PROSECUTING CHARGES FOR THE ACCOMPLISHMENT OF CERTAIN LEGAL ACTIVITIES. PROTECTION, GUARANTEES AND LIMITS IN THE PRACTICE OF THE LAWYER PROFESSION

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Abstract

In any democratic society the lawyer plays an essential role in defending the rights and freedoms recognized by law. The actual accomplishment of his mission can expose the lawyer to some risks and pressures exerted by the same judicial authorities called to ensure compliance with the law.

The current article aims to analyse the possible implications of prosecuting charges against a lawyer for facts that represent nothing but concrete ways to perform some legal activities. The limits within which such accusations can be formulated, the potential consequences of the criminal judicial activity from the perspective of the basis of the accusations brought and the possible forms of protection available to the lawyer will be considered.

Keywords: *lawyer, protection, risks, guarantees, charges.*

Introduction:

The study has as a starting point the concrete situation of a Romanian lawyer who has been the subject of a criminal investigation for the way in which he fulfilled his professional obligations. The peculiarity of the case is given by the fact that the lawyer did not act in his own name, but as a member of a top law firm. Starting from this factual premise, the analysis aims to identify and test the effectiveness of the legal protection that any lawyer should benefit from when practising the profession as well as the effective guarantees through which this protection should be realized. The article will follow not only the national forms of the legal protection of the lawyer, but, in particular, the supranational legal instruments, capable of providing an effective set of guarantees.

1. Preliminary aspects regarding the pluralism of the notion of lawyer in the Romanian judicial system.

Despite the apparent semantic evidence, given by the widespread use of the term, the technical meaning of the notion of *lawyer* was no longer easy to establish with the entry into force of the New Romanian Code of Criminal Procedure. For the legal practitioners, the semantic area of the concept has always had a complex dimension given that it was expressed in two different registers that often interfere. Thus, the quality of lawyer has a *substantial* but also a *procedural component.* As the lawyer capacity is expressed dynamically, the two dimensions involved by his judicial manifestation often overlap and create confusion about the content and limits of each of them. This was the reason for which, in the former regulation, the two dimensions

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of the term were expressed by different names: *lawyer,* for the substantial one and *defender,* for the procedural one.

From a substantial perspective, the lawyer is the only person who is able to practice the profession of lawyer, free and independent profession with autonomous organization and functioning. This dimension of the notion of lawyer evokes a professional category consisting of persons who have acquired, under the law, the right to practice the profession in one of the forms and by one of the modalities provided by law. Even if in this sense a genre seems to be rather expressed, only the vocation for the practice of the profession is of general order, the effective quality being always exclusive. In this respect, according to the provisions of article 1 paragraph (2) of Law no. 51/1995 on the organization and practice of the profession of lawyer, in Romania the profession of lawyer can be practiced only by lawyers registered with the table of lawyers of the bar to which they belong, bar member of the National Association of the Romanian Bars (UNBR), being forbitten to have bars established and functioning outside UNBR. The interdiction to establish other bars is absolute, the acts of constitution and registration of these entities being null and void. Thus, the substantial quality of lawyer necessarily precedes the procedural one, being its essential premise, and is acquired as a result of meeting the material conditions (regarding the admission to the profession and acquiring tenure, seniority, incompatibilities, etc.) provided in the Law and in the By-laws of the lawyer profession - Decision no. 64/2011 (published in the Official Journal no.898 of December 19, 2011).The quality of lawyer, once acquired, gives the holder the vocation to practice one of the activities through which specific activities may be performed, according to the law, activities that are always listed almost exhaustively. Considering the substantial dimension of the quality of lawyer, the lawyer is protected by law, but only in the practice of the profession and in relation to it.

In principle, the need for protection and the tools through which it is provided by the national authorities, are set out in article 7 of the By-laws of the lawyer profession which transposes provisions provided for in the European Union's Code of Conduct – the Decision no. 1486/2007. These provisions state that in a society based on the values of democracy and the rule of law, the lawyer plays an essential role. The lawyer is indispensable to the justice and the litigants and has the task of defending their rights and interests, acting both as adviser and defender of his client. In the practice of the profession, the lawyer may not be subjected to any restrictions, pressures, constraints or intimidation from the public authorities or institutions or other natural or legal persons. The freedom and independence of the lawyer are guaranteed by law. The analysis of these provisions showed that *independence is the essence of the profession of lawyer, being a fundamental principle of the organization and the practice of the profession*[1].

The independence of the lawyer cannot harm the interests of his client. The lawyer is obliged to give the client legal advice corresponding to the law and to act only within the limits of the law, the current by-laws and the code of conduct, according to his professional belief. In Romania, the

[1] TC Briciu, The main changes to the Law no. 51/1995 for the organization and the practice of the lawyer's profession, www.juridice.ro. The author states that "the purpose of the lawyer's activity is to promote and defend the rights, freedoms and legitimate interests of the individuals. This purpose may, in some cases, conflict with the interests of the state or public authorities. The client could ask for help against an abuse committed by the authorities themselves."

lawyer is not criminally liable for the claims made orally or in writing before the courts, other bodies of jurisdiction, prosecutors or other authorities, if these claims are related to the defence and are necessary to establish the truth. The criminal prosecution and the arraignment of the lawyer for criminal acts committed in the practice of the profession or in connection with it can be done only in the cases and the conditions provided by the law. Regarding this generic protection, it has been shown in the doctrine that the *lawyer is generally protected for statements made in order to defend the interests of his clients during the court proceedings in the courtroom, even when the hearing is public and the information can thus reach the general public knowledge.*[2]

From a procedural perspective, the lawyer is a procedural subject, a participant in the trial. In criminal matters, the lawyer is not a party to the trial. The lawyer is a distinct procedural subject, essential[3] in carrying out the judicial activity, exercising also, in addition to the procedural rights of the party he assists or represents, his own procedural rights. Despite these own procedural rights, the lawyer is a procedural subject that never has a *causal legitimacy*, in the sense of his own interest in the exercise of the judicial action. The lawyer has exclusive *procedural legitimacy,* as owner of procedural rights and obligations. These rights and obligations have, first and foremost, a derivative character because they are exercised in the name and in the interest of their primary holder (party in the trial or other procedural subject), not being excluded, as we have shown, the possibility of the lawyer to be the holder of his own procedural rights. However, by exercising the procedural rights of the party he/she defends, the lawyer is in the same procedural position as the party.[4]

Thus, according to article 31 Code of criminal procedure, the lawyer assists or represents the parties or the procedural subjects, according to the law. I consider that the current provision, by its clarity, resolves a practical controversy in our national system arising in relation to the possibility of the lawyer to provide legal assistance to a secondary procedural subject as well, such as the witness. The text uses the term of *procedural subjects* without limiting the category of those who can benefit from legal assistance in criminal matters, so that in this category must be included the persons expressly mentioned in art. 34 Code of criminal procedure: the witness, the expert, the interpreter, the procedural agent and any other persons having rights or obligations within the criminal judicial proceedings. In these circumstances, as a distinct procedural subject, the lawyer is called to provide legal assistance to the participants in the trial. The defence made by the lawyer, as a legal professional, based on a legal assistance contract concluded between him and the litigant, is known as a technical defence.[5] By its nature, the lawyer is called to compensate the difference in terms of specialization between the parties involved in the criminal judicial conflict since the *prosecution* is

[2] M. Udroiu, S. Răduleţu in M. Udroiu (coordinator), *Criminal Procedure Code. Commentary on articles*, 2nd edition, CH Beck Publishing House, Bucharest 2017, p. 350.

