scale, configures "a legal regime specific to this type of contract"*(Vartolomei, 2018, p. 46).* Thus, significant differences refer to the quality of the workers and the specifics *(Țop, 2022, p. 276)* of the employees' activity: in the case of telework, the worker is qualified by law as a teleworker, a qualification that we do not meet in the case of the worker working at home; the telecommuter uses information and telecommunications technology, while the home-based employee uses, as a rule; machines, equipment, mechanical, electrical installations, etc. classics; hence the specifics *(Țiclea, 2018, p.192)* of the profession/trade/qualification of the two categories of workers; in the case of home work, the salaried activity can be carried out by a wide range of employees, for example, accountants, economists, researchers, turners, locksmiths, tailors, etc., while in the case of telework, the workers have a strict specialization that refers to processing, transformation, manipulation and dissemination of information (such as, for example, analysts, programmers, computer scientists, etc.). *(Vartolomei, 2016, pp. 192-193)*

Only in our country, in Spain and in Portugal, the definition of telework is strictly related to the use of information and communication technology.

In the context of the pandemic, several European states have changed the legislation regarding telework. *(Voiculescu, 10 noiembrie 2023, www.avocatnet.ro)** In Croatia, for example, from January 1, 2023, employees can request telework in cases established by law (e.g.: pregnancy, caring for a family member) and employers must respond with reasons within 15 days (note that in our country the term is of five working days). Greece allows, also this year,

employees with certain conditions to request telework. The request must include a medical opinion, and in the absence of an answer, it is considered accepted. In Ireland, the right to telecommute came this spring, accompanied by an obligation for employers to comply with a statutory Code of Practice when assessing applications for telecommuting. The Dutch legislative proposal "Work Where You Want" ("Work from where you want") makes it more difficult for employers to reject requests from employees to change jobs - the proposal is awaiting Senate approval.

By far the most favorable law for employees would be in Portugal, according to the European report, where employers cannot unjustifiably refuse requests for telework, there it is compatible with the specifics of the activity. Also, parents with children under the age of eight and people who informally care for certain people can request telework without opposition from the employer under certain conditions.

I. WORK IN HYBRID REGIME

Hybrid work, i.e. work performed partly from home, partly from the office, considered a new form of telework can be used by employers, especially since by Law no. 241/2023 to supplement Law no. 53/2003 - Labor Code, a new article is introduced, article 1181, which provides in paragraph 1 that, "upon request, employees who have dependent children up to 11 years of age benefit from 4 days per month of work at home or telework, under the conditions of Law no. 81/2018 on the regulation of telework activity, with subsequent amendments and additions, except for situations where the nature or type of work does not allow the activity to be carried out under such conditions".

It was said that "the purpose of the law which provides for the four days of work from home for those who support children up to 11 years of age is, of course, to be appreciated and is part of the European desire to strengthen the balance between professional and family life . But the law does not solve a current problem of the labor market that we encounter both here and in other European countries or in the United States - the openness of employers to telework (where possible, of course). In reality, in companies where hybrid work has been embraced in the long term, employees with children have obtained the benefit of working from home anyway". *(Voiculescu, 24 iulie 2023, www.avocatnet.ro)*

Recently, employers, under the influence of the impact generated by the pandemic, combined with the desire of employees to have more flexibility in terms of organizing their work, are focusing on the implementation of hybrid work programs, which, in essence, involve a time interval given (as a rule, the reference is given by the working week) for employees to work from workplaces organized by the employer, as well as from other workplaces of their choice. *(Vlăsceanu, Iordache, 2023, p.97)**

It was mentioned that "employers who have not provided anything regarding the performance of the activity from the headquarters in the telework contracts have difficulties in bringing teleworkers to the office, even for one day a month." Any renegotiation of the terms and the transformation of telework exclusively from home into telework in a hybrid regime requires the agreement of the parties. On the other hand, although the law does not oblige them to provide the places from which the telework activity is performed, the parties can agree to provide those places, and the employer has an interest". *(Voiculescu, 31 august 2023, www. avocatnet.ro)*

Because Law no. 81/2018, or the rules of the Labor Code, do not take into account the hypothesis that the employee comes to the office when he wants, in the "hybrid" work regime, i.e. work performed partly from home, partly from the office, considered a new form of telework, should be expressly provided *(Țop, 2023, p.212)* for in the Labor Code.

Although not expressly regulated, hybrid work is a reality (Dimitriu, 2023, https://webinar-hr.legislatiamuncii.ro) that cannot be fully encapsulated in the concept of telework. As far as the Romanian legislation is concerned, I think there are still steps to be taken in the direction of making the hybrid employment relationship more flexible, so that it reaches its goal. Let's not forget that its widespread use was associated with a completely exceptional situation, namely the Covid 19 crisis. However, after the end of the pandemic, the percentage of employees who work, even partially, remotely, will never return at the low rates observed before the crisis, so that it has become a phenomenon that no longer has health causes, but is directly related to party choices.

Some studies show that telecommuting – especially hybrid models – has continued after the pandemic, as its widespread use has increased awareness of its benefits and shown that obstacles can be overcome. Workers who have gone through a process of integration and learning between work and private life are pushing employers to maintain flexible working patterns. In addition, hybrid work models are pushing companies to rethink the role of the office: the office of the future will be designed as a place for collaborative and creative work, socializing and experiencing company culture.

II. THE WORKPLACE OF THE TELEWORK

Currently, the legislation no longer requires the parties to provide for the "place(s) of the telework activity" in the individual labor contracts. Thus, in the contracts we can now have no reference to a place of performance of the activity or the places can be specified, in the terms agreed by the parties, for example, to mention that the activity is carried out only in Romania, or to show the exact address of employee's domicile, city, etc.

In certain situations, however, the provision of the place of activity is important. "If the teleworker is sent by the employer to a different location than

those agreed by the contract, he has the right to all benefits provided by art. 44 para. 2 of the Labor Code". The employee who, at the discretion of the employer, must temporarily exercise his duties and responsibilities outside his workplace benefits from the payment of transport and accommodation expenses (as the case may be), as well as a delegation allowance, under the conditions provided by law or the applicable collective labor agreement, more precisely. The Labor Code defines delegation as "the temporary exercise, at the disposal of the employer, by the employee of certain works or tasks corresponding to the duties of the service outside his workplace", and in the case of the two types of contracts (we could still say «atypical» or «special»), work at home and telework, if a period or days were not foreseen in which the employee with work at home or the teleworker should carry out his activity « at a workplace organized by the employer", we are in the presence of the delegation with all the rights provided by law". *(Năstase, 28 octombrie 2023, avocatnet.ro)*

If the employer does not restrict the scope of the teleworker's workplace to the territory of Romania, there may be various fiscal consequences if the teleworker decides to become a digital nomad in another state.

It should be noted that employees do not have the right to telework, and failure to show up at work, as stipulated in the contract, is practically equivalent to unjustified absence from work. Law 81/2018 is not always respected, so occasional work from home, without legal formalities, happens in practice and not infrequently. The context of her pregnancy. In the absence of an additional act to the individual employment contract regarding the telework regime, the employee is obliged to report to the workplace and the employer has the right to request this. The occasional permission to work from home does not give the employee a right in this sense. *(Voiculescu, 11 septembrie 2023, www. avocatnet.ro)*

Employers are required to give reasons for their refusal to accept employees' request to work remotely. Thus, if the employee requests a flexible work schedule, which could allow him to work from home, employers are obliged to give reasons for their refusal in writing, within five working days of receiving the request. *(Țop, 2022, pp. 7-17)*

The Bucharest Court of Appeal decided, e.g., that "the fact that the employer remained inactive for a longer period of time, as claimed by the appellant, cannot be considered as evidence of telework, the Court also noting the fact that the employer sent her notices to show up to discuss the employment relationship situation. Also, during this period, the appellant's activity was sporadic, although she was not prevented from performing her work".

Employers "must ensure that all specific clauses are found in the telework contract, such as those provided by art. 5 para. 2 of the Telework Law. The lack of specific clauses in telework contracts is sanctioned with a fine. It often happens that one or more of these clauses are forgotten in the content of teleworker contracts, or companies limit themselves to extremely brief provisions, which do

not tick the requirements of Law 81/2018, for example employers forget or do not know that telework contracts must specify how the timekeeping is done".

Even if the Labor Code gives employers the right to keep records as they see fit, electronically, on paper, etc., a matter also valid in the case of telework, it does not oblige them to put in the individual contracts how the time will be done. The telework law, however, requires this: "the method of highlighting the hours of work performed by the teleworker" must be stipulated in the contract.

There is no "one-size-fits-all formula for success in the use of telecommuting, as the range of activities and internal structures of organizations differ from one entity to another." However, useful guidelines such as simplifying regulations, achieving clear objectives of cost and management efficiency, increased but carefully weighted flexibility and, last but not least, optimal use of technology can transform the usual concept of telecommuting into an innovative concept of intelligent telecommuting, which could ultimately overturn modern work values and make use of the opportunities opening up for organizations'. *(Popa, Lungu, 22 august 2023, www. juridice.ro)**

III. THE RIGHT TO DISCONNECT - A FUNDAMENTAL RIGHT IN THE E.U.

Although there is the advantage that, thanks to information and telecommunications technologies, teleworkers can organize their working time according to their own needs, there is a risk that there is no longer a clear demarcation *(Țop, 2023, pp.1271-1283)* between working time and rest time. The increasing use of digital tools for professional purposes has led to the emergence of an "always on" culture. This has a negative impact on the work-life balance of employees.

Working from home has been critical to protecting certain jobs and businesses during the COVID-19 crisis. However, the combined effects of longer working hours and increased demands have led to increased cases of anxiety, depression, burnout and other physical and mental health problems.

The development of digital technologies has facilitated work from anywhere and, implicitly, created the conditions for workers to remain, in one way or another, "connected" to the professional environment. In addition, the spread of remote working has again contributed to the blurring of the boundaries between work and personal life and has in some cases coincided with employers' expectation that workers remain available even outside of agreed working hours.

In the EU, all states have legislation *(Voiculescu, 10 noiembrie 2023, www.avocatnet.ro)** guaranteeing the right to mandatory rest outside working hours. Furthermore, countries such as Spain have developed rules for recording working time which help to comply with and enforce working time regulations. However, it is debated whether the application of the traditional right to rest is sufficient to ensure that employers properly regulate the use of ICT devices and

flexible working arrangements, thus allowing employees to plan their working hours and free time effectively.

At the level of the European Union, there are a number of instruments that indirectly address the issue of the right to disconnect.

Before the pandemic, according to the report of the European Agency for Safety and Health at Work (EU-OSHA), only four European countries had regulated the right to disconnect: Belgium, France, Italy and Spain. As of 2020, laws regarding the right to disconnect had been passed in Croatia, Greece, Ireland, Portugal, Slovakia and Spain. In all these countries, with the exception of Greece and Slovakia, the right to disconnect formally applies to all employees, not just telecommuters. In Greece and Slovakia, the right is mainly limited to teleworkers. In Belgium, the right to disconnect has been introduced since 2018, and from January 2023, employers with at least 20 employees are required to develop internal procedures for applying the right to disconnect at company level, including mandatory minimum policies. Croatia regulated this right through amendments to the Labor Code at the end of 2022, prohibiting employers from contacting employees outside of working hours, with some specific exceptions. In Greece, the right to disconnect allows workers to completely refrain from work-related activities or communication outside of working hours. Ireland approved a so-called code of practice in 2021 that directs employers to allow disconnection, without precisely defining this right. Portugal has defined the right to disconnection as an employer's obligation to refrain from contacting employees during rest periods, and there may be contravention sanctions for non-compliance. Spain strengthened regulations on the right to disconnect with the 2020 telework law and can impose penalties for not having a disconnection policy. In Slovakia, the right to disconnect is linked to labor market reforms and allows employees working from home not to use work equipment during daily rest or holidays.

In our country, as in most of the member states of the European Union, the right to disconnection is not regulated in the current legislation. However, it is necessary to specify that in Romania the "very restrictive duration of working time and, respectively, rest time and its limits, as well as the organization and maintenance of records of working time" are regulated. The guarantees that accompany this right may derive, in part, from the mandatory regulation of the Labor Code regarding working time, rest time and the record of hours worked, against which Law no. 81/2018 which regulates telework activity, does not include exemptions to the detriment of the worker (*en pejus*).

Since the outbreak of the COVID-19 pandemic, "the proportion of remote work has increased by almost 30%. The figure is expected to remain high or even increase in the future. Eurofound research shows that people who regularly work from home are more than twice as likely to work more than the prescribed maximum of 48 hours per week compared to people who work at their employers' workplaces. Almost 30% of people who work from home say they also work in

their spare time, either daily or a few times a week, compared to less than 5% of office workers."

The European Parliament adopted a resolution urging the European Commission to prepare a directive on the so-called "right to disconnect". It is emphasized that the need to adopt a European directive and its subsequent transposition into national legislation throughout the EU is particularly important in the context generated by the COVID-19 crisis. Given that the pandemic has produced a significant increase in remote working, "which amplifies workplace stress and blurs the line between work and private life, it becomes even more urgent to ensure that workers can exercise their right to disconnect."

Taking into account the resolution of the European Parliament regarding the right to disconnect, it follows that the provisions of Law no. 81/2018 must be duly completed with the express consecration of this right and the guarantees that accompany it.

Among them, those that refer to the obligation of employers to establish an objective, reliable and accessible system that allows the measurement of the duration of the daily working time of teleworkers, as well as those that require written information from the worker, the assessment of the risks to your health. Also of particular importance to workplace safety are those related to the right to disconnect and awareness of remote workers, including through on-the-job training.

Although, compared to the provisions of the legislation, we can see, in the case of Romania, "a strict formal delimitation between working time and rest time, in practice, however, this delimitation is rarely respected, and employers face multiple problems in regarding the organization of additional work, both in the case of full-time employees and (in particular) in the case of part-time employees". Such a delimitation, by no means easy, "can be attributed both to the continuous digitization and to the transition that we observe in Romania, from the "classic" working schedule to a new flexible working schedule, so that a real right of employees to to disconnect completely after the end of the working day, which will include the right to refuse to consult e-mails received after this moment, to the extent that this will also be regulated in Romania".

In the absence of establishing some common minimum standards at the EU level, the regulation of the law risks losing its imperative character, as a fundamental right, as the preamble of the proposed directive calls it, and can be restricted without limitations, by conventional means.

The right to disconnection is a "fundamental right", *(Vernea, 2023, p. 81)* and also "an inseparable component of the new work models of the new digital era". This right should be seen as an important tool of social policy at the level of the European Union to ensure the protection of the rights of all workers; Also, the right to disconnect takes on importance for the most vulnerable workers, as well as people with caring responsibilities.

EMPLOYERS' OPENNESS TO TELEWORK

According to the legislation in force as well as the jurisprudence of the CJEU, "workers must not be at the disposal of the employer constantly and uninterruptedly; There is a difference between working time, in which case the worker must be at the employer's disposal, and non-working periods, in which case the worker is not obliged to remain at the employer's disposal, and on-call time is considered time. To work"; The European Parliament recognizes, however, that the right to disconnection is not explicitly regulated in Union law.

The European Parliament has shown that it is necessary to adopt specific regulations that guarantee the right to disconnection, in compliance with the existing directives in the matter, which refer at least to the following aspects:

- the right to disconnect, which enables remote workers to "carry out tasks, activities and electronic communications for professional purposes - such as phone calls, e-mail and other messages - outside working hours, including periods of rest, official and annual leave, maternity or parental leave and other types of leave, without facing negative consequences";
- to take necessary measures to ensure that new ways of implementing worker surveillance and work performance, which allow employers to track workers' activities on a large scale, are not seen as "opportunities for systematic worker surveillance";
- to inform workers about the processing of their personal data;
- respects working time and its predictable character;
- prohibits employers/colleagues from asking their employees to be available or accessible directly or indirectly outside of their working hours or tries, pursuing professional purposes, to contact them, even beyond the limits of the agreed working hours.;
- the express framing of the time in which a worker is at the disposal of the employer or in which he can be contacted by the latter as "working time";
- to inform workers about work conditions, in a timely manner and in written or digital form, to which workers can easily access.

The European authorities have been working since 2021 on a draft directive by which employers will be obliged to respect a new right of employees - that of being inaccessible outside working hours, stating that "this directive establishes the minimum requirements to allow workers who use digital tools, including ICT, for professional purposes, exercise the right to disconnect and ensure that employers respect workers' right to disconnect. The directive applies to all sectors, both public and private, and to all workers, regardless of their status and working arrangements". The right to disconnect "will mean, in practice, that employees will not have to engage in activities or communications related to their professional activity, through digital tools (for example, by phone or laptop), outside of working hours". *(Voiculescu, 10 noiembrie 2023, www.avocatnet.ro)*.

CONCLUSION

The evolution of telework has not been significant in Romania over the last decade, occupying the last position in the EU ranking annually, according to the total percentage of workers, and it went from 0.1% of employees who occasionally worked from home, only 0, 6% in 2019. In 2021, the proportion increased to 24% of the total number of employees who worked or worked only remotely, a situation that made Romania climb six positions among the member states of the European Union.

In our country, there is no regulation of an "absolute right to telework" for any category of employees, but the legislation obliges employers, in case of rejection of a request to work telework, to justify this refusal.

In Romania, at the moment, no regulations have been adopted that expressly refer to the right to disconnection, but it is expected that in the current context, the Romanian legislator will address this issue and advance a proposal for a regulatory act in this regard. Otherwise, to the extent that a directive is adopted at the level of the Union to guarantee the right to disconnect, the Romanian state will have the obligation to transpose this directive. Until then, and in the absence of the express enshrining of this right, the applicable legal provisions prohibit the performance of overtime without the consent of the worker, which is equivalent to the prohibition of the employer to impose on the worker the obligation to remain connected/available. outside of work hours.

It is desired to adopt a European-level directive that would require member states, including Romania, to implement the right to disconnection in their national legislation.

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THE INTERACTION OF EMERGING TECHNOLOGIES WITH THE LEGAL FIELD

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Abstract

Artificial intelligence (AI) is currently perceived as the most disruptive emerging technology, with more and more members of contemporary society seeing it as a significant driver of job loss. Without understanding the opportunities to transform labor relations through the emergence of new professions and the abandonment of those professions that can be replaced by automation, technologies based on artificial intelligence are considered a formidable adversary of humanity and not a tool created to production processes support. On the other hand, more and more companies are implementing emerging technologies to automate production processes, to optimize management, to implement effective security solutions and to diversify communication.

In this context, we aim to analyse how and in what way emerging technologies will interact with the legal field and propose a picture of future work reports. It is becoming increasingly clear that social resilience also requires an adequate legal framework, able to adapt to the new challenges caused by the digitization of the labor market.

The National Institute for Research and Development in Informatics - ICI Bucharest is concerned with scientific research and applied development, actively involved in ensuring the cyber security of the identity of any person, natural and legal, and through the solutions for the sustainability of the digitalized society, it supports the national effort to ensuring cyber security, an important part of national security.

Keywords: *emerging technologies, artificial intelligence, law, digital sustainability.*

INTRODUCTION

Today, more and more companies are implementing emerging technologies especially for automating governance processes and optimizing product delivery. These solutions are extremely effective for increasing productivity, but they produce social convulsions in terms of the increased demand for new professions and qualifications that presuppose a rapid reconversion of the labor force.

Such a change also requires an adaptation of the legal framework to regulate the new labor relations. In this way, innovations that stimulate differentiation and competitive efficiency are highlighted, behaviours are modeled, but new approaches are also required regarding the dimension of the security of the identity of individuals in the general context of maintaining the security of the democratic state.

I. GENERAL LEGAL CONTEXT APPLICABLE TO THE DIGITAL ECOSYSTEM

The modern state represents a construction whose formation and organization is based on society. The background of its dynamics is the legal framework made up of all social norms and rules (*Mihăilescu, S. L. Th., 2023, p.17*). Therefore, the law organizes life in common representing the technique of human coexistence intended to form a discipline that defends society from excesses. Within a society based on law, social relations are formed through legal rights and obligations, the observance of which is ensured, if necessary, by the coercive force of the state.

The information society represents the structuring of human society through the prism of information systems. By deduction, the digitized society represents an approach to the state through the digitization of digital resource relations. Digitization represents the process of transforming information into elementary units, measurable in bits, through which, with the help of specific technologies, objects, images, sounds or signals can be created. This transformation involves procedures that characterize the totality of interactions and relationships between people, processes, data and equipment in an organization involved in its information, decision-making, production and business processes.

The dimension of security is included in the information dimension, being determined by the value of knowledge in the field of interest. In the context of digitization, this must be "cyber" and characterizes the relationships of critical infrastructures, in particular, informational ones.

The presence of legal dimensions, in all information systems, makes sense as a support of the cyber dimension in the context of any approach to security (*Dinu, M.-Șt. 2022, pp.102-110*). In this way, solid legal instruments can be created that protect both individual rights and freedoms and ensure the protection of critical infrastructures of national or international interest. The coercive force

of the state and international organizations vis-à-vis non-state actors will apply to organized crime and terrorist structures, national, international and cross-border. Both organized crime and terrorism produce threats in the evolution of any information society, through cyber.

Therefore, if the regulatory object of civil law represents those social relations that are regulated by legal norms (*Boroi & Anghelescu, 2021, p.7*), we can affirm that the regulatory object of a new discipline, such as information law, can be represented by the correlation of all the regulations of informational law norms, during the procurement, storage and processing of information, regardless of the technology used. This will study the types of behaviour in digital relationships and will form a specific legal framework that includes norms and laws related to each element of the composition of information systems, components of the information ecosystem.

The function that enables the efficient evolution of the components of any information system is identity. Thus, system components can identify themselves and will gain authorized access for their participation in technological processes. Policies and procedures become the basic tools for preventing unauthorized access to various private data and information. Control of access to data and information is essential to block identity theft, violation of the right to privacy, violation of copyright and related rights, non-compliance with industrial property rights, violations of related rights legislation, intrusions into various components digitized for the purpose of hijacking critical information infrastructures necessary for the operation of critical sector components.

On the other hand, security and control policies and procedures must be carried out in accordance with legal provisions in the field of human rights, with regard to individual and civil rights and freedoms. They regulate the situations in which technical supervision, personal data protection, access to public information, etc. are required, and special attention must be given to them through constitutional norms and special laws. Thus, within the relations between the components of the information systems, new legal relations will not be generated that do not conform to social values.

We can affirm with real grounds that the historical stage we are going through represents a critical moment in the evolution of cyber-systems. Advances in computing, IT and communication systems have enabled the emergence of a wide range of digitized technologies, of which those based on artificial intelligence are becoming increasingly used. All this form the content of the concept of emerging technologies.

It is observed that, in some situations, the focus on the direction of technological developments has led to the emergence of an incoherence or a mismatch in cyber security.

It is known that the economic systems of a state are governed by functional requirements and markets in constant motion. Digital devices appear

and expand at an exponential rate, inversely proportional to the costs of their production. Their operational and finished product designs are evolving rapidly. New technological standards are emerging. Many devices that are already deployed have limited lifetimes, measured in years.

It is worth noting that these systems, whether they relate to a car's frontal collision prevention capability, a medical device's ability to adapt to circumstances in real time or the latest innovation in IoT, are a source that ensures the advantage competitive in the innovative economy (Industry 4.0), but generates various risks and vulnerabilities that can be exploited in hack activities (*Ciupercă, Cîrnu, Stanciu & Cristescu, 2022*).

The consequences of unintentional mistakes or malicious attacks can have a serious impact on the quality of human life and the environment. For this, every citizen, together with specialized structures, must make proactive efforts, coordinated through measures and procedures, to strengthen the cyber security culture and trust in emerging technologies. This is the only way to create legal norms correlated with the requirements of the digital environment, thus allowing the formation of a concrete and coherent cyber security policy (*Vevera, 2019, p.167*). In addition, cybersecurity must become a priority concern for everyone involved in the development of emerging technologies, from designers to administrators and users, as the digital ecosystem becomes part of our culture.

II. LAW AND EMERGING TECHNOLOGIES

The current comfort of modern life is unthinkable without the use of emerging technologies. Digital information processing provides food supply, human mobility, health maintenance, entertainment and other social functions. Digitization is recognized as the main driver of economic relations. Within progressive views, economic freedom, deregulation and digital bans, etc. all support individual freedom. However, the omnipresence of digital media, without adequate legal regulations, can affect, first of all, the capacity for self-determination.

The adaptation of the labor force to the new requirements is also signaled in the Report "The Future of Jobs" (World Economic Forum, 2023), published on April 30, 2023, by the Global Economic Forum. The paper presents a reasoned perspective on how socio-economic and technological trends will shape the job market. Based on sociological research, it is estimated that a number of professions will disappear in the next five years and new professions will be created. Digital technology will change the way work is done, the job content and the skills needed by future workers. The entire industry will focus on big data analysis, cloud computing, computational functions and AI, environmental management, encryption technologies and cyber security. About 75% of the companies surveyed confirmed that they will adopt these technologies in the next five years. The data also shows the impact of digitization of commerce and

occupations, with digital platforms and applications. These technologies are likely to be adopted by 86% of industrial companies compared to 75% of e-commerce and digital commerce companies. On a lower place in the pace of implementation of emerging technologies are the entities in which there is a pronounced emphasis on the displacement of jobs, such as those in the field of agriculture, digital platforms and applications, those in electronic and digital commerce. They will use AI only in the situation where they want to achieve a professional compensation through reconversion. Their expectations for implementing AI to improve performance are to solve more than 50% of tasks through automation.

Professions related to electronics, chemistry and advanced materials industries are much more willing to adopt new technologies than those related to personal services, insurance and pensions. Those in management services and real estate are the least inclined to adopt emerging technologies.

