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THE IMPLEMENTATION OF THE ECTHR'S CASE-LAW AND THE EXECUTION PROCEDURE AFTER PROTOCOL NO. 14*

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Keywords: *case-law, European Court of Human Rights, human rights*

I. Introduction

One of the goals of the Council of Europe, as stated in the Preamble of its Statute of London (5.5.1949) is to advance towards the idea of a democratic Europe, based on the principles of individual freedom, political freedom and the rule of law. Democracy and the commitment to respect the human rights, placing the importance of man before the importance of the State, is a condition to be accomplished by the states that should like to be members or are already members to the Council of Europe. In 1950 the European Convention of Human Rights (ECHR) is approved as an initial list of minimum essential fundamental rights, list that has been enhanced and completed later by different protocols. The body established to control the respect of the human rights and thus the compliance with the Convention is the European Court of Human Rights (ECtHR), which acquires exclusive jurisdiction to decide on the violations of the Covention since Protocol No. 11 was signed in 1998. Through its case-law the ECtHR not only grants protection against violations of the rights recognized in the Convention, but has contributed to expand the understanding of human rights and has promoted a legal harmonization within Europe by defining a common standard of human rights. In that sense, the ECtHR plays the role of a quasi-constitutional court for the protection of human rights[1]. But, once the decision is rendered, there is not a "European enforcement procedure".

When analyzing the impact of the European Court of Human Rights (ECtHR) upon the decisions and practice of domestic courts and institutions, a core issue is undoubtedly the implementation of the standards set out by the ECtHR and the execution of the Court's decisions in the Member States. The implementation of the case law of the ECtHR by the domestic courts, state institutions and in general the understanding of the Human Rights, requires that the Court's

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[1] E. GARCÍA DE ENTERRÍA, "Valeur de la jurisprudence de la Cour européenne des droits de l´homme en droit espagnol", in *Mélanges en l'honneur de Gérard J. Wiarda,* Köln 1988, p. 221.

decisions are enforced[2]. The ideal situation would be that immediately after the judgment has been rendered, the relevant state takes all the necessary individual or general measures in order to comply with the ECtHR's judgment. Unfortunately, this is not always the case. Although spontaneous execution of the judgments should be the rule, as the contracting states have assumed the obligation to abide by the Court's judgments – and this explains also why the Convention did not foresee any enforcement procedure or measures against the infringement of the Court's judgments –, experience has shown that a stronger supervising of the execution is needed. An overall assessment of the situation shows the excessive length of time taken to implement the Court's decisions. According to the working paper prepared by the Secretary in 2005, reflecting the situation of enforcements since 2000 when the Committee of Ministers (CM) commenced the procedure of supervising more intensely the execution of the Court's decisions, there were 2.597 decisions not executed, most of them stemming out of the systemic problems of the Italian judicial system.

The refusal and delays in the execution of the Court's judgments do not only constitute a violation of the rights of the individual in whose favour the judgment has been delivered, but the lack of execution of the Court's judgments undoubtedly does also have a very negative supra-individual impact as it affects the efficacy and credibility of the whole Convention system of protection of human rights[3]. The strengthening of the measures to achieve a more efficient execution procedure is essential to the functioning of the system, and if they are not implemented, the efficacy of whole system is endangered.

The aim of this paper is to give an overview on the execution of the Court's judgments and the supervising procedures adopted by the Committee of Ministers and the Court itself to overcome the present shortcomings of the European system of protection of human rights. We will also mention the provisions of Protocol 14 – which entered into force fully only a few months ago – specifically aimed to improve the execution of the Court's judgments and try to analyze the scope of these modifications which, even if they represent an improvement of the execution procedure, they might not be sufficient to face the unwillingness of certain states to abide by certain decisions of the Court.

II. The enforcement of ECtHR's judgments

1. The need to strengthen the execution procedure

Every legal system needs a reliable, independent and impartial judiciary to grant the rule of law. Moreover, for the system to work, the decisions of the courts have to be respected, and if the parties do not follow them willingly, an enforcement mechanism has to be in place. The right to access to court and the right to a fair trial, recognized in art. 6 ECHR encompasses the right to the execution of judgments. As the Court has held: the rights of art. 6 ECHR "would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party;" and "it would be inconceivable that Article 6 para. 1

[2] On the enforcement of the Court's decisions in Spain see C. RUIZ MIGUEL, *La ejecución de las sentencias del Tribunal Europeo de Derechos Humanos,* Madrid 1997; C. ESCOBAR HERNÁNDEZ, "Ejecución en España de las sentencias del TEDH", *REDI*, vol. XLII, 1990-2, pp. 547 et seq.; J.A. MORENILLA, RODRÍGUEZ, "La ejecución de las sentencias del TEDH", *Rev. Poder Judicial*, 15 (1990), pp. 79-102; J. BONET PÉREZ, "El problema de la efectividad interna de las sentencias del Tribunal Europeo de Derechos Humanos", in *Rev. Jca. Cat.* vol.92 (1993), pp. 58-59; D.J. LIÑÁN NOGUERAS, "Efectos de las sentencias del TEDH y Derecho español", *REDI* vol. XXXVII, 1985-2, pp. 355-376.

[3] Expressed in the report of the Group of Wise Persons, CM (2006) 203, of 15.11.2005, parag. 25.

(art. 6-1) should describe in detail procedural guarantees afforded to litigants -proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions"[4]. The same can be applied, saving the differences, to the ECtHR: if the judgments of the Court are not enforced by the States, the role of the sentences of the ECtHR would amount to recommendations. To the end, the whole European system of protection of human rights also relies on the enforcement of its decisions and the degree to which those decisions are integrated in the domestic legal order. The Committee of Ministers has also stated that respecting the judgments of the Court is one of the conditions of membership of the Council of Europe.

After a judgment condemning the respondent State has been rendered, the enforcement relies on the domestic rules. In other words, the efficacy of the decisions depends on the mechanisms provided in the domestic law and the intervention of the national authorities is needed to execute the decisions.

Aware of the shortcomings of the execution procedure, the Council of Europe back in the 90's started analyzing the situation and making a follow-up of the enforcement of the ECtHR's judgments by the States. The Parliamentary Assembly started paying growing attention to the execution of judgements and began putting strong pressure in some cases of non-execution. In September 2000, the Assembly adopted the Resolution 1226 (2000)[5]: it decided to keep an updated record of the execution of judgments, to hold regular debates on the issue and to adopt recommendations to the Committee of Ministers concerning the problems detected upon the record on the execution of certain judgments. In the same session, the Parliamentary Assembly also adopted the Recommendation 1477 (2000) to the Committee of Ministers on the execution of judgments of the Court[6]. Among other recommendations, the Assembly urged the Committee to strengthen de supervision procedure of the execution of judgments in order to ensure that effective measures were taken by the member States.

The same year 2000 the Committee of Ministers issued a recommendation to the member States with regard to the execution of judgments and precisely on the re-examination of cases and the setting aside of national judgments in order to comply with the Court's decisions. Since 2000 several recommendations and resolutions have been approved aimed on the effective implementation of the standards set out in the Convention, stating the obligation of the states to follow the decisions of the Court, and promoting the efficient execution of its judgements[7].

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[4] *Hornsby v. Greece*, 19.3.1997, para. 40. In the instant case, Mr. and Mrs. Hornsby, two English citizens resident en Rhodes, tried to open a private school there to teach English. The permit was denied by the administrative authorities. The case went up to the Supreme Administrative Court, which held that the permission had been unduly denied. However this judgment of the Supreme Administrative Court was not executed. They lodge complaint with the ECHR alleging a violation of art.6 ECHR. The respondent State, however affirmed that art. 6 ECHR did not grant the right to get a judicial decision enforced. This interpretation was completely rejected by the Court, stating that: "to construe Article 6 (art. 6) as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention (see, mutatis mutandis, the *Golder **v.** the United Kingdom* judgment of 21 February 1975, Series A no. 18, pp. 16-18, paras. 34-36). Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6 (art. 6)".

[5] Resolution 1226 (2000), Execution of judgments of the European Court of Human Rights, of 28 September 2000.

[6] Recommendation 1477 (2000) Execution of judgments of the European Court of Human Rights, of 28 September 2000. See also Recommendation 1546 (2002) of 22 January 2002, Implementation of decisions of the European Court of Human Rights. See also, Resolution 1268 (2002) on Implementation of decisions of the European Court of Human Rights of 22 January 2002; and Resolution of the Parliamentary Assembly 1411 (2004) of 23 November 2004, on the implementation of decisions of the ECtHR.

[7] The most relevant are:

– Recommendation(2000)2 / 19 January 2000 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights.

2. The content of the obligation to execute judgments of the ECtHR

Although art. 46 states that the Court's decisions have a binding effect[8] and art. 41[9] mentions specifically the right to just satisfaction when a violation of the Convention has been established, the system of the Convention does not provide for an enforcement procedure. The enforcement of the judgments relies on the domestic proceedings, and neither the Convention nor the Court does impose a specific ruling on the execution procedure and it is within the discretion of the states to choose the appropriate means of redress[10]. However, over the time the Court has slowly introduced more direct orders as to the measures to be taken to stop a violation or grant adequate redress. In fact, the Court's case law has evolved from ordering in a broad sense to grant restitution or just satisfaction to identify precise measures to be taken by the respondent state[11].

In the case of *Papamichalopoulos v. Greece*[12], of 31.10.1995, the Court clearly stated the obligation of the States to undertake individual measures for reparation:

– Recommendation (2002)13 of 18 December 2002 on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights.

– Recommendation (2004)5 of 12 May 2004 of the Committee of Ministers to member states on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights (adopted by the Committee of Ministers on 12 May 2004 at its 114th Session).

– Recommendation (2004)6 of 12 May 2004 of the Committee of Ministers to member states on the improvement of domestic remedies (adopted by the Committee of Ministers on 12 May 2004, at its 114th Session).

– Recommendation (2004)4 of 12 May 2004 of the Committee of Ministers to member states on the European Convention on Human Rights in university education and professional training (adopted by the Committee of Ministers on 12 May 2004, at its 114th Session).

– Recommendation (2008)2 of 6 February 2008, of the Committee of Ministers to member states on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights (adopted by the Committee of Ministers on 6 February 2008 at the 1017th meeting of the Ministers' Deputies).

– Recommendation (2010)3 of 24 February 2010 of the Committee of Ministers to member states on effective remedies for excessive length proceedings.

Additionally see the Resolutions: Res (2002) 58 of 18 December 2002 on the publication and dissemination of the case-law of the ECtHR; Res (2002) 59, of 18 December 2002 concerning the practice in respect of friendly settlements; Res (2004) 3 of 12 May 2004, on judgments revealing an underlying systemic problem.

[8] Art. 46 of the Convention: "The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution".

[9] Art. 41 of the Convention: "If the Court finds there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party".

[10] On the authority of the Court's decisions and the discussion of their binding effect has been discussed and written widely, see, among others, A. Z. DRZEMCZEWSKI, *European Human Rights Convention in Domestic Law. A comparative Study,* Oxford, 1983, pp. 260 et seq., although reflecting the situation until the 80's, where the Court did not order specific measures to be taken to grant just satisfaction; D. KILLIAN, *Die Bindungswirkung der Entscheidungen des Europäischen Gerichtshofs für Menschenrechte,* Frankfurt a.M., 1994; L.M. BUJOSA VADELL, *Las sentencias del Tribunal Europeo de Derechos Humanos y el ordenamiento español*, Madrid, 1997, pp.92-108; S. Haß, *Die Urteile des Europäischen G*erichtshofs für Menschenrechte, Frankfurt am Main, 2006, pp. 60 et seq.

[11] On the evoultion of the ECtHR case-law with regard to art. 41 of the Convention, see J.T. OSKIERSKI, *Schadenersatz im europäischen Recht. Eine vergleichende Untersuchung des Acquis Communautaire und der EMRK,* Baden-Baden 2010, pp. 145-153

[12] *Papamichalopoulos v. Greece* of 31.10.1995. The case deals with a property expropriation. The applicants, Greek nationals, were deprived of the use of their land by virtue of a Greek law passed after the dictatorship was established in 1967 which transferred the land to the Navy Fund. After democracy had been restored the authorities recognized the applicants as having title and ordered exchange of the land for other land of equal value. None of the land chosen by the authorities was able to be used for the proposed exchange and by the date of the Court's judgment no compensation had been awarded to the applicants. The applicants complained of a violation of Article 1 of Protocol No 1 to the Convention.

> "By Article 53 (currently 46.1) of the Convention the High Contracting Parties undertook to abide by the decision of the Court in any case to which they were parties; furthermore, Article 54 (currently 46.2) provides that the judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution. It follows that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach."

The Court concludes that taken together arts. 41 and 46 of the Convention, the just satisfaction cannot be solely the remedy for certain violations. After the Court has found a breach of the Convention it does not suffice that the State pays the sums awarded to the applicant party, but such a judgment imposes also the obligation to adopt not only individual measures, but also general measures in the domestic legal order to put an end to the violation, to grant full redress and if possible, to prevent similar violations[13]. In their decisions, the Court and the Committee of Ministers have paid increasing attention to the situation of the individual concerned, even requiring the states to change their legislation and to allow the reopening of proceedings.

In sum, a judgment that founds a breach entails three obligations for the contracting state: 1) individual measures; 2) just satisfaction; and 3) general measures. All three obligations are expressly stated also in rule 6 of the Rules adopted by the Committee of Ministers on the supervision of the execution of judgments[14].

1) *Individual measures*

To grant redress for the damaged applicant is essential, and this is not always achieved by the payment of a pecuniary sum for damages. The adequate redress might require the adoption of specific individual measures to put an end to the illicit situation or to put the damaged in the situation it was before the violation of his rights took place.

For instance, the striking out of an unjustified criminal conviction from the criminal records, the granting of a residence permit or the re-opening of impugned domestic proceedings. In fact in certain cases – most frequently when the breach of the Convention is originated by a domestic judicial decision or by procedural errors in the proceedings –, the only effective remedy is to adopt non-pecuniary individual measures.

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[13] *Scozzari and Giunta v. Italy* of 13.7.2000; *König v. Germany* of 10.3.1980. Further, on the right to reparation see F. CASTRO-RIAL GARONE, "El derecho de reparación del Convenio Europeo de Derechos Humanos", in *Cuadernos de Derecho Judicial. Jurisprudencia del Tribunal Europeo de Derechos Humanos II,* Madrid CGPJ, 1995, pp. 123-158. For a comparison on the right to full reparation in the European Union system and the European Human Rights Convention, see also J.T. OSKIERSKI, Baden-Baden 2010.

[14] Rules adopted by the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (for the application of Article 46, paragraph 2 of the European Convention on Human Rights), adopted on 10 May 2006 at the 964th meeting of the Ministers' deputies. Rule 6(2) says: "2. When supervising the execution of a judgment by the High Contracting Party concerned, pursuant to Article 46, paragraph 2, of the Convention, the Committee of Ministers shall examine:

a. whether any just satisfaction awarded by the Court has been paid, including as the case may be, default interest; and

b. if required, and taking into account the discretion of the High Contracting Party concerned to choose the means necessary to comply with the judgment, whether:

i. individual measures have been taken to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention;

ii. general measures have been adopted, preventing new violations similar to that or those found or putting an end to continuing violations.

This is particularly evident in cases where the procedural safeguards of the defendant have been violated but the applicant is continuing to serve the sentence[15]. The re-opening of the judicial proceedings in such cases might be the only possible way to stop the violation and accord full reparation for the damaged. In those cases it would not be acceptable to merely pay just satisfaction while the applicant is still kept in prison. Recognizing that the reopening of proceedings might be the most efficient way to achieve a full reparation or *restitutio in integrum*, in 2000 the Committee of Ministers approved the Recommendation R(2000)2, on re-examination or re-opening of certain cases at domestic level following judgments of the ECtHR, already mentioned above.

The re-opening of a proceeding, being sometimes absolutely necessary to grant redress, poses several problems. First, it is a measure that directly conflicts with one of the essential principles in adjudicating, which is the *res judicata* effect and the protection of the legal certainty which is linked to the aforementioned principle. Second, the setting aside of a final judgment may also affect the rights of third parties, which should also be respected. This is especially relevant in non-criminal proceedings, as in criminal proceedings the rights of the accused should always prevail. Despite the principle of legal certainty, the enforcement of the judgment of the ECtHR might require to sacrifice the principle of certainty in order to put an end to a breach of the Convention. And it is the duty of the member states to make the reopening of proceedings possible so that a new trial can take place. This is clearly stated in the Recommendation R(2000)2 of 19 January. Pursuant to its point II it is the obligation of the states to ensure that "there exist at national level adequate possibilities to re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention". The possibility to reopen the proceedings has to be especially granted if two conditions are met: the procedural violation "is of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of", and "that the injured party continues to suffer very serious negative consequences because of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or re-opening".

On the other hand, the procedure for reopening cases might also be effective to deal at a domestic level with repetitive cases and thus prevent many clone-cases to come to the ECtHR. All these reasons explain why the Court in its recent case-law shows a tendency to compel states to reopen proceedings in order to grant full reparation[16].

However, there are still some member states where the domestic legislation does not provide for the reopening of a criminal case with the aim of enforcing a judgment of the ECtHR.

This is the case, for example of Spain, where there is neither a ruling on the enforcing ECtHR's judgments nor specific measures to set aside a sentence to comply with them. This issue has been addressed and repeatedly criticized in the scientific literature. In the absence of specific rules to execute the judgments of the Court[17], the re-opening of a case could only be achieved by applying the general instruments provided in the rules of procedure to set a aside final judgment.

[15] This was the situation in the case *Hulki Günes v. Turkey* where the Committee of Ministers stated that not reopening the proceedings would amount to a "manifest breach of Article 46", see Interim Resolution CM/ResDH (2007)26 of 4.4.2007.

[16] For example, see *Claes and others v. Belgium*, of 2.6.2005, regarding a violation of the right to a tribunal established by the law; or *Lungoci v. Romania*, of 26.1.2006, relating a case of violation of the right to access to court. In this last case, the Court ordered the reopening of the proceedings, if this was the desire of the applicant, whilst awarding at the same time the payment of a certain sum for damages.

[17] On this topic see generally, S. RIPOLL CARULLA, *El sistema europeo de protección de los derechos humanos y el Derecho español,* Barcelona 2007, pp. 123-137; L. BUJOSA VADELL, op.cit., pp.57 y ss.; A. SALADO OSUNA, "Efectos y ejecución de las sentencias del Tribunal Europeo de Derechos Humanos en Derecho Español, in *Cuadernos de Derecho Judicial. Jurisprudencia del Tribunal Europeo de Derechos Humanos II,* Madrid CGPJ, 1995, pp. 189-223.

Focusing on the criminal procedure, these instruments under the Spanish domestic rules would be: the pardon – given by the government –; the annulment of the sentence; the review of the sentence; or the constitutional appeal before the Constitutional Court.

However none of these instruments is adequate for the purpose of the execution of a ECtHR's decision. In some cases, the pardon could possibly grant limited reparation of the damage, but still not a *restitutio in integrum*. And in cases where the violation found by the Court was a procedural error against the due process clause, the pardon would not allow a retrial of the case. The annulment of the judgment can only be requested within a short time limit and only for the specific reasons stated in the law.

Most frequently the attempts to reopen a case in order to comply with a ECtHR's decision have gone through the review of a penal sentence. Pursuant art. 954.4 of the Spanish Code of Criminal Procedure (CCP) review shall be granted if after the sentence has become final, new facts or documents previously unknown that proof the innocence of the convicted defendant appear. Only if a judgment of the ECtHR is considered a "new fact that proofs the innocence", this instrument would be suitable to reopen the case and comply with the Court's judgment. However the Spanish Supreme Court (Criminal Chamber) has not followed this interpretation of art. 954.4 CCP: in its view a new judgment is not a "new fact" that proofs a factual mistake of an already final decision, and therefore the grounds for review do not apply[18].

On the other hand, the Spanish Constitutional Court initially admitted the possibility of reopening a domestic case by way of constitutional appeal to grant the reparation ordered by the ECtHR, nevertheless this position was quickly abandoned. In its judgment 245/1991 of 16.12.1991 (case *Barberá, Messegué y Jabardo*)[19], it made a broad interpretation of art. 10.2 of the Spanish Constitution (SC)[20] declaring that the ECtHR's finding of a violation of art. 6 of the Convention amounted to a violation of art.24 SC[21], and therefore the constitutional appeal should grant protection to the convicted defendant and on this ground annul the conviction judgment[22]. Despite

[18] The Spanish Supreme Court in its sentence of 27.1.2000 refused the review of a final criminal judgment in the case *Castillo Algar*, stating that the ECtHR's decision only proofed that there had been a violation of art. 6.1 of the Convention, but it does not proof that the national sentence is wrong in the merits, nor does it proof that there are reasons to believe that the defendant is innocent. The same reasoning can be found in the Supreme Court's decision (Auto) of 27.7.2000, in the case *Riera Blume,* confirming that a final judgment cannot be reopened by way of review in order to execute a judgment of the ECtHR.

[19] On this case and its execution see C. RUIZ MIGUEL, "Las sentencias del TEDH: su ejecución desde la perspectiva del derecho constitucional comparado y español, pp. 836-845, available in: http://www.bibliojuridica.org/libros/1/113/37.pdf (visited 12.10.2010); A. SORIA JIMÉNEZ, "La problemática ejecución de las sentencias del TEDH. Análisis de la STC 245/1991 (Asunto Barberá, Messegué y Jabardo), *REDC*, 36 (1996), pp. 313-356.

[20] Art. 10.2 SC says: "The principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain."

[21] Article 24 SC: "1. Every person has the right to obtain the effective protection of the Judges and the Courts in the exercise of his or her legitimate rights and interests, and in no case may he go undefended.

2. Likewise, all persons have the right of access to the ordinary judge predetermined by law; to the defence and assistance of a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defence; to not make self-incriminating statements; to not declare themselves guilty; and to be presumed innocent.

The law shall determine the cases in which, for reasons of family relationship or professional secrecy, it shall not be compulsory to make statements regarding alleged criminal offences."

[22] The Constitutional Court holds also that, without setting aside the criminal conviction, a just reparation cannot be given to the applicant pursuant art. 41 of the Convention. All these reasons led the Spanish Constitutional Court to admit the constitutional procedure as a way to enforce the ECtHR' decision to reopen de criminal proceedings.

this initial stand, the Spanish Constitutional Court has thereinafter limited its own capacity to annul sentences in order to comply with the ECtHR's decisions. Only if following conditions are met, the Constitutional Court would declare the re-opening of the case, and thus fill the gap of the Spanish legislation: 1) if the right found to be violated by the ECtHR is also recognized in the Spanish Constitution and accords protection through the constitutional appeal; 2) if it is a criminal case; 3) if the effects of the sentence found in violation with the Convention are still lasting; and 4) if the freedom of the individual is affected.

Through this case-law, the Spanish Constitutional seeks to give reparation to the individual damaged in those cases where to stop the violation requires the reopening of a criminal case. It might not be the best solution, but at least, whilst the legislation provides a specific procedure for the execution of the ECtHR judgments, it may serve to put an end to the violation of the Convention.

2) *Just satisfaction*

If possible, the just satisfaction must amount to a "*restitutio in integrum*" to the damaged. In other words, only where the reparation of the damage and the *restitutio in integrum* are impossible, it should be substituted by a pecuniary compensation.

To grant just satisfaction the Court may order the payment of a certain sum to the applicant for pecuniary as well as non-pecuniary damages[23]. Although the Court has frequently held that the finding of a violation in itself constitutes just satisfaction for the applicant, there is a well established practice of granting pecuniary damages as just satisfaction. In such cases the Court sets a time-limit for payment by the respondent state. It is the function of the Committee of Ministers to control if the payment has been done within the established time or it has been delayed. Default interests may be demanded if the Court ordered so in the sentence. However there is a tendency within the Court to prefer that the just satisfaction is awarded on the domestic level[24]. With regard to the payment of pecuniary compensation the Court has kept the tendency of reinforcing the principle of subsidiarity embodied in the Convention. Pursuant to this principle, as a rule, the decision of the amount to be awarded as a compensation should be referred to the respondent state[25]. The Court would establish in the judgment a time-limit within the just satisfaction should be granted and lay down certain criteria that could serve as reference by the state when calculating the sum to be paid to the applicant.

3) *General Measures: to offer mechanisms and safeguards to avoid the repetition of the violation or prevent similar violations.*

This may require the adoption of general measures by the member states as, for example, legislative amendments as well as transitional measures in order to prevent new violations of the Convention while pending the required reform[26].

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[23] On the calculation of the damages, the currency, interests etc., see generally, G. DANNEMANN, *Schadenersatz bei Verletzung der Europäischen menschenrechtskonvention,* Köln 1994, pp. 203 et seq.; S. Haß, op.cit., pp. 104-111.

[24] See E. LAMBERT ABDELGAWAD, The execution of judgments of the European Court of Human Rights, Strasbourg, 2008, pp. 14-17.

[25] See, for example the case *Paudicio v. Italy*, 24.5.2007, where the Court refused to award a pecuniary sum for damages because the applicant could claim those damages before the civil courts of his country.

[26] See *Vermeire v. Belgium* of 29.11.1991. On precise legislative modifications launched by a judgment of the ECtHR, see L. BUJOSA VADELL, op. cit., p. 143-144. Some of the examples of general measures cited by the Committee of Ministers are: legislative or regulatory amendments, changes of case law or administrative practice or publication of the Court's judgment in the language of the respondent state and its dissemination to the authorities concerned.

Many legal changes have taken place in the member states as a consequence of the findings made by the ECtHR in its judgments, especially related to procedural safeguards and the judicial organization, but also in the field of criminal law, family law or administrative law. If a rule is not in line with the Convention, it does not make any difference what type of rule it is, regulatory, statutory or even constitutional. The Court does not make any distinction with regard to the category of the rule that has to be amended. In practice this has led to some constitutional reforms and in general to a certain legal harmonization within the member states, especially in the field of procedural safeguards.

The case *Broniowski v. Poland*[27] is the first pilot judgement aimed in improving the problem of repetitive cases. In essence it consists of a case that decides on the claim of the applicant, but orders the respondent state to adopt concrete general measures in order to grant full reparation to all the other individuals affected by the same problem, identified as a systemic problem[28]. After *Broniowski,* the Court has issued more judgments on pilot cases, where a systemic dysfunction was found to be underlying[29].

However the change of legislation may take a long time, therefore pending the reform of domestic law, a change of the case-law or a re-interpretation of the existing rules might be sufficient to prevent further violations. The problem in these cases is to assess in how far the reversal of precedent will be enough to avoid future violations and if the new interpretation is really followed by all the courts in future cases. In such cases, the supervisory function of the Committee of Ministers turns out to be of outmost importance, in order to check if, after the change of case law no further violations of the Convention have been found.

III. The supervision of the execution by the Committee of Ministers[30]

Under the ECHR it fell to the Committee of Ministers from the out-set to supervise the execution of the Court's judgments, functions that were strengthened after Protocol No.11 entered

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https://wcd.coe.int/ViewDoc.jsp?id=999329&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

[27] The case *Broniowski v. Poland of 22 June 2004* deals with the case of Mr Broniowski, whose grandmother was deprived of her property, a house, as a consequence of the new territorial divisions of Poland after the second World War. But many other people were also obliged to abandon their land. From 1944 to 1953 around 1,240,000 people were "repatriated" under the provisions of the republican agreements. Poland undertook to compensate all those who had been "repatriated" from the "territories beyond the Bug River" and had had to abandon their properties. Since 1946, Polish law has entitled those repatriated in such circumstances to compensation in kind; they have been entitled to buy land from the State and have the value of the abandoned property offset against the fee for the so-called "perpetual use" of this land or against the price of the compensatory property or land. The State Treasury, however has been unable to fulfil its obligation to meet the compensation claims. This caused the lodging of Mr. Broniowski's claim before the ECtHR —suit that ended with a friendly settlement –, in which the Court issued a pilot judgement and ordered the state to adopt those measures to grant full reparation to the people who had suffered the same violation of their rights as Mr. Broniowski.

[28] The Court held that the violation of the applicant's Convention right —deprivation of property without compensation – originated in a widespread, systemic problem as a consequence of which a whole class of people had been adversely affected. The judgment had made clear that general measures at national level were called for in execution of the judgment and that those measures had to take into account the many people affected and remedy the systemic defect underlying the Court's finding of a violation. On the development of the "pilot judgment procedure", see C. PARASKEVA, *The Relationship Between Domestic Implementation of the European Convention on Human rights and the Ongoing Reforms of the European Court of Human Rights (With a Case Study on Cyprus and Turkey)*, Antwerp, 2010, pp. 98 et seq.

[29] See, for example, *Hutten-Czapska v. Poland*, of 22.2.2005; or *Sejdovic v. Italy*, of 10.11.2004.

[30] See generally the 3rd Annual Report (2009) of the Committee of Ministers "Supervision of the execution of judgments of the European Court of Human Rights" and the detailed statistics included in it.

into force and abolished the judicial functions of the Committee of Ministers. The main provision governing the Committee of Ministers' supervision of the execution of the Court's judgments is art. 46 ECHR[31]. The scope of the execution measures required is defined in each case on the conclusions of the Court in its judgment, considered in the light of the ECtHR's case-law and the Committee of Ministers practice, and relevant information about the domestic situation[32]. The Rules adopted by the Committee of Ministers for the execution supervision, as amended in 2006, govern the supervisory procedure. Pursuant these rules new judgments establishing violations —or accepting friendly settlements— are inscribed on the Committee of Minister's agenda once they become final. In performing its supervisory functions the CM is assisted by the Department for the Execution of Judgments, responsible for preparing the case files and contacting the relevant national authorities. In the examination in the periodical meetings, priority is given to those judgments that reveal an underlying systemic problem. The examination of the execution, which is based basically on the information submitted by the respondent state, comes to the annotated agenda under different sections. Those cases which appear to be complex, are proposed for debate, the others are normally examined without debate. Decisions are adopted in written within fifteen days; however some decisions regarding the cases debated might be adopted in the same meeting. After confirming that the state has taken all the necessary measures to execute the sentence —or the friendly settlement—, the CM adopts a resolution.

If the execution is being neglected, the CM may adopt one of the following types of resolution: 1) resolution stating the non-execution, that measures have not been adopted and inviting the state to abide by the judgment; 2) resolution noting certain progress and encourage the state to adopt specific measures in the future, which is the most frequent kind of resolution; and 3) resolution stating the refusal to execute the judgment and calling upon the authorities of the member states to take such action as they deem appropriate to this end. In these cases where there is proved that the state is reluctant to abide by the Court's judgment, the resolution may threaten with the adoption of more serious measures, and threat with the exclusion of the Council of Europe. Clearly this kind of resolutions and strong threats are used only exceptionally in cases where all other mechanisms of pressure have failed and the state persists in the non-execution[33]. The interim resolutions are a way of making information public in order to put pressure on the reluctant state and to speed up the adoption of the required measures.

1. The modifications introduced by Protocol 14 relating to the execution of the Court's decisions

Since the initial stages of the discussions that led to the approval of Protocol 14, the improvement and acceleration of the execution of judgments was identified as a priority goal. This is logic, since one of the central objectives of the reform was, not only to reduce the heavy workload of the ECtHR, but to improve the implementation of the Convention system. By reinforcing the effectiveness of the execution, not only the individual violation will cease and the

[31] See above under footnote N. 9.

[32] See the 3rd Annual Report (2009) of the Committee of Ministers "Supervision of the execution of judgments of the European Court of Human Rights", p.19.

[33] This was the situation in the case of *Loizidou v. Turkey*, of 28.11.1996, where the CM in its Interim resolution of 26.6.2001 for the first time threatened with the exclusion. Theoretically this measure could be possible under art. 8 of the Statute of the Council of Europe if the refusal to execute the Court's judgments is interpreted as a violation of art. 3 of the Statute. In practice however the threat of exclusion is implausible and obviously not an effective measure. However precisely in the case of *Loizidou v. Turkey* following the interim resolution of the CM, the European Union reacted by introducing in its partnership agreement with Turkey the requirement to comply with the ECtHR's judgments. See E. LAMBERT ABDELGAWAD, op.cit., p. 41. The case also gave rise to action by the Parliamentary Assembly and the Secretary General of the Council of Europe.

adequate redress to the injured granted. The effectiveness of the enforcement procedures has a broader consequence upon the whole Convention system: it contributes to reduce the violations in general and thus to reduce the number of applications filed with the ECtHR. And in fact, in every legal system, the more rapid and effective the enforcement of judges is, the deterrence effect of violating the law increases. If the execution of the Court's decision requires general measures to be adopted in order to overcome a systemic problem, the more rapidly these measures are taken, the fewer the number of repetitive violations, and thus the fewer the number of identical applications to the Court[34]. This is why specifically the Preliminary report states that in order to maintain the effectiveness of the system, it is necessary to improve the supervision of the execution of judgments.

With regard to the execution of the Court's decisions Protocol No. 14 accords two new competences to the Committee of Ministers: the right to request the Court for an interpretation of a judgment in order to facilitate its execution; and the right to bring infringement proceedings[35]. As set forth in the explanatory report of Protocol 14, there were no intermediate measures between the light pressure of interim resolutions and the hard measure of art.8. And precisely, because of the hard consequences of art.8 it cannot be used to compel with the execution of the Court's decisions. Three new paragraphs have been added to art. 46 ECHR by way of art.16 of Protocol 14 to overcome the existing shortcomings in the execution of judgments:

"46.3 If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee:

4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.

5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case".

The amendment introduced in Art.46.3 tries to deal with the problem of lack of precision or clarity in the Court's judgments which may create difficulties regarding the quick and efficient execution.

Paragraphs 4 and 5 of art. 46 regulate the new infringement proceedings by which the Court may support the tasks of the CM with an additional judgment deciding whether the state has taken the measures required by the judgment or not. The entry into force of Protocol No.14 has been awaited with much interest and hope by the Committee of Ministers. But still, the introduction of an infringement proceeding has been not unanimously supported as it raises important legal and

[34] See W. VANDENHOLE, "Execution of Judgments", in *Protocol No. 14 and the Reform of the European Court of Human Rights* (P. Lemmens and W. Vandenhole eds.), Antwerpen 2005, p. 114.

[35] Art. 15 of Protocol 14 also introduces a new wording for art. 39 of the Convention which formally provides for supervision by the CM of the terms of the friendly settlement. Although this does not represent a practical innovation as the decisions of the Court endorsing friendly settlements took the form of judgments, the CM already supervised its execution under art. 46.2. Still, from now on, friendly settlements will not have to be judgments, and even taken the form of a Court's decision, they will be supervised by the CM. See W. VANDENHOLE, "Execution of Judgments", op.cit., p 117.

practical questions[36]. In fact, during the drafting process of Protocol No. 14 the Court opposed to their adoption, so it is not easy to say what can be in practice expected from this new instrument. In my opinion its objective is mainly preventive: by merely giving the possibility that the findings of the CM might be supported by a judgment by the Court, may increase the pressure on the state to fulfil its obligations. It can be expected that it only will be used in very exceptional serious cases of repeated violation of the obligation to execute a judgment. In any case, it is doubtful that in a case of persistent failure of a state to abide by the Court's judgments, when the concerned state is really unwilling to take the required measures, the decision of the Court stating such non-execution would change much[37].

IV. Conclusions

Systematic refusal by a state to enforce a judgment of the ECtHR is uncommon; the majority of states try to act in compliance with the Convention and the case-law of the ECtHR. However, there are some serious cases of persistent refusal of certain states to take the necessary measures to comply with the Court's ruling. Such cases have to be addressed with effective measures in order to maintain the credibility of the system. More frequently the enforcement suffers unacceptable delays, specifically when the execution of the judgment and the avoidance of another violation require introducing important legislative reforms in a legal system. Political reasons and budgetary reasons may also hamper the swift execution of the Court's judgments. The modifications introduced by Protocol 14, entered into force in the 1st June 2010, try among other issues, to introduce additional tools to strengthen the execution of the Court's judgments and achieve its compliance. It is too early to make an assessment of the improvements that might be achieved by them and to evaluate how the new art. 46 ECHR will be able to speed up and make more effective the procedure of execution of judgments. Much effort and hope has also been put in the measures adopted relating the so called "pilot judgments" to prevent clone cases and the consequent applications, but only time will show if they turned out to be effective or not.

The measures taken to strengthen the supervision of the enforcement by the Committee of Ministers might not be as effective as a system of daily fines to compel the states to abide by the Court's decisions[38]. Nevertheless, taken together, many steps have been taken in the last decade towards a more effective execution of the Court's procedure. The establishment of a record of non executed decisions; the publication of the information provided and the evaluations made related to the execution of judgments; the existence of an effective supervisory procedure, with a clear working method within the meetings of the CM; the efforts made by the CM to evaluate the

[36] For example, E. LAMBERT ABDELGAWAD, op.cit., p.58 mentions following questions with regard to the infringement proceedings introduced in art. 46.4 and .5 of the Convention: "What would be the procedural rights of the respondent state in these proceedings? What would be the basis for making a finding of violation? Would this not raise questions of interpretation of the initial judgment? Would this not confuse the existing clear distinction between the political/executive branch of the Council of Europe and its judicial branch?"

[37] In the same sense, W. VANDENHOLE, "Execution of Judgments", op.cit., p.120: « the lack of any accompanying sanctions, makes it unlikely that much additional pressure will result from these infringement procedures. See also, L. CAFLISH, "La mise en ouvre des arrêts de la Cour: nouvelles tendances", in *La nouvelle procédure devant la Cour européenne des droits de l'homme après le Protocole nº 14*, (F. Salerno dir.), p. 174.

[38] In its Resolution 1411 (2004), already quoted, the Parliamentary Assembly regrets that the system of daily fines has not been adopted: "16. The Assembly welcomed the possibility of the Committee of Ministers asking the Court to clarify its decisions in cases of disputes concerning the requested measures, as established by Protocol No. 14, but regrets that its proposal to establish a system of *astreintes* (daily fines for a delay in the performance of a legal obligation) has been rejected.

developments made at national level and the possible existence of structural problems; the issuing and publication of interim resolutions by the CM; the publication of an annual report on the supervision of the execution of judgments; the pressure exerted through press releases; the involvement of the Parliamentary Assembly in the monitoring of the execution procedure and the pressure put to the national authorities through the state delegates; the dissemination and translation of the Court's judgments; the cooperation with the states concerned in identifying the systemic or structural problems; the assistance given by the Council of Europe in the drafting of laws and improving the domestic remedies; and the adoption of best practices that would help to prevent future violations of the Convention, are all together measures that contribute to improve the execution of the Court's judgment and the effectiveness of the Convention's system. Still, education and training of all the legal players —and the civil society— in the culture of human rights is of the outmost relevance for the implementation of the human rights standards within the member states of the Council of Europe, particularly in young democracies and transitional countries: the understanding of human rights culture and its significance is the best mechanism to improve the execution of the Court's judgments and, obviously, the implementation of the Convention as a whole. And in this field there is still much to be done.

FORENSIC ISSUES IN FAMILY ABANDON OFFENCE INVESTIGATION

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Abstract

Family is community foundation, thus contributing to a very well-structured society able to ensure a healthy and safe environment in which any family can promote its members welfare, without excluding support that herself deserves from its own society. Considering the crucial role of family in any society, being inextricably linked to its function or dysfunction, due to time it felt the need to strengthen family relationships through a better legislation in the area, which has been concretized in incriminating acts likely to affect the social relations that protect it. With this respect, we particularly pay attention to determining the nature of crime and assessing its effects, for an appropriate qualification of the act as a criminal act or just as a contravention. It is also required a content decryption of incrimination and also a clarification of all existing and questioned controversies in practice and in juridical literature. Forensic methodology is based on researching normative ways of committing this crime, with a special focus on factual arrangements in aggravated forms, although there is no legal provision in this sense. The investigation search engine highlights criminal field lines, reflecting the whole family picture in which the perpetrator is conducted, taking into account his psychological attitude of his actions.

Keywords: *family relationships, welfare, abandon, offence, investigation*

Introduction

The Romanian lawmaker has given particular importance to the regulating of family relations, most of the times instituting through legal norms of imperative nature, both the personal and patrimonial duties that exist between spouses and the relations between parents and children. Without stating that one of these duties is more important than another, the study before you focuses on the fulfilling of these duties, necessary for the family members to coexist in a quiet environment or, in any case, bearing the costs of supporting them financially. As the family is the basis of society, an analysis of the relations within it is especially important owing to the fact that preserving the family can only be an advantage for any society.

From this point of view, the law must find the necessary solutions in order that the behaviour of a family member does not harm the integrity of the others, in case one fails to do one's lawful duties adequately. According to Romanian law, the act of abandonment is a non-violent offence, and investigating it is much more complex, difficult and needing more attention.

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This is the reason why this study analyses the subject of the offence, the forms of culpability, the ill will (decisive in this case), as well as a series of controversial elements concerning the subject in question. This paper presents an analysis of penal doctrine, with the mention that this offence is not widely found in this particular doctrine. This is in fact the reason why this subject is analysed in the present interdisciplinary study.

1. The Need to Institute a Well Structured Legal Framework to Ensure the Efficient Protection of Family Values

Many international documents[39] have brought the family into discussion, the family as "a natural and fundamental element of society" with the right to the protection of the state and society[40]. A particularly important problem is that of respecting family life in domestic law. In this sense, it has also been stated that a certain respect owed to the individual must be guaranteed, because he holds certain prerogatives, which permit him to demand respect for his private and family life[41]. By the same token, "The family is the natural and fundamental group unit of society and is entitled to protection by society and the state", and the fact that "Every minor child has the right to the measures of protection required by his condition as a minor on the part of the family, society and the state"[42] is also mentioned. Taking all these things into consideration, it becomes clear that the family has always been and will continue to be the key unit of all human societies[43], and any disintegration of it will lead in itself to a destruction of social life.

For our part, we consider that there should be a consciousness in every one of us. This could help us understand each other better, with all our needs and therefore understand our limits as well as our duties, in full accordance with society's requirements. It has been said[44], for good reason that the determinant factors, which limits man's capacity to suppress his violent impulses, are the economic and social conditions. In this sense, it was intended to find out how far the authorities should be involved when situations arise that could harm these social values, and further attention must be paid to the study of this phenomenon, in order to identify its causes and the methods to prevent them.

The family is considered of crucial social value in our society and all actions that could harm it represent a serious social peril for our protected values, a fact that requires the distinct regulation of these offences, within a well structured legal system. The legal ground for incrimination is that abandonment goes against the most basic feeling of solidarity and mutual aid that all family members owe one another, and thus this act is punished by the penal law[45].

2. Interpreting the Legal Text. Identifying the Factual Causation

A series of discussions have appeared in specialized literature[46] that aim to clarify the factual causation that could arise, depending on the different concrete data of every cause

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[39] R. Şerbănescu et al., *Principalele instrumente internationale privind drepturile omului la care România este parte*, Vol. 1 *Instrumente internaţionale*, 8th edition revised (Bucureşti: Ed. I.R.D.O., 2006).

[40] F. Sudre, *Drept european şi internaţional al drepturilor omului* (translated) (Iaşi: Ed. Polirom, 2006), 312.

[41] C. Bîrsan, *Convenţia europeană a drepturilor omului. Comentariu pe articole*, vol. 1, *Drepturi şi libertăţi*, (Bucureşti: Ed. All Beck, 2005), 593.

[42] Articles 17, 19 from the *American Convention on Human Rights* (ACHR), on the 22rd November 1969.

[43] Al. Boroi, *Infracţiuni contra unor relaţii de convieţuire socială* (Bucureşti: Ed. All Beck, 1998), 18.

[44] D. Voinea and V. Lăpăduşi, *Consideraţii privind faptele comise cu violenţă de-a lungul timpului*, published in the volume The International Symposium for Criminal Inverstigation of Crimes of Violence, organized by the Romanian Criminology Association and the General Inspectorate of the Romanian Police (the 4th-5th Nov. 2008), (Bucharest, 2009), 9.

[45] V. Dongoroz et al., *Explicaţii teoretice ale codului penal al RSR*, vol. IV (Bucureşti: Ed. Academiei RSR, 1972), 508.

[46] V. Dongoroz et al., *Explicaţii teoretice ale Codului penal român*, vol. III, Partea Specială (Bucureşti: Editura Academiei Române, 1971), 573; V. Dongoroz et al., *Explicaţiile teoretice ale Codului penal român*, vol. IV, second edition (Bucureşti: Editura All Beck, 2003), 512.

separately, aspects that should be carefully considered in individualizing the punishment. By this token, even thought the law's text stipulates that the act of abandonment has only simple modalities, there are more aggravated forms of it, such as, in the situation in which among the people left helpless there are more children, a situation in which the person indebted to sustain them is ill or the situation in which the perpetrator keeps changing his residence for the clear purpose of evading his legal obligations. Thus, the legal provisions are to be carefully interpreted, as the police have the task of carefully enforcing these in concrete, actual situations, which are mostly aggravated forms of abandonment, the more so as when it concerns an either way offence[47], wherein each of the ways in which the offence was committed is separately considered as it can characterize the offence[48].

Taking into consideration the multitude of factual ways in which an offence of abandonment can be committed, we are going to try to outline the particulars of investigating it, and we mention that is by this very investigation we obtain many of the indications referring to the causes and effects of such actions.

3. The Main Issues – the Object of Probation – That Must Be Clarified During the Criminal Investigation. Legally Classifying the Act of Abandonment – Ofence or Minor Offence?

In order to sort out the main issues referring to the illegal activity, it is paramount to establish whether the action consisted in driving away, abandoning or leaving without help people who are entitled to support, or consisted in not fulfilling in ill will the obligation of support as stipulated by law, or in the action of not paying in ill will, for two months, of the support money as decided on by the court of justice. We must also mention that, in all the aforementioned cases, there is a need to establish, *in concreto,* who are the persons entitled to support and which is the fact that confers them this right.

Speaking for our part, we consider it crucially necessary to clarify all problems connected to the perpetration of the offence of abandonment, since[49] many cases investigated by the authorities were based on unfounded complaints, made with the sole purpose of bringing the person that had left the marital home back to the family, by pressuring that person, although they fulfilled their obligation of support or those abandoned were not the victims of physical and emotional abuse or they are not even in need of support. The ill will, with which the perpetrator acts is the very basis of the incrimination for this offence and the existence of the offence is registered even when the perpetrator remains passive, by leaving the entitled party without the necessary support.

It is relevant to this that the criminal investigation to ascertain whether the abandoned party was or was not exposed to physical or emotional abuse, whether such abuse had been inflicted on them of is about to and what did it consist in. We also add that the need to establish the consequences of this action is great, in order to classify it as either the offence of abandonment or as a simple offence[50], by throwing out of the family home of the spouse, the children and any other person entitled to support. Being exposed to physical or mental abuse is a condition *sine-qua-non* to document abandonment, meaning that if the person entitled to alimony was not exposed to such

[47] V. Dobrinoiu and N. Conea, *Drept penal.Partea specială. Teorie şi practică juridică* (Bucureşti: Ed. Lumina Lex, 2002), 474.

[48] T. Vasilescu et al., *Codul penal al RSR, comentat şi asnotat – Pareta Specială*, vol. II (Bucureşti: Editura Ştiinţifică şi Enciclopedică, 1977), 380.

[49] I. Cora et al., *Curs de criminalistică*, vol. III, *Metodică criminalistică*, Partea a III-a, Ministerul de Interne (Bucureşti, 1977), 21.

[50] Law nr. 61 from the 27th of October 1991 to punish the acts of offending the rules of social life, order and public peace, published in the Official Monitor nr. 196 (from 27/Sep/1991, art. 2. letter ş)

abuse, then the action does not constitute an offence[51]. Therefore, there is no offence of abandonment in the situation, in which the mother abandons the family home, and the underage children remain under the care of the employed father and other two children, who are over 18 years old and have their en incomes[52]. When using the phrase "exposing to physical and mental abuse", it must be understood in the sense of maximum probability of the abuse being suffered or to suggest without a doubt that it could be so, and therefore it is not absolutely necessary for it to have already happened[53]. Had the lawmaker the actual suffering of the abuse, he would then have used the phrase "producing physical and mental abuse".

Therefore, it is absolutely necessary that all offences of the law have as a consequence the injury of a person and physical and emotional suffering, *per a contrario*, the offence of abandonment is not documented if the particular actions and inactions did not expose the party entitled to alimony to physical and emotional suffering[54].

Regarding the second legal variant stipulated by the text of the law for committing this offence, namely when the act consists in *not fulfilling the obligation to pay alimony*, any criminal investigation must establish to what extent the entitled party is in need of support, given that this situation represents the condition *sine-qua-non* for documenting the offence of abandonment done in this way[55]. It is not required that the party entitled to alimony be exposed to physical and emotional abuse, but only that the perpetrator commit the offence in ill will[56]. There is therefore ill will if the perpetrator, although capable of work, systematically refuses to become employed in order to obtain the necessary income to fulfill his family duties[57]. Thus, the meaning of *obligation to support*, the which the text of the second variant of constituting a material argument makes reference to, is not that of a sum of money in the form of a pension, rather material and moral support given by a person as obliged by the law[58]. Thus, the obligation to support must be understood as providing what is necessary in daily life – food, clothing, medicine – without which family life and the relations between its members is inconceivable[59].

Considering the nature of this obligation to support, it can appear directly in the law, as in the situation of parents responsible for feeding and clothing their children, but it can be instituted by a judicial decision, as in the situation of a person obliged to a pay a lifelong pension for injuries inflicted[60].

The lawmaker conditions the existence of the right to receive the entitled party, who is in a state of need, to receive alimony. This implies that the parent that does not give the necessary

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[51] T.M.B., sectia a II-a, dec. pen. nr. 862/1989 (unpubliched).

[52] Court of Braşov, dec. 772/1973, in *R.R.D*. nr. 9 (1974): 66.

[53] T. Vasiliu et al., *Codul penal comentat şi adnotat*, vol. II, (Bucureşti: Ed. Ştiinţifică şi Enciclopedică, 1977), 382.

[54] T.J. Braşov, dec, 172 from 1993, in "*Dreptul*" nr. 9/1994, p.68; TS, sect. pen., dec. Nr. 1699 from 1979 in *R.R.D*. nr. 4 (1980): 63; J. SatuMare, stp.23 from 1982, in *R.R.D*. nr. 2 (1983): 56.

[55] I. Cora et al., *Curs de criminalistică*, vol. III, *Metodică criminalistică*, partea a III-a, Ministerul de Interne (Bucureşti, 1977), 18.

[56] A. Boroi, *Infracţiuni contra unor relaţii de convieţuire socială* (Bucureşti: Ed. All Beck, 1988), 32.

[57] A. Verdeş, „Elementul subiectiv la infracţiunea de abandon de familie", *Revista Română de Drept* nr. 9 (1969): 72.

[58] Art. 101 Family Code "parents are obliged to care of the child. They are obliged to raise the child, to take care of his health and physical development, education, his professional training, according to his qualities, conforming with the state's goals, to make him useful to the community."

[59] T. Vasiliu et al., *Codul penal al R.S.R., comentat şi adnotat* – Partea specială, vol. II (Bucureşti: Editura Ştiinţifică şi Enciclopedică, 1977), 381; V. Dobrinoiu and N Cornea, *Drept penal. Partea specială*, vol. II (Bucureşti: Ed. Lumina Lex, 2002), 476.

[60] V. Dongoroz et al., *Explicaţii teoretice ale codului penal român*, vol. IV, second edition (Bucureşti: Ed. All Beck, 2003), 476.

means of living to his child that has his own income, is not in contravention of the penal law. And just the same, it does not constitute abandonment by not fulfilling the obligations of the mother to pay a monthly sum to the minor entrusted to a children's home[61].

It is not required that the person entitled to receive alimony be exposed to physical and moral suffering, but only that the perpetrator commit the offence with ill will[62].

In the case of spouses, the obligation to support must be related to their obligation to bear the wedding costs, and the common property of the spouses contributes to this obligation. Therefore, on the basis of the provisions of the Family Code both spouses have the mutual obligation to contribute to the familial obligations equally, and we are of the opinion[63] that it constitutes an act of abandonment if the parent who although has his own income, he uses them in a personal interest and unjustifiably refuses to use it to fulfill his familial duties.

Considering the nature of this obligation to support, it can appear directly in the law, as in the situation of parents responsible for feeding and clothing their children, but it can be instituted by a judicial decision, as in the situation of a person obliged to a pay a lifelong pension for harm inflicted[64].

In reference to the last legal variant, consisting in the not payment of alimony in ill will, a criminal investigation must ascertain whether there is a court order that declares this, the total sum of the alimony decided by the court, whether the perpetrator fulfilled his obligations and in what way, as well as whether the term imposed by the law of definitive remaining of the court's decision was met, or when was the alimony payment cut off. The lawmaker does not condition the existence of the offence committed in this way out of the need to constrainedly execute the court order, thorough which the alimony was set[65]. The term of two months for the alimony payment comes into effect on the date the court order concerning the obligation to support became definite or it is executed alternatively. In the situation were the court order was begun being executed, but eventually the payments stopped, a new term of two months commences since the date when the last payment was made[66]. Therefore, a partial payment is considered a non payment, because it is not the amount set by the court[67].

Considering the provisions[68] of the Family Code, which stipulate that an essential condition for a person to benefit from alimony is for him to be in a state of need, the minor is assumed to be in need, *per a contrario*, every time he earns his own income that permit him to afford a decent living, he cannot be considered in need of support. Therefore, even though the minor does have his own income, yet not enough to afford the necessary conditions to grow up, an education or a professional training, then the nonpayment of the alimony make the obliged party responsible in the eyes of the law[69]. Therefore, even if the minor has found work and has his own income, it does

[61] The Timiş County Court. pen. dec. Nr. 584/1976, in *R.R.D*. nr. 11 (1976): 53.

[62] A. Boroi, *Infracţiuni contra unor relaţii de convieţuire socială* (Bucurşti: Ed. All Beck, 1988), 32.

[63] A. Boroi, *Infracţiuni contra unor relaţii de convieţuire socială* (Bucurşti: Ed. All Beck, 1988), 32.

[64] V. Dongoroz et al., *Explicaţii teoretice ale codului penal român*, vol. IV, second edition (Bucureşti: Ed. All Beck, 2003), 510.

[65] To see O. A. Stoica, *Drept penal, partea specială* (Bucureşti: Ed. Didactică şi Pedagogică, 1976), 403.

As regards this point of view, in case there is a court order whereby the obligation to support is established and it is forcibly executed, then the obligation to pay falls on the third garnished party, which exonerates the obliged party of any obligation, in case of non payment of alimony after the act of garnishment came into effect. Therefore, in this case there is no offence of abandonment.

[66] V. Dongoroz et al., *Explicaţii teoretice ale codului penal român*, vol. IV, second edition (Bucureşti: Ed. All Beck, 2003), 511. Gh. Nistoreanu et al., *Drept penal, partea specială*, vol I (Bucureşti, 1994), 558; O. Loghin and A. Filipaş, *Drept penal, partea specială* (Bucureşti: Casa de editură şi presă "ansa S.R.L.", 1992), 298.

[67] V. Dongoroz et al., *Explicaţii teoretice ale codului penal român*, vol. IV, second edition, (Bucureşti: Ed. All Beck, 2003), 511; V. Brutaru, „Abandon de familie", *Revista de drept penal*, Anul XIV, Nr.2 (aprilie-iunie) (Bucureşti, 2007): 94-104.

[68] Article 86 from the Family Code.

[69] T.S., sec. pen., decizia nr 221/1973 (nepublicată); Trib. Supr, secţ. pen. dec. nr. 221/1973, în *C.D*. (1973): 53.

not mean that the parent is automatically released from paying the alimony he owed. So the minor that earns his own income is still eligible for support as this is not sufficient to ensure the necessities for a good development, education and professional training. That is why, not paying the alimony in ill will, within the conditions of article 305 paragraph, letter c), of the Criminal Code, constitutes in this case the offence of abandonment[70].

Therefore, in this last case it is most important to establish the presence of ill will, meaning that any criminal investigation must prove the fact that the person obliged to support, has voluntarily avoided fulfilling this obligation, despite the fact that he had the opportunity to pay the alimony as ordered by the court. In order to explain this matter, it must be ascertained which were the material capabilities of the offender and how much, in proportion to them, could he pay the alimony. *Per a contrario*, if the evidence proves that the offender did not have any objective reasons not to fulfill his obligations, it will be considered that he acted in ill will and with intent[71].

Time is an important factor in establishing whether there was ill will, and therefore that the offence exists. Clarifying the issue of the time when the offence was committed or when no action was taken by the offender, is important in establishing his guilt.

As we have previously mentioned, special attention must be paid[72] to how the perpetrator acted, in order to attribute the way he acted to ill will, taking into account the times he frequently changed jobs, that he did not notify his place of employment about his obligation to support, quitting his residence to avoid being forced to pay. Ill will also exists in the situation where the offender, although able to work, systematically refuses to become employed to obtain the income necessary to fulfill his obligations to his family[73], as in the case when a parent does not pay in ill will the alimony to support the minor for two months, even if the minor has his own income, though they are insufficient to ensure the necessary conditions to develop, study and gain a professional training[74], and even if the minor resides with the parents of the plaintiff who take care of him[75].