[3] By exercising his own procedural function and actively contributing to the achievement of the purpose of the criminal trial, the lawyer is one of the main participants in the criminal case - I. Neagu, M. Damaschin *Criminal Procedure Treaty. General part*, Universul Juridic Publishing House, Bucharest, 2014, p. 229.

[4] N. Volonciu, *Treaty of Criminal Procedure. General Part Vol. I*, 3rd edition, Paideia Publishing House, Bucharest, p. 122.

[5] A. Crișu, *Criminal Procedure Law. General part*, 3rd edition, revised and updated, Hamangiu Publishing House, 2018, p. 165.

always supported by specialized magistrates from the Public Ministry.

Currently, in Romania, the substantial and the procedural quality of lawyer are both designated by the same name, suggesting the legislator's exclusive preference for the professional category called to grant legal assistance in the criminal trial. Moreover, considering the natural interdependence between these qualities, it was stated that the legal assistance granted in the criminal trial by a person who did not acquire the capacity of lawyer under the conditions of Law no. 51/1995 is equivalent to the lack of defence.[6]

In the procedural sense, the lawyer acquires legitimacy or capacity in order to provide legal assistance to a party or to a procedural subject either as a result of his election, by the conclusion of a legal assistance contract, or as a result of his appointment, ex officio. In civil matters also, the contract of legal assistance expressly provides for the extension of the powers that the clients confer on the lawyer. According to this contract (which has the nature of a mandate), the lawyer legitimizes himself to third parties through the power of attorney.[7]

The protection that the law grants to the lawyer at the procedural level is specific to this capacity, which always involves an individual exercise. Thus, the contact between the lawyer and his client cannot be impeded or controlled, directly or indirectly, by any state body. The arrested or detained person has the right to contact the lawyer, being ensured that confidentiality of the communications is respected, in compliance with the necessary measures of visual surveillance, protection and security, without having their conversation being intercepted or recorded. The right to freedom of expression of the lawyer is a distinct right, recognized by the European Court and concerns the freedom of expression of the lawyer not only in the courtroom, but also outside it.[8] Thus, the lawyer's freedom and the confidentiality of the client-lawyer communication are the main guarantees of an effective defence. If a lawyer could not consult his detained client and could not receive confidential instructions without supervision, legal aid would loose from its utility and the European Convention guarantees practical and effective rights. Moreover, confidentiality concerns not only communication in prison but also in the courtroom (*ECHR,* Hodorkovsky v. Russia, Decision of May 31, 2011).

Therefore, considering these general explanations, in Romania, the concept of lawyer includes both a substantial meaning that evokes a specific category, composed of persons who have the ability to perform the activity of lawyer in one of the modalities provided by law, as well as a procedural meaning that designates the holder of a punctual legitimacy that allows him to participate in a criminal or civil trial. In both manifestations, the lawyer's mission can only be achieved by having his independence guaranteed. At the principle level, the law is generous regarding the content of the legal protection it grants to the lawyer.

The effectiveness of this protection must, however, be checked *in concreto* because, although absolute in its normative form, the prohibition to intervene through pressure on the independence and freedom of the lawyer, instituted also in the charge of

[6] High Court of Cassation and Justice, United Sections, Decision no. XXVII / 2007 admitting the appeal in the interest of the law, with applicability and at present, in the Official Journal no.772 / November 14, 2007.

[7] G. Boroi, M. Stancu, *Civil Procedural Law*, 4th edition Revised and Added, Hamangiu Publishing House, Bucharest 2017, p. 166.

[8] M. Udroiu, *Criminal procedure. The general part*, 5th edition, revised and supplemented, CH Beck Publishing House, Bucharest 2018, p. 925.

the judicial authorities, may become relative in some of its procedural manifestations.

2. Assessment of the lawyer's activity from a criminal perspective. The limits of the control of the activity of a lawyer by the judicial authorities. Case Study.

In order to verify the effectiveness of the protection assumed at the declarative level, we will analyse the situation of a lawyer against whom criminal charges have been formulated for facts that represent exclusively ways of performing the lawyer's activity. The analysis will not cover aspects related to the merits of the accusations being made because it does not seek to replace the only authorities called to establish the guilt of those sent to court. The purpose of the analysis is focused on identifying the set of guarantees offered at the legislative level and evaluating their effectiveness in concrete, so as to find out if there are limits in the legal protection offered to lawyers. Undoubtedly, no internal or supranational legal instrument for the protection of the legal profession can be judged as a form of absolute immunity. This is the reason why, beyond the problem of the innocence of the accused lawyer (which can only be determined by the competent courts), more important in this endeavour is to identify the limits within which the judicial authorities can manifest themselves when evaluating the exercise of a free and independent profession.

What are the factual premises that led to the formulation of criminal charges against a lawyer? In the analysed case, a judicial authority with a material competence specialized in investigating the corruption facts ordered the arraignment of a heterogeneous group composed of civil servants, businessmen, real estate experts, but also a lawyer for the manner in which the real estate retrocession was carried out for some real property taken abusively by the state during the communist period. Regarding the situation of the lawyer arraigned, by the writ of summons, the fact of complicity in the crime of abuse of office was retained, among others. From the material point of view, the lawyer was accused of having helped a civil servant to defectively exercise his duties of service in connection with the possession of a forestland real property, which would have caused the damage to the Romanian state with a significant amount of money.

Specifically, the aid would have materialized by issuing notifications - on behalf of the law firm to which the lawyer belong - to the units holding the real property in order to comply with the provisions of irrevocable court decisions by which it was decided to return the real property and by appointing another lawyer within the law firm to participate in the actual activities of re-possession of the real property. Another complicity in the crime of abuse of office was held in the responsibility of the lawyer due to the fact that he helped the civil servants of another holding unit to proceed with the restitution of a real property (land) to the person who had requested it, knowing that the applicant is not entitled person. Specifically, the aid granted by the lawyer consisted in attending two meetings of the Board of Directors of the holding unit (entity with majority state capital) in which he expressed his legal opinion regarding the applicant's right to the restitution of the building, legally assisting and representing his client. Also, the lawyer was also charged for the crime of complicity to money laundering, being imputed to him that, in order to hide both the illicit nature of the agreement between the persons involved and the criminal origin of the goods obtained from it, the lawyer assisted in the conclusion of several legal acts (either directly or

indirectly, by coordinating other lawyers within the company) - assignment contracts for the litigation rights and additional documents to them, notarized contracts for the sale of real property. Last but not least, the lawyer was also charged with the offense of trafficking in influence, stating that he determined the person who apparently had the right to request the restitution of the buildings taken abusively to conclude a litigation rights contract with other subjects, although, in fact, the lawyer only performed lawyers' activities: presenting the law firm he was a part of, performing a due-diligence report.