We can appreciate that without a renewal of strategies and a reanalysis of priorities, many production structures will be left behind or disappear from the market, a situation that will produce social movements through labor migration and the loss of some traditional jobs.

All these evaluations support the requirement to improve the rules of legal law to relate to the new relationships imposed by the transformations of life in the digital ecosystem. Law plays a crucial role in defining how AI-based technologies are used, protecting individual rights and ensuring the ethical and legal environment for their development.

Therefore, the interaction of law with emerging technologies can represent an interdisciplinary field where legal and technological knowledge intersect. The law must regulate relations regarding the use of technologies but also labor law to ensure compliance with laws, individual rights and ethics.

We present some opinions that we consider benchmarks for future analysis and research in the field of law:

1. In the area of regulations in legislation: Governments around the world and a number of international institutions have begun to develop and adopt laws and regulations to manage the impact of emerging technologies on society. They mainly concern data privacy, responsibility for AI decisions, copyright, etc. Often, emerging technologies are cross-border, making regulations complex. International organizations such as the UN and other regional organizations are engaged in developing global norms and standards to govern the use of AI internationally.

2. In the area of legal liability: One of the main challenges related to AI is establishing liability if AI technology systems cause harm. Scenarios where autonomous decisions are taken by robots or in the event of damage caused by autonomous vehicles are considered. Moreover, the use of AI for legal purposes such as evaluating evidence or analysing legal cases can change judicial practice.

An important issue is accountability for actions and decisions made by AI systems. If AI causes harm or injustice it must be determined who is responsible: the developer, the user or the system itself. This may lead to the development of specific rules to determine responsibility. Moreover, the law must adapt to integrate these technologies into legal processes. The development of legal systems through AI must support case research, case law analysis and provide legal assistance.

3. In the field of data protection. The use of AI involves the collection and processing of large amounts of data. The European Union's General Data Protection Regulation (GDPR) sets strict standards for the protection of personal data and enforces penalties for breaching them. In addition, the data used to train AI technologies must be accurate and non-discriminatory. The law must regulate the process of data collection and use to prevent biases from being introduced into algorithms and to protect individual rights related to personal data. Protecting data privacy and security is essential.

4. To establish ethical norms in the use of emerging technologies. In particular, in the use of AI, special attention must be paid to ethical aspects (Ciupercă & Stanciu, 2022). Issues related to discrimination, bias and transparency in AI algorithms are important topics for which the law must regulate, through standards and certification, ethical evaluation techniques and transparency of systems.

5. In the field of intellectual property. Especially for AI products, copyright and intellectual property questions may arise. In the situation where this technology is used for the generation of creative content or for the development of technological innovations, it is necessary to establish clarifications regarding who has the right to own and exploit such a creation, what are the copyrights and what is patent ownership. But computer viruses are also creative products and can be generated by AI. In addition, increased use of AI may lead to increased disputes between parties requiring arbitration. Arbitration and alternative dispute resolution procedures can play an important role in resolving these disputes.

6. For automated contracts and negotiations. AI can be used to negotiate and enforce contracts, which raises questions about the validity and enforceability of these contracts in the eyes of the law. Additionally, to ensure compliance with the law and ethical standards, it is important that emerging technology systems are audited and provide a clear explanation of how they make decisions. Regulations can require transparency in AI algorithms and decision-making processes to avoid discrimination and bias.

7. Protection against discrimination. Civil rights and equality laws have significant application in the AI context. AI systems must be developed and used

in a way that does not perpetuate discrimination based on race, gender, sexual orientation or other protected characteristics.

8. Consumer protection. An important part of e-commerce is consumer protection. When it comes to AI in e-commerce and online services, consumer protection laws play a crucial role. The law must ensure that users benefit from transparency, correct and appropriate information to make informed decisions in online transactions, as well as protection against deceptive commercial practices.

9. In the area of international cooperation: Since AI is not limited to national borders, international cooperation is essential to develop common regulations and standards that facilitate the global use of information, AI and emerging technologies, to ensure the application of rules in an international context.

These are just some of the priority directions for which the legal framework must modernize through interaction with emerging technologies. For this, a transformation of education and training in the legal field is also necessary. Training specific to legal disciplines involves a high level of complexity. Lawyers and legal professionals must be prepared to address the new issues brought by emerging technologies and AI.

On a sectoral level, through the prism of the regulations of certain relationships specific to the implementation of emerging technologies in production chains, we consider the following aspects to be revealed, which support the need to modernize the law:

- The development of autonomous vehicles that have entered the European market since 2020 (European Parliament, 2019), raises a number of legal questions that require new regulations. For example, how is responsibility determined in the event of a road accident and what is the application of road traffic safety regulations.

- Automated systems and industrial robots are easy to find in various technological lines and replace personnel especially in critical functions for human health. Thus, self-regulating and self-administering systems that can make decisions and act independently produce new reports that need to be legally regulated, especially for how these robots perform tasks without human intervention. Who is responsible if problems arise? In addition, labor law must adapt in terms of the protection of the rights of human workers, the rules for replacing the work performed by human staff and the ways of professional training.

- Artificial intelligence can also be used to develop cyber-attacks. The situations in which such technologies are involved in military conflicts are no longer a secret of contemporary wars. It is becoming a rule that jurisdictional

issues will arise in international conflicts where actors use AI and other emerging technologies. Especially in offensive cyber operations information manipulation and disinformation are main techniques that rely on AI. International law must address these issues and develop effective methods of investigation and prevention, both for cyber-crimes and for specific actions of cyber terrorism. Protection against fake news or controlled content by these technologies must be regulated by tools to prevent and sanction these activities, ensuring the integrity of information and public discussion. In addition, legislative overlaps or regulatory gaps must be identified.

- The integration of emerging technologies can cause threats to privacy and freedom of expression. The defense of individual rights remains a crucial direction in the age of digital communication. Laws must balance the efficient use of technologies while protecting these rights.

We believe that those presented are only a few of the many aspects related to law and the interaction with emerging technologies. Collaboration between the legal and technology communities remains crucial to develop an appropriate social environment and address future challenges.

III. THE SUPPORT OF THE NATIONAL INSTITUTE FOR RESEARCH AND DEVELOPMENT IN INFORMATICS – ICI BUCHAREST FOR THE MODERNIZATION OF THE LEGAL FRAMEWORK

Law and emerging technologies will continue to evolve in parallel, influencing each other. Their interaction will form an appropriate legal framework for the digital world of the future. In this sense, the National Institute for Research and Development in Informatics - ICI Bucharest must be considered a consistent support for the development of the national information society, having as its main mission support in research and innovation for the development of the knowledge-based economy and for better integration in the European space and international, of scientific research.

Over time, the institute's name has been associated with "premiere achievements" in Romanian informatics, among which we list (*ICI-București, 2023*):

- development of the first national computer network;
- complete Internet connectivity through ".ro" domains registered with IANA (Internet Assigned Numbers Authority);
- the first digital library in Romania;
- the first Romanian consortium for the development of the Grid;
- the first algebra-oriented language and the first compiler for linear optimization;
- the first Romanian Grid site certified and included in the European EGEE profile infrastructure;

- the first IT project in the field of Cloud Computing for public institutions in Romania;
- the first Competence Center in the HPC field in Romania;
- the first center specialized in the field of Cyber Diplomacy;
- the first European course in the field of Cyber Diplomacy under the auspices of the European External Action Service (European Commission);
- pioneering the development and adoption of Blockchain technology for societal applications;
- the first center of Cyber – influence (CIASC);
- the first digital forensic mobile laboratory.

The results of scientific research are made available to those interested through articles and conferences appreciated at national and international level, being indexed in recognized databases. In recent years, ICI specialists have published more than 500 articles in specialized journals and proceedings, as well as more than 30 books or chapters in volumes, from the country and abroad. ICI is represented by former and current specialists in the Romanian Academy, the Academy of Scientists and the Academy of Technical Sciences.

ICI Bucharest is represented in over 20 national and 30 international professional associations. During its activity, ICI received on several occasions confirmation of the recognition of its level of excellence and ICI researchers were rewarded over time with prestigious national and international awards, awards of the Romanian Academy and Doctor Honoris Causa titles of some universities from the country and abroad.

ICI Bucharest publishes the following specialized magazines:

- Studies in Informatics and Control – SIC
- The Romanian Journal of Informatics and Automation (Revista Română de Informatică și Automatică – RRIA)
- Romanian Cyber Security Journal – ROCYS
- International Journal of Cyber Diplomacy – IJCD

Among the services and products provided by ICI Bucharest are:

1. The National Program Library (BNP - Biblioteca Națională de Programe) which is a digital library of software products launched in 2011. It offers information facilities and access to various software products available in Romania, being adapted to the current requirements of the new information society and to facilitate online registration of program products.

2. ICI-Learning is a learning platform (e-learning) developed in 2020, being a useful tool for professional training through courses held within the Continuing Professional Training and Training Centre.

3. ICIPRO is a Cloud Computing infrastructure for public institutions in Romania, being made available to public services offered to citizens. It was made

to streamline the acquisition and use of ICT (Information and Communications Technology) at the level of public institutions, to increase the transparency of the activity of public institutions and to facilitate interoperability between public electronic services.

4. Local network vulnerability scanning and alerting services through ICISOC. This is combined with the implementation of customized IT security policies at the level of detail, policies that can greatly raise the awareness level of employees, can increase the IT security level of the entity, at an almost symbolic cost compared to the range of services provided.

5. Smart device testing service for each field of activity regulated by legislation and requested by economic operators, distributors, manufacturers, importers of tested fiscal equipment.

6. The RoTLD Registry represents the official authority that administers the .RO top-level domains by creating, implementing and maintaining software systems, databases and an infrastructure necessary for the ".ro" domain to be present on the Internet.

7. Research - Development - Innovation activities in the field of Blockchain technology, Asset Tokenization and Trading Ecosystems. The services based on Blockchain technologies provided by ICI Bucharest are developed based on in-depth research studies of emerging technologies, understanding the complexity and advantages that these technologies bring to various fields of activity, such as: e-medicine, education, transport, legal, finance, business and many others.

8. ICI-SIOC (Smart Integrated Operations and Control) is a complex solution for monitoring infrastructures, applications and IT services, providing support for AIOps with the aim of ensuring a high level of reliability, performance, security and information intelligence. Within the center IT experts, investigators and/or lawyers can carry out collaborative work for activities related to the field of computer forensics.

Last but not least, ICI organizes, is a partner or guest at a series of scientific events of international and national, professional or sectoral interest.

Among these, the cyber diplomacy conference, the International Conference on Cyber Diplomacy, this year is in its second edition. The event brings together various decision-makers and managers from the public and private sector, exponents of the institutional and diplomatic environment, academic and security experts, other relevant specialists for the fields in which cyber technologies are implemented. During the conference, topics are addressed about recent challenges and trends in the field of cyber security at the global level, about the role of diplomacy in generating common advantages through dialogue and a collective strategy. The current edition of the conference facilitated the approach

of topics of great interest such as: the analysis of the evolution of cyber threats, cross-border cyber-crime, internet governance, regulations in the cyber field, the impact of fake news on cyber diplomacy and many others.

Last but not least the international conferences that have become events with tradition, organized in partnership with other prestigious institutions under the name of Virtual Learning - ICVL (this year being at the 18th session) and the National Virtual Education Conference - CNIV (this year being at 21st session with international participation), bring together important representatives of Romanian education, offering an appropriate framework for the exchange of experience to actors involved in education, creating opportunities for future joint projects.

CONCLUSIONS

Concerns regarding the regulation of the use of emerging technologies and AI pose challenges both to the development of digitized technologies and to the contemporary legal system. The harmonization of norms and laws is the subject of numerous international meetings and discussions in various appropriate domestic and regional environments, with a view to building a common vision for a governance of the digital economy in accordance with democratic values, based on reliable emerging technologies. In this context, steps are being taken in Romania towards alignment with European legislation and international standards and good practices. They address issues mainly related to physical and cyber security for technical equipment and systems, establishing the model of a technical and organizational framework for the implementation of certification schemes and for accreditation regarding cyber security.

By Government Decision no. 1.321/2021, Romania's cyber security strategy for the period 2022-2027 was approved, as well as the action plan for its implementation. The document, based on an updated vision of the evolution of the cyber security issue, identifies five objectives of strategic importance, among which the achievement of a consolidated normative and institutional framework stands out.

In terms of the organization of cyber security activities at the national level, the general cooperation framework represented by the National Cyber Security System (SNSC - Sistemul Național de Securitate Cibernetică), coordinated by the Cyber Security Operative Council (COSC - Consiliul Operativ de Securitate Cibernetică), was defined. It brings together, unitarily coordinates and ensures cooperation at the level of all national actors in order to know, prevent, deter and respond to cyber threats to Romania. The main actors are the public authorities with competences in the matter, actors from the non-governmental, professional and business associative environment.

As is known, the Supreme National Defense Council (CSAT - Consiliul Suprem de Apărare a Țării) is the authority that strategically coordinates the

activity of the SNSC. The National Cyber Security Directorate established by GEO no. 104/2021 (Mof I no. 918/24.09.2021) represents an interface of the COSC member institutions for the cooperation of the listed actors with civil society, the private and academic environment, constituting an optimal framework for the creation and development of effective partnerships in the field of cyber security.

It is important to note that due to the complexity and interdisciplinary nature of the cyber security field, cooperation between different bodies, authorities and agencies is crucial to identify appropriate approaches to specific challenges in order to further develop the industry and related economies.

We are convinced that the entire legislative, national, European and international system will evolve and adapt continuously to identify and apply the best solutions in order to reduce the decision-making gap, to ensure the best conditions for the physical and cyber security of citizens, as well as for the maintenance of fair conditions for businesses, with a view to the economic development of all countries.

Through what has been presented, we want to reinforce the convictions that ICI Bucharest, like other professional structures, is actively working to improve the digital environment for the benefit of citizens in order to identify solutions and applications designed to effectively protect online users, to ensure cyber security and to facilitate the exchange of information in conditions of real cyber security.

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THE DEVELOPMENT OF THE ROMANIAN EDUCATION SYSTEM THROUGH FUNDING POLICIES AND EUROPEAN FUNDS

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Abstract

We live in the information age, where people have access to information in a way that was simply impossible in the past. In this era everything is moving and changing, and the need for readaptation is constantly appearing. The design of human development is based on education and culture, aiming at social inclusion, spiritual, moral and material fulfillment of graduates. With Romania's accession to the European Union, education is in a continuous transformation according to the models and criteria imposed by the Union, and our educational institutions try to keep up with everything that represents the European norm. In this paper we will address the importance of projects funded by European funds aimed at integrating the education system within the European Union model. We will also present the path that education in Romania has had since joining the Union in 2007, but also the role of Erasmus type programs in the evolution and adaptation of education to European requirements. The article is structured in three parts. The first part analyzes the features of the European context, the areas of the activity of the European Union, Romania's situation against the most important problems signaled by the European Commission, but also the educational policies at the level of the Union. Part two describes in the first part approaches to project management, what means a project financed by European funds as well as the main cross-cutting development issues. The third part presents two examples of best practices carried out under the most extensive program, namely Erasmus.

Key words: *Educational policies, European Union, Erasmus+, school dropout, skills.*

INTRODUCTION

No matter what country we come from or what language we speak, the European continent can be considered the country of all of us. Michel Foucher (2000) argued that "Europe is an invented tradition, being the foundation of an identity built and rebuilt according to the circumstances"[1]. The idea of a United States of Europe, as Adrian Liviu Ivan calls them, has been promoted throughout history by intellectuals and emperors, being considered, exactly, both a challenge and an opportunity to expand the European identity[2].

The European Union as a socio-political organization, in addition to institutions and treaties, constitutes a set of "values, attitudes, democratic, multicultural and pro-integration behaviors, a model for the young generation of students today, the future European leaders of tomorrow, promoters of European democracy and socio-cultural diversity"[3].

The European Union is an economic and political union between 27 European countries, including as of January 1, 2007, according to the European Commission and the Directorate-General for Communications and Romania. The predecessor of the European Union was created after World War II. The first step is to strengthen economic cooperation: The aim is to make countries involved in trade economically interdependent and thus avoid conflict. Thus, in 1958, the European Economic Community was established, with the initial aim of strengthening economic cooperation between the six countries of Belgium, Germany, France, Italy, Luxembourg and the Netherlands. Since then, 22 more countries have joined (the UK leaves the EU in 2020), creating a huge single market (also known as the "internal" market) that continues to grow to its full potential. What began as a purely economic union gradually evolved into an organization operating in many different policy areas, from climate policy, environment and health to external relations, security, justice and immigration. This change was reflected in the decision to shape the European Union in 1992.

This political project called the European Union takes multiple actions in different areas, showing a real interest in solving problems, fighting the shortcomings and improving life in all its aspects. The European Commission lists 35 different policy areas on which it operates. We summarized the content of several areas to highlight the most important activities undertaken by the EU.

I. EDUCATIONAL REPORTS AND PHILOSOPHIES IN THE EU CONTEXT

Through its youth policies and programs, the EU aims to ensure that young people can participate fully in all social categories and to provide them with

[1] Michel Foucher, *La Republique Europeenne*. Paris, Belin 2000, p. 78.
[2] Adrian Liviu Ivan, *Sub zodia „Statelor Unite ale Europei" De la Ideea și Planurile de Unitate Europeană la Europa Supranațională*. Cluj-Napoca: Ecoo, 2006, p.43.
[3] Claudia Anamaria Iov, Raluca Luțai, Adrian Liviu Ivan, *Ghidul Uniunii Europene pentru elevi și profesori Educație pentru Cetățenie, Democrație și Diversitate într-o Europă a tinerilor.* Cluj-Napoca: CA Publishing, 2018, p.7.

greater opportunities in education and the labor market. The EU has a number of programs and initiatives to help young people in Europe take a more active role in society and gain experience in other countries.

These include in particular: **Erasmus+** *is the European Union program to support education, training, youth and sport in Europe, providing opportunities to acquire knowledge and skills through foreign experiences such as studies, internships, apprenticeships, youth exchanges; teaching, training, youth and sport activities*.[4] European Solidarity (European Union) is an EU initiative that gives young people the opportunity to express their solidarity by participating in activities in their country or abroad that benefit the entire European community and people. **The Youth guarantee** - 8*.8 billion, supports the employment of young people by ensuring that all young people under 25 have access to specific and quality jobs, apprenticeships, traineeships or further studies within 4 months of completion of formal or professional education upon entry into unemployment*.[5]

Research and *innovation* are vital to our economy and society. They are at the heart of creating quality jobs, stimulating growth and investment in Europe. The European Union is the world's largest cercetation laboratory, generating one third of the world's scientific and technological production. All EU Member States have their own research policies and funding systems, but many important issues are best addressed by supporting collaboration between researchers and innovators from different countries. For this reason, research and innovation are supported at EU level, in particular through Horizon 2020[6]. The program is the largest research and innovation program in the history of the European Union, with 80 billion allocated to research funding over a period of 7 years (2014-2020), as well as other public and private investments.

Investing in education and training is essential for the future of people, especially when they are young. There are, however, more than 4.4 million people in the EU still leaving school early, according to a 2015 report[7]. 15% of adults have low intellectual skills, making it difficult for them to go to school. They enter the labor market and participate fully in society. The EU contributes to improving the quality of education by encouraging cooperation between Member

[4] European Commission, *Erasmus+ EU programme for education, training, youth and sport.* Accessed on https://erasmus-plus.ec.europa.eu/ro/despre-erasmus/despre-erasmus, to date 14.03.2023

[5] European Commission, *Economic and Monetary Union*, accessed on https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/economic-and-monetary-union_en, to date de 14.12.2022

[6] European Commission, *What is Horizon 2020?*, accessed on https://wayback.archive-it.org/12090/20220124080448/https://ec.europa.eu/programmes/horizon2020/en/what-horizon-2020, to 15.12.2022.

[7] European Commission, *European Green Deal*, 2020, p.22, accessed on https://ec.europa.eu/clima/eu-action/european-green-deal_en, to date 14.12.2022.

States and complementing national action. Erasmus+ offers opportunities for people of all ages, in particular by enabling young people to study, train, gain work experience or volunteer abroad.

The European Union states are responsible for their own education and training systems, but the Union budget helps states achieve a certain level of quality education through the exchange of best practices, setting benchmarks and objectives, allocating funding and expertise. The EU Strategy for Education and Training aims to: Make lifelong learning and mobility a reality; to improve the quality and efficiency of education and training; to promote equity, social cohesion and active citizenship; to stimulate creativity at all levels of education and training and innovation, including entrepreneurship.

Erasmus+ is the EU program for education, training, youth and sport, which helps fight youth unemployment by stimulating personal development, skills and employment of young people. With a total budget of 14.7 billion, it has supported over 4 million people, mainly young people, to study, train, gain work experience or volunteer in another country. Erasmus+ expands the employment and personal development prospects of young people by providing them with the skills they need in the labor market and in society now and in the future. The European Commission has set itself the objective of doubling Erasmus funding to nearly 30 billion under the current long-term EU budget (2021-2027). There are many other initiatives in the EU to facilitate study, training or work abroad. European countries, trade unions and employers are working together to improve education and training through the Copenhagen process.

The results include the European Credit System for Vocational Education and Training and a quality assurance network that supports people working and studying abroad. The Bologna process and the European higher Education Area facilitate mobility between European education systems by promoting mutual recognition of study durations, comparable qualifications and harmonized quality standards. The Europass document set helps workers apply for jobs abroad by presenting their skills and qualifications in a European standard format that is easier for employers to understand.

II. EDUCATIONAL POLICIES AT EU LEVEL

The issue of education has been, is and always will be, a major interest of societies and their elites. In the modern age, since the industrial revolution, when access to education has become widespread, education has been imposed on all social classes.

Given Romania's integration into the European Union as a basis and reference for the modernization and decentralization of the Romanian educational system, we try to observe the touch of European educational policies on the Romanian education system and on education at all levels. This is the expression of legislative and mentality changes since the moment of integration. Building on

European education legislation, changes in the education system and, implicitly, in school management take different forms, from focusing on student training rather than information, cooperative learning, skills focus, lifelong learning to integrate communication technology into the teaching process.

The European context calls for strategic decisions to streamline, streamline and improve the performance of pre-university education by reassessing its internal structures, in particular the human resources involved in the activity. Changes in structure and function find their ultimate goal in terms of optimization and specialization only when they are related to the diversity of human factors. Two researchers Huber and Hallinger[8] discussed the European dimension as a mandatory presence on the educational agenda, arguing that today's educational analysis must be linked to the current context at European level and within European countries. Those considerations are based on issues related to changes in the operating environment, whether at international, global, regional, continental or domestic level: National, regional and local. The presence of the international dimension can be felt by including the United States and Asian countries in the comparative analysis. The establishment of an alliance of European countries, as an objective need to deal with the vitality and competitiveness of the United States, is also an objective need of Asian countries to enter the stage of the economic game, forcing the governments of the EU Member States to reorganize themselves political and social systems.

In pre-university institutions, the importance of human resources has multiplied, and the engine of affirmation and development is innovation at the spiritual and material level, opening up new areas of research, addressing emerging phenomena and processes, formulating theories and hypotheses, measures and solutions. The program becomes a condition of performance and respectability due to the need for immediate practice. The performance of the mission of a public preparatory education institution shall take into account the quality and activities of teachers and administrators. The active and continuous involvement of human resources in Romanian pre-university education has always stimulated Romania's economic growth and plays an important role in the development of modern and post-modern societies. The continuous training of teachers determines the improvement of the quality of education at all levels, as well as the implementation of new projects that attract as many students as possible in the educational act. Therefore, the development of education is the

[8] Hallinger, P., Huber, S., *School leadership that makes a difference: international perspectives*, School *Effectiveness and School Improvement: An International Journal of Research, Policy and Practice*. London: Routledge2012, accessed on https://www.researchgate.net/publication/239787062_School_leadership_that_makes_a_difference_international_perspectives, on date 08.12.2022

result of socio-economic changes, and later education becomes a catalyst for economic development.

The main problems that arise at the level of education, which are the targets of the European Union, relate to early school leaving, lifelong learning, digital skills, green skills, education and vocational training, but also to the modernization and adaptation of the school and university curriculum to the requirements of the labor market. In order to better understand what the problems at the level of education consist and to highlight the current state in Romania compared to the European Union average, we will debate each of the targets listed above.

The share of „early school leaving", a term referring to early school leavers (aged 18 to 24), has steadily declined, according to Eurostat[9], in the European Union over the past 10 years (from 13.8% in 2010 to 9.9% in 2020). The same source shows that more young men left education and training earlier than women in 2020 - 11.8% of men, compared to 8.0% of women. Compared to 2019, the share of early school leaving for men remained the same, while the share of women decreased slightly (by 0.4 percentage points). EU Member States have set themselves a target of reducing the early school leaving rate to below 9% at EU level by 2030.

Compared to 2010, almost all EU Member States reported a lower proportion of people who left early in 2020, with the exception of Slovakia, the Czech Republic, Hungary, Sweden, the Czech Republic and the Czech Republic. Luxembourg and Bulgaria, which all reported a small increase (below 3 percentage points).

School dropout rate in the European Union by gender (source Eurostat, 2021)

[9] Eurostat, *Continued decline in early school leavers in the UE*, 2021, acchttps://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20210624-2, on date 16.03.2023.