As a defining note concerning each one of these legal variants, it must be ascertained how much the person entitled to receive support is deprived of the means to live (a home, food, clothing, medicine) or of the moral support (lack of help and assistance), taking the form of physical or emotional suffering. When the entitled party is exposed to the danger of ending up in such a situation, it has the same consequences that justify incriminating the act of abandonment. For example, when the injured party faces eviction from his own house or his financial resources are almost gone, remaining without financial support[76].

4. Controversies Concerning the Unity and Plurality of the Offence in Matters of Abandonment

The situation in which a parent cannot pay alimony to several minor children is a particular problem. Opinions expressed in specialized literature are divided, on one side we have the unity of the offence[77], and on the other we have the plurality of the offence[78].

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[70] Trib. Supr., secţ. pen., dec. Nr 2211-1973, în *C.D.* (1973): 443.

[71] V. Dongoroz et al., *Explicaţii teoretice ale codului penal român*, vol. III, Partea specială, (Bucureşti: Editura Academiei Române, 1971), 572.

[72] I. Cora et al., *Curs de criminalistică*, vol. III, *Metodică criminalistică*, partea a III-a, Ministerul de Interne (Bucureşti, 1977), 19.

[73] T.S. sec. Pen. Dec. 2612 din 1972, *C.D.*: 380; T.J. Timiş, dec. pen. 1din 1970, *RRD* nr. 10 (1970): 163, Aristorel Verdeş, „Elementul subiectiv în infracţiunea de abandon de familie", *RRD* nr. 9 (1969): 72.

[74] T.S. sec. pen. Dec. 2211 din 1973, *C.D.* : 433.

[75] T.S. Timiş, dec. pen. 709 din 1973, *RRD* nr. 12 (1973): 157.

[76] V. Dongoroz et al., *Explicaţii teoretice ale codului penal român*, vol. IV, ed. a II-a (Bucureşti: Editura All Beck, 2003), 510.

[77] G. Antoniu and C. Bulai, *Practică judiciară penală*, vol. III, Partea specială, (Bucureşti: Ed. Academiei Române, 1992), 269; În acelaşi sens şi majoritatea soluţiilor din practica judiciară: T.S. secţ. pen., dec. nr. 1369 din

Practically[79], it has been decided that many offences can be classified as abandonment under the variant stipulated by article 305 letter c) of the Criminal Code, and materialized in the form of the offences regulated by article 33 of the Criminal Code, in the situation in which the alimony was not paid in ill will for more than two months, as decided by a single court order or even by orders given at separate dates and concerning more than one minor. The decisions made by the court are based on the offender's not paying the alimony, which had several results, thus proving the plurality of the offence committed as stipulated by art. 305 letter c) of the Criminal Code.

The problem raised in this respect was the possibility of committing this offence in both the ways stipulated by article 33 of the Criminal Code, as materialized as real or ideal offences. The resolutions given on this matter did not emphasize the number of judicial orders that obliged the offender to financially support the minor, as there could be only one judicial order or even more, but it did take into account the results of the sole inaction of the perpetrator.

Therefore[80], when the perpetrator is obliged by the court after only one ruling to support two or more children, the offence of abandonment takes on the ideal form of this offence, and it is the same in the case if there are two judicial rulings given at the same time. However, the case is different when the judicial rulings, whereby the obligation to support more minors was issued, were given at distinct times; this represents the real form of the offence as stipulated by article 305 letter c).

For our part, we consider that there is only one offence, even though there are more judicial ruling in favour of several persons; we sustain this opinion by arguing that to establish the obligation to support, the court must taking into consideration its personal character[81], in the sense that this obligation must be clearly established, in relation to the needs of every minor, and connected to the debtor or creditor. Therefore, the number of minors entitled to alimony determines the number of legal relations that appear, as every minor is a passive subject of the offence, and there are as many obligations to support financially as there are underage children. Thus, there are several results, because by the nonpayment in ill will each minor suffers material damages as the determined by the different needs and interests of every one.

Relating to this matter, we state that the rulings given in practice[82] by the Supreme Court consider that, in the case the alimony was not paid for several persons, there is only one offence of abandonment, even though there are several judicial rulings in favour of several persons.

5. A Controversial Matter Concerning the Progressive Form of the Offence of abandonment and the Moment When Its Consequences are Considered

The need to establish the progressiveness of the offence of abandonment consists in the consideration the legal effects that is done in relation to the date when the offence was committed

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1982 în *R.R.D*. nr. 6 (1983): 61; Tj. Prahova, dec. pen. 639 din 1982, în *R.R.D*. nr. 2 (1983): 65; Tj. Suceava, dec. pen. nr. 673 din 1982, în *R.R.D*. nr. 12 (1983): 102.

[78] Gh. Vizitiu, "*Considerații privind încadrarea juridică în materia abandonului de familie prevăzută de art. 305 lit.c) C. pen"*, în *R.R.D*. nr. 2 (1979): 24, notă la soluțiile J. Suceava, stp. 92 din 1976, 486 din 1975, 1378 din 1975.

[79] In this sense a series of criminal sentences for abandonment were considered, materialized as the nonpayment of the alimony for a periode longer than two consecutive months, such as criminal sentence nr. 186 from the 14th of April 1995, sentence nr. 92 from the 22nd of January 1996, sentence nr. 1378 from the 14th of November 1995 (Suceava County), unpublished.

[80] A. Boroi, *Infractiuni contra unor relatii de convietuire sociala* (Bucuresti: Ed. ALL Beck, 1998), 40.

[81] Article 94 from the Family Code stipulates that alimony is the personal right of the minor and it is owed to him in relation to his state of need and the means of the person that pays it.

[82] C.S.J., sec. pen, dec. nr. 269/1993 (nepublicata); T.S. sec. pen., dec. nr. 1369 din 1982, in *Revista Romana de Drept*, nr. 6 (1983): 61.

and not relation to the date when it comes to an end[83]. On one side[84], it has been asserted that all legal consequences of the of a continuous offense must happen while taking into account the date of the action or inaction specific to the main offence. On the other side[85], it is considered that these consequences must be connected to the precise date of the most serious outcome and in relation to it the offence is legally classified and the sanctions applied.

With regards to the committing of the offence in the fist way, this does not pose a problem of classification as a temporary offence, that is done once the entitled party is abandoned, thrown out of the house or left without support.

As opposed to the first way the offence is committed, which is characterized as a temporary offence, the act of abandonment done with no ill will has a continuous quality, imposed by the nature of the obligation to support financially, a fact that implies the possibility of committing it during a period of time, in which the entitled person is in a state of need. As it is a continuous offence, it is over when the illegal action stops.

The act of abandonment, consisting in the not paying of the alimony when the offender becomes passive, after two months have passed, without any payment being made during this time, or when a verdict is passed for this offence[86]. Therefore, the offence reaches its end when it is stopped, either by fulfilling the obligation, either by sentencing the offender. In the case where the offender's salary is retained for not paying the alimony in ill will, the offence ends when this comes into effect. Thus, if amnesty is reached, the misdeed is considered as pardoned[87]. This solution has only partly been accepted, and it has been somewhat criticized[88], because if after his salary is withheld, the offender keeps cashing it without taking out the amount for the alimony and with no concern for who is guilty for this, the offence is not completely ended, because it is no the official act of withholding the salary that is decisive, but the end of the illegal conduct of the offender.

Some are of the opinion[89], to which we do not ascribe, that the offence of abandonment, consisting in not paying the alimony, is a momentary offence that ends once the two month deadline is reached.

Taking into account the two moments when the act of abandonment is assumed to have been committed according to the second legal way as stipulated by the law, we consider, along with other authors[90], that it is a continuous offence, because the illegal activity is not over when the two

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[83] Maria Zolyneak, „Unele aspecte ale aplicării legii penale în timp", *Analele tiinţifice ale Universităţii "Al.I. Cuza"* (Iaşi, 1875): 81 şi urm.; Maria Zolyneak, *Drept penal, partea generală*, vol. II (Iaşi: Ed. Fundaţiei "Chemarea", 1993), 457.

[84] C-tin Butiuc, *Infracţiunea complexă* (Bucureşti: Ed. All. Beck, 1999), 12; Al. Boroi and Gh. Nistoreanu, *Drept penal. Partea generală*, ed. a IV-a revizuită conform noului Cod Penal, (Bucureşti: Ed. All. Beck, 2006), 233; Al Boroi, *Drept penal. Partea generală* (Bucureşti: Ed. CH. Beck, 2006), 175; Gh. Alecu, *Drept penal. Partea generală,* curs universitar, ediţia a II a revizuită şi adăugită (Constanţa: Ed. Europolis, 2007), 313.

[85] C. Bulai, *Drept penal. Partea generală*, vol. I (Bucureşti: Casa de Editură şi presă Şansa SRL, 1992), 219; M. A. Hotca, *Drept penal. Partea generală* (Bucureşti: Ed. CH. Beck, 2007), 474.

[86] D. Pavel, "Infractiuni contra familiei din noul Cod penal", in *RRD* nr. 10 (1969): 59.

[87] T.S., sec. pen. dec. nr. 1824 din 1988, in *RRD* nr. 9-12, (1989): 143.

[88] G. Antoniu and C-tin Bulai, *Practica judiciara penala, Partea speciala*, vol. III (Bucuresti: Ed. Academiei Romane, 1992), 270.

[89] I. Oancea, *Abandonul de familie*, in V. Dongoroz „*Explicatii teoretice ale Codului penal roman, Partea speciala*, vol. IV (Bucuresti: Ed. Academiei Romane, 1972), 573.

[90] O. A. Stoica, *Drept penal, partea speciala* (Bucuresti: Ed. Didactica si pedagogica, 1976), 403; T. Vasiliu, D. Pavel, G. Antoniu, ST. Daneş, G. Daranga, D. Lucinescu, V. Papadopol, V. Rămureanu, *Codul penal al R.S.R. comentat si adnotat adnotat – Partea speciala*, vol. II (Bucuresti: Editura Stintifica si Enciclopedica, 1977), 381 ; D. Pavel, "Infracţiuni contra familiei în noul Cod penal", în *R.R.D.* nr. 10 (1969): 59 ; I.C.Vurdea, "O problemă de aplicare a amnistiei în infracţiunea de abandon de familie", în *R.R.D.* nr. 12 (1970): 19.

month deadline is reached, without the payment of the alimony being made in this time, but continues until the payment is made and the offender sentenced, the moment when the offence comes to an end; after this moment, if the alimony is again not paid, it constitutes a new offence of abandonment, committed as stipulated by article 305 letter c) of the Criminal Code.

Conclusions

The criminal inquest into the offence of abandonment has a series of particularities in order to give evidence of it, as it is of great importance to settle all the problems that arise from the diversity of ways in which this offence can be committed. Considering the aggravating forms of this offence, this study focuses on its consequences, both the material and psychologically traumatic ones, as these aspects are especially relevant to the process of legally classifying this action as an offence or an infraction. The more so as the inquest requires close attention be paid when there are underage children exposed to moral and physical pain. From a psychological point of view, the inquest should prove the existence of ill will on the perpetrator's part, also considering in this case the time factor.

The study is an answer to the controversies existing in the practice of law, but also in the literature, by clarifying the problems concerning the unity and plurality of the act of abandonment, in classifying this offence as momentary or continuous, as well as establishing the moment when it was committed in relation to the consequences of the illegal activities.

Because of the numerous existing controversies surrounding this offence, we consider that it appears as a result of the shortcomings of our criminal legislation. For this reason we should constantly adapt our legislation to the reality we live in, the more this reality tests us in the most diverse circumstances. It is necessary to identify all sensitive issues which pose a problem in practice and to solve them with suitable laws.

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ABOUT SOME NEW MODALITIES OF INDIVIDUALIZATION OF THE PUNISHMENTS ACCORDING WITH THE NEW PENAL CODE (LAW NO. 286/2009)

Versavia BRUTARU[*]

Abstract

The individualization of the penal sanctions is a complex operation, and it is realized in three different phases: The phase of incrimination of the penal offences, the phase of precise determination of the punishment and the phase of the execution of the applied punishment. Starting from this reality, the theory of the penal law makes a distinction between the three phases of individualization that correspond with the three mention ones: the legal individualization, the juridical individualization and the administrative individualization. Within each phases, the penal law sanctions are individualized by the activity of particular authorities, within certain limits and with certain methods.The main goal of the study is to present the new modalities of the punishment individualization, adopted by assuming responsibility by the Romanian Government (Law nr. 286/2009). The study also presents other modalities of individualization of the punishment that exist in German Penal legislation, French Penal Code, Portuguese Penal Code, Model Penal Code, used as example by the Romanian Ministry of Justice, the initiator of the project. Along the study, there are presented some of the issues that could appear within the normal application of these new institutions.

Keywords: *individualization, personalization, punishment, postponing the pronouncing of the punishment, renunciation to pronounce a punishment, defendant's obligations*

Introduction

The new institutions that regulate the individualization of the punishment introduced by the Law nr. 286/2009 (the New Penal Code) raise some issues, both theoretical and practical.

The study widely analyzes each institution and the issues that will rise, in our opinion, during the application in practice of these institutions.

The Romanian legislator, having as inspiration other legislations, that contain these kinds of institutions, had introduced many provisions, sometimes excessively clearly stated, and guided towards a very dense regulations (for example: the institution of postponing the applying of the punishment is excessively regulated by the Romanian legislator in comparison with the legislations that have been a model of inspiration).

As we will show within the study, our concern is the necessity of these new institutions, regarding the fact of existence the institution of conditional suspension of the punishment, a similar regulation with the one analyzed by us, and also the acquittal, provision that already exist in the Criminal procedure Code.

In addition, we wanted to give a pertinent explanation of the expressions and the way the legislator expresses some terms, many times not very clear or precise, from the juridical point of

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view. We take here into consideration the differentiations that have to be made between the provided punishment, the applied punishment, and the executed punishment.

The study also contains explanations regarding the evolution of the individualization of the punishment, the way that it is reflected on the future behavior of the offender, and the effects that could result from a correct individualization of the punishment, regarding a certain type of individual.

1. The issue of the individualization of the criminal punishment, including the rules or legal criteria of the proceedings in this case, in order to obtain an efficient influence on the human behavior, presumes the observing those individualization rules that contributes, one way or the other, to an ordered development of the process, through which is getting to an adequate adaptation of the criminal punishment, regarding the offences and the offender's person, and by that, toward an exercising a benefic influence on the behavior of the offender.

In the doctrine[91] was underlined that the individualization of the punishment is that operation through which the criminal punishment is properly adequate and proportional for each offender, regarding the level of guilt and the real necessities for a just and useful repressive reaction.

After the introduction of the educative measures and safety measures within the Penal code, the expression "individualization of the punishment" wasn't considered proper anymore, in relation with a feasible possibility and realization meanings for a repressive reaction; thus, it was proposed that the expression "individualization of the punishment" to be widened[92]. The expression proposed by the Romanian professor Vintilă Dongoroz was the "adaptation of the penal sanctions", regarding their finality: reunifying the juridical order and the social defense. Before professor Dongoroz, Ion Tanoviceanu suggested the use of the expression "proportionalization of the punishment", considering that the expression of the "individualization" is improper. In his vision, the proportionalization of the punishment has to be made in such a way as to correspond to the seriousness of the committed deed and, in the same time, to be able to ensure the juridical order, to satisfy the disagreement sentiment of the collectivity and to protect the society; also, regarding the proportionalization of the penal sanction it would have to take into account the finality and the function of each repressive measure, and also, the offender's person[93]. The Italian doctrine is using the expression "*la commisurazione della pena*"[94] and Raymond Saleilles[95], who elaborated the well known monograph on the individualization of the punishment, asserted that the punishment must be adjustable to the nature of the one who is going to be applied to; if the offender doesn't have a completely perverted nature, the punishment mustn't contribute to pervert that nature; the punishment must help him to raise up; if the offender is beyond recuperation, morally, the punishment must be very severe, to benefit the society, representing a radical measure of protection an prevention.

Taking as model of inspiration the French Penal Code, the Romanian doctrine[96] suggested using the expression "personalization of the sanction", instead of individualization, in order to express not only the idea of adaptation of the punishment in relation with the individuality of each offender, but also, the adhesion of the offender to the punishment. The personalization of the penal

[91] Vintilă Dongoroz, *Drept penal (Tratat),* Bucureşti, 1939, p. 670

[92] Ibidem, p. 670-671

[93] I. Tanoviceanu, *Tratat de drept şi procedură penală*, comentat de Vintilă Dongoroz şi colab., ed. a II-a, vol. III, Tipografia Curierul Judiciar, Bucureşti, 1926, p. 99-105

[94] G. Fiandaca, E. Musco, *Diritto penale. Parte generale*, Bologna, 2001, p. 725

[95] Raymond Saleilles, L'individualisation de la peine, 2-me edition, Paris, 1909, p. 47

[96] O. Brezeanu, *De la individualizarea la personalizarea sancţiunilor*, în R.D.P. nr. 1/2000, p. 49

sanction would mean, in other authors[97] opinion, a shifting, a reorientation of the legal criteria of the sanction, from the seriousness of the offence to the person of the delinquent, the person deprived from his liberty but not his dignity.

Using the expression "personalization of the sanction" would be more correct if we take into account that the moral person, that can be sanctioned now, the adaptation of the sanction would never be individualized (regarding the moral person) because the moral person is not an individual.

The individualization of the penal sanctions is a complex operation, and it is realized in three different phases: The phase of incrimination of the penal offences, the phase of precise determination of the punishment and the phase of the execution of the applied punishment. Starting from this reality, the theory of the penal law makes a distinction between the three phases of individualization that correspond with the three mention ones: the legal individualization, the juridical individualization and the administrative individualization. Within each phases, the penal law sanctions are individualized by the activity of particular authorities, within certain limits and with certain methods. Regarding the legal force, the phases of individualization have a certain hierarchy: the legal individualization is mandatory and it is imposed to the juridical and administrative individualization; the juridical individualization is imposed to the administrative individualization. So, the legal force of the different types of individualization are structured by their mandatory force; first is the legal one, followed by the juridical one (that couldn't exist without a legal individualization), and the administrative individualization (that couldn't exist without a juridical individualization). The administrative individualization is realized by the administrative authorities, when the punishment (restrictive of liberty) is applied, by adapting the execution regime to each individual and his behavior in the imprisonment place. This type of adaptation is regulated presently by the Law no. 275/2006, regarding the execution of the punishments and the measures disposed by the juridical authorities, during the criminal trial, and it's a matter of execution Penal law branch.

2. The new recently adopted Penal Code, by assuming the Government responsibility (Law no. 286/2009) has an objective the creation of a coherent legislative frame in criminal law, avoiding the useless superposition of the in force existent regulations in the actual Penal Code and special laws that contain incriminations; simplifying the substantial regulations in order to maintain an Unitarian and a prompt application in the activity of the juridical authorities; assuring the respect of the exigencies imposed by the fundamental principles of the penal law assigned by the Constitution and the Treaties and Pacts regarding to fundamental human rights, signed by Romania.; the transposition of the regulations adopted by the European Union within our national legal frame; and, the most important, the harmonization of the Romanian material penal law with the other member states penal system, as a premises of juridical cooperation in criminal law matter, based on mutual trust and recognition,

Under the influence of this last orientation, the new Penal Code provides two new penal institutions, regarding the individualization of the punishment: renouncing to apply the punishment and postponing applying the punishment (Chapter V, section III and IV).

3. Renouncing to apply the punishment represent the right of the Court to definitively renounce to establish and apply a punishment for a guilty person, regarding the offence, the offender's character and his previous and after the offence behavior. By applying an advertisement, the Court avoid the harm that would be done in case of pronouncing a punishment; in this case, would do more harm than good to the offender's reeducation and social reintegration. This institution

[97] Th. Papatheodoru, *De l'individualisation des peines et la personalisation de sanctions*, în Revue internationale de criminologie et de police technique, nr. 1/1993, p. 109

is also regulated in German penal law (section 60 Penal Code), Portuguese Penal Code (article 60 and 74), French Penal Code (article 132-58), Switzerland Penal Code (article 53 and 54).

The conditions of renouncing to apply a punishment are provided by the article 80:

a) the seriousness of the offence must be very reduced, regarding the nature and the extension of the consequences produced, the used means, the way and circumstances the offence was committed, the motive and the purpose had in mind by the offender;

b) the Court must consider that regarding the offender person, his behavior previously committing the offence, the efforts made to diminishing or eliminate the consequences of the offence, and also his real possibility to straighten up, an application of a punishment would be inopportune and could determine unwanted consequences regarding the offender person;

At letter a), the legislator considered both the objective conditions of the offence, but also some subjective conditions, such as the motive and the purpose pursued by the offender in committing the offence; the legal provision is granting the judge the possibility to easily decide, taking into consideration the two categories of conditions, if it is the case or not to apply this provision.

At letter b) the legislator was guided more toward some subjective conditions that have bearing on the offender personality giving the judge the possibility to evaluate better the nature and the quantum of the applied punishment, taking into consideration the mentioned conditions.

Within the cited section two, there are shown the conditions that must be respected in case the Court decides to renounce pronouncing the punishment. So, the Court cannot pronounce the renunciation to the punishment if:

a) the offender was previously convicted for an offence, excepting the cases provided by the article 42, letter a) and b) or for which (offence) had intervened the rehabilitation or the period provided for rehabilitation was fulfilled;

b) the offender beneficiated of this kind of individualization of the punishment within the last two years, previously the date of committing the actual judged offence;

c) the offender had been avoiding criminal prosecution or the criminal trial, or tried to shatter learning the truth or identifying and criminal prosecution of the participants;

d) the punishment provided by the law for the committed offence is the imprisonment larger than 5 years.

In case of concurrence offences, the renouncing to apply a punishment may be pronounced for each concurrent offence, if there are fulfilled the provisions stipulated by the law.

The Court, in applying this disposition, that has the character of an advertisement, stipulates within the grounds that sustained the judgment, what determined the Court to renounce to apply a punishment and compel the offender attention regarding his future behavior and the consequences if he will commit another offence. In case of concurrent offences, a single advertisement is applied. The effects of the renunciation to apply a punishment consists in non existing, in the future, for the offender, of any interdictions, incapacities or decays from any legal rights that could result from the offence committed. The offender is not absolved of the civil obligations provided by the judgment and neither from the execution of the safety measures (measures that have another juridical nature than the punishment; they are pronounced in order to eliminate a dangerous situation, produced by the offender).

4. Another modality of individualization of the punishment provided by the new Penal Code is postponing the application of the punishment (section 4).

The Court could pronounce the postponing and establish a probation period if there are fulfilled the following conditions:

a) the established punishment, including the case of concurrence offences, is a fine or, at most, two years of imprisonment;

b) the offender was never previously convicted to imprisonment, excepting the situations provided by the article 42, letter a) and b), or for the offence committed intervened the rehabilitation, or the period established for rehabilitation was fulfilled;

c) the offender asked to do work for the benefit of society, unpaid;

d) regarding the offender person, his previous behavior committing the offence, the efforts made by the offender to diminish or eliminate the consequences of the offence, and also his possibilities to straighten up himself, the Court appreciate that the immediately apply a punishment is not necessary; it is however necessary for the offender to have a supervised conduit for a determined period of time;

5. We observe the presence of both objective criteria (those referring to the offence, punishment established by the Court), but also subjective criteria, more numerous in this case[98]. The subjective criteria are more numerous in this case of individualization because the person of the offender is to be supervised on a period of time (two years), period within he must respect the supervise measures and to execute the obligations imposed by the Court. We mention that the Probation Service is in charge with the offender supervision within the period of 2 years (period that starts from the date of the conviction became definitively). The Probation service has the obligation to seizure the Court in both cases that the offender is not respecting the obligations imposed, or, in contrary, he is respecting the obligations imposed by the Court. The obligations that must be respected may suffer modifications during the execution. So, if during the probation period have intervened new grounds that justify either the imposing of new obligations, increasing them, or otherwise diminishing the existent execution conditions, the Court will pronounce the modification of the obligations accordingly, in order to assure the supervised person increased chances of rehabilitation. Therefore, the Court, when is ascertain of this facts, is obligated to modify the offender's obligations. The compulsoriness of the Court is the result of using the expression "**the Court decides**" instead of "**the Court may decide**", by the legislator.

The Court decides the discontinuing of the execution of some of the imposed obligations, when it's appreciated that the maintaining of these obligations is no longer necessary.

Also the Court may revoke the postponing of the application of the punishment if during the probation period, the offender, with bad faith, doesn't respect the supervision measures or he is not

[98] a) to present himself to the Probation Service, at certain fixated dates;

b) to receive visits of the probation officer assigned to his supervision;

c) to announce, beforehand, if he is changing the place of living, any travel that exceeds five days and his return;

d) to communicate changing the working place;

e) to communicate information and documents that permit the control of his meaning of existence;

2) The Court may impose to the offender to execute one or more of the following obligations:

a) to take a training course, a professional qualification course;

b) to work unpaid, for the benefit of the community, on a period of 30 to 60 days, respecting the conditions imposed by the Court, except the case his health doesn't permit that. The number of daily work hours are established by the Law of punishment execution;

c) to attend to one ore more social reintegration programs, developed by the probation service, or organized in collaboration with the communitarian institutions;

d) to submit himself to the control measures, treatment or health care;

e) not to communicate with the victim or its member family, with the persons who participated with him in committing the offence, or other persons named by the Court, or not to be in the proximity of those persons;

f) not to be in certain places or at certain sports, cultural meetings, or other public meetings, established by the Court;

g) not to drive certain vehicles established by the Court;

h) not to detain nor use or wear any kind of weapons;

i) not to leave the territory of Romania without the approve of the Court;

j) not to occupy or exercise the profession, activity or the position that he used in committing the offence;

executing the imposed obligations. In this case, the Court revokes the measure and decides the application and execution of the punishment. In case when, until the expiring the period of supervision, the offender is not fulfilling totally the civil obligations established in the judgment, the Court revokes the postponing and decides the application and execution of the punishment, excepting the case when the offender proves that he had no possibility to fulfill those obligations. If after the postponing the application of the punishment, the supervised person commits a new offence, intentionally or with praeter-intention, discovered by the authorities within the probation period, and for which a Court pronounced a conviction, even after the expiration of the probation period, the Court revokes the postponing and decides the execution of the punishment. The applied punishment as a result of the revoking the postponing and the punishment applied for the new offence is calculated in accordance with the dispositions regarding the concurrent offences. If the subsequent offence is committed without intention, the Court **may maintain** the disposition regarding the postponing of the application of the punishment.

In this case we observe that the Court has the **faculty** and not the **obligation** to maintain the disposition of postponing the application of the punishment. The Court can repeal the postponing of the punishment if during the probation period it is discovered that the person under probation had committed a new offence, until the judgment that disposed the postponing remained definitive, even after the expiration of this period, offence punished by prison, the postponing is repealed. In this case it will be applicable the dispositions regarding the concurrent offences, recurrence offences or intermediary plurality. In case of concurrent offences the Court can dispose the postponing of the application of the resulted punishments, if there are fulfilled the conditions provided by the article 83 of Penal Code. If the postponing will be pronounced, the probation period is calculated from the date that the previously judgment remained definitive.

The effects of the postponing of the applying of the judgment are: the punishment is not applied and the offender is not submitted to any interdiction, declined from any civil rights or incapacities that could be a result of committing the offence, with the condition that the person doesn't commit again another offence until the expiration of the probation period, or it wasn't pronounced the revoking of the postponing or it wasn't discovered a cause for annulations. The postponing of the application of the punishment doesn't produce any effects on the safety measures and the civil obligations established by the judgment. We observe that the effects of this type of individualization are identical with the ones provided by the article 80-82 (renouncing to the punishment) with the mention that, speaking about a postponing the punishment is no longer applied.

6. In relation with the issue mentioned above, there are more problems that must be debated. The jurisprudence, so far, never pointed out the necessity of introducing of these new institutions. We ask ourselves, what real problems would resolve these dispositions. The acquittal (discharging the trial) could resolve the problem of renunciation to pronounce a punishment. The provisions regarding the institution of the postponing the application of the punishment, could be satisfied by the institution of the conditioned suspension of the execution of the punishment. It is true, that are different expressions; regarding the postponing we use the expression "**established punishment**" and regarding to conditioned suspension we use "**applied punishment**", but, the question that is rising is when the individualization of the punishment is happening? When it is established, when it is applied or when it is executed? In the case of postponing, the legislator uses the expression "applied", but for the Court to be able to renounce or postpone the application of the punishment, it is necessary that the punishment to be already established. Maybe the following expression was more accurate "**postponing the execution of the punishment**" because the punishment is already established, in conformity with the provisions pointed out at letter a) where the expression used is "**the established punishment".**

The French authors[99] make a more accurate distinction regarding the renouncing and postponing the pronunciation of the punishment, using the effects of these institutions; the **postponing** presumes the **pronunciation** of the punishment; **the execution of the pronounced punishment is renounced to**; the postponing of the pronunciation has an effect only on the individualization of the punishment, this individualization could be followed by a pronunciation, if the offender doesn't respect the conditions imposed by the Court.

7. **Comparative law**. According to the German Penal Code, (Title V, section 59, 60, Absehen von Strafe), The Court renounce to the punishment when the consequences of the offence are so serious for the offender, that a sentence to prison would be a disaster. This disposition is not applicable if the offender was previous convicted for an offence to prison for more than a year. The criteria for the renunciation of the punishment could be: the seriousness of the offence is much reduced, the level of guilt is very low, or, other reasons[100].

According to the French Penal Code, In the case of a misdemeanor or, except in relation to the matters considered under articles 132-63 to 132-65, and in the case of a petty offence, the court, after finding the defendant guilty and ordering, if need be, the confiscation of dangerous or noxious objects, may either exempt the defendant from any other sentence, or defer sentence in the cases and pursuant to the conditions set out in the following articles. At the same time as it decides on the defendant's guilt, the court rules, if necessary, on any civil claim for damages. An exemption from penalty may be granted where it appears that the reintegration of the guilty party has been achieved, that the damage caused has been made good and that the public disturbance generated by the offence has ceased. A court granting an exemption from penalty may rule that its decision shall not be registered in the criminal records. Exemption from penalty does not extend to payment of the costs of the proceedings. A court may defer sentence where it appears that the reintegration of the guilty party is in the process of being achieved, that the damage caused is in the process of being repaired, and where the public disturbance generated by the offence will cease. In this case, it determines in its decision the date when it will pronounce sentence.

A deferment may only be ordered where the defendant, in the case of a natural person, or his representative, in the case of a legal person, is present at the hearing. At a reconvened hearing, the court may either exempt the defendant from penalty, or impose the penalty set out by law, or further defer pronouncement of sentence pursuant to the conditions and according to the terms set out under article 132-60. The decision with respect to the penalty must be made no later than a year after the first deferment decision.

At the reconvened hearing the court may, taking into account the offender's behavior, either exempt him from penalty, or pass sentence as set out by law, or further defer sentence pursuant to the conditions and according to the terms of article 132-63.

The decision regarding the penalty must be made no later than a year after the first deferment decision.

According to the Portuguese Penal Code (articles 60 and 74), an **admonition**, is pronounced by the Court if: the agent ought to be sentenced to a fine of a measure not superior to 120 days, the court may limit itself to pronounce an admonition.

Admonition only takes place if the damage has been repaired and the court concludes that, doing so, the aims of punishment will be accomplished in an appropriate and sufficient way;

As a rule, admonition will not be used if the agent, during the 3 years prior to the act, has been sentenced to whatever penalty, including admonition.

[99] F. Desportes, F. Le Gunehec, *Le nouveau Droit penal*, tome 1, Droit penal general, Septieme editition, Ed. Economica, Paris, 2000, p. 820-823

[100] Hans Jescheck, *Lehbruch des Strafrechts*, Alemeiner Teil, Duncher und Humbolt, Berlin, 1988, p. 769-773

Admonition consists of a solemn oral censure made in session by the court to the agent.

Article 74 provides the **Dispensation of penalty;** When the crime is punishable with imprisonment not superior to 6 months, or only with a fine not superior to 120 days, the court may declare the defendant guilty **without applying penalty** if:

a) The unlawfulness of the act and the guilt of the agent are minute;

b) The damages have been repaired;

c) Reasons of prevention do not oppose to the dispensation of penalty.

If the judge has reasons to believe that the damage reparation is about to happen, he may adjourn the decision for a reconsideration of the case within 1 year, on a day which will be immediately fixed.

When another rule allows the dispensation of penalty on a facultative nature, this will only take place if the case fulfils the pre-requisites stated in the sub-headings of number one above.

According to the Model Penal Code[101] (U.S.A), the Court can withhold the sentence of imprisonment and placing the defendant on probation. Subsection two sets forth eleven factors that should be accorded weight in favor of withholding a sentence of imprisonment. The list is not exclusive and the presence or absence of any of the factors is not meant to conclude the matter. The Court is directed not to impose imprisonment unless the circumstances of the case support an opinion that an imprisonment is necessary to protect the public because at least one of the three specified criteria is satisfied[102]. Since these three criteria are exhaustive of the factors that may justify imprisonment, a Court may not rely on some independent consideration for sending an offender to prison. In deciding whether to sentence an offender to prison, the Court, is required by subsection (2) to take account of the enumerated grounds that favor an alternative disposition. Subsection (2) does not, however, preclude the court from considering other reasons against an imprisonment sentence. A major purpose of this is to ensure that imprisonment sentence is not routinely imposed. The Subsection 3 is designed to suggest that is an additional judgment called for in those cases where a decision in favor of withholding a sentence of imprisonment is made, namely whether the supervisory regime of probation should be invoked or whether some other form of disposition is more appropriate. The other sanction to be considered includes a fine and suspension of imposition of sentence. The Model Penal Code moves within the older tradition in providing for a suspension of the imposition of sentence rather than for a conditional discharge.

Conclusions

The new Penal code, adopted in 2009, contains many new substantial penal law regulations. The aim of the study was only to clarify some of the issues that could rise up, for now, only theoretically.

It remains to be seen what other problems will be raised by the practitioners, after the new penal code will be enforced. This study refers to only a part of the vast institution of individualization of the punishment, with a special view on the new institutions.

The opinions expressed in the Romanian doctrine regarding the problems that may be solved by these new regulations are different; the regulation regarding the renunciation to apply a

[101] *Model Penal Code and Commentaries, part I, general provisions,* The American Law Institute, Philadelphia, Pa, 1985

[102] Under the introductory part of subsection (1), the Court may not sentence an offender to prison unless "it is of the opinion that his imprisonment is necessary for the protection of the public". If the finding or one or three specified factors does lead the Court to have that opinion, it would, of course, impose a sentence of imprisonment. But it is possible that the court will find one of the three specified factors and yet not conclude that imprisonment is necessary to protect the public. Then it is not authorized to impose that sentence.

punishment may be considered, by some authors, as an unpunishable cause with general application; after other authors, a modality of replacing the penal responsibility, because the renunciation to apply a punishment does not affect the character of the offence, the deed is still a crime, whether it is applied a punishment or not.

The legislator preferred to let the Court to decide if a punishment will be applied or just a warning.

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LEGAL NATURE OF THE INDIVIDUAL EMPLOYMENT CONTRACT

Ada HURBEAN*

Abstract

Obviously, the juridical act based on which a person works for and under the authority of another person in exchange of a salary can be only an individual employment contract, as the Labour Code specifies. So, in this case we are talking about a contract which should be governed by the rules of this matter as the common civil law stipulates, including the freedom of negotiation and concluding of this legal act. Unfortunately, on the present Romanian labour market the labour contract is transformed into a contract of adhesion, imposed by the law. This reality, which can't be ignored, distorts the legal nature of the labour contract and the free will principle which must be respected during the negotiation and conclusion of the individual employment contract.

Keywords: *individual employment contract, negotiation, free will, equal positions before the law of parties, subordination relationship*

The individual employment contract is actually considered, inclusively by its legislator, the main institution of the labour right, of the individual labour right, because the Labour Code establishes it about a third of its regulations (from Article 10 to Article 107 of the total 298 items).

Consequently, as it is defined by Article 10 of the Labour Code and by the professional legal literature, the individual employment contract is "the contract (agreement)[103] under which a natural person, named employee, undertakes to perform work for and under the authority of an employer, natural or legal person, in exchange for a remuneration called wages" and with ensuring the appropriate conditions for carrying out and maintaining work safety and health. It is obvious that we find ourselves in the presence of a contract with all the specifications of this bilateral legal act, ruled by the principle of free will. Even more, the individual employment contract is a contract named, synallagmatical (the parties' obligations are mutual, meaning that each parties' obligation represents the legal cause of the co-contractor's obligation), for valuable consideration, commutative, consensual (the form demanded by Article 16 of the Labour Code is only *ad probationem*), *intuitu personae* (it is concluded in the view of employee's training, skills and qualities, but also in the view of employer's specific activity) and with successive fulfilment (both parties provisions are done in time and not all at once).

Generally, the individual employment contract may have just two parts: the employer, natural or legal person and the employee, always a natural person. By exception, there are certain

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[103] It is considered that the legal definition of the individual employment contract has a deficient character, because, in the Romanian law, the labour terms and those of convention are synonymous. So that more appropriate wording would be "the contract... ... is the convention" instead of "the contract ... is the contract", in order to avoid the idem per idem character of the definition - in this sense Al. Țiclea, *Acte normative noi - Codul muncii*, in *Revista Română de dreptul muncii* no. 1/2003, p.8.

We consider that the definition's need of legal rectification is not an imperative one, given the fact that the deficiency is not a fund one, but strictly a form one. But on the other hand, it should be supplemented by the employer's obligation to provide the necessary conditions to conduct in good condition the work, and not only the obligation to pay wages.

situations where, as employers appear more persons, as it is the case of associative forms to practice the professions of lawyer, notary or physician. In this cases, the labour contract is concluded under the name of all associates, following that the employee subordinates to all these. The same solution is to be applied for the domestic staff too, in the sense that, even if the contract was signed by one spouse, the person hired will subordinate to the other spouse too.

Contrariwise, not only the individual employment contract supposes as object the provision of work. Work can be done under a service contract, but what distinguishes the two types of contracts is that in the case of the employment contract, the work is seen as a process that takes place over time in a well-determined place, while in the case of the service contract, the provider is hired to achieve a particular result[104]. In this context, it must be specified that the employee's obligation resulting from the individual employment contract is an obligation to make, but to which are not applicable the provisions of Article 1077 of the Civil Code, which allow to the creditor, in case of non fulfilment, to execute him, on his account, the debtor's obligation. The provisions of Article 1075 of the Civil Code, according to which each obligation to make changes in indemnifications, in case of non fulfilment, are not applicable in this context too. But, it is possible to include in the labour contract a stipulation of an objective, leading to other consequences regarding the employee's qualification, in terms of its object. Thus, we are in the presence of two obligations of the employee: an obligation of means, which supposes the submission of diligences to achieve the goal and an obligation of result, which absorbs the first, consisting in achieving the proposed object[105].

Returning, we must not forget the fact that only the work performed under an individual employment contract gives the employee, on full right, seniority, with all consequences arising there from.

Finally, what individualizes the employment contract in relation to other types of contracts, what could have the same object or a similar object, are its elements. Thus, *the elements of the individual employment contract* are: the labour supply, the payment of the salary and the subordination relationship. Some authors associate with these three elements the time[106] element too, but we consider that the latter is not likely to be part of the elements of the contract in question. Without insisting on the first two, the labour supply and payment of the wages, we may say that they represent the two characteristic and mutual provisions of the synallagmatical contract, but the subordination relationship is the item that confers individuality to the contract and a special status among the other types of contracts. The existence of this item results clearly from the legal definition of the individual employment contract; even if the legislator did not use the term of "subordination", preferring that of "authority", it has not been made a change of view, because, the term "authority" designates the power, the employer's right to give mandatory provisions. Therefore, the subordination relationship between the employer and the employee appears during the performance of the labour supply of the latter. So, it can not be concluded an individual employment contract between the sole associate of a limited liability company and the company concerned, as the essential characters of the individual employment contract are lacking: legal subordination and bilateral negotiation of the contract.

In this particular case, the subordination refers to the work process and it manifests, by the employer's right to give orders and provisions to the employee and to control his work. Ensuring the employer's authority is achieved through its recognized provisions, under the Article 40 paragraph 1 of the Labour Code, respectively the normative power, the organizational and disciplinary one.

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[104] Al. Athanasiu, M. Voloniciu, L. Dima, O. Cazan, *Codul muncii. Comentariu pe articole,* p. 35.

[105] In this sense O. Macovei¸ *Conţinutul contractului individual de muncă*, Edit. Lumina Lex, Bucureşti, 2004, pp. 65-66.

[106] V. Barbu, *Dreptul muncii. Curs universitar*, Edit. Naţional, Bucureşti, 2003, pp. 91-92.

Thus, the subordination, as item of the individual employment contract, may be both legal, meaning the existence of the authority, the employer's power of directing the employee's activity, to control and sanction him disciplinary, and economic too, since the employer provides the livelihoods of the employee who, in principle, has no other income.

The question arising is if the existence of this subordination relationship transforms the individual employment contract into a legal act of adhesion or if it justifies this thing? To answer to this question we must, firstly, distinguish between two important moments: the negotiation and the conclusion of the labour contract moment and its execution moment.

During the moment of the *negotiation and the conclusion of the individual employment contract* the parties involved are on *equal positions before the law*.

The will's agreement always requires the conciliation of two or more contradictory legal interests[107]. Thus concluding the contract often requires a period of negotiations, by considering the interests of each party. So, the negotiation can lead or not to the conclusion of a contract. The same situation is found in the case of the individual employment contract too.

Thus, the negotiation of the labour contract represents one of the most important stages in forming the wills' agreement, importance clearly underlined by the legislator too, who, in Article 17 Labour Code, establishes that the employer has the obligation to inform the selected person for employment regarding the essential clauses he intends to introduce in the contract, clauses further enumerated in paragraph 2 of the same article. *We believe* that the law's wording left room, in practice, for interpretation within the meaning that the clauses of the labour contract are imposed. Moreover, legally developing a framework Model of individual employment contract by Order no. 64/2003, amended by Order no. 76/2003, does nothing else but to support this thing and to strive to defeat the principle of freedom and autonomy of will that should govern both the negotiating and conclusion moment of the labour contract. For this reason, most times this contract is transformed into an act of adhesion.

Consequently, the content of individual employment contract is considered to have a double juridical nature, legal and contractual, in juridical literature[108]. Legal part is referring to the rights and obligations from Labour Code and other bills which regulate the labour relations. This legal part, we consider to be important especially regarding public authorities and institutions workers, because their salaries, recreation leave and the amount of recreation leave are established by special laws.

The contractual part of the contract, on the other hand, is determined by the free will of the parties, but only if they respect the legal limits.

We believe, that to impose directions to negotiate the labour contract should not make this contract into an impose one, because we believe that the intention of law wasn't to modify the equal position of the parties in negotiating and concluding the labour contract.

We must specify that, the appearance and the "use", more and more intensive, of the adhesion contracts has led to the reconsideration of the limits of the will autonomy principle of the legal deeds. If in the case of the classic contract the parties mutually agree over its content and effects, in the adhesion contracts only one party establishes the contractual clauses, the other party being just free to join or not the contract developed under these conditions[109]. The fact that these

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[107] Flour, J.-L. Aubert, *Droit civil. Les obligations. L'acte juridique*, vol. I, Paris, 1975, p. 404.

[108] See, Al. Ticlea, *Tratat de dreptul muncii*, second edition, Ed. Universul Juridic, 2007, p. 429-431.

[109] V. Pătulea, *Principiul libertăţii contractuale şi limitele sale*, in *Dreptul* nr. 10/1997, p. 24. Regarding the contracts with clauses imposed only by one of the parties, the Contract Law of the Popular Republic of China stipulates the following: if a contract contains standard clauses (meaning contractual provisions established before concluding the contract by one of the parties, for repeated use), the party that established these clauses must comply with the principle of good faith in prescribing the rights and obligations of the other party and must draw the

contracts are and may become a legal limitation of the principle of will autonomy it is noticed from the regulation of the adhesion contracts too, in the new Civil Code, which in Article 1175 states: "The contract is one of adhesion when its essential clauses are imposed or when they are drafted by one of the parties, for this one or following his instructions, the other party having merely the obligation to accept them as such".

Due to the new limitations of the principle of contractual freedom, which tend to deny the very existence of the principle, we believe that it is not irrelevant to take into consideration the possibility of legal and institutional isolation of those types of contracts and their understanding as a distinct reality from the contractual, classical one. This is done precisely to protect and perpetuate, not only theoretically, the principle in question. But, on the other hand, the proliferation of these types of contracts it may seem that they represent one of the symptoms of defeating the principle of will autonomy by another socio-economical phenomenon and finally a legal one, that of dirigisme[110]. Actually, we are talking about the strong intervention of the state in the economy, reflected in the enactment of some new legislation or amending the existing ones, or by sanction of the law of the new interpretations given to some oldest legal institutions[111].

Another manifestation of dirigisme is to broaden the concept of public order, because, if in the previous phase (that of domination of the principle of will autonomy) this concept was limited to the political and moral area, in principle, now, the concept includes the economic public order too, not only the national one, but the European too, in the context of creating and expanding the European Union. Moreover, the notion of public order extends over some social aspects too, creating the social public order, which designates some measures taken by the State regarding the regulation of the labour contracts and leasing of estates. Also, it must not be omitted the aspect that the State's intervention in the contractual domain lead to the restriction of the binding force of the contract, either because sometimes its non-compliance is allowed, or a performance in other terms than those originally established by the parties[112].

Returning to *the employer's obligation of information*, we consider that, in fact, it has the significance of an offer to conclude. In other words, in the content of the employment contract, which is concluded later, it will be included the same elements, but their concrete quantum may differ as a result of the parties' negotiation. If any modification was not allowed, the information would coincide with the implementation agreement of the parties, which would deprive the obligation of information of any content and would violate the freedom of the parties to negotiate the terms of this contract.[113] As it is mentioned by the legal text too, the negotiation must cover at least the following items: identity of the parties; the workplace or, in the absence of a permanent

attention to the latter, in a reasonable manner, on certain clauses, such as are those by which the liability of the party is excluded or limited and, also, this party is obliged to explain to the other party the contract's terms when asked (Article 39).

[110] Otherwise, a new term was created, that of "contractual dirigisme", by L. Josserand, in *Les tendances actuelles de la théorie des contrats,* in R.T.D. civ., 1937, pp. 1-30.

[111] The appearance of the contractual dirigisme is due to the fact that nowadays the economic activity is dominated by the existence of large companies or groups of companies, with a great economic power, whose interests are focused on increased speed and suppleness of the economic circuit. The State, the one that organizes the economic activity, even in a broad sense, by creating the legislative framework, has perceived and finally enacted the interests of those participants to the economic circuit. All these lead to the removal, more or less, of the principle of will autonomy, which corresponded to the modern period, when the economic activity was left, largely, at the private initiative's will and which corresponded, in fact, to the economic liberalism (C. Stătescu, C. Bîrsan, *op. cit.*, pp. 17-19).

[112] In this regard, see A. Hurbean, *Viciile de consimţământ*, Edit. Hamagiu, 2009, p. 31 and following.

[113] Similarly, Al. Athanasiu, I. Dima, *Regimul juridic al raporturilor de muncă în reglementarea noului Cod al muncii*, in *Pandectele române*, nr. 4/2003, p. 258.

workplace, the possibility of working in several places; the headquarters or, as appropriate, the domicile of the employer; the position / occupation according to the Romanian Classification of Occupations or other regulatory documents and the job description; the job-specific risks; the date when the contract takes effect; in the case of an employment contract of limited duration or of a temporary employment contract, its respective length; the length of the leave the employee is entitled to; the conditions under which the contracting parties may give notice and its length; the basic wages, other components of earned income, as well as the payment frequency for the wages the employee is entitled to; the normal length of work, expressed in hours per day and hours per week; the reference to the collective labour agreement governing the working conditions of the employee; the length of the probationary period. Of course, nothing stops the parties to negotiate on other clauses they want to stipulate in the future contract. Otherwise, the Labour Code itself regulates four of the additional clauses (the clause on vocational training, non-compete clause, mobility clause and confidentiality clause).

According to Article 18 paragraph 1 of the Labour Code when the employee should perform his activity abroad, the employer has the obligation to communicate him information regarding the following aspects too: the length of the work to be performed abroad; the currency of wages payment, as well as the payment methods; the benefits in money and/or in kind related to the activity performed abroad; he climatic conditions; the main labour law regulations in that country; the local customs whose breach would endanger his life, freedom or personal safety and the employee repatriation conditions.

Because we are at a stage prior to the conclusion of the individual employment contract, the employer's obligation of information must be done between the time of selection the candidate, future employee and that of employment, without being relevant if the parties finalize the negotiations concluding a contract or not. At this precise moment too, as the legal texts establish, between the parties may occur a confidentiality contract. As stated in the legal literature[114], the confidentiality contract is completely separate from any employment contract; it is not confused with the confidentiality clause either, which can be inserted in such a contract. Taking into consideration the legal wording, this is a contract that generates only unilateral obligations for the employee or future employee, respectively the obligation to keep the confidentiality of the information received. Still, we believe that this contract could contain mutual obligations, based on Article 29 paragraph 3 and 4 of the Labour Code. It could stipulate the employer's obligation to keep the confidentiality of the information he receives from the other party, regarding, for example, the professional skills or the information taken from his former employers.

If the obligation of information has the role of an offer to conclude, than the acceptance of the labour offer has as consequence the contract's formation, which means that the employer is no longer entitled to withdraw his offer. Thus, an eventual withdrawal shall have the legal value of an illegal dismissal. The provisions of the Common Law, regarding the valuable forming of the contracts by offer and its acceptance, are fully applicable to the individual employment contract too. So, if the offer is the proposal made by a person to another person, to conclude a contract, the acceptance represents a manifestation of the person's will to conclude a contract as provided in the offer addressed to him for this purpose. The acceptance can only be pure and simple, because formulation of some reservations, conditions or modifying proposals has the nature of a counteroffer, and it is usually intentionally, but it can be made tacitly too. In all cases it must be unequivocal. The acceptance, made valid before the offer has been revoked or has been lapsed, has as effect the conclusion of the contract it refers too. The acceptance intervened subsequently is late

[114] R. Dumitriu, *Contractul individual de muncă, prezent şi perspective*, Edit. Tribuna Economică, Bucureşti, 2006, p. 88.

and does not produce any effect; but if the offer was mindless revoked before the expiry of the express or tacit term of acceptance, the acceptance interfered within the limits of this term shall entitle the acceptant at the repairing of the prejudice caused by the non-conclusion of the contract following the offer's abusive revocation.

The contractual freedom, the will's autonomy of the parties during the negotiation and the conclusion of the individual employment contract is *limited*, on one hand, by the rules of the public order, morals and mandatory rules – general limits to all contracts, and, on the other hand, by the provisions of the applicable collective labour agreement and Article 38 Labour Code. Is obvious that the negotiation freedom of the individual employment contract is much more limited compared with that of the civil contracts, reason for witch it was stated that Article 38 Labour Code represents a fundamental mark of delimitation between the labour law and the civil law.[115]

Without insisting too much on the general legal limitations of the will autonomy, we may say that by public order it is understood a set of rules and principles that express the essential legal organization of a particular human society, at a certain time. Regarding the good manners, it is underlined[116] that these represent nothing else but moral aspect of the public order, in its traditional acceptance of political order, in fact, a set of ethical rules, well-known and accepted therefore by the society's members. Just that this concept, as well as that of public order, can not be ever general applicable to the human society and it is in a continuous evolution.[117]

The limitations imposed especially to the contractual freedom by the labour's legislation refer, as we have already said, mainly at the provisions of Article 38 Labour Code, which include those referring to the collective labour agreement too. Specifically, corroborating Article 11 and 38 Labour Code, any clause from a convention or unilateral act, by which an employee would consent to a limitation or waiver of rights guaranteed by law or to those negotiated through the collective agreement or individual employment contract, is touched by absolute nullity.

According to Article 8 of the National Collective Agreement, the employees' rights stipulated in its content can not represent the cause of reducing other collective or individual rights that were established by the collective agreements concluded at branch level, groups of units and units before the conclusion of the National Collective Labour Agreement.

In the situations in which, regarding the rights deriving from the National Unique Collective Labour Agreement, it intervenes more favourable provisions, these will be lawfully a part of the mentioned contract.

Also, the signatory parties of the National Unique Collective Labour Agreement assumed the obligation that, during the period of application of this collective labour agreement, they should not promote or sustain draft laws whose adoption would lead to the reduction of the rights arising from the collective labour agreements, regardless the level they were concluded to.

Consequently, as noted in the legal special literature[118], according to the applicable legal texts there is no legal regime difference between the established rights, edicts, recognized or guaranteed by legal or conventional means (by individual or collective negotiation), because the employer can not waive any of his rights, whatever its origin.

The motivation of this interpretation of Article 38 Labour Code is found in the protection of the employee's rights; in fact, it was shown[119] that these legal provisions represent protective measures for employees, destined to assure the free exercise of rights and legitimate interests to which they are entitled to, under the employment relationships, in order to protect them from any abuses or threats from employers.

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[115] A. G. Uluitu, *Aspecte privind aplicarea art. 38 din Codul Muncii*, in *R. R. D. M* nr. 1/2009, p. 42.
[116] J. Ghestin, *op. cit.*, p. 87.
[117] In this regard, see A. Hurbean , *op.cit.*, p. 30.
[118] I.T. Ştefănescu, *Consideraţii referitoare la aplicarea art. 38 din Codul muncii*, in *Dreptul* nr. 9/2004, p. 81.
[119] The Constitutional Court, decision no. 494/2004, the Official Gazette, Part I, no. 59 of January 18, 2004.

By another decision of the Constitutional Court[120] it is shown that Article 38 of the Labour Code does not infringe the principle of the contractual freedom, because this is not a constitutional principle and, anyway the contractual freedom knows reasonable limits imposed by reasons of protection of some private and public interests. In this context, as it is further specified, the legislative provisions in question represent mandatory rules, ensuring thus social protection measures for persons in disadvantaged economic position. Also, the provisions of Article 38 of the Labour Code do not prejudice to the provisions of Article 16 paragraph 1 of the Constitution of Romania, as they only seek to ensure the equality between the contractors, unequal, *ab initio*, regarding the financial and economic potential. The provisions of the Article 38 do not contravene to the provisions of Article 16 paragraph 2, 3 and 4, Article 30, 40 and 45 of the Romanian Constitution, since their area of impact is totally different, which excludes the possibility of collision between them.

In other words, the legal provisions in discussion should be understood in the sense that the legislator tries to balance the position of the two parties of the individual employment contract, given that, after its conclusion, the employee is subordinated to the employer, his position being one of inferiority. Just that, the provisions of Article 38 corroborated with those of Article 11 of the Labour Code refer both to the moment of the negotiation and conclusion of the individual employment contract when the parties are on positions of legal equality.

In fact, Article 38 of the Labour Code is in obvious contradiction with the current socio-economic reality. So, as long as we consider that we live in a society based on the objective rules of the market economy, one of the principles of the employment right imposes to be the principle of negotiation, and not the promotion of the legal provisions which violate and restrict this principle. We arrive, thus, in the situation in which, seeking the employee's protection from an eventual abusive attitude of the employer, we defend the employee against his own will.[121]

Thus, by the application *ad literam* of these legal provisions it could reach to contrary situations to those wanted to be defended – the impossibility of waiver of a right recognised by the law could cause to the employee a disadvantage materialized in a prejudice – such as the situation of renouncing to a part or to the whole notice by the employee, in order to occupy another job. If, in this case, we accepted that the employee can not waive the right of notice, stipulated by the law into his favour, we should also accept the fact that this could lose a new job, which can be immediately occupied, which, we consider, the legislator did not intend.

Therefore, together with other authors[122], we consider that Article 38 must not be literally, grammatically interpreted, but theologically. So, the legislator did not pursue to forbid any transactions, but only the conclusions of the legal acts by which the employer would waive of his imperative rights provided by law. Consequently, as the legal practice demonstrates too, the conclusion of an agreement in the labour law is fully legal.

Specifically, the prohibition stipulated by Article 38 of the Labour Code does not apply if the employee waive of his partial or total right in change of obtaining an advantage, provided that the waiver does not lead to the right's decrease under the limit set by law. Meanwhile, the prohibition is inapplicable if the employee waive of a right in order to save his individual employment contract, unless it lead to the lowering under the legal limit of the provided right. For instance, it was shown that it is possible the employee's indirect waiver of his rights, by accepting

[120] Decision no. 356/2005, published in the Official Gazette, Part I, no. 825 of September 13, 2005.

[121] In this regard, also see Al. Athanasiu, M. Volonciu, L. Dima, O. Cazan, *Codul muncii. Comentariu pe articole*, pp. 188-189.

[122] D. Dascălu, M. Fodor, *Unele consideraţii privind competenţa soluţionării conflictelor de muncă şi a litigiilor de muncă. Impactul elementelor de extranietate asupra competenţei soluţionării litigiilor şi conflictelor de muncă*, in *Revista Română de Dreptul Muncii*, no. 1/2004, p. 124.

the increase of his obligations, beyond the limit set by law, unless this situation lead to the lowering of the employee's rights under the limit established by law.[123]

Moreover, the Labour Code regulates in a different way certain institutions of labour right and employees rights.

Thus, if regarding the payment and the right to leave, the Labour Code contains special provisions in this regard, the settlement of non-compete clause has a different legal status.