It can be observed that although from a material point of view all the activities imputed to the lawyer are nothing but ways of practising the profession of lawyer, recognized and protected as such by the law, in the view of the Public Ministry, the thing that confers an criminal connotation to the activity carried out as a lawyer is exclusively his mental attitude - the subjective position regarding the non-justification of the person requesting the return to acquire the claimed goods. However, although the prosecution considers that this mental attitude was formed following the assessment of the legal situation of the person requesting the goods, as a professional, as lawyer (one of the many lawyers involved in this project), no rational explanation is offered for the exclusive way in which he is charged. No other lawyer, neither within the company in which he was a member, nor from other companies, was charged for issuing opinions that coincided with those expressed by the lawyer arraigned. First of all, in the context of such accusations, which is the way in which a lawyer performing his activity within a law firm can protect himself against the judicial authorities accusing him of carrying out activities not in his own name but on behalf of the company, activities that performed not individually but with other lawyers?

In this respect, one must not neglect the provisions of article 185 of the By-laws of the profession of lawyer (the form in force in the year when the alleged acts were committed), according to which *"the civil legal relationship is born between the client and the professional civil society, the professional services to be performed by any of the lawyers appointed by the coordinating lawyer, without asking the client's option, except when the professional services consist of legal assistance and representation in courts, prosecutor's offices, criminal investigation bodies or other authorities, when in the legal assistance contract the name of the lawyer designated or accepted by the client is mentioned, as well as the lawyer's right or prohibition to substitution"*. Thus, all the documents concluded and the activities carried out as a lawyer in this case, were performed not in the lawyer's own name, but in the name of the law firm in which the lawyer performs his activity, and which was a party to the legal assistance contracts concluded with clients.

Regarding the legal opinions issued in relation to the claims of the person requesting the goods, it should be noted that these were the result of legal analyses, as well as of thorough documentation, initially made by a team of more than 10 lawyers. As a result of these analyses and documentations carried out, the *Legal Audit Report* was prepared. Subsequently, the analysis covered each litigation or administrative file, an activity in which 62 lawyers were involved. In this context, how can a lawyer be effectively protected against him being charged by withdrawing from the group in which he practices the profession?

Secondly, if the only element that can give criminal relevance to a lawyer's activity is *his mental attitude* towards the legal issue on which he was called to rule, then the risk of arbitrary judgments by the judicial

authorities is very difficult to remove. For an element of a subjective nature whose assessment naturally depends on the impression or conviction of the judicial body, the absence of objective standards, materially verifiable in the documents and papers of the file, contributes significantly to diminishing the real protection of the lawyer against external interference and pressure. In this context, in order to identify a set of effective guarantees that will protect the lawyer, we must first refer to the legal provisions according to which the standard of professional good faith can be established or at least anticipated, respectively those texts on the legal nature of the rules regarding the professional conduct:

1. Law no. 51/1995 for the organization and the practice of the profession of lawyer ("Law no.51/1995 ")[9]:

- Article 2 paragraph (2): *"the lawyer promotes and defends the human rights, freedoms and legitimate interests"*.

2. The by-laws of the lawyer profession from 25.09.2004 (the "By-Laws")[10]:

- Article 2 paragraph (1): *"the purpose of practicing the profession of lawyer is to promote and defend the rights, freedoms and legitimate interests of natural persons and legal persons, of public and private law"*.

- Article 6 paragraph (1): *"The freedom and independence of the lawyer profession are principles based on which the lawyer promotes and defends the legitimate rights, freedoms and interests of the clients according to the law and the present by-laws. These principles define the professional status of the lawyer and guarantee his professional activity"*.

- Article 2.7. The client's interest: *"subject to strict observance of legal and deontological rules, the lawyer has the obligation to always defend the interests of his client as best he can, even in relation to his own interests or the interests of his colleagues"*.

3. United Nations Basic Principles on the Role of the Lawyer ("UN Principles"), adopted at the Eighth United Nations Congress on Crime Prevention and Treatment of Offenders, Havana (Cuba), August 27-September 7, 1990[11]:

- Principle no.16: "*Governments shall ensure that lawyers: (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened*

[9] Published in the Official Journal of Romania no.116 / 09.06.1995, republished in the Official Journal of Romania no. 113/2001 as amended including by the Law no. 255/2004 published in the Official Journal no. 559 of June 23, 2004 and GEO no. 190/2005 for the implementation of necessary measures in the process of European integration, published in the Official Journal of Romania no. 1179 / 28.12.2005. Subsequently, the Law no. 51/1995 was amended by the Emergency Ordinance no. 159/2008, found as unconstitutional by the Decision no. 109/2010 of the Constitutional Court.

[10] Published in the Official Journal no.45/13.01.2005. It was subsequently amended by the Decision of the National Association of The Romanian Bars from 30.06.2007 and subsequently by the Decision no. 15 / 15.09.2011. The By-laws was published in the Official Journal no. 898 / 19.12.2011.

[11] Available for consultation online at the following web address: [last accessed October 4, 2018]. These principles are used by the European Court of Human Rights when interpreting the lawyer's freedom of expression, being referred to the section "Relevant international documents" or "Relevant domestic and international law": see Hajbeyli and Aliyev v. Azerbaijan (para. 40, the Judgment of April 19, 2018) or Morice v. France (para. 57, decision of April 23, 2015, the Grand Chamber).

with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics" [italics mine]

- Principle no.18: "*Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.*" [italics mine].

- Principle no.19: "*No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.*".

- Principle no.20: "*Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority*."

However, the clearest provisions regarding the role of the rules of deontology are those to which the writ of summons itself refers to, respectively those included in the Code of conduct of the lawyers in the European Union, the sanction for their non-observance, if it exists, being of a disciplinary nature:

"*1.2.1 Rules of professional conduct are designed through their willing acceptance by those to whom they apply to ensure the proper performance by the lawyer of a function which is recognised as essential in all civilized societies. The failure of the lawyer to observe these rules must in the last resort result in a disciplinary sanction.*

1.2.2. The particular rules of each Bar or Law Society arise from its own traditions. They are adapted to the organisation and sphere of activity of the profession in the Member State concerned and to its judicial and administrative procedures and to its national legislation. It is neither possible nor desirable that they should be taken out of their context nor that an attempt should be made to give general application to rules which are inherently incapable of such application. The particular rules of each Bar and Law Society nevertheless are based on the same values and in most cases demonstrate a common foundation."

The rules regarding professional deontology have as purpose the protection of the client's private interest, either natural or legal person requesting legal services, and the eventual violation of these norms, attracts disciplinary sanctions. The infringement of the professional deontology does not constitute, *per se*, an offense, neither directly nor indirectly - by removing the exonerating cause of liability as an effect of finding an alleged infringement.

The opposite reasoning would lead to the conclusion that a lawyer has, *ab initio*, latent criminal conduct in any case in which he has the capacity of defender. This thesis would be contrary to the UN Principles cited above, equivalent to a *de facto* ban on practicing the profession of lawyer.