In 2020, according to the idiclic Eurostat[10] statistics, the Member States that reported the lowest percentages of early school leaving were Croatia (2.2%), Greece (3.8%), Slovenia (4.1%), Ireland (5.0%) and Poland (5.4%). By contrast, the highest shares were recorded in Malta (16.7%), Spain (16.0%), Italy (13.1%) and Bulgaria (12.8%), among which Romania with a percentage of 15.6%, while the European Union rate was 9.9%, Thus occupying the third position among the countries with the highest degree of early school leaving, but we can say that it is a good percentage compared to 2010 when Romania registered a school drop-out rate of 19.3%. Eighteen Member States have already met the 2030 EU-wide target for this indicator: Belgium (8.1%), the Czech Republic (7.6%), Estonia (8.5%), Ireland (5%), Greece (3.8%), France (8%), Croatia (2.2%), Latvia (7.2%), Lithuania (5.6%), Luxembourg (8.2%), The Netherlands (7%), Austria (8.1%), Poland (5.4%), Portugal (8.9%), Slovenia 4.1%), Slovakia (7.6%), Finland (8.2%) and Sweden (7.7%). In 2020, the share of early abandonment from education and training was lower for young women than for young men from all EU Member States except Romania and the Czech Republic.

Early school leaving rate in 2020 (source Eurostat, 2021)

Denmark, Finland and Sweden stood out from the other EU Member States as they reported considerably higher proportions of their adult populations participating in lifelong learning in the four weeks prior to the interview, ranging from 20.0% to 28.6%. Estonia, the Netherlands and Luxembourg were the only Member States in which the participation rate in 2020 exceeded the 15 % threshold. By contrast, Bulgaria, Slovakia, Croatia and Poland reported adult

[10] Eurostat, *Early leavers from education and training by sex and labour status*, 2021, accessed to https://ec.europa.eu/eurostat/databrowser/view/EDAT_LFSE_14__custom_1052523/bookmark/table?lang=en&bookmarkId=8cadd261-d35a-4be6-9162-89f6d8d85d08, on date 11.01.2023.

learning rates below 4.0%, while Romania missed the target assumed to the European Commission, with the 2020 indicator (1%) being comparatively lower than in 2010 (1.3%)[11].

According to Eurostat statistics, the proportion of the population that participated in adult learning was higher among women (10.0% in 2020) in the EU than among men (8.3%). The share for men and women was lower in 2020 than it was five years earlier. The participation rate of women and men increased continuously until 2019 and decreased only in 2020, i.e. with the onset of the COVID-2019 pandemic. In 2020, women recorded higher participation rates than men in all EU Member States except the Czech Republic, Germany, Greece and Cyprus (where the rates for men were higher), while Romania reported the same rate for both sexes. The largest gender gap in percentage points was in Sweden, where the participation rate for women was 13.6 percentage points higher than for men.

	Total		Male		Female	
	2015	2020	2015	2020	2015	2020
EU	10.1	9.2	9.2	8.3	10.9	10.0
Belgium (1)	6.9	7.4	6.5	7.1	7.3	7.7
Bulgaria	2.0	1.6	1.9	1.4	2.1	1.7
Czechia	8.5	8.6	8.3	8.6	8.6	8.5
Denmark (1)	31.5	29.0	29.8	26.4	33.5	31.8
Germany (1)	8.1	7.7	8.2	7.8	8.0	7.6
Estonia	12.4	17.1	10.9	13.1	14.1	21.1
Ireland (1)	6.5	11.0	6.0	9.2	7.1	12.9
Greece	3.3	4.1	3.3	4.3	3.3	4.0
Spain	9.9	11.0	9.2	9.9	10.7	12.0
France	18.6	15.0	18.9	11.2	21.2	14.9
Croatia	3.1	3.2	2.7	2.6	3.6	3.8
Italy	7.3	7.2	6.9	7.0	7.7	7.4
Cyprus	7.9	4.7	9.9	4.9	5.9	4.6
Latvia	5.7	6.6	4.1	4.9	7.2	8.4
Lithuania	6.9	7.2	6.1	6.6	6.6	8.7
Luxembourg	16.0	16.3	16.2	16.3	17.8	17.3
Hungary	7.1	6.1	6.8	6.4	7.6	6.7
Malta (1)	7.4	11.0	6.8	9.6	7.9	12.7
Netherlands	16.9	18.8	16.4	17.9	16.4	19.8
Austria	14.4	11.7	13.3	10.8	15.4	12.7
Poland (1)	3.5	3.7	3.3	3.1	3.8	4.3
Portugal	9.7	10.0	9.7	9.6	9.8	10.4
Romania	1.3	1.0	1.3	1.0	1.3	1.0
Slovenia	11.9	8.4	10.7	7.4	13.3	9.5
Slovakia	3.1	2.8	2.7	2.6	3.4	3.0
Finland	25.4	27.3	21.8	23.0	29.1	31.7
Sweden (1)	29.4	28.8	22.3	21.9	36.7	35.5
Iceland (1)	28.1	25.5	23.5	18.8	32.7	34.1
Norway	20.1	18.4	18.3	15.0	22.0	17.9
Switzerland	30.8	27.8	31.5	28.5	30.2	27.7
Montenegro	3.0	2.7	3.4	2.8	2.5	2.8
North Macedonia	2.5	2.5	2.7	2.5	2.5	2.7
Serbia	4.8	3.7	4.5	3.3	5.1	4.0
Turkey	5.5	5.8	5.9	6.0	5.3	5.5

Lifelong learning in the states of the European Union (source - Eurostat, 2021)

In the framework of the Porto Social engagement of 7 May 2021, the European Parliament, the Council of the EU, the European social partners and civil society organizations endorsed the objective of at least 60% of all adults taking part in training each year by 2030. The European skills Agenda sets out a five-year plan to help individuals and businesses develop more and better skills and implement them. The actions of the skills Agenda also relate to tools and initiatives to support people in their lifelong learning pathways.

[11] Eurostat, *Participation rate in education and training, last 4 weeks – 2020*. Statistics to 2021, accessed to https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Adult_learning_statistics, on date 14.01.2023.

Vocational education and training is a key element of lifelong learning systems. The Copenhagen process, established in 2002, establishes the basis for cooperation in vocational education and training (VET) between 33 European countries. The overall goal is to encourage more people to make wider use of professional learning opportunities, whether at school, in higher education, at work or through private courses. The actions and tools developed as part of the process aim to enable users to connect and rely on learning acquired at different times, both in formal and non-formal contexts. More recently, on 24 November 2020, the Council of the European Union adopted a Recommendation on vocational education and training for sustainable competitiveness, social equity and resilience. The Recommendation defines key principles to ensure that vocational education and training are agile by adapting quickly to labor market needs and providing quality learning opportunities for both young and adult learners. Strong emphasis is placed on increased flexibility in vocational education and training, enhanced opportunities for learning and apprenticeships at work, and improved quality assurance[12].

There are various definitions for *digital skills or competences* and several terms, such as „digital literacy", „digital competence", „ICT-related skills" and „computer skills", are often used as synonyms. In May 2018, the Council defined digital competence as "involving the confident, critical and responsible use of digital technologies, as well as their use for learning, in the workplace, and for participation in society [13]. These include information and data literacy, communication and collaboration, media education, digital content creation (including programming), security (including digital well-being and cybersecurity skills), intellectual property issues, and problem-solving and critical thinking.

According to the European Commission, in terms of digital skills, 56% of people in the EU have at least basic digital skills[14]. The data show a slight increase in the number of ICT specialists in employment: In 2020, the EU had 8.4 million ICT specialists, compared to 7.8 million a year ago. With 55% of businesses reporting difficulties in recruiting ICT specialists in 2020, this lack of employees with advanced digital skills is also a contributing factor to the slower digital transformation of businesses in many Member States The data indicate a

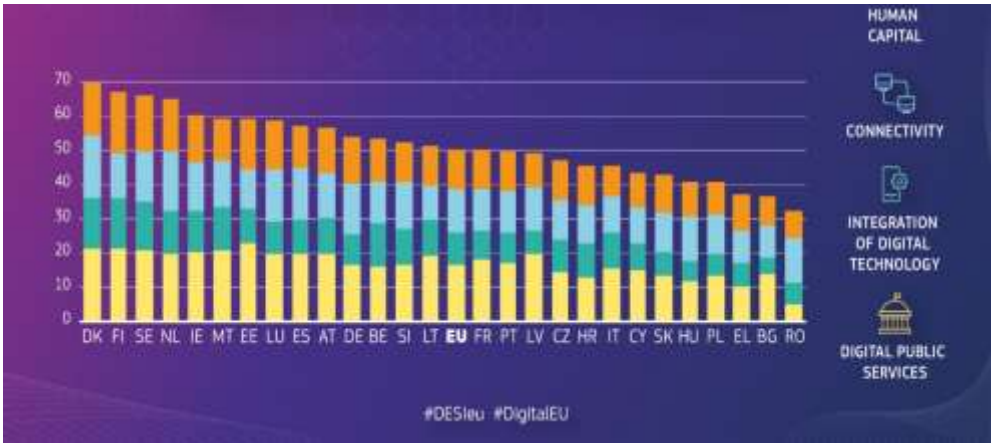
[12] Eurostat,*Glossary: Vocational education and training (VET),* 2021 accessed to https://ec.europa.eu/eurostat/statisticsexplained/index.php?title=Glossary:Vocational_education_and_training_(VE), on date 15.01.2023.

[13] ***European Court of Auditory***, EU *actions aimed at raising the level of basic digital skills-analissis document* nr.02/2021, p.7 accessed to https://www.eca.europa.eu/lists/ecadocuments/rw21_02/rw_digital_skills_ro.pdf, on date 15.01.2023.

[14] European Commission, *Digital Economy and Society Index 2021: overall preogress in digital transition but need for new EU-wide efforts.* Brussels, 2021, accessed to https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5481, on date 15.01.2023.

clear need to increase training opportunities and opportunities to achieve the Digital decade skills goals (80% of the population have basic digital skills and 20 million ICT specialists).

Significant improvements are expected in the coming years, partly because 17% of digital investment in the RRPs adopted so far by the Council is dedicated to digital skills (around 20 billion out of a total of 117 billion).



Digitization in the European Union (Source European Commission, 2021)

On 9 March 2021, the European Commission presented a vision and pathways for Europe's digital transformation by 2030. The Commission is proposing a digital compass for the EU's digital decade, evolving around four cardinal points: Skills, governance, infrastructure, business[15]. The Commission will follow the EU's digital ambitions for 2030 with concrete targets and expected trajectories, a solid common governance framework to monitor progress and address the shortcomings of multinational projects combining EU, Member State and private sector investment.

THE CRED project has also produced a number of studies and reports related to updating the curricular approach, such as the report on the state of the curriculum to the school decision and the current regulatory framework and the comparative analysis of European recommendations on key competences. Also through THE PROJECT, DURING 2021-2022, the activities will be completed: Revision of the second chance Program methodology (ads); Development of specific school curricula for the ads primary and secondary education program (including related framework plans); development and publication of

[15] European Commission, *Europe's Digital Decade: digital targets for 2030.* Statistics 2022, accessed to https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/europes-digital-decade-digital-targets-2030_en#international-partnerships-for-the-digital-decade, on date 15.03.2023

methodological guides for the different study disciplines in primary and secondary education (18 completed guides); Development of Open Educational resources (OER) and other related resources to support the classroom implementation of new school programs (7,200 OER completed by 14 August 2022, the date of completion of the project); 20 model school programs for integrated optional subjects (including ads); a base-line study on the assessment of the skills of 4th grade graduates from the perspective of key skills acquisition, especially for students in disadvantaged categories. In order to assess the impact of the curriculum, Romania will participate in THE PISA 2022 study, an international program to assess the literacy level of 15-year-olds in the fields of mathematics, science and reading, in the period 2021-2022. For the first time in Romania, THE PISA administration will adopt computerized Administration (CBA type - computer-based assessment). The Pisa 2022 administration will be carried out by the National Center for Educational evaluation and Policy - Research Department.

In order to improve the quality of higher education and to link it to the labor market, the POCA project entitled "improving public policy in higher education and improving the quality of regulations by updating quality standards – QAFIN (budget: 16.073 billion lei). In the period 2014-2020, within the POCU project, a request for support of a pilot project for initial training of teachers in pre-university education was launched, of which, at the end of March 2021, a pilot project for the initial training of teachers in pre-university education was launched. A financing contract for the start in career project was signed by the Master of teaching by MED, worth EUR 15.9 million.

The project specifically aims to develop an institutional and operational framework for the organization and piloting of master programs by diversifying the educational offers of the university education and improving the competences of the teachers from the eight universities chosen by Omen no. 4524/2020 regarding the establishment and conduct of the university master programs. Education is designed to address these challenges by developing strategies to adapt to a changing world, while providing students with the tools of professional and social guidance as they discover their career or aspirations in certain areas of activity. In this context, schools have new approaches to education arising from the diversity of social issues and the diversity of areas of educational intervention.

III. SPECIAL FEATURES OF PROJECTS FUNDED BY EUROPEAN FUNDS

Approaches to project management the modernization and development of Romania since 2000 largely depends on the continuous status of our country in the European Union. All stages have a direct impact on the development of the economic environment. Development projects can vary significantly in terms of their objectives, scope and scale. Smaller projects could involve modest financial resources and could take only a few months, while a large project could involve

many millions of euros and take many years to adapt to this kind of diversity, it is important that project cycle management systems support the application of standard working arrangements or rules in a flexible way.

Project Cycle Management is an integrated approach to project planning, design and management. This integrated approach is a guarantor of the fact that the major principles and policy of each project funder or of each interested factor are systematically taken into account, at each stage, throughout the duration of the project[16]. The PCM helps to ensure that projects are relevant to an agreed strategy and to the problems of the target groups. Projects should also be feasible, which means that objectives can be achieved within the limits of the operating environment and within the framework of the implementing organization's competences. Projects should also generate sustainable benefits. Project management methodologies (PM) used worldwide are definitions of project management processes aimed at standardizing and improving the quality of the life cycle of project management. The quality of projects can be defined in terms of the relevance, feasibility and effectiveness of the investment impact, including how well they are managed. Regardless of the orientation of the sector, the delivery method (budget aid or projects) or the geographical location of the European Commission's development assistance, there are a number of cross-cutting critical development issues that need to be properly addressed throughout the project management cycle. The main cross-cutting development problems are described as follows:

Gender equality. The Fourth United Nations World Conference on Women, held in Beijing in 1995, established gender equality as a basic principle in development cooperation.

Gender equality refers to equal opportunities, rights, distribution of resources and benefits, responsibilities for women and men in private and public life, and the value accorded to male and female characteristics. Promoting gender equality does not only concern women's issues, but also covers broader actions to be taken by both women and men. A key requirement for gender equality is that women participate in decision-making and political processes on an equal footing with men. Gender disparities are deeply rooted in policies, institutional and legal practices, households and social relations. Gender is therefore a cross-cutting issue that needs to be integrated into all aspects of policy formulation, program and project planning, institutional structures and decision-making procedures. The process of integrating gender equality concerns into all these areas is known as gender mainstreaming. The financing of such projects is done through the Regional Operational Program (ROP) 2021-2027. This is a continuation of the

[16] European Commission, *Aid Delivery Methods Porject Cycle Management Guidelines.* Brussels. Accesat pe https://ec.europa.eu/international-partnerships/system/files/methodology-aid-delivery-methods-project-cycle-management-200403_en.pdf, la data 16.04.2022

program implemented during 2014-2021, through which Romania has access to European Structural Funds, but also to investments from the European Regional Development Fund between 2014-2020.

Regional Operational Program 2021–2027 has five priority investment axes[17]:

-***A smarter Europe*** through innovation, digitalisation, economic transformation and support for small and medium-sized enterprises

-***A greener, carbon-free Europe***, implementation of the Paris Agreement and investment in energy transition, renewable energy and climate change

-***A connected Europe***, with strategic transport and digital networks

-***A more social Europe***, to achieve the European Pillar of Social Rights and to support the quality of jobs, education, skills, social inclusion and equal access to the health system

-***A Europe closer to its citizens***, By supporting locally-led development strategies and sustainable urban development in the EU.

The main problems in Romania led to the elaboration of a strategic vision for the project, based on social analysis, and on the economic situation of the society. The problems identified come from different areas, namely: Research, development and innovation, SMEs, energy efficiency, environment, urban development, heritage resources, tourism, road infrastructure, cadastre, administrative capacity and social and educational infrastructure.

The country report on Romania[18], prepared by the European Council in 2020, identified the main problems in the education sector as: Low levels of training in basic, digital and non-technical skills; low participation in education and early care; high rates of school dropout; low labor market relevance for vocational education and training and higher education; shortage of teachers, especially in rural areas, and difficulty in obtaining vocational training. The report highlights that "Romania is performing particularly poorly compared to the EU average, with a large number of children leaving school early and young people not in employment or in any educational, training or qualification program."

A major problem identified in this assessment was the underfunding of the system. The petition (2021) states that Romania is the country with the lowest funding for education in the EU, well below the EU average (2.8% compared to the EU average of 4.6%), the funding cycle is disproportionate and the lowest funding for preparatory education - school and primary education (It allocated 21.8% of the EU average 32% of the budget) and the highest in higher education (according to the European average).

[17] Fonduri Structurale, *EU Budget for the Future*, 2021, accessed to https://www.fonduri-structurale.ro/2021-2027, on date 16.01.2023

[18] European Commission, *Public Health*, accesed to https://ec.europa.eu/info/policies/public-health_en, on date 15.02.2023.

„It is not a very difficult process, the local public administration sets investment priorities, schools show their interest, present their situation, start with small steps, with technical and economic documentation, then we see what needs the investment objective has, where we can frame that objective, next is the writing of the project, the evaluation and the obtaining of funding. We need to be strong, strong, and strong."[19] European funds are poorly absorbed! Romania has 15 years of experience in the EU, and in the third fiscal cycle, plus the experience from the pre-accession period, Romania still fails to take advantage of EU funding according to our needs, as the data officer from the European Commission pointed out[20].

According to Cătălin Zamfir[21], the absorption rate that Romania attracted from the European Structural and Investment Fund (ESIF) during the planning period 2014-2022, according to its performance on 31 December, which represents the absorption rate of European capital in Romania in 2021, is 59%. In terms of currency, the same source mentions that Romania attracted 19.8 billion euros, of which the FESI offered the country a total of 33.4 billion euros through the Multiannual Financial Framework 2014-2020. As of 31 December 2021, around 14 billion euros, representing the difference, are in the EU budget and are waiting to be attracted to them. Romania could attract these funds by the end of 2023.

Here we are talking about the European funds provided by THE EC to Romania through 8 European sources, including the Cohesion Fund, the European Regional Development Fund, the European Social Fund and the European Rural Development Fund.

At national level, this funding is administered by the management bodies of the European Ministry of investments and projects (MIPE), the Ministry of Development, public works and Administration (MDLPA) and the Ministry of Agriculture and Rural Development (MADR).

Practically, all the development needs of Romania are met with European funds: National road and rail infrastructure, wastewater treatment, water supply, landfills, village development, schools, hospitals, small private enterprises in

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[19] Euractiv, *Educație la puterea viitorului: ajută fondurile europene modernizarea învățământului românesc*, 2020, accessed to https://www.euractiv.ro/fonduri-ue-politica-de-coeziune/educatie-la-puterea-viitorului-prin-fonduri-europene-13343, on date 21.01.2023.

[20] European Commission, *State of execution of payments for 2014-2020 ESIF Operational Programmes and the level of the „rest a liquider" (RAL) for 2007-2013 Heading 2a (former Heading 1b) programmes (Status as of 31st December 2021).* Brussels, 2022, accessed to https://www.scribd.com/document/554250870/EU-Funds-2014-2020#download&from_embed, on date 3.02.2023.

[21] Claudiu Zamfir, *Greu la fondurile UE: România, la coada absorbției banilor europeni 2014-2020. Mai sunt 14 miliarde de euro la care ne uiăm lung*, Startup Café/21.01.2022 accessed to https://www.startupcafe.ro/fonduri-europene/romania-absorbtie-fonduri-europene-miliarde-euro.htm, on date 3.02.2023.

localities and more. In addition to direct payments per hectare to agriculture from the EU's separate Agricultural guarantee Fund. According to the website of the Ministry of European investments and projects, Romania has an absorption rate of 56.71% compared to the European Union average of 63%.

CONCLUSION

Programs and implicitly modernization and development projects financed by European funds are necessary in education, as humanity is in continuous progress, and the education system must keep up with the current, technology being increasingly advanced and demand on the labor market increasingly demanding.

At the level of education in Romania, several projects with European funding have been implemented, but perhaps the most important and tender program within which these projects have been implemented is Erasmus+. Because we believe that this program plays a major role in the modernization, development and integration of the Romanian education system in the European context, we have chosen to debate the most important aspects and to exemplify some projects in which Romania was either a coordinating state or a partner state in their implementation.

***Erasmus+** is the European Union program for education, training, youth and sport, both in and outside the EU Member States and outside the European continent. It takes its name from the philosopher, theologian and humanist Erasmus of Rotterdam. With an estimated budget of EUR 26.2 billion[22], which is close to double the funding acquired under the previous program, which ran from 2014 to 2020, of which 30% will be allocated to cooperation projects and policy-making activities. For Romania, the allocated budget is about 90 million euros. The 2021-2027 program has as main objectives, according to the Erasmus Plus website, social inclusion, the green and digital transition, as well as supporting the participation of young people in democratic life.*

The types of activities carried out under Erasmus+ projects consist of:

Student mobility – have as main objectives the help of students to Benefit from an educational, linguistic and cultural study experience in other countries in Europe, but also facilitate credit transfer.

***Student mobility** – aims to ensure full recognition by the higher education institution of their membership of the period during which they have carried out activities abroad.*

[22] European Commission, *The new Erasmus+ programme for 2021-2027 has launched!*, 2021, accessed pe https://www.eacea.ec.europa.eu/news-events/news/new-erasmus-programme-2021-2027-has-launched-2021-03-25_en, on date 20.02.2023.

Mobility teachers – promote the exchange of expertise and experience on teaching methodology and encourage universities to enrich and extend the courses they provide. Training of teachers and teaching staff – aims at the mobility of teachers between the higher education institution they represent and certain companies, partner institutions or other partner higher education institutions.

***The Erasmus+** program has been addressing topics such as: New and innovative curriculum, educational methods and development through training courses; teaching and learning of foreign languages; digital skills, intercultural, intergenerational lifelong education; international relations and cooperation; pedagogy and didactics since 2014; improving the quality of institutions and/or methods; combating school dropout; climate and environmental change; entrepreneurial education; disabilities – special needs; research and innovation; inclusion and equity.*

Applicants under the mentioned program are mostly non-governmental organizations, on the Erasmus+ website noting that over the last 8 years 25 063 such organizations have carried out projects, followed by higher education institutions in a number of 22 412, schools/institutions or educational centers with 20 232, as well as centers for adult education in a number of 2 856.

The program has been implemented in 60 coordinating countries, of which 27 EU members, among the top countries being Germany with 22 504 coordinated projects, followed closely by Spain (22 387), France (16 814), Poland (16 063), Italy (12 336) and Romania with only 6 282 projects, A small number compared to Germany, but quite large compared to Luxembourg, which has only 700 projects carried out under the Erasmus+ program, if we do not take into account the number of inhabitants of these states. Regarding the situation in which states were partners in the implementation of projects carried out under the Erasmus+ program, we note that Italy was partner in 39 883 projects, Spain in 35 651, Germany ranks third with 22 924 partnerships, Romania is ranked 8 with 20 209 partnership projects.

*Regarding the activity of Erasmus+ in Romania, among the most important projects coordinated by institutions in our country we mention **Feed4Saving**[23], a project framed by the Erasmus students in success stories and good practices, carried out between 2016 – 2018, With EU funding of 129 985 euros. As can be seen, Erasmus+, as a European Union program, addresses the main issues of EU Member States and beyond, paying particular attention to early school leaving, lifelong learning, curriculum modernization, but also experiential learning, As stated in an article Nada and Legtuko[24], thus facilitating the*

[23] European Commission, *Feed4Saving*. Accesat pe https://erasmus-plus.ec.europa.eu/projects/search/details/2016-1-RO01-KA201-024552, on date 2.02.2023

[24] Cosmin Nada, Justyna Legutko, *Maybe we did not learn that much academically, but we learn more from experience – Erasmus mobility and its potential for transformative learning*.

exchange of experience between participants and providing them with a positive, enriched and very valuable learning experience.

The Erasmus+ program brings together seven other European funding programs as follows: ***Life Long Learning***, ***Youth in Action***, ***Erasmus Mundus***, ***Tempus***, ***Alfa***, ***Edulink*** *and the cooperation program with industrialized countries.*

We conclude by stating that ***Erasmus+*** *is not only a program financed by European funds, but rather the path toward the modernization and emancipation of participants, the creation of intercultural and interracial links, the binder toward the integration of the Romanian education system in the context of the European Union.*

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9. European Commission, *What is Horizon 2020?*, accessed on https://wayback.archive-it.org/12090/20220124080448/https://ec.europa.eu/programmes/horizon2020/en/what-horizon-2020, to 15.12.2022;
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SPOTLIGHTS ON RES IUDICATA NATURE OF THE DECISION OF THE PRELIMINARY CHAMBER JUDGE

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Abstract
Res judicata is frequently linked to the court's decision which adjudicates the merits of the criminal process. This paper explores the limits within the final decisions of the preliminary chamber judge on the legality of the prosecution are binding for the trial court or the limits within these decisions should be considered in a new preliminary chamber procedure.

Key words: *res iudicata, criminal action, preliminary chamber judge*

INTRODUCTION

The *res iudicata* authority is enshrined in the Criminal Procedure Code as a general principle of criminal procedure (Article 6), as well as an impediment to initiate or to exercise the criminal action against the culprit (section 16 paragraph 1 letter i), and even as a ground for an extraordinary appeal for annulment (section 426 letter i). However, there is no legal rule enshrining the authority of res judicata of the preliminary chamber judge's decision.