According to Article 165 Labour Code, the acceptance without reservation of a part of the payment rights or signing the payment acts in such situations can not have the signification of the employee's waiver of the rights that are entitled to him, as provided by the legal or contractual provisions. Even more, Article 139 paragraph 2 expressly states that the right to leave can not form the object of any cession, renunciation or limitation (similar Article 59 paragraph 5 of the National Unique Collective Labour Agreement).

But, the adjustments referring to the non-compete clause represents, in fact, an exception to the provisions of Article 38 Labour Code, meaning that the employee is legally allowed to accept certain waivers of his labour freedom in change of obtaining an additional benefit. This benefit has a material nature, consisting in a non-compete monthly allowance, which the employer obliges to pay to him.

Unlike the employee, the provisions of Article 38 are not incident in the employer's case. Nothing prevents him to waive of his exclusive rights, although the right is provided by a mandatory rule, except the situation in which this waiver would infringe a public interest. If we exclusively refer to the employer financed from budgetary sources, the renunciation is twice limited. Firstly, the waiver can not prejudice the financial resources available to these employers, and secondly, the waiver can not prejudice a public interest.

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[123] In this regard, see O. Macovei, *op. cit.*, p. 80; I. T. Ştefănescu, *op. cit.*, pp. 46, 78-79, 103.

SEVERAL REFLECTIONS ON THE SIGNIFICANCE OF THE ICJ ADVISORY OPINION ON ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL DECLARATION OF INDEPENDENCE IN RESPECT OF KOSOVO

Beatrice ONICA JARKA*

Abstract

The paper shall focus on the presentation of the reasoning stated in the ICJ Advisory Opinion on the accordance with international law of the unilateral declaration of independence in respect of Kosovo and the significance of the said reasoning in the actual context of international law in respect of new statehood. The paper shall try to point out the existence of an intent of the ICJ by its Advisory Opinion to state a new understanding of the statehood considering that the context of the unilateral independence statement and the capacity in which its authors acted is of sufficient importance to rule on the legality of such statement. By avoiding to rule on the coexistence of the right to territorial integrity and the right of self determination as rights connected with the unilateral statement of independence, the Court lost the opportunity to settle the relation between the two rights in the context of the remedial secession solution in favor of a multiethnic group which was subject to gross human rights violation in the past. Assuming the jurisdiction on the Advisory Opinion, the Court proved itself willing to show that issues which were till now considered purely political and subject to decision of the political organs of the UN may become, even in a narrow approach, points of law.

Keywords: *ICJ, Kosovo, independence, jurisprudence, secession*

Introduction

On July 22, 2010, the ICJ has delivered its Advisory Opinion on accordance with international law of the unilateral declaration of independence in respect of Kosovo, by deciding among others by ten votes to four that the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law.

The said Advisory Opinion was granted as a response to the United Nations General Assembly question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" While the Court in its Advisory Opinion apparently approached the matter in a narrow formal manner, willfully ignoring the right of Kosovo to secede from Serbia, the significance of the Advisory Opinion is crucial in the actual international context in which Republic of Kosovo has been recognized already by 70 states and states as Romania, Cyprus, Spain or Russia continues to oppose to such recognition.

This paper shall focus on the significance of the ICJ Advisory Opinion, examining both its legal and political dimension and the lost opportunity for the Court to open a reinterpretation of the right to self determination and its exercise by minority groups easily able to declare their

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independence. The narrow approach of the ICJ in considering only the legality of the statement of independence without going in depth to the rights behind the statement of independence and their exercise in connection with the rights of sovereignty and territorial integrity of Serbia is not going to stop developing a path in which right to secede may become integral part of the right to self determination. It is the ICJ Advisory Opinion which opened the Pandora box for all states which will see in the Kosovo case the acceptance by international community of secession by the unilateral will of the population occupying a certain territory. The Advisory Opinion on Kosovo stands as legal evidence that the international community is ready to embrace unilateral secession despite and against rights to territorial integrity sovereignty. Even considering the unique character of Kosovo situation, there will others who will claim similar treatment.

The significance of the ICJ Advisory Opinion shall be examined from the point of view of the legal aspects considered by the Court in its reasoning and comparison with the existing international law in the field of rights to self determination, right to secede and right to territorial integrity and sovereignty.

The examination of the ICJ Advisory Opinion allows at this point observing the correspondence with the existing doctrine and the other UN organs resolutions and the use of such doctrine and resolutions by ICJ.

Finally the examination of the ICJ Advisory Opinion will allow several reflections on a possible initiation of jurisprudence[1] of ICJ in respect of the self determination right as a possible auxiliary source of law in the determination and interpretation of this right in the postcolonial context.

1. Legal framework

The legal framework is represented by the UN Charter, the 1970 Resolution 2625 (XXV) of the UN General Assembly concerning " Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with The Charter of United States" or the Final Act of the Conference on Security and Cooperation in Europe, the International Covenants on Civil and Political Rights and respectively on Economical, Social and Cultural Rights,, Security Council resolution 1244 (1999)

2. Description of the Advisory Opinion

2.1. Request for the Advisory Opinion

By a letter dated 15 August 2008 sent to the Secretary-General, Republic of Serbia requested the inclusion in the agenda of the sixty-third session of the General Assembly of a supplementary item entitled "Request for an Advisory Opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law"**.**

At the second plenary meeting of its sixty-third session held on 19 September 2008, the General Assembly approved the recommendation of the General Committee for **i**nclusion of the item in the agenda of the sixty-third session under heading F. "Promotion of justice and

[1] This work was supported by CNCSIS –UEFISCSU, project number 860 PNII – IDEI 1094/2008 in an exercise of showing how the international jursiprudence is considered an auxiliarry source of law in determination and interpretation of the norms of international law.

international law", and allocated it to the Plenary (A/63/PV.2). In this sense Serbia submitted draft resolution A/63/L.2 dated 23 September 2008 on the "Request for an Advisory Opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law" (A/63/L.2 of 23 September 2008). At the 22nd plenary meeting of its sixty-third session held on 8 October 2008, the General Assembly adopted the draft resolution submitted by Serbia by a recorded vote of 77 in favor to 6 against, with 74 abstentions (A/63/PV.22). The resolution represents the General Assembly resolution 63/3, with the title "Request for an Advisory Opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law" (A/RES/63/3 of 8 October 2008)[2].

2.2. Proceedings before ICJ

The question addressed to ICJ raised a strong interest among the UN states. Within the time-limit fixed by the Court for that purpose, written statements were filed by 36 states while more than 20 states have oral submissions within the proceedings. The diversity of the states interested in the topic is impressive. Among the states submitting written statements were states supporting the independence of Kosovo as United Kingdom, United States of America or Germany and states which declared that they will not recognize the new created Republic of Kosovo as Romania or Russian Federation.

The authors of the unilateral declaration of independence themselves filed a written contribution. The acceptance of the written contribution of the unilateral declarations of independence within the procedure in front of ICJ represents a strong indication of the ICJ's belief as to the capacity these authors were acting with. As provided in the ICJ Statute, article 66, ICJ shall receive written statements and oral statements only from states and international organizations in connection to the matter addressed for the Advisory Opinion.

2.3. Conclusion of the Advisory Opinion

On July 22, 2010, the ICJ has delivered its Advisory Opinion on accordance with international law of the unilateral declaration of independence in respect of Kosovo, by deciding among others by ten votes to four that the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law.

2.4. Content of the Advisory Opinion

i. Powers of General Assembly to address the question for Advisory Opinion

After a short description of the factual situation and the legal context, the Court concluded that the General Assembly has legitimate interest in the question, even though this matter is under Security Council consideration.

ii. Scope and meaning of the question

The Court turned to the scope and meaning of the question on which the General Assembly has requested that it give its opinion and considered it being clearly formulated.

In a clear attempt to avoid explicit implications of its opinion, the Court considered that the question addressed by the General Assembly is narrow and specific. In this sense the Court considered that the question posed does not ask whether or not Kosovo has achieved statehood nor

[2] See International Court Of Justice Reports Of Judgments, Advisory Opinions And Orders, Accordance With International Law Of The Unilateral Declaration Of Independence By The Provisional Institutions Of Self-Government Of Kosovo (Request For Advisory Opinion) Order Of 17 October 2008 at the internet address: http://www.icj-cij.org/docket/files/141/14799.pdf

about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State.

As consequence, the Court was not of the opinion that reformulation of the scope of the question is necessary.

Nevertheless the Court found herself in the position to note that the reference to the *Provisional Institutions of Self-Government of Kosovo*" (General Assembly resolution 63/3 of 8 October 2008) as the authors of the declaration of independence is, comparing with the title of the resolution "Request for an Advisory Opinion of the International Court of Justice on whether the declaration of independence *of Kosovo* is in accordance with international law", a matter which is capable of affecting the answer to the question whether that declaration was in accordance with international law. This is why the Court decided to freely examine the "*entire record and decide for itself whether that declaration was promulgated by the Provisional Institutions of Self-Government or some other entity*."

Avoiding any matter of secession, the Court felt obliged to make clear that in case of Kosovo the question addressed by the General Assembly does not require to take a position on "*whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, a fortiori, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it*."[3]

As a consequence on this aspect the Court expressed the opinion that it is "*entirely possible for a particular act such as a unilateral declaration of independence not to be in violation of international law without necessarily constituting the exercise of a right conferred by it*".

iii. Legal background for considering the question

Further on the substance of the matter**,** the Court analyzed the legal background against which the request has to be considered. Based on the existing international law as to independence declarations the Court reached the conclusion that the practice of States as a whole does not suggest that the act of promulgating the declaration was regarded as contrary to international law but rather that international law contained no prohibition of declarations of independence.

The Court made the difference between the statements of independence within the context of the exercise of the right of self determination and statements of independence outside this context. In connection to this last type of statements, the Court noted that "*the practice of States does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases*"[4].

By merely mentioning the scope of the principle of territorial integrity as enshrined in the international instruments, the resolutions of the Security Council condemning particular declarations of independence invoked by several written submissions in case of Southern Rhodesia, northern Cyprus, Republika Srpska and the right of "*remedial secession*" in the face of the situation in Kosovo, due to their express invocation in the written statements of the participants in the proceedings, the Court concluded nevertheless, that these issues fail outside the scope of the question posed by the General Assembly.

Regarding the Security Council resolution 1244 (1999) and the UNMIK Constitutional Framework created there under, the Court noted that none of the participants in the proceedings has questioned the fact that resolution 1244 (1999), which specifically deals with the situation in Kosovo, is part of the law relevant in the present situation.

[3] See Advisory Opinion on 22 July 2010 at the internet address: http://www.icj-cij.org/docket/files/141/15987.pdf

[4] Advisory Opinion, para. 79

Within the international law background, the Court appreciated that there are a number of other Security Council resolutions adopted on the question of Kosovo, notably Security Council resolutions 1160 (1998), 1199 (1998),1203 (1998) and 1239 (1999); however, the Court sees no need to pronounce specifically on resolutions of the Security Council adopted prior to resolution 1244 (1999), which are, in any case, recalled in the second preambular paragraph of the latter.

Regarding the regulations adopted on behalf of UNMIK by the Special Representative of the Secretary-General, notably the Constitutional Framework, the Court observed that the Constitutional Framework is binding and derives its binding force from the binding character of resolution 1244 (1999) and thus from international law and in that sense it therefore possesses an international legal character. On the other hand the Constitutional Framework functions in the opinion of the Court as part of a specific legal order, created pursuant to resolution 1244 (1999), which is applicable only in Kosovo and the purpose of which is to regulate, during the interim phase established by resolution 1244 (1999), matters which would ordinarily be the subject of internal, rather than international, law.

In this regard, the Court noted that Security Council resolution 1244 (1999) and the Constitutional Framework were still in force and applicable as at 17 February 2008 and definitely form part of the international law which is to be considered in replying to the question posed by the General Assembly in its request for the Advisory Opinion.

Going further to the 1244 (1999) Security Council resolution interpretation, the Court observed[5] that three distinct features of that resolution are relevant for discerning its object and purpose.

First, resolution 1244 (1999) establishes an international civil and security presence in Kosovo with full civil and political authority and sole responsibility for the governance of Kosovo.

Secondly, the solution embodied in resolution 1244 (1999), namely, the implementation of an interim international territorial administration, was designed for humanitarian purposes to provide a mean for the stabilization of Kosovo and for the re-establishment of a basic public order (para.98). In this sense the Court noted that the interim administration in Kosovo was designed to suspend temporarily Serbia's exercise of its authority flowing from its continuing sovereignty over the territory of Kosovo with the purpose to establish, organize and oversee the development of local institutions of self-government in Kosovo under the aegis of the interim international presence.

Thirdly, resolution 1244 (1999) clearly establishes an interim régime; it cannot be understood as putting in place a permanent institutional framework in the territory of Kosovo.

iv. Identity of the authors of the declaration of independence

The Court considered important to comment on the identity of the authors of the declaration of independence, trying to determine whether the declaration of independence of 17 February 2008 was an act of the "Assembly of Kosovo", one of the Provisional Institutions of created for the government of Kosovo during the interim phase. After analyzing the text of the declaration and the context of its adoption the Court concluded that the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.

Then, the Court turned to the question whether the authors of the declaration of independence acted in violation of Security Council resolution 1244 (1999) or the measures adopted thereunder representing the Constitutional Framework. In this sense the Court concludes

[5] Advisory Opinion, para. 97-99

that the Security Council resolution 1244 (1999) does not "*contain a prohibition, binding on the authors of the declaration of independence, against declaring independence; nor can such a prohibition be derived from the language of the resolution understood in its context and considering its object and purpose*"[6]. In the same sense, the Court held that as the declaration was not issued by the Provisional Institutions of Self-Government as set out in the Constitutional Framework, "*the authors of the declaration of independence were not bound by the framework of powers and responsibilities established to govern the conduct of the Provisional Institutions of Self-Government*[7]". Accordingly, the Court found that the declaration of independence did not violate the Constitutional Framework.

3. Concurring and dissenting opinions

The Advisory Opinion reasoning felt frustrating equally for the judges voting against the opinion but also to several voting for judges. In this sense, four judges from those voting in the favor of the Advisory Opinion considered necessary to address the content of opinion separately. Going from Judge Simma's statement to that expressed by Judge Cancado Trindade, through the separate opinion of Judge Sepulveda Amor and that of Judge Yusuf, all express the clear need for clarification of the Court standing as to the Kosovo matter.

3.1. Concurring opinions

Judge Simma[8] has stated for example that the Court's interpretation of the General Assembly's request is unnecessarily limited and potentially misguiding reflecting an outdated view of international law. The request deserved in the opinion of Judge Simma a more comprehensive answer, assessing both permissive and prohibitive rules of international law.

In the same sense, Judge Sepúlveda-Amor[9] , after considering that there were no compelling reasons for the Court to decline to exercise jurisdiction in respect of the request of the General Assembly has expressed the opinion that the Court could have taken a broader perspective, providing a more comprehensive response to the request by the General Assembly. Even if the Court has not been asked to decide on consequences produced by the Declaration of Independence, but only to determine whether it is in accordance with international law, the larger picture was necessary. Therefore, issues such as the scope of self-determination, "*remedial secession*", the extent of the powers of the Security Council in respect of territorial integrity, the fate of a Chapter VII international administration, complexities in the relationship between UNMIK and the Provisional Institutions of Self-Government, and the effect of recognition and non-recognition in the present case fall within the realm of the Court's advisory functions.

Judge Yusuf[10] delivered its separate opinion following, in principle, the same line of reasoning as his two colleagues mentioned above. In this sense, judge Yusuf stated that the Court overly restricted the scope of the question put to it by the General Assembly. Going further Judge Yusuf considered that while declarations of independence *per se* are not regulated by international

[6] Advisory Opinion, para.118

[7] Advisory Opinion, para.121

[8] See Judge Simka's Separate Opinion in the case at the internet address: http://www.icj-cij.org/docket/files/141/15993.pdf

[9] See the Judge Sepulveda – Amor Separate Opinion in the case at the internet address: http://www.icj-cij.org/docket/files/141/15997.pdf

[10] See Judge Yusuf's Separate Opinion in the case at the internet address: http://www.icj-cij.org/docket/files/141/16005.pdf

law, the claims they express and the processes they trigger may be of interest to international law and for the Court in expressing a position on the scope and normative contents of the right to self-determination, in its post-colonial conception and the circumstance in which external self determination of people of Kosovo was legal.

The last and most elaborated separate opinion belongs to Judge Cancado Trindade[11]. In a 71 pages length opinion, Judge Cancado Trindade felt obliged to analyze in depth the needs and aspirations of the "People" or the "Population", the international administration of territory, the concern of the United Nations Organization as a whole with the humanitarian tragedy in Kosovo, the Principle of Self-Determination of Peoples under prolonged adversity or systematic oppression or the Kosovo's Independence with U.N. supervision, Judge Cancado Trindade concluded that states exist for human beings and not *vice-versa* and "*states transformed into machines of oppression and destruction ceased to be States in the eyes of their victimized population*"[12]

3.2. Dissenting opinions

On the other side, in their dissenting opinions, the judges voting against the conclusions of the Advisory Opinion expressed further their frustration as to the Advisory Opinion content.

Reflecting this frustration, the Vice-President Tomka[13] considered that the Court should have exercised its discretion and declined to respond to the General Assembly's request, as the Security Council's silence cannot be interpreted as implying any tacit approval of the declaration and the Advisory Opinion is prejudicial to the exercise of the Security Council's powers. Vice President Tomka further presented himself in the favoring of considering that final settlement should have been determined by the agreement between the parties or by the Security Council, but not merely by one party as it happened in the situation.

Dissenting opinion of Judge Bennouna[14] was in the sense that, by delivering the Advisory Opinion the Court substituted for the Security Council in exercising its political responsibilities. Judge Bennouna felt compelled to criticize the option undertaken by the Court to respond to the request of the General Assembly in case of Kosovo.

By his dissenting opinion, Judge Skotnikov[15] has also considered that the Court should have used its discretion to refrain from exercising its advisory jurisdiction in the rather peculiar circumstances of the case which implied that an answer to a question posed by one organ of the United Nations, is entirely dependent on the interpretation of a decision taken by another United Nations organ. In his opinion, the Court – both as a principal organ of the United Nations and as a judicial body – must have exercised great care in order not to disturb the balance between the three principal organs General Assembly, Security Council and the Court, as has been established by the Charter and the Statute. Judge Skotnikov also addressed the issue of the Court's interpretation of general international law. According to the Advisory Opinion, which was supporting the finding that "*general international law contains no applicable prohibition of declarations of independence"*, Judge Skotnikov considered that such an interpretation is a misleading statement

[11] See Judge Trindades's Separate Opinion in the case at the internet address http://www.icj-cij.org/docket/files/141/16003.pdf

[12] See Judge Trindades's Separate Opinion in the case at the internet address http://www.icj-cij.org/docket/files/141/16003.pdf

[13] See Judge Tomka Dissenting Opinion in the case at the internet address: http://www.icj-cij.org/docket/files/141/15989.pdf

[14] See Judge Bennouna Dissenting Opinion in the case at the internet address: http://www.icj-cij.org/docket/files/141/15999.pdf

[15] See Judge Stontnikov Dissenting opinion in the case at the internet address: http://www.icj-cij.org/docket/files/141/16001.pdf

as the general international law simply does not address the issuance of declarations of independence, because "*declarations of independence do not 'create' or constitute States under international law*."

4. Weaknesses of the ICJ Advisory Opinion

The content of the Advisory Opinion has obvious weaknesses revealed in both the concurring and dissenting opinion. The Court after considering in its discretion that it should answer to the question posed by the General Assembly, it limited the scope of the question to general consideration of the unilateral independence statement, taken totally out from the entire context of its issuance which was ultimately more political than legal.

By issuing the Advisory Opinion the Court frustrated not only those declared against the unilateral independence declaration but also those in favor of it. And we do not refer solely to the dissenting and concurring judges but also to the many states participating in the procedure which, most of them, addressed the issues posed by the General Assembly in their complexity as points of law. The Advisory Opinion was like the Court decided to make a step ahead on an unprecedented matter and than its courage failed so the Court took a half of step back, hiding behind a supposed narrow scope of the question.

The question addressed to the Court deals with the very specific issue of how far could go the exercise of two essential international rights one against each other: the right belonging to the state – the right to territorial integrity and another belonging to a "*people*" – the right to self determination, in its extreme form of manifestation the "*remedial secession*" and the issue of new statehood based on the unilateral statement of independence.

In essence, these were the points of law which the Court had to the construe in order to assess the legality of the unilateral statement of independence for Kosovo. It was unexpected to see how the Court chooses to consider such a narrow approach of the independence statement going so far as to state that such instrument does not need to be the exercise of a right under international law, eventually the right to self determination. The unilateral statement of independence of a people cannot be obviously seen taken out from the context of international law, which includes the exercise of rights in an independence statement and the effects of such statement. It would have conferred to the Advisory Opinion quality to assess the impact of the independence statement on the territorial integrity of Serbia and to analyze it as an exercise of the right to external self determination – underlining the consequences of such statement the creation of a new state.

4. 1. The state sovereignty and right to territorial integrity

The sovereign equality and rights inherent to sovereignty which include the right to territorial integrity represent for many years the foundation of international law having both legal and political importance. Its enshrining in instruments with both universal and regional significance: the UN Charter, the 1970 Resolution 2625 (XXV) of the UN General Assembly concerning " Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with The Charter of United States" or the Final Act of the Conference on Security and Cooperation in Europe evidences the long standing and centrality these legal norms have in international law. ICJ has indeed recently referred to "the central importance in international law and relations of State sovereignty over territory and of the stability and certainty of that sovereignty" (case concerning *Sovereignty over Pedra* Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), 2003). Within

the proceedings the sovereignty and the right to territorial integrity of Serbia represented the main issue by which the unilateral statement of independence of Kosovo was to be interpreted.

The Court had for the first time the opportunity to make clear the application of the principle of sovereignty and territorial integrity in the context of state and non-state entities relation, and to make a first in stating on the significance of this right in connection the rights of minorities and an eventual right to self determination of such groups if necessary.

4.2. The right to self determination and its application outside the process of decolonization

The right of self determination is recognized at international level as having broad application. The principle is enshrined in UN Charter, in the International Covenants on Civil and Political Rights and respectively on Economical, Social and Cultural Rights, the 1970 Resolution 2625 (XXV) of the UN General Assembly concerning "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with The Charter of United States" or the Final Act of the Conference on Security and Cooperation in Europe. The international doctrine[16] has several times dealt with the right of self- determination, the internal and external determination and the right to remedial secession. By the Advisory Opinion, the Court had the opportunity to finally settle the coexistence of the right of territorial integrity and the right to self determination and the exercise of such right in the context of the territorial integrity of the state, but it did not.

4.3. The declaration of independence and the statehood criteria

The declaration of independence cannot be viewed outside the context of the fulfillment of the statehood criteria by the authors of the declaration.

It is mandatory to interpret the legality of a declaration of independence together with the criteria referring to the statehood. Such criteria should have been analyzed in the context of the entrenched presence of international organizations in Kosovo, such as KFOR, UNMIK and EULEX and their effective governmental responsibilities in the territory and the United Nations Secretary-General's Special Representative and UNMIK powers to enter into foreign relations. As stated in the concurring opinions, the Court could gave discussed also the consequences of the declaration of independence.

4.4. Political nature of the ICJ Court decision

Instead of addressing the points of law in question, exercise of international rights, new statehood issue, the Court preferred to rather take a political approach of the matter stating that an independence statement made a group is not forbidden under international law.

5. Significance of the ICJ Advisory Opinion – Conclusions

While de Court has not settled important points of law as the coexistence of the principles of the Advisory Opinion of the ICJ proclaiming the legality of the statement of independence of Republic of Kosovo has a strong significance to the new statehood concept.

At a first sight its extremely narrow scope could be considered to not contribute to any development of the statehood issue. Nevertheless, despite such a narrow scope there will be states

[16] See James Crawford, The Creation of States in International Law, Second Edition, Clarendon Press, Oxford, 2006 or Rosalyn Higgins, Problems&Process, International Law and how to use it, Clarendon Press, Oxford,1996

that do have separatist movements and that will fear that the decision will be interpreted as giving the go-ahead for breakaway regions or *de facto* states to declare independence. It is to be said that the Advisory Opinion implicitly recognizes that Serbia lost its sovereignty over Kosovo as a result of the war crimes committed in that territory.

Following the adoption of the Advisory Opinion, states that supported Kosovo's independence and have recognized Kosovo as an independent state greeted the Advisory Opinion.

It was the U.S. Secretary of State Hillary Clinton who called on all states that have not done so, to recognize Kosovo, while Member of European Parliament for Austrian Social-Democrats Hannes Swoboda said that Kosovo's independence completes the dissolution of Yugoslavia and marks the establishment of a new order in the Balkans Region[17]. Therefore the Advisory Opinion shall have an impact on the recognition of the Republic of Kosovo, despite the fact that the Court apparenty has not discussed this issue in the Advisory Opinion.

On the other side, it is important to underline that the Advisory Opinion, as narrow as it is, shall have not only an impact on the Republic of Kosovo recognition but also on other interested groups in supporting an international right to secession, recognised by the international community. It should not be forgotten that the Advisory Opinon is grounded on the state practice not forbidding statements of independence and affirms to a certain extent an emerging international rule of law as to the right of seccesion.

Last but not least, the Advisory Opinion marks also the intent of the Court to procced on issues conisdered to be under the realm of political organs of the UN as a statement of independence shall always be the first affirmation of the statehood within international relations and statehood has been considered for a long time exclusively a political consideration.

Whether or not the Advisory Opinion may be considered the initiation of a jurisprudence on the recent developments of the right to self determination outside the colonial context and on their growing acceptance by the international community remains to be seen.

[17] KOSOVO. Weekly Report: ICJ Advisory Opinion on Kosovo Independence 28 July 2010 at the internet address: http://www.vita.it/news/view/105870

GENERAL ASPECTS OF THE INFRINGEMENT PROCEDURE

Roxana-Mariana POPESCU*

Abstract

Each Member State is responsible for the implementation of EU law (adoption of implementing measures before a specified deadline, conformity and correct application) within its own legal system. The infringement procedure is one of the enforcement mechanisms that can be applied by the Commission against a Member State whenever the Commission is of the opinion that the Member State is in breach of its obligations under EU law. Is a procedure with which the European Commission fulfils one of its most fundamental duties, that is supervision of the implementation of the acquis. The infringement procedure can be initiated ex officio, following a proposal from a Member State or from a person reporting the infringement, be it a legal or a natural person.

Keywords: *infringement procedure; EU law; European Commission; Member State; acquis.*

In the context of EU accession, Member States have assumed their obligation to integrate in their own legal order, the legal rules of the European Union. "In this regard, each Member State must take measures to make sure that EU legal rule can be applied in the internal law, to ensure the compliance of internal rules with EU legal rules and also to apply them correctly"[1]. The Treaty establishing the European Community provides various mechanisms for ensuring compliance with the law of the European Union, mechanisms that include legal proceedings initiated, generally by the European Commission and, in particular, we can say, by a Member State.

Since Member States have assumed a number of obligations, including those relating to the correct and complete compliance and enforcement of EU law in the internal law, by expressing their consent to become parties establishing treaties of the European Communities and the European Union, naturally, these obligations must be fulfilled. Otherwise, the Treaty on the Functioning of the European Union (TFEU) establishes a procedure by which states are held responsible, namely, the procedure for infringement by Member States of their obligations under EU law, which is specific to EU law and is regulated in Article 258, TFEU[2].

As "guardian of treaties", the European Commission shall ensure the implementation and correct application of EU law into the internal law of Member States, and, under certain circumstances, it can bring to the Court of Justice, an action against a Member State, if it finds that the State has not fulfilled its obligations, under the treaties.

This action of finding the infringement of obligations is, according to the doctrine[3], the "special control instrument specific to the Commission, within its powers in relation to Member States, as expression of the existing dualism between Member States and institutions of the European Union. Through this mechanism of action for finding infringements of treaties, the Commission makes

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[1] Monica Elena Otel, *"The Procedure for the action of finding obligations infringement, by Member States, under the EC Treaty and EU environmental law"*, the Romanian Community Law Magazine, no. 2 / 2006, p. 55.

[2] V.n. Art. 226 TEC.

[3] Fabian Gyula, *"Community Institutional Law"*, Third edition revised and enlarged with references to the Treaty of Lisbon, Legal Sphere Publishing House, Cluj-Napoca, 2008, p. 359 ff.

sure that Member States do not exercise powers that they have voluntarily renounced at, in favor of Communities"[4].

The possibility of introducing an appeal[5] to involve States liability when they do not fulfill one or more of their obligations is reserved to the European Commission, according to art. 258, TFEU. Thus, "if the Commission considers that a Member State failed to fulfill any of its obligations, under this Treaty, then the Commission issues a reasoned notification on the matter, after giving that State the opportunity to comment. If the state in question does not comply with the notification within the deadline set by the Commission, then the Commission may go to the Court of Justice"[6].

Although, as noted, the Treaty speaks of infringement of an obligation, the concept is not defined in any of the articles regulating the procedure. In this case, as in other cases, the Court had the task to define it. Thus, the Court concludes that a breach of obligations is any infringement, by any state authority, of mandatory rules and principles of EU law. The Court even stated that states were responsible for actions, inactions or omissions of state bodies, independent from the constitutional point of view. Whether it involves the provisions of constituent or modifying treaties on secondary legislation, international agreements interconnecting the European Community, respectively the European Union, or general principles of law guaranteed by EU law, it is not important. At the same time, it must be mentioned that not acknowledging a decision of the Court of Justice is also an obligation infringement, although, according to the Court in Luxembourg, it is "a special infringement"[7], likely to be referred to the Court.

The inconsistent behavior of a state may consist in an action, inaction or omission. For example, the infringement of an obligation may be the result of applying a measure or a national provision incompatible with EU law or keeping a national provision which is contrary to the one in the law of the European Union. The Member State will be charged with infringement, but the state body (authority) which is actually at the origin of the assumed obligation infringement is not taken into consideration.

1. Causes and methods to begin the procedure for the infringement of assumed obligations

A. Causes that may involve the procedure for the infringement of assumed obligations

There are several situations that could lead to beginning the procedure, namely:

- *the infringement of a positive obligation to ensure effectiveness of EU law*. The Court considers that the obligation is not fulfilled when a Member State does not sanction those who violate EU law in the same manner as those who violate the national law;

- *general and persistent infringements.* In practice, it appears that the state can be held responsible even when EU legal rules are properly implemented. The situation takes, however, into consideration a national administrative practice contrary to EU law, provided that it is regarded as constant and widespread. In these cases, the Court of Justice considers that the infringement, by a Member State, of assumed obligations can be established only after having

[4] *Idem.*

[5] In the European Community law, the term "appeal" does not take into consideration the extraordinary path of offense of the internal law, and for this notion, the concept of "action" brought before a court is synonymous.

[6] Art. 258 TFEU.

[7] Ami Barav, Christian Philip**,** „*Dictionnaire juridique des Communautés européennes",* PUF, Paris, 1993, p. 639.

"sufficient evidence to prove in detail and with documents the practice of the national government and / or the respective courts, which differs from the type of evidence, typically required for, when the infringement relates to terms used to formulate the national legislation"[8];

- *the Court proceedings of a Member State*. Often, the action of national courts has constituted an infringement of EU law, generally and of obligations assumed by a Member State, in particular. According to the constant practice of the Court of Justice, states are responsible for actions or omissions of bodies, independent from the constitutional point of view;

- *"the omission of notification of national regulations transposing EU acts.* The obligation of Member States is to notify both the transposing legislation, as well as the one ensuring the implementation"[9] of EU regulations, and it is mentioned in most cases, in the final provisions of EU regulations;

- *the improper transposition of EU legal acts*. Another obligation of Member States is that the national legislation transposing EU regulations should be in absolute compliance with the requirements of those acts in the field;

- *the non-conformity of the national legislation with EU legal regulatory requirements* (inadequate implementation of EU law). Member States are obliged to ensure the exact enforcement of the transposing provisions. The jurisprudence of the Court of Justice mentions that, often, the reason for the Commission complaint is the inadequate implementation of EU legislation, and not the incomplete transposition or its non-transposition. The Court states that "the freedom of a Member State to decide how to implement" (...) does not relieve it from the obligation to transpose the Directive provisions through national provisions with mandatory character (...). The mere administrative practices, which can be modified by nature, as the administration likes, can not be regarded as constituting a valid execution of the obligation, under the Directive"[10]. According to the Court, "the proper implementation is particularly important so that individuals know their rights, when those whom the Directive confers certain rights are citizens of other Member States"[11]. It should be cleared that, if the national law contains provisions, some of which are compliant with EU law and some of which not, the Court considers that such legislation is not clear enough to be consistent with EU law.

B. Detailed methods to begin the procedure for the infringement of assumed obligations

The Commission initiates the procedure, under Article 258 TEC, in response to the complaint of a Member State[12] national or at its own initiative. However, without an available inquiry service, the Commission collects the information necessary for filing the complaint, from various sources, such as: "through press, questions or petitions addressed in the Parliament or, more and more frequently, through modern technological resources, such as databases that show where Member States have not notified the implementation of the Directive"[13].

Thus, we identify the following ways to begin the procedure:

- the automatic report of omission cases of notifying the transposing national legislation. The

[8] Paul Craig, Gráinne de Burca, *« EU Law. Comments, jurisprudence and doctrine"*, Fourth Edition, Hamangiu Publishing House, Bucharest, 2009, p. 561.

[9] Monica Elena Otel, *op. cit.*,p. 57.

[10] Paragraph 12 of the ECCJ Decision of May 25th, 1982, *Commission des Communautés Européennes c / Royaume des Pays-Bas*, C-96/81.

[11] Paul Craig, Gráinne de Burca, *"EU Law. Comments, jurisprudence and doctrine"*, *op. cit*., p. 559.

[12] According to art. 3, paragraph (3), point a) of Law no. 157/2005 for the ratification of the Treaty of Romania's EU accession, *"the national of a State means the natural or legal person having the citizenship, respectively the nationality of that State, in accordance with its internal legislation"*.

[13] Paul Craig, Gráinne de Burca, *"EU Law. Comments, jurisprudence and doctrine", op. cit.*, p. 539.

Commission benefits from a referral system that allows informing, leading thus to the beginning of the automatic procedure. Through this system, the documentation of notification is brought directly, by the Member State, into the database of the Commission;

- the complaint filed to the Commission by any legal or natural person seeking any measure or practice of a Member State which it considers incompatible with EU rules. The complaint may be drawn up in any official language of the European Union[14], is exempt from taxes and may have the form either of a letter or it can also be used the standard form[15], elaborated by the European Commission[16]. The natural or legal person filing the complaint should not have any interest in that action and not be directly injured. The only condition for admitting the complaint is that it relates to the violation of an EU legal rule, by a Member State. However, the Commission highlighted that "the procedure is not intended primarily to offer people a way to appeal, but is an objective mechanism to ensure compliance, by the state, with the Community law"[17]. Under the doctrine, "the Commission is free to respond or not to such a request". The complaint is recorded in a register kept by the General Secretariat, and the complainant receives a notification with the number of the complaint. Within a year, the Commission is compelled, either to close the case or to move to the next stage. The complainant is, then, informed by the General Directorate in charge of the field, on the action taken by the Commission, in response to his complaint" [18];

- The Commission's own investigations:

a) Reports drawn up by Member States: all Member States have the obligation to prepare annual reports on the situation of complying with EU legal rules;

b) Parliamentary questions: The European Parliament may address the Commission, in exercising control responsibilities, questions that concern their work. As a consequence to these questions, the Commission may take notice and begin the procedure;

c) Petitions: within the European Parliament, operates a Committee on Petitions which serves to receive such complaints from citizens. Some of these petitions are submitted to the Commission for resolution and after analyzing them, the Commission may conclude that a Member State has not complied with obligations, under EU legal rules[19].

2. The procedure of finding the infringement of assumed obligations, by States

The specialized literature has formulated more opinions on the stages / phases of the procedure. According to Paul Craig and Gráinne de Burca[20], "the procedure of finding the infringement by Member States of obligations assumed, under the EC Treaty, can be divided into four distinct phases": the negotiation from the initial pre-contentious stage, the official notification on that alleged violation, via a letter from the Commission, the issuance of a reasoned notice from the Commission, sent to the State in question and the final stage - the referral to the Court of Justice, by the Commission.

Carol Harlow and Richard Rawlings[21] identify, however three phases, namely: "an initial stage which is diplomatic and shaped by the Commission, a subsequent phase, a little more

[14] Currently, there are 23 official languages.

[15] The form became available to persons interested in it, in 1999. It can be found in Romanian, at the following website: http://ec.europa.eu/community_law/your_rights/your_rights_forms_en.htm

[16] Monica Elena Otel, *op. cit.*, p. 58.

[17] Paul Craig, Gráinne de Burca, *"EU Law. Comments, jurisprudence and doctrine ", op. cit.*, p. 539.

[18] Gyula Fabian*, op. cit.*, p. 361.

[19] Monica Elena Otel, *op. cit.*, p. 59.

[20] *"EU Law. Comments, jurisprudence and doctrine ", op. cit.*, p. 542.

[21] *"Accountability and Law Enforcement: The Centralized EU Infringement Procedure"*, quoted by Paul Craig, Gráinne de Burca in *"EU Law. Comments, jurisprudence and doctrine", op. cit.*, p. 541.

jurisdictional, influenced by the Court, and yet dominated by the negotiator style of the Commission and a third phase, with a clear legal character, as a consequence of applying a pecuniary penalty against the State".

In our opinion, analyzing the content of the above stages, belonging to the authors mentioned, we consider that the procedure has two main, but distinct stages, which in turn comprise several actions, namely an administrative stage, a pre-contentious stage and a judicial stage which is contentious. Thus, further, we shall present the procedure development, considering these two stages.

A. *The administrative, pre-contentious stage*

The objective of this phase consists in allowing the Member State concerned to justify its position or, if necessary, to comply with the treaty requirements. The administrative stage gives the possibility to amicably resolve the misunderstandings that led the Commission to the conclusion that the State concerned has not complied with EU law.

The administrative stage is a mutual change of views between the future complainant (the Commission) and the future defendant (the Member State), "more specifically, in this stage, some time limits to resolve the situation inconsistent with EU law are set, and what is also important is that, within the administrative procedure, the delimitation of the scope of the future action brought before the Court of Justice is also established"[22].

The Court itself has stated repeatedly that the procedure purpose is "to enable the Member State, on one hand to remedy, correct or rectify its position on the issue presented before Court and, secondly, to present its defense against complaints of the Commission"[23].

In most cases, the procedure is initiated by the European Commission. In this case, the Commission shall send to the Member State likely to have infringed EU law, an informal letter. The General Directorate, with responsibilities in a particular area, requests, through this letter, to the State in question, relevant details on the alleged infringement of EU law. The role of this letter is to collect information and to eliminate any misunderstanding of the Commission. "In practice, it was shown that in many cases, the alleged infringement of EU law was due to shortcomings in translating national acts or to their misinterpretation"[24].

If, after the response received from the State, the Commission considers that the state is still likely to have infringed EU law, it shall send to the state in question, a "formal letter" requesting to the Member State to submit its views on its conduct towards the situation, which the Commission considers an EU law infringement. The letter states what the EU law infringement is, contains a summary of objections of the European Commission and also sets a time limit during which the state has the opportunity to make observations. The opportunity offered to the State to make comments, is considered by the Court as an essential guarantee, without which the infringement procedure, by States, of their assumed obligations, would be unfounded (illegal)[25].

The Member State can indicate, through observations, the measures it has taken to "entry into normality, if it recognizes that it ran counter to the Community legal order"[26].

We agree with authors of the specialized literature stating that "the State may not invoke provisions in its favor, practices or circumstances existing in its internal law to justify the non-

[22] Gyula Fabian, *op. cit.*, p. 362.

[23] *Idem.*

[24] Monica Elena Otel, *op. cit.*, 2006, p. 60.

[25] Section 1 of the ECJ Decision Summary, of March 28th, 1985, *Commission des Communautés Européennes c / République italienne*, C-274/83 *("The purpose of Art. 169 TCEE clears that the pre-contentious stage of the procedure for obligations infringement must contain* (...) the state possibility to make comments (...) - an essential guarantee required by the Treaty, and respecting this guarantee is a condition that guarantees the legality of this procedure").

[26] Gyula Fabian, *op. cit.*, p. 363.

compliance with the Community law obligations, even if they are constitutional" [27].

If after an exchange of views between the Commission and the Member State, or in the case the Commission receives no response from the State, the Commission is still convinced that it involves an EU law infringement, it issues a reasoned notification. The notification does not bind on the Member State concerned, and its legal effect is possible only in connection with an eventual notice of the Court of Justice. The notification must meet the following conditions:

1. to contain only those objections of the Commission presented in a formal letter;

2. to be reasoned, meaning "to contain a coherent and detailed statement of the reasons which led the Commission to consider that the State in question has failed to fulfill an obligation assumed under the Treaty"[28];

3. to specify a reasonable period in which the Member State would comply with EU law.

Regarding the need for motivating the notification, we have to make an observation. In the law of the European Union, the obligation to state reasons is an essential procedural requirement. Furthermore, Article 297 TFEU expressly requires that regulations, directives and decisions must be accompanied by reasons for which they have been developed and adopted. Article 258 puts, indirectly, this provision also in documents issued by the Commission, on its grounds. If in the first case, the lack of motivation is the subject of an action for cancellation, it is not the same with the failure of stating reasons for a notification of the Commission, and this merely because the notification is an act without legal force, being, in fact a tool guide. As argument, we take into consideration the statement made by the General Advocate Lagrange in the conclusions presented in the case Commission v Italy in 1961[29], namely: "This document should not be required to fulfill any formality, since (. ..), the reasoned notification is not an administrative act subject to the control of the Court, with regard to its legality". Nevertheless, the Member State which the notification is addressed, may appeal the absence of its motivation, but only before the Court of Justice, if the procedure reaches this point.

Since the Treaty does not stipulate a time within which the State must submit comments, "the Commission shall give a reasonable time, ordinarily two months, but the time limit may vary depending on the complexity of the case, emergency, whether the state was already informed before the initiation of the procedure"[30]. The deadline established by the Commission can be extended only by the Commission because the Court of Justice has no jurisdiction in granting a time extension.

The Member State is not compelled to answer to the notification letter sent by the Commission, and the absence of such a response does not involve any negative consequences.

But if the State answers to the European Commission, the answer must include measures taken in order to comply with EU law. The measures may be administrative or legislative, or both. The deadline for the implementation of measures and for response at the Commission's requirements is of two months, but it may be extended at the request of the Member State concerned, by a maximum of three months, if necessary measures to comply with the reasoned opinion must be adopted through a legislative procedure[31] .

If the state does not conform to the notification transmitted by the Commission, within the time stipulated, it (the Commission) may go to the Court of Justice. Interestingly, the Luxembourg

[27] Monica Elena Otel, *op. cit*, p. 61.

[28] Section 1 of the ECCJ Decision Summary, of July 11th, 1991, *Commission des Communautés Européennes c / République portugaise*, C-247/89.

[29] ECCJ Decision of December 19th, 1961, *Commission de la Communauté économique européenne c. / République italienne*, C-7/61.

[30] Mihaela-Augustin Dumitrascu, article published in the Newsletter of INPPA, no. 3 / 2005.

[31] Monica Elena Otel, *op. cit.*, p. 62.

Court may be notified, even in the case where the Member State has straightened its behavior, but after the deadline established. The reasons why the State is not exempted from any liability, were presented by the Commission itself, namely: the Commission maintains that it has a permanent interest in bringing the action to prevent states to "undermine" the infringement proceedings, ending their behavior which is not in accordance with EU law, before pronouncing an order, so that, subsequently it can resume its impugned conduct. However, the Commission argues, the Court must hear and determine also the short-term violations, because punishable is the EU law infringement, and not the duration of the infringement.

Through the referral to the Court, by the Commission, a confirmation of its legal position adopted in the reasoned notification is wanted. The referral is, in fact the start of the contentious stage.

B. The contentious stage

"The appeal for finding the infringement of obligations assumed must be introduced, at the latest within one month, after the Commission decided to refer the case to the Court of Justice"[32].

Regarding the contents of the appeal, some clarifications must be made. Given that the reasoned notification acts as a "procedural protection for the benefit of the Member State"[33] suspected to infringe EU law, the Commission can not change the substantive content of its claims when it goes to Court. Moreover, "the Commission can not alter the substantive content of its arguments, not even when it comes to hearing the case by the Court of Justice, even if both parties wish the Court to examine other aspects referring to the state conduct that occurred after the date of issuing the notice"[34]. In the case where the Commission wishes to introduce a new objection (which is not in the reasoned notification), it can not change the complaint, but it must resume the entire procedure, under Article 226. The only case upheld by the Court on amendments to claims formulated by the Commission, refers to a situation where they are less than in the reasoned notification.

In conclusion, the Commission can not express, at this stage, other claims than those found in the reasoned notification, but it can renounce at some of them.

In the application, the Commission must clearly indicate what its claims are, which are the matters of law and fact on which the calling of the State, to the Court, is based.

From the jurisprudence of the Court, it results that the Member State, although recognizing the EU law infringement, can not rely on the structure of its internal administrative system, established in accordance with constitutional rules, to argue the impossibility to resolve the problem. In this case, the Member State concerned is compelled to change the national system in order to ensure the uniform application of EU law.

Often, Member States invoke in order to explain the noncompliance, in time, with EU law, issues related to the legal system and to the separation of state powers, in the internal systems of law, rejected, however, constantly by EUCJ. The Court reiterated comments according to which the State was responsible "whatever would be the state body whose act or omission underlies the obligations infringement, even in the case of an institution constitutionally independent[35]" and that "a Member State may not invoke provisions, practices or circumstances existing within the internal legal system to justify the non-compliance with obligations and time limits set by community Directives"[36].

Another form of defense of the states is reflected in claiming the lack of intent, but not even this time the Court is willing to "forgive" the state, because the Court finds only if the infringement has occurred or not, and not whether it happened intentionally or negligently.

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[32] Monica Elena Otel, *op. cit.*, p. 63.
[33] Paul Craig, Gráinne de Burca in *"EU Law. Comments, jurisprudence and doctrine", op. cit.*, p. 551.
[34] Idem.
[35] Idem, p. 563.
[36] Idem.

Another reason brought forward by Member States refers to the fact that the infringement was committed by other Member States, but not even this reason stands up. The Court has often rejected the idea according to which the obligation of respecting EU law is mutual and dependent on the absolute compliance by other Member States.

And last but not least, we mention that according to the Court, "it is not possible for a Member State to invoke the illegality of a previous EU decision that had been sent, in order to prevent a decision against it, within an action based"[37] on article 258 for failing to comply with that decision.

"Within a month after the decision of the Court, the Commission sends a letter to the Member State which reminds it the obligation to take necessary measures to ensure compliance with the violated EU law and to report within three months, the measures taken or to be taken"[38]. "The Member State is able to transmit a response to the Commission, on measures it has taken to comply with the decision of the Court, this option representing the right of the Member State concerned to defend it and to demonstrate how it considers necessary to respect the decision of the Community Court"[39].

If after observations transmitted by the Member State concerned, the Commission still considers that it has not taken the necessary measures to comply with the decision of the Court, it will issue a reasoned notification specifying the aspects on which the State has not complied with the decision of the Court.

"If the Member State concerned has not taken measures imposed by the Court's judgment within the period set by the Commission, then the Commission may go to the Court of Justice. The Commission states the quantum of the lump sum or penalty payments which it considers appropriate to the circumstances and that the Member State must pay"[40].

Under Article 260, section (2), paragraph 3) TFEU, the infringement by the Member State of the Court decision constitutes a new violation of the Treaties provisions which may be sanctioned again with an action of obligations infringement, and the Court may oblige the Member State to pay a lump sum or sums with comminatory character, until the fulfillment of obligations specified in the first decision.

In determining the lump sum, the Court will consider the following: "the hazard of the infringement, the duration of the infringement, the possibility of the Member State to pay the compensation required, the effect of the infringement on the public or private interest and the urgency of the matter"[41].

C. Effects of the decision

"The decision of the Court of Justice for failure to fulfill obligations assumed by Member States is just a declaration. It establishes only the infringement existence, and national authorities have the task to take measures in order to enforce the decision"[42].

The Court has no power to suspend and annul the state actions contested by the finding of EU law infringement or to establish concrete measures that the respondent State is compelled to. The Court decision requires the State concerned to amend the legislation, adjusting it properly and without delay, to measures ordered[43]. Although the Court decision has res judicata authority only between the parties, individuals can invoke an EU regulation, the purpose and scope of which have been defined by the Court of Justice.

[37] Idem, p. 564.
[38] Monica Elena Otel, *op. cit.*, 2006, p. 64.
[39] Idem, p. 65.
[40] Art. 260, paragraph (3), TFEU.
[41] Gyula Fabian, *op. cit.*, p. 370.
[42] Mihaela-Augustina Dumitrascu, *op. cit*.
[43] Gyula Fabian, *op. cit.*, p. 369.

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SHORT CONSIDERATIONS ON THE TACIT APPROVAL PROCEDURE

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Abstract

The publication in the Official Gazette of Law no.157/12 July 2010 amending and supplementing the Government Emergency Ordinance no. 27/2003 on the tacit approval procedure, gave us the occasion to start this demarche by which we tried to present the main changes of substance caused to the public administration activity and their impact on the improvement of the business environment. In this paper we will specify what the regulatory scope of this law is, we will define the notion of authorization and will analyze whether the administration can be sanctioned for passiveness in its relationship with the citizen. Last but no least, we will conclude by presenting procedural details in solving disputes regarding the issue of authorizations that fall within the scope of the tacit approval procedure.

Keywords: *public service, tacit approval, authorization, obligation to publish information, obligation to communicate information*

Introduction

In the following, we aim at presenting the tacit approval procedure, as seen from the perspective of the Romanian law, considering the existing institutional framework.

A scientifically rigorous approach determines us, before proceeding to the analysis of the subject itself, to make a short presentation of the public service and of the principles of operation of public services.

In other words, the preface of this theme aims at describing the institutional framework of the good administration concept, analyzed simultaneously with the code of conduct for public servants (I)

The central axis of this paper consists in the analysis of the content of the Government Emergency Ordinance no. 27/2003[2] on the tacit approval procedure, as seen from the perspective of the new changes caused to it by Law no. 157/12 July 2010[3] (II).

The usefulness of this paper is due to its intent of highlighting the novelties brought in the matter as concerns the following: procedural details in issuing the authorizations falling under the scope of tacit approval procedure, the impact of these changes on the business environment and on the public administration activity in general.

Finally, we aim at making a synthesis of the conclusions deriving from our analysis (III).

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[2] Government Emergency Ordinance no. 27/2003 on the tacit approval procedure, published in the Official Gazette no. 291/25 April 2003

[3] Law no. 157/12 July 2010 amending and supplementing the Government Emergency Ordinance no. 27/2003 on the tacit approval procedure, published in the Official Gazette no. 496/19.07.2010

(I) Public service, principles of operation of public services, right to good administration, code of conduct of public servants

In the doctrine of specialty, the notion of **public service** has been the subject of many research efforts of some famous authors in the legal and other fields. Etymologically speaking, the word *"service"* comes from the Latin word "*servitum"* that means "slave", hence the interpretation of being in somebody's service, or put at service, which evokes the idea of public utility or public service[4]. The term of public service is used both with organizational meaning, as social organization, and with functional meaning, as activity carried out by such an organization.[5]

In P. Negulescu's understanding, "public service" meant an administrative organization created by the State, the county or the commune, with well determined competence and powers, with financial means obtained from the general patrimony of the creating administration, placed at the public's disposal in order to regularly and continuously satisfy a general need, whose private initiative could only provide incomplete and intermittent satisfaction[6].

Professor Ioan Alexandru[7] defined the public service as the organization of the State or of the local collective created by the competent authorities in order to guarantee the satisfaction of certain requirements of society members in the law enforcement process, in terms of administrative or civil law.

Another reputed author, Verginia Vedinaş[8], asserts that, in the specialty literature, we are in the presence of a public service if several conditions are met:

- the requirements of the society members are satisfied,
- its creation is made through government acts,
- the activity of the service must be carried out while exercising public authority, and its personnel must, usually, consist of public servants etc.

As we all know, legality is the essence of the State's activity, of the administration's activity as a whole.[9] The public administration, regardless of the level it is at, must adopt one decision or the other, depending on the applicable laws, in accordance with the public interest.

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[4] For a wider view, see Iordan Nicola, *Managementul serviciilor publice locale (Management of local public services)*, (Allbeck Publishing House, Bucharest, 2003), p.63, quoted by Verginia Vedinaş in *Drept Administrativ (Administrative Law)*, 4th Edition revised and updated, (Universul Juridic Publishing House, Bucharest, 2009) p. 243

[5] Ioan Alexandru, Ivan Vasile Ivanoff, Claudia Gilia, *Sisteme politico administrative europene (European Political-Administrative Systems)*, (Bibliotheca Publishing House, Târgovişte, 2007), p.86; Anton Trăilescu, *Drept Administrativ (Administrative Law)*, 4th Edition, (C.H. Beck Publishing House, Bucharest 2010), p. 102 defined the public service from the material and formal points of view.

[6] P. Negulescu, *Tratat de drept administrative (Treatise on Administrative Law)*, 1st volume, 4th Edition (Marvan Publishing House, Bucharest, 1934), p. 126, quoted by Cătălin-Liviu Săraru, *Contractele administrative, Reglementare, Doctrină, Jurisprudenţă (Administrative Contracts, Regulatory framework, Doctrine, Case-Law)* (C.H. Beck Publishing House, Bucharest, 2009) p. 203-204

[7] Ioan Alexandru, Ivan Vasile Ivanoff, Claudia Gilia, *op.cit,* p.87

[8] Verginia Vedinaş, *Drept Administrativ (Administrative Law)*, op.cit, p. 245. For other opinions, see also: Dana Apostol Tofan, *Drept Administrativ (Administrative Law)*, 1st volume, 2nd Edition (CH Beck Publishing House, Bucharest 2008), p.8; Rodica Narcisa Petrescu, *Drept Administrativ (Administrative Law)*, (Accent Publishing House, Cluj Napoca, 2004), p.24 etc.

[9] Ioan Alexandru - *Drept administrativ comparat (Comparative Administrative Law)*, (Lumina Lex Publishing House, Bucharest, 2000) p.133, quoted by Verginia Vedinaş in *Statutul funcţionarilor publici. Legea nr.188/1999, cu modificările şi completările ulterioare, republicată (Statute of Public Servants. Law no. 188/1999, as subsequently amended and supplemented, republished),* (Universul Juridic Publishing House, Bucharest, 2009), p.18

The public interest, as defined in the code of conduct for public servants, is the interest that public institutions and authorities guarantee and observe the legitimate rights, freedoms and interests of citizens, recognized by the Constitution, by the domestic legislation and by the international treaties Romania is part in.

At the level of the European Union, there is the Charter of Fundamental Rights[10] which provides the **right to good administration**, as a fundamental right of the citizens of the Union.

Moreover, on September 6th, 2001, the European Parliament adopted the European Code of good administrative behaviour[11] that the institutions and organizations in the European Union, the administration and its servants must abide by in its relationship with the public.

The European Ombudsman had an important contribution to the enactment of the European Code of good administrative behaviour, by which it defined the concept of good administration, as it made suggestions for its wording, and which is currently a guide and source[12] of information for the personnel of all the institutions and organizations of the Community.

The right to good administration[13], according to the European Code of good administrative behaviour, has four components:

1.) Every person has the right to have the institutions and organizations of the Union fairly and impartially analyze their case within a reasonable period of time;

2.) This right mainly includes: the right of every person of being heard before taking any individual measures that might negatively influence their situation; every person's right to have access to the file of their own case, provided that they observe the authorized confidentiality interests and the professional and business secrecy; the administration has the obligation to justify its decisions;

3.) Every person has the right, in accordance with the common general principles in the legislation of the Member States, to have the Community repair the damage caused by the institutions or by their employees in exercising their functions;

4.) Every person may address the Unions' institutions in writing, in one of the languages of the treaty and receive an answer in the same language.

In accordance with the provisions of article 4 titled "Legitimacy", "the servant must carry out its activity in accordance with the law and apply the rules and procedures established in the Community legislation. The servant pays attention particularly to whether the decisions affecting the rights or interests of citizens have the required legal substantiation and a legal content".

Like other states, Romania has harmonized its legislation with the European standards, thus adopting, among other relevant pieces of legislation, the **Code[14] of conduct for public servants** establishing the rules of professional conduct of public servants; therefore, there is a conceptual compatibility.

As for the principles governing the professional conduct of public servants, here are some examples: supremacy of the Constitution, priority of the public interest, equal treatment of citizens before the public authorities and institutions, professionalism, impartiality, fairness and correctness, openness and transparency, etc.

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[10] JO 2007 C 303. It was proclaimed first in December 2000 at Nice and was signed and proclaimed again on 12 September 2007, before the signing of the Lisbon Treaty on 13 December 2007. See the entire text at: http://eur-lex.europa.eu/ro/treaties/dat/32007X1214/htm/C2007303RO.01000101.htm

[11] See the entire text: *Le Code Européen de Bonne Conduite Administrative*, Office des publications officielles des Communautés Européennes, L- 2985 Luxembourg 2002, ISBN 92-95010-42-6

[12] For full details, see http://www.ombudsman.europa.eu/activities/home.faces

[13] For other details, the wording of the Code can be consulted at the web address: www.euroombudsman.eu.int.