It is therefore natural, in relation to the legal nature of the deontological norms, but also to their specificity ("*each bar has its own specific rules"*) that the competent bodies to verify their compliance to be those within the profession and not the criminal investigation bodies, regardless of the matter analysed by them.

From the perspective of the competence of verifying the respect of professional deontology, it is absolutely natural that only the organs of the profession have such an attribute, as long as the lawyer's profession is a liberal and independent profession, subject to the observance of the norms that it has imposed

and an essential means of defence of human rights before the State and other powers in the society, as shown in the Code of Conduct of the Lawyers in the European Union.

Moreover, the national judicial practice has also been pronounced in the sense of recognizing the competences of the professional bodies in the matter.[12]

However, against the lack of any referral or proceedings before the bar where the accused lawyer was a member, it is necessary to establish that the competent professional bodies, according to the law, to verify the observance of the professional deontology have not established, by specific acts, the presence of a situation of violation of the rules governing the exercise of the profession of lawyer, the prosecutor's office not being able to substitute the competence to make such an analysis and to establish alleged violations of the deontological rules, without violating the mentioned provisions.

At the same time, it should be emphasized that the justification of a criminal procedure against a lawyer by the alleged non-observance of the rules of the profession is explicitly forbidden by the national and international law.

Thus, according to the Law no. 51/1995 *"in the exercise of the profession and in relation to it the lawyer is protected by the law."* According to the By-laws of the lawyer profession:

Article 37 paragraph (1)

"In the exercise of the profession, the lawyers are protected by the law, without being assimilated to the civil servant or to another employee. [...]

(6) The lawyer is not criminally liable for the claims made orally or in writing, in the appropriate form and in compliance with the provisions of para. (5), before the courts, the criminal investigation bodies or other administrative bodies of jurisdiction and only if these claims are related to the defence

[12] "According to articles 115 - 116 of the By-laws of the profession of lawyer, the obligations of a defender are obligations of diligence and not of result, and, the good faith the lawyer must prove in defending the interests of the person to whom he provides legal assistance, according to art. 116 - 117 of the By-laws of the profession of lawyer and art.38 of Law no. 51/1995 must be analysed by the management bodies of the bar and not by the judicial bodies, such a fact not being criminalized by the criminal law, but qualified as a disciplinary infringement by the last thesis of art. 38 from the Law no.51/1995. Moreover, the petitioner addressed the management of Iasi Bar Association for restitution of the fee, his complaint being rejected by the Decision no. 30 of November 24, 2011". (Iași Court of Appeal - Criminal and Minors Section, Criminal Judgment no. 101/2012 on www.rolii.ro).

"The mere non-recognition of compliance with the obligation assumed by the respondent through the legal assistance contract concluded, cannot constitute an element of misleading the petitioner, as the defence tries to assert. According to art. 228 para. 4 Code of criminal procedure in relation with art. 10 lit. b from the Code of criminal procedure, the initiation of the criminal action cannot be exercised under the conditions in which the act is not provided by the criminal law.

Instead, the petitioner can file a complaint with the Bucharest Bar, competent to analyse the existence or non-existence of the provisions of art. 38 of Law no. 51/1995." (Bucharest Court of Appeal, 1st Criminal Section, Criminal Sentence no. 375/2009 on www.rolii.ro).

"It was correctly ordered not to start the criminal prosecution in terms of the committed crime as foreseen by art.215 Criminal Code, considering that there is no evidence to establish the existence of a misleading action in the sense of the provisions from art. 215 Criminal Code, in the opinion of the petitioner, there is a breach, or a defective fulfilment of the contractual obligations of judicial assistance, actions that cannot incur a criminal liability and which can only be analysed by the management bodies of the Bucharest Bar." (Bucharest Court of Appeal, 1st Criminal Section, Criminal Sentence no. 100/2010)

"(…) examining the quality of the legal assistance granted by the lawyer and his professional competence represent the duties of the representatives of the bar associations.

In analysing the allegations made to the respondent, the Court finds that the case prosecutor correctly considered that the alleged offense does not exist". (Iași Court of Appeal - Criminal Section and for cases with minors, final criminal sentence no. 38/2012 on www.rolii.ro).

in that case and are necessary to establish the truth."[13]

Even clearer norms from this point of view are included in the international instruments, cited above, respectively the Principles no. 16 and no. 18 of the UN Principles.

It is easy to see that in this case the provisions cited were seriously infringed, the lawyer being subjected to a criminal proceeding on the assumption that his client had no rights, neither substantive, and therefore neither procedural, and the actions taken would take due to this reasons, a criminal connotation. Regarding the other charges, they are the result of a violation of another principle, that of the prohibition of assimilating the lawyer with his client (UN Principle no.18 - cited above).

Regarding the evolution in time of the analysed regulations, (during the period in which the professional activities qualified as illegal by the Prosecutor's Office were carried out, this problem was regulated in the article 37 paragraph (6) of the Law no. 51/1995, but also in the article 7 paragraph (5) of the By-laws), some observations are required:

- In its original form, the lawyer's liability was dismissed for any claims "*in connection with the defence and necessary for the case entrusted to him*".

- In 2004, the text of the law provided that the lawyer's liability was removed for the claims made "*in the proper form, in relation to the defence in that case and necessary to establish the truth*".

- Subsequently, starting with 2014[14], the text has been modified again and provides that the lawyer's claims must be made in the "*appropriate form [...] if they are related to the consultations offered to the litigants or to the formulation of the defence in that case, if they are made in compliance with the rules of professional deontology* ".

- The guarantees offered to the lawyer on the basis of this legal text have been strengthen by the legislator with the introduction, by the Law no. 25/2017 regarding the modification and completion of the Law no. 51/1995 for the organization and exercise of the profession of lawyer, of a new paragraph (5) of the art. 38 (new number): *"(5) The legal opinions of the lawyer, the exercise of rights, the fulfilment of the obligations provided by law and the use of legal means for the effective preparation and realization of the defence of liberties, rights and legitimate interests of his /her clients do not constitute a disciplinary offense nor can they attract other forms of legal liability of the lawyer.*"

The initial form, the current form, but also the evolution of the text, they all denote the legislator's firm intention to establish a guarantee of the lawyer's independence. Regardless of the nature of this provision (justifying cause / non-punishing cause), the

[13] By the Law no. 270/2010 para. 61 was also introduced with the following content: "The lawyer is not criminally liable for the professional recommendations and opinions he communicates to his client nor for the legal acts he proposes to his client, followed by the client committing a deed foreseen by the criminal law. This paragraph does not apply in the case of the offenses provided by the Criminal Code at art. 155 - art. 173, art. 174 - art. 192, art. 197 - art. 204, art. 205 - art. 206, art. 236 - art. 244, art. 273 - art. 277, art. 279 - art. 281, art. 303 - art. 307, art. 308 - art. 313, art. 314 - art. 316, art. 317 - art. 330, art. 331 - art. 347, art. 348 - art. 352, art. 353 - art. 355, art. 356 - art. 361."