The case-law has recognized that there are also judgments handed down by the judge of rights and freedoms or the preliminary chamber judge which may enjoy, under certain conditions, a relative (temporary, limited to the period of time during which the facts or different legal grounds remain unchanged in relation to the subject-matter of the judicial examination) authority of res judicata in subsequent proceedings, although these do not adjudicate the very substance of a criminal accusation.

I. THE VIEW OF THE CONSTITUTIONAL COURT ON THE AUTHORITY OF RES IUDICATA OF THE PRELIMINARY CHAMBER JUDGE'S DECISION

The courts of law have neither uniformly assessed the concept of res judicata related to the preliminary chamber judge's decisions, if any, nor have they considered a set of binding benchmarks to understand its limits.

On the other hand, the Constitutional Court's decision No. 812/2021[1] emphasized some clarifications regarding the particularities of *res iudicata* in relation to the judgement of the preliminary chamber judge, holding, in essence, as follows:

a. *"res iudicata* is associated only with those final judgments which deal with the merits of the case".

Per a contrario, the Constitutional Court does not recognize, as a matter of principle, the res judicata effect for those decisions rendered by the preliminary chamber jurisdictions, in the exercise of their peculiar judicial powers, namely those decisions rendered pursuant to sections 346 and 347 of the Criminal Procedure Code.

b. "the power of the trial judge to call into question, during the trial, those issues of legality previously ruled by the preliminary chamber's judgement, pursuant to section 346 of the Criminal Procedure Code or, as the case may be, section 347 of the Criminal Procedure Code, must be recognized insofar as the provisions of procedural law on nullities are applicable. This kind of a challenge may concern the rulings under the preliminary chamber judgement handed down even by the trial judge in his former capacity as pre-trial judge, or to the judgment delivered by the pre-trial jurisdiction of a higher court (or, as the case may be, the competent panel of the High Court of Cassation and Justice)".

On one hand, the Constitutional Court considers that, insofar the nullity of the acts ruled by the preliminary chamber judge may still be held to exist, their annulment must be ordered by the court.

On the other hand, the Constitutional Court seems to remain silent regarding the effects that a trial court decision invalidating the acts of the preliminary chamber judge may have and does not specify whether or not the reassessment of legality is judicial review under condition – related to potential new grounds – or whether it regards the same grounds examined by the preliminary chamber judge.

c. "judgment delivered in the proceedings governed by ss. 344 - 347 of the Criminal Procedure Code has the authority of *res iudicata* only within the limits established by the Constitutional Court, namely as regards the order to bind the defendant over for trial and the impossibility of returning the case to the prosecutor, i.e. the legality of the indictment; all other findings of the preliminary

[1] Published in the Official Journal of Romania, Part I, no. 200 of 1 March 2022.

chamber judge, which may concern the legality of the investigation acts and gathering of evidence, may be subject to review during the trial on the merits, in accordance with the rules applicable to the nullities and do not enjoy the authority of res judicata before the court of first instance or the court of appeal".

Thus, on one hand, the Constitutional Court has limited the effects of the preliminary chamber judge's decision and, on the other hand, has ruled out the possibility of returning the case to the public prosecutor's office after the trial court has found that there is a case of nullity, even if it concerns both the criminal trial proceedings and the preliminary chamber procedure.

II. THE CRITICAL APPRAISAL OF CONSTITUTIONAL JURISDICTION'S "PURE REASON"

It Under a closer examination, the recitals of the Constitutional Court's decision No. 812/2021 reveal shortcomings in the representation of the diversity of situations in which the preliminary chamber judge's decisions settle issues of legality and fairness of proceedings and do not take into account the need to respect the principle of security of legal relations. We will now present some hypotheses that reveal the inapplicability of the decision of the Constitutional Court.

Primus, the Constitutional Court's assessment of the res judicata nature of the preliminary chamber judge's finding as to the legality of the court's referral (which implies that the subject-matter and limits of the proceedings can be determined) is incongruent to the decision of the Court of Justice of the European Union in the ZX case (C 282/20, judgment of 21 October 2021), which held that: "article 6(3) of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings and Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as precluding national legislation which does not provide for a procedural means of remedying, errors and deficiencies in the indictment which prejudice the right of the accused person to be provided with detailed information about the charges following the pre-trial hearing in a criminal case. Article 6(3) of Directive 2012/13 and article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as requiring the referring court to give an interpretation of the national rules on the amendment of the charges, as far as possible in a manner consistent with that law, so as to enable the prosecutor to remedy errors and omissions in the content of the indictment at the trial, while at the same time actively and genuinely safeguarding the rights of the defense of the accused person. Only if the referring court considers that such an interpretation is not possible should it disregard the national provision prohibiting the suspension of court proceedings and refer the case back to the public prosecutor in order for the latter to draw up a new indictment."

Thus, whether a national trial court of law would comply with this decision of the EU jurisdiction, I believe that, regardless the irregularity of the indictment was invoked in the preliminary chamber phase, the trial court shall follow those steps to clarify the accusation no later than before commencing the debates on the merits of the case, when it finds that the ambiguities and gaps in the content of the indictment affect the defendant's right to defense and constitute an obstacle to pronounce a decision in the case. If the court considers that, due to the nature and particularities of the case, the deficiencies regarding the description of the fact(s) and the ambiguities regarding the concrete accusations brought against the defendant could not be fulfilled, directly applying the binding rulings of the Court of Justice of the European Union, it will be able to order the referral of the case back to the prosecutor's office, this kind of a ruling being a derogation from the res judicata authority of the judgement passed by the preliminary chamber judge, which considered that the object and the limits of the adjudication were unequivocally established.

Secundus, following the amendment made by Law No. 201/2023, it should be borne in mind that certain cases of absolute nullity, as well as cases of relative nullity, cannot be invoked at the trial stage, hence the assessment of the preliminary chamber judge being final. Thus, the provisions of section 281(2) (a) of the Criminal Procedure Code and of article 281 (3) of the Criminal Procedure Code do not apply. Section 281 para. (3) and (4) of the Criminal Procedure Code provide, on the one hand, that all the cases of absolute nullity provided by para. (1) of the Criminal Procedure Code which occurred at the preliminary chamber stage may be invoked throughout this stage or even at the trial stage in first instance or on appeal, just as those which occurred at the trial stage, in first instance, may be invoked at this stage or at the appeal stage. In this regard, section 386^1 of the Criminal Procedure Code introduced by Law No. 201/2023 also provides that, when the trial jurisdiction ascertain the absolute nullity of the preliminary chamber proceedings, this court shall invalidate the ruling to bind the defendant over for trial and shall establish the limits under the proceedings shall be resumed. This decision is subject to appeal under section 425^1 of the Criminal Procedure Code.

On the other hand, if the violation of the legal provision occurred during the early stage of the criminal proceedings and the defendant is binded over for trial by an indictment, the cases of absolute nullity set forth under section 281 para. (1) (b^1), (e) and (f) of the Criminal Procedure Code may be invoked until the end of the proceedings in the preliminary chamber phase. Therefore, following the entry into force of Law No. 201/2023, the court will not be able to overrule the assessment of the preliminary chamber judge with reference to these cases of absolute nullity (for example, the violation of the rules relating to the material, personal and functional lack of competence of the prosecution bodies in relation to the acts carried out or the evidence gathered during the investigation was

unduly limited and can be invoked only during the preliminary chamber phase, and not at any stage of the proceedings).

It remains uncertain whether this legislative intervention would withstand a future constitutionality review given that following the Constitutional Court decision No. 302/2017[2] the violation of the legal rules concerning the material, personal and functional competence of the investigation bodies could also be censured at the trial stage.

It should also be borne in mind that under the decision No. 802/2017[3], the Constitutional Court held that the elements of unlawfulness provided for in section 101 of the Criminal Procedure Code may be invoked, including at the trial stage. Thus, this court may carry out an analysis of the lawfulness f the proceedings at the prosecution stage in order to determine the legality of the evidence to be assessed during the deliberation.

Thirdly, the unlawfulness of the initiation of criminal proceedings in the absence of the authorization provided for under section 9 para. (3) of the Criminal Code and section 10 para. (2) of the Criminal Code may be invoked at the trial stage in order to obtain a decision to terminate the criminal proceedings, even if it was not invoked or examined at the preliminary chamber stage, but the judge held that the referral of the case to the court was lawful, even though, given the facts of the case, it was obvious that the referral of the case to the court was unlawful in the absence of the Attorney General's authorization.

In this regard, the Supreme Court stated that "in the preliminary chamber proceedings, it is verified whether the acts of criminal prosecution may be submitted to the court, whether a court may examine the content of the charges and what the limits of the submission are (what material acts are part of the content of the offences, who are the victims of these material acts, what are the evidence to be examined, directly, in a public and adversarial procedure, to determine whether guilt exists or not). Once the preliminary chamber procedure has been completed, the judicial inquiry will verify whether the charge is grounded, i.e. whether the offences referred to the court in the indictment have the typical elements required by law to give rise to criminal liability, i.e. what the consequences of criminal liability are, as well as the elements deriving from the provisions of article 396 para. (6) of the Code of Criminal Procedure and which lead to the termination of criminal proceedings. The rules for the application of criminal law in space, relied on by the defense, are laid down by the law to establish the conditions under which the Romanian authorities have jurisdiction to examine the criminal proceedings and fall within the scope of article 16 (1) letter e) of the Criminal Procedure Code. The specific legal nature of the conditions to be examined (belonging to substantive law, e.g. double criminality under the

[2] Published in the Official Journal of Romania, Part I, no. 566 of 17 July 2017.
[3] Published in the Official Journal of Romania, Part I, no. 116 of 06 February 2018

principle of the personality of criminal law, or belonging to procedural law, e.g. authorization of the public prosecutor to initiate criminal proceedings) does not preclude the application of article 396(2). (6) of the Criminal Procedure Code with reference to article 16 para. (1)(e) of the Criminal Procedure Code and, consequently, the criticism can be examined on appeal" (I.C.C.J., Criminal Division, Decision No 174/A/2022, www.scj.ro).

CONCLUSION

The res judicata nature of the preliminary chamber judge's decision will remain a controversial issue even after the legislative changes made in summer of 2023.

We further note that the legislator has failed to consistently determine the effects of final judgments handed down in the preliminary chamber stage, while the Constitutional Court has ruled in this area by excessively limiting res iudicata.

We will certainly also see forthcoming unconstitutionality rulings in this area, which will give the Constitutional Court the opportunity to (un)set new limits on res iudicata in relation to final judgments of the preliminary chamber judge.

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2. I.C.C.J., Criminal Division, Decision No 174/A/2022;
3. Constitutional Court's decision No. 812/2021;
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CLASSIFICATION OF ADMINISTRATIVE ACTS

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Abstract

The administrative act, a legal institution of rare preeminence in any legal system of the democratic world, represents a symbol of the structured activity of administration. It involves the manner of transposing the imperative, unequivocal, and unidirectional will of superordinate state structures into objective reality. This will enters specialized legal relations and is characterized by the exercise of public power.

The administrative act represents, in this manner, a representative and well-defined means of imposing the will of organized state structures at every level of society by transposing informed but conceptualized will into a materialized and easily perceptible resort.

As conceptualized in Romanian doctrine, the specific act of administrative law represents the primary and revealing form of public administration activity. It is the only legal act issued/adopted by authorities, institutions, or other public bodies that produces concrete effects concerning its recipients and beyond.

However, this distinct type of legal act is characterized by a series of distinctive features that individualize it within the framework of internal legal relations and reveal its specific aspects, as well as the effects emanating from its content.

Not all administrative acts have the same form, structure, effects, characteristics, purposes, and certainly, not all have the same impact on the individualized legal order at the level of society.

Therefore, in specialized doctrine followed by the practice of national courts, a series of distinct criteria have been imposed for crystallizing distinct typologies of administrative acts.

Keywords: *administrative act, classification, categories, relevance.*

INTRODUCTION

From the outset, it's important to note that in specialized literature, there is no unified vision regarding the criteria and defining elements for categorizing the administrative act, a natural situation considering the „*different conceptions of the content and scope of the administrative act, implicitly regarding public administration*" *(Tofan, 2005, p.38).*

However, a rigorous classification of the administrative act is an imperative, considering that the inherent legal effects of this legal act vary widely, depending functionally on the category of administrative act to which it is attached.

Through this endeavor, we aim to highlight the main typologies of administrative acts, which are essential both in doctrinal conception and especially in the practical activity of institutions.

I. Section N^{o}. 1

In French doctrine, it is considered that this „*classification of decisions can be carried out from two points of view: formal (emphasis is placed on the nature of the body making the decision and, moreover, on elements such as the procedure for drafting the decision: this is the distinction between different categories of decrees or orders), and material (emphasis is placed on the content of the decisions taken by the public authority: this is the distinction between regulatory decisions and non-regulatory decisions)*" (*Ricci, 2021, p. 51).*

Administrative acts are classified as follows *(Barrientos, 2023, pp. 317-357):*

A. According to the category of the issuing body, we identify:

a) acts emanating from organs of state or central administration;

b) acts emanating from the autonomous authorities of local public administration;

c) acts emanating, based on authorizations given by the state or organs of state administration, from private individuals - administrative acts by delegation.

B. According to the material competence of the issuing body, we recognize:

a) acts of general administration, which are adopted by state authorities and institutions with ubiquitous competence;

b) acts of special administration, which are the prerogative of authorities of public administration with specific and particular competence;

C. From the perspective of territorial competence, these acts are divided into:

a) acts of central bodies, with an area of imposition usually related to the entire country;

b) acts of local bodies, issued by local authorities of public administration and which have a limited applicability to the territorial unit within the jurisdiction of the issuing authority.

However, as rightfully noted in doctrine, the scope of administrative acts does not always correspond to the competence area of the issuing administrative authority. In this sense, it has been rightly pointed out that „*individual acts apply only in strictly determined cases, while in connection with normative acts, it can be provided that these apply only in certain portions of territory, and not over the entire territory in which the issuing body is competent*" *(Tofan, 2020, p.17; Brezoianu, 2004, p.73).*

D. According to the purpose and extent of the effects, we distinguish:

a) normative acts;

b) individual acts;

c) acts with an internal character (which in turn can be normative or individual).

This criterion for distinguishing administrative acts finds its eloquent legal basis in the provisions of Article 2 paragraph 1 letter c) of Law no. 554/2004, which contains the legal definition of the administrative act[1] and structurally facilitates the semantic, and particularly the legal distinctions between the typology of legal cause, as well as between the effects of these two major categories of acts.

This criterion of categorization, first established in French doctrine, is widely embraced in the practice of national courts, especially in that of the Supreme Court, with an impressive succession of rulings reiterating this typology of differentiation between administrative acts[2].

It has been stated that „*such qualification is based on defining normative acts as that category of legal acts containing a rule, namely an act of repeated*

[1] As being „*the unilateral act with an individual or normative character issued by a public authority, under public authority, for the purpose of organizing the execution of the law or concretely executing the law, which creates, modifies, or extinguishes legal relationships*".

[2] For instance, in a recent case, the Supreme Court established that „*according to the provisions of art. 2 para. (1) letter c) of Law no. 554/2004, amended and supplemented, the administrative act is the unilateral act with an individual or normative character issued by a public authority, under public authority, for the purpose of organizing the execution of the law or concretely executing the law, which creates, modifies, or extinguishes legal relationships. Administrative acts are classified according to the purpose for which they were adopted/issued and the extent of the legal effects produced. Regarding the first criterion, normative administrative acts are adopted/issued for the purpose of organizing the execution of the law, while individual administrative acts are issued for the concrete execution of the laws. Concerning the second criterion, normative administrative acts contain rules of a general nature, applicable to an undefined number of situations, producing erga omnes legal effects, whereas individual administrative acts produce effects on a single person or on a determined/determinable number of persons*" – High Court of Cassation and Justice, Administrative and Fiscal Division, Decision no. 3517/June 16, 2022, https://www.scj.ro/, in the form from January 14, 2023.

applicability, upon undetermined legal subjects, and individual acts as that category of acts aiming to stabilize a precise legal situation in relation to a relatively restricted and determined number of legal subjects"[3].

By the requirement of the purpose for which it is issued/adopted, the normative administrative act aims at organizing the execution of the law, effectively establishing those provisions of the law that institute a standardized conduct in a certain field of activity, and for whose actual entry into force the normative administrative act is issued, containing the rules for implementing the respective law or concretely individualizing a certain generic procedure of imposition of legal obligations among its recipients, undifferentiated by specific criteria *(Iakab, 2022, pp. 2-18).*

However, by the same criterion, based implicitly on the legal definition, the individual administrative act concretely implements the law or a normative administrative act with force, by extrapolating the generic legal effect of the normative act into the specifically stated and individualized situations through the content of the individual administrative act.

Considering the second dimension of the aforementioned classification criterion, that of the extent of effects, the normative act presents maximum generality, by establishing abstract provisions and impersonal situational typologies, giving rise to undifferentiated behavioral obligations among the categories of legal subjects targeted by the normative act *(Markova, 2023, pp. 151-162).*

Practically, the normative act creates an abstract typology of behavior, with erga omnes opposability, or regulates non-individualized legal situations, in their concrete content and effects, instituting generally obligatory norms for all its recipients, not individualized in any way by specific distinction criteria[4].

According to the same criterion, the individual administrative act is intended to create, modify, or terminate specific rights and obligations for its recipients, constituting a narrow circle of precisely determined legal subjects, through precise identification elements, or for whom concrete determinability criteria are provided, no later than the date of execution of the administrative act in question[5].

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[3] ÎCCJ, SCAF, Decizia nr. 3772/23 iunie 2022**,** https://www.scj.ro, in the version from 14.01.2023.

[4] In the view of the High Court, an administrative normative act is understood as an act that „*includes regulations formulated abstractly, as principles with mandatory character for an undetermined number of persons or situations falling within the hypothesis of the norm it institutes. The criteria for establishing the scope of the recipients are determined, rather than each beneficiary individually*" - HCCJ, RIL Decision No. 12/2021 of June 28, 2021.

[5] In the view of the High Court, „*administrative acts with an individual character aim to establish legal relationships in a strictly determined situation and have effects either towards a single person or towards a determined or determinable number of persons*" - HCCJ, SCAF, Decision No. 3772/June 23, 2022, https://www.scj.ro, in the form as of January 14, 2023.

In conclusion, we define the unilateral normative administrative act as representing the legal act that organizes the execution of the law and legislates, in an abstract manner, generic legal situations and establishes rules of law applicable to all its recipients, who are not individualized in any way.

As has been aptly stated in French doctrine, „*the regulatory decision is an act of general and impersonal scope. It may concern a single person, but this person will not be taken ut singuli, it will be reduced to the category to which it belongs. The regulatory decision establishes the organization of a public service or intervenes in the execution of legislative requirements, or even other regulations; it is a measure taken without considering specific individuals (cf. concl. Rigaud on 19 November 1965, Husband Delattre-Floury)*" *(Ricci, 2021, p.51)* .

The degree of generality of regulated situations and recipients of normative administrative acts may vary case by case *(Brezoianu, 2004, p.71).*

), possibly involving a broad circle of these legal subjects targeted by the legal act (for example, Romanian citizens in the country or those in the diaspora) or a more restricted category (for example, property associations in Sector 3 of the Municipality of Bucharest, to which certain rights are granted or a series of obligations are imposed), it being important that the established provisions are characterized by abstraction and conceptual organization and impose erga omnes obligations *(Lewandowski, 2023, p. 49)* .

However, precisely this character of normative administrative acts may create, as we will see in the following lines, a series of real difficulties in identifying specific elements of differentiation from individual acts that institute rights and obligations for a determinable category of immediate recipients[6].

The normative administrative act, as stated, encompasses general, impersonal, and obligatory regulations addressing an undetermined number of legal subjects, producing erga omnes effects, with only the criteria being determined to establish the sphere of recipients, not each beneficiary individually[7].

[6] So, it doesn't concern determined legal subjects.

[7] As decided, for instance, by the High Court through a decision of non-uniform practice, „*in the unified interpretation and application of the provisions of Article 31^1, Article 32 paragraph (5) letter a), Article 39, 44, 45, Article 47 paragraph (1) and (2), Article 56 paragraph (1), (4), (6) and (7), and Article 64 paragraph (3) of Law no. 350/2001 on territorial planning and urbanism, with subsequent amendments and completions, related to Article 68 of Law no. 24/2000 on legislative technical norms for drafting normative acts, republished, with subsequent amendments and completions, the decision of the local council to approve a zoning plan represents an administrative act with normative character*" – ICCJ, RIL Decision no. 12/2021, published in the Official Gazette, Part I no. 933 from 30/09/2021.

II. SECTION N^O^. 2

As correctly noted in the Romanian specialized literature, 'the norms contained in normative administrative acts are imperative, prohibitive, or permissive. Cases where an administrative act contains only norms of a certain kind are rare *(Iovănaş, 1997, p.21).*

From the perspective of the effects produced, in European jurisprudence, other effects of normative administrative acts have been identified, distinguishing „*until the end of 2002, the regulatory circular (EC 29 Jan. 1954, Institution Notre-Dame du Kreisker, Lebon 64), a true regulation subject to the legal regime of enforceable decisions, and the interpretative circular (EC 11 Apr. 1951, National Federation of French Men's Clothing Producers, Lebon 184), limited to commenting or interpreting a previous text, not subject to this regime. But by a decision dated December 18, 2002 (Duvignères GAJA no. 103), the Council of State abandoned the traditional distinction. It is now appropriate to oppose the imperative circular, which is questionable, to the one that is not, without any objection: 'The interpretation that [...] the administrative authority gives to the laws and regulations [...] cannot be contested in front of the judge, regarding the abuse of power when, being devoid of an imperative character, it cannot [...] cause any dissatisfaction; [...] on the other hand, the imperative provisions with a general character of a circular or instruction must be considered harmful, just like the refusal to repeal them*" *(Maurin, 2018, p.68.).*

Normative administrative acts present significant particularities regarding legal avenues and the control procedure, whether it is control exercised through politico-administrative means [8] or through administrative litigation *(Turchak, 2022, p. 248).*

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[8] In this regard, in the practice of the constitutional court, it was established, for instance, that the Decision of the Romanian Parliament no. 5/2020 approving the state of alert and the measures instituted by Government Decision no. 394/2020 regarding the declaration of the state of alert and the measures applied during it to prevent and combat the effects of the COVID-19 pandemic is unconstitutional. Among other aspects, the Constitutional Court held that „*unlike normative acts adopted through legislative delegation, regarding the government's decisions, the constitutional legislator did not establish any approval by Parliament, which is why the intervention of the latter authority in the sphere of the mentioned administrative acts constitutes a clear deviation from its constitutional prerogatives established by Article 61 paragraph (1) of the Constitution, in the sense of accumulating prerogatives of the executive power. Therefore, the "approval" or "modification" by Parliament of the measures adopted by the Government through decisions lacks constitutional basis and distorts the legal regime of Government decisions, as acts of law execution.' Based on the distinction between parliamentary control over the executive and judicial court control over public administration, regulated by Articles 21, 52, and 126 paragraph (6) of the Constitution, the Court noted that, precisely considering the legal nature of Government decisions, the constitutional legislator provided for the competence of judicial courts to control them. Consequently, 'the parliamentary control configured by the constitutional legislator cannot extend to the normative content of Government decisions, in the sense of approval, modification, or rejection. Such an intervention radically changes the meaning attributed by the constitutional*

Although its name may create semantic and legal classification confusions, we emphasize that the administrative act with normative character should not, in any way, be confused with the normative or legislative act, as it is known in specialized literature.

Thus, an act with a legislative character presents a legal force immediately inferior to the constitutional provisions[9] and establishes a general normative framework, thus shaping the internal legal order of the Romanian State, this being the exclusive prerogative of the primary legislator of the state, namely the Parliament, according to article 61 paragraph 1 of the Constitution, or that of the delegated or subsidiary legislator, namely the Government."

In this sense, the Constitutional Court stated that „*the emergency ordinance is not an administrative act; the objectors making a mistake regarding the legal nature of the emergency ordinance; both the jurisprudence of the Constitutional Court and legal doctrine concur regarding the legal nature of emergency ordinances. These, depending on their issuer, would be acts with an administrative character, but considering the subject matter in which they intervene, they are legislative acts. To support the above, the jurisprudence of the Constitutional Court held that emergency ordinances have the force of law and, therefore, can contain primary regulatory norms*"[10].

Therefore, acts with a legislative or normative character consist exclusively of laws, strictly speaking, and government ordinances, simple or emergency, the legal regime of which is established by article 115 of the Constitution.

As it results from the logical-juridical, grammatical, and teleological interpretation of the provisions of article 146 letters a) and d) of the Constitution, correlated with the provisions of article 29 of Law no. 47/1992 regarding the organization and functioning of the Constitutional Court and with articles 1, 8, and 18 of Law no. 554/2004 on administrative litigation, laws and ordinances are exempt from the „*legality and opportunity*" control of administrative litigation courts, being subject, based on the principle of hierarchy and the force of normative acts, exclusively to the scrutiny of compliance with constitutional norms and principles, controlled in a unitary and full manner by the Constitutional Court.

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legislator to the concept of parliamentary control, as well as the traditional legal nature of Government decisions, which take on features of administrative acts concerning relations with Parliament, with consequences in terms of access to justice for challenging them" – Constitutional Court Decision no. 672/20.10.2021, published in the Official Gazette no. 1030 from 28.10.2021.

[9] Therefore, in the relevant practice of the Constitutional Court, these normative acts are referred to as „*infra-constitutional acts*" – see, for instance, Constitutional Court Decision no. 672 of October 20, 2021, published in the Official Gazette no. 1030 of October 28, 2021, or Constitutional Court Decision no. 738 of September 19, 2012, published in the Official Gazette no. 690 of October 8, 2012.

[10] Decizia CCR nr.919 din 6 iulie 2011, publicată în Monitorul Oficial nr. 504 din 15 iulie 2011.