[14] Law no. 7 / 18 February 2004 on the Code of conduct for public servants, published in the Official Gazette of Romania no. 157/23 February 2004, amended by Law no. 50/13 March 2007

The reason why I made a short analysis of the concepts of public service, right to good administration, code of conduct for public servants was to ensure an easier transition to the object of analysis of this paper, namely the tacit approval procedure.

(II) The main provisions of Law no. 157/12 July 2010 amending and supplementing the Government Emergency Ordinance no. 27/2003 on the tacit approval procedure

2.1. In treating this subject, we will start by defining the **notion of "tacit approval"** and then we will make a comparative presentation of the new elements brought by Law no. 157 / 12 July 2010 simultaneously with the provisions of the Government Emergency Ordinance no. 27/2003 that suffered no changes.

The tacit approval procedure[15], as it is defined by the Government Emergency Ordinance no. 27/2003, is "the procedure by which the authorization is considered as granted if the public administration authority fails to give an answer to the applicant within the legal deadline set for the issue of such authorization".

In the civil law there is a very well known theory of the legal value of silence. It's the Latin adage *"qui tacit consentire videtur"*, i.e. *"he who is silent is taken to agree"*.

As a rule, in the civil law[16], silence is not seen as externalized consent. As an exception, silence is seen as consent: 1) when the law expressly provides it; 2) when, due to the express will of the parties, a certain legal significance is ascribed to silence; 3) when silence is seen as consent according to the customs.

If we extrapolate the civilian theory to the public law, we can assert that, through the tacit approval procedure, the lawmaker intended to ascribe a certain legal significance to silence, under certain conditions strictly determined by this legal text.

The reason for adopting this legislative text is that accountability[17] was intended for the public administration authorities in view of complying with the legal deadlines set for the issue of authorizations and permits, but we will revert to this aspect towards the end of our demarche.

According to the Government Emergency Ordinance no.27/2003 on the tacit approval procedure, its main objectives are, among others: removal of the administrative barriers in the business environment, fight against corruption by reducing arbitrariness in the administrative decision-making process, as well as promotion of the quality of public services by simplifying the administrative procedures.

In the first part of our paper we identified the principles that public servants must take into account in their activity and, on that occasion, we spoke of their professionalism and of their abidance to the law.

We believe that the professional training of public servants is reflected first of all in the quality of the public services they provide, and the quality of services is tightly connected to law-abidance.

In the following, we will present the provisions of Law no.157/12 July 2010 amending and supplementing the Government Emergency Ordinance no. 27/2003 on the tacit approval procedure.

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[15] Article 3 point b) of the Government Emergency Ordinance no. 27/2003

[16] Gheorghe Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil (Romanian Civil Law. Introduction to Civil Law. Themes of Civil Law)* (Casa de Editură şi Presă „Şansa" SRL, Bucharest, 1992), p.130-131

[17] Article 1 point b) of the Government Emergency Ordinance no. 27/2003

2.2. The regulatory framework of the tacit approval procedure has remained the same, meaning that it applies to all the authorizations issued by the public administration authorities, except for those issued in the field of nuclear activities, those regarding the regime of firearms, ammunition and explosives, the regime of drugs and precursors, as well as authorizations in the national safety field.

Also, the provisions of the Government Emergency Ordinance no. 27/2003 apply to the authorization issue procedures, to the authorization renewal procedures and to the reauthorization procedures, as a result of the expiry of the authorization suspension period or of the accomplishment of the measures established by the competent control bodies, according to article1 par. 2.

2.3. The notions used have not changed their meaning, namely:

"**Authorization**" means the administrative document, issued by the public administration authorities, by which the applicant is allowed to conduct a certain activity, to provide a certain service or to exercise a certain profession. The notion of "authorization" also includes the permits, licenses, approvals, or other such administrative documents.

- The **"negative answer"** of the competent public administration authority, given within the legal authorization issue deadline, is not the same thing as tacit approval.

2.4. About the obligations of authorities concerning the display of information regarding the issue of authorizations.

Among the important changes caused to the aforementioned piece of legislation regarding to the obligation to display information, we remind some of them:

- the public administration authorities that are competent to issue authorizations must display in their premises *and, as the case may be,* on their web page the information concerning the issue of authorizations;

- also, the authorities must display the list of authorizations (within the scope of activity of such authorities) for which the tacit approval procedure is applicable, as well as the following information for each separate type of authorization:

a.) – the application form that must be filled in by the applicant, as well as the instructions for filling it up;

b.) – the list of all the documents needed for the issue of the authorization and the manner in which they must be submitted to the public administration authority;

c.) – all the information regarding the preparation of documents and, if necessary, the list of public administration authorities that are competent to issue administrative documents included in the documentation that must be lodged, such as: address, telephone or fax number, office hours for the public.

The amendment of the wording consists in the introduction of the copulative conjunction *"and"* and of the expression *"as the case may be",* as opposed to the former regulation where these obligations were alternative, using the disjunctive conjunction *"or"*.

The information that must be displayed will be presented in a clear manner, giving, if possible, concrete examples.

The public administration authorities will elaborate guides regarding the authorization procedure and the preparation of the documentation that the issue of an authorization is based on. Any interested person may obtain a copy containing the information specified above, according to the provisions of article 4. Most European states guarantee the citizens' right to have access to the

documents of the administration, and in 1906, in the United States, a general right of consultation of the documents in possession of the federal authorities was instituted.[18]

2.5. About the obligation of authorities to[19] communicate information upon the applicant's filing of the application

The public authorities will have the obligation to communicate, in writing, upon the filing of the application:

- its registration number;
- registration date;
- express information regarding the legal settlement deadline;
- whether the application is subject or not to tacit approval.

This information is also communicated if the electronic filing of applications is possible.

The aforementioned obligation of communication is applicable both to applications for the issue of authorizations and to applications for the renewal of authorizations.

Also, Law no. 157/12 July 2010 amending and supplementing the Government Emergency Ordinance no. 27/2003 on the tacit approval procedure deliberately includes in its wording that **the explicit or tacit refusal of the appointed employee of an authority to apply the provisions regarding the publicity of the aforementioned information is sanctioned**[20], and this deed is construed as default and will engage the disciplinary liability of the defaulting employee.

The guilty infringement by public servants of the duties relevant to their public function and of the rules of professional and civic conduct established by the law is construed as disciplinary default and will engage their disciplinary liability[21].

It has been said in the specialty literature[22] that disciplinary defaults negatively influence the quality of public services and law enforcement, thus determining the decrease of the citizens' trust in the public authorities.

2.6. Another new element brought by Law no. 157/2010 refers to the document[23] considered equal to an authorization for all purposes.

The applicant lodges with the competent public authority an application accompanied by the full documentation, prepared in accordance the legal provisions regulating the authorization procedure in question and with the aforementioned information.

Virtually, the authorization is construed as granted or, as the case may be, renewed if the public administration authority fails to give an answer to the applicant within the legal deadline set by the law for the issue or renewal of the relevant authorization.

According to the wording of the ordinance, unless the law sets forth a deadline for the settlement of the authorization application, the public administration authorities must settle the authorization application within 30 days as of its submittal.

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[18] Bertil Cottier, *La publicité des documents administratifs, Étude de droit suédois et suisse. Thèse de doctorat*, Imprimeries Réunies SA Lausanne, 1982, p. 179, quoted by Verginia Vedinaş in *Statutul funcţionarilor publici. Legea nr. 188/1999, cu modificările şi completările ulterioare, republicată (Statute of Public Servants. Law no. 188/1999, as subsequently amended and supplemented, republished),* (Universul Juridic Publishing House, Bucharest, 2009), p. 22.

[19] Article 6 of the Government Emergency Ordinance no. 27/2003

[20] It's the information that must be displayed in the premises of authorities and, as the case may be, on their web page.

[21] Dana Apostol Tofan, op cit, p.361

[22] Anton Trăilescu*, op cit,* p. 167

[23] Article 8 of the Government Emergency Ordinance no. 27/2003

When[24] the applicant approaches the relevant public administration authority and his authorization has not been not issued within the legal deadline, therefore after the expiry of the response time, the applicant informs it about the existence of the approval case regarding any document that is subject to tacit approval, according to the law, and demands that the registry office of that authority issue an official document confirming that no answer has been given within the legal deadline with regard to his request. In such situation, the public administration authority must issue, within 5 days as of such demand, a document allowing the applicant to conduct an activity, provide a service or exercise a profession.

This *document allows the applicant to conduct and activity, to provide a service or to exercise a profession and is considered equal to an authorization for all purposes*, *including before the control bodies,* except for the authorization that is valid only in its standard form, expressly regulated by the law.

In the old regulatory framework there was no provision regarding the document replacing the authorization for all purposes, issued by the public administration authority when such authority, being in default for not answering to the applicant within the legal deadline, was indirectly forced to grant the authorization by means of this document.

The law goes further and protects the applicant's interests, indirectly sanctioning the passive attitude of the public administration authority by giving the applicant the possibility to bring an action in court. Thus, if the relevant public administration authority fails or refuses to issue the document allowing the conduct of an activity, the provision of a service or the exercising of a profession, as well as if the authorization is valid only in its standard form, expressly regulated by the law, the applicant may approach the court of law, according to the procedure established by this ordinance.

The court will settle the application within 30 days as of its lodging, by summoning the parties.

2.7. Another new element brought by Law no. 157/2010 is connected to the prosecutor's participation in the trial.

The compulsoriness of the prosecutor's participation in dispute settlement has been eliminated as regards the issue of authorizations that fall within the scope of the tacit approval procedure, as opposed to the former regulation where this was not compulsory, according to article 9 par. 3.

2.8. As regards the irregularity of the documentation that accompanies the authorization application, the tacit approval procedure has not been modified by Law no. 157/2010, and remains the same.

Thus, if an irregularity in the lodged documents is acknowledged at the application filing time, the public administration authority will notify this to the applicant at least 10 days before the expiry of the legal deadline for the issue of such authorization, if such deadline exceeds 15 days, or at least 5 days before the expiry of the legal deadline for the issue of the authorization, if such deadline is less than 15 days. At the same time, the public administration authority will specify the method to remedy the acknowledged irregularity.

In the aforementioned situations, the issue deadline or, as the case may be, the renewal deadline is extended accordingly by 10 days or 5 days, as the case may be.

Please note that the public administration authority that fails to approve the authorization application within the legal deadline by the applicant's fault, as detailed above, is not sanctioned.

[24] Article 8 par. 1 of Law no. 157/2010

2.9. Another provision refers to what happens when, after the issue of the document allowing to conduct an activity, to provide a service or to exercise a profession, the public administration authority acknowledges the failure to meet some conditions that are important for the issue of the authorization.

In such situation, the public administration authority will not be able to cancel the document, but will immediately notify its holder, by registered letter with acknowledgement of receipt, about the irregularities found, specifying how to remedy all the identified minuses, as well as the deadline within which the holder must fulfil this obligation. Such deadline cannot be less than 30 days and will start running as of receiving the notice.

2.10. Also, procedural details are set forth in case the applicant approaches the court. The applicant must prepare a file containing the following: the petition accompanied by the copy of the authorization application having the number and date of registration with the respondent public administration authority, accompanied by the entire documentation filed with this authority, as well as by the mentions specified[25] under article 6 par. (3^1).

In the following, we will present the *solutions of the court* vested with a legal action based on the ordinance on the tacit approval procedure.

Considering the legal text, the court has two options:

- *to allow the petition,* if it acknowledges that the conditions set forth by the emergency ordinance on the tacit approval are met, and issue a decision forcing the public administration authority to issue the official document allowing the applicant to conduct a certain activity, provide a service or exercise a certain profession;

- *to reject the petition*, if it acknowledges that there is an answer of the state body or a notice regarding the irregularity of the filed documentation, having the posting date stamped at the dispatch location or the date when the applicant became acquainted with the answer, anterior to the expiry of the legal deadline for the issue of the authorization.

Court decisions are drafted within 10 days as of pronouncement and are irrevocable.

2.11. The provisions regarding the sanction of the public administration authorities have not been modified, therefore there may be several situations:

- if the petition is allowed and the public administration authority fails to fulfil its obligation and issue the official document allowing the applicant to conduct a certain activity, to provide a service or to exercise a profession within the deadline mentioned in the court decision, upon the applicant's demand, the court may force the manager of the public administration authority in whose charge the obligation was established to pay a judicial fine representing 20% of the national minimum net wage for each day of delay, as well as to pay indemnities for damages caused by such delay.

- the deed of the public servant or of the contractual personnel by whose fault the public administration authority has failed to give an answer within the legal deadline, thus applying the tacit approval procedure for granting or renewing an authorization, is punished according to Law no. 188/1999 on the Statute of public servants or, as the case may be, according to the labour legislation, being construed as disciplinary default, unless it was committed in such circumstances that, according to the criminal law, it may be construed as felony. In such case, the public servant's civil, patrimonial or criminal liability, as the case may be, could be engaged as well.

- the deed of the public servant who, being aware of the authorization application and its relevant documentation, knowingly refuses to settle the application within the legal deadline and

[25] They refer to the legal deadline to settle the dispute, specifying if the relevant application is subject to the tacit approval procedure or not.

determines the intervention of the presumption of tacit approval is a felony and is punished with imprisonment.

2.12. Also, the provisions regarding the sections for the guilty conduct of petitioner have been maintained:

- the deed of a person invoking before a public authority or institution the existence of an authorization as a result of the tacit approval procedure by knowingly omitting to produce the answer or the notice received as part of the authorization process, according to article 6 par. 4, is a felony (misrepresentation) and is punished according to the Criminal Code.
- conducting the activities referred to under article 2 par. 1 without having an express authorization from the competent public authority is a felony and is punished with imprisonment.

(III) Conclusions

The analysis of the tacit approval procedure pointed out an important aspect that must be taken into account in the activity of the public administration, namely the deadline to conclude the administrative procedures. For this ordinance to be sustainable, the public administration authorities must, first of all, have the qualified, responsible personnel, well acquainted with the law.

In the future, a greater importance should be attached to the way ingoing/outgoing documents are drafted at the level of registry offices within institutions because the registration date and number on the applicant's deposit slip are key elements in this procedure.

In practice, many cases are pending before the courts of law to figure out the following judiciary matter: is the tacit approval procedure applicable also to building authorizations? However, we will expand on this subject in some other paper.

Although we do not deny the merits of Law no. 157/2010 on the tacit approval procedure, we cannot go without specifying the weak points of this special procedure, namely:

- the notion of public administration authority is not defined;
- the deadline to approach the court of law is not expressly specified.

To find out what "public authority" means, we can make an interpretation based on a juridical reasoning, by corroborating several notions used in the public law. Starting from the idea that the tacit approval procedure is a good practice in the relationship between the public administration in general and the business environment in particular, our opinion is that its meaning can be determined by relating to the Constitution and to the general definition given to the public administration by the administrative disputes law.

Thus, Law no. 554/2004[26], article 2 par.1 point b defines "public authority" as any state body[27] or other body of the administrative-territorial units acting, with public power, to satisfy a public legitimate interest; within the meaning of this law, the category of public authorities consists of private law legal entities which, according to the law, have obtained a public utility statute or are authorized to provide a public service, with public power.

As regards the court competent to approve o reject the petition based on the ordinance on the tacit approval procedure, we believe that it is the court specialized in administrative disputes.

[26] Law no. 554/ 2 December 2004 on administrative disputes, published in the Official Gazette no. 1154/7 December 2004, updated.

[27] Antonie Iorgovan, Liliana Vişan, Alexandru Sorin Ciobanu, Diana Iuliana Pasăre, *Legea contenciosului administrativ (Legea nr.554/ 2004) -cu modificările şi completările la zi- comentariu şi Jurisprudenţă (Law on administrative disputes (Law no. 554/2004) –as amended and supplemented to date- Comments and Case-Law),* (Universul Juridic Publishing House, Bucharest, 2008), p.66 et seq.

By expressly setting forth sanctions that can be applied to public servants by whose fault the tacit approval procedure intervened, such as: disciplinary, patrimonial, civil or criminal sanctions, but also the disciplinary liability for failing to fulfil the information publicity obligation, Law no. 157/2010 refers to the positive answer to this question: can the public administration be sanctioned for passivity in its relationship with the citizen?

Moreover, for the same purpose mentioned above, we believe that the aims of this ordinance are realistic, namely to remove administrative barriers from the business environment and fight against corruption by reducing arbitrariness in the administrative decision-making process.

We believe that the target of "boosting economic development by providing the most favourable conditions to enterprisers, by involving authorization costs as low as possible" is merely theoretical and unrealistic as long as the law itself leaves the possibility to prolong the waiting time in obtaining the authorization and to add costs. By that we mean that, regardless of the adopted procedure, the facultative one or the judicious one, if the public administration authority fails to issue the document according to the filed application (provided that it meets all the legal requirements) within the legal deadline or fails to enforce the court decision by issuing the document, there is an unjustified loss of time and money for the applicant.

In the end of our demarche, we express our confidence that, in the future, as the Romanian Code of conduct for public servants provides, the quality of the public service will increase since public servants have the obligation of ensuring a high-quality public service to the benefit of citizens.

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DOCUMENTS PRECEDING THE ADOPTION OF DIRECTIVE 2004/35/EC TRANSPOSED IN THE ROMANIAN LAW BY GOVERNMENT EMERGENCY ORDINANCE NO. 68/2007 ON ENVIRONMENTAL LIABILITY

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Abstract

The European legislation realized in 2004 one of the historical challenges of EU environmental legislation. The Community law has had long before the intention to regulate the legal regime of environmental damage, facing though many obstacles: the technical complexity of this task, the opposition of states and sectors affected by the system, including ideological factors and the supremacy of the precautionary principle in the area of environmental law. The regime proposed considers that the environmental liability is based on the "polluter pays" principle, but also on principles 13 and 16 of the Rio Declaration (1992) on Environment and Development which established, on one hand that subjects who pollute, should in principle bear the cost of pollution, and on the other hand, imposed an obligation on states, to develop the national law regarding liability for environmental damage and compensation for victims of pollution and environmental degradation. The Directive is the result of 15 years of attempts to change and adapt the liability regime to the specificity of environmental damage and to exploit developments in this context, especially in the prevention and remedying area; it is an attempt of "green revolution" of the tort liability system. By this normative act, the European Community has known for the first time in its history, a regulation dealing, in a horizontal and systemic manner, the problem of preventing and remedying the environmental damage. The Directive succeeds to establish reference points for the harmonization of the national legislation on measures for preventing and remedying environmental damage at EU level, ensuring a minimum level of legal and administrative rules, on the matter.

Keywords: *environment, damage, liability, Directive 2004/35/EC, "polluter pays" principle*

Introduction

Although the Treaty establishing the European Economic Community[1] did not stipulate competences in the sphere of environmental protection, the awareness of the need for Community action in this regard took shape through the first Environmental Action Programs at Community level, materialized in statements / resolutions of the Council of European Communities and of Member States[2] representatives.

The European Community competence to adopt environmental protection measures was included in the Treaty of Rome, simultaneously with the adoption of the Single European Act[3],

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[1] Adopted at Rome on March 25, 1957 and entered into force on January 1st, 1958.

[2] Milena Tomescu, Serban- Alexandru Stanescu, "Condi□iile răspunderii juridice pentru daune aduse mediului potrivit Directivei 2004/35/CE*", Revista Română de Drept al Afacerilor* 6 (2006): 48.

[3] Signed in Luxembourg on February 14, 1986 and in Hague on February 28, 1986 and entered into force on July 1st, 1987.

then in the Treaty on European Union[4], and last, but not least, in the Treaty of Amsterdam[5], finding the explanation in an objective reality, namely that pollution has no borders, its effects affecting people's life and health, their property, the flora and fauna, without taking into account the limits of the national territory, and, on the other hand, measures for pollution prevention, compensation and restoration of the damaged environment are more easily to take, being based on uniform rules of law, which should not vary from state to state[6].

Thus, on May 14, 1993 the ***Green Paper*** on environmental liability[7] was adopted, and in its introduction it mentioned several environmental accidents which had a significant impact on the environment: Seveso, Amoco Cadiz, Sandoz, Coruna and Braer.

Without going into details, we will try to make a summary of the environmental disasters mentioned in the Green Paper:

The Seveso Case 1976

The accident of **Seveso** took place on July 10, 1976, when, after a reactor explosion at a chemical plant in town, 5 km north of Milan, in Italy, a large quantity of dioxin leaked; being one of the most toxic and dangerous toxins, the dioxin sowed death, disease and desolation in the Brianza valley, where the city concerned was located. Within just a few days, a total of 33.00 animals were found dead[8].

The Amoco-Cadiz Case 1978

On March 16, 1978, the Liberian tanker **Amoco-Cadiz** which moved toward Le Havre harbour failed near the French coasts, in Bretagne, after a steering system failure. For nearly two weeks, the entire load (227.000 tones of oil) was discharged into the sea, representing the largest oil slick registered in the history of oil vessels accidents. 360 km of coast were affected, constituting the largest environmental disaster caused by an accident of this type. In the affected area, 30% of the fauna and 5% of the flora were destroyed. About 20,000 seabirds were discovered killed by the oil slick, the marine cultivations of oysters were strongly affected, losses amounting to 9,000 tons, and also the fishing activity, the shellfish harvesting and the tourism were affected on a short term. The compensation amounted to 1,257 billion francs[9].

The Sandoz Case 1986

In November 1986, a fire destroyed a warehouse of the **Sandoz** chemical group, located on the Rhine, at Schweizerhalle. The fire caused the discharge in the river of over 30 tones of chemicals, insecticides, fungicides and herbicides. This first environmental catastrophe that occurred in Switzerland, caused a significant pollution of the Rhine and the death of hundreds of thousands of fish, affecting all neighbouring countries crossed by the Rhine.

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[4] Signed in Maastricht on February 7, 1992 and entered into force on November 1st, 1993.

[5] The Treaty of Amsterdam amending the Maastricht Treaty, Treaties establishing the European Communities and other related documents signed on October 2nd, 1997 and entered into force on May 1st, 1999; art. 12 provides the renumbering of articles, titles and sections of the Treaty establishing the European Community, so that Title XVI – Environment becomes Title XIX - Environment (Milena Tomescu, Serban- Alexandru Stanescu, *op cit*.., p. 49, notes 10 and 11).

[6] Milena Tomescu, Serban-Alexandru Stanescu, *op. cit*., p. 49.

[7] COM (93) 47 final. The Green Paper is a notice of the Commission (complementary source of community law, without specific legal effects) which presents various options, without taking a position, with the exact purpose of opening a debate with Member States. (Augustin Fuerea, *Drept comunitar european. Partea generală* (Bucharest, All Beck Publishing House, 2004) 135, note 5)

[8] http://en.wikipedia.org/wiki/Seveso_disaster

[9] Serban-Alexandru Stanescu, *Protec□ia mediului marin împotriva poluării cu hidrocarburi. Prevenirea, limitarea efectelor, angajarea răspunderii*, (Bucharest, Hamangiu Publishing House, 2010), 37-38; Mircea Dutu, *Tratat de Dreptul mediului*, Issue 3, (Bucharest,CH Beck Publishing House, 2007), 478.

The Coruna Case 1992

The Greek-flagged tanker Aegean Sea failed during a severe storm, on December 3, 1992, and trying to enter La Coruna harbour (Spain), it got on fire. Over 300 km of coast were affected by pollution when the 66, 800 tones of oil were discharged into the sea. The accident affected the work of more than 4,000 fishermen, gatherers of shellfish and aquaculture producers[10].

The Braer Case 1993

On January 5, 1993, the **Braer** tanker failed in southern Shetland Islands (United Kingdom) following an engine damage occurred during a severe storm. The 84,500 tons of spilled oil affected the marine cultures of salmon, the sheep, and over 2,000 victims sought compensation for damages caused by pollution, damages totaling 58, 4 million pounds[11].

The questions raised in the content of the Green Paper are conceived to arouse discussions that the Commission pursues on this topic of remedying the environmental damage, in order to better inform its future actions in this area.

First, the Green Paper states that the civil liability is a legal and financial tool used to determine those who are responsible for causing damages, to pay compensation for costs of remedying such damage. Secondly, the Green Paper seeks to investigate the possibility of remedying the environmental damage which is not covered by the principles of civil liability.

The Green Paper was received with great interest by European Union Member States, by the industrial sector, but also by NGOs for environmental protection.

In April 1994, the European Parliament adopted a resolution inviting the Commission to develop a proposal for a directive on the regulation of environmental damage[12]. In this regard, on January 29, 1997, the Commission decided to develop ***a White Paper***[13] on environmental liability, which was adopted on February 9, 2000. The purpose of the White Paper is to investigate how "the polluter pays" principle, one of the key principles in environmental matters, may be applied to best serve the needs of the Community environmental policy[14].

Also, the White Paper refers to two environmental disasters: the Aznalcóllar case and the Erika case, which we shall briefly present below:

The Aznalcóllar Case 1998

The accident was represented by the breaking of the dam from Aznalcóllar (Spain). The Boliden Mine, from the town above mentioned, used to produce about 125,000 tones of zinc and 2, 9 million ounces of silver per year. The residue pool of the mine broke on a length of about 50 m, in late April 1998, spilling a toxic wave of about 3 million m3 of mud and 4 million m3 of acidic water into the Agri River, in an area next to the Coto Donana National Park, one of the largest natural reserves in Europe.

The accident caused damage on an area of 30 km, destroying rare species of flora and fauna. The cost of the cleaning done by the public authorities was $ 44 million and the costs of the Regional Council of Andalusia amounted to $ 53.3 million. The company spent a total of EUR 96 million to clean the discharge and received more EU funding, worth 37.7 million euros. By May 2002, the total cost of the disaster had been calculated at 377.70 million euros. The mine was permanently closed on September 20, 2001[15].

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[10] Serban-Alexandru Stanescu, *op. cit*., 39.

[11] Serban-Alexandru Stanescu, *op. cit*., 39.

[12] Simona-Maya Teodoroiu, *Dreptul mediului şi dezvoltării durabile*, (Bucharest, Legal Universe Publishing House, 2009), 230.

[13] The White Paper is a notice of the Commission (complementary source of community law, without specific legal effects) used to take position on a certain issue (Augustin Fuerea, *op cit*.., 135, note 4)

[14] http://ec.europa.eu/environment/legal/liability/white_paper.htm;

[15] http://www.arpm7c.ro/twinning/twinning-phase1/downloads/WEBPAGE%20FINAL/04_Horizontal%20Assessments/Mission52/07b_ELV_cases_impact_RO.pdf

The Erika Case 1999

The Maltese-flagged tanker Erika, with 30,000 tons of oil on board, was caught in a storm on December 11, 1999, sinking in the Bay of Biscay (France). 20,000 tones of oil of its reservoir leaked. The pollution resulted was an ecological and economic disaster: more than 61,400 water birds killed, 450 km of coastline affected by pollution, over 200,000 tones of oil waste collected[16].

What is important is the fact that before drafting the White Paper, from 1995 - 1997, a series of studies[17] were commissioned by the Commission in order to help prepare the White Paper on environmental liability. The summaries of these studies appear in the annexes to the White Paper.

The first study, published on December 31st, 1995, *"Study of civil liability systems for remedying environmental damage"*[18], examines the legal system of liability on remedying the environmental damage from 19 different countries[19]. Initially, the analysis should have included only the civil liability system, however for a thoroughgoing study and a general overview, both the civil and the criminal liability were taken into consideration.

The second study, *"Liability for damage to natural resources"*[20] was published on September 17, 1997, as the result of a brief research on liability for damage caused to natural resources. The aim of this study was to analyze and identify possible solutions to various problems that may arise in the damage recovery of natural resources (damage assessment, natural resources covered by the law in force). The study began in July 1997 and ended in September 1997.

"Liability for contaminated sites"[21] is the third study, published on September 26, 1997, stating the importance of a liability regime for damage caused through soil pollution, necessary to ensure the application of the precautionary principle, the prevention principle and "the polluter pays" principle, since pollution is a serious problem of the modern society, most European countries, especially the industrialized ones facing this problem.

Thus, after the European Commission decided to prepare the White Paper on liability for environmental damage, the position of Member States was swift: the attitude of Austria, Belgium, Finland, Greece, Luxembourg, Netherlands, Portugal and Sweden was favorable for the action in the field of liability for environmental damage, and several Member States said they expected legislative proposals of the European Commission before starting the process of national regulation in this area. The comments of Member States regarded the inclusion in the project of the environmental damage caused by the deliberate release and introduction on the market of genetically modified organisms[22].

After consulting several independent experts, national experts from Member States, but also all interested parties, on February 9, 2000, the Commission drew up and released the White Paper[23] on liability for environmental damage, which was a step forward in creating a systemic, uniform and consistent regulation for environmental damage, at the level of the European Community[24] and which considered that "the environmental liability aims at determining a person who has caused damage to the environment (the polluter) to pay some money to remedy the damage caused", reflecting in this way the content of "the polluter pays" principle[25].

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[16] Serban-Alexandru Stanescu, *op. cit*., p. 40, see also http://www.euractiv.ro/uniunea-europeana/articles%7CdisplayArticle/articleID_9305/Politici-de-mediu.html

[17] http://ec.europa.eu/environment/legal/liability/background.htm

[18] Translated from English: "The study of civil liability systems for remedying environmental damage".

[19] The United States of America, Denmark, Finland, France, Germany, Italy, Netherlands, Spain, Sweden, England, Austria, Belgium, Greece, Iceland, Ireland, Luxembourg, Norway, Portugal and Switzerland.

[20] Translated from English: "Liability for damage to natural resources"

[21] Translated from English: "Liability for Contaminated Sites"

[22] Simona-Maya Teodoroiu, *op. cit*., p. 231.

[23] COM (2000) 66 final.

[24] Simona-Maya Teodoroiu, *op. cit*., p. 232.

[25] Cristian Mares, "Răspunderea comunitară pentru daunele aduse mediului reglementată de Directiva 2004/35/CE", *Annals of the Faculty of Juridical Sciences, Wallachia University of Targoviste*, 1 (2009): 121.

The White Paper concludes that the most appropriate option is a Framework Directive on liability for damage caused by dangerous activities, regulated by the European Commission, meant to cover the traditional damage, as well as the environmental damage and the fault-based liability for environmental damage caused by activities that are not dangerous.

Thus, on February 21st, 2002, based on the White Paper, the European Parliament and the Council adopted a proposed directive[26] on environmental liability, and two years later the Directive 2004/35/EC of the European Parliament and Council on environmental liability with regard to preventing and remedying environmental damage was adopted. The directive is destined to all Member States, and the deadline for transposing it into the national law is April 30, 2007[27].

• Directive 2004/35/EC[28] on environmental liability concerning the prevention and remedying of environmental damage

The European legislation realized in 2004 one of the historical challenges of EU environmental legislation. The Community law has had long before the intention to regulate the legal regime of environmental damage, facing though many obstacles: the technical complexity of this task, the opposition of states and sectors affected by the system, including ideological factors and the supremacy of the precautionary principle in the area of environmental law[29].

The regime proposed considers that the environmental liability is based on the "polluter pays" principle, but also on principles 13[30] and 16[31] of the Rio Declaration (1992) on Environment and Development which established, on one hand that subjects who pollute, should in principle bear the cost of pollution, and on the other hand, imposed an obligation on states, to develop the national law regarding liability for environmental damage and compensation for victims of pollution and environmental degradation[32].

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[26] O.J no. C 151 E, June 25, 2002

[27] Milena Tomescu, Serban-Alexandru Stanescu, *op. cit*., 50.

[28] Directive 2004/35/EC of the European Parliament and the Council, of April 21st, 2004 on environmental liability to prevent and remedy environmental damage, O.J no. L 143/56 of April 30, 2004. The Directive was amended by Directive 2006/21/EC of the European Parliament and the Council, of March 15, 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC, O.J no. L102/15 of November 4, 2006 and Directive 2009/31/EC of the European Parliament and the Council, of April 23, 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, as well as Directives 2000 / 60/CE, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and the Commission Regulation (EC) no. 1013/2006 of the European Parliament and Council, O.J no. L 140/114, of June 5, 2009.

[29] Jesús Jordano Fraga, "La responsabilidad por daños ambientales en el Derecho de La Unión Europea: Análisis de la Directiva 2004/35, de 21 abril, sobre Responsabilidad medioambiental", *Revista Electrónica de Derecho Ambiental "Medio Ambiente & Derecho"* 12-13 (2005), http://huespedes.cica.es/aliens/gimadus/

[30] Principle 13 of the Rio Declaration: "States should draw up national laws on liability and compensation for victims of pollution and other damage to the environment. Also, States should cooperate with greater timeliness and determination to develop further international laws regarding liability and compensation for adverse effects caused by damage to the environment, through activities found in their jurisdiction or under their control, in areas outside the national jurisdiction".

[31] Principle 16 of the Rio Declaration: " The national authorities should make efforts to promote the internalization of environmental costs, and use economic instruments, taking into account the approach according to which, in principle, the polluter should bear the cost of pollution, with due concern for the public interest, and without distorting the trade and the international investments".

[32] Mario Peña Chacón, "La nueva directiva sobre responsabilidad ambiental en relación con la prevención y reparación de los daños ambientales y su relación con los regimenes latinoamericanos de responsabilidad ambiental", *Revista Electrónica de Derecho Ambiental "Medio Ambiente & Derecho"* 12-13 (2005), http://huespedes.cica.es/aliens/gimadus/

According to authors specialized on the matter[33], the Directive is the result of 15 years of attempts to change and adapt the liability regime to the specificity of environmental damage and to exploit developments in this context, especially in the prevention and remedying area; it is an attempt of "green revolution" of the tort liability system. By this normative act, the European Community has known for the first time in its history, a regulation dealing, in a horizontal and systemic manner, the problem of preventing and remedying the environmental damage.

The Directive succeeds to establish reference points for the harmonization of the national legislation on measures for preventing and remedying environmental damage at EU level, ensuring a minimum level of legal and administrative rules, on the matter.

It should be noted that Directive 2004/35/EC does not establish a civil liability regime, but rather a regime of responsibility of public character, a specific responsibility, mainly of administrative nature, which involves important procedural differences from the classical civil liability[34].

In this respect, the Directive establishes a two-step procedure for resolving the claims of environmental damage and those on the imminent threat of such damage[35].

Thus, under Article 12, first of all, the request, accompanied by relevant information and data on the environmental damage, must be addressed to the competent authority[36], asking it to take the appropriate measures established by the Directive. If the request for action and the accompanying observations indicate, in a plausible manner, the existence of environmental damage, the competent authority shall examine these comments and the request for action. In such cases, the competent authority gives the operator the opportunity to express his opinion on the request for action and on the accompanying observations. The Directive requires the competent authority to inform the applicant as soon as possible and in accordance with the relevant provisions of the national law, of its decision to accept or reject the request and the grounds on which it is based; Member States have, though, the possibility to decide that these requirements do not apply to an imminent threat of damage.

Article 13 of the Directive presents the second stage of processing requests, namely, the review procedures. Thus, decisions, documents or the refusal to act of the competent authority may be challenged before a court or other public body which is independent and impartial.

With regard to the active capacity to pursue proceedings, three alternatives are provided, and each Member State must implement the alternative corresponding to its legal system:

- persons affected or potentially affected by damage;
- persons who have a sufficient interest in taking a decision on the damage;
- persons claiming a right violation.

The Directive establishes that preventing and remedying the environmental damage must be implemented in accordance with "the polluter pays" principle and with the sustainability principle. Thus, the fundamental principle of the directive should be that the operator whose activity has caused environmental damage or imminent threat of such damage should be held financially liable, in order to determine operators to adopt measures and develop practices to reduce the risks of environmental damage so as to reduce exposure to implicit financial risks.

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[33] Mircea Dutu, "Prevenirea i repararea pagubelor de mediu potrivit Ordonanei de urgenă a Guvernului nr. 68/2007", *Law Review* 11 (2007): 10.

[34] Berthy van den Beoek, "Environmental Liability and Nature Protection Areas. Will the EU Environmental Liability Directive actually lead to the restoration of damaged natural resources?", *Utrecht Law Review*, Volume 5, 1 (2009): 117; Mircea Dutu, *Tratat ...*, 492

[35] Monica - Elena Otel, *Răspunderea internaională în domeniul mediului,*, (Bucharest, Legal Universe Publishing House, 2009), 304.

[36] Article 11, paragraph (1): Member States designate the competent authority or authorities responsible for fulfilling obligations under this Directive.

The content of the directive provides in Article 1, the goal of its adoption, namely, establishing a liability framework for environmental damage based on the "polluter pays" principle, in order to prevent and remedy environmental damage, and in Article 2, it defines the concepts that it uses.

Article 3 of the Directive regulates its scope, creating two forms of liability, namely[37]:

First, an objective liability for dangerous or potentially dangerous occupational activities listed in Annex III, which allows covering the environmental damage, and secondly, a subjective liability (based on fault) for professional activities not listed in Annex III, allowing liability to cover only damage to species or habitats protected in the community law.

With regard to dangerous or potentially dangerous occupational activities listed in Annex III, it must be mentioned that Directive 2004/35/EC has so far incurred *two amendments*, made, on one hand, by Directive 2006/21/EC[38] of the European Parliament and the Council of March 15, 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC, and on the other hand, Directive 2009/31/EC[39] of the European Parliament and Council of April 23, 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Commission Regulation (EC) no. 1013/2006 of the European Parliament and Council.

In this respect, the two directives bring changes to the list with dangerous occupations, in Annex III, by the insertion of two activities, as it follows:

- Directive 2006/21/EC introduces the activity of *managing the extractive waste ;*
- Directive 2009/31/EC introduces the activity of *operating sites for geological storage of carbon dioxide.*

Regarding the transposition of the two Directives, Directive 2006/21/EC had as transposing deadline, the date of May 1st, 2008. So far, only two Member States have not implemented national measures, namely Estonia and France. Romania's transposition measures are included in the Government Decision no. 856/2008[40] on the management of waste from extractive industries and the Government Emergency Ordinance no. 15/2009[41] amending and supplementing Government Emergency Ordinance no. 68 / 2007 on environmental liability with regard to preventing and remedying environmental damage. Directive 2009/31/EC requires as implementation deadline, the date of June 25, 2011, but Member States must make sure that the following storage sites covered by the directive are operated in accordance with its requirements until June 25, 2012:

- storage sites used in accordance with the law in force, on June 25, 2009
- authorized storage sites in accordance with such legislation before June 25, 2009, provided that the sites should not be used for more than a year after that date .

So far, only three Member States have transposed the Directive 2009/31/EC into their national legislation, namely, Belgium, Lithuania and Austria. Until today, Romania has not yet implemented the directive.

In Article 4 of Directive 2004/35/EC, we find exceptions that are excluded from its scope, especially those for which, liability is involved under the international instruments listed in Annexes IV and V, as it follows:

- November 27, 1992, the International Convention on civil liability for oil pollution damage;
- November 27, 1992, the International Convention on establishing an international fund for compensation, for oil pollution damage;
- March 23, 2001, the International Convention on civil liability for bunker oil pollution damage;

[37] Milena Tomescu, Serban-Alexandru Stanescu, *op. cit*., 52.
[38] O.J no. L102/15 of April 11, 2006.
[39] O.J no. L 140/114 of June 5, 2009.
[40] Official Gazette. no. 624 of August 27, 2008.
[41] Official Gazette. no. 149 of March 10, 2009.

- May 3, 1996, the International Convention on liability and compensation for damages related to the transport by sea of dangerous and noxious substances;

- October 10, 1989, the Convention on civil liability for damage caused during transport by road, rail and inland waterway of dangerous goods;

- July 29, 1960, the Paris Convention on civil liability in the field of nuclear energy and the Brussels Supplementary Convention of January 31st, 1963;

- May 21st, 1963, Vienna Convention on civil liability for nuclear damage;

- September 12, 1997, the Convention for additional compensation for nuclear damage;

- September 21st, 1988, the Joint Protocol on the implementation of the Vienna Convention and Paris Convention;

- December 17, 1971 the Brussels Convention on civil liability in maritime transport of nuclear material.

Also, the Directive does not apply to activities that have as main purpose the national defense or the international security, or to activities conducted to protect from natural disasters.

Regarding the preventive measures, under Article 5, if an environmental damage has not yet occurred, but there is an imminent threat of such damage, the operator must take the necessary preventive measures, and the Member States must foresee any situation where an imminent threat of environmental damage is not eliminated despite preventive measures taken by the operator, in order for the operator to inform, as soon as possible, the competent authority on all relevant aspects of the situation.

Article 6 refers to the act of repair, so that in case of environmental damage, the operator must inform without delay the competent authority on all relevant aspects of the situation and take all practical measures to control, limit, eliminate or manage immediately, the relevant contaminants and / or any other damage factors in order to limit or prevent further environmental damage and harm to human health or further deterioration of services.

Regarding the application in time, the Directive does not apply in three cases expressly stipulated in the Article:

- damage caused by an emission, event or incident that occurred before April 30, 2007;

- damage caused by an emission, event or incident that occurred after April 30, 2007, in case it resulted from a specific activity that occurred and ended before that date;

- damage, if thirty years have passed from the emission, event or incident that caused it.

Regarding the implementation, Member States must implement, under Article 19, laws, regulations and administrative provisions necessary to comply with the directive, until April 30, 2007, while having the obligation to immediately inform the Commission thereof.

Regarding the transposition of Directive 2004/35/EC, there were a number of decisions of the European Court of Justice for infringement of obligations, by Member States.

In the context of accession to the European Communities, Member States have undertaken the obligation to integrate rules of the Community law in their own legal system. In this regard, each Member State must take measures to make sure that the Community rule can be applied in the internal law[42], to ensure the compliance of internal rules with Community rules and also to correctly apply the Community rule[43].

[42] Depending on the Community act in question, a Member State must go through several stages. For example, in the case of the directive, as known, it is necessary to transpose it into national law first, and then take steps to implement it, if necessary. In the case of regulations, they have direct applicability, and there is no need for transposition, however there are situations when adopting some internal measures to ensure its applicability becomes necessary.

[43] Monica - Elena Otel, „Procedura acţiunii pentru constatarea neîndeplinirii de către statele membre a obligaţiilor de decurg din Tratatul CE şi dreptul comunitar al mediului", *Revista română de Drept Comunitar*, 2 (2006): 55.

Since Member States have willingly assumed these obligations, it is natural for them to be fulfilled; otherwise, the Community treaties establish *a procedure by which they are being held responsible, namely, the infringement by Member States of their obligations, under the Community law*[44], procedure which is specific to the Community law[45].

As "guardian of treaties", the European Commission shall ensure the correct implementation of Community law in Member States, and it may even bring to Court an action against a Member State when it considers that that State has failed to fulfill its obligations, under the treaties[46].

This action of finding the infringement constitutes, under the doctrine[47], the control instrument specific to the Commission, within its powers in relation to Member States, as the expression of the existing dualism between Member States and Community institutions. By this mechanism of action for finding infringements of treaties, the Commission shall make sure that Member States do not exercise powers that they have voluntarily renounced at, in favor of the Communities.

The infringement of obligations, as we shall see in the next chapter, can be the result of a positive action, of the inappropriate application of Community regulations, as well as the consequence of a negative action, namely, the omission of notification of national regulations transposing and implementing directives, or the noncompliance of the national law with requirements of the Community rules.

We believe[48] that it is very important that this action provides also a preliminary *non-contentious procedure* of resolving "disputes" between the Commission and Member States, on the application of the Community law, allowing in this way to amicably resolve the dispute.

This preliminary procedure is a mutual change of views between the future plaintiff and the future defendant, more specifically, it sets some deadlines for resolving the situation inconsistent with the Community law; also relevant is that, during the preliminary procedure, the scope of the future action brought before the Court of Justice[49] is established.

With regard to the procedure purpose, the Court itself has stated repeatedly that it is "to give the possibility to the Member State, on the one hand to remedy, correct or rectify its position towards the issue brought before the Court and, secondly, to present its defense against complaints of the Commission"[50].

Any natural or legal person, including any other Member State has the possibility to notify the Commission. Other sources of information for the Commission are: Member States reports on the state of transposition of EU directives, the press, MEPs or civil society organizations. The active capacity to pursue the proceedings and the interest of the Commission do not have to be proved; in this respect, the Court has stated on several occasions that "in exercising powers it has, based on art. 211 and 226 of the EC, the Commission must not prove a legal interest since, in the

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[44] In English for this procedure, the term *"infringement"* is being used, and in French, *"en manquement"*.

[45] The legal basis for infringement by Member States, under the Community law, is found in Art. 226 of the Treaty establishing the European Community

[46] Andrada Trusca, "Procedura acţiunii pentru constatarea neîndeplinirii de către statele membre a obligaţiilor ce le revin conform dreptului comunitar. Privire specială asupra dreptului mediului", *Revista Transilvană de Ştiinţe Administrative*, 2 (24) (2009): 148.

[47] Gyula Fabian, *Drept instituţional comunitar*, Third edition revised and enlarged, with reference to the Treaty of Lisbon, (Cluj-Napoca, Legal Sphere Publishing House, 2008), 359.

[48] Andrada Trusca, *op. cit.*, 149.

[49] Gyula Fabian, *op. cit*., 362.

[50] See ECJ Decision of January 31st, 1984, Case 74/82, *Commission v. Ireland*, ECR European Court of Justice in 1984, p. 00317; ECJ Decision of February 2nd, 1988, Case 293/85, *Commission v. Belgium*, ECR European Court of Justice in 1988, p. 00305; ECJ Decision of May 10, 2001, Case C-152/98, *Commission v. Netherlands*, ECR European Court Justice, 2001 p. I-03463. http://eur-lex.europa.eu/

general interest of the Community, its function is to make sure that treaty provisions are being applied by Member States and to observe the existence of any infringement of obligations deriving thereof, in order to stop this infringement"[51].

The importance of this preliminary procedure lies equally in the fact that it is confidential, leading to the facilitation of the amicable settlement, 90% of the nearly 200 cases per year being resolved amicably, even before notifying the Court[52].

Therefore, taking into account the above, we shall try to define the infringement by Member States, of their obligations under the Community law, as a legal tool at the disposal of some determined subjects of law, ensuring the compliance by Member States with the Community law, and punishing conducts inconsistent with its rules.

Thus, in 2008, the European Court of Justice pronounced two decisions for infringement by a Member State, for not adopting, within the prescribed period, the provisions necessary to comply with Directive 2004/35/EC, ECJ Decision, dated December 11, 2008[53] in Case C-330/08 *Commission v. France* and ECJ Decision, dated December 22, 2008[54] in Case C-328/08 *Commission v Finland*.

In 2009, Court's decisions for infringement targeted five Member States, namely, ECJ Decision of March 12, 2009[55] in Case C-402/08, *Commission v. Slovenia*, ECJ Decision of March 24, 2009[56] in Case C-331/08, *Commission v. Luxembourg*, ECJ Decision dated May 19, 2009[57] in Case C-368/08, *Commission v. Greece*, ECJ Decision dated June 18, 2009 in Case C-417/08, *Commission v. United Kingdom* and ECJ Decision dated June 18, 2009 in Case C-422/08, *Commission v. Austria*.

Conclusions

Romania's accession to the European Union, on January 1st, 2007 imposed the transposition into the national law, of the Council and European Parliament Directive no. 2004/35/EC on environmental liability with regard to environmental damage, seeking a common framework for preventing and remedying environmental damage, at a reasonable cost to society. This was realized by Government Emergency Ordinance no. 68/2007[58] with the same title, promoting thus in the internal law, a special, innovative regime of prevention and repair of environmental damage, of a different nature from the classical liability systems, in which prevention is the priority; however, in case of damage, the priority is to repair it, which is why some financial guarantees[59] are being established.

[51] See ECJ Decision of April 4, 1974, Case 167/73, *Commission v. France*, ECR European Court of Justice, 1974 p. 00359; ECJ Decision of August 11, 1995, Case C-431 / 92, *Commission v. Germany*, ECR European Court of Justice in 1995, p. I-02189; ECJ Decision of November 9, 1999, Case C-365/97, *Commission v. Italy*, ECR European Court of Justice, 1999, p. I-07773; ECJ Decision of January 1st, 2001, Case C-333/99, *Commission v. France*, ECR the European Court of Justice in 2001, p. I-01025, http:// / eur-lex.europa.eu /

[52] Augustin Fuerea, *Manualul Uniunii Europene*, Third Edition, revised and enlarged, (Bucharest, Legal Universe Publishing House, 2006), 267.

[53] ECR European Court of Justice in 2008, Page I-00191.

[54] ECR European Court of Justice in 2008, Page I-00200.

[55] ECR European Court of Justice in 2008, Page I-00034.

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[58] Published in the Official Gazette, no. 446 of June 29, 2007, approved by Law no. 19/2008, as amended by Government Emergency Ordinance no. 15/2009, published in the Official Gazette no. 149 of March 10, 2009

[59] Mircea Dutu, *Prevenirea*….., 9.

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DISCUSSIONS REGARDING THE CONDITIONS OF THE CRIMINAL RESPONSIBILITY OF THE LEGAL PERSON IN THE REGULATION OF THE NEW CRIMINAL CODE

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Abstract

According to the new Criminal code, the legal person, except for the state and the public authorities, is criminally responsible for the infractions committed for the carrying out of the activity object or in the interest and in the name of the legal person. The public institutions are not criminally responsible for the infractions committed for the carrying on of an activity that is not the object of the private domain. The criminal responsibility of a legal person does not exclude the criminal responsibility of the natural person that contributed to the committing of the same deed. In what follows, we will try to present the general conditions regarding the engagement of the criminal responsibility of the legal persons, filtering through our own analysis various opinions expressed in doctrine regarding this theme, the purpose of which is the prevention of some non-unitary solutions in the judicial praxis.

Keywords: *new Criminal code, criminal responsibility, legal persons, public institutions, public authorities, non- unitary solutions.*

I. Introduction

The **c**riminal responsibility of the legal person is encountered in more national law systems. For instance, in the Great Britain, the Netherlands, Belgium, France, the USA etc. In what comes, we will briefly analyze some of these.

In the **Great Britain**, the criminal responsibility of the legal person is based on the theory of identification that implies a mechanism that contains two stages: (1) the analysis of the constitutive elements of the infraction regarding the natural person doer; (2) the identification, that is the verification if the natural person that has a certain position within a legal person represents this one's thinking and will[2]. The criteria based on which the natural persons that are the carriers of the thinking and will of the legal person are to be identified refer mainly to the idea of authority and control over it and it is considered that only the deeds committed by the **controlling officer** attract the criminal responsibility of the company. To this category belong the natural persons that have the capacity of manager, director etc. and that participate to the controlling of the legal person, as well as the officials with similar functions. The theory of identification was criticized,

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[2] *A. Jurma,* Persoana juridică – subiect activ al infracțiunii/ Legal person - active subject of the infraction, C.H. Beck Publishing house, Bucharest, 2010, page 43.

assuming that the controlling officers could detach (isolate) from the illicit practices of the legal person that they controlled, so that the criminal responsibility of a certain legal persons should not be engaged[3].

In the **United States of America**, with some exceptions, the criminal responsibility of the legal person was based on the idea of the **respondeat superior.** According to this theory, a company is criminally responsible for the deeds committed by any of its agents or employees, if two conditions are met. The first condition is that the agent or employee of the legal entity should have carried on its activity within the limits of its attributions granted by the latter. The second condition is that that natural person should have totally or partially taken action for the benefit of the corporation. At present, it is encountered the **theory of the aggregation** (called also of the collective consciousness), that was conceived by certain American federal courts and allowed, if the corporatist will belonged to more natural persons, that all the „particles" of subjective elements should be united in a single subjective element, imputable to the legal person. Besides its innovative character, this theory was not accepted by all the America courts that reproached with it that the individual cognitive elements could not be comprised in order to make a whole, and if, by referring it to the involved natural persons, the entire subjective element could not be retained, the comprising was not possible[4].

The **Netherlands** also instituted the criminal responsibility of the legal person, which had a certain particularity compared to the regulation in our country[5]. One of the elements that singularize the criminal responsibility of the legal person in the Dutch law is the domain of the collective entities that are criminally responsible; certain groups of persons that do not benefit from the legal personality belong also to this category. Then, in order to engage the criminal responsibility of the collective entity, it is necessary that the criminal responsibility of a natural person that carries out a function according to the social purpose of the entity should previously be established.

In the **French law**, the criminal responsibility of the legal person was introduced through Criminal code since 1994 (art. 121-2) which was incident, also as in the case of the Romanian law, only in the case of the entities endowed with legal personality. Although, in the initial form, the criminal responsibility of the legal person was exclusively incident in the case of the infractions for which there was a precise provision in this sense (specialty principle), starting with year 2005 (when the Criminal code was modified), it has been instituted the **generality rule of the criminal responsibility** of the legal person, without this should be limited to certain infractions. From the point of view of the conditions necessary for the engagement of the criminal responsibility of the legal person, the French Criminal code was interpreted in the sense that this form of responsibility could be engaged only if an infraction had been committed by a representative or organ of the legal person. It is still accepted that, based on the legislative modifications in 2000 in the case of the voluntary infractions, the holding criminal responsible of the legal person is possible, no matter of the previous retaining or not of the conditions of the criminal responsibility of a natural person.

Based on monitoring reports drawn up by GRECO[6] and OCDE[7], certain conclusions were drawn regarding the way how the criminal responsibility of the legal persons was regulated in

[3] Idem, page 45.

[4] In praxis, it was shown that „One can not add an innocent mental attitude to another innocent mental attitude so that the result should be guilt" (cause of Armstrong v. Strain), quoted by *A. Jurma*, quoted work, page 48.

[5] We mention that the criminal responsibility of the legal entities was stipulated in the Dutch law since 1870.

[6] Group of States against Corruption set up at the level of the Council of Europe. This Group consists of 45 European states and the United States of America. www.coe.int.

[7] www.oecd.org.

various systems of law. Basically, GRECO considers that, at present, its recommendations were satisfyingly implemented in the member states of the group[8].

The GRECO evaluation is based on the following main criteria[9]:

- Existence of the responsibility of the legal persons (criminal, administrative etc.);
- Conditions of the engagement of the criminal responsibility of the legal person and the deeds for which such a form of responsibility can be engaged (for instance, money laundering);
- Engagement of the responsibility of the legal person no matter of the circumstance that this managed or not to obtain the benefit had in mind through the corruption act;
- If the responsibility of the legal person is engaged also in the case of the lack of surveillance from the natural person with control attributions;
- Existence of some discouraging and proportionate sanctions for the deeds committed by legal persons;
- Possibility of engaging the responsibility of the legal person independent of the responsibility of the natural person;
- Existence of the criminal record for the convictions of the legal persons;
- Existence of some measures through which the states assure the effective sanctioning of the legal persons.

With regard to the OCDE evaluation internationally drawn up through WGB[10], it is found, that although there were significant progresses regarding the regulation of the criminal responsibility of the legal person, there are still some criticisms that can be brought to certain national systems of law. For instance, it is criticized the discretionary power that the prosecutor in the Australian legislation has, that can appreciate that, regarding the sanction that is to be applied, the activity of criminal prosecution is disproportional and consumption of power is not justifying[11].

With regard to the compared law, at present, we remark the tendency of the European states to regulate the criminal responsibility of the legal person, tendency determined mainly by the fact that many conventions and juridical instruments that deal with or recommend such a responsibility were adopted at the level of the Council of Europe and of the European Union[12].

Among the documents adopted at the European level that contain references to the criminal responsibility of the legal person, we mention:

- Recommendation R(81)12 of the Council of Europe on the criminality of business (that accept the possibility of instituting the criminal responsibility of the legal persons for the infractions committed in the commercial law);
- Recommendation R(88)18 of the Council of Europe on the responsibility of the legal person enterprises for the infractions committed in their activity. Within this European juridical instrument, the member states are recommended to institute the criminal responsibility of the enterprises independent on an eventual criminal responsibility of some natural persons, considering that these have their own guilt distinct from guilt of the natural persons that also have to answer if the conditions of their criminal responsibility are met;
- Recommendation R(96)8 regarding the criminal policy in an Europe in transformation;

[8] www.coe.int.

[9] For additional data, see *A. Jurma,* quoted work, page 100.

[10] Working Group on Bribery (Grupul de Lucru privind Corupția).

[11] For more data, see *A. Jurma,* quoted work, page 105.

[12] Among the European states that regulated the criminal responsibility of the legal person, we mention Denmark, Finland, France, Belgium, the Netherlands etc.

- Resolution (97) 24 regarding the 20 directory principals in the fight against corruption;
- Convention regarding the protection of the financial interest of the European Communities (1995);
- Convention regarding the environment protection by means of the criminal law (1998);
- Criminal convention regarding the corruption (1999);
- Convention regarding the cybercriminality (2001).

We mention that, through the decision of the Court of Justice of the European Community on October 2nd 1991, this court indirectly admits the principle of the criminal responsibility of the legal persons[13].