[14] As a result of the modifications made by the Law no. 286/2009 regarding the Criminal Code, published in the Official Journal of Romania no.757 / 12.11.2012.

conclusion is just one: as long as the lawyer provides the services listed in the law and the by-laws and fulfils his/her primary mission of serving his/her client, he/she will be able to plead for his/her benefit such legal provisions. It results from the rules and recommendations applicable to the profession that the lawyer has both the right and the obligation to protect and optimize the client's legitimate rights and interests. This principle is closely related to the lawyer's first assignment, as a consultant to his client, thus contributing decisively to the existence of a balance in the relations between the court and the state authorities. The principle is expressed by the following legal provisions: art. 2 paragraph (2), art. 3, art. 38 of the Law no. 51/1995[15] and art. 89, art. 90, art. 91, art. 116, art. 138 paragraph (2) and (3), art. 145 paragraph (1), art. 216 paragraph (1) of the By-laws.

At the same time, this principle is provided by point 3 of the Recommendation[16] , art.1.1, art. 2.7. of the EU Code of Conduct. This principle involves the following activities, characteristic for the lawyers' activity: the right / obligation to keep his client informed (otherwise, article 145 paragraph (1) of the By-laws establishes an express rule in this respect), to offer the client legal consultations [art. 3 paragraph (1) letter a) of Law no. 51/1995, art. 89 of the By-laws], to represent the client in front of the authorities, to draft legal acts that express arguments in the client's favour. In these conditions, the facts retained in the Indictment (informing the client about the status of the files, meetings with the client at the law firm's headquarters, in relation to the forest-land, making notifications based on irrevocable court decisions regarding the real property, representation before the authority that solved the request for restitution and the expression of legal opinions related to the situation of the good) represent precisely the services performed within the lawyer profession.

In addition, as we have shown above, the legal and statutory provisions do not consecrate a simple vocation of the lawyer in carrying out such activities, but a professional obligation whose violation constitutes a disciplinary infringement (the final thesis of the article 38 of the Law no.51/1995). Therefore, it is the failure to perform these activities that would be the equivalent of improper / faulty fulfilment of the lawyer's mandate and of the due diligence obligations that were assumed and not their performance as the prosecution claims. Analysing the role of the lawyer in a

[15] Article 2 paragraph (3): "The lawyer has the right to assist and represent the natural and legal persons before the courts and other bodies of jurisdiction, the criminal prosecution bodies, the public authorities and institutions, as well as before other natural or legal persons, who have the obligation to allow and assure the lawyer the unrestricted conduct of his activity, according to the law".

Article 3 paragraph (1): "[a] the activity of the lawyer is accomplished through: [...]

(b) legal assistance and representation before the courts, [...] public administration bodies and institutions, as well as other legal persons, according to the law;

(c) drafting legal documents [...];

(e) the defence and representation with specific legal means of the legitimate rights and interests of the natural and legal persons in their relations with public authorities, institutions and any Romanian or foreign persons".

Art. 38: "[a] the lawyer must study thoroughly the cases that have been entrusted to him, when hired or appointed ex officio, to be present at each term to the courts or to the criminal investigation bodies or to other institutions, according to the mandate entrusted, to show conscientiousness and professional probity, to plead with dignity towards judges and the parties in the process, to submit written conclusions or hearing notes whenever the nature or difficulty of the case requires it or the court orders it. Failure to comply with these professional duties constitutes a disciplinary offense."

[16] Principle III. The role and duties of lawyers. Point 3: "the lawyer's duties towards the client include: [...] c) taking legal measures to protect, respect and exercise the rights and interests of their clients."

democratic society based on the rule of law, the European Court of Human Rights has ruled in several occasions in the sense of the need to impose effective guarantees to protect the opinions of a lawyer, even when such guarantees are either in minority or contrary to those advanced by the authorities or even include an exaggeration.

In this regard, with applicability in this case, the Court indicated in Nikula v. Finland (31611/06) that "*assessing the relevance and usefulness of a defence argument should be the lawyer's privilege, subject to the court's assessment, without being affected by a possible 'chilling effect' that may be produced even by a relatively light criminal penalty or by the obligation to pay damages for the damage caused and the costs incurred*." (italics mine) (paragraph 54).

In the same perspective, the Court reiterated in Steuer v. the Netherlands (39657/98) the principle that the mere threat given by the possibility of *ex post facto* control of the claims formulated by a lawyer in the exercise of his representation function could be very difficult to reconcile with the obligation to defend the interests of his own client: "[…] *even so, the threat of an ex post facto control of his critics regarding the way in which a proof was obtained from his client is difficult to reconcile with the obligation to defend the interests of the client and could have a "chilling effect" on the practice of the profession"* [italics mine] (paragraph 44).

Further, in the case of Radobuljac v. Croatia (51000/11), the Court was called upon to provide further clarification on the link between the freedom of expression and the independence of the legal professions, showing that lawyers are obliged to defend their clients in a zealous manner:

" 60. The specific status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. They therefore play a key role in ensuring that the courts enjoy public confidence. However, for members of the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation (see Morice, cited above, § 132). That special role of lawyers, as independent professionals, in the administration of justice entails a number of duties, particularly with regard to their conduct. Whilst they are subject to restrictions on their professional conduct, which must be discreet, honest and dignified, they also enjoy exclusive rights and privileges that may vary from one jurisdiction to another – among them, usually, a certain latitude regarding arguments used in court (ibid., § 133).

61. Therefore, the freedom of expression of lawyers is related to the independence of the legal profession, which is crucial for the effective functioning of the fair administration of justice (ibid., § 135). Lawyers have the duty to defend their clients' interests zealously, which means that they sometimes have to decide whether or not they should object to or complain about the conduct of the court (ibid., § 137)." [italics mine]

Then, in a January 2018 ruling in Ceferin v. Slovenia (40975/08), the Strasbourg Court again noted that "it should be up to the lawyers themselves, subject to court evaluation, to assess the relevance and usefulness of a defence argument. *The court reiterates that freedom of expression "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb"* (paragraph 61).

Finally, in a September 2018 ruling in Tuğluk and Others v. Turkey (30687/05 and 45630/05), the Strasbourg judges stated *expressis verbis* that the lawyer is an intermediary between the litigants and the

courts, occupying a central position in the administration of justice and having a key role in ensuring public confidence in the courts, their mission being, therefore, fundamental in a democracy and a rule of law[17].

The entire European jurisprudence, cited above, reinforces a number of principles applicable with priority to the case:

a) The lawyer must be ensured full sovereignty and discretion on the opinions / arguments that are useful to the defence of a client. Any *ex post facto* control procedure of these claims, which are nonetheless subject to the assessment of an authority / jurisdiction has every chance to be contrary to the fundamental right to freedom of expression, all the more essential considering the central role of the lawyer in a democratic society.

b) However, the establishment of an *ex post facto* control procedure on the lawyer's claims may question the effectiveness of practicing this profession. Moreover, the establishment of the option to criminally charge the defences and arguments issued by a lawyer when supporting a client's case represents a violation of art. 10 of the Convention.

c) In the interest of ensuring full freedom of expression and considering the central role that the lawyer's profession plays in a democratic society, lawyers benefit from a wide margin of appreciation in the expression of opinions, being even allowed to them to formulate minority ideas / arguments, divergent in relation to a majority, ideas /arguments that may shock or disturb.

d) Defending, "zealously" even, the interests of the client is not an option, but a duty of the lawyer[18].