In this regard, in American doctrine, it has been noted that „*challenging federal administrative rules and guidelines in general is not admissible (Rose-Ackerman 1995: 72–3). Rules governing status and private application exclude it. Individuals and groups outside cannot directly challenge government policies. Some commentators argue that the scope of judicial control over administrative action may (or should) expand with new developments in the 'doctrine of normative authorization,' which under certain circumstances allows challenging market regulation (Oster 2008: 1295–6). However, except for significant changes, judicial control of administrative action in Germany is entirely different from other considered countries, as it is simply not available in a wide range of cases (Rose-Ackerman 1995: 72-3, von Oertzen 1983: 269)*" *(Rose-Ackerman, P. L. Lindseth, 2010, p.144-145.).*

On the other hand, the administrative act with a normative character is issued/adopted by an administrative authority of the Romanian State, having a different form of expression and a different legal nature than the laws and government ordinances. It is issued based on legislative acts and in executing their provisions. From this perspective, we conclude that they have a legal force inferior to legislative acts, which is why in case law, they are considered as having an infralegal character[11], preventing them from adding, modifying, or repealing a legal norm[12].

Therefore, government ordinances, although adopted by an executive authority, are not administrative acts with a normative character but normative acts with the force of law. Even though the government can adopt these acts with legislative character, such as simple or emergency ordinances, the same authority, as a pillar of the Romanian Executive, is competent to adopt administrative acts with a normative character, namely Government Resolutions, by implementing the adopted ordinances in a concrete manner.

[11] That's right, a legal force immediately inferior to laws enacted by Parliament and government ordinances.

[12] „*The legal force of Presidential decrees is immediately inferior to laws, meaning they cannot override, substitute, or add to the law, thus cannot contain primary regulatory norms. Considering that the legislative framework circumscribed by laws cannot be modified or completed by sub-legal acts, and the measures instituted during the state of emergency/alert were necessary even in the judicial field to prevent and combat the effects of the COVID-19 pandemic while aiming to protect the rights and legitimate interests of citizens and legal entities, the legislator assessed the need to transpose them into primary legislation*" - see Supreme Court Decision CDCD no. 59/2022, pronounced on October 17, 2022, published in the Official Gazette, Part I no. 1130 dated November 23, 2022.

Hence, the distinction between legislative acts and administrative acts with a normative character is not necessarily at the level of the issuing authority but rather in terms of the object and legal effects of the adopted act[13].

CONCLUSIONS

The administrative act presents multiple dimensions, revealing a complex structure and various classification methods, each with practical consequences, especially concerning its legal effects and the judicial control methods applied to it.

Depending on the type of the act, it can have diverse legal relevance. However, more crucial is the fact that based on the legal nature of the administrative act, it generates a range of highly diverse and potent legal effects. Considering the legal relationships produced, modified, or extended, it brings forth a varied and distinctly rooted manner of judicial control over their legality and appropriateness.

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BRIEF CONSIDERATIONS REGARDING THE SPECIFIC CONCEPT OF „CONSUMER" - CONTRACTING PARTY INVOLVED IN A COMMERCIAL LEGAL RELATIONSHIP

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Abstract

At the level of the European Union, consumer protection has been integrated into all relevant policy areas of the Union legislation, so consumer interests have been a central theme in several legislative initiatives of the European Commission. At the same time, the need to modernize or strengthen some of the existing provisions in the matter of consumer protection was also noted.

Therefore, at the level of 2023, we can appreciate, without making a mistake, that the citizens of the Union Member States benefit from adequate Union legislation as well as application or transposition, as the case may be, regarding consumer protection in major areas such as passenger rights, purchase of goods and services, including in the digital system, the acquisition of the right of use for a certain period of some accommodation lodgings, or some holiday packages, and also the unfair commercial practices or abusive contractual clauses.

Keywords: *consumer, commercial professional, pre-determined clauses, abuse of economic power, limitation of freedom of contract.*

INTRODUCTION

In the light of art.169 of the Treaty on the Functioning of the European Union (TFEU), the policy in the field of consumer protection has as its main purpose the promotion of the health and safety of consumers, but also their right to information, and to organize themselves in such a way as to protect their

interests. To the same extent, art. 12 of the TFEU provides that the consumer protection policy must represent for the union co-legislator, a fundamental pillar in the definition of other union policies.

The legal systems of the member states as a whole as well as the legislation of the European Union protect EU citizens as well as non-EU citizens in their capacity as consumers, ensuring the necessary framework for access to goods and services, including digital ones.

The policy regarding the protection of consumers involved in contractual relations with commercial professionals is a broad one that includes the most diverse fields, from regulations regarding the rights they benefit from in the pre-contractual stage as well as in the contractual stage with the concrete identification of the relevant obligations professionals, to regulations aimed at protecting consumers from unfair commercial practices of traders to provisions on ensuring the defense of the collective interests of consumers on the economic market (actions in representation).

At the level of the Romanian legal system, the legislation on consumer protection is made up of a set of framework provisions formed by Law no. 296/2004[1] (called the Consumer Code) and O.G. no. 21/1992[2] on consumer protection, which after the entry into force of the consumer code became an annex of the first, remaining applicable even today. To this legislative "core package" one added sectoral or special normative acts whose object is regulation, areas of interest for the topic deduced from the analysis. Thus, we recall in this sense, as an example, Law no. 363 /2007[3] on combating unfair practices of traders in the relationship with consumers and harmonizing regulations with European legislation on consumer protection; Law no. 193/2000[4] republished on abusive clauses in contracts concluded between merchants and consumers.

I. ABOUT CONSUMERS AND THEIR RIGHTS UNDER CONTRACTS WITH TRADING PROFESSIONALS

I.1. Special look at the concept of "consumer"

The beneficiary of the framework legislation but also of the special legislation stated above is the "consumer".

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[1] Republished in O.G. no. 224 of March 24, 2008

[2] Published in O.G. no. 208 of March 28, 2007

[3] Published in O.G. no. 899/2007, amended by GEO no. 58 of April 28, 2022 published in the O.G. no. 456 of May 6, 2022

[4] Republished in O.G. no. 543 of August 3, 2012; Law no. 193/2000 transposes Directive (EEC) 93/13 on abusive clauses in contracts concluded with consumers (OJ L 95, 21.4.1993, p. 29-34, special edition in Romanian; chapter 15 volume 002, p. 273-278, current consolidated version on 28/05/2022) as amended by Directive (EU) 2019/2161 amending Council Directive (EEC)/93/13 and Directives (EC) 98/6, 2005/29 and (EU) 2011/83 of the Parliament and the Council with regard to better ensuring compliance with Union consumer protection rules and the modernization of these rules (OJ L328, 18.12.2019, p.7-28

BRIEF CONSIDERATIONS REGARDING THE SPECIFIC CONCEPT OF „CONSUMER" – CONTRACTING PARTY INVOLVED IN A COMMERCIAL LEGAL RELATIONSHIP

The term "consumer" is defined by the framework legislation, in an objective sense, within art. 2 paragraph (1) letter (2) OG no. 21/1992 as being a natural person or an association of natural persons acting for purposes outside of his professional activity. A similar definition can be found in art. 2 paragraph (1) from Law no. 193/2000 republished on abusive clauses in contracts concluded between traders and consumers.

We find that the legislator, through the two provisions stated above, by way of example, creates the profile of the consumer in the sense that:

(a) *This is always a natural person* who completes a contract with the trading professional for the purpose of personal or family consumption, i.e. never for the purpose of making a profit. Also, his actions are not repetitive, in the sense that they are not done as a profession, there being no intention of the consumer to make a profit.

However, it is necessary to clarify the fact that it falls within the scope of the concept of "consumer" and "associations for the protection of consumers", at least from the perspective of the right to take legal action against the professional trader. *(Niță, 2023, p.38-39)*

Regulations with reference to "consumer associations" can be found in OG no. 21/92 on consumer protection, in Chapter VI, where in article 30 it is ordered that associations that protect consumers represent non-governmental organizations, which have non-profit purposes, their only concern consisting in defending the rights and legitimate interests of consumers, facilitating administrative or judicial actions for them. For example, as regulated in art. 36 letter h) of OG no. 21/92, "consumer associations" are recognized the right to file legal actions with the object of protecting their rights[5].

At the level of the European Union, (EU) Directive 2020/1828[6] of the European Parliament and of the Council of 25 November 2020 was adopted regarding actions in representation for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, through which the Union legislator creates an effective and efficient procedural mechanism that allows qualified entities that represent the collective interests of consumers to introduce actions in representation both to obtain injunctions and to obtain reparative measures against traders who violate the provisions of European Union law.

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[5] Through (EU) Directive 2020/1828 of the Parliament and of the Council of November 25, 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, consumer associations, qualified as "qualified entities, the power to bring legal actions, thus facilitating broad access to justice for consumers in order to protect their interests, requesting either measures to stop illegal practices or remedial measures (such as reimbursement, replacement, repair) or both types of measures.

[6] OJ L 409, 4.12.2020, p. 1-27, Current version consolidated on 02.05.2023

(b) The phrase "outside of his professional activity" is used by the legislator with the aim of bringing into the scope of the concept of "consumer", a natural person who can simultaneously or successively be both "consumer" and "professional". How do we explain such conceptual "coexistence"?

It means that a natural person maintains the quality of consumer whenever he buys products or services, which are not part of his profession, i.e. these goods or services are used for personal or family consumption, which means for example that one will qualify as consumer the lawyer who concludes a credit contract with a banking company, whenever the credit contract is not related to the professional activity of the lawyer. However, it will not be considered relevant to qualify the lawyer otherwise than a consumer even in the hypothesis where the mortgage loan contract concerns the real estate intended for the exercise of his professional activity.

Per a contrario, the natural person becomes a professional when he acts (sells or provides) the products or services for purposes related to his professional, private or public activity.[7].

In the *Costea*[8] case, the CJEU held at points 16-18, that the notion of "consumer" means any natural person, simple individual who, within the contracts regulated by the unfair terms' directive (Directive 93/13/CEE), acts for purposes who is outside his professional activity, while "seller or supplier" means any natural or legal person who, within the contracts regulated by the same directive, acts for purposes related to his professional, public or private activity.

I.2 Rights of consumers

Whenever we approach the topic of the rights of consumers involved in commercial legal relations*(Boghirnea, 2023, p.220-235*) with commercial professionals, it is necessary to mention the principle of contractual solidarity in which the two contracting parties have the obligation to be involved both during the pre-contractual period and throughout the duration of the contract execution, with the sole purpose of concretizing their contractual approach. In this context, part of the specialized doctrine *(Piperea, 2018, p.8)* appreciates, as far as the consumer is concerned, that he is the exclusive beneficiary of the rights arising from the exercise of the contractual obligations assumed by the professional trader, while the latter has almost exclusively obligations.

With reference to the rights available to consumers, art. 27 of Law no. 296/2004 (called the Consumer Code) specifically regulates them. Moreover, each of these is reiterated within the special legislation related to different types of commercial contracts in which the consumer is a contracting party. Specifically, we remind you in this sense:

(a) the right to have access to quality products or services;

[7] See in this sense, case C-110/14, H.O. Costea c, SC Volksbank Romania SA, points 16-18.
[8] Case C-110/14, H.O. Costea v. SC Volksbank Romania SA EU:C:2015:538

(b) the right to be fully, correctly and accurately informed about the essential features of the goods or services to be purchased. This is done with the help of identification elements written in plain sight, legible and easy to understand, as the case may be, on the product, on the label, on the packaging or in the technical book of the product, etc.

(c) the right to be informed about the final price of the product or service. This must be indicated visibly and in an unequivocal, easily readable form by marking, labeling and/or display[9]. Also, the price of the product or service must be a fair one, in the case of a contract, respectively, whenever we are in the presence of an unfair price, i.e. an excessively higher price compared to the production price, it will represent the expression of a manifestation of abuse of the dominant position of the professional trader in relation to the consumer. *(Piperea, 2018, p.8)*

(d) the right to refuse to complete contracts containing abusive clauses. Therefore, any contract concluded by the consumer with a professional trader must contain clear, unambiguous contractual terms[10] that do not require specialist knowledge for the consumer.

(e) the right to safe products, and implicitly the right to return a non-compliant product, the right to its replacement or repair during the warranty period.

(f) the right to be properly and properly compensated for damages caused as a result of non-compliant quality of products and services;

(g) the right to unilaterally terminate the contract accompanied by the right to fair compensation.

(h) the right to organize themselves in consumer associations, in order to defend their rights.*(Ulariu, Cliza, 2023, p.82)*

II. TYPES OF COMMERCIAL CONTRACTS CONCLUDED BY CONSUMERS WITH TRADING PROFESSIONALS

The term consumer is strictly related to concepts such as commercial professional, respectively to the commercial legal relationship, in other words "about commercial contracts". The autonomy of will is the cornerstone of the contractual matter that individualizes the right of option of each person to engage or not, as the case may be, in a contractual relationship." (.*(Ulariu, Cliza, 2023, p.82)* Therefore, it is imperative to present the types of commercial contracts practiced by consumers, as they are currently regulated by the civil code.

A first example in this sense is the adhesion contract[11] *(Bercea, R.R.D.P. no. 4/2020, p. 367-427)* characterized by the fact that its essential clauses are

[9] See in this sense, art. 65 of Law no. 296/2004
[10] See in this sense, art. 75 of Law no. 296/2004
[11] regulated by the Civil Code at art. 1175

predetermined by one of the contracting parties, respectively by the professional trader, the other party, in turn, the consumer, having only the option to purchase from them. This category includes most contracts concluded by consumers, such as credit contracts, insurance contracts, service contracts, etc.

A distinct category of contracts regulated by the civil code is the category of framework contracts[12], being defined as the agreement reached between the parties in order to negotiate, conclude or, as the case may be, maintain the contractual relationship whose essential elements are previously established by it. Therefore, the manner in which the framework contract is to be executed, i.e. references regarding the terms of execution of the obligations assumed by the parties, the volume of services and their price are to be established by subsequent agreements.

In specialized literature, subsequent contracts concluded on the basis of framework contracts are called "application contracts", characterized by the fact that the contracting parties establish the terms of the contract in accordance with the conditions set forth in the framework contract. Thus, it is appreciated that the existence of the framework contract considerably simplifies the negotiation procedure prior to perfecting the application contract. *(Angheni, 2022, p.429)*

It must be stated that although a significant part of the contracts qualified as part of this category are concluded between professional traders, the possibility of a consumer being a "contracting party to an application contract" is not excluded".

A last category of contracts mentioned by the civil code[13] that refers to the special commercial legislation, is the *contracts concluded with consumers*. Among the special regulations applicable to legal relationships established between consumers and professionals, we mention: the Consumer Code (Law no. 296/2004), Law no. 193/2000 republished applicable to credit contracts concluded between merchants and consumers, Law no. 363/2007 on combating incorrect practices but also OG no. 21/92 on consumer protection.

III. ON THE PRINCIPLE OF FREEDOM TO CONTRACT. LIMITATION OF APPLICATION TO CONSUMERS

Pursuant to art. 1169 and 1170 of the Civil Code, the conclusion, execution but also the termination of a (commercial) contract is based on the principle of freedom of will doubled by that of good faith, thus the contracting parties, in the analyzed situation, the professional and the consumer "are free to conclude any contracts and determine their content, within the limits imposed by law, public order and good morals, being also obliged to show good faith throughout the negotiation, at the time of perfecting the contract, but also during its execution. *Per a contrario*, in the light of art. 11 of the Civil Code, a contract

[12] stipulated in art. 1176 C.civ.
[13] See in this sense, art. 1177

that contains provisions derogating from laws that concern public order or good morals will be considered invalid[14].

The legal public order is built, mainly from all the legal norms that make up the branches of public law, we mention in this sense, constitutional law, administrative law, fiscal law, criminal law, etc. and is based on the need to guarantee general interests, therefore the rights of individuals at the level of society.

In the matter of contracts and especially with regard to consumer rights, the legal public order is also determined by the economic order, with multiple valences in the Union law system specific to the matter deduced from the analysis, in which a Union public order is configured. *(Angheni, 2022, p.424)*

What particularity presents the applicability of the principle of contractual freedom of will in the distinct case of the consumer, as a contracting party of a commercial contract?

We make it clear that the freedom to contract is manifested both at the time of the conclusion of the contract representing, in fact, the unequivocal decision to complete the contract as well as the subsequent manifestation, through the possibility of the contracting party to determine the essential clauses of the contract.

Prin urmare, este important să identificăm în ce măsură cele două dimensiuni ale principiului libertății de voință contractuală sunt întru-totul aplicabile consumatorului, ca parte contractantă implicată într-un raport obligațional comercial.

We are of the opinion that the freedom to contract, as a basic principle regulated by the civil code, is analyzed in close connection with the legal equality of the contracting parties, respectively consumer and professional trader.

In the case analyzed in this research, regardless of whether we are considering contracts for the sale of goods and services, including digital ones, credit contracts, etc. we believe that their particularity is given by the fact that there are no legal equality relationships between consumers and professionals, in the sense that the consumer is in a situation of legal inferiority, given by his impossibility to negotiate with the merchant because the analyzed contracts are

[14] The principle of contractual freedom must be correlated with the principle of the binding force of the contract, "pacta sun servanta" principle expressed by the legislator in art. 1270 paragraph (1) Civil Code, according to which "The validly concluded contract has the force of law between the contracting parties ", which means that, on the one hand, in order to be validly concluded, it must not harm public order and good morals, and, on the other hand, at the time of conclusion, the validity conditions provided for by art. 1179 C.civ. (the capacity to contract, the consent of the parties, a determined and lawful object, a lawful and moral cause) and, in certain cases, the form prescribed by law. If the contracting parties respect, mainly, the content of art. 1169 and art. 1179 C.civ., the contract has "force of law", it is binding between the parties.

characterized by the presence of predetermined, non-negotiable clauses, against which the consumer can only purchase or refuse to complete it, as the case may be.

Therefore, the applicability of the principle of freedom of will is limited only to the possibility of the consumer to enter into a binding relationship with the merchant, i.e. to conclude or not a commercial contract, however, the consumer's freedom in terms of negotiating contractual clauses cannot be appreciated, considering the above comment.

IV. METHODS OF PROTECTING CONSUMERS DETERMINED BY THE NEED TO PREVENT AND COMBAT THE ABUSE OF ECONOMIC POWER OF THE MERCHANT PROFESSIONAL

Some authors *(Piperea, 2018, p.4)* of specialized literature mention the consumer as the vulnerable part of the commercial contract, which is characterized by the fact that it needs special legal protection precisely in order not to become a victim of the trader's abuse of power.

In concrete terms, the appropriate consumer protection legislation takes into account the legal relations between the consumer and the professional, carried out both in the pre-contractual stage, at the time of concluding the contract, but also throughout its execution.

What are the concrete ways to protect the consumer?

a) A first aspect in this regard is the trader's obligation to inform the consumer about his rights. We exemplify in this sense, the obligation of the air transport operator to inform passengers about their rights. Specifically, based on art. 14 para. (1) in conjunction with the provisions of art. 5 para. (1) and (3) of Regulation (EC) no. 261/2004 regarding the rights enjoyed by passengers, in the event of the cancellation of a scheduled flight, they are offered, by the air transport operator: a readable announcement, in the passenger registration area, consisting of a written announcement in clear and legible characters in which they are informed that in the event of a flight being canceled or delayed for at least two hours, passengers have the option to request a form stating their rights at the check-in desk or at the boarding gate regarding compensation and assistance. Also, art. 11 of Directive (EU) 2011/38 on consumer rights, regulates aspects related to the way in which consumers can express their right of withdrawal from a contract concluded at a distance or from a contract completed beyond the commercial location. *(Vâlcu, 2022, p.171-179)*

b) Also, consumer protection is presumed to be ensured by regulating the legal regime of abusive clauses as well as by the presence of the coercive system applicable to incorrect, aggressive or deceptive practices of traders. Thus, we recall here, the presence of courts that can limit the effects that these contracts generate by finding the abusive nature of some contractual clauses and consequently following the judicial re-adaptation, a re-balancing of these contracts takes place.

c) Combating the abuse of power by the professional trader is also achieved through the presence of special regulations regarding the rights of consumers to withdraw from a contract concluded with professional traders under the conditions of art. 9 of Directive (EU) 2011/38, the guarantee obligation, of quality and durability of the goods, but also the liability (*Beka, 2018*) of the professional trader for damages caused to consumers by the products or services sold.

CONCLUSIONS

As I clarified in the content of this research, the protection granted to consumers, natural persons considered in particular, is intended to correct the legal inequality created in the obligatory relations between consumers and commercial professionals. At the same time, this legislative protection determines essential derogations from the common law of contracts and tortious civil liability.

Also, we believe that the legal framework appropriate to the matter deduced from the analysis is broad, complex but, to the same extent, unanimously outlined when we discuss the meaning of the concept of "consumer", a meaning dedicated eminently to the natural person in actions that exceed his professional field, in other words or how many times the contracted product or service serves personal or family consumption.

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THE OFFENSE OF VIOLATING THE LEGAL PROVISIONS REGARDING THE CONFLICT OF INTERESTS IN THE CASE OF COMPANIES WITH LEGAL PERSONALITY

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Abstract

At the conflict of interests designates, in the general sense, that situation in which, when making a decision or participating in the deliberation process for making a decision, a person has a personal patrimonial interest that may have influence regarding the objective fulfillment of the duties assigned to him according to the legislation in force.

Both in European and domestic legislation, when the conflict of interests is regulated, a distinction is made between persons exercising public dignities and offices and persons exercising their duties within companies with legal personality in the private sector. Of course, in the case of persons who exercise certain dignities or public offices, the principle of the supremacy of the public interest must be respected, which is why, in the case of these persons, the legal regime of the conflict of interests is much more restrictive, unlike the case of persons who carry out their activity in the private sector, in which case they receive the interest of the legal entity within which they exercise their duties. In other words, a distinction must be made between conflict of interests in the public domain and conflict of interests in the private domain.

Considering the particularities and special importance of the legal regime regarding the conflict of interests in the private field, this paper proposes a detailed analysis of the way in which criminal protection is provided to the legal regime regarding the conflict of interests in the case of companies with legal personality. A clarification is made of the notions of incompatibility, indignity and conflict of interests, by highlighting the common characteristics and aspects that differentiate these notions, highlighting the particularities of the way of criminalizing the conflict of interests in the domestic legislation.

Keywords: *conflict of interests, company with legal personality, administrator, favoring certain persons.*

INTRODUCTION

INTRODUCTORY NOTIONS ON THE CONFLICT OF INTEREST

In order to better understand the notion of conflict of interests, we believe that this notion must be delimited from the notions of incompatibility and indignity. According to DEX (The Explicative Dictionary of the Romanian Language), the incompatibility represents "that state of incompatibility between two offices, professions or tasks, which makes a person unable to exercise or occupy them at the same time "(*Dicționarul explicativ al limbii române,* 2012, p. 499).

In the Companies Law no. 31/1990 we do not find a definition of incompatibility, but from the analysis of the provisions of this normative act we could define incompatibility as the general situation in which a member of the management bodies of the company with legal personality, the partner or the shareholder of such a company finds himself to hold and/or exercise simultaneously several offices of the same nature or of a different nature, when such situations are prohibited by law.

Regarding the conflict of interests within the company with legal personality, it could be defined as the situation where a person who holds a position within such a company has a personal patrimonial interest that may have influence regarding the objective fulfillment of the duties that fall to him according to the legislation in force.

We can conclude that incompatibility refers to the occupation by a person of an office that is not compatible with another office that is already occupied by him. Incompatibility is an institution that aims to avoid situations of conflict of interests by prohibiting the simultaneous occupation by a person of several positions that would put that person in a situation of conflict of interests, it being impossible that when the person in question makes decisions he can adequately represent the interests of all companies with legal personality. Thus, according to Article 15316 of Law no. 31/1990, "a natural person can simultaneously exercise at most 5 mandates of administrator and/or member of the Board of Supervisors in joint-stock companies whose headquarters are located on the territory of Romania. This provision applies to the same extent to the natural person administrator or member of the Board of Supervisors, as well as to the natural person permanent representative of a legal person administrator or member of the Board of Supervisors". According to Article 277 (3) of Law no. 31/1990, the act of the founder, administrator, director, executive director or censor exercising their duties or assignments, in violation of the provisions of Law no. 31/1990 regarding incompatibility, constitutes an offense.

As for indignity, it should not be confused with the state of incompatibility, because indignity refers to the qualities that a person who is going to occupy a certain position within a company with legal personality has qualities that do not

allow him to occupy that position. Thus, according to Article 6 (2) of Law no. 31/1990, „the following persons cannot be founders: persons who, according to the law, are incapable or who have been forbidden by a final court decision the right to exercise the capacity of founder as a complementary punishment of conviction for offenses against patrimony through breach of trust, corruption offenses, embezzlement, offenses of forgery in documents, tax evasion, offenses provided by Law no. 129/2019 for the prevention and combating of money laundering and the financing of terrorism, as well as for the amendment and completion of some normative acts, with subsequent amendments and additions, or for the offenses provided for by this law". At the same time, according to Article 731 of Law no. 31/1990, „the persons who, according to Article 6 (2), cannot be founders, nor can they be administrators, directors, members of the Board of Supervisors and the Board of Directors, censors or financial auditors, and if they are elected, their rights shall be terminated".

I. BRIEF HISTORY REGARDING THE CRIMINALIZATION OF CONFLICT OF INTERESTS IN THE CRIMINAL CODE

In 2003, the Organization for Economic Co-operation and Development (OECD) published a Guideline for Managing Conflict of Interest in the Public Sector (https://www.oecd.org/gov/ethics/2957377.pdf), where the particularly high risk that situations of conflict of interests raise both in the public and in the private domain is emphasized. This guideline shows that complex forms of relationships between the public and private sectors have developed that have generated increasingly close collaborations between the two sectors, such as public/private partnerships (*Remus Jurj-Tudoran*, accessed on: 28.10.2023, http://revistaprolege .ro/infractiunea-de-conflict-de-interese-teorie-si-practica-judiciara/).