Among the documents adopted at the international level that contain references to the criminal responsibility of the legal person, we mention:

- Convention regarding the fight against the corruption of the foreign public clerks in the international trading transactions[14]. This convention binds the party states to sanction also the legal persons with sanctions, even non- criminal (if the responsibility of the legal person is not instituted), proportionate and discouraging ones;
- Convention against the organized transnational criminality concluded in Palermo (Italia)[15];
- Convention against corruption concluded in Merida (Mexic)[16].

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[13] For more references, see *N. Iliescu*, Noul Cod penal/ New Criminal Code, pages 465-467.

[14] Adopted under the aegis of the Organization for Economic Co-operation and Development (OECD), on December 17th 1997.

[15] Adopted by the General Assembly of ONU in 2000.

[16] Adopted by the General Assembly of ONU in 2003.

8/2005; *C. Ungureanu, E. Paraschiv*, Răspunderea penală a persoanei juridice/ Criminal responsibility of the legal person, Pro Lege no. 2/2005; D.A. Brudariu, Răspunderea penală a legal persons. Experiența legislației franceze/ Criminal responsibility of the legal persons. Experience of the French legislation, RDP no. 1/2006; *Ghe. Mărgărit*, Conceptul de răspundere penală a persoanei juridice în noul Cod penal/ Concept of criminal responsibility of the legal person in the new Criminal code, Law no. 2/2005; *I. Lascu,* Răspunderea penală a persoanei juridice în lumina noului Cod penal/ Criminal responsibility of the legal person in the light of the new Criminal code, Law no. 8/2010; *H. Diaconescu,* Este răspunderea penală a persoanei juridice o răspundere pentru fapta altuia/ Is the criminal responsibility of the legal person a responsibility for the deed of another, Law no. 12/2005; *C. Balaban*, Legal person, subiect activ al infractions i/ Legal person, the active subject of the infraction, RDP no. 2/2002; *V. Mirea,* Legal person – subiect activ al infractions i/ Legal person - active subject of the infraction, Law no. 12/2005; *S. Bacigalupo,* La responsabilidad penal de las personas juridicas, Bosch, Barcelona, 1998; *J.R. Spencer*, La responsabilité pénale dans l'entreprise en Angleterre, Revue de science criminelle et de droit comparé, 1997; *D.M. Costin,* Răspunderea persoanei juridice în dreptul penal român/ Responsibility of the legal person in the Romanian criminal law, Universul Juridic Publishing house, Bucharest, 2010.

I. Condition of the criminal responsibility engagement of the legal person

1. Legal personality

1.1. Common aspects

One of the general conditions for the engagement of the criminal responsibility of the legal person is that the latter should have **legal personality**. The legal person is a form of organizing that, meeting the conditions required by the law, is holder of civil rights and obligations. Any legal person has to have a standalone organization and its own patrimony for the carrying out of a licit and moral purpose according to the general interest.

The legal persons that are subject to the registration have the capacity to have the rights and obligations since the date of their registration. The other legal persons have the capacity to have the rights and obligations, depending on the case, since the date of the setting up document, since the authorization date of the their setting up or since the date of any other requirement stipulated by law.

According to art. 219 of the new Civil code, the licit or illicit deeds committed by the organs of the legal person bind the legal person itself, but only if they are connected to the attributions and the purpose of the assigned functions. The illicit deeds draw also the personal and solidary responsibility of those that committed them both to the legal person and to third parties.

According to art. 220 of the new Civil code, the vicarious liability against the administrators, censors, directors and other persons that took action in their capacity of members of the organs of the legal person, for the prejudices caused to the legal person by these ones by violating their duties set in their charge, belongs, in the name of the legal person, to the competent management organ that will decide with the majority required by law and its absence, with the majority required by the statutory provisions.

With regard to the **entities under setting up** or those that **ceased their existence by dissolution**, these are not criminally responsible, because the entities under setting up and those that no longer belong to the category of the legal persons, because they did not obtain or lost their legal personality, do not have the criminal juridical capacity until the date admitted as the moment of obtaining the personality. Indeed, we appreciate that the legal persons under setting up are not

criminally responsible, if they commit deeds stipulated by the criminal law, even if a limited legal personality is recognized from the civil point of view, because this type of personality is recognized only for the valid setting up of the legal person in question.

In doctrine, it was considered that the criminal responsibility of **the legal persons in the liquidation phase** could be engaged for the deeds committed during this phase[17], arguing as well as in the French doctrine, that the liquidated legal persons kept their legal capacity necessary for the turning of the assets into money and the payment of the liabilities[18].

The criminal responsibility of the legal person is **direct** and **personal**, which means that the eventual right to sue for compensation of the legal person against its official in charge exceeds the criminal legal report of conflicts[19]. **The right to sue for compensation** of the legal person against the natural person that is responsible for the committing of the infraction is exercisable based on the tort liability.

Based on the territoriality principle of the criminal law, wee must admit that the foreign legal persons that commit infractions of the territory of Romania will also be criminally responsible according to the Romanian criminal law[20].

1.2. Particular aspects

The legal persons of private law obtain the legal personality based on its particularity, which are usually classified in two large categories: **legal persons with lucrative purpose** and **legal persons without lucrative purpose** (non-profit).

In the case of the trading companies, cooperative companies, agricultural companies, co-operative organizations, groups of economic interest, European groups of economic interest, national companies and autonomous administrations, the legal personality is obtained starting with the registration date with the trade register office.

The trading companies that are illegally set up, but registered with the trade register office, have a special situation. Considering that the illegally set up trading companies obtained the legal personality and that the eventual finding of its nullity according to art. 58 of Law no. 31/1990 produces effects only for the future, we consider that their criminal responsibility can be engaged[21]. In exchange, the legal person can not be subject of the criminal responsibility, because it has no legal personality, which is a condition that has to exist „in law" and not in facts when committing the deed stipulated by the criminal law[22].

The legal persons of private law without lucrative purpose are legal persons set up with nonprofit finality and are set up in order to carry on certain activities of general non- patrimonial interest of some collectivities or some natural persons. That is associations, foundations, trade unions, employers, political parties, religious or ethnical organizations.

According to art. 8 paragraph (1) of Government Ordinance no. 26/2000, the associations and foundations obtain the legal personality since their registration in the association and foundation register of the court registry, and the federations since their registration in the federation register of the tribunal registry. The loss of the legal personality of these persons takes place at the dissolution.

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[17] *A. Jurma,* quoted work, page 122.

[18] Idem, 123.

[19] *I. Poenaru*, Problemele legislației în domeniul contravențiilor/ Legislation problems in the domain of contraventions, Lumina Lex Publishing house, Bucharest, 1998, pages 55-56.

[20] *D.M. Costin,* Răspunderea persoanei juridice în dreptul penal roman/ Responsibility of the legal person in the Romanian criminal law, Universul Juridic Publishing house, Bucharest, page 273.

[21] Idem, page 282. See also *Gh. Piperea*, Obligațiile şi răspunderea administratorilor societăților comerciale/ Obligations and responsibility of the trading company administrators, All Beck Publishing house, Bucharest, 1998, page 51.

[22] For the same opinion, see *M. Costin,* quoted work, page 284.

We state that the **associations, foundations** and **other legal persons without lucrative purpose** are criminally responsible even if they were pronounced of public utility, because they do not become authorities or public institutions through this capacity.

According to art. 1 of Law no. 14/2003, the **political parties** are legal persons of public law. They obtain the legal personality since the resolution through which the registration petition is admitted remains irrevocably (art. 22). The political parties cease their legal existence through dissolution or through the order of the Constitutional Court or through a court order in the cases and under the conditions stipulated by law. Although, by law, the political parties are legal persons of public law, the legislator did not except them from the criminal responsibility, but it excluded only their application against certain complementary punishments, that is dissolution and activity suspension.

The trade unions and the employers obtain and lose the legal personality under the conditions stipulated by Law no. 54/2003 (of the unions) and no. 54/2004 (of the employers). As well as in the case of the political parties, neither the unions nor the employers can be applied the dissolution and activity suspension.

The religious organizations and those belonging to the national minorities have a criminal legal regime similar to that applied to the political parties, trade unions and employers, because the complementary punishment of dissolution and activity suspension can be applied neither in their case. The religious cults can be admitted as legal persons through a government resolution and the loss of this capacity takes place also through such a resolution in the cases and under the conditions stipulated by law (Law no. 489/2006). Except for the religious cults, it can be set up religious associations that obtain the legal personality at their registration in the Religious association register with the court.

The legal persons that carry on activities in the media field, no matter of the legal form [of public law (for instance, Societatea Română de Radiodifuziune – Law no. 41/1994) or of private law], are criminally responsible, but they can not be applied three of the complementary punishments: dissolution, activity suspension and shutting down of some bias points.

2. Legal capacity

a) Preliminary explanations. The second general condition for the criminal responsibility of the legal person to be able to be engaged is that this should not belong to the excluded category, because not all the legal persons are criminally responsible. **The state and the public authorities are not criminally responsible**, because they do not have the criminal legal capacity, so that they can not enter such reports of criminal responsibility in their capacity of passive subjects. The **public institutions** are also not criminally responsible for the infractions during the carrying on of an activity that can not be the object of the private domain.

We mention that it results from the legal text that the legal persons, except for those particularly excerpted, are criminally responsible no matter if they are of public or private law. Also according to art. 221 of the new Civil code, if not otherwise ordered by law, the legal persons of public law are bound for the licit or illicit deeds of their organs under the same conditions as the legal persons of private law.

b) State. The exclusion of the state from the sphere of the legal persons that are criminally responsible is justified by the fact that the state is among the only legal persons that can not be abolished and, on the other side, this is the only active subject of the reports of criminal responsibility. The state also can not be sanctioned, because in case of the fine, the only main punishment applicable to the legal persons, this would make a payment by itself[23]. Besides, neither

[23] *M. Basarab, V. Paşca, Gh. Mateuţ, C-tin Butiuc,* Codul penal comentat/ Commented criminal code, vol. I,

the complementary punishments can be applied when it comes to the state, because the activity of the state can not be suspended, this can not be dissolved, it does not participate to the public auctions etc.

Therefore, in our legal system, the state is not criminally responsible and there are no reasons to suggest *de lege ferenda* the instituting of such a responsibility, no matter of the deeds that it can be charged with. Still, the state can be responsible in the field of other branches of the (civil, international etc.) law.

Besides, except for Denmark, in the Criminal code of which, art. 27, it is stipulated the possibility of engaging the criminal responsibility of the state for infractions that were not committed while carrying out the attributions regarding the public power[24] and some states of *common law*[25]*,* the other legislations exclude *de plano* the criminal responsibility of the state.

The exclusion of the state from the category of the legal persons that are criminally responsible is based also on the provisions of the second Protocol of the Convention regarding the protection of the financial interests of the European Communities that stipulates in art.1 lit. d) that the „legal person" is any entity that has this statute based on the applicable national law, **except for the states** or other public entities in the exercise of their public power prerogatives and the international public organizations.

c) Public authorities. In the Constitution, there are important provisions regarding the public authorities. The fundamental law stipulates that the „public authorities" are: the Parliament (Chapter I, art. 61-79), the President of Romania (Chapter II, art. 80-101), the Government (Chapter III, art. 102-110), the Public administration (Chapter V, art. 116-123), the Judiciary authority (Chapter VI, art. 124-134).

The type of public authorities that belong to the central specialty public administration includes the ministries, the specialty organs organized in the subordination of the Government, the specialty organs organized in the subordination of the ministries, the specialty organs organized as autonomous administrative authorities, armed forces, Supreme Council of National Defense, Court of Accounts.

The local councils elected from communes, towns and administrative- territorial subdivisions of the municipalities (art. 120), the elected mayors (art. 121), the elected county councils (art. 122) and the prefect (the prefect's office) appointed in each county and in Bucharest municipality that is the local representative of the Government and runs the decentralized public services of the ministries and other organs of the central public administration in the administrative- territorial units (art. 123) belong to the category of the public authorities that belong to the local public administration.

The courts of law (art. 126-130), the prosecutor's offices that function with them (art. 131-132) and the Superior Council of Magistracy (art. 133-134) belong to the „judiciary authority".

The expression of „public authority" is defined in art. 2 paragraph (1) lit. b) of Law no. 554/2004: „any organ of the state or of the administrative- territorial units that act in regime of public power for the satisfying of a legitimate public interest is assimilated to the public authorities, *in the sense of the current law (s.n.)*, the legal persons of private law that, according to the law, obtained the statute of public utility or are authorized to provide a public service in regime of public power". Because the assimilation is made only in the sense of Law no. 554/2004, we believe that it can not be extended also to the domain of the criminal law.

d) Public institutions. According to art. 135 paragraph (1): „The public institutions are not criminally responsible for the infractions committed **while exercising an activity that can not be**

Partea generală/ Generalities, Hamangiu Publishing house, page 104.

[24] *S. Bacigalupo,* La responsabilidad penal de las personas juridicas, Bosch, Barcelona, 1998, page 336.

[25] For instance, in the Great Britain, the Crown (state, government and ministries) can be penal responsible in the case of the infractions created on the jurisprudential way and in other cases stipulated by law.

the object of the private domain". In the drawing of the previous Criminal code, it is stipulated that it is not criminally responsible the public institutions „that carry on an activity that **can not be the object of the private domain**". It is observed that the editors of the new Criminal code took into consideration the suggestion made in the specialty literature regarding the previous formulation that was not considered corresponding[26].

The difference consists in the fact that, under the previous Criminal code, the immunity was determined by the capacity of the subject (personal immunity), while the new Criminal code connects the immunity to the particularity of the committed infraction (real immunity). Therefore, the public institutions – even those that carry on an activity that can not be the object of the private domain – will criminally be responsible for those infractions committed in the carrying on of an activity opened at the private initiative (for instance, a public institution that mainly carries on an activity excluded to the private domain will be criminally responsible for the infractions committed in the carrying on of a secondary activity allowed to the private domain – such as the activity of assuring the meals for the employed personnel).

Which are the public institutions that carry on activities that can not be the object of the private domain? They are those that carry on an activity excluded to the private domain, which means that they can not be carried out by natural persons or legal persons of private law[27].

Basically, such institutions are relatively difficult to identify, because at least a part of the institutions that carry on activities that can not be the object of the private initiative can be included also in the category of the public authorities. We believe that, in every case, the judicial organs have to check the legal provisions applicable to the legal person in question and if it finds that the infraction was committed while exercising an activity that can not be the object of the private domain, it will exclude the possibility of the criminal responsibility and if the infraction was committed while exercising an activity that can be the object of the private domain, the judicial organ will consider the legal requirement as carried out and will order consequently.

It is public institutions, for instance, National Institute of Magistracy, „Mina Minovici" Institute of Legal Medicine, Institute of Forensic Expertise, National Institute for the Training and Improvement of the Attorneys, National Bank of Romania, Romanian National Bar Association, National Union of the Notaries Public from Romania, Institute of Public Health in Bucharest etc[28]. For instance, the state universities or other institutions of public law that carry on activities that can be the object of the private initiative is not in the sphere of the legal persons excluded from the criminal responsibility.

The autonomous administrations can not be included in the category of the public institutions, even if these have a mixed juridical nature (of private and public law), because art. 136 of the Constitution stipulates these distinctly, so that all the administrations can be responsible, no matter if they carry on or not the activity in a domain that is excluded to the private initiative. For instance, the administrations of local transportation, Autonomous Public Service Undertaking "State Mint of Romania", Autonomous Administration „Monitorul Oficial" etc[29].

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[26] *Fl. Streteanu,* Câteva considerații privind răspunderea penală a persoanei juridice potrivit proiectului de lege pentru modificarea și completarea Codului penal/ A few considerations regarding the criminal responsibility of the legal person according to the bill for the modification and completion of the Criminal code, CDP no. 1/2005, page 42. See also *Fl. Streteanu, R. Chiriță,* Răspunderea penală a persoanei juridice/ Criminal responsibility of the legal person, Second edition, C.H. Beck Publishing house, Bucharest, 2007, page 395.

[27] See also *Fl. Streteanu, R. Chiriță,* quoted work, page 395.

[28] According to the definition formulated by Univ. Prof. Dr. *D. Apostol Tofan*, the public institutions are: „the subordinated structures of some authorities of the public administration that function from budget incomes, but also from extra- budgetary sources" (Administrative law, vol. I, Second edition, C.H. Beck Publishing house, Bucharest, 2008, page 6).

[29] For this opinion, see *Fl. Streteanu, R. Chiriță,* quoted work, page 396-397.

On the other hand, **the legal persons of private law can be criminally responsible**, no matter of the type of activity that it carries on by observing the limitations set by the law. So, for instance, according to art. 141 of the Criminal code, the dissolution and suspension of the activity or of one of the activities of the legal person can not be applied to the political parties, trade unions, employers and religious organizations or to the organizations of the minorities set up according to the law and nor to the legal persons that carry on their activity in the media field.

They will be criminally responsible, if also the other conditions stipulated by law, for instance, the following categories of legal persons: associations, foundations, trade unions, trading companies, cooperative companies, agricultural companies, groups of economic interest, autonomous administrations etc. are met.

3. The committing of the infraction in the carrying out of the activity object or in the interest or in the name of the legal person

A third general condition for the engaging of the criminal responsibility of the legal persons is that the infractions should be committed in the carrying out of the **activity object** or in the **interest** or in the **name** of the legal person[30].

It is noticed that the Romanian lawgiver regulated the criminal responsibility of the legal person based on the **general clause (responsibility) system** or the **general responsibility model,** because especially in the *common law,* according to which the legal person can be criminally responsible for any infraction, without the exclusion *de plano* of some infractions. Of course, certain infractions, such as rape, false testimony, etc. can not conceptually be committed by the legal person.

Regarding this condition, it has to be solved the matter of the content of the connection between the natural person that performs the act of conduct of the infraction and the legal person, because, according to art. 135 Criminal code, in order to engage the criminal responsibility of the legal persons, it is necessary that the infractions should be committed during the carrying out of the **activity object** or in the **interest** or in the **name** of the legal person. The legal text does not contain the criteria based on which it should be identified the persons that commit infractions either for the turning into practice of the activity object or just for the use or in the interest of the legal person.

In order to commit an infraction in the carrying out of the **activity object,** we should understand that an **organ, official in charge[31] or representative** of the legal person committed an infraction while turning into practice the activities that the legal person could carry on according to the law or the constitutive deeds. For instance, to this category, belong the infractions at the competition regime, infractions in the work field, etc. In any case, as it was remarked in the doctrine, the evaluated deeds had to have connections to the „general policy of the legal person" or to the „main activities meant to carry out the object of the company, and not to the deeds resulted

[30] In the judicial praxis, it was considered that the deed had been committed for the carrying out of the activity object, retaining the following: „regarding the license agreement for the program Autodesk Map 3D 2006, the indicted company had the right to install and use the program in discussion just for a computer with the possibility of activating (upgrading) to the latest annual version under the conditions of paying up the subscription. The defendant B.I. sustained that the programs identified on the occasion of the control by the police organs had been installed by him in order to test their functionality; he also showed that he had personally proceeded to the reproduction of the computer programs on the functional units inside the bias point. The defendant B.I. also sustained that he was the only one that was dealing with the management of the company" (High Court of Cassation and Justice, pen. s, dec. no. 4034/1999, www.scj.ro).

[31] According to art. 1373 paragraph (2) of the new Criminal code: „The principal is the one that, based on an agreement or on the law, carries out the direction, surveillance and control on the one that carries out certain functions or duties in its interests or the interest of the latter".

from activities indirectly connected to this object"[32]. The official in charge is a person that carries out an assignment or position in the interest of the legal person and the legal person will be criminally responsible if the deed committed by it is connected to the attributions or the purpose of the assigned positions.

Starting from the **specialty rule of the usage capacity**, the Romanian lawgiver had in view only the activities specific to the activity object of the legal person, either that this was the main one or it was one of the secondary ones. For instance, if a legal person, the activity object of which is artistic business management, commits deeds of human trafficking for the purpose of prostitution practice.

An infraction is committed **in the interest** of the legal person in all the cases when the - material or moral – benefit obtained from the infractions comes, totally or partially, to the legal person, although the infraction is not committed for the carrying out of the activity object. With reason, it is considered that an infraction is committed in the interest of the legal person also when the benefit consists in preventing a loss[33]. Among the infractions that can be committed in the interest of the legal person, we mention drug trafficking, human trafficking, smuggling, money laundering, etc.

A problem of law raised already in our doctrine is that of the solution for the hypothesis when a natural person commits an infraction for the carrying out of the activity object, but **for the exclusive benefit of that natural person** (or of some other person) or even against the interests of the legal person[34]. Starting from the idea that the three hypotheses – the committing of the infraction for the carrying out of the activity object of the legal person in the interest of the legal person or in the name of the legal person – are not cumulative conditions, but they are three alternative situations, we consider that the criminal responsibility of the legal person can be engaged any time the conditions of at least one of the hypotheses are met, no matter of the circumstance that the deed was committed or not also in the interest of the legal person or if it was committed or not in its name, of course, by meeting the objective and subjective conditions stipulated by law for the charged infraction.

In the sense of the criminal law, an infraction is committed **in the name** of the legal person if the natural person that commits the material element of the deed acts in its capacity of official in charge or representative of the legal person, officially assigned without the deed to have been committed in the carrying out of the activity object or for the benefit of the legal person in question.

According to the project *Corpus Juris*, in order for the illicit activity of a natural person to engage the criminal responsibility of the legal person, it is not required the condition of an official appointment in a decision, representation or control position, it is enough that the natural person should act in the name of the legal person or it should have had such a legal or actual power.

Another problem of law is that of establishing the legal solution for the hypothesis when a natural person commits a deed stipulated by the criminal law in the name of a legal person, but contrary to this one's interest. For instance, the committing of an infraction of money laundering exclusively in the name of a trading company by a representative of the company, without a direct connection to the carrying out of the activity object, in the interest of one of the shareholders of the trading company.

As far as we are concerned, because the three hypothesis stipulated by art. 135 are not cumulative, we appreciate that the legal solution is that that neither the lack of connection to the

[32] *Fl. Streteanu, R. Chiriță,* quoted work, page 400.
[33] Idem, page 400. See also *D.M. Costin,* quoted work, page 356.
[34] *A. Jurma,* quoted work, page 138.

activity object, nor the circumstance that the deed was committed contrary to the interests of the legal person have relevance, as long as that deed was committed in the name of the legal person. But, we state that, even if a deed stipulated by the criminal law is committed in the name of a legal person, it is possible that this should engage exclusively the criminal responsibility of the natural person, especially when the interests of the legal person are damaged while committing the infraction, but not because the deed is against this one's interests, but because it is possible that the content of the subjective element should not be carried out, because the guilt, as we will see, is reported to the attitude of some natural persons within the legal person.

As a result of the analysis of the legal text, as it was already found in doctrine, it is noticed that the three categories of infractions – in the carrying out of the activity object of the legal person in the interest of the legal person or in the name of the legal person – interpenetrate[35], because the deeds that are committed in the carrying out of the activity object in the interest and in the name of the legal person. For instance, the committing of an infraction of human trafficking by the director of a trading company, the object of which is the transportation of persons, is an infraction that can be included in any of the three categories.

4. Criminal guilt of the legal person

For the engagement of the criminal responsibility of the legal person, art. 19^1 of the previous Criminal code stipulated that the deed had to be committed with the form of guilt stipulated by the criminal law. As we have already said it, the new Criminal code no longer resumed this mention, but not because the guilt was not a condition for the engaging of the criminal responsibility of the legal person, but because the mention would have been useless, because art. 16 paragraph (1) Criminal code established that the „deed – **no matter if it was committed by a natural person or a legal person** (s.n.) – was an infraction only if it had been committed with the form of guilt stipulated by the criminal law".

The guilt of the legal person is reported to this one's organs and organization and it can be said that the establishing of the guilt of the natural persons that form the organs of the legal person is equivalent to the establishing of the guilt of the legal person in question. If the deed is not committed by the organs of the legal person, but by its representatives or officials in charge, the guilt of the legal person is established by reporting to the attitude of its organs. The existence of guilt or of its form or modality will result from the objective aspects of the way how the resolutions were adopted by the management organs of the legal person or from the existing known or tolerated practices within the activity of the legal person. Although, basically, it can be affirmed that the guilt of the natural person in the management of the legal person proves also the latter's guilt, nevertheless, we believe that the judicial organs have to establish the existing rules and practices within the organization and functioning of that legal person and, based on the findings, if it results that the organs of the legal person ordered, knew or did not prevent the committing of some infractions based on the instruments at hand, then it can be engaged the criminal responsibility of the legal person, if the form of guilt required by law for the examined infraction is carried out.

In the case of the deliberate deeds, it is necessary the preexistence of a decision of the legal person, based on which the deed stipulated by the criminal law was committed. In the case of the voluntary infractions, the guilt is established by verifying the way of carrying out the obligations of the legal person. For instance, if the infraction was determined by a not corresponding organizing. In the hypothesis of the criminal responsibility of the legal person for the voluntary deeds, it is considered that this is possible no matter if the guilt of a natural person is or is not

[35] *Fl. Streteanu, R. Chiriță,* quoted work, page 401.

established, because the guilt is reported to the attitude of the organs of the collective entity in question[36].

With regard to the infractions committed by **other persons than the organs of the legal person**, it is necessary for the existence of the infraction that the legal person should have known or should have had to know about the criminal activity carried on by the natural person. Therefore, the criminal responsibility of the legal person is excluded when the infraction is unexpectedly committed by an official in charge of the legal person or if the criminal deed does not belong to a practice tolerated or approved by the legal person. Also, if the legal person created a well organized system of surveillance and control that was able to prevent the committing of infractions in a responsible way, the liability of the legal person is excluded.

In doctrine, it is considered that, as long as the guilt of the legal person is an element distinct from the guilt of the natural person, which is separately analyzed, we have to admit that the guilt of the two persons can be the same (with the same form or modality) or different[37].

It can be talked about the same form of guilt when both the legal person and the natural one act voluntarily or deliberately. For instance, if the members of the board of directors of a legal person made the decision to misappropriate the activity object for the purpose of carrying on activities of human trafficking and the same subjective attitude to this activity had also the natural persons involved in the putting into practice of the resolutions of the board of directors. Another example that can be retained here is that when, in a work accident that led to the death of more persons, both the natural person that operated the device that ran out of order and caused the accident and the management organs of the company that did not perform the training regarding the work safety had a guilty attitude.

In doctrine, there are also examples in the sense that the form of guilt with which the legal person and the natural person act can be different. For instance, the employee that constantly disposes with intention wastes that are polluting and the legal person for which this works does not know (through its organs) about the activity of its official in charge, but it is found a repeated negligence with regard to the surveillance of the activity of the employees.

In the cases presented above as examples, the material doer – the negligent employee or the dishonest one – will be criminally responsible in their capacity either of participants or of sole doer, depending on the case, because it is possible that the legal person should not be criminally responsible as well as the situation that the natural person in the management of the legal person should not be drawn criminally responsible. So, the criminal responsibility of the legal person can coexist together with the responsibility of the natural person that has the capacity of organ of the legal person and that of the natural person that performed the material element of the infraction, but the three categories of subjects can be also in other positions. For instance, the legal person is not criminally responsible, but the two natural persons are. Or, the legal person and the material doer are criminally responsible, without that the natural person that runs the legal person should be criminally responsible. It is also possible that only the legal person should be criminally responsible[38].

Regarding the evidence of guilt, it is shown in doctrine that this is made indirectly by proving the guilt of the organs of the legal person.

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[36] *D.M. Costin,* quoted work, page 373.

[37] *Fl. Streteanu, R. Chiriță,* quoted work, page 403. In doctrine, it was expressed also the opinion according to which the guilt of the legal person was identical to the guilt of the natural person (*M. Basarab, V. Pașca, Gh. Mateuț, C-tin Butiuc,* Commented criminal code, vol. I, Generalities, Publishing house Hamangiu, page 126-127)

[38] Idem, page 406. The authors give as example the case in which the decision at the level of the legal person was made through secret vote, with majority of votes, and the identity of the persons that agreed to that decision can not be established.

II. Correlation of the criminal responsibility of the legal person with the criminal responsibility of the natural person

We underline the fact that, by introducing the criminal responsibility of the legal person, the Romanian lawgiver did not want to make an „umbrella" under which the natural persons that had carried out the material element of the infraction should take refuge. On the contrary, in art. 135 paragraph (3) Criminal code, it is stipulated that the „Criminal responsibility of the legal person does not exclude the criminal responsibility of the natural person that contributed to the committing of the same deed". Analyzing the hypotheses under which it is raised the issue of the criminal responsibility of the legal person and based also on the practice experience of other states, we find that, excluding certain exceptional situations, usually the natural person regarding which the objective aspects of the deed stipulated by the criminal law are met, while the legal person in connection to which the infraction was committed is sometimes criminally responsible and there are, very rarely, cases when the legal person is exclusively criminally responsible. The possibility of the exclusive criminal responsibility of the legal person results from the provisions of art. 135 paragraph (3) Criminal code according to which the criminal responsibility of the legal person does not exclude the criminal responsibility of the natural person.

Based on these legal provisions, it can be said that the criminal responsibility of the legal person can be cumulated to that of the natural person, but it does not presume it, so that there can be cases when the legal person is criminally responsible, although the judicial organs did not manage to retain the conditions of the criminal responsibility in the charge of a natural person. In such situations, in doctrine, it is discussed about the way how the existence of the conditions of criminal responsibility of the legal person can be established in the absence of referring to a natural person[39].

As far as we are concerned, we appreciate that the establishing of the criminal responsibility of the legal person presumes in all case the reference to one or more natural persons that carried out the material element of the deed stipulated by the criminal law. Without such a reference, the engaging of the criminal responsibility of the legal person would be arbitrary. For instance, in case the decision belongs to a collective organ and it can not be established which of the natural persons took part to the decision making, the legal person is criminally responsible only if a natural person set into practice the resolution of the collective organ of the legal person. The „performer" – natural person – is criminally responsible only if it committed the deed with the form of guilt stipulated by law, but the legal person will be criminally responsible irrespective of the criminal situation of the natural person, because the deed was committed for sure with guilt. Also, if the decision of the collective organ carries out by itself the objective elements of an infraction, the material element of the deed is also attributed to some natural persons, so that the carrying out of the objective aspects of the deed are appreciated based on the natural persons participating to the decision making in question. In case the deed stipulated by the criminal law is attributed to a collective organ and it can not be established that at least a part of the natural persons that make this organ committed the deed with the form of guilt required by the law, therefore, the criminal responsibility of the legal person will be also excluded.

We mention that, although the criminal responsibility of the legal person can be engaged without retaining the criminal responsibility of at least a natural person, the subjective aspect has to be charged to at least one natural person every time, even if its identity can not be established (in the case of the collective organs, for instance).

Unlike other legislations that stipulate the exclusion of the plurality of the criminal responsibility of the legal person and of the criminal responsibility of the natural person, we

[39] *A. Jurma,* quoted work, page 148.

believe that our legislation sets the rule according to which the criminal responsibility of the natural person and of the legal person are not excluded, but they are cumulated [40].

Based on the principle of the personal character of the criminal responsibility, the legal person can not sue for compensation in order to ask for the payment of the paid criminal fine, but it will be able to request from the natural person doers compensations based on the tort liability. The associates of the legal person also can not be made to be responsible for the criminal fines applicable to the entity in relation to which they have the capacity of associates, because the principle of the criminal responsibility personality may be broken, and the solution is the same including in the case of those legal persons within which the associates are unlimited or solidary responsible[41].

Conclusions

Comparatively analyzing art. 135 of the new Criminal code with the previous equivalent text introduced in the criminal legislation through Law no. 278/2006, we find that the **principles** of the previous **regulation were kept**. So, it was mentioned the concept of the liability of the legal person for any infraction, the existence condition of the legal personality as premises for the engaging of the criminal responsibility of the collective entities, the possibility of the plurality of the criminal responsibility of the legal person with the criminal responsibility of some natural persons, etc.

Compared to the previous regulation, the lawgiver operated the **restrain of the criminal immunity of the public institutions** that carry on an activity that can not be the object of the private domain and limited it to the infractions committed during the carrying on of such activities. There were also modifications with regard to the individualization of the sanctions applicable to the legal person determined by the introduction of the day- fine system for the natural person.

On the other hand, to the complementary punishments applicable to the legal persons, it was introduced a new such punishment, that is, **the placement under surveillance**, that can be applied to the legal person according to the conditions stipulated by law.

There are also other modifications that aim at the conditions of the criminal responsibility of the legal person. Firstly, we notice that compared to the previous regulation that was not clearly enough, in the new Criminal code, the types of the legal persons that are not criminally responsible are stipulated more clearly. Secondly, the new Criminal code did not resume the provision regarding the subjective element[42], because it was set through art. 16 paragraph (1) of the new Criminal code that the „*Deed is an infraction only if it was committed with the form of guilt required by the criminal law*". Therefore, such an explanation was useless.

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[40] In the Belgian law, for example, in the case of the voluntary infractions, the plurality of the criminal responsibility of the legal person is excluded, because in such a situation it is applied the exclusive rule of the person that has the severer guilt (for more data, see *A. Jurma,* quoted work, page 148). For instance, according to art. 5 of the Belgian Criminal code: „When the responsibility of the legal person is exclusively engaged as a result of the intervention of a natural person, only the person that committed the severer deed can be convicted. If the identified natural person committed the deed knowingly and advisedly, it can be convicted at the same time with the responsible legal person".

[41] See also *Fl. Streteanu, R. Chiriță,* quoted work, page 408-409. The authors show that, as long as the associates in the case were also penal punished for that deed, the rule of *non bis in idem* would be violated.

[42] According to Art. 19^1 paragraph (1) of the previous Criminal code, in order to engage the criminal responsibility of a legal person, it is necessary the condition that the deed should have „*been committed with the form of guilt stipulated by law*".

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HISTORY OF THE EUROPEAN UNION

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Abstract

This article aims to demonstrate how the project of the 'European Union' evolved both in the interwar period and in the years following the Second World War, focusing on promoters of the idea of federal Europe who attempted to find the best ways for building a suitable European Community development. The establishment of three European Communities in the 50`s, although they were mainly orientated economically also involved political cooperation, thus contributing to a new federal vision. Evolution of the European Communities has been marked by the widening of their accession of new members and by the review of the institutive treaties in order to speed and flexibly achieve those objectives. Given the constant changing of modern world, the European leaders had to agree on new rules that would take into account political, economic and social changes, while also meeting the aspirations and hopes of the Europeans. Signing the Lisbon Treaty was the recognition that the EU needs to modernize and to have effective and consistent tools, not only adapted to the functioning of a Union extended to 27 countries, but also to the rapid changes of the present day world. The Lisbon Treaty clearly defined objectives and values of the European Union on peace, democracy, human rights, justice, equality, rule of law durability and also set up a stable institutional framework which gives the ability to obtain better results closer to expectations of European citizens.

Keywords

European Community, European Union, the Community treaties, accession, modernization, reform treaty.

1. Background of united Europe idea

The idea of a united Europe is old and deeply rooted in the history of European continent, these taking different forms over the passage of time. According to historian Jean-Baptiste Duroselle, over time were tested four types of relevant projects respectively for unity by force, unity as a principle, unity in diversity and unity through mutual agreement, some of them overlapping at times [1].

Greek antiquity has created the first forms of unity and cooperation, when they generated the League of Delos [2] and the League of Peloponnese [3], both political creations having the form of confederation. After their disappearance, the new power of Rome, based on a policy of continuous expansion, managed to create the largest and most compact empire of antiquity, one of the most consistent and durable state formations in human history [4]. The Roman model would be for many centuries a target in terms of recovery, albeit partial, of the European continental unity, temporarily fulfilled by the emperors Charlemagne [5] or Otto I [6].

Another form of continental unity was Christian. If along with the Edict of Milan (313 AD) Christianity became a "*religio licita"* equal in rights with other religions of the Roman Empire, the Edict of Thessalonica (380 AD) made it the state mandatory religion for all Empire subjects. Thus Christianity has achieved a synthesis of European spirituality which evolved into the idea of unity,

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which will continue to be supported and promoted even after the Great Schism [7] in 1054, the church operating as the first pan-European structure.

In the context of affirmation of national states it was felt the need for a stronger bond than religion to unite European countries. Thus, from the eighteenth century it began to shape the idea of formulation of new projects of peace and unity in Europe through its radical reorganization. Examples would be "The design to make permanent peace in Europe" from 1713, belonging to the abbot of Saint-Piere [8]," Plan of a universal and eternal peace "by Jeremy Bentham [9] or the idea of "European Republic" by JJ Rousseau [10].

Another project known as *The philosophical project of permanent peace (Friede Zum Ewigen)* formulated in 1795 by the great philosopher Immanuel Kant (1724-1804), where he developed the idea of an international pact designed to eliminate war forever in peoples lives. The means for this purpose was the termination of the states illegal status (which represented the main source of war) and the establishment of a new type of international society, a "nation state" of federative type, to ensure security and protection for all countries regardless of their size. This society should have been achieved progressively, starting from a strong core, provided by the nation with a republican state system, extending itself to the continental level and then ultimately to the entire world. Until this goal would have materialized, he wanted to have the federal alliance between the confederate states to ensure the exclusion of war and abuse of any kind. Even if the project did not include a specific institutional breakdown, with regard to the functioning of the federal system envisaged, it nevertheless marks a milestone in the curdling of a unitary concept that includes both ideals of pacifism, liberalism and federalism, using the formula of a free federation of states with Republican constitutional regime and based on international law, with mutual guarantee of rights.

Likewise have expressed their opinions other illustrious personalities: Alphonse de Lamartine [11] who launched *Manifesto to Europe*, and Victor Hugo [12] a *Call for United States of Europe* (1851). Later, Victor Hugo said that "*Europe needs a European nationality,*" and in a message to the Peace Congress in Lugano, he wrote: "*Surely we will have this formidable European republic,. We will have these United States of Europe that will crown the ancient world* "[13].

But this dream was shattered by the First World War (also known as the Great War), which destroyed internationalist pacifism illusions and hopes, the war effects being beyond the most pessimistic projections [14].

Thus, almost one hundred years after the Napoleonic wars, which devastated for many years the old continent, the Great War left Europe in ruins, with significant casualties, as well as severe economic and social problems. The desire of states to cooperate to prevent recurrence of a disaster of the magnitude of World War I, made the Paris Peace Conference (held from January 18, 1919 to June 21, 1920) to decide the establishment of the League of Nations [15], whose basic principles have been formulated in the plenary session of the Conference on January 25, 1919, showing that: "*It is essential for maintaining global status that the associated nations desire, to create a League of Nations, a body of international cooperation which will ensure international obligations and provide safeguards against war"* [16].

Starting from the new European geopolitical realities and from the goals of the League of Nations, the problem of finding new forms of organization of the European continent was repeated in several projects that concerned not only the intellectual elite of the time, but also the politicians. But the idea of a united Europe can not be imposed easily, it had to struggle with the fear of nation states (especially those arising from the peace treaty) not to be swallowed by a super state led by a great power, thus reenacting the prewar situation [17].

Four more years had to pass until Count Richard Coudenhove-Kalergi [18] began to develop his project which gave rise to the Pan-Europe movement. In 1922, in Vienna, he published a manifesto with a title "*Europe's problem is summed up in two words: unification or collapse*" and in

1923 he published a comprehensive paper entitled *Pan-Europe*, which will become the classic work of the movement with the same name initiated in the same year. For the first time in history it was issued a lucid analysis work which contained the basic principles of a precise and coherent political program. The paper stressed the need for reconciliation between France and Germany as the indispensable basis of European reconstruction. The Union had to follow in many ways the Pan American organization that seemed able to reconcile national independence with regional and international cooperation. Pan-Europe was to be equipped with a Council composed of delegates from the states, a Parliamentary Assembly composed of delegates from national parliaments and a Court of Justice.

In the manifesto, "What the Pan-European Movement wants?", adopted on September 11, 1926, were proclaimed the lines of action necessary for the carrying out of Pan-Europe: ensuring equality, security and sovereignty of the states, the creation of military alliances, creating a customs union, creating a common currency, the common recovery of resources of the colonies of Member States, respect for cultural individuality of each state and civilization, the protection of national minorities, cooperation with other states of the League of Nations. So, they set economic goals, in terms of international relations and in terms of human rights [19].

Union has enjoyed great success among some politicians, writers, or intellectuals, such as Aristide Briand, Leon Blum, Edouard Herriot, Eduard Benes, Konrad Adenauer, Paul Valery, Paul Claudel, Rainer Maria Rilke and many others yet.

Meanwhile, Count Coudenhove-Kalergi initiative faced with adverse reactions. An article in the newspaper "Arbeiter-Zeitung (Workers Newspaper) reveals that the idea belongs to one man who sees European peace treaty under threat and eternal conflict, showing that: "*Utopia is to believe that the capitalist powers can be convinced of the usefulness of international solidarity if they are shown the potential danger of nationalist egoism."*[20]

The Pan-European Movement has continued to attract the attention in the next period setting in motion a true intellectual rivalry, but in terms of real output the Pan-European movement failed.

In 1929, it passed from the stage of propaganda in favor of European unification to that of official action. Thus, the French foreign minister, Aristide Briand [21], supported by his German counterpart, Gustav Stresemann on the occasion of the tenth session of the League of Nations General Assembly (September 5, 1929) gave a speech in which he proposed a plan for the United States of Europe, saying: "*I was associated during these years in active propaganda in favor of ideas that wanted to be qualified as generous, so as not to be qualified as imprudent. This idea, which was born many years ago, which ignited the imagination of philosophers and poets [...] finally appeared to correspond to a need [...] I believe that among the peoples who are geographically grouped in Europe there must be some sort of federal link. That federal link I will endeavor to make real* [22].

In his speech, Gustav Stresemann, strongly supported the economic objectives of such a union, by creating new markets for the industry of European countries, streamlining the continent's economy and its integration into the world circuit. He also expressed the need to clarify political objectives, so that the expected unification should not limit the sovereignty of participating countries and should not be directed against any extra-European powers.

Representatives of 27 European countries, members of the League of Nations recognized the need for such an approach and called for France to draw up a memorandum which included the principles of organizing the new structure of European Union, which will be submitted for documentation to all European governments to express their observations. The views of governments were to be sent to the French Government, then the findings of the consultations were to be presented to a future session of the General Assembly of the League.

Thus the postponing the debate of Briand project for several months sealed its fate due to adverse changes occurring in international political and economic context.

G. Stresemann's death (October 3, 1929) and the Brüning minority government coming into power (March 27, 1930) led to discontinuation of the Franco-German dialogue. Heinrich Brüning cabinet achieved a decisive shift in German foreign policy in a revisionist nationalist sense and the idea of reconciliation with France has given way to a greater intransigence for revision of peace treaties and pursuing priority national interests of Germany.

However, on May 17, 1930, was submitted for documentation to all European governments "*French Government Memorandum on the organization of a system of European Federal Union* ", in which appeared the necessity of coordination of economic policies and the need for an institutional mechanism capable of providing the Union its vital organs necessary to achieve its goal, consisting of: a representative body as a regular institution of the "European Conference", drawn from representatives of all European governments members of the League of Nations, an executive form of permanent political committee with a restricted membership, to which may be invited to other states, members or non-members of the League of Nations, when discussing issues that concern them directly, a Secretariat which will develop and provide preliminary work in terms of administrative enforcement of the instructions of the Political Standing Committee or the European Conference [23].

Memorandum had a huge media echo raising a great interest among European public opinion. In France, while the non-communist left and center press welcomes the project having reservations about the principle of maintaining absolute national sovereignty, the right press spoke of "incurable delusion" and " traitor pacifism ", seeing only one advantage only in obliging all states to openly declare acceptance of the situation created by the peace treaties. In Germany, center and left media, although objecting to the stabilization of the Versailles system by putting the spotlight on security guarantees, however, stressed the unrepeatable opportunity offered by the project for European unification, for the peaceful resolution of all disputes, including existing border revision through understanding. Right-wing newspapers, however, generalized the critics of the project as an expression of French national interests, designed to impose new "encumbrances" to Germany and sustained the idea of central Eastern Europe under German auspices.

In the Romanian media, the issue has been addressed extensively, many journalists, politicians, personalities of culture and science, expressing their point of view. One of the most relevant points of view is that of Vespasian V. Pella [24], which in a series of articles examined the whole problem contained in the Memorandum. According to him, the creation of European Federal Union was intended to "*provide moral and material recovery of our continent, to provide somewhat second revival of Europe, this Europe which many politicians and economists consider on the verge of collapse as today.* Also V. Pella showed that: "*Europe can only be saved through cooperation based on the principle of equality between all members of our society, through a cooperation which does not interfere with anything in the process to normalize and strengthen those states that are now stopped in their natural development by foreign domination under which they were found before World War and which countries are thus in a state of manifest inferiority, finally, through a cooperative in which all peoples of our continent, without any thought of political and economic hegemony, want to participate in the truthful reorganization and progress of the European community* [25].

On September 9, 1930, representatives of European states to the Geneva Conference were called to give their verdict on the project Briand. The author of the plan proposed adoption of a declaration of principles for European Union constitution and the Federal Assembly. German counterproposal provides a simple resolution declaring the will of States to discuss European issues in their entirety, only in the League of Nations. Finally, at the England's proposal, the adopted resolution only stated by the formation of a committee of study of the problem of the European Union within the League of Nations with a Secretariat headed by Secretary General of

the General Assembly. Committee met in January 1931 and had several sessions until September 1932 in Geneva without adopting resolutions, but only reports to the General Assembly of the League of Nations. During the debate addressed to the Committee there were only economic problems, and in September 1931, the Committee rejected a final proposal of A. Briand regarding the creation of standing committees of the League of Nations on the problem of European unity. Disappointed and discouraged, Aristide Briand declared the withdrawal of his project and further limiting of the availability of France to a policy of understanding with Germany.

In conclusion, Brüning cabinet caused the failure of French plans. For Germany, Briand Plan has only secondary importance to the German policy of revising peace treaties and to the domestic issues such as the economic crisis, unemployment, electoral fight and Nazis rising [26].

In early 1932, the aggressive attitude of Germany continues to be stated, the hegemonic tendencies of Europe becoming increasingly obvious. Following the affluence of consolidated foreign capital of benefit from Dawes Plan [27], of the war unpaid debts and of the path opened to the east through agreements of Locarno, Germany was in a privileged position in terms of economic relations with the Member states of the Danube basin. To bar the road of German imperialism to the Danubian region in February 1932, France launched the Tardieu Plan of "European Economic Union." The Anglo-Franco-German conflict of interests was evident in conversations between these powers, so the French plan was rejected. Failure of Tardieu Plan was reported by the severe censorship of the major powers (Britain, Germany, Italy) in the London Conference, held between 6 and 8 April 1932 [28].

When we refer to legitimate concerns of Romanians and Romania in relation to the emergence and evolution of the idea of European integration we can not ignore the presence of great diplomat N. Titulescu [29] in such a context; as a League president, he has helped to strengthen the thesis of "European unification", but also to remove the danger of a new world war.

Another approach started in Romania in view of the European unification was the *Esperanto* call to achieve United States of Europe (1934), call that "*by its clairvoyance goes beyond the frontiers of imagination*." The call text in its 10 points has a tendency to come true today:

"Europeans!

1. Despite the opposition and against all, trust in the European Union.

2. In the national elections, vote only for a party that militate in favor of creating a unified economic area.

3. Ask the national European parliaments to establishing a common Parliament.

4. Ask for the formation of a common European army and the introducing of a single currency.

5. Have an autonomous status for countries, regions and cities in the United States of Europe.

6. To study in a European spirit.

7. Respect other nationalities.

8. Fight to free the economy from the burden of bureaucracy.

9. Fight for laws and institutions that enable social development.

10. Who fights for the European Union promotes world peace "[30].

Unfortunately, these messages did not have the expected echo in Europe; so once again, the continent has been ravaged by a devastating war, with harmful consequences for European countries.

During the Second World War, several European countries have developed manifestations of ideas of European unification. In 1944, representatives of the European resistance movements, meeting in Geneva (Switzerland), have developed a European ruling which stated that the creation of a prosperous, democratic and peaceful Europe formed of sovereign states, separated by political borders and customs is impossible, claiming that only a European federation could remove the causes of the two world wars.

At the end of World War II took a new form of hope was born. Those who resisted totalitarianism during the Second World War were determined to end the international antagonism and rivalry in Europe and thus create conditions for lasting peace. Between 1945 and 1950, some statesmen, including Winston Churchill, Robert Schuman, Konrad Adenauer, Alcide de Gasperi were determined to persuade citizens of the need to enter into a new era, that of a structured organization of Western Europe, based on common interests and based on treaties, which guarantee the rule of law and equality between all nations.

From here, however, until the actual implementation of the idea of European Union there had to be taken several preliminary steps. A first step is the ideas of relaunching the European Union ideas in the context of inter-war situation. In this respect we recall Winston Churchill's statement from University of Zurich in 1946 where he reiterates the idea of European unity by creating a Union of European States and a congress [31].

Several days later, on September 21, 1946, held in Hertenstein (Switzerland) a meeting of representatives of the European federalist movement, ended with a resolution approving a training program of a European union. As a result, from 27 to 31 August 1947 was held in Montreux (Switzerland) the Founding Congress of the Union of European Federalists (Union of European Federalists - UEF).

At Congress meeting in Montreux, representatives of European federalist movements [32] have been proposed to test the six principles on which the future federation was to be completed:

- European federation can be formed only on giving up any hegemonic principles;
- Federalism is based only on giving up any sense of the system;
- Federalism should not face the problem of minorities;
- Federalism is not intended to remove national differences and coverage of all nations in a single block, but rather retain their identities;
- Federalism should be based on acceptance of complexity, contrary to simplicity, which is characteristic of totalitarian spirit;
- Formation of a federation must be carried out step by step and not from the center, or by government means.

The Montreux Congress, during which the Federal States of Europe adopted the draft, was the prelude to the Congress of Europe in 1948. The Congress of Europe (known as the Hague Congress), held from 7 to 11 May 1948, The Hague (Netherlands), aimed at discussing ways of unifying Europe and was the first step of the process that led to formation of the European Union. Congress brought together the most representative contemporary European personalities who had proposed to demonstrate the extent of movement for European unification and to establish objectives to be achieved to make such a union. The congress resulted in numerous resolutions, whose approach reflects two perspectives on European construction: the federalist tendency (who wanted to fast forward and asked for a partial transfer of sovereignty of participating countries, through the formation of a European federation, according to the principle adopted in the United States of America) and unionist tendency (supporter of the idea of a European Union, in which participating states should retain full sovereignty, unity whose main functions would be economic cooperation and strengthen the defense capacity of Western countries) [33].

Political resolution adopted then by the Congress, entitled "Message to Europeans", underlined the urgent need for nations to unite Europe economically and politically in a structure capable of ensuring their security and social progress. In this relatively informal framework it was accepted the idea of partial transfer of sovereignty to a union, which thus can better defend their political and economic interests. It also requires the election of a European Assembly to examine the legal and constitutional implications deriving from the establishment of such a union or federation and social consequences thereof or otherwise. Following The Hague Congress, the

International Coordination of Movements for European Unity was transformed into "European Movement" [34], which has a coordinating role and brings together European movements.

In the same time, some European aspirations have been realized through the establishment of two organizations. The first one, "Western Union", was born after the *Treaty of cooperation in economic, social and cultural and collective self-defense*, signed in Brussels on March 17, 1948, by Belgium, France, Luxembourg, Netherlands and United Kingdom. By this treaty, the signatory states took commitment to defend each other if one of them would be the victim of armed aggression. Besides the fact that he proposed the creation of a common defense system for Member States, the organization is not limited to matters of defense policy but also considered strengthening economic, social and cultural connections between Member States in order to successfully resist from a military and ideological point of view to the new profile threat. In this regard, five states have established a 'Standing Committee for the study and development of European federation "[35].

The second organization released was OECE (European Economic Cooperation), which was created by the Treaty of Paris of April 16, 1948. OECE objectives were: management of financial aid from European countries by the United States, resulted in the Marshall Plan [36], coordination of national economic policies, offsetting the lack of convertibility of currencies and abolition of quantitative restrictions on trade between the states involved, and achieve a customs union and a free trade area [37].

Creating these two organizations responded only partially to the objectives stated at the Hague Congress. What was missing was the parliamentary component, namely an assembly of representatives of national parliaments to provide "*a platform for exchanging ideas and expressing an opinion on Europe, on topical issues.*

In these circumstances, in July 1948, just two months after the Hague Congress, Foreign Minister of France, Georges Bidault presented at a meeting of the Advisory Council of the Brussels Treaty, the first formal proposal at government level for creating a European parliament. The proposal was greeted with some apprehension. Subsequently, on October 26, 1948, the Brussels Council decided to set up a committee on research and development of European unity, composed of representatives of the five members of the Western Union [38]. Meeting in Paris in October 1948, under the presidency of Edouard Herriot, the Committee was asked by a Franco-Belgian proposal that called for a European Parliamentary Assembly. British delegation presented a counter-proposal predicting a competent European Council on matters of common interest, except for military defense and economic issues which were operated by OECE. It also proposed that in addition to the Committee of Ministers it should also be established an Assembly composed of representatives of governments. Faithful to its conception of the creation of a classic intergovernmental body, United Kingdom rejected any decision-making power of its own, virtually any parliamentary character of the Assembly [39].

On the Treaty Consultative Council meeting in Brussels on 27 and January 28, 1949, Britain softened its position, and agreed with the principle of creating a Parliamentary Assembly, but with an advisory role. The five foreign ministers reached consensus on establishing a Council of Europe consisting of a ministerial committee, which met behind closed doors, and a consultative body whose meetings were public. They decided to convene a conference of ambassadors to devise tasks and organize this new institution and invited five other countries (Denmark, Ireland, Italy, Norway and Sweden) to participate in negotiations. This conference should establish the status of the Council of Europe.

In early May 1949, ten foreign ministers met in London in Saint James Palace, to discuss ambassadors' findings and resolve past difficulties. Following these consultations, on May 5, 1949, was signed the Statute of the Council of Europe [40]. The official communiqué issued

shows: "*The essential feature of status [...] is to create a Committee of Ministers and a Consultative Assembly which set up the Council of Europe. Committee of Ministers shall have the powers to develop cooperation between governments and the Consultative Assembly, expressing the aspirations of the peoples of Europe, will provide governments the opportunity to remain in permanent contact with European public opinion* "[41].

Council of Europe Statute entered into force on August 3, 1949, the first session of the Committee of Ministers and Consultative Assembly taking place immediately thereafter, in Strasbourg [42]. Council of Europe has completed politically the previous organizations, bringing together European states which enjoyed a democracy and promoted human rights. These organizations, since 1950, came to be added to the European Communities, organizations intended primarily for economic purposes, but which have also assumed political cooperation, thus contributing to a new federal vision that ultimately will materialize in the emergence of the European Union.

2. Establishment of the European Communities

Creating European Communities in the 1950s is based on the same postwar realities that have led to the establishment of other European organizations. Communities appeared, therefore, as a new type of international organizations based on economic integration of Member States, with other words, on their membership in a unitary, integrated body, well beyond the sphere of relations of cooperation, partnership and joint action that characterizes the work of classic international organizations. The economic objectives pursued through the creation of new communities aimed at improving their economic and technical capacity to increase efficiency, in the conditions required for the development of modern society [43].

In these circumstances, in December 1949, Michel Debré [44] proposed a draft pact for the European Union States, based on a presidential system and the federalists who have an arbitrator chosen by universal suffrage for a period of five years, a Senate of Ministers of the Member States, a European Assembly composed of national delegates elected, based on the number of inhabitants and a Court consisting of Judges [45]. Michel Debré's proposal was followed by the declaration of Robert Schuman (French Foreign Minister), who in May 9, 1950, taking an old idea of Jean Monnet [46] proposed the pooling of coal and steel production France and Germany, and creating a market for coal and steel to be conducted according to supranational methods. In the Declaration it was stated: *"The French Government proposes that Franco-German production of coal and steel to be placed under a High Authority, within an organization open to other European countries. Control of coal and steel production should lead immediately to build a base for economic development as a first step towards a European federation, while changing the destinies of those regions which were previously dedicated to the manufacturing of munitions of war, whose victims were rapidly becoming. The solidarity in production thus established will show that any conflict between France and Germany becomes not merely unthinkable, but impossible. The establishment of this strong production unit, open to all countries wishing to cooperate and undertake to give member countries the main elements of industrial production on equal terms, will lay a true foundation for economic unification. This production will be offered to the world, without distinction or exception, to help raise living standards and to promoting peaceful achievements* "[47].

To fulfill this goal, in June 20, 1950, France has organized an intergovernmental conference whose presidency was provided by Jean Monnet, who, on this occasion said: *"We are not here to make a joint work, not to negotiate advantages, but to seek benefit of our mutual advantages* [48]. Following discussions and negotiations on April 18, 1951, was signed the Treaty of Paris which

established the European Coal and Steel Community (CECA / ECSC) [49]. Treaty entered into force on July 23, 1952, after being ratified by the six signatory countries: France, West Germany, Italy, Belgium, Luxembourg and the Netherlands.

ECSC Treaty stated the creation of a common market for coal and steel, which resulted in suppression of customs duties and quantitative restrictions on free movement of goods, the prohibition of discriminatory measures and grants or aid by the state. Although there was a sector common market (which referred only to coal and steel), it set an institutional precedent that will provide the foundation for the European construction.