To decide the opposite would mean that in all criminal cases in which the defence lawyer contradicts the opinion of the prosecutor expressed in the indictment, he would commit an offense whenever he knows that his client is supporting an apparently uncertain factual thesis. At the same time, whenever a client's rights involve probative or legal difficulties, the lawyer should give up the client in violation of his

[17] "First, the Court recalls the principles of its case-law applicable in this case, according to which the specific status of lawyers, intermediaries between the justices and the courts, makes them occupy a central position in the administration of justice. For this reason, they play a key role in ensuring that the public has confidence in the action of the courts, which have a fundamental mission in a democracy and a rule of law [.]".

[18] „Unlike the situation of the representatives of other powers or of the representatives of the general public, the activity of influencing the judge also comes within the scope of the profession of lawyer. We do this every day, by the way we present our cases in court, we contradict the evidence of the opponents or we support legal bases. The lawyer provides the judges with information, arguments and grounds of law. Judges will reject or consider what they hear in the courtroom. The dispute is a necessary influence on the judges and part of the way in which the judge reaches a final decision. This influence must be exercised by independent lawyers. (…) The citizen has the right to be assisted by a lawyer, both in criminal cases and in civil cases. To ensure the right of the person to assistance, the service provided must be of a certain quality. The legal profession is regulated to ensure public trust in lawyers. The rules, whether they are international recommendations or national legislation, will focus on the need to ensure the independence of the legal profession. Quality is defined not only by the level of legal powers held by the person concerned, but also by his ability to act independently." Berit Reiss-Andersen A Speech from a Lawyer in Practice: The Independence of the Judiciary and the Independence of the Legal Profession - Dependent on Each Other in Regulating Judicial Activity in Europe, A Guidebook to Working Practices of the Supreme Courts, Elgar Publishing House, 2014, at pp. 209-210 citate.juridice.ro [last accessed on January 19, 2019].

professional obligations.[19] To bring an action in court (on behalf of the client and based on a mandate) is nothing more than the exercise of a fundamental right guaranteed by the fundamental law itself. Similarly, the request for the entering into possession of a building on the basis of rights recognized by the courts represents the exercise of a right. All these legal activities represent the expression of a legal opinion in the appropriate procedural framework, on behalf and in the name of the client. Or, the lawyer is bound by the obligation to perform - in order to comply with the deontological rules - all the diligences that are useful for defending the interests of his client. Thus, the lawyer must and has the obligation to invoke all the operative reasons to make such a defence. In the same sense, and recently, in March 2018 in the Mikhaylova v. Ukraine (10644/08), the Strasbourg Court has shown that the infringement of a lawyer's freedom of expression can lead to violations of Article 6 of the Convention, if such a breach concerns the claims made by a lawyer in a trial[20].

In accordance with the above-mentioned case law of the ECHR, the case law of the High Court of Cassation and Justice and of other highest courts has emphasized on several occasions that the expression of opinions regarding the legal classification of a client's factual situation under no circumstances cannot lead to criminal liability, this being a vocation of any lawyer by virtue of Law no.51/1995. At the same time, it has been shown that the exercise of activities that are confined to the duties of the lawyer under the Law no. 51/1995 cannot justify criminal charges such as the support of a criminal group. *In this sense we show:*

a) *"Analysing the documents submitted with the file, the court found that in the case there are no indications leading to the conclusion that the respondent committed acts of criminal nature.*

As defender of the administrative-territorial unit, he exercised its powers in accordance with the provisions of the Law no. 51/1995, and especially those provided by the civil procedural rules, the defences formulated in the above mentioned case not being restricted by anyone else than the court. It is the task of the court that has to settle the case having as object "land fund" to establish the procedural quality of the parties, the reconstitution of the property rights of the parties, the way in which this will be ordered, and so on following the probationary assembly administered by motivated admission or dismissal of the defences formulated by one side or the other, on the occasion of its judgment." (HCCJ, Criminal Decision no. 243 / 26.01.2012)[21].

b) *"In his capacity as lawyer, the respondent appellant, L.E. has filed legal actions and claims based on the legal assistance contracts concluded*

[19] "If the lawyers were to take no action until they were sure that it was fair, an individual would be completely stopped by a trial over his claim, although, if it was examined judicially, it could be found to be a very fair claim"- Dr. Samuel Johnson, Journal of a Tour to the Hebrides, 1773.

"In no case does the whole evil lie on one side, and only the good on the other." - Thierry Massis, Lwe principe de verité et l'avocat (the Principle of truth and the lawyer) in Mélanges en l'Honneur d'Yves Mayaud: Entre tradition et modernité: le droit penal en contrepoint, Dalloz, June 2017, p. 659.

[20] The Court considers that an interference with the freedom of expression during a trial could raise a problem based on art. 6 of the Convention on the right to a fair trial. Although freedom of expression of the parties should not be unlimited, the "equality of arms" and other equity considerations may advocate for a free exchange of arguments between the parties (see Nikula case, cited above, § 49, and Mariapori case , cited above, § 63)."

[21] http://www.scj.ro/1093/Details case law?customQuery% 5B0% 5D.Key = id & customQuery% 5B0% 5D.Value = 68 344.

with SC 'CI' SRL, the judicial activity being carried out, as it results from the judicial decisions in the file, in the conditions and in compliance with the provisions of the Law no. 51/1995 for the organisation and the practice of the lawyer's profession and the civil procedural rules incident in the cases brought to trial. [...] It is also worth mentioning that the court decisions in the file, which dissatisfied the petitioner the Administration of the Real Estate Fund and which are not considered enforceable against other party, can be censured, according to the law, by ordinary and extraordinary means of appeal" (HCCJ, Criminal Decision no. 877 / 07.03.2011)[22] .

c) "*In this regard, it is found that it was correctly held that one of the constituent elements of the offense is missing, as the material element of the misrepresentation (forgery) offence cannot consist in the lawyer's pleadings, made during the practice of his profession, whose nature involves the submission of all due diligence to ensure the interests of the party he represents in a trial. Moreover, the solution is pronounced by the court on the basis of all the probative material in the file, the possible false claims or writings of the lawyer being unable to constitute the basis for pronouncing the decision.*

The petitioner's critics regarding the solution pronounced in the civil case can be invoked through the exercise of legal remedies, where there is the possibility to have them verified by the judicial control courts.