Also in 2003, Law no. 161/2003 regarding some measures to ensure transparency in the exercise of public dignities, public offices and in the business environment, prevention and sanctioning of corruption. This normative act defines in Article 70 the conflict of interests as being "the situation in which the person who exercises a public dignity or a public office has a personal interest of a patrimonial nature, which could influence the objective fulfillment of his/her duties, according to the Constitution and other normative acts". We note that in this normative act the conflict of interests is defined by reference to the exercise of public dignities and public offices, so it considers situations of conflict of interests that arise in the public sector.

As for the offense of conflict of interests, it was introduced for the first time in Romanian law by Article 1 point 61 of Law no. 278/2006 for the amendment and completion of the Criminal Code, as well as for the amendment and completion of other laws. Thus, by this normative act it is introduced into the old Criminal Code, Article 2531, with the marginal name Conflict of interests, which incriminates "The conduct of the public servant who, while carrying out their professional duties, committed an act or participated in making a decision that

resulted, directly or indirectly, in a material gain for themselves, their spouses, for a relative or an affiliate, including those twice removed, or for another person with whom they were in business or labor relations for the past 5 years or from whom they benefited of services or gains of any nature". According to this indictment rule, the provisions that criminalize the conflict of interests „shall not apply to the cases which refer to issuing, endorsing or adopting regulatory documents". In the understanding of the old Criminal Code, public servant meant any person who exercises permanently or temporarily, with any title, regardless of how he was invested, an assignment of any nature, remunerated or not, in the service of a public unit, public institutions, institutions or legal entities of public interest, or of another person who administers, uses or exploits public property goods, public interest services, as well as the goods of any kind that, according to the law, are of public interest. Article 258 of the old Criminal Code regulates, in a similar way to Article 308 of the current Criminal Code, "Acts committed by other officials", in respect of which it provided for the same reduction by one third of the maximum penalty provided by law for the committed deed, without including, among the offenses committed while in office, or in connection with the office that could be committed by "other officials", the conflict of interests offense. Thus, active subjects of the offense of conflict of interests could be public servants, in the sense of Article 147 (1) of the Criminal Code from 1969, respectively, any person who exercises permanently or temporarily, with any title, regardless of how it was vested, an assignment of any nature, remunerated or not, in the service of a unit among those referred to in Article 145, from the same code, or "official", provided by Article 147 (2) of the Criminal Code from 1969, respectively the person mentioned in paragraph (1) of this article, as well as any employee who performs an assignment in the service of a legal entity other than those provided in that paragraph.

Therefore, the old Criminal Code protected, by Article 2531, only the legal regime regarding the conflict of interests in the public sector, without the acts of conflict of interests, committed by persons exercising a task in the service of legal persons other than those of public interest, public authorities, public institutions or institutions or legal persons of public interest falling under this indictment rule.

The new Criminal Code provided for the offense of conflict of interests in Article 301 with the following content:

(1) „The conduct of the public servant who, while carrying out their professional duties, committed an act or participated in making a decision that resulted, directly or indirectly, in a material gain for themselves, their spouses, for a relative or an affiliate, including those twice removed, or for another person with whom they were in business or labor relations for the past 5 years or from whom they had or have benefits of any nature, shall be punishable by no less than 1 and no more than 5 years of imprisonment and the ban from exercising the right to hold a public office.

(2) (2) Par. (1) shall not apply to issuing, endorsing or adopting regulatory documents.".

At the same time, within the contents of Article 308 of the Criminal Code it was provided that the provisions of Article 301 regarding public servants shall also apply accordingly to acts committed by or in relation to persons who exercise, permanently or temporarily, with or without remuneration, an assignment of any nature in the service of an assimilated public official or within any legal entity. Article 308 basically regulated a mitigated version of the offense of conflict of interests, which had as a circumstantial, mitigating factor the fact that the act of conflict of interests was committed in private relationships, including within a private legal entity. Thus, Article 308 of the Criminal Code extended the scope of the offense of conflict of interests to any company with legal personality.

However, by Decision no. 603/2015 the Constitutional Court declared unconstitutional the phrases "commercial relations" from the content of the indictment rule the offense of conflict of interests, as well as "or within any legal entity" from the content of the provisions of Article 308 (1) of the Criminal Code.

Regarding the phrase commercial relations used in the content of Article 301 of the Criminal Code, the Constitutional Court considers that this phrase gives a lack of clarity, precision and predictability to the legal object of the offense of conflict of interests. However, the addressee of the criminal law cannot order his conduct in relation to an incriminating law that does not comply with the quality conditions of the law, which is why the provisions of Article 301 (1) of the Criminal Code violate the provisions of Article 1 (5) and Article 23 of the Constitution regarding the quality of the law and individual freedom, respectively.

With reference to the phrase or within any legal entity, used by Article 308 (1) of the Criminal Code, the Constitutional Court finds that this category includes any form of company defined in the Civil Code, Companies Law no. 31/1990 or Law no. 1/2005 regarding the organization and operation of the cooperation. However, the Constitutional Review Court shows that in the statement of reasons of Law no. 278/2006 by which the offense of conflict of interests was regulated for the first time, it is expressly mentioned that the criminalization of acts of conflict of interests was aimed at penalizing the public official who, consciously and deliberately, satisfies his personal interests by fulfilling public duties, the rest of the people, who carry out their activity in the private system, due to the fact that they do not fulfill public duties in carrying out their activities, being clearly excluded from this approach of criminalizing acts of conflict of interests. It is thus concluded that the regulation as an active subject of the offense of conflict of interests of some private persons is excessive, because there is an impermissible expansion of the coercive force of the state through the use of criminal means, on the freedom of action of people in terms of the right to work and economic freedom, without there being a criminological justification in this regard. Article 61 (1) and Article 73 (3) h) of the Constitution do not allow the legislator to regulate offenses in a way that generates an exaggerated discrepancy between the importance of the social value that must be protected and the social value that must

be limited, because between such a situation it would lead to the violation of the latter social value. However, in the present case, the social value that is criminally protected targets the private environment, so it does not have a public character, which is why the state has no interest in criminalizing the conflict of interests in such a way. This is all the more so if the acts of conflict of interests in a private environment cause damage, they can be remedied with the help of civil law, labor law or other legal mechanisms, which do not incur criminal liability.

II. USING THE PUBLIC OFFICE TO FAVOR SOME PEOPLE

Considering Decision no. 603/2015 pronounced by the Constitutional Court, by Law no. 193/2017 for the amendment of Law no. 286/2009 on the Criminal Code, Article 301 and Article 308 of the Criminal Code were amended, as follows:

Article 301 of the Criminal Code has undergone a name change, so that at the moment the marginal name of this offense is the use of public office to favor certain persons, the legal content of the offense being the following:

"(1) The conduct of the public servant who, while carrying out their professional duties, committed an act or participated in making a decision that resulted, directly or indirectly, in a material gain for themselves, their spouses, for a relative or an affiliate, including those twice removed, shall be punishable by no less than 1 and no more than 5 years of imprisonment and the ban from exercising the right to hold a public office for a period of 3 years.

(2) Par. (1) shall not apply to the cases in which the act or the decision refer to one of the following:

a) issuing, endorsing or adopting regulatory documents;

b) the exercise of a right recognized by law or in the fulfillment of an obligation imposed by law, in compliance with the conditions and limits provided by it."

From the analysis of the indictment rule, it results that the active subject of this offense can only be a public servant under the understanding of Article 175 of the Criminal Code. Thus, according to Article 175 (1) of the Criminal Code, a public servant „is the person who, on a permanent or temporary basis, with or without remuneration:

a) shall exercise the duties and responsibilities, set under the law, to implement the prerogatives of the legislative, executive or judiciary branches;

b) shall exercise an office of public dignity or a public office irrespective of its nature;

c) shall exercise, alone or jointly with other persons, within a public utility company, or another economic operator or a legal entity owned by the state alone or whose majority shareholder the state is, responsibilities needed to carry out the activity of the entity".

At the same time, according to Article 175 (2) of the Criminal Code, „the following shall be deemed a public servant: the person who supplies a public-interest service, which they have been vested with by the public authorities or who

shall be subject to the latter's control or supervision with respect to carrying out such public service.".

As stated in the specialized literature, Article 175 (1) of the Criminal Code regulates the genuine public servant, while Article 175 (2) of the Criminal Code regulates the assimilated public servant *(Cioclei, 2016, p. 210).*

We conclude that this offense can only be committed in connection with the exercise of powers in order to achieve the prerogatives of the legislative, executive or judicial power, by persons who exercise a position of public dignity or a public position of any nature, or by persons who exercise duties related to the achievement of the object of activity within an autonomous company of another economic operator or of a legal entity with full or majority state capital.

We note that in the current content, the incrimination norm from Article 301 of the Criminal Code restricts the scope of criminal protection of the legal regime regarding the conflict of interests only to situations in which the public servant performed an act by which he obtained a material gain for themselves, their spouses, for a relative or an affiliate, including those twice removed. At the same time, criminal protection is incidental only to persons who carry out their activity within public authorities, public institutions, autonomous companies, an economic operator or a legal entity with full or majority state capital. It follows that as far as companies with legal personality are concerned, this indictment rule only considers the acts committed within economic operators or companies with full or majority state capital. The acts committed within companies with legal personality with full or majority private capital do not fall under the scope of the law.

We can say that Article 301 of the Criminal Code represents the general norm regarding the criminal protection of conflict of interests within companies with legal personality. We will see, however, that in the Companies Law no. 31/1990 we find several offenses specifically regarding the conflict of interests, which grant criminal protection to certain concrete acts by which the interests of companies with legal personality may be harmed, regardless of whether we are talking about companies with state or private capital.

III. CRIMINAL PROTECTION OF THE LEGAL REGIME REGARDING CONFLICT OF INTERESTS UNDER COMPANIES LAW NO. 31/1990

As the name suggests, in order for there to be an offense of conflict of interests, there must be certain interests involved. From the analysis of the provisions of the Companies Law no. 31/1990 it results that this normative act operates with three distinct interpretations of the notion of interest, more precisely, it takes into account the interest of the company with legal personality, personal interest and the interest of a third party.

There is a conflict of interests in the situation where the members of the governing bodies or associations issue decisions or participate in the deliberation process in order to pursue their own interest or that of a third party. Thus, we will further present the criminalization rules from the Companies Law no. 31/1990

which protects the legal regime regarding the conflict of interests in the case of companies with legal personality.

III.1 The offense provided by Article 275 (1) a) of Law no. 31/1990

According to this indictment rule, it is an offense for the administrator, the general manager, the director, the member of the Board of Supervisors or of Directors who violates, even through persons interposed or through simulated acts, the provisions of Article 1443 of Law no. 31/1990. The social value protected by this offense consists in the correctness, probity, honesty and loyalty of the people who have the right to decide and regulate within a company with legal personality, persons who must strictly respect the interests of the company they represent when participating in decision-making for these legal entities *(Schiau, Prescure, 2007, p. 823).*

According to Article 144³ (1), „the administrator who, in a certain operation, directly or indirectly, has interests contrary to the interests of the company, must notify the other administrators and the censors or internal auditors and not take part in any deliberation regarding this operation". „The administrator has the same obligation if, in a certain operation, he knows that his husband or wife, relatives or relatives inclusively up to the fourth degree are interested" [Article 144³ (2)]. „If the provisions of the articles of incorporation do not provide otherwise, the prohibitions established in Article 144³ (1) and (2), regarding the participation, deliberation and voting of administrators, are not applicable if the object of the vote is: a) offering for subscription, to an administrator or to the persons mentioned in Article 144³ (2), regarding the shares or bonds of the company; b) granted by the administrator or by the persons mentioned in the Article 144³ (2) of a loan or setting up a guarantee in favor of the company" [art. 144³ (3)].

Through these legal provisions, the legislator instituted certain special obligations of information and abstention from voting for administrators, in the situation where they or their husbands/wives or their relatives or next of kin up to the fourth degree, inclusively, are interested in a certain operation that must be submitted to deliberation in the bodies established under the statutes of the company with legal personality *(Boroi, Gorunescu, Barbu, Vîrjan, Nistor, 2023, p 88).*

Although the prohibitions of Article 1443 refers only to the administrator, from the content of the incrimination rule it follows that the active subject of the offense provided for by Article 275 (1) a) of Law no. 31/1990 can also be the general manager, director, member of the Board of Supervisors or of Directors.

We are in the presence of an offense of danger; therefore, the deed is consummated at the time of the realization of the material element of the objective side. Regarding the subjective side, the offense is committed with direct or indirect intent. The attempt is possible, but it is not criminalized.

III.2 The offense provided for by Article 275 (1) b) thesis II of Law no. 31/1990

According to this indictment rule, it is an offense for the administrator, the general manager, the director, the member of the Board of Supervisors or of Directors who violates the provisions of Article 193 (2) of Law no. 31/1990.

According to Article 193 (2), „the associate cannot exercise his right to vote in the deliberations of the Assemblies of Associates regarding his contributions in kind" (for example, there is some uncertainty regarding the contribution of land or movable property within the company) „or to the legal acts concluded between him and the company" (for example, a sales contract where the associate is the seller and the company is the buyer) *(Boroi, Gorunescu, Barbu, Vîrjan, Nistor, 2023 p. 90).*

The act constitutes an offense when these legal provisions are violated, both in the situation where the violation of the provisions of Article 193 (2) is carried out by the interested partner himself, and in the case that another partner exercises his voting rights, knowing that the decisions are taken in violation of the provisions of Article 193 (2) of Law no. 31/1990 and allows this as an administrator, general manager, director or member of the Board of Supervisors or the Board of Directors.

We are in the presence of an offense of danger, therefore the act is committed at the time of the realization of the material element of the objective side. Regarding the subjective side, the act is committed with direct or indirect intention. The attempt is possible but not punishable.

III.3 The offense provided for by Article 275 (2) of Law no. 31/1990

According to this law, it is an offense for the partner to violate the provisions of Article 127 or Article 193 (2) of Law no. 31/1990. The offense is similar from the point of view of the material element of the objective side to the offenses provided for in paragraph (1) let. a) and b) of Article 275, the essential difference regarding the special quality of the active subject, who must be an associate who does not also have the capacity of administrator, general manager, director or member of the Board of Supervisors or the Board of Directors *(Boroi, Gorunescu, Barbu, Vîrjan, Nistor, 2023 p. 90).*

According to Article 127 of Law no. 31/1990, „the shareholder who, in a certain operation, has, either personally or as a representative of another person, an interest contrary to that of the company, will have to abstain from the deliberations regarding that operation". The shareholder who contravenes this provision is liable for the damages caused to the company, if, without his vote, the required majority would not have been obtained.

According to Article 193 (2) of Law no. 31/1990, „an associate cannot exercise his right to vote in the deliberations of the Assembly of Associates regarding his contributions in kind or the legal acts concluded between him and the company".

And in the case of this offense, the immediate consequence consists in creating a state of danger for the company with legal personality. The offense is committed with direct or indirect intent. The attempt is possible but not punishable.

CONCLUSIONS

As can be seen, the legal regime regarding the conflict of interests in the case of companies with legal personality benefits from criminal protection both in Article 301 of the Criminal Code with the marginal title the use of the public office to favor some persons, which represents the general indictment rule in this field, as well as in the Companies Law no. 31/1990, within which we find some specific offenses of Article 301 of the Criminal Code, which criminalize some concrete ways by which the legal regime of the conflict of interests is violated within the company with legal personality.

The general criminal norm in the Criminal Code criminalizes only the conflict of interests in the public environment, while the provisions of Law no. 31/1990 criminalizes certain situations of conflict of interests that may arise within companies with legal personality, regardless of whether they are companies with majority or wholly private capital or companies with majority or wholly state capital.

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A JURISPRUDENTIAL ANALYSIS REGARDING THE SANCTIONING OF THE VIOLATION OF THE PROTECTION ORDER CRIME FROM THE PERSPECTIVE OF LEGISLATIVE EVOLUTION

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Abstract

At the phenomenon of domestic and couple violence has generated in recent decades, both at global, European and national level, a multitude of debates in the public space, aimed at both highlighting the phenomenon and the most appropriate measures to adopt in order to limit it. Among these measures, one of the most effective, at least in the short and medium term, is the establishment of a protection order. Although the special civil Law no. 217/2003 on preventing and combating domestic violence did not provide for this measure at the time of its adoption, it was necessary to introduce it after the famous "Perla Hairdresser" case in Bucharest, in which a woman was killed at work, despite having previously made several complaints against her husband, who was a firearm owner and user by profession. This article aims to study from a legislative and jurisprudential point of view the evolution of the regulation of the protection order and the provisional protection order, in particular with regard to the sanctioning of its violation.

Keywords: *protection order (OP); provisional protection order (PPO); domestic violence; the offence of violating the protection order and that of the provisional protection order.*

INTRODUCTION

Prior to 1990, various forms of family and domestic violence were treated as normal ways of relating. The opening up of our country and its accession to new European and international bodies, such as the Council of Europe and, much

later, the European Union, has led to a common approach to the problem of these forms of violence, which exist in all societies and are present on all social levels.

In Romania, the state's first reaction was of criminal nature.

Thus, the criminal legislation on family and domestic violence has evolved from the regulations adopted in 2000 *(Law no. 197/2000),* which involved the creation of aggravated forms of the offences of assault and other violence *(Art. 180 of the previous Criminal Code)* and simple bodily harm *(Art. 181 of the previous Criminal Code)* to the current ones present in the Criminal Code, which includes a separate criminal type of family violence *(Art. 199 of the Criminal Code).* Despite the fact that the crime of domestic violence is provided for in a separate article, most doctrine *(Pușcașu, 2014, p. 437; Boroi, 2014, p. 95; Pușcașu, Ghigheci, 2021, pp. 122-123)* and jurisprudence still consider this offence only an aggravated form of the offences to which it refers, namely: the offence of assault and other violence (Art. 193 CC), bodily harm (Art. 194 CC), simple and qualified murder (Art. 188-189 CC) and the offence of blows and injuries causing death (Art. 195 CC).

At the same time, the crime of killing or injuring a newborn child immediately after birth is also considered a form of domestic violence (Art. 200 of the Criminal Code), a crime that should have been placed in another chapter, given its criminogenic substrate and very different personal and social motivations from the rest of domestic violence.

But alongside the development of criminal law regulation, which can still be much improved, there is an even more dynamic development of civil law in this area. The adoption in August 2003 of Law no. 217/2003 on preventing and combating family violence, which later became domestic violence in 2018, was an important step in creating effective means of dealing with and limiting the phenomenon of relational violence, especially in the private sphere. According to IGPR statistics for 2018, 81% of domestic violence crimes are committed in the home of the parties (*Network for Preventing and Combating Violence against Women*, 2018), which makes it necessary, and at the same time useful, to establish a victim protection order.

The introduction of the protection order for victims of domestic violence into the legislation in 2012 was created against the background of an increasing number of cases brought to the attention of criminal investigation bodies and in the media concerning such acts. Although the phenomenon seems to have had a slight decline in 2014 (probably due to changes in criminal legislation, following the entry into force of the two Codes: Criminal and Criminal Procedure), it has recorded steady increases from 2015 to the present (*The National Agency for Equal Opportunities for Women and Men, Monitoring report on the status of implementation of the Operational Plan for the implementation of the National Strategy on promoting equal opportunities between women and men and*

preventing and combating domestic violence for the period 2018-2021, 2018, p. 6).

In order to create effective remedies against domestic violence and violence against women, Law no. 217/2003 has been amended 16 times so far, being subject to both constitutionality review (CCR Decision no. 264/2017) and interpretation by the ICCJ in its Decision no. 50/HP/2020.

Legislative mobility at national level has followed in these cases the dynamics of European regulations, especially those at the level of the Council of Europe, especially after the adoption by Romania of the Convention on preventing and combating violence against women and domestic violence, also known as the Istanbul Convention *(Marinică, 2021)*, as well as the international ones at the level of the UN Parliamentary Assembly.

At the same time, it highlighted a phenomenon that is present but still hidden in people's consciences and homes, not only in our country but everywhere.

I. PRESENTATION OF THE LEGISLATIVE CHANGES WHICH LED TO THE INTRODUCTION OF THE PROTECTION ORDER AND THE PROVISIONAL PROTECTION ORDER

In accordance with the provisions of Art. 52 and 53 of the Istanbul Convention, the signatory States have an obligation to introduce in their legislation, if they do not already have them, protection orders and urgent restraining orders, as mechanisms for the defense of victims, either in an acute state of need or in the position of habitual victims of domestic violence by their partner in particular.

Romania's ratification of the above-mentioned Convention in 2016 led to the adoption of some of the most significant and multiple amendments to Law no. 217/2003 since its adoption, along with those produced in 2012.

However, since in this article we have set out to analyze the legislative history in this field, it is important to recall the original legal provisions and the evolution of regulation over time, in order to be able to appreciate the current situation, both legislatively and jurisprudentially.

In its original version, Law no. 217/2003 on preventing and combating domestic violence did not provide for any offences in case of violation of its provisions, but only for a series of misdemeanors. The only legal provision referring to criminal proceedings (Art. 26 of Law no. 217/2003 in its original form) provided that, *ex officio* or on request, if the prosecution authorities or the court were to find that there was definite evidence or strong indications that violence causing physical or mental suffering had been committed, they could provisionally order one of the following safety measures: ordering medical treatment (Art. 113 previous CC), medical internment (Art. 114 previous CC;

*(Vlădilă, Mastacan, 2012, pp. 249-258)*or, ineffectively, the prohibition to return to the family home *(Art. 116 previous CC; Vlădilă, 2007, pp. 131-140).*The adoption of any of these measures implied, first of all, the existence of a criminal trial and, in addition, a long period of time; as for the prohibition to return to the family home, which seemed more like a complementary punishment, it could only be ordered if the defendant was convicted, which presupposed that a considerable period of time had passed since the assault.The effectiveness of such a measure, as I pointed out on another occasion, was almost nil, especially in cases of domestic violence, where the need for the state bodies to react must be ultra-rapid. These legal provisions remained in force until the legislative changes in May 2012.The lack of pragmatism of these legislative measures has been highlighted by the contradictions that have arisen between the slowness or sometimes the lack of responsiveness of criminal investigation bodies to the growing needs of victims for protection. The effect ? *The case of "Perla Hairdresser" Bucharest*.

I will not repeat the details of this case, but it is necessary to note that in May 2012 this case led to one of the most important legislative changes adopted since 2003 in the content of Law no. 217/2003. Following these changes, the law was republished for the first time.Following the adoption of Law no. 25/2012 (Official Gazette of Romania, no. 365/13 May 2012) Chapter IV on the Protection Order (proper) was introduced.The chapter has comprehensively regulated the situation of this legislative and practical means of protection for victims of domestic violence; according to Art. 23 (of the regulations adopted after 2012), the protection order is the procedural means by which a person whose life, physical or mental integrity or freedom is endangered by an act of violence by a family member is protected; the law has created several measures that can be ordered by the court, which have proved, in the 11 years of application, very useful and even necessary.

Also, at this time of legislative change, a special or qualified form of the offence of failure to comply with a court order (Art. 287 of the Criminal Code) was introduced in the art. 32 of Law 217/2003, who was intitle similar to the one prevent by the Criminal Law, as: the offence of non-compliance with the court order. The penalty was only with imprisonment from one month to one year.

The legal provisions as originally adopted created the impression of a regulatory mismatch. On the one hand, the law gave offenders the impression of leniency, as it provided for the possibility of reconciliation of the parties/remission (after the entry into force of the current Criminal Code), and on the other hand, it imposed a sentence of execution only or possibly the execution of the sentence at work (a possibility that existed only until 2014, but rarely used in practice, especially in such cases).

That is why, in the same year of its adoption, the text as originally proposed was amended by Law no. 187/2012 for the implementation of Law no. 286/2009 on the Criminal Code (Art. 134), removing the provisions of Para. 2,

which provided for the impossibility of applying conditional suspension of the execution of the sentence, keeping intact the other provisions.In any case, after the entry into force of the current Penal Code, the text of Para. 2 would have been obsolete, as the institution of conditional suspension of the execution of the sentence no longer existed. The effectiveness of the provision on reconciliation as a ground for removing criminal liability remains to be examined. Was it a benefit for the victim or for the offender?

From a jurisprudential point of view, we have encountered enough situations, from some apparently lighter ones, presenting minimal social danger, to some even very serious ones, in which the parties to the dispute have nevertheless reconciled.In this context, I will recall the case of an aggressor who, after a protection order was issued against him, violated it 6 times for 33 days, threatened the victim, destroyed certain property and committed the crime of housebreaking 6 more times, yet the beneficiary of the protection order reconciled with the offender (Bacău Court of Appeal, Decision no. 1107/2016).In another case, the perpetrator was present for 4 days at the victim's home, his sister, violating the protection order that required him not to approach the victim's home at more than 50 m, and also committed the offence of culpable destruction by arson, forgetting a lit candle in the house, being sentenced for this last act, only to a fine of 4500 lei (Bacău Court, Sentence no. 1815/2018). Another serious situation in which the parties reconciled, their family relationship being that of son-aggressor and elderly parents, was that in which the son, a shepherd by profession, violated the protection order three times "causing them serious and unbearable mental disorders" (Sibiu Court, Judgment no. 10/2015).