By ECSC Treaty was provided for the creation of four community bodies, namely:
- *High Authority* as a Community body that have a position of independence from the governments of the ECSC;
- *Special Council of Ministers*, which was an intergovernmental body;
- *Common Assembly* which had the task of democratic control and which was composed of representatives of parliaments of Member States, elected by direct universal suffrage;
- *Court of Justice*, with a mission to ensure the observation of ECSC law along with the interpretation and application of the Treaty.

Since the treaty constituting the ECSC the Treaty drafters wanted to create a community of law in which law should take the place of force. The treaty comprises four principles that form the basis of existing EU construction: the superiority of the institutions, the independence of the Community institutions, collaboration between institutions and equality among states. Although the Treaty has no longer the importance that the European economy had in the 50-ies, being out of force today, the major institutions which it created remain valid.

According to the Decision 234/2002/ECSC of the Representatives of the governments of the member states, meeting within the Council, of 27 February 2002 on the financial consequences of the expiry of the ECSC Treaty and on the research fund for coal and steel, the Treaty establishing the European Coal and Steel Community (ECSC) expires on 23 July 2002 and the ownership of the ECSC funds will revert to the Member States.

In accordance with Article 1 of Decision 234/2002/ECSC, Commission was authorized to manage on behalf of the Member States, all existing assets and liabilities of the ECSC to July 23, 2002, from July 24, 2002.

Subject to any increase or decrease which may occur as a result from the liquidation operations, was considered as assets intended for research in the sectors related to the coal and steel industry, referred to as the “ECSC in liquidation”. After completion of the liquidation, the assets were to be called "Active Research Fund for Coal and Steel" and the income from these assets, called the "Assets of the Research Fund for Coal and Steel", to be used exclusively for research in sectors related to Coal and steel in accordance with this decision and acts on it [50].

In the period following the creation of the ECSC, attempting to focus this organizational model to other areas, has proposed creating a European defense community, which involves the establishment of a common European army with contingents made available by Member States and that would have been "attached political institutions of the united Europe" [51]. In this regard it was signed on May 27, 1952, the Treaty establishing the European Defence Community (EDC), which was sent to ECSC Member States on March 9, 1953. This project was abandoned in August 30, 1954, after the French National Assembly refused to ratify this treaty, although the treaty had been ratified by other countries [52].

After the 1954 failure of ambitious plans to create a European Defence Community (in conjunction with this and a European political community, in other words the supranational level of cooperation in an area extremely sensitive and politicized) during 1– 3 June, 1955, held in Messina (Italy) a conference of foreign ministers of member countries of the ECSC, an event

which restarted Community building. On this occasion, it was approved the Memorandum issued on May 20, 1955, by the Benelux countries [53] and it ruled the European integration process in all sectors of the economy.

The participants agreed to set up a committee composed of government representatives, under the chairmanship of Paul-Henri Spaak [54], which was to report on creating a common generalized market and an atomic energy community. United Kingdom, although initially accepted the invitation to join the committee, retired in November 1955, believing that it is better to have inter-governmental cooperation in the OEEC (Organization for European Economic Co-operation).

Spaak Report, released on April 21, 1956, was discussed and adopted by the Venice meeting of foreign ministers of the six ECSC member states from 29 to 30 May 1956. It was agreed that this document should be the basis of negotiations for treaties. Another step, also important, was *the inter-governmental conference* in Brussels on June 26, 1956 [55].

Other negotiations followed in summer and autumn, due to the diversity and complexity of problems, the divergence of views. Following negotiations, it was finally agreed the completion of substance and detail aspects of the EEC and EURATOM Treaties.

Thus, on March 25, 1957, in Rome, the Treaties establishing the European Atomic Energy Community and European Economic Community were signed. On the same occasion were also signed other documents, of particular importance including, the Convention on certain institutions common to the European Communities (Parliament Assembly and the Court of Justice of the European Community). The treaties were ratified during the July-December 1957, entered into force on January 1, 1958.

By signing the Treaties of Rome, two new Communities came into being: European Economic Community (EEC) and European Atomic Energy Community (EAEC), the new communities being inspired by the institutional concepts already put into practice by the ECSC.

According EEC Treaty, the stated purpose of the European Economic Community was that by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States.

To achieve these goals, the Community action involved:

(a) the elimination, as between Member States, of customs duties and of quantitative restrictions in regard to the importation and exportation of goods, as well as of all other measures with equivalent effect;

(b) the establishment of a common customs tariff and a common commercial policy towards third countries;

(c) the abolition, as between Member States, of the obstacles to the free movement of persons, services and capital;

(d) the inauguration of a common agricultural policy;

(e) the inauguration of a common transport policy;

(f) the establishment of a system ensuring that competition shall not be distorted in the Common Market;

(g) the application of procedures which shall make it possible to co-ordinate the economic policies of Member States and to remedy disequilibria in their balances of payments;

(h) the approximation of their respective municipal law to the extent necessary for the functioning of the Common Market;

(i) the creation of a European Social Fund in order to improve the possibilities of employment for workers and to contribute to the raising of their standard of living;

(j) the establishment of a European Investment Bank intended to facilitate the economic expansion of the Community through the creation of new resources; and

(k) the association of overseas countries and territories with the Community with a view to increasing trade and to pursuing jointly their effort towards economic and social development [56].

Like the European Atomic Energy Community, in order to fulfill its duties, the EEC has been endowed with a Parliamentary Assembly, a Ministerial Council, a Commission and a Court of Justice. It was also established that the Council and Commission must be supported by an Economic and Social Committee who have advisory attributions [57].

Also, according EAEC Treaty the main objective of the European Atomic Energy Community was to contribute to the raising of the standard of living in Member States and to the development of commercial exchanges with other countries by the creation of conditions necessary for the speedy establishment and growth of nuclear industries.

To accomplish its mission, EAEC should:

(a) develop research and ensure the dissemination of technical knowledge,

(b) establish, and ensure the application of, uniform safety standards to protect the health of workers and of the general public,

(c) facilitate investment and ensure, particularly by encouraging business enterprise, the construction of the basic facilities required for the development of nuclear energy within the Community,

(d) ensure a regular and equitable supply of ores and nuclear fuels to all users in the Community,

(e) guarantee, by appropriate measures of control, that nuclear materials are not diverted for purposes other than those for which they are intended,

(f) exercise the property rights conferred upon it in respect of special fissionable materials,

(g) ensure extensive markets and access to the best technical means by the creation of a common market for specialized materials and equipment, by the free movement of capital for nuclear investment, and by freedom of employment for specialists within the Community,

(h) establish with other countries and with international organizations any contacts likely to promote progress in the peaceful uses of nuclear energy [58].

In order to perform its tasks it has been endowed with the following bodies: a Parliamentary Assembly, a Ministerial Council, a Commission and a Court of Justice [59]. It was established that the Council and Commission are to be assisted by an Economic and Social Committee which was advisory.

3. Evolution of the European Communities

Creating the three European communities marked the beginning of a process of evolution of the European construction, which is developing in two directions: extending Communities by attracting new members and institutional improvement.

3.1. Enlargement of the European Communities

As is known, the founding members of the three communities were six, but under the treaties of incorporation, the founders envisioned the possibility of extending the communities by receiving new members. This was provided both in ECSC Treaty, EEC Treaty (Art. 237) and EAEC Treaty (Art. 205).

The first wave of enlargement took place on January 1, 1973, when Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland have signed the accession to the European Communities, which will include nine states since then. Norway has voted with a majority against membership, following a referendum organized for this purpose.

The following membership application was submitted by Greece in 1975 (after having first concluded an association agreement with the European Communities in July 1961); the Accession Treaty was signed on May 28, 1979, it entered into force on January 1, 1981.

Two other countries, Spain and Portugal joined in 1985 (after having first concluded an association agreement with the European Communities in 1977), the Accession Treaty enters into force on January 1, 1986. With the accession of Spain and Portugal, the number of Member States of the European Communities has risen to 12.

Given the policy of opening to other countries of the European Communities, in subsequent years were filed new applications for membership, as follows: Turkey (14 April 1987), Austria (July 17, 1989), Cyprus (July 4, 1990), Malta (July 16, 1990), Sweden (July 1, 1991), Finland (March 18, 1992), Switzerland (May 20, 1992), Norway (November 25, 1992) [60].

On February 1, 1993, in Brussels, Romania signed the "The European agreement establishing an association between the European Communities and their Member States, of the one part, and Romania, of the other part" [61]. The following year, on May 4, 1994, European Parliament gave its consent for admission as members of Austria, Finland, Norway and Sweden, to be completed the internal procedures of the Member for this purpose. Of these countries only Norway has rejected membership in a referendum (for the second time), so that from 1 January 1995 the membership number increased to 15.

In the following period, a number of other states have applied for membership, namely: Hungary (March 31, 1994), Poland (April 5, 1994), Romania (June 22, 1995), Slovakia (June 27, 1995), Latvia (October 27, 1995), Estonia (November 28, 1995), Lithuania (December 8, 1995), Bulgaria (December 14, 1995), Czech Republic (January 17, 1996), Slovenia (June 10, 1996).

Following these requests, on May 1, 2004, ten new countries joined the European Communities, namely: Cyprus, Estonia, Latvia, Lithuania, Malta, Poland, Czech Republic, Slovakia, Slovenia and Hungary, the number of Member States amounting to 25.

The next enlargement took place on January 1, 2007, when Romania and Bulgaria became full members of the European Community [62].

3.2. Institutional Improvement

Institutional improvement, the second main direction in the expansion of the European Communities, was marked, according to some authors [63], by a series of crises and failures, which led to a reflection and summary on how to overcome these crises, materialized finally in positive law by adopting legal rules that have changed the original treaties. According to others [64], the institutional development of the European Communities and their expansion only as the effect of crises and failures can not provide a sufficiently complete basis to explain the basic community building, arguing that in addition, an important role in institutional development Community had the results obtained by integration, especially since they are capable of joining the common efforts in the development of integration. For a better understanding of the entire process it is necessary to have a chronological presentation of key events that influenced the institutional development of the European Communities.

Thus, during 1961-1962, against the Franco-German rapprochement promoted by General Charles de Gaulle and Chancellor Konrad Adenauer, it was attempted to create a political community. In this regard, the Heads of State or Government of Member States have entrusted a committee led by Christian Fouchet, French Foreign Minister, with the mission to develop a draft treaty on the creation of a Union of States.

The project, known as 'Fouchet Plan' was published in November 1961 and proposed the creation of a European political union, governed by principles of intergovernmental coordination of foreign policies for the Member States, provide a Council of Heads of State, a Commission

composed of European Policy Senior foreign affairs officials and the European Parliamentary Assembly. The 'Fouchet Plan' was rejected by the community partners of France, being perceived as a Gaullist plot to undermine the European Communities [65].

A second 'Fouchet Plan' was published on January 18, 1962; it is more limited than the first, providing only the joint development of Member States' foreign policy, the defense and the cultural policy.

Following negotiations between member countries of the European Communities, regarding the ant federalist views of General Charles de Gaulle this project was not approved either.

Thus, in the '60s, the development of the community was characterized by a constant tension between national interests and EU integration, especially marked by the serious crisis which occurred in June 30, 1965 when France practiced so-called politics of the "empty chair" at Council meetings. The crisis was triggered by the discussions on financial issues related to agricultural trade. France rejected proposals from the Commission (chaired by Walter Hallstein) on common agricultural policy and was withdrawing its representative in negotiations. The Commission was charged that it assumed political power normally given the Council, thus trying to set up a supranational body.

The situation has been blocked without any possibility of output because France was in a different position on the issue of adopting a decision. France, which denied that decisions should be taken by majority vote and claimed that any decision should be taken by unanimity community members, was absent from Council meetings between 30 June 1965 to 30 January 1966, when the crisis ended with the "Luxembourg Compromise". The Luxembourg Compromise, although it had no legal value, established that Member States may request to postpone the vote and extend the debate around a proposed Community act if that act would harm important national interests. It was stated that decisions will be taken by majority vote, the Member states, however, agreeing that the important issues should have unanimous vote.

Another important institutional development of the European Communities was the adoption on April 8, 1965, of the "Treaty establishing a Single Council and a Single Commission of the European Communities", known as the "Treaty of Brussels" or "Merger Treaty"[66]. The treaty was to unify structure institutions in the three European Communities, which is expressly provided in the Preamble of the Treaty.

Thus, at decision level it was a single body, the Council of Ministers, which replaced the Special Council of Ministers of the European Coal and Steel Community, European Economic Community Council and the European Atomic Energy Community Council. This exercised its powers and competencies of these institutions in the conditions of each constituent part of the Treaty.

At the executive level resulted a single institution - European Commission, which replaced the High Authority of ECSC and EEC Commission and the Commission of the EAEC, the new entity exercising the powers and competences of the three institutions gathered under the terms of the constituent treaties.

The entity created by this Treaty, namely the "European Communities" enjoyed on the territory of Member States privileges and immunities necessary to carry out their mission, as laid down in the Protocol annexed to the Treaty. Also, officials and other servants of the three Communities became, at the entry into force of the Treaty, officials and other servants of the European Communities as part of a single administration of these communities [67].

In conclusion, the Treaty has made an institutional merger that led to the creation of a single budget of the Communities and the emergence of a single EU government. Unification which has been achieved took place only at the institutional level, new institutions created accomplishing the tasks provided in all three constituent treaties, leaving the three communities distinct.

At the Hague Summit in December 1969, the six members of the European Communities have reinforced the need for political unification of Europe [68]. This has led to the adoption of "Davignon Report", on October 27, 1970 be which was an agreement in simplified form which does not constitute a change in the constituent treaties, but requires only a moral obligation for Member States. Davignon Report consisted of four parts: in the first part were set some general considerations on the European political union to be "based on a common heritage of freedom and respect for human rights and to collect democratic states which have a freely elected parliament. The second part set objectives and means (harmonizing the views and concerted action in foreign policy, resulting from regular meetings of foreign ministers prepared for a permanent committee of the kind that draw up the report), in Part Three ministers are undertaken to continue this process of reflection and to prepare a new report assessing the results and the fourth provided the combination to the process of candidate countries for accession to the European Communities.

Following an objective integration political (which was not established institutionally until the coming into force of the Single European Act), Davignon Report managed a foreign policy focus of Member States, and one could say it has the merit of having prepared the future Member States for Common Foreign and Security Policy (CFSP).

The next major step in the evolution of the European Communities was adopting the Single European Act (SEA) by which were revised some provisions of the Treaty which established the Communities and it has shown willingness of the Member States to end stagnation community building. Single European Act was negotiated and drafted in an Intergovernmental Conference held in Luxembourg, from September 9, 1985 to February 17, 1986, the SEA text being signed in two stages: at February 17, 1986, by the nine states of the 12 States (Belgium, France, Germany, Ireland, Luxembourg, Britain, Netherlands, Portugal, Spain) and on February 28, 1986, by the other three (Italy, Denmark and Greece).

In the first stage, SEA has been ratified only by 11 Member States, considering that Ireland must first amend the constitution because of security references in the foreign policy community. After ratification by the SEA and Ireland, on July 1, 1987, the Treaty entered into force.

Single European Act brings together in a single document provisions for reform of European institutions and extends Community competence, also containing provisions on cooperation in foreign policy and environmental protection. SEA also removes the last barriers to complete the single market and broadens the field of Community action in the social sphere, environment protection, research and technological development. Institutionally speaking, it extends the area in which the Council of Ministers votes by qualified majority and formally recognizes the existence of the European Council. Also at the institutional level, Parliament first becomes associated in the legislative process, by establishing the principle of cooperation [69]. The same document establishes dual jurisdiction, by creating the Court of First Instance and Court powers extend. The document reinforces and extends competences in Executive Committee too.

Another milestone in the Community building is the adoption of the Maastricht Treaty. This one together with the treaties that have followed are further analyzed as referring to a new stage in the evolution of the European Communities, namely the European Union.

4. Establishment of the European Union and the further evolution of the Community scheme

A crucial moment in the evolution of community building is the relaunching of this process by adopting several texts, in legal form which merged with the Union's political and economic and monetary union, and have resulted by signing on February 7, 1992, in the Maastricht Treaty, known as the Treaty on European Union (TEU) [70].

Maastricht Treaty is composed of seven titles, as follows: Common provisions (Title I), Modification of the three treaties that each community has been established (Titles II-IV), Provisions on a common foreign and security policy (Title V), Regulation of cooperation in justice and home affairs (Title VI) and Final Provisions (Title VII). In addition the Treaty has annexed protocols and declarations on community problems.

Even the first article of the treaty states that: ″This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen". Further, the Treaty states that "The Union is founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty. Its mission is to organize, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples".

Based on these provisions, it can be said clearly that the three Treaties establishing the European Union constituents have not been removed [71] and thus not the three communities, which are one of the three pillars on which the Union is based [72].

Maastricht Treaty has brought some changes in terms of the European Communities, covering the most important European Economic Community (EEC), the objectives of which were reworked according to Community competences changes that suffered a number of institutional changes [73].

According to Article B of the TEU, the Union has the following main objectives:

- to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty;
- to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence;
- to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union;
- to develop close cooperation on justice and home affairs;
- to maintain in full the '*acquis communautaire*' and build on it with a view to considering, through the procedure referred to in Article N (2), to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community.

In view of the future evolution of community building, in the article N, of the TEU states: "A conference of representatives of the governments of the Member States shall be convened in 1996 to examine those provisions of this Treaty for which revision is provided, in accordance with the objectives set out in Articles A and B".

The treaty also provides for review of treaty provisions in the coming years depending on the institutional changes increase the Member States and a possible strengthening of the European Parliament.

Application of the Maastricht Treaty required, in some respects, the adoption of texts or enforcement measures (institutional arrangements, changes in institutions' internal regulations), some of which were developed in anticipation of entry into force of the Treaty and entered into force together with it. 1 January 1999 was chosen for the transition to the third stage of Economic and Monetary Union, and could finally be respected [74].

Adoption of the Treaty of Amsterdam [75], on October 2, 1997, marks a milestone that has significant elements in the reform of EU institutions, in terms of integration and cooperation of states in the enlargement of the communities receiving new states, particularly Central and Eastern Europe. Treaty of Amsterdam consists of three parts, an appendix and 13 protocols. Thus:

- The first part (substantial changes) includes important amendments to the Treaty on European Union, the Treaty of establishing the European Community, the Treaty establishing the European Coal and Steel Community, the Treaty establishing the European Atomic Energy Community and the Act annexed to Council decision of September 20, 1976 on the choice of representatives in the European Parliament by direct universal suffrage;

- Part Two (Simplification) refers to the simplification of the Treaties establishing the three European Communities, seeking to eliminate provisions that are no longer present to adapt the wording of certain provisions. This part provides a series of Abrogation of common institutions, from March 25, 1957, and the Merger Treaty, signed on April 8, 1965, maintaining their effects;

- Part Three (General and final provisions) contains general and final provisions of the Treaty: the new numbering system of items (the Maastricht Treaty, the indexing was done by letter, by the Amsterdam Treaty is replaced by an index based on figures), the ratification procedure, language versions, unlimited validity;

- The annex included a list of equivalence of the articles renumbered TEU and TEC;

- The Treaty of Amsterdam 13 protocols annexed to it: Western European Union and the creation of a common defense policy, integrating the *Schengen acquis* within the European Union, the positions adopted by Denmark, Ireland and the UK on some issues, implementation of the principle of subsidiarity and proportionality, protection and welfare of animals, the role of national parliaments in the European Union, etc.

Among the requirements which imposed the adoption of the treaty in order to amend the Maastricht Treaty are the following:

- Need to increase the European Parliament's role in decision making;

- Need to refine the operating system of two important pillars of the European Union: Common Foreign and Security Policy (CFSP) and cooperation in justice and home affairs (JHA);

- Need to remove the technocracy that dominates the work of the Community institutions and the effect of distancing their citizens;

- Need to reduce disagreements between the small and large EU countries in relation to various aspects of community activities, particularly in the area of achieving future political union.

Treaty of Amsterdam entered into the scope of its concerns matters of particular importance for the development of European integration and community building developments, of which we mention:

- Greater flexibility in the design integration of new candidate countries in their level of development;

- The possibility offered by the EU Council that unanimously on a proposal or a third of Member States and the European Parliament's opinion may suspend certain rights of the State seriously and persistently violating human rights;

- Enhance the powers of the Communities in some areas (environmental protection);

- Specifying the relationship between national and Union citizenship, in that last one up on the national and not replaced;

- Indication of the competence of EU institutions in view of enlargement (up to 700 MPs) and in terms of qualified majority voting;

- New regulations on visa free movement of persons and arrangements;

- New regulations regarding social policy and employment [76].

Amsterdam Treaty also provided, through a protocol, further discussions on reform. The decision to hold an intergovernmental conference, having regard to the provisions of this Protocol, was taken at the Koln European Council, from 3 to 4 June 1999.

The official opening of the Intergovernmental Conference held on February 14, 2000, in Brussels. On this occasion, candidates states were aware of the importance of the following:

Formal adoption and implementation of the *acquis* and ensure the smooth functioning of the internal market, in line with EU policies, with a special emphasis on agriculture, justice and affairs and environmental protection practices align to EU relations with third countries and international organizations. Also, the candidate states received assurances that each application for membership will be judged on its merits.

A milestone was the adoption, at the meeting in Nice (at December 7, 2000) of the *Charter of Fundamental Rights*. The special significance of this document, but also the content of its provisions have led some experts to see its adoption as a step towards developing future EU Constitution. EU Charter of Fundamental Rights [77] summed in a single document for the first time in European history, the whole area of civil, political, economic and social rights. As to the scope of legal issues, the Charter makes no distinction between citizens and foreigners, comprising, for the first time in a single document, the rights of all persons who are lawfully within the EU. In light of the Charter, it can be said that through this important document was accepted, reaffirmed and developed fundamental legal norms on human rights, but avoiding to go too far in subsuming other international documents (or the competence of Member States) [78].

The conference ended with the Nice European Council meeting held on 7-11 December 2000, when it was decided to accelerate the accession negotiations with candidate countries and positively appreciated their effort to qualify for the adoption and application of the *acquis*. Council also discussed the European Security and Defence Policy, European Social Agenda approved, reviewed the process of European research, coordination of economic policies, consumer health and safety, maritime safety, environmental protection services of general interest Freedom, security and justice, culture, remote and external relations. Intergovernmental Conference ended on December 11, 2000, with a political agreement on signing the Treaty of Nice, the Heads of State or Government nominated for this purpose as their plenipotentiaries the foreign ministers of member countries.

Thus, on February 26, 2001, "after having exchanged their full powers, found in good and due form", they signed the Treaty of Nice [79], which was a reform in the sense of improvement and adaptation of the Community institutions community to new realities.

The main changes made by this Treaty refer to limiting the size and composition of the Commission, the extension of qualified majority voting, a new balance of votes in the Council flexibility and strengthening of cooperation agreements. In addition, there have also been addressed other institutional issues, namely: simplification of the treaties, defining the powers, the Charter of Fundamental Rights and the role of national parliaments. Declaration on the Future of the European Union annexed to the Treaty, setting out steps to be taken to deepen institutional reform.

European Council in Laeken (Belgium), held from 14 to 15 December 2001, decided to convene the Convention on the Future of Europe, chaired by Valery Giscard d'Estaing [80]. Work of the European Convention, which began on February 28, 2002 and ended in July 2003, aimed to determine the key issues to be considered having regard to the future of the European Union and to identify possible options for solutions. Convention work was particularly burdensome, but it finally adopted the "Draft Treaty of establishing a Constitution for Europe."

The project developed by the Convention established the future of key issues, namely:

- Defining Europe as a Union of states and citizens;
- Intended to build a community of values and rights, a unified economic space and money and an influential entity on the international scene;
- Maintenance of inter-institutional balance through strengthening the powers of the European Parliament, Commission and Council;
- Overcoming thick structures established by previous treaties;

- Attribution of international legal personality to the Union;
- Integration in the Constitutional Charter of Fundamental Rights;
- Clearer division of competences between the Union and Member States regarding national identity and their national organization;
- Introduction of mechanisms to ensure real respect for subsidiary and wider participation in the life of national parliaments;
- More flexible rules regarding cooperation, in order to allow a group of states to continue the integration process, a permanent vanguard open to accession of the states that did not want or could not participate in the cooperation since started;
- Streamlining provisions and European legal and financial instruments by introducing a hierarchy of legal texts containing framework laws and European laws adopted jointly by Parliament and Council;
- Improving the provisions on foreign, security and defense;
- Strengthening the unique space of freedom, security and justice;
- A further extension of qualified majority voting;
- Adopting the conventional method for designing future constitutional revision;
- Providing a right out of the Union [81].

At the Brussels European Council, held from 17 to 18 June 2004, Heads of State or Government of Member States have reached agreement on the Treaty establishing a Constitution for Europe, and so on 29 October 2004, in Rome, Heads of State or Government of Member States [82] and three candidate countries [83], signed the *Treaty establishing a Constitution for Europe,* known as the "constitutional treaty" or "European Constitution".

The final form of the Treaty establishing a Constitution for Europe is in fact true expression of what is today the European Union: compromise reached after a long process of negotiations and attempts to obtain a balance between the two great currents of opinion: the integrationist and the one who decides to maintain the status quo of the current EU, national governments retain a significant power. Treaty demonstrates the prevalence of the European spirit, resulting in the maintenance of a balance between European and its Member States.

What is new in this Treaty essentially boils down to:

- Reduce the number of application areas by unanimous decision;
- A new mechanism for making decisions by qualified majority within the Council, clearer, more effective and better reflects the double nature of the EU as a Union of states and peoples;
- A clearer delineation of responsibilities and simplify EU instruments available to EU institutions;
- Opening to the public of the Council's legislative work;
- A greater flexibility in adapting the Community legal framework, depending on future developments;
- Creating the office of Minister of European Affairs;
- Establish a stable European Council Presidency;
- Provisions relating to reinforce solidarity between Member States;
- Increasing cooperation in foreign policy and security policy;
- Conferring single international legal personality for the EU;
- Include, as part of the Constitution, the Charter of Fundamental Rights;
- Introduction of legislative initiative by citizens;
- Increasing the role of national parliaments in EU activities.

As stated, the Treaty would enter into force when all Member States had deposited instruments of ratification, setting the deadline is November 1, 2006. Following the referendum in France (May 29, 2005) and the Netherlands (1 June 2005), the Treaty was rejected, many voices

saying that "*the European Constitution Treaty died in France and was buried in the Netherlands"*, not few are those who believed that the political project of United Europe died before birth.

Following these consultations of citizens called to rule on the Treaty, became evident a number of issues and challenges currently facing the European Union. First, it is obvious damage to the relationship with citizens as the direct beneficiary of the policies and actions undertaken at Community level. Secondly, it is necessary to maintain the principle of subsidiary and national level as the main level of Community intervention and decision only if the added value is a fact. Thirdly, closely related to the principle of subsidiary is also the tackling of the democratic deficit. The European Parliament has failed to transform itself into the representative body for European citizens, as initially wanted as evidence is the fact that turnout at elections is low.

Following these results and to overcome the impasse created by the Treaty rejection in France and Holland, the European Council held in Brussels from 16 to 17 June 2005, decided to launch a "period of reflection" in which the national debate to take place to involve citizens, social partners, institutions to find a solution for the future of the Union. In addition, in September 2005, Parliament decided to set a period of reflection for itself and a group responsible for structuring the debate on the future of the context analysis. Thus, to revitalize the debate on the future of Europe, the Reflection Group has proposed a series of conferences between national and European parliaments, called "*parliamentary fora"*. The first such forum was to be held in spring 2006, before the June European Council [84].

Combined efforts of the European Council and European Parliament, European Commission launched in October 2005 a "Plan D" [85], mainly aimed at stimulating debate between citizens and EU institutions to propose ideas on the way in which the EU can become more democratic, more transparent and efficient. Also, the European Commission launched an action program, which enjoyed the support of informal European Council at Hampton Court (London), October 2005, took the double approach outlined in "An agenda for Citizens". It stated that to address the imperatives facing Europe in terms of policies requires adequate tools and appropriate working methods.

After a period of political consultations, the European Council in Brussels in June 2007, agreed to convene an Intergovernmental Conference (IGC) in July 2007. In this particular sense, a mandate was adopted, which provided in detail the elements of reform. The mission of the Intergovernmental Conference was to adopt the text of a Reform Treaty "to amend the existing treaties in order to enhance the effectiveness and democratic legitimacy of the enlarged Union and the consistency of its external action".

In this regard, the mandate of the Intergovernmental Conference shows that it is abandoned the constitutional concept, which consisted in repealing all existing Treaties and replacing them with a single text called "Constitution".

It also indicated that the Reform Treaty will introduce into the existing Treaties, which remain in force, the innovations resulting from the IGC since 2004 (CIG 2004), as detailed below:

- The *Reform Treaty* will contain two substantive clauses amending respectively the *Treaty on the European Union (TEU)* and the *Treaty establishing the European Community. (TEC)*. The *TEU* will keep its present name and the *TEC* will be called *Treaty on the Functioning of the Union*, the Union having a single legal personality. The word "Community" will throughout be replaced by the word "Union"; it will be stated that the two Treaties constitute the Treaties on which the Union is founded and that the Union replaces and succeeds the Community. Further clauses will contain the usual provisions on ratification and entry into force as well as transitional arrangements. Technical amendments to the *EURATOM* Treaty and to the existing *Protocol*s, as agreed in the 2004 IGC, will be done via Protocols attached to the *Reform Treat.*

- The *TEU* and the *Treaty on the Functioning of the Union* (new name of the TEC) will not have a constitutional character. The terminology used throughout the Treaties will reflect this

change: the term "Constitution" will not be used, the "Union Minister for Foreign Affairs" will be called High Representative of the Union for Foreign Affairs and Security Policy and the denominations "law" and "framework law" will be abandoned, the existing denominations "regulations", "directives" and "decisions" being retained. Likewise, there will be no article in the amended Treaties mentioning the symbols of the EU such as the flag, the anthem or the motto. Concerning the primacy of EU law, the IGC will adopt a Declaration recalling the existing case law of the EU Court of Justice [86];

- As far as the content of the amendments to the existing Treaties is concerned, the innovations resulting from the 2004 IGC will be integrated into the *TEU* and the *Treaty on the Functioning of the Union*, as specified in this mandate. Modifications to these innovations introduced as a result of the consultations held with the Member States over the past 6 months are clearly indicated below. They concern in particular the respective competences of the EU and the Member States and their delimitation, the specific nature of the Common Foreign and Security Policy, the enhanced role of national parliaments, the treatment of the Charter of Fundamental Rights and a mechanism, in the area of police and judicial cooperation in criminal matters, enabling Member States to go forward on a given act while allowing others not to participate [87].

In conclusion, Portugal, who took over the EU Council presidency on July 1, 2007, was on the agenda as a priority of the first Intergovernmental Conference (IGC), the drafting of the future EU treaty. For the IGC to conclude its task as soon as possible, in any event before the end of 2007 so that sufficient time be available for treaty ratification, before parliamentary elections in June 2009, it was decided that the Portuguese Presidency to prepare a version The preliminary text of the Treaty, in accordance with the terms of office, text to be submitted to the IGC as soon as it opens. It was also decided that: IGC to be held under the overall responsibility of Heads of State or Government, assisted by members of the General Affairs and External Relations Council, a Commission representative to attend the conference, the European Parliament to be closely associated and involved Conference to work with a number of three representatives, the Council Secretariat to provide activities for the Conference secretariat.

Following consultations and negotiations [88], it was possible that at the informal European Council that took place from October 18 to 19, 2007, to arrive at an agreement on the Reform Treaty text, which will be signed during the summit, in December 2007 in Lisbon.

Consequently, at December 13, 2007 at a summit in Lisbon (Portugal) was signed the Lisbon Treaty, officially named "*Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community".*

Entry into force of the Lisbon Treaty ratification depended on each of the 27 EU Member States [89], unrealized process until the set deadline. According to Art 6 of the Treaty of Lisbon, it was to come into force on 1 January 2009 provided that "all the instruments of ratification have been deposited, or, failing that, on the first day of the month following the deposit of the instrument of ratification by the last signatory State to take this step". Until all Member States have concluded the ratification process of the Lisbon Treaty, the European Union working base remained the Nice Treaty.

Since December 1, 2009, the Lisbon Treaty enters into force, providing the EU legal framework and legal instruments needed to meet future challenges and to meet citizens' expectations. Thus, under Article 1, item 2 of the Treaty of Lisbon, the European Union (based on the Treaty on European Union and on the Treaty on the Functioning of the European Union, both having the same legal value) is substituted to the European Community and succeeds it.

Other reforms proposed by this Treaty, in particular new institutional arrangements and mechanisms work can be summarized as follows:

- Granting legal status binding Charter of Fundamental Rights through its introduction in European primary law. Charter is a true compendium of rights enjoyed by citizens to European

legislation, such as the right to integrity, the prohibition of torture or inhuman or degrading treatment, right to liberty, respect for private and family life, right to education, ownership of non-discrimination, gender equality, cultural, linguistic and religious diversity etc;

- Strengthening the role of citizens (one million citizens from a significant number of Member States may request the Commission to submit a proposal in an area it considers that action is needed for the Union). Introduction of new possibilities for action at EU level in areas of interest to citizens, such as energy, citizen safety, social, climate change, combating terrorism;

- European Council will have a stable President (with a term of two and a half years, renewable), giving the EU greater continuity and political vision;

- Enhance the role of European Parliament. It will be directly elected by EU citizens and will have new powers of legislation, the EU budget and international agreements. It will use that more often co-decision procedure in EU policy, European Parliament will be on an equal footing with the Council, representing Member States in respect of most adoption of EU legislation;

- Keeping the principle of representation in the European Commission under "a state commissioner" until 2014, after which the Commission will be restructured College (two-thirds of the Member States, equal rotation);

- Has strengthened role of national parliaments (informing them of the draft laws initiated by the Union or the applications to join, increased involvement of national parliaments in matters concerning the area of freedom, security and justice, strengthening their role in subsidiary monitoring). Along with the enhanced role of the European Parliament, national parliaments involved will lead to strengthening the democratic nature and to increase legitimacy of EU action;

Expanding the field in which decisions are taken by the Council by qualified majority (instead of unanimity) or by using qualified majority in areas that are now voted unanimously (asylum, immigration, Europol, Eurojust, border control initiatives High Representative for CFSP, common transport policy, objectives and organization of the Structural Funds and Cohesion Fund, etc..) or by extending qualified majority voting in new areas where there is no legal basis in the treaties currently in force (own resources Union's space policy, energy, sports, tourism, civil protection, permanent structured cooperation on defense, diplomatic and consular protection, voluntary withdrawal of a Member State of the Union the right to popular initiative, the services of general economic interest, humanitarian aid etc.). Since 2014, calculating the qualified majority will be based on a double majority system, member states and population, reflecting the Union's double legitimacy. Double majority is achieved when a decision is taken by vote of 55% of Member States representing at least 65% of the population. The new method will simplify EU legislative process, resulting in greater efficiency in European decisions, with tangible results at the Europeans;

- Maintain innovations to foreign policy and security policy of the Constitutional Treaty, and the defense, taking over most of the provisions in these areas. It is introduced the possibility of closer cooperation between Member States interested in security and defense (permanent structured cooperation). It also provided visibility and coherence of European action in these areas by establishing the post of High Representative for Foreign and Security Policy who will chair the Council of Foreign Relations and will be at the same time one of the Vice-Presidents of the Commission. He will have as provide the Constitutional Treaty, a European diplomatic service;

- Inclusion of a solidarity clause between Member States for a series of threats such as terrorism, natural disasters or human origin, or energy problems;

- Treaty provides a legal framework for establishing a special relationship between the Union and neighboring states. For the first time in the history of European construction, the importance of Union's neighborhood relations is established at treaty level. Also, a number of provisions allowing flexibility and strengthening the Union's action regarding the area of freedom,

security and justice, providing responses in areas of current citizens as well as migration, fight against organized crime or terrorism;

- Granting single international legal personality of the European Union (part that will allow consistent and increased visibility on the international stage, its ability to become a representative or member of an international organization). The international legal personality will strengthen the Union power bargaining, causing it to be more efficient in the world and a more visible partner for third countries and international organizations [90].

5. Conclusions

Before becoming a real political objective, the idea of uniting Europe was merely a dream of philosophers and visionaries which, unfortunately, was shattered by terrible wars that have ravaged the European continent in the first half of the twentieth century. After World War II the need for peace and stability on the European continent in prosperity and to regain the position of cultural, political and economic world has forced European countries to search for pragmatic solutions, in fact transform the idea of unification. In this way, the EU has become from a utopia a reality based primarily on an economic union, which, in the current period, is facing new challenges designed to reconfigure its existence.

Thus, in a world in constant evolution, the European Union faces new challenges of the XXIth century: economic globalization, demographic change, climate change, the need for sustainable energy sources and new security threats.

All these aspects do not respect borders, and EU Member States are no longer able to face all these problems alone. To find solutions and address the concerns of citizens, a collective effort was needed at European level. Europe needs to modernize, to have effective and consistent tools, not only adapted to the functioning of a Union recently extended from 15 to 27 Member States but also to rapid changes which the world today is facing. Therefore, the rules underpinning cooperation between countries needed to be reviewed.

This was the objective of the Treaty signed in Lisbon on December 13, 2007, when EU leaders agreed on new rules taking into account the political, economic and social changes and wanting to meet the aspirations and hopes of the Europeans. Thus, the Lisbon Treaty established which are the European Union powers and the means that it can use and modified the structure of institutions and their functioning. However, the Lisbon Treaty has strengthened the Union's capacity to act, by improving the coherence of external actions, choice of domestic policies, obtaining better results and policy achievements in terms of citizens and upgrading institutions so as to ensure the operation of a Union of 27 Member States.

These elements give the Union an opportunity to better implement its policies to ensure growth and competitiveness, improving social and working conditions, enhance personal and collective security, to promote a cleaner environment and better health conditions, develop cohesion and solidarity among Member States as well as scientific and technological progress and, not least to improve their ability to act externally.

Given the foregoing, it is difficult to formulate predictions on the evolution of the European Union in the near future, especially given that the Treaty allowed for the first time the possibility of withdrawing from the Union, but this does not prevent the recognition and acceptance of records: The Union develops, progresses, rendering states in a novel management structure, potential archetype of the future political system.

The evolution of the European Union to a higher stage of federalization or contrary to a prevailing multilateralism will not eliminate the original character of community building as the

Union moves gradually, in my view, to an entirely different model of political organization different from the existing ones, model which has not yet received a proper name or definition.

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25. www.fondationspaak.org;
26. www.eur-lex.europa.eu - Portal access to the European Union;

27. www.ier.ro - European Institute of Romania;
28. www.infoeuropa.ro - site of the European Commission's Information Centre in Bucharest;
29. www.mae.ro - official website of the Ministry of Foreign Affairs of Romania.

Notes:

[1] J.B. Duroselle "The idea of European Unity" in European Integration, Baltimore: The Johns Hopkins Press, 1957, p.11.

[2] League of Delos was a confederation of Greek Ionian city-states led by Athens and founded in 478 BC response to claims of domination of Sparta on the Greek cities, but also as a form of self-help to repel any possible attack from the Persian Empire.

[3] Peloponnesian League was based on an alliance between Sparta and Tegea that the city is obliged to give aid the Spartans in war and rebellion against helot. This alliance later joined other cities in the central area of the Peloponnesus, to be allied with Sparta concerned, this is the most powerful state in military terms.

[4] The Romanian state has experienced several periods of development in terms of their shapes its organization. First it has evolved during the royalty (mid-century. VI BC - until 509 BC), then during the republic (509 BC - 27 BC), because during the monarchy or Empire to evolve in two stages, namely: Principality (27 BC - 284 AD) and dominance (284 AD - 565 AD).

[5] Charles the Great (768-814 AD), in his attempt to revive the Western Roman Empire, led numerous campaigns against Lombard conquest (773-774), the Saxons (772-804), Moors (785-812) and the Avars (791-797) after which he founded an empire which included among its outside Gaul, northern and central Italian peninsula, northeast of the Iberian Peninsula and extensive lands east of the Rhine, for which May is sometimes seen as a founding father of both France and Germany.

[6] Otto I or Otto the Great (912-973 AD) was a German king since 936 and 962 became the first Holy Roman Emperor after Pope John XII crowned in Rome.

[7] Great Schism of 1054 divided Christianity into two main branches: Catholic and Orthodox. The main causes were disputes over papal authority and those relating to jurisdiction over certain areas or certain liturgical practices.

[8] Charles-Irénée Castel, abbé de Saint-Pierre (1658-1743), thought that to avoid war and ensure "peace and future" for trade development, sovereigns should conclude a perpetual alliance, to submit a "European Senate" which have a common army, maintained by contributions paid by member countries. It is proposed as a collective security system to ensure the existence and integrity of participating states.

[9] Jeremy Bentham (1748-1832) was a lawyer, English philosopher and social reformer. The project goal was to reduce and stabilize its labor system of different components of European nations, by removing the treaties of alliance, offensive or defensive trade agreements with unilateral advantages, the naval forces in excess, by dismantling the colonial system. He proposed a treaty of general and permanent, which is supported primarily by Britain and France, as a condition of pacification of Europe warranty. To implement it he proposed convening a European Congress with the participation of a pair of delegates from each country and a common Court of Justice for settlement of disputes between nations.

[10] Jean Jacques Rousseau (1712-1778) was a philosopher, writer and French composer, one of the most brilliant thinkers of the Enlightenment. Influenced decisive revolutionary spirit, principles of law and social consciousness of the era, his ideas can be found in the changes promoted by the French Revolution of 1789.

[11] Alphonse Marie Louise de Prat de Lamartine (1790-1869) - poet, writer and French politician.
[12] Victor Hugo (1802-1885) - French poet, novelist and writer.
[13] Irina Moroianu Zlătescu, Radu C. Demetrescu, 2005, p. 15.
[14] At the end of World War balance of casualties was a tragedy: over 10 million soldiers were killed and another 10 million perished because of disease. Were killed, also, 13 million civilians, nine million of 10 million refugees and prisoners completing the list of disasters – Zorin Zamfir, Jean Banciu, 1995, pp 334-335.
[15] In an opening week of the Paris Peace Conference to constitute a committee with the task of drafting the constitution of the League, as part of the peace treaty. Final draft of the document, called the League of Nations Covenant was approved unanimously by the plenary session of the Conference on April 1, 1919, but that pact was included in the Treaty of Versailles, the official date of incorporation of the same League the entry into force of the Treaty of Peace, after its ratification, on 10 January 1920.
[16] Viorica Moisuc, 2002, p. 108.
[17] George Sbârnă, 2002, p. 18.
[18] Count Richard Nikolaus von Coudenhove-Kalergi (1894-1972) was a journalist, political thinker and militant federalist European Austrian origin.
[19] Irina Moroianu Zlatescu, Radu C. Demetrescu, op. cit., p. 16.
[20] George Sbârnă op. cit., p. 26.
[21] Aristide Briand (1862 -1932) - French politician and statesman who served several times as Prime Minister of France and were awarded the 1926 Nobel Peace Prize.
[22] George Sbârnă op. cit., p. 38.
[23] Ştefan Delureanu, 1999, p. 45.
[24] Vespasian V. Pella (1898-1952) - Romanian lawyer and diplomat, delegate to the League of Nations Assembly sessions and committee member in various committees of this international organization. Envoy Extraordinary and Minister Plenipotentiary at The Hague (1936) and Berne (1943-1944). Substitute Committee to amend the Covenant of the League of Nations in order to make them consistent with the Pact of Paris (1930). He played an important role in the development Balkan Conferences (1930, 1931, and 1933). Delegate to the Conference of Disarmament (1932-1934). Following the assignment of moral disarmament Committee Political Committee of the Conference of Disarmament, VV Pella does it a memorandum, known as the "Memorandum Pella" in connection with the adjustment of national laws to the fundamental requirements of international life. Member of the European Danube Commission, Secretary General of International Bureau for the Unification of Criminal Law.
[25] "Universul"/9 Iunie 1930.
[26] Martin Vogt, "Die deutsche haltung Briand-Plan zum im Sommer 1930 und Hintergründe der Europapolitik politisches Umfeld des Kabinetts Brüning", in Le Plan Briand, Bern, 1998, pp 307-329.
[27] Charles G. Dawes was director of the U.S. Budget Bureau in 1921 and member of the Allied Commission for repairs since 1923. Work done to "stabilize the German economy brought him his Nobel Peace Prize in 1925. After being elected Vice-President Calvin Coolidge during his mandate (the XXX-century U.S. president) in 1931 was appointed U.S. Ambassador to England.
[28] Eliza Campus, 1968, pp 97-110.
[29] N. Titulescu (1882-1941) - Romanian diplomat and politician repeatedly minister, former president of the League twice in succession. Based his entire work on major fundamental

issues of the Romanian foreign policy. After the establishment of fascism in Germany, realizing the danger he represented him for the European continent, has made a living N.Titulescu work towards strengthening international cooperation in the interest of European peace and security. Convention has contributed to defining the aggressor (London, 1933) and reorganization of the Little Entente (1933) and adoption of the Balkan Entente (1934).

[30] Andrei Popescu, Ion Jinga, 2001, pp 4-5.

[31] On September 19, 1946, Winston Churchill gave a speech in the Aula of the University of Zurich (Switzerland), which stated: "Our goal must be constantly strengthening the United Nations force. Under this concept and the need to recreate the European family in a regional structure called - probably - United States of Europe and the first practical step would be formation of a Council of Europe. If at first not all states will be willing or able to join a union, we need to gather those who will and who may participate. Save all ordinary people from all countries and all races of war and subjugation must have a strong foundation, and be created by decision of all men and women to die rather than live under tyranny. In all these urgent issues, France and Germany must take the lead together. UK, British Commonwealth, America strong and - hopefully - Soviet Russia - for then, really, everything will be fine - to be friends and supporters of the new Europe and must fight for her right to live. So I tell you: Leave Europe to stand up! "- Winston Churchill Conference at the University of Zurich, September 19, 1946, published in *The Times*, September 20, 1946.

[32] In January 1947, Winston Churchill set up in London "Provisional Committee for a United Europe", composed of leaders of the three major UK political parties: Conservative, Liberal and Labor as well as academics and leaders of religious organizations. The Committee then turned to "Movement for a United Europe." Themselves at a conference convened in London by the UK Labor Party in 22 to 23 February 1947, socialist parties have formed an organization called "Socialist Movement for the United States of Europe." In June 1947, was founded in Chaudfontaine near Liege, Belgium, the organization "New International Teams, Christian democratic orientation. Initiative of creating this organization was taken by Robert Bichet of France, and Désiré Auguste de Schryver Lamalle and Belgium. The initiative was supported among others by Robert Schuman, Georges Bidault, Alcide De Gasperi and Konrad Adenauer. A first attempt to coordinate activities of all these organizations was held in Paris on July 17, 1947. She was followed by a second meeting on November 10, 1947, when it was established a Coordinating Committee that representatives of those organizations. Committee, entitled "International Steering Committee of the Movements for European Unity" was intended to organize the Congress of Europe, which were to participate with people who championed the idea of a united Europe.

[33] A number of resolutions were adopted at the end of Congress, seeking, inter alia, the creation of economic and political union to guarantee security, economic independence and social progress, the establishment of a consultative assembly elected by national parliaments, the drafting of a book European human rights and the establishment of a tribunal to enforce its judgments. All the themes around which Europe was to be built were already sketched in the initial design. Congress also revealed differences that were soon to separate unconditional supporters of a European federation (France and Belgium) of those who favored a simple intergovernmental cooperation, such as Britain, Ireland and Scandinavian countries.

[34] On October 25, 1948, the International Coordination of Movements for European Unity decided to change its name to the European Movement. On this occasion, Duncan Sandys

was elected president of the new organization, and Leon Blum, Winston Churchill, Alcide De Gasperi and Paul-Henri Spaak was appointed honorary chairman. Since 1948, the European Movement has played a key role in European integration process, exerting a massive influence in institutions nationally, regionally and internationally. She campaigned for direct elections to European Parliament for citizens of Europe and the Treaty on European Union and the European Constitution. European Movement permanent role in strengthening European institutions and ideals is recognized by senior officials and politicians from European countries.

[35] Dan Vătăman, 2008, p. 70.

[36] Marshall Plan, officially known as the European Recovery Program (ERP) was first reconstruction plan developed by the United States and for European allies in the war. On June 5, 1947, in a speech in Harvard Hall, Secretary of State George Marshall announced a broad program of economic assistance for the recovery of European economies in order to restrain Communist expansion, a phenomenon which he considers related issues economic. U.S. support has taken various forms: loans with favorable interest and repayment terms, free supplies, and low prices. All this was made possible by the conclusion of several bilateral treaties that have defined the conditions of their grant each Member assisted. Soviet Union and the countries under U.S. domination they refused the proposal.

[37] Dan Vătăman, 2008, p. 96.

[38] On October 28, 1948, the International Committee who organized the Hague Congress created the "European Movement", the official organization for continuous progress of European unification. Its honorary presidents of the Frenchman Léon Blum became Winston Churchill, the Italian De Gasperi and Paul-Henri Spaak Belgian, who guaranteed the international and non-partisan.

[39] Nicolae Ecobescu, Mariana Nițelea, 2006, p. 35.

[40] First signatories to the Statute of the Council of Europe countries were: Belgium, Netherlands, Luxembourg, United Kingdom, Ireland, France, Denmark, Norway, Sweden, Italy.

[41] Nicolae Ecobescu, Mariana Nițelea, 2006, p. 36.

[42] Dan Vătăman, *Organizații europene şi euroatlantice*, Bucureşti, Editura C.H. Beck, 2009 p. 23;

[43] Viorel Marcu, 1994, p. 15.

[44] Michel Debré (1912 -1996) was a French politician, was the first prime minister of the French Fifth Republic. The instruction of General Charles de Gaulle he prepared a draft constitution which was approved by referendum on September 28, 1958, which became the Constitution of October 4, 1958 is often called the Constitution of the Fifth Republic (Constitution of the Cinquième République).

[45] Viorel Marcu, Mihai Ioniță, 2006, p.9.

[46] Jean Monnet, head of France's General Planning Commission, concluded that it was illusory to try to create a complete once a supranational institutional edifice without a face strong resistance from the states recently emerging from war. In his opinion, to succeed, had the desired objectives of cooperation between European countries is limited to specific areas, but with a strong psychological impact and the decision to establish a mechanism to receive, then new skills gradually. Behind this initiative was: it was unlikely to be imposed unilaterally on Germany's control of its heavy industry, but on the other hand, it was considered completely independent leaving a potential threat to peace, so the only solution was that of German integration (in terms of political and economic) in a highly structured European community.

[47] www.robert-schuman.org - the official site of the Robert Schuman Foundation.
[48] Jean Monnet, Mémoires, Paris, Edition Fayard, 1976, p. 378.
[49] *CECA: La Communauté europeéne du charbon et de l'acier*, and *ECSC: The European Community of Steel and Coal.*
[50] Decision 2002/234/ECSC of the Representatives of the Governments of the Member States, meeting within the Council, of 27 February 2002, on the financial consequences of the expiry of the ECSC Treaty and on the research fund for coal and steel - Official Journal of the European Communities L 79/42, 22.3.2002.
[51] Ion Jinga, Andrei Popescu, 2000, p. 140.
[52] In the early '50s, the U.S. has developed a rearmament plan of West Germany, which has sparked vehement opposition of France. To allay fears that it would have caused only a few years after the end of World War II, the restoration of German military and rearmament of West Germany firmly anchored in the European construction project, France came in October 1950, with a counter-project, called Pleven Plan: the creation of a European Defense Community (European Defense Community). After heated debate and negotiations held in May 1952 that the treaty should establish EDC was signed by the six founding countries of the ECSC - France, Belgium, Netherlands, Luxembourg, Italy and West Germany. Community project envisaged the establishment of a European army fully integrated (with common uniform and their flag), composed of 40 divisions (14 French, 12 German, 11 Italian and three Benelux countries), having led to a European minister of defense. However, in September 1952, negotiations were launched aimed to implement Article 38 of the EDC Treaty, which stipulated the need for strengthened democratic control over the new community. The new project should be that of a European Political Community (European Political Community), based on a system of joint decision-making bodies. But at August 30, 1954, the French National Assembly (French parliament) refused to ratify the treaty that established the European Defense Community, in these circumstances both CEA and the related draft it, and a European political community, fell into disuse – for the details see Dan Vătăman, *Drept comunitar european*, Bucureşti, Editura Universul Juridic, 2009, p. 24;
[53] Benelux - is the acronym used to refer to an economic union in Western Europe that comprises three neighboring monarchies: Belgium, Netherlands and Luxembourg. The Union's name is formed from the beginning of each country's name.
[54] Paul-Henri Spaak (1899-1972) - Belgian politician, signatory of the Treaty of Rome by Belgium, as foreign minister. After the war, was involved in the most important European organizations and initiatives: Benelux, European Movement, Council of Europe Congress of Europe, etc. Was on the management of several major international organizations as the first president of the UN General Assembly (1946), Chairman of the Council of Europe Parliamentary Assembly (1949-1951), Secretary General of NATO (1957-1961). In 1952, he became the first chairman of the Joint Assembly of the European Coal and Steel Community - for details see www.fondationspaak.org
[55] Pierre Gerbet, *Le construction de l'Europe*, Imprimerie Nationale, Paris, 1994, pp. 170-188.
[56] Article 3 of the EEC Treaty (Treaty establishing the European Economic Community)
[57] Article 4 of EEC Treaty
[58] Article 2 of EAEC Treaty (Treaty establishing the European Atomic Energy Community)
[59] Parliamentary Assembly and Court of Justice became common for the three communities since 1958.
[60] On April 28, 1990, held a special European Council in Dublin (Ireland) where he agreed a common position on German unification and the Community relations with countries in

Central and Eastern Europe. In the process of reunifying the two German states, the German Democratic Republic was included in the European Communities, on October 30, 1990, without being regarded as a new member, but only as a result of unification.

[61] Association Agreement was ratified by the Romanian Parliament by Law no. 20/1993, published in Official Journal no. 73 of 12 April 1993.

[62] On 13 April 2005, the European Parliament adopts a Legislative Resolution in order to give its assent to the application by Romania to become a member of the European Union. Therefore, on April 25, 2005, in Luxembourg, Romania signed the Accession Treaty, while he was drafted as a Protocol of Accession documents and Alternative an Act of Accession. Thus, depending on time of entry into force of the Treaty establishing a Constitution for Europe, if it had occurred before the accession of Romania's Accession Protocol was annexed to the Treaty establishing a Constitution for Europe. Rejection of the Treaty establishing the European Constitution by referendum by France (May 29, 2005) and Holland (June 1, 2005) was not possible to enter into force on November 1, 2006, as planned. Consequently, the documents signed by Romania entered into force the Act of Accession, which is attached constituent treaties in force (the Treaty on European Union, the Treaty establishing the European Community and the Treaty establishing the European Atomic Energy Community), resulting status Romania's membership of the European Communities - for details see Dan Vătăman, *Drept comunitar european*, 2009 p. 28.

[63] Ion P. Filipescu, Augustin Fuerea, 2000, p. 14.

[64] Viorel Marcu, 1994, p. 17.

[65] French President rule strongly against any supranational organizations. He hardly recognized the EEC and was determined to limit his power and influence and to reduce them by as much as possible. His preference was an association of heads of state. In his memoirs, de Gaulle declared that "myths writers want to see the assembly in Strasbourg a" European Parliament ", which is, of course, no actual power, but gives" executive "appearance of the Brussels democratic accountability - for details see Charles de Gaulle, 1970, p. 195.

[66] The Brussels Treaty entered into force on January 1, 1967.

[67] Article 24 of the Brussels Treaty.

[68] This was made possible by Charles de Gaulle's resignation in April 28, 1969, which put up a fierce opposition to the expansion of Communities. However, France could not prevent long-term extension. At the Hague Summit in 1969, de Gaulle's successor, Georges Pompidou has agreed to resume negotiations, France received in exchange for his agreement on the extension the permission to complete the project and develop the Common Agricultural Policy.

[69] In Chapter two of title two of the Single European Act (SEA), entitled "Provisions amending the Treaty establishing the European Economic Community", Section I - Institutional provisions, in Art. 6 states that: "Cooperation is a procedure which apply to acts based on Articles 7, 49, 54 (2), 56 (2), second sentence, 57, with the exception of the second sentence of paragraph 2 thereof, 100a, 100b, 118a, 130e and 130q(2) of the EEC Treaty. Also states that: In Article 7, second paragraph of the EEC Treaty the terms "*after consulting the Assembly"* shall be replaced by "*in co-operation with the European Parliament*".

[70] The Treaty entered into force after deposit of instruments of ratification on November 1, 1993.

[71] Article M of the Treaty on European Union provides that: "Subject to the provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, the Treaty establishing the European Coal and Steel

Community and the Treaty establishing the European Atomic Energy Community, and to these final provisions, nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them".

[72] The Maastricht Treaty has created a European Union based on the European Communities and supplemented by forms of cooperation and policies of the Treaty. Thus, the concept of the EU Treaty was a building which rests on three pillars: the European Community, Common Foreign and Security Policy (CFSP) and cooperation in Justice and Home Affairs (JHA).

[73] Treaty of Maastricht amended EEC Treaty, replacing the term 'European Economic Community' with the term 'European Community', which he invested with sweeping powers, giving it new purposes - Title II, Article G of Treaty.