Moreover, the dissatisfaction of any person regarding the performance of lawyers can be invoked under the conditions expressed by the Law no. 51/1995, at the bar association to which the lawyers are registered with, specific sanctions for this liberal profession being provided." (HCCJ, Criminal Decision no. 849 / 04.03.2010)[23] .

d) "*(...) no evidence was presented in the present case showing that the lawyers from SCP xxxx have tried to mislead the court. According to art. 174 para. 4 of the By-laws, at any time the lawyer should not knowingly submit false information or mislead. As mentioned above, the procedural documents… were based on: legal provisions, existing information in public registers (BPI), documents issued by the respondent debtors…, legal acts invoked by the appellant – claimant in the present case… Or, the interpretation of the legal provisions / of the contractual clauses is subject to the censorship of the court. At the same time, the exceptions / claims / defences formulated by the parties are verified by the court in relation to the legal / contractual provisions and to the evidence administered. As such, there is no evidence to show that, by the procedural documents performed on the occasion of the appeal judgment, SCP xxxx would have knowingly presented false information or would have tried to mislead the court*". (Bucharest Court of Appeal, 5th Civil Section, Civil Decision no. 839 / 05.21.2015).

[22] http://www.scj.ro/1093/Detaliijurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=75380.

[23] http://www.scj.ro/1093/Detaliijurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=52227.

e) *"(...) Certainly, these claims of the petitioner cannot lead to the criminal liability of the magistrates who have pronounced the respective judgments, nor of the prosecutors who carried out criminal proceedings or verifications of the respective solutions, being unable to reach the extension of the area of active subjects of the offenses for which the petitioner has filed a criminal complaint, with the consequence of circumventing the legal provisions regarding the exercise of the remedies and respectively of the res judicata of the judgments given in Romania.(...) Regarding the respondent lawyers..., the claims of the petitioner according to which, by granting the legal assistance, the respondents would be guilty of committing the offenses of deception, abuse in service against the interests of persons and false testimony, because they would have defended with deceit and by criminal association with the magistrates; such claims are obviously contrary to the legal provisions and cannot lead to the criminal liability of the respondents. This is because they were hired to provide legal assistance. As consequence, applicability was made in terms of the provisions of art. 37 of the Law no. 51/1995 for the organization and the practice of the lawyer's profession, with the subsequent amendments and completions. This article establishes in paragraph 6 that the lawyer does not answer criminally for the claims made orally or in writing before the court or other bodies, if these claims are related with the defence and necessary to the cause entrusted to the lawyer.*

Also, according to para. (1) of article 37 of the same normative act, while practicing the profession, the lawyers are protected by the law and cannot be assimilated to the civil servants or to another employee. Thus, as during the execution of the preliminary acts, it was not established that the respondents violated any provision foreseen by the Law no. 51/1995 or by the By-laws of the profession of lawyer, in force, it follows that the simple statements of the petitioner, made in the context of a case pending in the court, cannot give rise to a legal criminal law relationship, more so, as free access to justice is guaranteed to any person according to the constitutional provisions." (Ploieşti Court of Appeal, 5th Civil Section, Civil Decision no. 123 / 18.07.2011).

f) "*In terms of assessing the legal situation of the defendants and their contribution to the alleged criminal activity, it should be mentioned that, the analysis of the typical elements of the deed is done for each defendant and in particular, the activities carried out by them in the accomplishment of the objective side of the alleged committed offence are taken into account. Or, in the case, from the administered evidence it results that the defendant H. carried out, within the SC T.T.T.T.T. SRL, only activities that are confined to the duties that were incumbent to him and for which he was hired (the certification as a true copy of the mediation contracts, the declarations of acceptance and declarations on their own responsibility) and not (actions) to support the activity of an organized criminal group or the exploitation through work of the 15 injured persons. At the same time, evidence was administered in connection with the activities carried*

out by the defendant H., during the reference period, which the defendant himself detailed and proved with the documents filed in the defence, but all these evidence support the appreciation that the acts performed by the accused are in compliance with the legal norms and his attributions and cannot outline the material elements of the objective side of the facts of constituting an organized criminal group and human trafficking." [italics mine] (HCCJ, Criminal Decision no. 435 / A / 04.11.2016).

These findings of the highest court can be found even in the case law of the Brașov Court of Appeal:

g) "*Moreover, the provisions of art. 37 paragraph 6 of the Law no. 51/1995 (the updated form of the law) provide that the lawyer is not criminally liable for the claims made orally or in writing, in the appropriate form and in compliance with the provisions of para. (5), before the courts, the criminal investigation bodies or other administrative bodies of jurisdiction and only if these claims are related to the defence in that case and are necessary to establish the truth.*

The assertions made in the written conclusions are confined to the aforementioned provisions, being related to the defence in that case and were necessary to establish the truth, the defender being able to formulate interpretations of the legal provisions in favour of the party he represents, in order to ensure a real defence for that party." [italics mine] (Brașov Court of Appeal, Criminal Judgment no. 44 / F / 27.04.2009)

h) "*The court has the professional obligation to verify the claims made by the lawyers and to take them into account or to dismiss them according to the evidence that is administered in the file.*

According to the law no. 51/1995, as correctly stated, the lawyer has the right to make oral or written statements according to his professional beliefs in order to defend the interests of the client he assists. The lawyer is defended from the criminal liability, by law, for the claims made before the courts during the professional activity because otherwise it would be impossible to practice this profession, insofar as the expression of a point of view could have consequences of criminal order. On the other hand, it should not be lost sight of the fact that the lawyer is obliged to defend the interests of his client and to make statements only in his interest.[24]" [italics mine] (Brașov Court of Appeal, Criminal Judgment no. 40 / F / 04.05.2009).

i) "*The Court holds that the statement of defence is the procedural act by which the defendant responds to the sue petition, seeking to defend himself against the applicant's claims.[...] The party's assessment of the case is subjective in nature and is not decisive in the decision that the invested panel of judges should make. The judges of the case have the obligation to verify the parties' claims by reference to the evidence administered in the case, and when deliberating they will keep the facts that have been proven, they will analyse if those fact fall within the rule of probable law, established during the debates and, if so, they will draw the necessary conclusion, ruling on the claims raised before them, thus settling the dispute between the parties.*

Therefore, the facts or circumstances attested in the court decision are due to the

[24] http://www.rolii.ro/hotarari/58933600e490098434000c89.

judge's assessment of the relevance and cogency of the means and reasoning proposed by the parties, and the rule "the matter subjected to judgement is deemed to be true" has been interpreted even since the Roman law in the sense that "the ruling given by the judge is not the truth, but it shall be deemed as the truth." (Brașov Court of Appeal, Criminal Judgment no. 27 / 20.04.2010)[25].

Actions such as informing the client about the evolution of the file, the meetings with the client, do not constitute violations of professional ethics. On the contrary, their lack of would have constituted not only an infringement of professional ethics, but also of the elementary norms concerning the duties of the lawyer profession, which impose a certain discipline regarding the lawyer's relationship with the client.

The situation is similar with regard to the two buildings to which, in the analysed case, the activity of the lawyer is reported. In relation to the forest land, it is not conceivable that making notifications in the virtue of an irrevocable restitution decision and a possession decision would be contrary to the profession's ethics or an illegal practice. A contrary claim would be equivalent not only to denying the essence of a deontological behaviour (the lawyer does not support his client to execute a favourable judicial act), but also with a challenge of the judiciary (legitimizing the lawyer to ignore not only the client's interests, but also the result of a dispute). Any notification regarding the enforcement of a decision does not contain only the request itself, because it would be redundant (the decisions should be executed voluntarily, without the need for insistence from the interested parties); the role of such proceedings is precisely to bring to the attention of the party at fault the sanctions provided by law if such a decision is continuously ignored, despite its definitive and binding character.