Situations in which the violation of the protection order was manifested with minimal physical effects or the offence was only one of danger, we encountered when the aggressor against whom a protection order had been imposed for a maximum period of 6 months (at that time), returned 3 months after its imposition, to wash his working overalls in the common home and although he was warned by his children that he was violating the court order, he still ignored it and stayed there until the police arrived and found that the offence had been committed *(Galati Court, Sentence no. 410/2018)*;or the situation where, dissatisfied that a protection order had been issued against him, the husband insulted the victim, who called the police for his protection (Sibiu Court, Judgement no. 345/2016) or the case of a husband against whom a protection order had been issued who met his wife on the street and approached her a few meters away to talk to her *(Oradea Court, Judgement no. 92/2017).*

As we can see, the cases range from the most serious to some seemingly harmless situations.

However, until an optimal solution is found, the Romanian legislator has made other changes regarding the issuance of the protection order.

II. ANALYSIS OF THE LEGISLATIVE AMENDMENTS CONCERNING THE PROVISIONS OF ART. 32/47 OF THE LAW NO. 217/2003

Thus, the next change concerning the implementation of the protection order was ordered by Law no. 272/2015 (Official Gazette of Romania, no. 842/12 November 2015), in order to complete the provisions of Art. 31. In this context, which aimed to ensure the speedy protection of the victim, the law provided for the need to communicate the protection order to the police authorities in the area of residence of both the victim and the aggressor, if they are different, within a maximum of 5 hours after the court has issued it.

The amendments made by Law no. 351/2015 (Official Gazette of Romania, no. 979/30 December 2015) were also made for the same purpose, requiring the courts to hear the case within 72 hours from the time of the referral, the participation of the prosecutor being mandatory (Art. 27).

Law no. 35/2017 (Official Gazette of Romania no. 214/29 March 2017) added to Art. 23, in the sense that it allowed the court to require the aggressor to report regularly to the police in order to verify compliance with the protection order, but also to require him to inform the same bodies of his housing situation, if the court had ordered his eviction from the common dwelling. The new provision was intended to create a greater police presence in the offender's life, direct and immediate contact with the offender, to discourage him from violating the order and causing further harm to the victim. With regard to violations of protection orders, the statistical situation shows a constant percentage of about one third of court decisions not respected, which justifies the introduction of such a provision. For example, in 2016 a percentage of 28.86% had been violated, in 2017, protection orders violated amounted to a percentage of 33.7%, for 2018 the percentage was 37.72%, and in 2019 it decreased to 09.69% (Romanian Government Press Release, 2016-2017; ANES, 2018, p. 10; OSSPC, 2021, p. 19). However, even if the percentage seems similar, it should be noted that the number of protection orders issued by the courts has been and is increasing from year to year; therefore, the number of offences of violation has been and is increasing. It is, in my opinion, what has justified, since 2018, the adoption of a firmer criminal policy than previously towards such acts.

In the context of strengthening measures to ensure the protection of victims, the next legislative act that significantly amended the provisions of the law on preventing and combating domestic violence was Law no. 174/2018 (Official Gazette of Romania, no. 618/18 July 2018). The normative act in question was promoted in the Romanian public space after the ratification of the Istanbul Convention by Law no. 30/2016, being necessary to bring the national provisions in line with this convention, which the Constitutional Court considers a genuine treaty promoting human rights (CCR Decision no. 264/2017).

From the perspective of our present research, the new law brought several significant additions: it changed the name of the law from family violence to

domestic violence; it redefined certain forms of violence from those specified under Art. 4, it extended the application of the protection order to the situation of partners who are no longer living together, it gave the possibility to Probation Services to work with persons convicted of crimes, which are classified as forms of domestic violence according to Law no. 217/2003 and not the Criminal Code (thus widening the scope of work), enabled the courts to order the aggressor to wear an electronic protection system, introduced the possibility for the police to grant a provisional protection order for 5 days, required the person protected by the protection order to comply with it, last but not least, it removed the possibility of reconciliation as a means of extinguishing criminal proceedings in the case of the offence of violation of the protection order itself, by criminalizing a new offence, namely that of violation of the provisional protection order, which has a similar constitutive content to the previous one, differing only in the prerequisite situation (in the first case a protection order is issued and in the second case a provisional protection order). Renumbering of the texts as a result of republication, the text of Art. 32 has become Art. 47 with two paragraphs.

At the same time, Law no. 174/2018 removed the name of the offence from its content, which leads us to believe that the legislator intended, among other aspects, to change its special legal object, from a special offence of non-compliance with a court order (Boroi, 2014, pp. 412-413), into an offence, also against the administration of justice, but which has its own special legal object, clearly defined, in which the idea of a protection order and the family relationship between the parties is essential and not necessarily the fact that this order is issued by a court decision, which in the case of the offence under Art. 32 Para. 1 (at that time) may be a special secondary legal object.Also, it should be noted that the name of the offense provided for by Art. 32 Para. 1 may have also been determined by the new criminalization of the violation of the provisional protection order, which is ordered by the police bodies, so that a unitary regulation was required, which also involved a new conception of the special legal object of the two crimes, according to the shown above.

The last two changes, but the removal of the possibility of conciliation, are the result of strengthening the legal and effective protection of the victim that I mentioned previously. As I tried to show through the presented cases, I found the existence of enough situations in which the parties to the criminal litigation reconciled, which gave a low efficiency to the incriminating provisions. The feeling of impunity because of reconciliation has in many cases weakened the firmness of the arm of the criminal law and the institution of the protection order. In this sense, in a study carried out on domestic violence, one of the interviewed victims specified that, in Spain, even if the victim agrees to "forgive the aggressor", still by violating the protection order the person is convicted and then either he or other people who would be in the same situation "... maybe they think

twice, before doing something because they know that they are not forgiven" *(CCSAS, p. 121).*

However, for the acts of non-compliance with the protection order, I noticed that there are more cases in which the courts either ordered the conviction of the defendant but applying the provisions of Art. 91 of the Criminal Code regarding the suspension of the execution of the sentence under supervision, or they have chosen the solution of postponing the application of the sentence (Art. 83 et seq. of the Criminal Code). For example, in a case in which the aggressor against whom a protection order was ordered, the very next day after this, he went twice to the victim's residence, thus violating the ordered order; in this case, the court established the penalty of 6 months in prison, along with the complementary penalty of the prohibition of certain rights for its minimum duration of 1 year, but postponed its application, establishing a term of supervision of 2 years. Although, in general, we appreciated those courts that also imposed the complementary punishment, even if the law does not impose it, nevertheless, in this case, as a result of the solution chosen to sanction the defendant, the court could not order the application of a complementary punishment; in addition, the choice of the rights that were prohibited was not very inspired either, since they had nothing to do with the type of crime and the protection of the victim (the prohibition of the rights provided for by Art. 66, Para. 1, Let. a)-b) CC was ordered in the case; District Court 6 Bucharest, Sentence no. 118/2021).

In another, more serious case, in which the aggressor committed a combination of four offences, namely: assault and other violence in simple form (Art. 193 Para. 1 of the Criminal Code), continuous threat (Art. 206, with the application of Art. 35 Para. 1 of the Criminal Code) that he would kill the victim and set fire to her/his home, an act which also occurred a few days after the threat, leading to the classification of aggravated destruction by arson (Art. 253 Para. 1 and 4 of the Criminal Code) and violation of the protection order (Art. 47 of Law no. 217/2003, with the application of Art. 5 of the Criminal Code), the court established a prison sentence of 7 months for the offence provided for by the special law, and the application of the provisions on concurrent offences resulted in a final sentence of 2 years and 11 months, of which 7 months had already been spent in pre-trial detention. Taking into account that "the defendant, aged 63, retired, with a good conduct in society prior to the commission of the offences, where he was known as a quiet person, good housekeeper, skilled woodworker, who is in his first conflict with the criminal law, suffering from several illnesses and had a largely sincere attitude, admitting and regretting during the criminal proceedings what had happened", his own daughter giving a good characterization, the court chose the prison sentence but, ordering its execution to be suspended under supervision. However, the court of judicial review, the Iasi Court of Appeal, by Decision no. 158/2022, criticized the application of the suspended sentence, since, in its assessment, "it was necessary to establish much

more severe penalties, dosed towards the environment of the special limits of punishment", because "the judicial bodies have the obligation to react firmly, through effective, proportionate and dissuasive measures, which take into account the particularities of acts of domestic violence – a serious and often hidden social problem that could cause systematic psychological and physical trauma, with severe consequences", so that this would have led to the imposition of a sentence with execution.

With this example, however, we move on to the last legislative amendment of the offences analyzed in this study, namely Law no. 183/2020 (Official Gazette of Romania no. 758/19 August 2020), which amended the penalty for the two offences from 1 month to 1 year, to 6 months to 5 years, and, in addition, increased the application of the material element, in the sense that it was established that it is an offence to violate several measures ordered by the protection order, extending from Art. 23 Para. 1, 3 and 4 Let. a)-b) of the Law no. 217/2003.

Therefore, given the date of commission of the offence and the date of the trial both in the previous case presented (Decision no. 158/2022 of the Iasi Court of Appeal) and in the case I am going to present at the end of this study, the two higher courts applied the provisions of Art. 5 of the Criminal Code, i.e. they chose Law no. 217/2003 prior to its amendment in August 2020 as the more favorable criminal law on the basis of the criterion of lighter criminal sanctions.

As already mentioned, in the next case I wish to present, the defendant, against whom a protection order had been issued the day before, arrived at night (2.45 a.m.) at the victim's home and set fire to two cars, one of which belonged to the victim and the other to the victim's mother. In this case, the court held that there was a concurrence of offences between the offence of violation of the protection order (Art. 47 Para. 1 of Law no. 217/2003), for which the defendant was sentenced to 1 year and 6 months of imprisonment, and the offence of aggravated destruction (Art. 253 Para. 1-4 of the Criminal Code), for which he was sentenced to 2 years of imprisonment, resulting in a final sentence of 2 years and 6 months of imprisonment, which he was sentenced to serve. The Bucharest Court of Appeal, as a court of judicial review, rejecting the defendant's appeal against the sentence set by the first instance, found that the operation of individualization is an important but also sensitive operation in the machinery of the criminal trial, which is why one of its roles is to "restore social peace and reintegrate the legal order". Specifically, in relation to the acts committed by the defendant, the Bucharest Court of Appeal "notes the defendant's total disregard for the need to respect the rules of social coexistence. In the conscience of any man of good faith, the existence of a protection order in his name should awaken a sense of awareness of the situation in which he finds himself", and "by violating the protection order and setting fire to a car that was in front of the dwelling

where the persons protected by the protection order lived, the defendant demonstrated defiant and violent behavior. He simply cannot censor his behavior (even though there is a protection order which he has to take into account), which leads to the conclusion that at any time the situation could degenerate and the defendant could commit acts with much more serious consequences".

Even if it does not directly concern offences under Art. 47 of the special law, it has also been amended during 2021 and this year (2023), both of which will be specified below. By Law no. 146/2021 on electronic monitoring in judicial and criminal enforcement proceedings (Official Gazette of Romania no. 515/18 May 2021), the use of the Electronic Monitoring Information System (SIME) was established also in case of application of the provisional protection order and the protection order itself (Art. 1 Para. 2, Let. c) of Law no. 146/2021), and by Law no. 240/2023 (Official Gazette of Romania no. 669/20 July 2023) the period for granting the protection order was extended from 6 months to 1 year (12 months), which, however, can no longer be extended, as in the previous regulation.

CONCLUSIONS

I mentioned at the beginning of the article that this analysis over time of the provisions that amended Law no. 217/2003 will help us to perceive their true value; of course, we were also able to do this on the basis of a study of the case law that accompanied those legislative amendments, as well as official statistics, as we have also sought to do. Based on all the material studied, it emerged that the law under discussion has undergone a number of changes, in a rapid manner, sometimes even several times in one year (e.g., in 2012, 2015, 2018 or 2020), but that these were determined by the rapid adaptation of the laws to the factual situation. Perhaps some of the contributing factors were Romania's convictions at the ECHR on domestic and gender-based violence, which will be the subject of a study in another article; perhaps spurred on by the Western trend, by Western trends in legislative changes, but also by our integration into the Council of Europe, the European Union and the UN, these changes were self-imposed.

Were they necessary? Were they welcomed?

Our answer is without hesitation: yes, in both cases. The analysis of the case law we conducted for this article showed the difference in the perception of the courts between the situations prior to the 2018 amendments and afterwards, with the tightening of the criminal law response, but also between courts of different ranks, with higher courts considering that sentences with execution were imposed in the cases presented.

What else should be done? Is it enough just to increase penalties?

In the vast majority of cases where our legislature has chosen as its only penal policy the creation of too high penalties for crimes committed, on a large scale, I considered and still consider that it was not a viable solution unless it came with other changes in the social and economic environment.

In this case, the policy of harsher punishments has been carried out against the backdrop of important legislative additions and the creation of social structures (SPASs, DASs, DGASPCs, as well as mobile teams working within them), legal structures (creation of the protection order and the provisional protection order) and administrative structures (creation of ministerial structures – ANES) which have supported this trend of impunity, in the sense that they have come to the aid of victims, who no longer find themselves at the discretion of the perpetrators, finding support in the criminal investigation bodies and the courts, as well as in the social services, but also in order to counter the aggressive actions which are increasingly coming to light in this period. The number of protection orders increasing year on year is proof of this.

However, tougher sanctions alone are not enough, as we well know; they need to be complemented by a policy of firm and immediate enforcement, without regrets and evasions, without hesitation. As Beccaria said, "the cruelty of punishments...would only be useless and contrary to justice and the social contract itself" (Beccaria, 2001, p. 40).

There are still steps to be taken; linking the actions and activities of the administrative, judicial and medical institutions involved is one of them. Education, the creation of new, harmonious, happy patterns of relationships in the collective subconscious, are other steps. But each of them requires time and patience on the part of all those involved.

Everything that has been achieved so far gives us hope; that is why I prefer to end the article on an optimistic note, showing that the solutions are within Romanian society and therefore within our reach.

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PREVENTIVE ONLINE SAFETY EDUCATION FOR TEENAGERS

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Abstract

The rapid evolution of digital technology has brought both opportunities and risks, particularly for adolescents navigating the online world. This paper delves into the significance of preventive online safety education tailored for teenagers. It explores the current landscape of online threats, encompassing cyberbullying, privacy breaches, and exposure to inappropriate content, among others. Additionally, it evaluates existing educational approaches, emphasizing the need for a proactive, multifaceted strategy to equip teenagers with the necessary skills and knowledge to safely navigate the digital sphere. The proposed preventive education model integrates elements of digital literacy, critical thinking, and responsible online behavior. Furthermore, it discusses potential challenges in implementing such programs and suggests collaborative efforts among educators, parents, and policymakers to ensure comprehensive online safety education for teenagers, fostering a safer and more secure digital environment for the next generation.

Keywords: *preventive education, teenagers, cyber security, online education, POSE.*

INTRODUCTION

Preventive Online Security Education (POSE) is a topic of growing international importance in the digital age. With the increase in the use of the Internet and mobile devices, teenagers around the world face increasingly complex and diverse risks when browsing online platforms. This issue has profound implications in their lives, especially in terms of personal data protection, cyberbullying, online manipulation and dealing with inappropriate content.

Therefore, Preventive Online Security Education has become a global necessity, and countries around the world are striving to develop effective strategies and programs to address these issues. Next, we will explore the initiatives, methods and importance of this preventive education for teenagers, approached both nationally and internationally. We must take into account that online education also comes with a series of advantages and disadvantage:

The online education is often celebrated for its accessibility and flexibility. It provides opportunities for individuals worldwide to access educational resources and courses, overcoming geographical barriers and allowing for learning at one's own pace. Many view online education as a convenient and cost-effective alternative to traditional classroom-based learning. It eliminates the need for commuting, offers flexible scheduling, and often reduces overall educational costs. Online education encompasses a wide range of learning formats, from short courses to full-degree programs. This diversity appeals to learners with varying needs, whether they seek specific skill development or are pursuing advanced academic qualifications. The integration of technology in online education is both praised and critiqued. Supporters see it as a way to enhance interactive learning experiences through multimedia, simulations, and collaborative tools. Critics argue that a lack of face-to-face interaction may hinder certain aspects of the learning process.

Online education is seen as a facilitator of lifelong learning. Individuals can continually update their skills and knowledge throughout their careers, promoting a culture of continuous learning in response to the demands of a rapidly changing job market. Teenagers often use social media extensively. Education in online security includes aspects of social media literacy, teaching them about privacy settings, the potential consequences of oversharing, and how to identify and report inappropriate content. Online security education encourages teenagers to strike a balance between their online and offline lives. This includes being mindful of screen time, managing online relationships responsibly, and understanding the potential impact of online actions on their well-being.

I. PREVENTIVE ONLINE SECURITY EDUCATION

Stages of POSE are: Awareness, Advice And Support, Training And Incident Management, Adapting To Changes, Figure 1.

Figure 1. Stages of preventive online education

In each phase we have some methods that we should apply to improve the POSE and also by applying these methods in schools or in educational centers we will improve POSE at the national level or maybe international also.

I.1 Methods of Awareness

- INFORMATION SESSIONS AND DISCUSSIONS IN SCHOOLS: Organizing information sessions and discussions in schools or by means of educational programs can help teenagers to better understand the online risks and to openly talk about their experiences.
- AWARENESS EVENTS: Organizing special communities or school events to promote cyber security awareness. These events may include: presentations, seminars, workshops or competitions related to cyber security (Ansari, et al., 2022).
- PRACTICAL EXERCISES: Organizing of practical exercises in which teenagers can apply the acquired knowledge. These exercises may include: cyber-attack simulations, exercises for creating strong passwords or testing their phishing recognition skills.
- COMPETITIONS AND AWARDS: Holding competitions related to cyber security, offering prizes for those who demonstrate the best online security practices. These methods can stimulate teenagers' interest in the subject.
- PARENTS INVOLVEMENT: Encourage parents to be part of the awareness process and be informed about cyber risks. Parents can play an important role in supporting teenagers in online environment.
- QUESTION AND ANSWER SESSIONS: Organizing question and answer sessions during which teenagers can ask questions and talk to cyber security experts.

I.2 Methods of Advice and Support

- INDIVIDUAL AND GROUP COUNSELING SESSIONS: Organizing counselling sessions where teenagers can talk to a counsellor or cyber security

specialist about their online concerns. These sessions can provide a safe environment to address personal issues and provide personalized advice.

● INFORMATION AND AWARENESS MATERIALS: Providing support resources such as: brochures, flayers, audio-video materials, tutorials and presentations that provide practical information about cyber security and resources for those experiencing difficulties.

● SUPPORT AND GUIDANCE SERVICES: Signposting teenagers to organizations and services specializing in cyber security and online protection, who can provide support and advice if they need it.

I.3 Methods of training and Incident Management

A computer security incident is any actual or suspected adverse event related to computer system or network security. Computer security incident activity can be defined as network or host activity that threatens the security potential of computer systems.

In *(Zamfiroiu and Sharma, 2022*) the principles of cybersecurity incidents management are presented, Figure 2. These principles must be learned by young people, and they must be aware of the application of security procedures as they are applied in companies and be applied in schools or at home.

Figure 2. Principles of cybersecurity management

The methods that should be used for incident management are:

PROMOTING A CULTURE OF CYBER SECURITY

● Stimulating a responsible attitude towards the use of the Internet.

● Encouraging teenagers to report any cyber security incidents.

● SKILL TESTING

● Organizing ethical hacking competitions or cyber-attack simulation exercises to test the knowledge of teenagers.

IMPLEMENTATION OF TECHNICAL SECURITY MEASURES

● Promoting the use of strong passwords and multi-factor authentication for online accounts.

● Installing security software such as antivirus or content filtering solutions.

I.4 Methods of adapting to changes

● INVOLVEMENT OF TEENAGERS IN THE ADAPTATION PROCESS

● Solicit feedback and suggestions from teenager to improve prevention education programs.

● INCLUSION OF PERSONAL DATA PROTECTION TRAINING

● Focusing on the importance of personal data protection and online privacy.

● RAPID RESPONSE TO INCIDENTS

● Develop clear reporting and incident management procedures to act effectively in the event of a cyber-attack.

● ADDRESSING LEGAL AND ETHICAL ISSUES

Informing teenagers about the legal and ethical implications of online activities, including the consequences of inappropriate behaviour.

II. AWARENESS FOR DEEP AND DARK WEB

The terms "Deep Web" and "Dark Web" refer to distinct portions of the internet that are not indexed by traditional search engines and are often associated with anonymity and privacy concerns. The normal user access only the visible web or surface web that is available for everyone.

Figure 3. Layers of the internet

● The **SURFACE WEB**, also known as the Visible Web, comprises the part of the internet that is indexed by search engines and is easily accessible to the general public through standard web browsers. It includes websites, web pages, and content that can be found and accessed using search engines like Google,

Bing, or Yahoo. These sites are designed to be openly available, and their content is not hidden behind paywalls, logins, or specific access restrictions.

CHARACTERISTICS OF THE SURFACE WEB:

- **Searchable Content:** Surface web content is indexed by search engines, making it discoverable through search queries.
- **Publicly Accessible**: The information on the Surface Web is intended for public consumption and doesn't require special permissions or access.
- **Structured Content**: Websites are designed with navigation and linking structures, making information easy to find and navigate.
- **Standard Web Protocols:** This part of the web operates through standard protocols such as HTTP and HTTPS, ensuring compatibility with standard web browsers.
- **Varied Content:** It includes a vast array of content, from news articles and educational resources to e-commerce websites, blogs, forums, and much more.

● **DEEP WEB** contain the information that is not indexed on search engines and that may be available through some web pages. This vast section of the web contains content that isn't accessible through traditional search methods. It includes anything behind paywalls, private databases, password-protected sites, or content that is dynamically generated *(Kakoty and Rahman, 2018).*

CHARACTERISTICS OF THE DEEP WEB:

● **Unindexed Content:** The Deep Web consists of content that isn't accessible through standard search engines. This includes databases, academic resources, private networks, and more.

- **Non-Indexed Pages:** Pages that haven't been linked to other pages or where search engines haven't crawled and indexed the content remain in the deep corners of the web.
- **Privateand Restricted Access**: It contains content that requires specific access permissions, logins, or specialized software to view, like subscription-based content, company intranets, or personal email accounts.
- **Significant Content Volume:** The Deep Web is estimated to be significantly larger than the Surface Web, housing a plethora of information that's not meant for public consumption.

● **DARK WEB** is a small, hidden portion of the internet that requires specific software and configurations to access. It operates on networks like Tor (The Onion Router) and I2P (Invisible Internet Project), which provide anonymity by routing internet traffic through a series of encrypted relays (Alaidi, et al., 2022).

CHARACTERISTICS OF THE DARK WEB:

- **Anonymity:** Users on the Dark Web often remain anonymous, as their internet traffic is routed through various layers of encryption, making it challenging to trace their identity or location.

o **Intentional Secrecy:** Content on the Dark Web intentionally remains hidden and requires specialized software (like the Tor browser) to access it.

o **Illicit Activities:** The Dark Web is infamous for hosting illegal marketplaces, where illicit goods, such as drugs, weapons, and stolen information, are bought and sold. It's also known for hosting forums and sites that promote various illegal activities.

o **Hidden Services:** Websites on the Dark Web use "onion" domains and offer services that are often not accessible through conventional browsers. These sites are often involved in illegal activities but can also provide a platform for free speech in regions where it's restricted.

o **Cautionary Environment:** The Dark Web is a digital space with numerous risks, including exposure to illegal content, scams, and potential security threats.

DARK WEB is one of the most dangerours platforms where products and information are traded such as *(Koch, 2019):*

- personal databases of children (photos, movies, geographic location data, etc.);
- databases with basic information, personal data, data with access to computers and servers;
- works of art, trade secrets, organ trafficking, identity change services, drugs, weapons.

In *(Nazah et al., 2020)* eight major crime threats in the Dark Web are presented. For teenagers is very important because they use social media and a lot of applications for communication. People with bad influences can use these platforms to interact with the children. So, the dark web is used massively by Pedophiles and related criminals for child pornography.

IV. DISCUSSIONS

Online security represents all the actions we do to protect ourselves from dangers, and for teenagers is very important to pay attention to the next points:

- Exposure of teenagers to illegal and/or harmful content;
- Victimization through intimidation, harassment or threats (or "cyberbullying");
- Alienation or theft of personal data;
- Sending or receiving video sequences, images or messages of a sexual nature (or "sexting");
- Grooming (luring for the purpose of committing sexual acts).

All these represent the risks to which we can be exposed so also the teenagers can be exposed, and it is possible that they are not able to distinct the reality of the fake information and for that it is possible to be victims of these kind of attacks.

Cyber security regulations serve as a proactive measure to address the ever-growing threats in the digital realm, ensuring a safer, more secure online environment for individuals, businesses, and nations. They are essential in establishing a baseline of security practices and encouraging a collective effort towards protecting digital assets.

Cybersecurity regulations typically encompass several key components to ensure comprehensive protection in the digital space:

- **Data Protection Standards:** Regulations outline specific measures to protect sensitive data, including encryption requirements, access controls, and guidelines for data storage and transmission.
- **Incident Response Protocols:** Establishing procedures for identifying, reporting, and responding to cyber incidents is crucial. Regulations often mandate incident response plans to minimize damage in case of a security breach.
- **Compliance and Reporting Requirements:** Regulations typically mandate compliance with certain standards and reporting of cybersecurity measures. This might involve audits, assessments, or regular reporting to ensure ongoing adherence to security standards.
- **Access Control and Authentication:** Rules governing user access, authentication methods, and authorization mechanisms help prevent unauthorized entry and data breaches.
- **Security Testing and Vulnerability Assessments:** Mandating regular security testing, including vulnerability assessments, helps proactively identify weaknesses in systems, enabling their timely resolution.
- **Education and Training:** Regulations might stress the importance of educating employees or individuals on cybersecurity best practices, raising awareness about potential threats and how to mitigate them *(Vevera, 2019).*

THE NATIONAL INSTITUTE FOR RESEARCH AND DEVELOPMENT IN INFORMATICS (ICI BUCHAREST) strategies to improve online safety education for teenagers:

- create partnerships with schools and educational institutions;
- collaborate with youth organizations and ONG;
- leverage social media and online platforms;
- organize cybersecurity competitions and events;
- establish a network of cybersecurity ambassadors.