[74] Augustin Fuerea, 2006, pp 46-47.

[75] The full name is the "Treaty of Amsterdam amending the Treaty on European Union, the treaties establishing the European Communities and other related acts." The treaty entered into force on May 1, 1999.

[76] Marcu Viorel, Mihai Ioniță, 2006, p. 24.

[77] The draft charter was prepared by a Convention composed of 62 members: 15 representatives of the Heads of State or Government, 30 representatives of national parliaments (two from each Member State how many), 16 representatives of European Parliament, The European Commission's representative. The work of the Convention, attended, as observers, two representatives of the Court and Council of Europe. In addition, they were heard members of the Economic and Social Committee of the Regions, European Ombudsman, representatives of countries of Central and Eastern Europe, experts and representatives of NGOs. Civil society was consulted extensively, especially through a website that has gathered contributions from many associations and groups. The draft Charter was adopted by the Convention in early October 2000. Biarritz European Council on 13-14 October 2000 unanimously approved the project and to the European Parliament and European Commission. EU Charter of Fundamental Rights was proclaimed by European Commission President, European Parliament and Council President, following the Nice European Council of December 7, 2000.

[78] Dan Vătăman, Drept Comunitar European, 2009, pp.36-37.

[79] The full name is "Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts." The treaty entered into force on February 1, 2003, after being ratified by all Member States in accordance with constitutional rules specify.

[80] Valery Giscard d'Estaing - French politician, who between 1974 and 1981 was the twentieth president of France. He was President of the European Convention, which dealt with the drafting of articles of the European Constitutional Treaty. For this, in 2003, Karl was awarded the Aachen, which is offered annually for merit in European unification.

[81] Dan Vătăman, *Drept instituțional al Uniunii Europene*, Bucureşti, Editura Universul Juridic, 2010, p. 42.

[82] At that time, the EU had 25 Member States.

[83] Romania and other candidate countries (Bulgaria and Turkey), which participated in the Intergovernmental Conference as an observer participated in this event, being invited to sign the Final Act of the Intergovernmental Conference.

[84] European Parliament resolution of 19 January 2006, "The period of reflection: the structure, subjects and context for an assessment of the debate on the European Union", published in OJ 287 / 24.11.2006, p. 306.

[85] Commission contribution to the reflection and beyond: Plan D for Democracy, Dialogue and Debate - COM (2005) 494, 13.10.2005.

[86] Whilst the Article on primacy of Union law will not be reproduced in the TEU, the IGC will agree the following statement: "*The Conference recalls that, in accordance with well settled case-law of the EU Court of Justice, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case-law*." In addition, the opinion of the Legal Service of the Council (doc. 580/07) will be annexed to the Final Act of the Conference.

[87] For details see Council of European Union mandate for the IGC 2007, Doc. no. 11218 / 26 June 2007 - http://register.consilium.europa.eu

[88] During the negotiation of the Treaty of Lisbon, almost every country he fought for something: France on terms that would ensure its protectionist policies, Britain to be exempted from the EU Charter of Fundamental Rights, Parliament increased powers Germany European Competitiveness Netherlands, Finland and Denmark against reducing the number of commissioners. Poland won the maintenance Ioannina compromise (urging inclusion of a provision in the Treaty allows Member States to block a decision for a "reasonable period"). Bulgaria has requested the right to use the name "evro" for the euro. Romania "have carefully reviewed all proposals of Member States" and decided not to ask anything.

[89] On February 4, 2008, the Romanian Parliament ratified the Lisbon Reform Treaty by Law 1 / 2008, which was promulgated by President of Romania, on February 6, 2008.

[90] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community – http://europa.eu/lisbon_treaty/full_text/index_ro.htm

THE MONETARY NEUTRALITY AND ITS IMPLICATIONS UPON THE REAL ECONOMY

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Abstract

The monetary neutrality considers the way the monetary decisions affect the real variables and implicitly the real economy both on short term and long run. Although early study of this problem is rooted in the '70s, the issue is studied also nowadays, as many works aim to test whether the long-term monetary neutrality occurs indeed at any time, in any circumstances and regardless of the area. This paper aims to analyse the answer to the following question: How do monetary changes affect the main macroeconomic variables, such as output, real wages and real interest rates?

Keywords: *money, real interest rate, monetary policy, real wages, real variables*

Introduction

In this article we consider particularly the discussion of some key issues regarding money, the effects on real variables in short term and long run due to its changes. To reflect this interaction between money and real economy, we considered it necessary to display different ideas acquired by Keynesians and Monetarists. While the debate of these economists' opinions pertaining to these two trends seem to be of the past, from our point of view in order to develop new theories and ideas is absolutely necessary to study the past.

Moreover, in order to highlight the importance of interaction between money and real economy we could not neglect monetary neutrality, which is referring to how the monetary decisions affect real variables (and implicitly the real economy) on short term and long run. Although early study of this problem is rooted in the '70s, the issue is studied also nowadays, as many works aim to test whether the long-term monetary neutrality occurs indeed at any time, in any circumstances and regardless of the area.

This paper aims to analyse the answer to the following question: How do monetary changes affect the main macroeconomic variables, such as output, real wages and real interest rates?

The answer to the question was obtained by analyzing several reference works on the topic, one of them being Robert Lucas' lecture, Nobel Laureate on monetary neutrality.

The need to capture the monetary implications on socio-economic and political space from nowadays leads us to do, above all, a periplus in the literature, covering the history and evolution of money because the latter is, rightly so, "the central axis" of the modern society.

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In the everyday language and literature, it is used not only the term "money", but also the term "currency".

Money is "anything that is generally accepted as payment for goods and services and replicas of debt" (Mishkin 2004, 8). Money is, also, considered "a set of assets in an economy that people regularly use to buy goods and services from other people" (Mankiw 2007, 320). In the explanatory dictionary of Romanian language, the money means "general equivalent value of the goods, metal or paper currency recognized as a medium of exchange and payment.

The term of currency means "notes and coins" in Miskin's opinion and according to Larousse dictionary it means "a piece of metal issued by the sovereign authority to serve as a medium of exchange".

The definitions above allow us to observe differences between the two concepts:

- the concept of money includes all means of exchange;
- the concept of currency is the generic name for banknotes and metal parts.

Nowadays, the term of currency is broadly used, which means consideration of coins, banknotes and scriptural money. From this point of view, it is considered that the two terms are similar, leading to the similarity of currency and monetary circulation (Vasilescu 1980, 15).

As the economy takes place in time and a considerable number of decisions are made in situations of uncertainty, currency plays a vital role by creating a link between present and future. Therefore, it is imperative to study it in light of two trends: Keynesism and Monetarism, which led to the shaping of ideas on its role in the economy.

Monetarism vs. Keynesism – confrontation of ideas

To reveal the importance of money we have to discuss the divergent views of Keynesians and Monetarists from the 1950s until the 1970s (Bradford de Long, 2000, 83-94).

Europe has experienced for the first time what much later was to call monetarism in the XVI century, under the influence of mercantilist doctrine, which saw the accumulation of precious as a source of wealth nations. Unfortunately very few endowed with gold and silver, Europe was obliged to seek different solutions to get rich with these metals. English people, due to a system of contracts, forced every importer to buy with gold English products before leaving England. The French people made low-priced manufactured goods guaranteed by the State in order to be more competitive abroad. Payable in gold, these assets contributed to increasing the nation's stock of precious metals. Spanish and Portuguese conquistadors went to South America to bring precious metals and so to enrich considerably Spain and Portugal. Gold brought in Spain caused a real economic crisis. Economic growth slowed and inflation appeared. Taking advantage of its reserves, Spain multiplied minting gold coins, thus contributing to the devaluation of reference monetary material and to further increases of the price.

The first relationship between real property and monetary system has been identified as a result of the above events, opening the way for theoretical debates during the following centuries.

The increase of prices led to a famous controversy between Malestroit (Adviser to the Court of Auditors) and Jean Bodin (French economist and philosopher). According to the first, the price increase is only apparent because it is due to the currency's wear, these do not contain enough gold. Jean Bodin considers the price increase as being real and takes account of the gold stock's growth. His paper, *Responses à monsieur de Malestroit*, announces the quantitative theory of money.

These theories are then studied by David Hume in *Of Interest*, David Ricardo in the *Des principes de l'economie politique et de l'impôt* which defines the first principles of the Cambridge equation, resumed by Latane in *Cash, Balances and the Interest Rate: A Pragmatic Approach* and known as a "quantity theory of money" by Fisher, the representative of early monetarism.

Monetarism is divided into four parts: First Monetarism, Old Chicago Monetarism, Classic Monetarism and Political Monetarism.

First Monetarism belongs, among others, to Irving Fischer *(Appreciation and Interest, The Rate of Interest and The Purchasing Power of Money)*. In its work, the author stresses that to understand the determination of prices, interest rates and the business cycle it should be seen first the stock of money. Also, Fisher is the one who developed "quantitative theory of money". It is true that this theory goes back to David Hume, or even earlier, but Fisher is the one who turned the theory into a tool to achieve the quantitative analysis and for producing forecasts on prices, inflation and interest rates.

The theory is mathematically represented as: MV = PQ, where M = money, V = velocity of movement, PQ = total transactions. This simple equation allows a greater understanding of the monetarist critics. Nobody disputes the form of the equation, but having it as a base the economists may collide with each other endlessly in the variables behaviour.

The Monetarists' critics say that the standard analysis of the quantity theory of money is completely useless: " Now "on long run" this thing (drawing the quantity theory: a doubling of money doubles price level) is probably true ... But this term is a cheating guide to current affairs. In the long run we are all dead. "(Keynes 1923)

Furthermore, Milton Friedman agrees with the assessment made by Keynes. He stated that one of the main aims is to save Monetarism from being a "rigid and atrophied caricature" of the economic theory that has become in the period between the two wars (Friedman 1956, 3-21). Meanwhile, economists such as Robbins (*The Great Depression*) and Joseph Schumpeter (*Depressions*) shared the view that monetary and fiscal policies were ineffective in fighting recession as they could not create real wealth, but only one false that contains the seeds of a future longer or deeper depression.

The Old Chicago Monetarism is represented by Viner, Simons and Knight. This school emphasized the variability of velocity and its potential correlation with inflation. They accused the monetary forces that have caused deflation as a source of depression. Viner said that due to monetary and fiscal policies ... banks failed and the amount of deposits dropped "along the Great Depression. Their solution is a stimulating monetary expansion and large government deficits (Viner 1933).

Among those who do not recognize this school include Don Patinkin and Harry Johnson. In their work *The Chicago Tradition, The Quantity Theory, and Friedman and The Keynesian Revolution and the Monetarist Counterrevolution* they argue that Old Chicago Monetarism is too amorphous and vague to be called a theory or a school.

On the other hand, there are supporters as Friedman or Tavlas (*Retrospectives: Was the Monetarist Tradition Invented?)* who agree that it is a theory, even if only a default theory, a theory that was not ever written, an "oral theory ". Friedman in *Comments on the Critics* (1972) believes that this oral tradition made possible macroeconomic analysis considered by Viner: a "subtle and relevant version .... of the quantitative theory .... a flexible and sensitive tool for the interpretation of aggregate economic activity movements and for the development of relevant policy recommendations.

Whether it is considered a theory or not, it is important to note that those who belonged to the Old Chicago Monetarism did not believe that the velocity is stable and the money supply can be controlled directly and easily. They didn't believe that the velocity is stable as traders act differently in the period of boom, inflation, recession and deflation. Or just because of such differences, there are amplified the effects of monetary shocks on nominal total expenditure with effect on the real economy.

The Classic Monetarism is represented mainly by Milton Friedman with the following works: *Essays in Positive Economics, Studies in the Quantity Theory of Money, A Program for*

Monetary Stability and The Role of Monetary Policy. Other representatives are: Karl Brunner with *The Role of Money and Monetary Policy*, and Alan Meltzer with *Friedman's Monetary Theory.*

This school includes empirical demonstrations for several problems, namely:

- if money demand functions may be stable under extreme conditions of hyperinflation;
- how close is the natural rate of unemployment the unemployment rate;
- what is the potential of monetary policy over time;
- demonstrations of short-term effects of monetary policy.

So, the monetarists argue that on short-term, money can influence both prices and economic activity, but on long run, changing the money supply leads only to price changes.

Keynes advocated state intervention in economy and thought that a government that leads well and prudently can bring economic growth and stable prices. In contrast, the monetarists considered the non-influence of government expenditures on prices or production, if money supply does not change. In other words, money is the only that counts.

We believe that this vision is an extreme approach, because in reality, there is a need of both a monetary and fiscal policy. For an economy to achieve the optimal level, these policies should be intertwined, coordinate, in order to achieve a policy mix.

Monetarists argue that velocity is stable because if the Central Bank increases money supply by buying securities, the producers have more money. People, believes them, have money in particular for daily transactions. If they have more money, then people will buy more goods and services, so GDP increases. Otherwise, if people have less money (Central Bank has reduced money supply), they will spend less, so GDP will decline. Therefore, monetary policy affects the liquidity of the population.

If velocity is stable, and the central bank can control the money supply, then there is an effective tool (money supply) which can speed up or slow down economic activity. However, when the velocity is not stable, and people oscillate between keeping a greater or lesser part of their current funds and current accounts, controlling money supply is no longer of much use, and the acceleration stops working well.

Keynes's criticism aimed precisely the following: why the velocity must be stable? Why do people have to spend all that have more? Why cannot be save that money? Keynes introduced another reason, the speculative one, in which economic agents can use extra cash to speculate on market shares and bonds.

The Keynesians appreciated, also, another transmission mechanism of money, the interest rate. They considered two important steps must be fulfilled. The first phase refers to the fact that if the Central Bank increases the money supply, people should not collect money. However, if this is not done, they can buy stocks and bonds, meaning financial assets rather than real assets. This will result in lower interest rates. The second stage involves credits from banks to households and firms, but, also, the purchase of goods and services, so as to increase the GDP.

Conversely, if money supply is reduced, people might not care about having less money saved. Even if they could sell their financial assets, leading to increased interest rates, those who want loans might not be discouraged by this (if they have to continue some projects necessarily), so that GDP will fluctuate.

In this criticism, as that money would not count too much, Friedman published a series of essays by which he improves the quantity theory. He says that demand for money is stable because it depends on factors with long-term action, such as health, education and income level which one expects to obtain throughout life. As these factors do not change randomly, the velocity does not fluctuate (Friedman 1956, 3-21). (Keynes did not take into account long-term factors)

Moreover, Friedman turned his attention to consumption. If Keynes believed that people change their consumption based on current income changes, Friedman says that people consume

steadily as they have certain expectations in the long term income. Thus, the permanent income hypothesis is born. Consumers will not allow a low week, month or year to change their lifestyle. They simply will use the savings. But if they see a major shift, they will change their way of acting.

The conclusion of Friedman's remarks is represented by the stability of consumption.

Friedman believes, also, that the Great Depression is a proof of monetary policy and not of her inability - as Keynes believed. It argues, moreover, the idea that misuse of monetary policy accompanies each strong recession and each period with emphasized inflation (Friedman and Schwatz 1963). The authors have not agreed with the Federal Reserve, which during the crisis did not give cash to banks in order to give customers money back. They argue that a little help from the Federal Reserve would have instilled more confidence to the customers.

After the power of money has been proven, Monetarists wanted to contradict Keynesians' statement that government spending would stimulate the economy. They obtained the demonstration by answering the following question: where comes the money that the government spends from? If money supply is constant, while the state spends money means that someone should spend less. If you increase taxes to finance various programs, consumers no longer have as much cash available for purchases. If the State borrows by selling bonds, companies can not borrow as much to invest. Interest rates increase and decrease investments. It is clear that increasing government spending lower the private sector spending.

Keynesians can not deny this, but they claim that the reduction in private spending is not perfectly equal to the growth of government, especially during recessions. So what is important is the extent of reduction.

Even if Monetarists are right and the velocity is stable on long run, it certainly varies in the short term. If the velocity drops for a few months, while the money supply continues to grow at a steady pace, the economy will collapse. Maybe not for long, but in such circumstances the number of jobs depend on what the Central Bank does. Some hard questions about the central bank remain unanswered: How long it needs to detect a change in velocity? How much time must pass so that the measures taken by it to influence the economy?

Moreover, the behaviour of a central bank depends heavily on the information available. The dynamic behaviour of the monetary policymaker varies because it reacts differently when there is complete or incomplete information. (Dotsey and Hornstein 2002)

It is said that "early Keynesianism received a "rediscovery of money ". Money matters without and can only. In their enthusiasm about the role of fiscal policy many Keynesians unduly underestimated the role of money. "(Samuelson and Nordhaus 1985, 331)

Currently, it takes a mix of policies, both monetary and the fiscal one.

Political Monetarism was something different from the Classic Monetarism. The idea of this theory is that the velocity can be made stable if monetary shocks are avoided, but that the velocity is stable. It supports the idea that there is no need for institutional reforms as the central bank to have easy control over money supply because central bank already controls the money supply changes. The Central Bank is the source of all monetary forces. Everything goes wrong in the economy has a single, simple cause: central bank failed to increase the money supply with an adequate rate.

Those who belong to this school claim that the major effect of fiscal stimulus is to increase interest rates more than you should and not to increase the nominal demand. Only if the fiscal stimulus is financed by issuing money has a positive effect. They also are sceptical regarding velocity's dependence of interest rates. Their conclusion is that any policy that does not affect the amount of money and its growth rate simply can not have a major impact on the economy.

The Political Monetarists have not enjoyed the same success as the Classics. The research that we undertook in this area show that, currently, there are ideas kept from both

Monetarists and Keynesians. From Monetarists the ideas preserved are in particular those relating to the fact that for realizing a macroeconomic policy analyse should be considered long-run implications, that monetary policy is a powerful tool for achieving macroeconomic stability and from Keynesians the one relating to the fact that for an economy to function optimally the state intervention is, also, necessary.

But, the assumption that it is easy for a central bank to find and control the relevance of money supply has proved to be false. (Goodhart 1970)

It is therefore necessary to observe short term and long run implications of monetary changes needed to study monetary neutrality, meaning how these changes affect real macroeconomic variables.

Monetary neutrality and its implications

How monetary changes affect important macroeconomic variables, such as production, real wages and real interest rates?

This question has intrigued many economists. David Hume, the great philosopher, suggests that all economic variables should be divided into two groups: nominal variables - measured in monetary units and real variables - measured in physical units (Hume 1970). Currently, this separation of economic variables is called the classical dichotomy.

Applying classical dichotomy on price is a little more complicated. Prices from an economy are usually noted in terms of money and therefore are nominal variables. Regarding the relative price - the price of an object compared with one another - it is a real variable because the measure in monetary units disappeared and appears the one in physical units.

Separation of variables is necessary. According to Hume, certain factors affect nominal variables and other real variables. He supports the idea that nominal variables are affected by developments in monetary economic system, while this monetary system is irrelevant in terms of understanding the determinants of real variables.

Changes in money supply affect nominal variables but not real ones. When the central bank doubles the money supply, the price is doubled, the salary is doubled. Real variables such as production, real wages and real interest rates do not change. The irrelevance of monetary changes for real variables is called monetary neutrality.

Hume highlights the neutrality of money: "It is indeed obvious that money is not anything but a representation of labour and goods and serves only as a method of rating or estimation. When the currency is in full so that a larger amount is necessary to represent the same quantity of goods, it can't have any effect, either good or bad."

Also, Hume writes: "When a quantity of money is imported into a country, it is not initially dispersed in many hands, but it is kept in the locker of a few people that will use it in order to obtain an advantage. Here we may found a set of producers and traders who have received, for example, gold or silver for some goods sent to Cadiz. Thus, they can hire more workers than before, who do not dream to ask for higher wages, but they are happy for the job obtained from these good employers. [Crafts] ... carries his money to the market, where he finds all at the same price as formerly, but returns with a larger quantity of goods and of better quality for the benefit of the family. Farmer and gardener, finding that all their assets were sold promptly increase production ... It is easy to find money through the entire state, where we first find that each individual's diligence should be accelerated before increasing the work price." (Hume 1970)

Is this monetary neutrality conclusion a real description of our world? The answer is: not really. A change in monetary decisions has short-term effect on real variables. Hume himself was not sure whether monetary neutrality applies to short-term. Most economists accept Hume's long-term conclusions.

Robert E. Lucas, Nobel Prize in 1995 for monetary neutrality, demonstrates in one of his works of 1972 *Expectations and the Neutrality of Money* that money is not neutral in the short term.

To do this, he uses a model taken from Samuelson's working paper *An Exact Consumption-Loan Model of Interest with or without the Contrivance of Money*.

Samuelson introduced a simple example of an economy in which cash does not have a direct use in consumption or production, but plays an essential role in economic life.

In Samuelson's model, each individual lives two periods: one of activity and another one of retirement; so, two generations coexist in each period, one of active youth and the other one of old pensioners. There is no family structure in this economy: no inheritance or financial support made by one individual to another. The youth work and produce goods, while the elderly consume goods, but they are not able to produce.

One of the problems is providing sufficient resources to the second generation. Those who wish to consume, the elderly, have nothing to offer in exchange for goods produced by the young. If it is assumed that there is some money in circulation, initially in the hands of the elderly, then they will give young people in exchange for goods, establishing a market price.

The cash introduction remedies this deficiency. The presence of currency enables young people to sell their production against the money, currency that they will use in old age to purchase goods. Will accept young people these symbols- with no intrinsic value (Wallace 1980) - and to retain symbols value as goods at any level greater than zero? Perhaps not: this possibility can not be stated definitely. Young people can accept to produce in exchange for fiduciary currency because they hope that in the future when they become older to be able to pay for goods produced in that period.

The difficulty arises from non-contractual nature of money: nothing can guarantee to the current youth that, when they are old, the future young people will accept as payment the money.

It is possible that money runs endlessly, being continually changed on goods. If the exchange takes place in a single competitive spot market and the price p is established, then a young person who starts without money and produces n pieces will receive pn cash units. If that person spends all the goods in the next period, it will be achieved (pn) / p = n units of consumption. If money supply is constant and distributed to each elderly person in the value of m, then the equilibrium price will also be constant: $p = m / n^*$, where n^* is the units consumed in equilibrium conditions, meaning when the consumer utility is maximized.

Obviously, in this case, Hume's theory is true: if m increases, the equilibrium price level increases in the same proportion and the amount of work and production will not be affected at all.

If the stock of money is changed, the issue of neutrality is complicated. The hypothesis of a constant money supply is replaced with the one in which the amount of money increases at a constant percentage rate. It is assumed that each young receives an equal share of the money newly created, when the transition is made from active to the retirement period. This amount is independent of the money he earns by working.

It is considered that the supply of money increases by x times in each period. Price level will rise between periods with exactly the same rate of growth of money supply, but according to the model, the balance of work is affected.

As the currency increases further, the more important is the overnight transfer, relative to the cash accumulated through work. Money transfer diminishing income from employment. Production of goods decreases as inflation rate increases, so things get worse.

This is, in fact, money non-neutrality, a real effect of currency changes; this effect is not the incentive of a monetary expansion, but rather reduces the real value of income derived from employment.

Regarding long term neutrality, it is said that this "is considered as given almost an axiom" (Bullard 1999, 57-77). When referring to long-term monetary neutrality, economists refer to a hypothetical experiment which normally is not directly observed in actual economies. The experiment involves a sudden and permanent change of the stock of money. If, for example, the stock of money is 5 billion dollars a day and this value is kept for a long time, which would be the effect of unexpected changes in the 6 billion money stock and of keeping it for a long time? Pursuant to the quantity theory of money, prices will probably increase in the same proportion to the money stock and the real variables after a certain period of time, will probably return to baseline until another disturbing factor intervenes. This is neutrality in the long run.

Lucas on Nobel Prize lecture sustained (*Monetary Neutrality*) mentions some evidence of long-term monetary neutrality. Between them, Friedman and Schwartz are quoted with *A Monetary History of the United States, 1867-1960* in which the authors have argued that the major recessions in the United States between 1867 and 1960 were preceded by substantial contraction of money supply, suggesting that monetary policy errors were the main cause. Lucas, also, supports the idea that severe monetary contraction has played an important role along the Great Depression of the 1929-1933 periods.

It also cites the work of Thomas J. Sargent *The End of Four Big Inflations* making the idea that large reductions in the rate of monetary expansion - sales more than what was experienced during the post Civil War period from USA – did not lead to an unusual massive reduction in real GDP in the hyperinflationary period after First World War in the European economies. These reductions were achieved with a monetary reform. Hyperinflation has been ended abruptly when it was announced a credible reform.

Citations made by Lucas are additional to its view for which the long term monetary neutrality is preserved.

As is shown in the rows above, long-term monetary neutrality implies a permanent and unexpected change in the stock of money from a country and the impact of this change. To study this directly, we need time series on inflation and monetary growth for individual countries. The difficulty that arises is: can be isolated the permanent changes of the money stock, which are correlated with persistent changes in price level while they are not related to permanent change of real variables?

The idea of a permanent change of economic variables is modelled from econometric point of view with a unit root in a time series autoregressive representation, a time series with unit root has several different properties different from a stationary series. An autoregressive process is a model where the current value of the dependent variable y depends only on its values from previous periods plus an error term. It considers the simple case of an autoregressive process: $y_t = a\, y_{t-1} + u_t$. (1)

Coefficient 'a' takes any value. The process is rewritten using firstly a lag time between periods and then two lags between periods:

$$y_{t-1} = a\, y_{t-2} + u_{t-1} \quad (2)$$

$$y_{t-2} = a\, y_{t-3} + u_{t-2} \quad (3)$$

Substituting equation (2) in (1) is obtained:

$$y_t = a\,(a\, y_{t-2} + u_{t-1}) + u_t \quad (4)$$

$$y_t = a^2 y_{t-2} + a u_{t-1} + u_t \quad (5)$$

Replacing equation (3) to (5) is obtained:

$$y_t = a^2 (a\, y_{t-3} + u_{t-2}) + a u_{t-1} + u_t$$

$$y_t = a^3 y_{t-3} + a^2 u_{t-2} + a u_{t-1} + u_t$$

If are made T successive replacements it comes to the following equation:

$$y_t = a^T y_{t-T} + a u_{t-1} + a^2 u_{t-2} + a^3 u_{t-3} + \ldots + a^T u_{t-T} + u_t$$

Three possible cases arise:

1. $a < 1 \Rightarrow a^T \to 0$ on the measure $T \to \infty$

In this case, system's shocks will gradually disappear, so the series is stationary. A stationary series can strongly influence its behaviour and properties. Also, this type of series is characterized by constant mean, constant variance and constant autocovariance for each lag. "Shock" is a term used to indicate a change or an unexpected change of a variable or even simple, the error's value over a particular period of time. In a stationary series, shocks gradually disappear, meaning that the effect of a shock in period t will have a smaller effect during t+1 and smaller in t+2 and so on.

2. $a = 1 \Rightarrow a^T = 1$, whatever T

Shocks persist in the system and do not disappear ever. Thus, you get:

$y_t = y_0 + \sum u_t$, as $T \to \infty$, t evolves from 0 to ∞

Thus, the current value of y is an infinite sum of past shocks plus baseline y_0. This case is known as unit root because the root of the characteristic equation is 1.

3. $a > 1$

Here, shocks become more influential as time passes, since if $a > 1$, $a^3 > a^2 > a$. It is an explosive event and therefore it is not considered a plausible description of the data.

In the early '70s, Lucas in *Econometric Testing of the Natural Rate Hypothesis* writes for the first time about permanent changes modelled as unit root in an autoregressive time series. Only then, the implications of unit root in an economic time series began to be recognized. Charles Nelson and Charles Plosser argued in their *Trends and Random Walks in Macroeconomic Time Series: Some Evidence and Implications* that many macroeconomic time series of the United States were best characterized by unit root in univariate autoregressive representations.

The nonstationary of economic variables has been a headache for most macroeconometricians. But as a happy change of events, it is an advantage in terms of neutrality test. As noted Lucas, to test long-term neutrality requires permanent changes in the stock of money as part of a historical record. But macroeconomic time series dispose of permanent shocks.

Lucas's ideas are used by other authors to improve long-term test of neutrality. Thus, Mark E. Fisher and John J. Seater in *Long-Run Neutrality and Superneutrality in an ARIMA Framework* used a bivariate model in which a dependent variable is the nominal money supply M (the model used the natural logarithm of money supply) and the second dependent variable is real GDP Y (the model used the natural logarithm of Y). They use all unit root process.

In the hypothetical experiments, it is very important for the change to be unexpected because if traders know that money supply will increase and thus the price level, they could begin to change their present behaviour. For example, they can now buy goods before the price rises. Thus, prices should begin to increase before the money supply to grow and things get more complicated.

Conclusions

In this paper, we analyzed the following key issues regarding money. Firstly, we focused on the difference between money and currency. These terms are similar from one point of view: when the term of currency means consideration of coins, banknotes and scriptural money as it is broadly used.

Secondly, as currency plays a vital role by creating a link between present and future, we emphasized it through Keynesism and Monetarism. Thus, we revealed the confrontation of ideas

between these two trends making a review of the four parts of Monetarism: First Monetarism, Old Chicago Monetarism, Classic Monetarism and Political Monetarism. The research that we undertook in this area show that, currently, there are ideas kept from both Monetarists and Keynesians. From Monetarists the ideas preserved are in particular those relating to the fact that for realizing a macroeconomic policy analyse should be considered long-run implications, that monetary policy is a powerful tool for achieving macroeconomic stability and from Keynesians the one relating to the fact that for an economy to function optimally the state intervention is, also, necessary.

Thirdly, we highlighted the implications of monetary neutrality on short term and long run upon real variables. Even if it is known that money is neutral on long run, there are still researchers who try to improve this idea using different models. As a future research, we recommend to deepen the implications of monetary neutrality in the conduct of monetary policy.

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ENTREPRENEURIAL CONSULTING AND DEVELOPMENT FOR YOUTH WITHIN RURAL AREAS - A CASE STUDY FOR DEVELOPING NORTH EAST, CENTRAL AND SOUTH EAST REGIONS

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Abstract

We propose to show the connection between consulting and entrepreneurial approach, emphasizing the normality of including assistance within the entrepreneurs' activity. The theoretical component deals with the elements that define the consulting activity in business and the specific approach to initiate and develop business by young rural entrepreneurs. The applicative component is represented by the presentation of the specific consulting needs for business initiating and development in the rural areas within developing regions of North East, Central and South East. The undertaken sociological research is representative for the study group and was held within the SOP HRD strategic project "Rural Manager".

Keywords: entrepreneurship, entrepreneur, consulting

Introduction

Entrepreneurial consulting and development represents an important resource for business success, especially for youth from rural areas. From the study made within the strategic project "Rural-manager" on a target group of 942 people composed of entrepreneurs and future entrepreneurs from rural areas, especially young people, in developing regions of North East, Central and South East and we shall respond to a series of questions that can guide future efforts to better calibrate the offer of consulting services and entrepreneurial development. The study used a mix of methods (surveys, focus groups, brainstorming and depth interviews) to answer the following key questions:

(1) Who needs consulting and in which areas?
(2) What was the degree of satisfaction with these services?
(3) Has the quality of consulting evolved in the last couple of years?
(4) What are the needs of entrepreneurial training and consulting for the future?

1. Business consulting and entrepreneurial development

Business consulting consists of assisting organizations in improving performance by analyzing the existing problems, developing improvement plans and, in some cases, providing assistance in implementing those plans. Organizations turn to consultants to obtain more objective analysis and advice from outside, to have access to the specific expertise of a particular consultant,

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to obtain information on best field practices or to obtain a temporary support in situations when permanent employment of a person is not justified. Consultants may also provide assistance in leading and implementing organizational change, development of coaching skills, implementing new technologies, designing and implementing strategies or improving services or production operations. Consultants generally bring their own methods or thought frameworks that guide efforts to identify problems and provide a basis for formulating recommendations for achieving more effective and efficient the business processes.

Areas in which is given advice on business are: starting the business, finance and business financial management, business structuring and management, strategy, human resources, marketing, sales, information technology, law, accounting, export, quality, health and labour safety, technical and technological issues, personal development of entrepreneurs and managers, choices for sources of outsourcing or insourcing for various business activities.

Entrepreneurial development includes topics such as: drafting the business plan, forecast cash flow, marketing plan, business organization, human resources employment, internal financial administration, legal aspects.

Usually, entrepreneurs and managers turn to consultancy when they "feel overcome by the complexity of the situations they are faced, or at best, when they consider they can save time and effort in the process of achieving the results they want."[1]

Business consulting for small and medium enterprises is an area that has developed in Romania since 1990 both with the help of some foreign assistance programs (such as *Professional Business Counsellor* Program funded by USAID - United States Agency for International Development and Washington State University), through local efforts to professionalize the job of counselling (for example, the foundation of AMCOR - Management Consultants Association in Romania) and the involvement of specialists from academic field to practice this profession. Independent consultants, consulting centres affiliated with universities, consultants affiliated to The Chambers of Commerce and Industry, business consulting companies gradually emerged. However, most of the business consulting turned to providing services to midsize and large companies that could bear the costs of consulting programs. Consultancy market (supply and demand) has grown especially in urban areas and mainly in Bucharest, Cluj and Timisoara. The consultancy offer on the Romanian market is currently relatively small (there is only one consulting company with turnover exceeding 3 million Euros, the remaining companies within this field achieving extremely modest turnovers - between 20,000 and 200,000 Euros).

During 2009-2013 for the entrepreneurial development in rural areas (especially supporting the initiatives promoted by young people and women, supporting the traditional crafts and other activities) it is possible to access funds worth 3.83 million Euros provided by the European Union and the Romanian Government. This support is available as grants, loans, guarantees, non-financial assistance in the form of programs and support services for enterprises (including business consulting and training programs). As a result, naturally, much of the consultancy supply and demand is concentrated within the area of assistance for accessing such funds. Consulting companies specialized on such services (assistance to access EU funds) that are successful actually offer a broader package of services that participate in the success of the projects (project management, financial management, business management, human resources management, marketing, training producer groups to access funds etc.).

There are many theoretical approaches that business consultancy is based on: scientific management theory[2], game theory, theory of constraints[3], lean production[4], 6 sigma, complexity theory[5] etc.

[1] David Philip, *Getting Started*, Kogan Page, London, 1998

[2] Viorel Cornescu, Paul Marinescu, Doru Curteanu, Sorin Toma, *Management – from theory to practice*, University of Bucharest Publishing House, 2003

[3] Mabin, Victoria J., Balderstone, Steven J., *The World of the Theory of Constraints: A Review of the International Literature*, St. Lucie Press, 1999

For our study conducted within the project "Rural Manager" we chose to focus not so much on identifying theoretical approaches that were used, but on identifying areas of intervention, but both in terms of their history (to which type of consulting services the participants in this research have turned to in the past) and future (which are the priority areas where there is a need for consulting). For the first part we chose to formulate open questions so that not to affect participants' responses and for the second aspect we made a list of areas in accordance to the priorities of the current period generated on one hand by the constraints of the economic crisis, and on the other hand by the opportunities given by the European financial consulting programs. This way, along with classical areas of business consulting such as strategic management, elaboration of business plans, general management, production management, human resources, accounting, legal, IT, communication, the following have emerged as distinct areas: certifications (required for participating in auctions), auctions, access to European funds, managing projects.

2. The methodology used within research

2.1. Background and research methods

The study was conducted within the strategic project "Rural-manager". The project "Rural-Manager" has the financing contract SOPHRD/13/5.2/S/8 being selected within the Sectoral Operational Programme Human Resources Development - SOPHRD, axis 5, DMI 5.2., which is co-financed by the European Social Fund. "Rural-manager" is implemented by the National Foundation of Young Managers FNTM (www.fntm.ro), as leader of the consortium, in partnership with organizations Training and Development Center of Employers Associations of Bavaria - bfz GmbH (www.bfz.de), SC Siveco Romania SA (www.siveco.ro) and the Euro <26 Association (www.euro26.ro).

The target group of the project consists of entrepreneurs or prospective rural entrepreneurs, especially young people, who can generate local development and employment opportunities by expanding their business in developing regions of North East, Central and South East.

For the scientific measurement of the training and management consulting needs of the entrepreneurs and those wishing to start a business in rural areas a complex research has been made that is covering several aspects:

- Creating a representative poll for the target group and a comparative survey conducted among civil servants
- Conducting three focus groups (one for each region) about the motivations, expectations and entrepreneurial behaviour
- Making 3 brainstorming (one for each region) about the significance and daily meanings associated with concepts of management science
- Conducting 30 in-depth interviews (10 in each region) about entrepreneurial experiences.

The quantitative researches were combined with the qualitative researches in order to study the training needs. A questionnaire was built on entrepreneurial values, behaviour and motivations, on management knowledge and experience in consulting and the mutual perceptions of businessmen and people in government.

To elaborate the sample it was taken into account the share of the rural population of each county in all the three regions and it was agreed to ensure the greatest possible territorial

[4] Earl M. Murman, *Transitioning to a Lean Enterprise: A Guide for Leaders*, Volume I, ,Massachusetts Institute of Technology, 2000

[5] Jonathan Rosenhead, John Mingers, *Rational Analysis for a Problematic World: Problem Structuring Methods for Complexity, Uncertainty and Conflict,* 2nd Edition, John Wiley and Sons, 2001

dispersion. For every rural village it was put together a list of entrepreneurs and potential entrepreneurs, based on information collected from the FNTM county coordinators. From that list almost 1100 individuals were selected by statistical step and they were invited to attend regional conferences of the strategic project "Rural-Manager". Among the conference participants, 942 individuals agreed to participate in sociological research. Those 942 individuals live in 493 cities - on average every two persons from a village. The sample is representative for the target group (entrepreneurs and potential entrepreneurs in rural areas in 18 counties in North East, Centre and South-East) with an error of + / -3.2%.

Of the 942 individuals, 23 participated in focus groups, 22 in brainstorming and 30 in-depth interviews. At the regional conferences in Alba Iulia, Iasi and Focsani one focus group, brainstorming and 10 in-depth interviews were conducted to accurately identify people's motivations, expectations and ideas about various managerial aspects. Qualitative researches were conducted in rooms specially equipped for this purpose and were moderated by experts in the field. The selection criteria for participants in focus groups and brainstorming were full - probability, random, with statistic step from the lists of participants to the meeting. Participation was voluntary. Participants were told that refusal to participate will not influence the chances of participation in the Project. Focus groups and brainstorming were held prior to the Conferences in order not alter the collected qualitative data by information provided in the Event.

In the search for similarities in a group as heterogeneous as the one that is studied, we grouped participants into three categories. In each category we specified the share of the total sample. Then we divided a category into several subcategories:

1. Non shareholder managers – 3%
2. Employers and self employed persons – 29,3%
3. Potential entrepreneurs (willing to start a business) - 67.7%, of which:
    a. Employees in the public sector – 13,6%
    b. Employees in the private sector – 17,8%
    c. Self employed – 8,2%
    d. Farmers with own farm – 10,4%
    e. Other statute (students, unemployed) 17,7%

2.2. Characteristics of the analyzed sample

Although few, we have analyzed separately the non shareholder managers because we noted that they had the highest level of economic training. They are executives at companies with large numbers of employees; they are averagely 38 years old, know foreign languages, frequently use the computer and Internet and have bank loans.

From employers, nearly half of them own production businesses (agricultural, livestock, woodworking, baking, construction, clothing), a quarter deals with services (agro-tourism, transport, notary, consulting), and the other quarter deals with trade. Most of the companies within the rural areas are micro-sized - 90% have fewer than 10 employees. They function but at a satisfactory level for three quarters of employers, which means that their satisfaction does not depends on the extent of conducted business.

Statistically 98-99% of the businesses taking place in the world, regardless of continent or country, are small-sized, having up to 10 employees. The average number of employees per enterprise is 2 for micro-enterprises, 20 for small enterprises and 103 for medium enterprises, while the average number of employees per total of SME's is 6.2, according to the National Agency for Small and Medium Enterprises and Cooperatives - NASMEC (Catalin Alexe - Business Plan Professor / Department of Management, UPB).

If employers' and managers' world is dominated by men, the civil servants' world is more well-balanced divided on gender and we noticed more women from public administration willing to enter the business world. Like managers, the employees from the public sector have a higher education level (60% have graduated college), they are frequently using the computer and have a relatively good command of foreign languages. Three quarters of them are married and most of them have children.

Unlike civil servants, employees from the private sector are mostly unmarried, have an average level of education, and have lower incomes than their peers from the public sector. This should be correlated with their average age (25 years old) - less than the occupational categories listed above. Therefore, seeing businesses run by their employers, employees in the private sector immediately wish to follow their footsteps, opening their own business. They haven't begun a business from the same reasons as all the potential entrepreneurs: they did not have the capital and the equipment to start off (41%), they did not have a good idea for business (17%), they did not have the necessary connections (11%), they did not feel ready for something like this (10%).

Self employed individuals (traders, unregistered tax craftsmen) together with farmers have a slightly different social profile: they use the computer and Internet the least, they master foreign languages the least, they do not take many loans from the banks and they have a low international professional experience (only 15% of farmers say they have learned or worked abroad). Instead they have an important marketing activity: nearly half of the interviewed farmers have personally sold agricultural products or livestock at the market last year (men have sold two times more than women). In Transylvania counties selling your own products at the market is more intense than in the north-east of the country.

Almost all students and unemployed individuals that were interviewed are unmarried; they speak foreign languages and spend lot of time on the Internet. There have no loans from banks and they have the lowest income of all survey participants (about 200 Euros a month). In the potential entrepreneurs group, they have the lowest average age: 23 years.

Beyond these categories (employment, gender, age, education level, experience working with computers, working abroad, working with banks), we did not noticed other socio-demographic patterns responsible for people's desire to start a business in rural area. They were fat and thin, tall and short, silent and talkative; some of them were disabled, while others had obvious problems that required medical treatment, even during interviews. They fancied various parties from the political scene or despise them all equally. Fond of dainties or reluctant about cuisine, authoritarian or not, they all had the desire to succeed in the world of rural management. Trying to find out what urged them towards business, we asked them more questions about values and their way of thinking

3. Getting consultancy services when practicing an entrepreneurial and managerial activity

Business consulting is a rare experience: only 12.4% of survey participants used consultancy services so far.

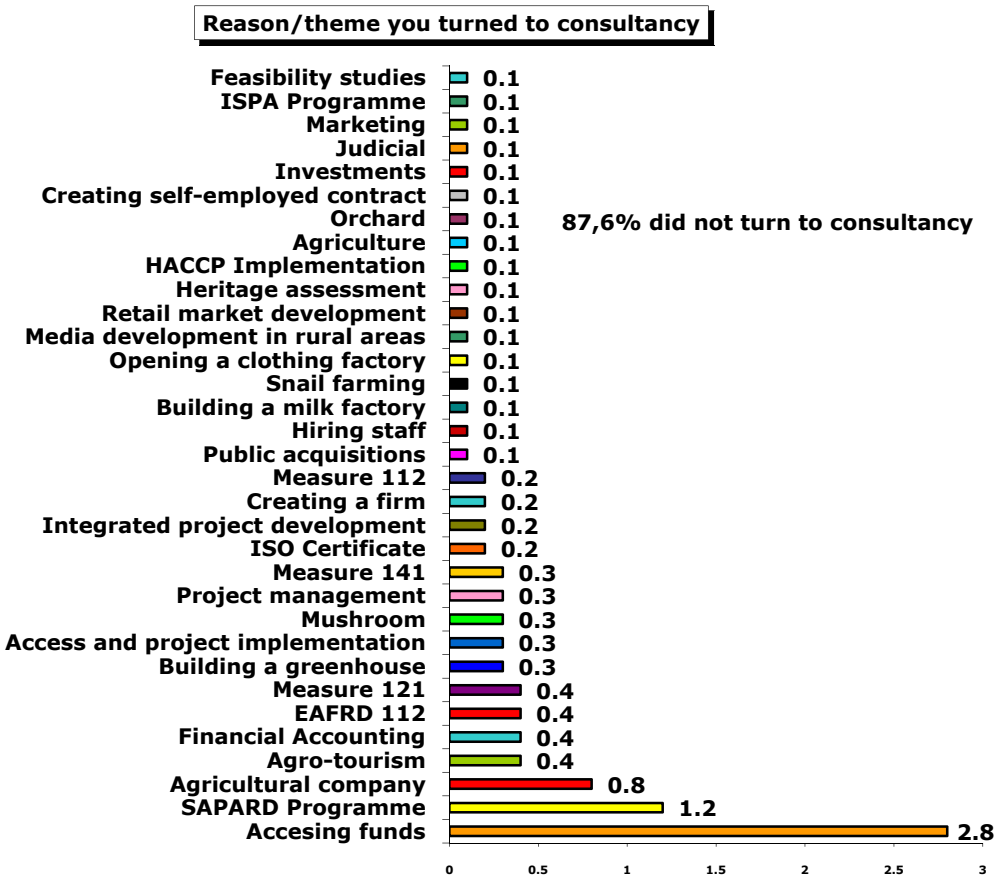
Looking at a detailed description on the target groups of the project we find significant differences between the three groups. Thus, entrepreneurs have consulting experience in a significant percentage of 28%, unlike the non shareholder managers - 18% and potential entrepreneurs with 5.5%. Although "potential entrepreneurs" is a heterogeneous group (includes employees from the public and private sector, farmers, and self-employed individuals) there are no statistically significant differences within the group. This strengthens the hypothesis of the reduced

level of entrepreneurial culture that people from this important segment have for the revitalizing of the rural: potential entrepreneurs.

Table no. 1. Getting consulting services depending on the target groups of the project

	Non shareholder managers	Entrepreneurs	Potential entrepreneurs	**Total sample**
Have turned to consulting	17.9	27.9	5.5	**12.4**
Have not turned to consulting	82.1	72.1	94.5	**87.6**
Total	100	100	100	**100**

A very important aspect of the problem of consultancy for rural areas is represented by the subject of the required assistance until the questionnaire-based sociological inquiry. The free responses without pre variants look like this:



Access to funds

Grouping these answers on topics show the following hierarchy:

1. access to European funds: 44.4%
2. Business Development: 24.8%
3. Other: 30,8%

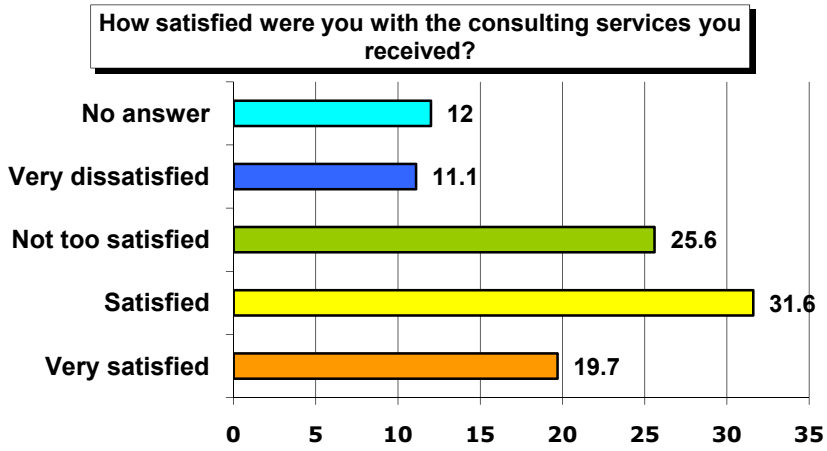
So we observe that for almost half of consultancy beneficiaries the main objective was access to grants, pre-adhesion funds and other European funds. The reason why a quarter of those who requested consulting services was the business development through technical advices. 30% of them requested consulting for certification, insurance, legal, financial, accounting aspects. The significance test shows that we have no statistically significant associations between the subject of consulting and the field in which it operates. The question regarding the years they have turned to consulting provides us with surprising answers:

Table no. 2. Year distribution of those who turned to consulting

Years	%
until 2004	19.7
2005	7.7
2006	11.9
2007	11.9
2008	23.9
2009	24.8
	100

One may notice that a fifth of those who went to counseling did this until 2004. In the first four months of this year they have requested consulting as throughout the whole year 2008 or 2006 and 2007 combined. Hence the boom in demand for consulting and the need for help to access EU funds.

Were they satisfied by the consulting services? It is a natural question for any evaluation approach. Most people who have turned to consulting: 51% were satisfied and very satisfied with advice received as opposed to 37% of them who were dissatisfied and very dissatisfied.



Regarding consulting topics, the highest percentage of those satisfied with the advice is recorded in the case of those who resorted to various practical problems of a company's activity: accounting, marketing, law and other. 15% of those who expected a practical advice were dissatisfied. Second place among satisfaction from consulting services are those that have asked

for help in accessing funds: 62% versus 31% that declared themselves as dissatisfied. Most dissatisfied were those who sought advice on business development: 69%, versus 31% that declared themselves as satisfied.

Has the quality of consulting evolved in any way in the recent years?

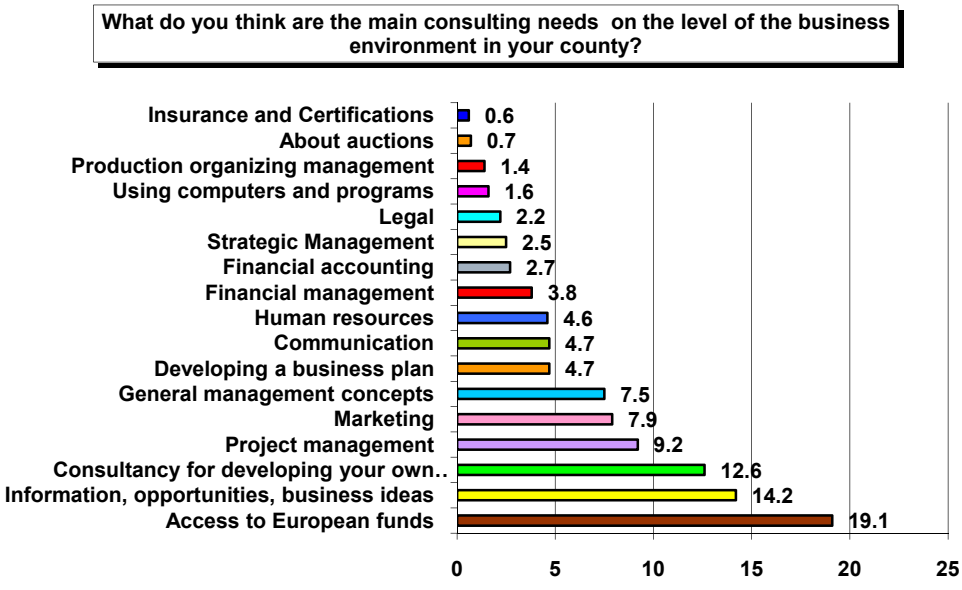
The only easy statistically significant association is negative and refers to those who sought advice in 2007. In the last two years an increase in satisfaction with consulting services has been observed. We believe that in the first quarter of 2009 we can speak rather of a high level of expectations from the consultancy work than actual achievements; most requested consulting is on structural funds.

The individuals that participated in the research were asked about needs for consulting from their county. The question was open, each respondent expressing his opinion in his own words. The response rate to the questions was 48.6% of total participants, similar to the current shares from polls. Respondents indicated an average of 2.2 answers of three possible answers. Analyzed in terms of target groups of the project, 61% of managers, 58% of entrepreneurs and 44% of the potential entrepreneurs have expressed their opinion about the need for counselling. Significance tests show that entrepreneurs are more likely to express a need for advice.

From the perspective of participants' residency, those who have expressed a real need for consulting were those of the Central region: 54% of participants, then those from the North-West region: 50% and those from the South East region: 42%. Those with higher education particularly expressed their opinion to the question, followed by those who graduated high school; in another way put, the training level influences and makes aware of the support that consulting services can bring to business.

Those who have asked for consulting services have formulated with a ratio of over 68% a specific requirement to this activity. It is a significantly higher percentage than the percentage of those who have never used consulting services, but have made a requirement for consulting: 46%. Thus, we have an example of the importance of rising awareness on the importance of consulting and the possibilities offered in solving business problems.

It is interesting to emphasize the fact that the dissatisfaction with the advice received did not deter the influence on formulation of a support requirement for the business activities; those who have been dissatisfied have formulated precise needs for consultancy in an even higher percentage than those satisfied with the consulting services.



It is noticed that obtaining reimbursable or not European funds is in the top of consulting needs, almost a fifth of all the requirements.

It is not by chance that the second requirement is related to providing information about business opportunities and ideas in the area. It is rather the fear that their business ideas cannot be supported by European funds and they prefer to fold business on areas supported by European money.

The analysis of target groups of the "Rural Manager" project shows significant differences when talking about the need for consulting. If the first two positions are common to all target groups, the other themes have different priority ranks. For managers to strengthen knowledge management, project management and getting business development advice represent a third priority, followed by consultancy on human resources issues and financial and accounting management.

For entrepreneurs the top of the need for consulting is made complete by business development, then the need for marketing knowledge, the way they can better fructify their products and services, the way they can better manage accounting, the financial management in general.

For the potential entrepreneurs, the support when starting and developing a business is almost as important as the information on business opportunities in the area. Thus the correlation between orientating towards a business supported by European funds and starting off the business becomes clear.

The need to learn to manage their projects, to seek retail market for the products or services of their business is organically correlating with the need to assimilate notions of management and notions of developing a business plan.

Has the type of experience regarding consulting influenced the demand/need in the future of this kind of support? Those who have experience of consultancy for obtaining financing or European funds have in a proportion of 1/3 a growing interest for this type of consulting, on the second place being business development consultancy and project management.

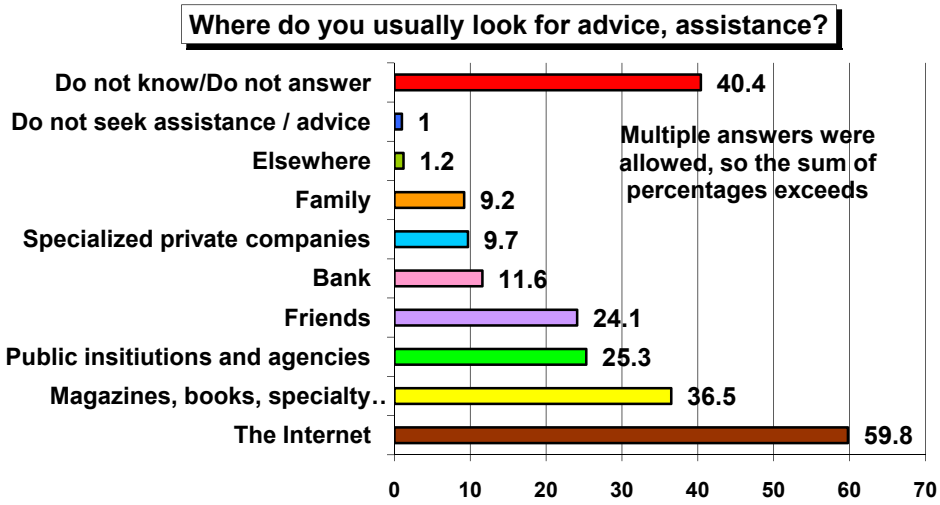
Those who are experienced in business development consulting are moving in the second plan, after the need for funds, towards the need for knowing how to manage projects and then to a lesser extent to the need for information / business development opportunities. Those that tried to resolve their specific problems within their business by turning to consulting also seek advice on accessing European funds and business opportunities. Thus they are those who developed their company on classic format and they are looking for ideas and funds for expansion.

Also analyzing the need for consulting from the perspective of subjective assessment of business operation it appears that managers and entrepreneurs, who state that their business is very profitable, rather need information and business ideas and subsequently consultancy for European funds. Those who say that their business is going well rather need advice for funds and then advice for information and ultimately advice to strengthen the business. Those who appreciate their business is going quite well would especially like consultancy to obtain funds, then information and finally advice for business development. For the entrepreneurs who believe that their business goes wrong, access to business information and European funds are equally important. Somehow the needs of this group of entrepreneurs are closer to the potential entrepreneurs' needs. On the line it can be said the majority group of potential entrepreneurs is created around the subsistence entrepreneurship.

From the perspective of the field the business is carried on, there are no statistically significant associations found between the type of business and a specific consulting need, which reinforces the idea of homogeneity of the rural business environment. Those from services have more information about business opportunities than those in trade or production.

Asking people where they are usually seeking advice and assistance, we observed that most of them mentioned the Internet.

Google has become our brother for advice. It provides an answer to everything you search for (male, 35 years old, employer, graduate, AB)



The distribution of consulting sources within the main target groups of the project shows significant differences. Managers are among those seeking professionalized advice; 71% of the assistance they need is obtained from the Internet, publications and banks. Entrepreneurs and potential entrepreneurs are turning in almost 60% of the cases to professional sources. The informal environment is more important in terms of assistance, advice for potential entrepreneurs: 20%, compared to 16% for entrepreneurs or 9% for managers.

It is noted that together with the professionalization of business, the transition to entrepreneurship or management, the transition to other formal sources of advice or assistance also occurs.