Finally, with regard to the second building - there is no norm to incriminate:

- the representation before the authority that solved the restitution application; on the contrary, in addition to the above-mentioned statutory norms, there were special provisions in 2008: according to art. 23 paragraph (2) of Law no. 10/2001, "*the entitled person has the right to bring before the management bodies of the unit holding the request for restitution in kind. To this end, the entitled person will be invited in writing, in due time, to take part in the works of the management body of the holding unit*".

- the submission of a document that summarizes the client's arguments

- the issuance of legal notes related to the situation of the good. These notes are not even nominated by the prosecution, being addressed in a generic way. However, as we have shown, the writing of notes expressing the legal opinion of a lawyer constitutes a specific legal activity, which cannot lead to criminal liability. Likewise, informing the client about the identification and existence of certain risks related to possible alternative, unfavourable interpretations of the law, is confined to a usual legal and deontological legal advice activity. No professional lawyer will offer the client certain, absolute guarantees regarding the way the law will be interpreted, the factual situation deduced from the analysis of public institutions or the courts[26]. In practice, the

[25] http://www.rolii.ro/hotarari/5893360ae490098434002503.

[26] This principle was also ascertained regarding the activity of other legal professions: "… This aspect only confirms that the text in question is susceptible to different interpretations, its formulation allowing a wide margin of appreciation. Therefore, it cannot be held that the case prosecutor acted out of gross negligence, as long as the

client is always informed about the identification of possible divergent opinions and the Legal Audit Report submitted to the client has proven this.

All these aspects relate to the thorough preparation of exchanges of legal ideas and can never have criminal relevance. There are numerous normative texts that can offer different interpretations[27], and in terms of the text that is the object of the prosecutor's criticisms, even the highest court showed that there was a "*non-unitary practice of the courts in the matter of the Law no.10/2001* "(Court resolution no.338 / 11.03.2016 of the High Court of Cassation and Justice - p. 39). Moreover, the lack of a unitary practice in the matter of the Law no. 10/2001 appears without denial even from the rulings delivered in the appeals in the interest of the law that had as object different provisions of this law[28]. Likewise, it is obvious that the expression of legal opinions during various consultations, written documents, and procedural documents can under no circumstances lead to criminal liability. The jurisprudence confirmed these principles[29]. In relation to the legal documents presented by the lawyers within the law firm involved in the course of the retrocession proceedings, we recall the Romanian doctrine that held that *"the lawyer is not a body of investigation, cannot abolish a legal act vitiated by absolute nullities more than apparently, nor does he own an active procedural legitimation, the limits of the practice of his activity being strictly regulated by the Law no. 51/1995 and the By-laws of the lawyer profession."*[30]

formulation of the legal texts under discussion allows interpretations that lead to two diametrically opposed conclusions, both plausible. (…) "- Bucharest Court of Appeal, 8th Section of administrative and fiscal litigations, Civil Sentence no. 480 / 16.02.2016, published in the Bulletin of the Courts of Appeal no. 10/2016, p. 7, CH Beck Publishing House.

[27] "… the text in question is susceptible to different interpretations, its formulation offering a wide margin of appreciation. Therefore, it cannot be held that the case prosecutor acted with serious negligence, as long as the formulation of the legal texts under discussion allows interpretations that lead to two diametrically opposed conclusions, both plausible. "- Civil Sentence no. 60 / 16.02.2016 pronounced by the Bucharest Court of Appeal - cited in the Bulletin of the Courts of Appeal no. 10/2006, p. 7.

[28] Such as the Decision no. 27 of November 14, 2011 and Decision no. 1 of January 19, 2015.

[29] "The Prosecutor General further stated that the petitioner DM did not present arguments .....It is not possible to withhold the responsibility of the offender PN for the alleged offences. She exercised her profession in good faith, she assisted the party in all the procedural cycles, the acts and the facts deduced to the court were not considered illegal by any of the courts that have investigated the case. It is known that the profession of lawyer is free and independent, has autonomous organization and functioning. According to art. 39 para. 1 of Law no. 51/1995 for the organization and the practice of the profession of lawyer republished in the exercise of the profession, the lawyers are protected by law without being able to be assimilated to the public official or to another employee, and according to art. 39 para. 7 the lawyer does not answer criminally for the claims made orally or in writing, in an appropriate form, respecting the solemnity of the court hearing, before the courts, as long as the claims concern the defense in that case and are necessary to establish the truth. "- Ploiești Court of Appeal, Sentence no. 91 / 09.05.2011. - http://www.rolii.ro/hotarari/5899c2c3e4900990330019b0.

"*The petitioner argues that those reported and presented by the lawyer in these conclusions are unreal, but, as the prosecutor also noted, the lawyer can exercise his prerogatives and set out his own opinions in conclusions (written or oral) filed in a civil, criminal case, etc.. The lawyer may use the arguments he considers relevant and conclusive according to his legal logic to perform the defence, and these statements and defences cannot be considered as offenses of forgery in statements and use of forgery. Nor the respondents (defendants in the civil case) can be held criminally liable for the defence made by their chosen lawyer. In these conditions, it is only the court, where the case is pending, that will analyze and assess the merits of the defences made by the chosen lawyer of the (respondent) defendants* " - Ploiești Court of Appeal, Sentence no.74 / 04.04.2011 - http://www.rolii.ro/hotarari/5899c2c0e490099033001402.

[30] In this regard, see PhD Candidate Constantin Neacșu, Lawyers are asking – the exercise of a right ", justifying cause for the lawyer who draws up subsequently acts used for committing crimes, available on

In conclusion, considering that the activity of a lawyer, a member of a law firm, performed with other lawyers in compliance with the mandate granted to the firm based on the legal assistance contracts signed by clients and in full compliance with all legal, statutory and deontological rules regarding the fair exercise of the profession of lawyer, can be considered of a criminal nature only as a result of a personal interpretation that a judicial authority makes about the good faith of the lawyer means to ignore all the national and supranational protection instruments that guarantee the freedom and independence of the lawyer's profession. The lawyer must be guaranteed the freedom to perform defences according to his conviction, in relation to the elements that he considers to be in favour of his client and in relation to the chances that he has to have his pleadings accepted[31].

Conclusions

The exercise of the lawyer's profession, especially in cases in which significant financial, political, economic or even social interests are involved, is likely to generate a real vulnerability for any member of the Bar association. The potential risks, whatever their nature or the authority that causes them, can act in a discouraging or dissuasive way for the lawyer, which really affects the way the profession is practiced and the independence that should characterize the lawyer's activity. The identification of an effective set of guarantees and the possibility of having real protection from the authorities contributes significantly to removing these risks.

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[31] C. Ghigheci in N. Volonciu et al., *Criminal Procedure Code Commented*, 3rd edition, revised and added, Hamangiu Publishing House, 2017, p. 36.