CONCLUSIONS

Implementing preventive online safety education for teens is not only a proactive measure, but a fundamental necessity in today's digital landscape. Through comprehensive education covering aspects of digital literacy, critical thinking and responsible online behavior, we are paving the way for a safer and more informed generation. By integrating such programs into educational programs and collaborating across sectors-educators, parents, policymakers, and

technology companies-we create a support network that empowers teenagers with the skills to navigate the online world safely. This not only protects them from potential threats such as cyberbullying, privacy violations and exposure to inappropriate content, but also empowers them to harness the positive potential of the internet.

The education isn't just about cautionary tales but also an empowerment tool, enabling teenagers to harness the positive aspects of the online realm while protecting themselves from potential risks. Creating a culture of responsible digital citizenship ensures that these young individuals not only safeguard themselves but also contribute positively to the digital community.

Ultimately, the success of online safety education lies in its ability to shape conscientious and informed digital citizens, promoting a safer, more supportive online environment for teenagers to explore, learn, and thrive.

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CRIMINAL PROCEDURAL MEASURES TO PROTECT VICTIMS OF DOMESTIC VIOLENCE

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Abstract

Protecting the victims of crimes is an objective of the judicial bodies to avoid the risk of revictimization, thus exercising their obligation to defend the fundamental rights of the person (the right to life, the right to health and physical and mental integrity, the protection of dignity, private life, the right to free expression etc.), as protected by a series of national and international normative acts.

The criminal procedural measures for the protection of victims of the crime of domestic violence can belong to various criminal legal or criminal procedural institutions: general protective measures, regulated in art. 113 of Criminal Procedure Code related to art. 125-130 of Criminal Procedure Code, preventive measures, accessory and complementary punishments and administrative protective measures ordered on the basis of Law 682/2002 on the protection of witnesses.

The development of Romanian legislation to complete the spectrum of available instruments, protective measures imposed by international legislation or inspired by the legislation of other states or from the recommendations presented by international experts, is necessary and would follow the trend on a European scale to harmonize the practices of physical and psychological protection of victims.

Thus, the capacity of the judicial bodies to obtain the willingness of the victims to cooperate with the judicial bodies will be enhanced, the risks of exposure to any danger by participating in the trial being minimized, and they will be encouraged to adopt a sincere, unhindered attitude during the hearings.

Key words: *protection of crime victims; domestic violence; procedural protection measures; administrative protection measures.*

INTRODUCTION

The concept of "domestic violence", for which the expression "family violence" is also used, has known numerous definitions in the sociological, criminological, psychological etc. literature.

In the doctrine, several characteristics of this phenomenon so present in society were revealed, namely:

- the presence of coercive, abusive and violent behavior, manifested physically or verbally;
- the subjects are members of the same family group, intimate partners, children, parents or other relatives;
- permanent access to the victim;
- the goal of imposing the will and control over the family members persists permanently;
- cyclic character;
- causes physical, psychological suffering or material damage. [1]

The expression "domestic violence" was defined in art. 3 of the Council of Europe Convention on preventing and combating violence against women and domestic violence, adopted in Istanbul in 2011 (Ratified by Romania through Law 30/2016), as representing "all acts of physical, sexual, psychological or economic violence, which occur in the family or in the domestic unit or between former or current spouses or partners, regardless of whether the aggressor shares or has shared the same residence with the victim."

In the European acquis there are provisions regarding the obligations of the member states of the European Union to ensure a minimum standard of protection for victims of crimes, making special reference to victims of domestic violence.

A legal instrument adopted for this purpose is Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Framework Decision 2001/220/JHA of the Council, in which emphasized the seriousness of the phenomenon of violence within close relationships and its potential to cause systematic physical and mental trauma, with profoundly severe repercussions on the victim.

It has been stressed that women are disproportionately affected by this type of violence, and their situation may be worse if they are dependent on the perpetrator economically, socially or in terms of the right of residence. Consequently, the need for measures to protect victims of domestic violence in certain cases was emphasized.

Directive 2012/29/EU provided in art. 18 that the member states have the obligation to adopt some protection measures for the victims and their family members so that they are not subjected to further aggressions or threats to cooperate with the judicial bodies or to reprisals from the accused or other persons acting in his interest.

The protective measures must also aim at removing the risk of secondary victimization, as well as protecting the dignity of the victims during their hearing.

Through the same directive, it was emphasized that victims of crime should benefit in an appropriate manner from state support for their recovery and have sufficient access to justice.

In the specialized literature, it has been shown that the expression "secondary victimization" refers to "the complex and long-lasting consequences of a crime resulting from the negative attitude, of criminalizing the victim, not providing support, even condemning and alienating the victim." [2]

According to the reason presented at point 9 of the above-mentioned directive, in all contacts that victims of domestic violence have with a competent authority in criminal proceedings and with any service that comes into contact with them, the personal situation should be taken into account and the urgent needs of the victim, "the age, gender, possible disability and maturity of the victims of crime, while fully respecting their physical, mental and moral integrity."

In Romanian legislation, the concept of domestic violence was defined in art. 3 of Law 217/2003 for the prevention and combating of domestic violence, republished, in the sense that it represents "any inaction or intentional action of physical, sexual, psychological, economic, social, spiritual or cyber violence, which occurs in the family or domestic environment or between spouses or ex-spouses, as well as between current or former partners, regardless of whether the aggressor lives or has lived with the victim." [3]

This definition is likely to cover all the plans and forms in which the abusive behavior of the person can be manifested within close relationships and overlaps only in part with the area of criminal behavior criminalized in the Criminal Code at art. 199 under the name of "family violence", the content of which is more limited.

The criminal acts qualified as "family violence" are, in essence, aggravated forms of the following crimes: murder (art. 188 of the Criminal Code), qualified murder (art. 189 of the Criminal Code), hitting or other violence (art. 193 of Criminal Code), bodily harm (art. 194 of the Criminal Code) or hitting or bodily harm that caused death (art. 195 of the Criminal Code), in the sense that the higher punishment limit will be increased by quarter if the act is committed by the perpetrator against a family member.

The social values protected by the criminalization of these crimes are the life of the person, respectively the physical integrity or the health of the family member and the social relations that develop around these values, but also the social relations regarding good coexistence within the family.

The material object of these crimes is the body of the injured person who is a family member.

From the perspective of the crime of domestic violence prev. of art. 199 of the Criminal Code, the victim will only be the passive subject of that crime, i.e. the person who suffered a physical, material or moral injury through the criminal act. In the criminal process, this person will acquire the status of an injured person, and if this person will constitute a civil party to obtain material compensation or the prosecutor will exercise the civil action in his interest (in the case of minors), he will have the status of a civil party. If the victim of the crime does not want to participate in the criminal trial as an injured person, he may be heard in the criminal trial as a witness.

Participating in the criminal process by filing a criminal complaint, making statements in the criminal process or participating in other judicial activities (including collaboration with the judicial bodies to obtain evidence in the criminal process, according to art. 148 of the Criminal Procedure Code) may generate risks to the life, health, physical and mental integrity of the victim of domestic violence, but also to other people close to her as a result of the aggressor's desire for revenge and/or his attempt to intimidate the victim in order to discourage her from providing information that could to contribute to his criminal liability for committing one or more crimes from those provided for in art. 199 of Criminal Code.

Protecting the victims of crimes is an objective of the judicial bodies to avoid the risk of revictimization, thus exercising their obligation to defend the fundamental rights of the person (the right to life, the right to health and physical and mental integrity, the protection of dignity, private life, the right to free expression, etc.), as protected by a series of national and international normative acts, including the Charter of Fundamental Rights of the European Union, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Constitution of Romania [4].

In order to achieve these goals, the Romanian legislator instituted a series of mechanisms for the protection of victims of crimes, this paper focusing on those measures that can be ordered in a criminal trial with the object of crimes of domestic violence.

The measures for the protection of victims of crimes can have as their objective, in addition to protecting victims of crimes or other people close to them against threats to their physical and mental safety, ensuring the smooth running of the criminal process, by creating conditions for obtaining honest statements on the part of the injured persons, without them fearing that they will be the victims of a revenge by the accused person or an attempt to intimidate by aggressive methods, so that they do not cooperate with the judicial bodies and the truth about the facts that happened is found out.

The ability of a person to testify freely and truthfully in a criminal trial or to cooperate with the investigative bodies, without fear of suffering retaliation, may have important repercussions in the resolution of a criminal case through

fruition of honest information that can lead to finding out the truth. Conversely, giving statements can be a source of great anxiety for many people, and the quality of their testimonial evidence can be seriously affected if they perceive a danger to themselves or other close people, such as imminent retaliation by the defendants.

The bodies competent to apply protective measures must take into account the particular situation that requires the establishment of such measures: the type of crime investigated, the person who needs protection, the nature of the relationships with the defendants, the level of stress or fear, the degree of danger to physical psychological safety, the specific needs of the person. Particularly relevant in this sense is the recommendation in point 58 of Directive 2012/29/EU according to which the states of anguish and fear of victims related to the carrying of legal proceedings should be an essential factor in the decision-making process regarding taking protective measures.

I. CRIMINAL PROCEDURAL MEASURES FOR THE PROTECTION OF VICTIMS OF DOMESTIC VIOLENCE

The criminal procedural measures for the protection of victims of the crime of family violence can belong to various criminal substantive or procedural institutions: general protective measures, regulated in art. 113 of Criminal Procedure Code related to art. 125-130 of Criminal Procedure Code, obligations established by the court on the occasion of postponing the application of the penalty, preventive measures, accessory and complementary punishments and administrative protective measures ordered on the basis of Law 682/2002 on the protection of witnesses.

As for the general measures for the protection of the victim, they can be ordered in cases where such measures can be taken against the threatened or vulnerable witness, or when the measures are necessary for the protection of the victim's private life or dignity.

According to art. 125 of the Romanian Code of Criminal Procedure, the procedural protection measures provided for threatened witnesses can be taken “in case there is a reasonable suspicion that their life, bodily integrity, freedom, property or professional activity” or of other persons could be endangered. Such protection measures can be ordered even in the absence of suspicion that there is a danger to the witness, when he is considered vulnerable due to the trauma suffered as a result of the commission of the crime or the subsequent behavior of the criminal or when the witness is a minor.

In the specialized literature, the opinion was expressed that the notion of “trauma” suffered by the witness refers only to those unfortunate consequences “of a physical (bodily) or mental nature” so that this concept does not include material damages. [5] We do not share the opinion of the authors in the sense that trauma does not include the material damage suffered by the witness as, under

certain conditions, such an event could have a strong emotional impact on a person, like the loss of wealth.

Certain categories of crimes injured persons are considered vulnerable due to special circumstances or the nature of the crime committed against them, including child victims, victims who are dependent on the perpetrator of the crime, victims of violence within close relationships.

Certain protective measures can be taken even if there are no objective reasons to suspect that there is a danger to the life, bodily integrity, freedom, assets or professional activity of the injured person or a family member as a result of the statements provided to judicial bodies.

This presumption meets the needs of victims of crimes and contributes to the smooth carrying of the criminal process by simplifying the procedure for taking protective measures, which can be essential to preserve the sincerity of these persons and, implicitly, the veracity of their statements.

If the injured person or the civil party is in any of the situations mentioned above (the victim is presumed to be vulnerable), the criminal prosecution body informs them about the protective measures that can be taken, what they consist of, and that they can waive them. In case of waiving the protective measures, the statement of the injured person/civil party is recorded in writing and signed by her, being assisted by the legal representative in the cases provided by law.

During the criminal investigation, the prosecutor has the power to institute protective measures, ex officio or at the request of the victim of the crime of family violence, issuing a reasoned order, which is kept in a special place to ensure confidentiality.

The protective measures that can be taken by the prosecutor are the following:

- supervising and guarding the victim's home or providing a temporary home.

This measure is aimed at the physical protection of the victim and his family (protection of life, health, bodily integrity and freedom), protection against attempts to influence his statements, protection of property and even professional activity.

- accompanying and ensuring the protection of the victim and/or his family members during the journeys.

In addition to protecting the victim or family members against physical or mental aggression that the defendant or their henchmen could inflict on them, the measure is also useful to ensure the presence of the victim at the headquarters of the judicial body. The persons subject to protection can be accompanied in any type of travel, both in the country and outside it, and it is ensured by the state bodies competent to ensure the protection of persons (police, gendarmes).

- the protection of identity data (name, surname, personal numerical code, etc.) by assigning a pseudonym with which the victim will sign his statements.

When a person is assigned another name under which he will sign the statement, any hearing of him will take place in such a way that the other participants in the criminal process (except judicial bodies) do not know the true identity of the protected person. Thus, it will be possible to be heard through technical means that allow the person to be located in another room or even to be heard from a distance. The protection measure may be combined with another protection measure, explained below.

- hearing the victim without the victim being present at the place where the judicial body is located, by means of audio-video technical means of transmission, with the voice and image distorted, when the other protective measures are not sufficient.

This measure is ordered with the objective to ensure the anonymity of the victim or the witness and "the impossibility of the suspect/defendant/his relatives to perceive the characteristics of his physiognomy and voice and to recognize him at the moment or to identify him later for the purpose of revenge." [6]

In order to protect the identity of the person who has been allowed by the competent judicial body to use a pseudonym under which he will give the statement and whose hearing is done by technical means that distort the voice and image, the prosecutor, the judge or the court will reject those questions likely to require answers that may provide clues or reveal the identity of the person benefiting from the protection measures.

The persons who have the status of "family members" and who can benefit from the protection measures mentioned above are those indicated in art. 177 of the Criminal Code, i.e. the ascendants and descendants, brothers and sisters, their children, as well as the persons who have become such relatives through adoption (family relations are also preserved in relation to natural relatives), the spouse, but also persons living in cohabitation or who have established relationships similar to those of parents and children, if they live together.

In addition to these protective measures, the injured person also has the possibility to request to be informed if the defendant will be detained, under preventive arrest or house arrest, or if he will be sentenced to a custodial sentence (prison or detention for life), regarding his release or escape (art. 111 par. 5 of Criminal Procedure Code). Such a provision is intended to put the injured person on guard, who can take the necessary precautions if he considers that the release of the defendant would represent a danger of any kind to him or to another person.

As a result of the changes brought by Law no. 217/2023, starting from 01.01.2024, at art. 111 par. 6 of Criminal Procedure Code an additional measure of protection of the injured person will be provided, i.e. hearing him via videoconference or other technical means of communication at the place where he is temporarily accommodated on the basis of a protective measure.

Also from 01.01.2024, as an effect of the above-mentioned law, the Criminal Procedure Code will provide for additional scenarios in which protective

measures can be taken both for the benefit of the injured person, the civil party, and the threatened or vulnerable witness, respectively when the release or escape of the perpetrator of the crime may represent a danger to their private life or dignity or may cause them damage of any nature, regardless of its extent.

The same protective measures shown above can be ordered during the trial phase, an additional protective measure that can be ordered at this procedural moment being the non-publicity of the court hearing during the hearing of the victim, having in consideration that the general rule is the publicity of the criminal process.

In the preliminary chamber phase, the body competent to rule on protective measures (taking, maintaining, and revoking) is the preliminary chamber judge, and in the trial phase the court before which the case is pending.

During the criminal investigation, the prosecutor has the obligation to verify, at reasonable time intervals, whether the reasons that determined the taking of protective measures exist, and otherwise order, by means of a reasoned ordinance, their termination.

After the file has been registered with the court, within 15 days, the judge of the preliminary chamber must check whether or not the maintenance of the protective measures is still required, by ordering their maintenance or termination.

The court will check before the start of the judicial investigation, as well as before each hearing of a person who benefits from a protection measure, if the conditions that determined their taking still exist and will issue a reasoned decision in the sense of maintaining or terminating the measures of protection.

If the court decides to postpone the application of the penalty against the defendant according to art. 83 of the Criminal Code, it can impose on the defendant the obligation not to communicate with the victim or her family members or to approach these persons during the 2-year supervision period (art. 85 par. 2 letter e of Criminal Procedure Code). In the case of bad faith non-compliance with this obligation by the defendant, the postponement of the application of the penalty will be revoked and its application and execution will be ordered.

In order to protect the victim of crime of family violence, the judicial bodies can impose certain obligations on the defendant when taking or during preventive measures, namely that of judicial control, judicial control on bail and house arrest.

The judicial body competent to rule on the preventive measure of judicial control or judicial control on bail (the prosecutor, the judge of the preliminary chamber or the court, as the case may be) will be able to impose on the defendant the obligation not to return to the family home, not to approach the injured person or their family members and not to communicate with them directly or indirectly, in any way (art. 215 par. 2 letter d of Criminal Procedure Code). In the content of the act ordering the taking of these preventive measures, the obligations that the

defendant must comply with are expressly provided and his attention is drawn to the fact that, in case of bad faith violation of the obligations imposed on him, the measure preventive measures of judicial control or judicial control on bail can be replaced by the measure of house arrest or preventive arrest.

A similar prohibition is imposed on the defendant when the measure of house arrest is ordered, the defendant having the obligation established by law not to communicate with the injured person or his family members, or with witnesses (art. 221 par. 2 letter b of Criminal Procedure Code).

If the defendant violates in bad faith the obligations related to the measure of house arrest, including that of not communicating with the injured person, the measure of house arrest may be replaced by preventive arrest.

Protection measures for victims or other close persons can also be ordered by means of accessory and complementary punishments consisting in the prohibition of certain rights, which aim to complement the coercive, re-educational and exemplary functions of the main punishment.

In the case of penalties applied to natural persons, accessory penalties are executed during the execution of the main penalty or are in force even when the convicted person avoids execution, while the complementary penalty enters into force after the execution of the main penalty or its consideration as executed (as as a result of the expiration of the statute of limitations for the execution of the sentence or the pardon) or from the date of the definitive stay of the sentence of imprisonment, the execution of which was suspended under supervision.

The complementary penalty of the prohibition of certain rights is applied for a minimum period of one year and a maximum of 5 years.

In accordance with art. 66 para. 1 lit. n and o of the Criminal Code, the court may prohibit the convicted person, as an accessory and complementary punishment, the right to communicate with the victim of the crime or with her family members or to get close to them, as well as the right to approached the home, workplace, school or other places where the victim carries out his social activities, under the conditions established by the court through the sentencing decision.

The non-compliance by the convicted person, with intention, of these complementary or accessory punishments constitutes the crime of non-execution of criminal sanctions, provided. of art. 288 para. 1 of the Criminal Code and is punished with imprisonment from 3 months to 2 years or with a fine, if the act does not constitute a more serious crime.

II. ADMINISTRATIVE MEASURES FOR THE PROTECTION OF CRIME VICTIMS

In addition to the procedural protection measures regulated in the Code of Criminal Procedure, there is the possibility of ordering some administrative protection and assistance measures for the victims of crimes, by introducing them into a protection program, regulated by Law no. 682/2002 on witness protection.

Family members or other close people can also be included in the protection program. According to the special law, the notion of "family member" includes the spouse, parents and children, while the expression "close persons" refers to those persons with whom the victim is linked by strong emotional ties.

These persons may be entered into the witness protection program if their life, bodily integrity or freedom is threatened as a result of the information, data and/or statements provided or which they have agreed to provide to judicial bodies.

We observe, thus, that administrative protection measures are taken under more restrictive conditions compared to the procedural measures provided for in the Code of Criminal Procedure, which also provide for other hypotheses that justify the taking of protective measures: when there is a reasonable suspicion or fear that the goods or the activity professional status of the witness or a family member may be jeopardized.

Moreover, from the economy of the text of Law no. 682/2002 on the protection of witnesses results that the threat to life, health, bodily integrity or freedom must be concrete or, at least, very likely, for the introduction of the persons concerned by the danger in the protection program.

Another difference between the two categories of protective measures concerns the persons who can benefit from the respective measures, in the sense that, in order to benefit from protection under the special law, these persons must have the capacity of a witness, not an injured person, and protective measures are available if the data, information, statements given by a person are related to the most serious crimes such as genocide, war crimes, terrorism, murder, crimes related to drug trafficking, human trafficking, money laundering, etc., as well as any other crime punishable by a prison sentence, the special maximum of which is at least 10 years, which may be the case for some of the crimes provided for in art. 199 of Criminal Code, such as murder or sexual assaults.

If the persons indicated above provided data, information or made statements in relation to facts other than those indicated in Law 682/2002 on the protection of witnesses, they and family members or other close persons, as the case may be, will only be able to benefit from the procedural mechanisms of protection, regulated in the Romanian Criminal Procedure Code.

The measure of introduction into the witness protection program is ordered by the prosecutor, the preliminary chamber judge or the court, as the case may be, upon the proposal of the criminal investigation bodies, during the criminal investigation phase, or by the prosecutor in the preliminary chamber procedure or during the trial phase.

The body that will establish the protection scheme as a result of the introduction of people into the witness protection program is the National Office for Witness Protection, which operates within the Ministry of Internal Affairs and under the General Inspectorate of the Romanian Police.

Regarding the content of the protection program, it is composed of one or more of the range of measures provided for in art. 12 of Law 682/2002 on witness protection:

a) protection of the identity data of the protected witness;

b) the protection of his statement;

c) listening to the protected witness by the judicial bodies, under an identity other than the real one or through special ways of distorting the image and voice. This measure has an equivalent among procedural protection measures.

d) the protection of the witness in detention, preventive arrest or in the execution of a custodial sentence, in collaboration with the bodies that administer the places of detention;

e) increased security measures at home, as well as protecting the movement of the witness to and from the judicial bodies, which also corresponds to the procedural protection measures.

f) change of domicile;

g) change of identity;

h) change of appearance.

The assistance measures that can be provided, as appropriate, within the support scheme are:

a) reinsertion into another social environment;

b) professional retraining;

c) changing or securing the job;

d) securing an income until finding a job.

This type of assistance has a complementary character to the measures for the protection of threatened persons and aims to create the possibility for them to integrate socially when the cooperation of witnesses, in the sense of the special law, with the judicial bodies generates such a substantial danger for some persons, that they can no longer return to the places they frequented and even have to relocate to avoid being found by potential aggressors.

In the situation where the person eligible to be included in the protection program is in a state of danger, which requires immediate protection measures, the police unit or, as the case may be, the body that administers the place of detention can take the protection measures provided for in Art. 12 par. 2 of Law no. 682/2002 on a provisional basis, for a determined period, until the imminent danger disappears or until the person in question is included in the protection program.

Termination of the protection program according to the special law is ordered by the prosecutor by ordinance or by the court by a conclusion, depending on the procedural phase of the criminal case in connection with which the protected person gave the statement.

III. THE NEED TO COMPLETE THE NATIONAL LEGISLATIVE FRAMEWORK

The Romanian legislation is quite comprehensive in terms of measures to protect the participants in the process and, in particular, the victims of the crime, but it can be enriched so that there are the most effective prerequisites for achieving the goal pursued by their disposition.

In order to reduce the victim's feeling of fear towards the defendant, in order to avoid a face-to-face confrontation with the accused, we believe that the possibility of removing the defendant from the courtroom during the hearing of the protected person should be provided for, under the condition that the defendant is represented by a lawyer who to address the questions they consider useful for the exercise of the right to defence.

As is also provided in the legislation of Great Britain, we believe that the legislation of the protection measure consisting in the hearing of the protected person by placing him in a room next to the one where the court session is held, the dividing wall being represented by a two-way mirror, is required, which would allow people in the courtroom to see the person being interviewed, but not the other way around. The advantages of such a protective measure are multiple:

- visual contact between the interviewed person and the defendant/defendants will be avoided, at the same time reducing the stress she might feel as a result of seeing the defendant;

- you can observe the reactions of the person being heard and perceive his non-verbal language;

- the risk that the defendant will try, verbally or through gestures, to intimidate the person formulating the statement, in order to determine him not to testify against him or other persons, will be removed.

Taking an example from Spanish legislation but also the prescriptions of Directive 2012/29/EU, a measure that the legislator should institute as soon as possible is the allocation of special waiting areas, with security, for people who benefit from protection and who are going to participate at the court hearing. Moreover, routes should be established in the premises of the courts, so that the persons in need of protection do not meet the defendants or the rest of the public throughout their stay in the court premises.

In this way, contact between victims and defendants or other persons who could intimidate or threaten those persons will be avoided before the case in which they participate is called. Cases are often not called at the scheduled times due to extended court sessions, so waiting times for court proceedings can be quite long, while public interactions in the common waiting rooms are not closely monitored by the gendarmes who provides security in court premises.

CONCLUSIONS

Protective measures in the criminal process are essential both for protecting the fundamental rights of the person subject to a risk of revictimization,

but also for ensuring the normal conduct of criminal proceedings against defendants investigated for acts of domestic violence.

This type of measures must be vehemently effective and, at the same time, as flexible as possible, depending on the specifics of the situation and the needs of the person concerned.

The development of Romanian legislation to complete the spectrum of available instruments, at least in the sense of adopting our recommendations above, protective measures imposed by international legislation or inspired by the legislation of other states or from the recommendations presented by international experts, is necessary and would follow the trend at scale European effort to harmonize physical and psychological protection practices for victims.

Thus, the capacity of the judicial bodies to obtain the willingness of the victims to cooperate with the judicial bodies will be enhanced, the risks of exposure to any danger by participating in the trial being minimized, and they will be encouraged to adopt a sincere, unhindered attitude during the hearings.

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