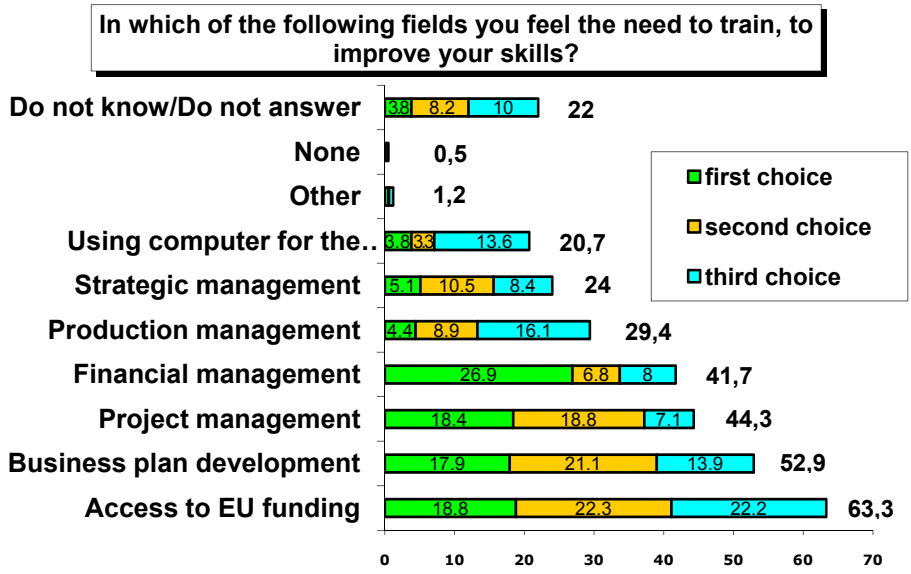
Does the source of assistance influence the business success? The data show a slight association between the source of assistance and the progress of the business, meaning that turning to professional sources of information and consulting increases the likelihood that business is more prosperous.

Table no. 3 Correlation between source of information and progress of the business

Category	good	so and so	bad
Internet	31.8	30.9	33
In magazines, books, specialty publications	24.6	20.6	24
Public institutions and agencies	14.9	16.5	10
Friends	10.7	13.6	17
Bank	8.0	7.0	4
Specialised private companies	6.9	6.6	5
Family	2.1	3.3	5
Elsewhere	1.0	0.0	1
Does not seek advice	0.0	1.5	1
N=330 responses			

4. The need for entrepreneurial training

Apart from the positive perceptions about themselves, employers and prospective employers from the rural areas felt the need for management improvements, a specialization in business management science. Asked about their training needs, their responses were:

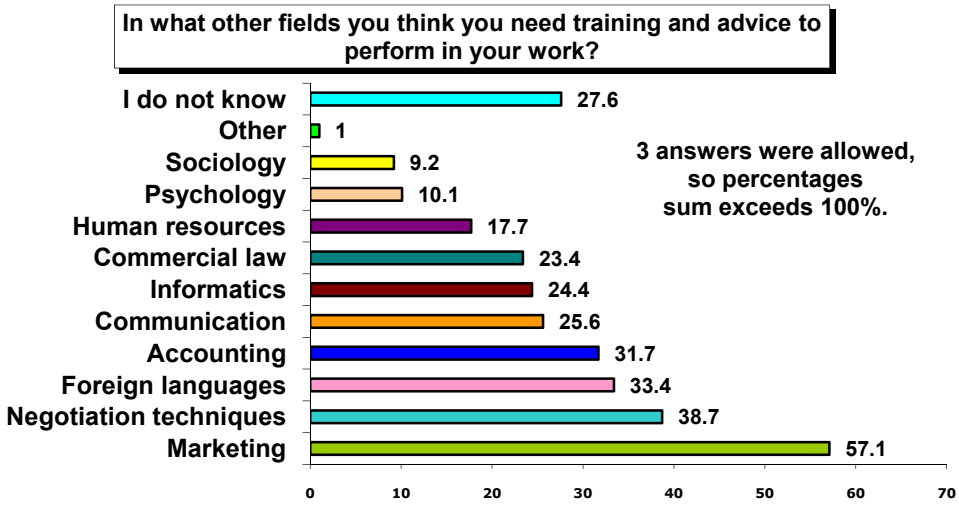


Observing the order of priorities, on the first place are seen knowledge related to financial management, followed by accessing European funds, project management and business plan development. It is interesting that the second option focuses on accessing European funding and developing business plans. For the third, production management appears in addition to accessing funds.

If we would cumulate the responses, ignoring the order of precedence, the hierarchy would be as follows: accessing European funds (63.3%), developing a business plan (52.9%), project management (44.3%), financial management (41, 7%). Thus, we have an obvious clustering around the moment: access to finance and everything that would implement a structural design. In the second place are production management (29.4%), strategic management (24%) and using the computer (20.7%).

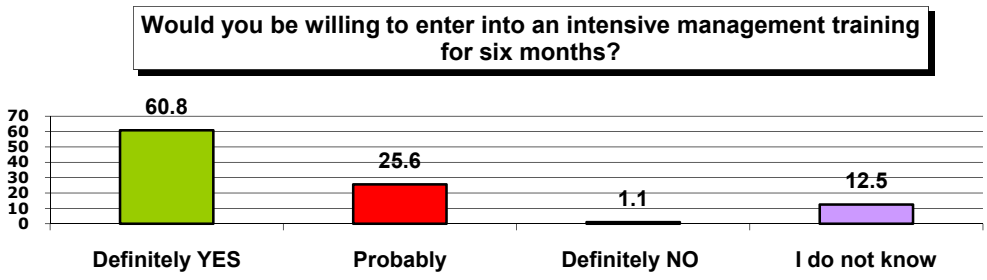
Significance tests show that managers tend to be more concerned with training for developing business plans, while potential entrepreneurs are concerned with training on project management. From the gender perspective, women tend to be rather preoccupied with business plan development and men with improving in production management.

From the perspective of studies one can notice that those that have an average education are more attracted by financial and production management classes. Those with superior studies are more likely to improve in areas such as project management, financial and strategic management. Additional specialties of the management are also desired by those that are interested to conduct business. The greatest needs are related to marketing.

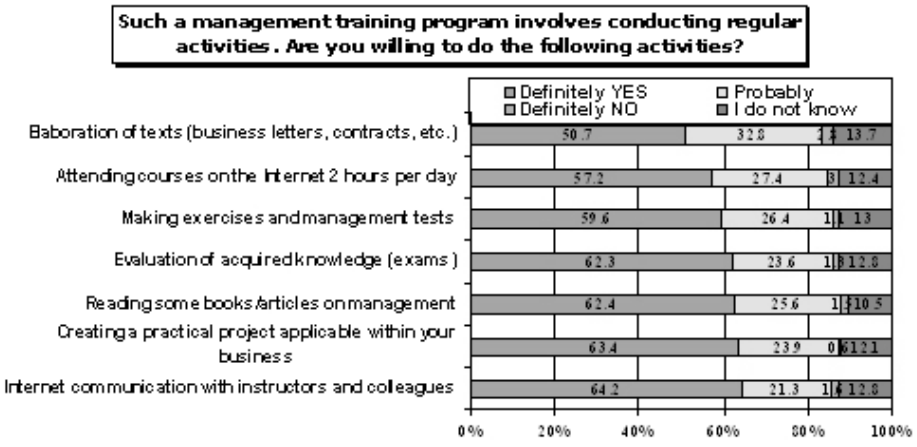


The need to improve in sales is tremendous in all the analyzed groups. For the unemployed and workers from the private sector this need is overcome by the desire to improve their knowledge of foreign languages. For the self-employed knowledge about informatics comes first. This preponderance of marketing in training needs is explained by the desire of people from the rural to understand how to find new markets and new customers for their products. As we noted earlier, they considered themselves great technically skilled in fields in which will carry on business, but they feel unsecure when it comes to selling their products. Young people focus on mastering foreign language because they wish to seek customers in other countries. The elderly rather want training in negotiation techniques, in a bid to get more profit from existing customers.

It is important that 60% of subjects would definitely be willing to undergo an entrepreneurship training program. Nin stakeholder managers would be the first to be excited by such a program, as well as women and those with higher technical education. Vocational school graduates, farmers and self-employed had the greatest hesitations and doubts about such a training program, but even in their cases we notices a high enthusiasm (50%).

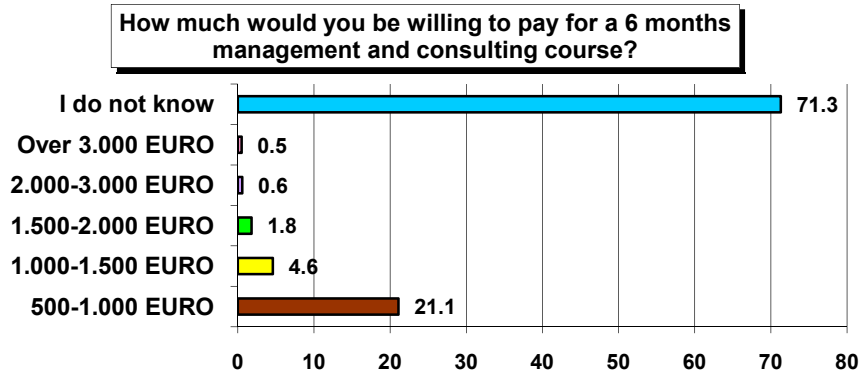


Even when they knew the effort they must submit for completion of such a management training program, people have not lost interest in it. This shows a great willingness to learn.



A surprise of this research was that people want to participate in a modern training, e-learning, where they can communicate through the Internet with teachers and colleagues. To the same extent they want their business ideas to be discussed in classes, to be transformed into practical projects. Contrary to expectations, they are not running away from exams and evaluations, but they accept them as beneficial happenings to their management career. Young people have a greater availability of taking such courses, regardless of their existing education level.

Availability is reduced when it comes to paying the training courses.



I would like to attend business performance courses. I would not pay for them. (Man, VN, 18-35 years old, entrepreneur, high school educated)

In my opinion, if you want a good thing you have to pay. (Man, IS, 18-35 years old, entrepreneur, high school educated)

Sure, I would pay. (Man, VN, 18-35 years old, entrepreneur, high school educated)

Yes, maybe a small fee (male, VN, 18-35 years old, entrepreneur, high school educated)

Of course, nobody is teaching for free. But if only it is useful. (Man, VN, 18-35 years old, entrepreneur, high school educated)

For a good idea why not? It's too early to tell. (Man, VN, 36-57 years old, entrepreneur, high school educated)

I do not know if I could afford it. (Female, AB 0.18-35 years entrepreneur, high school educated)

Willingness to pay for training courses is higher for non shareholder managers, public officials and employers and is lower for farmers, unemployed and self-employed. College graduates are more willing to pay than those who have graduated vocational schools, and women are more likely to pay the costs of specialization in business than men. As they age, people are more inclined to pay the costs of a management training course.

At the same time, the large amounts are factors of educational disengagement. People know they have to pay for management training courses, but prefer to pay small amounts. And often they say that they want these courses to be paid by someone else, not by themselves.

Conclusions

Business consulting is a rare experience: only 12.4% of survey participants used consulting services so far. For almost half of the consulting beneficiaries the objective was accessing European funds. For one quarter of these individuals business development through technical advice was the reason for contacting a consultant. Another 30% of those that used consulting services have opted for certification, insurance, legal, financial and accounting aspects. A few over half (51%) of those who went to counseling were satisfied and very satisfied with the advice received, as opposed to 37% of them who said they were dissatisfied and very dissatisfied.

In the top of consulting needs, with almost a fifth of all the formulated requirements is the need for assistance to obtain European funds. The second requirement relates to providing information about business opportunities in the area and about business ideas. On the third position among the needs for consulting the following are priorities: for managers consolidating management knowledge, project management and business development, for entrepreneurs - business development, marketing and financial management skills are in third position.

Regarding the need for training the hierarchy is as follows: accessing European funds (63.3%), developing a business plan (52.9%), project management (44.3%), financial management (41.7%) production management (29.4%), strategic management (24%) and computer usage (20.7%). Over 60% of respondents would definitely be willing to undergo entrepreneurship training program, e-learning type, even for a period of six months but would prefer to pay small amounts for these training courses or to be paid by someone else, and not by themselves.

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FISCAL MANAGEMENT OF ROMANIAN COMPANIES

Maria Zenovia GRIGORE [*]
Mariana GURĂU [**]

Abstract

This paper is aimed to analyze the taxation influence upon the company's activity. Fiscal management is integrated into the company management and must therefore be defined in terms of general policy objectives of the company. The **efficiency** *of* **fiscal** *policy is an essential element of fiscal management. This can be achieved directly (through the tax law that includes measures of fiscal incitement) or indirectly (when the tax system offers a number of tax deductions for expenses, the possibility to cover losses from previous financial periods, the limitation of deductible expenses according to earnings before taxes etc.). The two forms of* **efficiency** *of* **fiscal** *policy are placed in the calculation of relations between fiscal management, strategic planning, tax risk and accounting. Fiscal policy should aim at the company's research and to achieve optimal cost of taxation. This paper analyses the methods that the companies dispose of in order to reduce this cost.*

Keywords*: fiscal management,* **fiscal** *policy,* **fiscal** *efficiency, cost of taxation, fiscal optimization.*

Introduction

Fiscal instability and the great number of laws which regulate various economic activities influence decisively the business environment from Romania.

No matter how reticent the economic agents may be at the idea of taxation, lasting existence and in conditions of legality of a company on the market oblige them to know and observe the fiscal legislation. Even for those economic agents who want to avoid the payment of some taxes or charges, it is important for them to know the legislative provisions in domain in order to choose the most legal ways in this sense.

I shall present in this paper some concrete modalities through which managers can use the fiscal provisions in order to influence positively the company's economic and financial performances.

Since there are not aspects of financial and implicitly fiscal nature, which do not suppose, in countertrade, the registration in accountancy, I considered necessary to tackle, in the first section, the problem of the convergence between taxation and how the accounting theory can be applied in the enterprise's life. The role of fiscal management is to analyse the deviations resulted from the incompatibility between the fiscal rule and the accounting one, the convergences between them, as

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well as to establish on the basis of this analyse, the fiscal risk and the modalities of growth of the company's fiscal efficiency.

In the second section of this paper, I emphasized the objectives of the fiscal management: diminution of pressure of taxation and its deferral in time, use of fiscal variable with the purpose of regularization in time of profit's level registered by the company and assurance of carrying out the company's tax liabilities with a very reduced cost and diminution of fiscal risk.

For the fulfillment of each objective, the company uses various fiscal optimization methods and techniques. The third section comprises an analysis of the most used above techniques, starting with the observation that fiscal optimization is realized at two levels: at the level of fiscal regulations, by the retention of the most appropriate fiscal options and by the exploitation of fiscal advantages offered by the fiscal law and at the level of management decisions, through the integration of the fiscal parameter in taking decisions.

1. The relations between accountancy and taxation

Accountancy represents an instrument of knowledge and management of the patrimony, financial situation and obtained result. It must ensure information for capital investors, for state's institutions (including fiscal administration), suppliers and employees.

With regard to these users, the accountancy should render a true, clear and complete image upon the patrimonial and financial situation, as well as upon the result. The fiscal rules don't subordinate to the presentation of the true and faire view of patrimonial situation, but they rather aim to stimulate or to inhibit some activities. In this sense, we have the example of the investments' stimulation which is accomplished by different fiscal levers, as the accelerated depreciation or the tax exemption for the profit reinvested in the production or purchase of technological equipments.

When the accounting principles are contradictory to the fiscal ones, the conciliation problem arises between accountancy, which represents the society's interest and taxation, which represents the state's interest.

The company's managers have to make arbitrations between the duty to present the accounts observing the true and faire view principle and the desire to optimize the fiscal cost of the company's activity. A solution conformable to the accounting rules and principles can be incompatible with the taxation's point of view, which brings down penalties upon the company.

The profit and loss account as document attached to the balance sheet, in which the criterion of delimitation of expenses and incomes is realized depending upon their economic nature, satisfies first of all the state's interest. The company's managers, who use the accounting information for analysis, prevision and decision find in this document only but the profit's value and its origin after nature. Therefore, there are used in practice other models of the profit and loss account, as for example the model of the Intermediate Management Balances. This model offers the possibility to the financial analyst to establish the strategy regarding the company's commercial policy, the suppliers' policy, the production policy, the efficiency of the physical capital and its renewal period, the analyse of the fiscal cost and its optimization, the staff's efficiency and the way of growth of labour productivity.

The excessive taxation and the instability of fiscal regulations determine companies to choose some accounting methods which finally don't render a true and faire view of the patrimonial situation, but one adapted to fiscal and conjunctural rules. Given this situation, it arises the problem of delimitation and classification on the hierarchical system of the relations between the company's accountancy and taxation.

These relations can be classified in two categories: integrated relations and neutral relations.

Integrated relations are relations of connection or engagement, being determined by the intersection between the accounting interest and the fiscal one. In the case of these relations, there

are discrepancies between the principles of accountancy and the fiscal ones, which have to be harmonized. In the sphere of these relations, we notice especially three problems: the depreciation of fixed assets, the accounting evaluation of the patrimony and the corporate tax.

In the practice of countries where the accountancy is connected to taxation, there are primarily deductible the expenses with the devaluation corresponding to the real depreciation, justified from an economic point of view, being imposed the accounting norms. Taxation is also used to incite companies to achieve productive investments. In this situation, the companies have the possibility to register in accountancy buying up of annuities that don't correspond to an economically justified depreciation of the physical capital. Thus, the accounting instrumentation through the fiscal rule has a double drawback: on the one hand, a sub evaluation of the accounting net value of the material investment in comparison with its use, and on the other hand an over measure of expenses with the depreciation correspondent to the operating activity. The implications of the fiscal rule lead to the obtainment of unreal Intermediate Management Balances which are contradictory to the objective of true and faire view of annual financial documents.

In Romania, according to the Fiscal Code, the fiscal depreciation is realized without taking into consideration the accounting depreciation, the text of the law lacking a clear delimitation between the two procedures.

The Order of MFP no. 3055/2009 defines the fixed assets as being those assets intended to be used on a continuous base for the development of the entity's activity. Relating to duration, the same order shows that the depreciation of tangible assets is calculated beginning with the next month of the putting into service and until the complete recovery of their entry value, depending on the duration of the economic use and their conditions of use.

From a fiscal point of view, it is applied the article 8 from the Law no. 15/1994, by which the normal duration of operation as well as the classification of fixed assets is approved of through the government decision.

The Law no. 571/2003 regarding the Fiscal Code defines the fiscal value used for the calculus of fiscal depreciation as the purchase cost, the production cost or the market value of fixed assets earned for good and valuable consideration or constituted as a contribution, at the date of entry in the tax payer's patrimony. In the fiscal value, there are also included the accounting revaluations performed according to the law.

From an accounting point of view, the revaluation of tangible assets is made at the fair value from the date of the balance sheet. In case there are performed revaluations of redeemable fixed assets which determine a diminution of their value under the entry cost, the fiscal value remained unredeemable is recalculated till the level of the value established on the basis of the entry cost.

Any behavior regarding the principles and methods of evaluation is propagated directly upon the depreciation and profit. Therefore, in the profit case, the taxation appropriated some principles of accountancy. We refer to the principle according to which the evaluation methods of the patrimony must be the same during the all financial year, as well as from a financial year to another. If there are justified cases in which methods are changed, one must calculate the influences upon the patrimonial and financial situation, as well as upon the level of the profit tax.

In the sphere of delimitation of integrated relations between accountancy and taxation, it is of great interest their analysis through the provisions of the Fiscal Code, with reference to the deductibility of expenses in the determination of the company's taxable profit. The allowable expenses from a fiscal point of view are analysed from various points of view.

A first aspect refers to the fact that there are nondeductible from a fiscal point of view those expenses that are enumerated in the Fiscal Code, no matter the nature of activity deployed by the company.

The variety of expenses that are occasioned by the activity of economic agents makes impossible a strict enumeration of non-deductible expenses from a fiscal point of view. Thus, the

principle of connecting expenses to incomes must be applied, since it imposes the recognition in the financial situations only of those expenses occasioned by the current development of the commercial society's activity. Any other occasioned expenses must not be recognized in the financial situations. This point of view is more one of a strictly accounting nature. But, taking into consideration the fiscal aspect of the problem, the company must register all documents that are realized in its name, which it means that some of them contain expenses that are not recognized. These expenses must be registered in accountancy, but they must be eliminated at the calculus of the profit tax, thus obtaining a bigger value of the taxable profit and implicitly of the profit tax due to state budget.

Another consequence of the application of connecting expenses to incomes principle is the following: an expense is deductible from a fiscal point of view only if there are generated incomes through its achievement. For example, if a company registers expenses during the period when it doesn't deploy any activity, the occasioned expenses are considered non-deductible from a fiscal point of view.

In the category of non-deductible expenses from a fiscal point of view, we can also mention those expenses that produce incomes, but of inferior value. Thus, if an enterprise realizes expenses generating incomes, but of inferior value, the difference between expenses (bigger) and incomes (smaller) is considered no-deductible from a fiscal point of view, thus increasing the taxation base of the profit tax. For example, a stock deficit due to a natural calamity will generate an expense by registering as expense the value of the stock found deficitary at the inventory. If this stock was ensured and the enterprise receives from the insurance company the equivalent value of the stock found deficitary at the inventory, the value of this expense is considered deductible from a fiscal point of view; in the opposite direction, the value of the respective expense is considered non-deductible.

These solutions for profit taxation are of a conciliating nature, in the sense that taxation recognizes the accounting rules and principles and in consequence, it accepts the passage solution between the accounting result and the fiscal one.

Neutral relations between accountancy and taxation don't affect directly the company's profitableness; they appear in the case of dividends tax, wages tax, contributions to social insurances, VAT (when it has a deductible pro-rata of 100%). The information offered by accountancy is used by taxation in the calculus and discount of taxes, charges and contributions.

As a rule, neutral relations don't generate problems regarding the harmonization of the two interests. These relations can become inciting for the company's fiscal management, implicitly for accountancy, only as far as they mobilize the imposed subject to a behaviour registered in the fiscal efficiency.

2. The objectives of fiscal management

Taxation presents a double aspect for the economic agent. On the one hand, it concretizes in compulsory tax bites for the state, with influence upon the company's treasury. This aspect gives content to the notion of pressure of taxation.

On the other hand, the company can also use in its interest the fiscal methods and principles. Thus, in operating activities, financial or of company's investments, there can be used methods and techniques whose fiscal incidences offer advantages concretized in tax discounts or in a more favorable treasury situation. To administrate taxes means, first of all, to accept the fact that these taxes, even if they are compulsory, they can be used in its interest, by transforming them in an active variable of strategy.

There are at least two criteria of the quality appreciation of actions and decisions taken in the fiscal management of the company: fiscal efficiency and confirmation of the observance of fiscal regulations to the fiscal administration.

a. Fiscal efficiency constitutes an essential element of fiscal management. The fiscal management, as well as the commercial management or of production, integrates in the company's management and therefore it must be defined depending on the objectives of the company's general policy or in relation with the adopted strategy. The company's fiscal strategy must be considered as a sub-strategy of the company's general development. The fiscal management must be centered upon the identification of means of fiscal efficiency, of conditions and directions of this efficiency.

The company's fiscal efficiency can be achieved directly or indirectly.

Direct fiscal efficiency can be realized through the fiscal law which comprises measures of help or of fiscal incitement. The company which uses the best these incitement measures obtains an immediately financial advantage. This is the most important aspect in the research of fiscal efficiency. The obtainment of legal fiscal advantages supposes that the company knows well the set of measures in force, despite of the temporary character of fiscal rule and of frequent legislative modifications which characterize the Romanian economic environment.

Among the means of obtainment of direct fiscal efficiency, we can mention:

- Use of evaluation methods of output stocks depending on inflation (LIFO);
- Profit investment in the production or purchase of technological equipments, with the consequence of the total profit tax exemption;
- Option to use the accelerated depreciation instead of the linear one for some fixed assets (with the approval of the Ministry of Finance on the basis of the documentation presented by the company);
- Option to be or not to be VAT payer under the legal level of the exempt turnover.

Indirect fiscal efficiency is possible on condition that the system of taxes, charges and contributions offers the possibility of fiscal deduction of some expenses, limitation of deductibility of other expenses depending on the gross mass of the profit, coverage of losses from previous financial periods etc.

b. Confirmation of observance of fiscal regulations. The company assumes a fiscal risk, and the control authorities accept and admit certain ability in relation to regulations of fiscal nature. The limit that divides the acknowledged fiscal ability from the excessive one is far to be established. This delimitation of the fiscal management doesn't involve the abuse of fiscal law.

As a result of the verification by fiscal administration of the correctness used by the company to honor its obligations to the state, we can sometimes emphasize actions whose character can be considered abnormal (that means it doesn't require any countertrade for it). The appreciation of the normality of an act of management can be yet quite subjective and it is rather made at economic level than at juridical level.

Here are some examples of situations that can be considered abnormal by fiscal administration:

- Unjustified expenses as a rule (those which have nothing to do with the company's interest);
- Expenses whose size is exaggerated (which generally concretize in advantages conferred to company's administrators or partners);
- Renunciation of some incomes without countertrade or without justification (renunciation of debts, granting of advances without interests);
- Transfer of pressure of taxation to other tax-payers;
- A "broader" interpretation of accounting principles (as the independence of financial periods).

In Romania, such acts could be identified in:

- Advances offered between companies, which can constitute real inter-companies loans, without interests;

- Renunciations of debts inside the groups;
- Purchase by the enterprises' owners of cars of personal use, but which are registered in the company's accountancy, for the obtainment of obvious fiscal advantages: deduction from incomes of a supplementary depreciation which diminishes the taxable profit. Until the issue of OUG no. 34/2009, another fiscal advantage in such a situation was constituted by the VAT deduction from the supplier's invoice (this tax was completely supported by the enterprise's owner, if the purchase was made in his name). At present, the right to VAT deduction is exerted only in a few situations stipulated deliberately by law.

The fiscal administration is considered a frontier which divides the acknowledged fiscal facilities from the exaggerated ones.

The company's fiscal management must be correct, the choices we make must correspond to the rules of fiscal law. Their infringement leads to an incorrect fiscal management or to tax evasion.

The fiscal law defines the tax evasion as embezzlement from taxation of the taxable matter. Depending the way it is performed, the tax evasion can be: legal (licit) and illegal (fraudulent or illicit). In most cases, the legal tax evasion is defined as a versatile use of possibilities offered by law and is distinguished from the fraudulent tax evasion which designates a law infringement.

The legal tax evasion allows the embezzlement from taxation of a part from the taxable matter, thing which is not considered contravention or infringement. This becomes possible because the legislation from different world countries allows the taking out from the tax incidence of some incomes, parts of incomes, components of fortune or of some acts and facts that on conditions of a rigorous observance of legislation and taxation principles, they shouldn't be exempted from taxation.

The licit tax evasion is favored by:

- granting some fiscal facilities under the form of exonerations, partial exemptions, discounts, deductions etc.;
- granting some temporarily defined exemptions, in the case of setting up of new commercial companies;
- exploitation of some law's gaps etc.

Tax havens are a form of the licit tax evasion. They represent little juridical entities of the State or they have special statute, offering fiscal advantages, in comparison with other juridical entities, to companies which establish their registered office or to private individuals who have their residence on their territory. On the territory of these states, there are set up many foreign companies to which are directed the profits of productive units being on the territory of other countries, the tax collector being thus evaded.

Among the advantages offered by tax havens to companies, we mention the following:

- Income and profit tax exemption (or the application of a very reduced quota),
- Absence of some restrictive regulations regarding the banking and financial system,
- Absence of a control upon exchanges, etc.

Fraudulent tax evasion is present on a larger scale than legal tax evasion and it is based on fraud and dishonesty.

Even if there are many proceedings to make a fraudulent tax evasion, this can be classified in four categories (table 1).

For the delimitation of the frontier between legal and illegal tax evasion, the doctrine has systematized three criteria: the taxpayer's fiscal motivation, the forced use of civil law and the fiscal profit obtained from the respective operation.

Tax audit can provide useful information not only to the purposes of fiscal bodies but also, for example, to investors or even to a company's administrators, regarding the efficiency in taking decisions or the way operations were carried on in the respective company.

Table 1: Categories of fraudulent tax evasion

Fraudulent tax evasion	Explanations
Traditional fraud (through dissimulation)	*Traditional fraud* consists in the non-drawing up of documents asked by legislation in force or their incorrect drawing up. Examples: - Drawing up of false fiscal statements, when there are deliberately mentioned only a part from the realized incomes; - Drawing up of false customs declarations at the goods' import; - Sales without invoice; - Registration of fictitious expenses; - Recompense of some activities in a secret manner (for example, illicit work).
Juridical fraud	*Juridical fraud* consists in hiding the nature of a contract or agency with the purpose of reducing tax liabilities. Examples: - An economic activity can be deployed under the form of an association without lucrative purpose in order not to be liable to the profit tax which naturally has to be due if this is deployed in participation in a business of full member type. - Setting up of commercial firms „in chain" by the same employer or group of associates immediately after their society came out of the period of profit tax exemption from payment (in the period when new established companies benefited by this exemption).
Accounting fraud	*Accounting fraud* consists in false or inexact entries in the accounts which affect the balance sheet, having as a result a diminution of tax liabilities. Examples: - Entries with the purpose of reducing the results; - Setting up of passive accounts with fictitious nomenclatures; - Illegal liquidations and liquidations at overestimations; - Undisclosed reserves; - Wrongful entries with legal documents; - Entry of unreal figures in commercial ledgers; - Concealments of parts from profit by omission; - Booking of expenses and fictitious invoices etc.
Fraud by evaluation	*Fraud by evaluation* consists in the subevaluation of the amount of taxable matter. Examples: - diminution of stocks' value and overestimation of liquidations and provisions with the purpose of delaying the profit - in the case of authentication of buildings' alienation acts, the parties often understand each other that the sale price registered in the notarially certified act of sale be inferior to the one practiced in reality, in order that the stamp tax be calculated at a smaller price.

In conclusion, fiscal management consists in the administration of the company's fiscal side, so that be ensured the observance of regulations with fiscal character and be optimized the level of pressure of taxation on condition that the realized gain justifies the efforts made.

Yet, fiscal options at the level of the economic agent have also limits such as:

- juridical limits, in order not to slip down in tax evasion.
- opportunity limit which derives from the company's general policy confronted with certain strategic objectives. Some fiscal options can contravene to long-term objectives regarding the imperatives of the capital's financing or mobility. Therefore, the profit diminution through fiscal techniques can reduce the investors' trust, diminishing their interest and deteriorating the company's image on the financial market. Also, even in an environment where the financial market hasn't a very important role (as it is the case of Romania) there are situations when the board of administration or the company's managers have an interest that, through methods and options of any nature (including the accounting and fiscal ones), to achieve a bigger declared profit. This behavior can be explained by the fact that the management position and the managers' remuneration are often related to performances in terms of profit realized by the company in a given period.

Taking into account the definition given to the fiscal management and the limits specified below, we can emphasize the following objectives of the fiscal management:

- Diminution of pressure of taxation, as an absolute size and as share in the turnover;
- Deferral in time of pressure of taxation;
- Use of fiscal variable with the purpose of settlement in time of the level of the profit registered by the company;
- Assurance of carrying out the company's tax liabilities with a very reduced cost and diminution of fiscal risk.

For the fulfillment of each objective, the company will adopt proper fiscal policies.

The diminution of pressure of taxation supposes as a rule, the diminution of taxable profit, because the possibilities to influence other components of the pressure of taxation are rather limited. This objective can be realized by using some evaluation methods, through the optimum determination of profit or through reorganization operations.

The deferral in time of pressure of taxation is the objective which offers most of the possibilities of realization. In conditions of inflation, its importance increases due to the favorable influence it has upon the treasury situation.

The company's interest is not always satisfied through diminution or deferral in time of pressure of taxation. There are situations in which it is preferable to declare, in annual accounts, bigger profits than those actually realized in the fiscal period, either to ensure a relatively constant level of these profits from an year to another, or with the purpose of distribution of regular dividends, either to transfer them in more generous fiscal territories, or for reasons of image, financial or commercial nature.

In all these situations, the fiscal instruments can be used successfully. Sometimes, even some components of the company's strategy make no sense but in the context of the fiscal advantage they offer (fiscal leasing, constitution of subsidiaries in tax havens).

3. Techniques of fiscal optimization

Fiscal policy at the company's level represents the concrete manner through which there are used the specific instruments and techniques in order to realize the objectives of the fiscal management. The fiscal management supposes a series of activities and technical competences which can be synthesized as follows (table 2):

Table 2: Activities of fiscal management

Activities	Technical competences
Assurance of juridical supervision necessary to the application of tax liabilities	Selection and consultation of adapted and updated sources of information Identification of fiscal evolutions having consequences upon the company
Identification of the sphere of application of company's taxes and operations deployed by them	Identification of fiscal disposals applicable to the company and operations deployed by them Taking into consideration the evolution of fiscal regulations and the analysis of their consequences
Identification of terms of realization of fiscal works	Determination of nature and periodicity of different fiscal obligations and their incidence upon the company
Realization and control of fiscal works regarding the taxes due by the company	Determination of tax base for the taxes due by the company Drawing up of fiscal declarations Operation of taxes and charges Detection of anomalies after the effectuation of the control
Participation to the evaluation of fiscal options	Sighting and analysis of different fiscal options of the company Simulation of the effects of fiscal decisions Evaluation of financial impact upon the fiscal decisions

Fiscal optimization is realized at two levels:

A) at the level of fiscal regulations, by the retention of the most appropriate fiscal options, among those proposed by law and by the exploitation of fiscal advantages offered by the fiscal law;

B) at the level of management decisions, through the integration of the fiscal parameter in taking decisions.

A) The identification of optimum fiscal options aims especially to obtain one of the following advantages: deferral in time of tax liabilities and diminution of the tax base for the taxes due by the company.

The deferral in time of tax liabilities can be realized through a set of fiscal measures such as:

- appropriate use of evaluation methods at the entry of goods in patrimony,
- appropriate use of evaluation methods at the output of goods from patrimony,
- optimum use of amortization systems,
- constitution of provisions;
- choice of the VAT term of payment (monthly, quarterly, half-yearly or annually);

Regarding the evaluation at the entry in patrimony, if the company has an interest to defer a part from the pressure of taxation, then it will act so that a greater part from the expenses that could be found in the entry value (purchase cost or production cost) be considered expenses of the period, thus enjoying the immediate and integral deductibility. The other way, if we desire the accounting determination of a bigger profit, then there will be included in the entry value as many expenses as possible. In this case, the deductibility of the respective expenses is deferred till the output from patrimony (in case of stocks) or till the moment of the amortizations book entry (in case of fixed assets – within the limit of the degree of use).

Evaluation at the output from patrimony of interchangeable (or fungible) elements, as stocks and securities, can be made through various methods. Here also, the fiscal interest recommends the

use of the method which allows the evaluation at the biggest price. In conditions of inflation, such an approach is better also due to its financial implications.

The fact that legal regulations allow the use of three depreciation systems for fixed assets, offers the possibility to the company to choose between a faster or a slower recovery of the amounts invested in immobilizations. From a fiscal point of view, it is favourable the method of depreciation which defers the pressure of taxation, that is the method which allows a faster recovery through value depreciation of fixed assets. The systems of regressive and accelerated depreciation are also useful to fiscal management objectives: in the first years, the expense with the depreciation is bigger, so the fiscal profit and the tax are lower, while, in the last part of the normal duration of functioning, the depreciation is lower and it is paid a bigger tax.

Provisions, whose constitution is based upon the probability of appearance of losses, risks or depreciations, represent an instrument privileged by fiscal policy as far as their fiscal deductibility is admitted. At constitution, the taxable result diminishes, without generating payments, and at cancellation or diminution there are discovered incomes which don't generate incomings.

The company's fiscal options can aim to minimize costs with the due taxes. Among these, we mention:

- Option to be registered as unincorporated enterprise (income tax payer) instead of trading company (profit tax payer). This option has become more and more attractive for many enterprisers in conditions of the introduction from 2009 of the minimum tax, through OUG no. 34/2009.
- Option of companies with annual turnover inferior to the limit of 35.000 euro, to be VAT payers. Exporters can be interested to choose the VAT payment, thus having the possibility to recover the VAT paid to purchases, as well as the little tradesmen or service providers, who will deduce the VAT corresponding to supplies and will transfer the right of deduction upon the clients. In this way, the VAT is no longer considered an element of expense, so it will not influence the profit and loss account.
- Option to invest the profit in the production or purchase of technological equipments, with the purpose to benefit by the total profit tax exemption, according to the Law 329/2009.
- Restructuring of companies as fusion or assets' distribution; the advantage of such a measure is that the possible loss of one of the companies is deductible from the profit of the company resulting after the restructuring.

Fiscal management has not in view only the national frame, but it is also extended to the relations of the company with other countries. There are taken into consideration the possibilities of optimization of treasury flows in conditions of international financial, commercial and fiscal assemblies.

Also, the enterprisers' interest to concede to state authorities as less as possible from the realized incomes incites to optimum determination of profits, on the basis of a real international fiscal strategy. This method of fiscal optimization ca be used with good results at the level of groups of companies, through the transfers of profits between the companies from the same group, so that in fiscal territories with a high quota of tax, the profit be smaller or inexistent, while where taxation is made in more favourable conditions, the profit be as big as possible. The practical realization of this objective is made through the transfer prices between the group's companies, through the control of inter-group circulation of licences, certificates or technologies or through the creation of „captive companies".

B) Management decisions and fiscal options

Management decisions which can have fiscal implications, generally aim to choose the company's juridical form, decision of investments, choice of instruments of money investment, of financing modalities, of the allocation way of the net profit etc.

The decisions of money investment are taken depending on the risk and efficiency, but also on the fiscal advantages correspondent to each category of investment (tax exemptions, smaller quotas of taxation etc.).

The decision of investments must take into account the fiscal parameter. We shall analyze first of all the fiscal implications of the decision to buy or to hire a frozen asset in leasing system.

- In order to buy the asset, the company must establish a financing plan. The fiscal cost of financing varies depending the financing source: internal (self-financing) or external (increase of capital or loan). If the company is the owner of the frozen asset, this will appear in the balance sheet. This thing allows the thirds' information upon the content of the operating capital disposed of by the company. Moreover, the company could deduce its expenses with the depreciation and maintenance of the respective goods.

- In case it resorts to leasing, the company uses the hired asset for a certain period, having the possibility to buy it at the end of the contract at a pre-established value (residual value). The leasing has the advantage of flexibility, but it is more expensive, despite the deductions offered to the company. It allows the differentiation in time of the tax as a result of the deduction of royalties during a period inferior to the amortization period. In a fiscal plan, companies which resort to leasing benefit more rapidly by a tax saving because the annual royalty is in most of the cases bigger than the annual amortization expense.

The decision of financing must take into consideration the following aspects:

- through indebtedness, the companies benefit by a tax saving, as a result of deductibility of interest expenses (total deductibility in case of banking loans and limited deductibility in case of loans from associates or thirds) and by depreciation expenses.

- In comparison with financing through loans, financing through leasing has as a fiscal advantage the fact that royalties' expenses are bigger than the amount of interest and depreciation expenses. Royalties are submitted to VAT, which is deductible.

- Self-financing has two components whose fiscal cost is different: current self-financing or of maintenance, formed of annual liquidations, which allows for the compensation of immobilizations' depreciation, and self-financing of increase, which represents the net income reinvested in the company.

The depreciation expense generates a fiscal economy through taxation and also acts upon the capacity of company's self-financing, an action that could generate superior economic and financial results in the future.

Conclusions

The interdependence between accountancy and taxation is decisive within the company's fiscal management, even on conditions of incompatibility of some of their rules. The cause of this incompatibility is the fact that the accounting principles regarding evaluation and economic calculus are not convergent in all cases with the fiscal ones, which do not subordinate to the presentation of a true and faire view of operations that are taking place within the company. The study object of fiscal management is constituted by the analysis of distortions resulted from the incompatibility between the fiscal rule and the accounting one and the determination, on the basis of this analysis, of the strategy, fiscal risk and company's fiscal efficiency.

Within the legal frame created by the public authority, the company has the possibility that, in order to solve a problem, to choose between many methods and techniques whose fiscal incidences are different. Fiscal management proposes the optimization of pressure of taxation in conditions of efficiency and within the larger frame of the company's total management. Yet, the options in fiscal matter at the level of the economic agent have also limits. First of all, there is the problem of juridical limits, in order not to slip down in tax evasion. Then, we have to take into account an opportunity limit which derives from the general policy of the company confronted with certain strategical objectives. It happens sometimes that the best fiscal choice not to be, in a compulsory way, the best solution for the company from the point of view of its development

strategy. Some fiscal options can contravene to long term objectives regarding the imperatives of the capital's financing or mobility. The profit diminution through fiscal techniques can reduce the investors' trust, diminishing their interest and deteriorating the company's image on the financial market. Also, even in an environment where financial market hasn't a very important role(as it is the case of Romania) there are situations when the board of administration or the company's managers have an interest that, through methods and options of any nature (including the accounting and fiscal ones), to achieve a bigger declared profit. This behaviour can be explained by the fact that the management position and the managers' remuneration are often related to performances in terms of profit realized by the company in a given period.

The effective realization of fiscal management objectives takes place through the company's fiscal policy, as a concrete manner of use of specific instruments and techniques of fiscal optimization. Therefore, fiscal policies chosen by the company with the purpose of diminution or deferral of pressure of taxation can refer to the optimum determination of profits, restructuring operations, choice of the company's juridical form, depreciation methods, choice of the VAT taxation system, decision for investments, instruments of money investment, modalities of investments' financing, the way of allocation of the net profit etc.

The decision for investments and the financing one take into consideration the deductible character of some expenses (expenses for interests, depreciation, provisions, royalties etc.), and their values constitute important variables for the fundamentation of the respective decisions.

Each tax that the company has to pay for the obtained profits/incomes or for the deployed activities has a date of payment stipulated by the fiscal legislation. What can be interesting for the company's management is the modality through which all these payments are joined in a general plan of recurring payments, in other words, the way in which the company's treasury will be affected as a result of the carrying out of tax liabilities.

In conclusion, we can affirm that fiscal regulations must be carefully analysed, not only from a strictly accounting point of view, but also from the perspective of the implications exerted upon the fundamental financial indicators which characterize the company, as well as upon the decisions of investment and financing as a whole. In this way, the manager can identify the most efficient ways of growth of his company's value, by finding an optimum from a fiscal point of view.

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DIRECTIONS FOR IMPROVEMENT OF THE MANAGERIAL ACCOUNTING

Oprea CĂLIN[*]

Abstract

This paper presents the actual accountancy methodology and costs calculation in a single circuit which considers the collecting and distribution of them related to their destination – on calculating articles - does not allow the distinguished reflection of the expenses depending on the economic nature. We are presenting some consideration for general organization of the accountancy and the production expenses especially in two circuits, one depending on the economic nature in the general or financial accountancy, on their destination, in the managerial accountancy. In the second part of the paper we present directions for improving the costs calculation that respond better to the companies' management.

Keywords: *managerial accounting, cost calculation, direct costing, cost analysis, cost calculation methods*

Introduction

The current methodology for accounting and production costing in one circuit (Călin, 2003), which is considering the collection and their distribution as their destination - the calculating articles, does not allow reflecting the distinct economic costs by nature. This makes it harder to identify ways to reduce costs and particularly materials costs of production which in our economy have a fairly significant percentage, setting the smooth efficiency indicators of economic activity based on unit production costs, calculate the efficiency of the final results of the company, setting the assets situation and timely preparation and presentation of current financial statements (balance sheet, profit and loss, etc..) which are required to be published. Here are a few reasons for which some authors have decided to organize general accountancy and managerial accountancy in particular in two circuits, one depending on the economic nature or financial accountancy and second, in the managerial accountancy.

Proposal for improvement of the Class 9 "Management accounts"

About the way how managerial accounting or management organization chart of accounts in general is designed and the operation of accounts in Class 9 "Management accounts" of this plan can be a series of proposals for improving the methodology of calculation of the cost on calculating objects (Călin, 2007).

Thus, to specify the operation of each account referred to in this class, bear in mind that the ultimate aim of registration with their expenses is not just "venting" them in order to determine the

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total by destination on types of activities, but calculating the actual cost of on calculating objects and deviations from the predetermined costs in the same structure. It implies, first, that the expenditure of financial accounts to be grouped collected and distributed in managerial accounting, regarding their use and sequencing of strict calculation of the unit cost of product. It is this latter issue that is not respect and we think that can be achieved by operating the following concept of functioning of the accounts in Class 9 (see diagram 1).

Diagram 1.
Operation of accounts in Class 9 "Management accounts"

D 901	"Internal settlement regarding expenses"	**C**
Real cost of the finite products (account:**931**) Actual cost of the production in progress (account:**933**)		Production costs taken from financial accounts which are registered by their economic nature and management accounts recorded by destination (account:**921,922,923,924,925**)

D 902	"Internal settlement regarding the obtained production"	**C**
Actual cost of finished products obtained (account:**921**) Actual cost of production in progress (account:**933**)		Standard cost of finished products obtained (account:**931**) Price differences related to finished products obtained (account:**903**)

D 903	"Internal settlement of price differences "	**C**
Price differences related to finished products obtained (account:**902**)		Price differences related finished products produced, distributed (account:**931**)

D 921	"Basic business expenses "	**C**
Direct costs of core business (account:**901**) Costs of auxiliary activities (account:**922**) Indirect costs of production (account:**923**) Administrative overheads (account:**924**) Sales Expenses (account:**925**) Actual cost of finished products and production in progress		Actual cost of production in progress (account:**933**) Actual cost of finished products obtained (account:**902**)

D 922	"Costs of auxiliary activities"	**C**
Collected expenditure (account: **901**) Mutual settlements (account: **922** in analytical)		Mutual settlements (account: **922** in analytical) Breakdown of expenditure on consumer sites (account:**921,923,924,925**) Actual cost of production in progress (account: **933**) Actual cost of production goods (account:**902**)

D 923	"Indirect costs of production"	**C**
Indirect costs of the main production sections (account:**901**) Costs of auxiliary activities (account:**922**)		The share of indirect costs of the main production sections distributed by calculation objects (account:**921**)

D 924	"Administrative overheads"	**C**
General administrative overheads (account:**901**) Costs of auxiliary activities (account:**922**)	Administrative overheads share distributed by calculating objects (account:**921,922**)	

D 925	"Sales expenses"	**C**
Sales expenses (account:**901**) Costs of auxiliary activities (account:**922**)	The share of expenditure allocated by calculating objects (account:**921, 922**)	

D 931	"The cost of the obtained"	**C**
Standard cost of finished products obtained (account:**902**) Price differences related to finished products obtained (account:**903**)	Actual cost of finished products obtained (account:**901**)	

D 933	"Cost of production in progress"	**C**
Actual cost of production in progress (account:**921**)	Actual cost of production in progress settled on account of expenses incurred (account:**901**)	

Applying this concept, although the results in cost calculation on computer objects to determine the actual deviations from the predefined costs, and other variants based on the concept shown depending on the method of calculation used, are nevertheless a number of limitations (Călin, 2008). Thus, we believe that the main limit is given that accounting is organized in double circuit leading to a large volume of work, which will cause many businesses to waive the second circuit - managerial accounting and cost calculation - as a result overall activity may be established on the basis of financial accounting, bookkeeping and making settlement that allows the tax line and the preparation and timely submission of annual financial statements. This leads to lack of information necessary for decisions of the managers, and, above all, to drive the production process. The lack of such information actually leads to ignorance of the economic cost, the unit cost of output, the expected cost (i.e. preset cost on calculating objects and cost budgets), the deviations of actual costs from the preset costs - and budget control for the budget for development cost of the analytical results produced and the internal structure of the company, the real bases for assessing stocks of finished goods and production in progress, etc., strictly necessary information for internal business analysis of operating decisions on short and medium term, the definition of development strategy and trade policy of the company, etc.

Removing those limits and determine the companies to organize together with financial accounting the managerial accounting and cost calculation, so that it can meet all the requirements of internal and external management of business, including timely preparation and submission of statements financial, can be achieved by applying an integrated model of financial accounting and management of costs and their calculation.

The proposed model envisages a merger between Class 6 accounts “Expenditure accounts” and those in class 9 "Management accounts" of the general plan of accounts in compliance with grouping of the financial accounting on the three categories - operating expenses, financial expenses and extraordinary expenses-, monthly costs settlement through the profit and loss accounts for the outcome in the global financial accountancy, but with the possibility of establishing analytical results in managerial accountancy.

Under this concept, calculating accounts in Class 9 in which the spending will be registered by purpose will be included in class 6 to reflect the operating costs by destination and by nature, maintaining accounts and financial costs of extraordinary expenses, and at the end of the period of all management accounts will be closed through profit and loss account to enable comparison of costs with revenues and determine the final outcome.

To do this improvement, accounting information system for collecting operating costs and costing of production can be organized in two variants, namely:

a) the usage in the whole system costs and costing calculation registration, the cost structure elements (nature of expenditure) grouped by function and the direct and indirect costs using calculating accounts in Group 92 of the general chart of accounts, which means that the process of collecting expenses from all structures which generate costs to consider destination and in doing so, the nature of expenditure. Monthly, expenditure outlined in this vision can settle on revenue for the outcome, but it and can be calculated and allocated to determine the actual cost of a given product, orders or semi-product which in its initial phase will receive expenses directness, also ordered by the economic nature;

b) maintaining the registration system of operating expenses - which form the basis of production costs - the structure of the calculating articles, but its inclusion in a largest possible number of items of expenditure that is a based by economic nature, that correspond to the primary elements and complex expenditure ratio, and in particular indirect substantial decrease in cost of the products. In this case, indirect costs should be budgeted and followed by identifying types and their distribution in the cost of the products and must consider both the destination, places that they rise and economic structure by nature, so that they occur after the product cost structure together with other direct costs.

Proposals to improve methods of costs calculation

Operative and future management of any business and hence, of any economic unit requires improving the methods and procedures used for this purpose and, within them, costing methods have an important place. This improving should cover both the need to obtain essential information to include data on cost of production and traceability pre-operative compliance with the expenditure budgets and the determination of reasonable estimates, to allow optimization of the relationship of the workload, cost of production and profit (Călin, 2005).

So, ultimately, improved costing methods aimed at providing information leading to the development of science-based decisions, fast and efficient ones to intervene actively and fully in the organization and management of the production process.

Costing methods should become effective management tools to business managers, active tools of analysis, control and forecasting.

Traditional methods of cost calculation based on actual production costs, which are currently used in our country (global approach, phases method and orders methods) only allow for a control of compliance with the level of postoperative costs. They doesn't make possible the operational knowledge of deviations from normal conditions of production deployment considered when budgeting or spending standardization in detail, on types, causes, places of production, etc.. As a result, the information provided does not allow knowing at the right time the noneconomical expenses, the difficulties occurred in the normal course of business, they did not consider the issues of optimizing the activity and minimize the costs. All these aspects burdensome substantiation of the management decisions to be taken in relation to costs, with the results.

To overcome all these shortcomings, which manifest itself in information on production costs, it must *improve accounting methods of production costs and costing* so that new methods

make it possible to provide current or future change effects and to determine the cost with satisfactory accuracy. This can be done several ways.

A first way is the improvement of traditional methods, which can be achieved by using the calculation of projected prices or already computed as is the standard or budgeted cost; they would become recorded prices. During the course of business it will be able to determine the actual cost by monitoring and recording operational deviations of actual expenditure from these prices. On this basis it can be created conditions to calculate the actual cost efficiency and to analyze deviations from the original provisions for short periods of time in order to understand the degree of compliance with budget production costs, the causes for such deviations and the adoption of most appropriate decision for their removal or mitigation. Effectiveness of such methods of calculation depend on the degree of reliance on scientific information on production costs, the budget forecast production costs and standards of expenditure (consumption of materials and labor).

Such conditions creates the possibility of applying the principle of management by exception, which is currently the most rational choice conception and providing useful information to beneficiaries at different levels of the enterprise and providing possibilities for upper-wide information system . As is known, the knowledge of the anomaly (deviation) is more important for management decisions than the whole mass of records.

By applying this method of management the foresight aspect of the information is developing, which leads to ease of analysis, decision, and actions to improve business.

So, tracking production costs is done at the level of the production process, signaling all deviations from normal.

Another way is to study possibilities for experimentation, adaptation and generalization of modern calculation methods used in some advanced countries, or elements of them; for this purpose, a critical analysis of their features is required, taken in light of actual conditions in which economic activity takes place in our country and only then decide what methods can be adopted or what items may be taken depending on the opportunity to provide information on costs of decision making.

In this respect, we believe that the management at various levels of business activity can pay attention to *monitoring and calculating the cost of production expenses on places as it is called in the literature on cost centers or business centers*. These may include a production department, a workshop, a group of machines, installation, functional service etc. Monitoring activity and calculating cost on locations expenses aim is to tighten the responsibility of each employee in economical expenditure of material and financial resources that were provided to achieve a certain volume of activity. This method contributes to strengthening economic management, namely to increase the economic efficiency of business.

It is necessary that the information about the cost of production to show that expenditures are considered normal under certain operating conditions, as a certain level of appropriate standard activity and, therefore, to be incorporated in production cost; however, to reveal which unforeseen expenses arise in the normal operations of the company accidentally and it should not be incorporates in the cost of production. In some developed countries these costs are passed directly to final results, because they calculate the total cost. This would you have a great importance because the management know the degree to which work activities and the undertaking of fixed costs should not be incorporated in production cost due to a lower activity level than that normally found in forecast calculations, i.e. the loss of subtasks (improper activity) which reduce the overall outcome. In our country, in the current cost accounting system the cost of subtasks is also determined which usually is not included in cost of products, but is reflected directly in profit or loss. In the subtasks costs the costs of scrap and losses caused by technical failure of the production are included.

Such a costing method, known as the "rational imputation", provides information to the leadership to watch if the business falls within the normal, to examine carefully the two major categories costs, variable and fixed and determine the level of activity influence the cost of production.

We consider preparation of various cost budgets for various sectors of business (production, sales, administration, etc.) of particular importance for effective management of business, each of them having a certain amount of activity. Based on these types of budgets the general budget is drawn up for the entire enterprise and one can determine the forecast results of each activity. Respective budgets can be developed in the production departments, workshops, groups of machines, functional services etc., so at the level of costs places as activity centers and at the same time responsibility places.

Such a way of management information enhances and deepens the expected character of information on production costs and facilitates the control of production costs in relation to the achieved level of activity, as the basis for decisions regarding the level of activity that the company should reach to achieve efficiency.

An important role is also played by the knowledge of the information on variable and operational costs, fixed and costs structure costs. Based on the information on variable costs of a particular period the management may provide direction for any amount of their activity level, since these costs vary with the volume of activity and volume production capacity and their related costs, i.e. fixed, remain unchanged. This allows short-term decisions. Not like this stand the problem with the costs structure, which are generally fixed for a certain volume of activity for a certain period of time in which the activity fluctuates around an average. Information about these costs are important for management because they remain fixed, increased or decreased level of activity compared to the average leads to a change in the opposite direction of the production cost, which requires particular attention in future decisions as a result of difficulties providing an optimal activity level, considered normal. On the basis of such information is taken long-term decisions such as those related to investments that result in changes in production capacity. But as problems for short term decisions are different, and have the largest share, the information on variable costs have the largest share of information about the costs of production that serve to substantiate decisions.

Also as a method of analysis and operational information on the economic activities, which enables operational decisions for short period, is the *Direct-Costing method or variable cost approach*. This method is also based on dividing the costs of production and sales in variable and fixed, which facilitates decision making due to the fact that make out more operative relations between costs, prices and volume activity. Based on information supplied to it, management can easily solve some fundamental problems for decisions such as the unit cost of production (of course only form of variable costs), total fixed costs, the products to be manufactured to achieve a more profitable variety, quantity of products to be sold to achieve a profit, production volume to be made to maintain the same level of profit if the selling price should be decreased or the selling expenses should be increased, the amount with which the profit increase by dropping the unprofitable products and customers, the case when the management can accept a sales at a price below the variable cost. Also, based on information provided by this method, the management knows how to increase production volume to meet a certain increase in the number of employees, a situation that can produce a product whose sale price does not cover the costs (i.e. when the sale of unprofitable products contribute to the highly profitable sale items), boosting profits at the expense of lower sales of those products whose contribution to cover fixed costs is low, boosting profits at the expense of production and sale of products whose retail price is greater than unit variable cost, even if the total cost is greater than or equal to him to cover all fixed costs, such sales should be as wide and as the

need to increase the overall volume of sales to make a number of products unprofitable to profitable products, which are products and markets that carry the highest profit, etc.

Of course, in the current calculations of costs prevailing in our country, involving, in general, a total cost (full), this method does not finds application, since it determines only a partial cost that would distort the analysis results and could not be used as a basis for determining the selling price and fixed costs are not demarcated in time to the production activity that has given rise mostly, but depending on the activity of selling. Some corrective actions such as the distribution of fixed costs in proportion to the variable ones, or gross profit contribution, this method could lead to a full cost and then it would serve both the production cost calculation and the determining the final results and analysis by product and by product types, thus providing the management information base on which can take decisions to ensure maximum return on entire business.

Given the constancy of variable costs per unit of product and fixed costs over time and to a certain volume of activity, this method can be applied to business forecasting and management, enabling the calculation of the unit cost, total variable and fixed costs, profits and profitability, etc. corresponding to the workload of the future periods.

Direct-costing method provides additional information if one apply within the business departments, sites or activity centers expenditure (cost) in combination with standard cost method, i.e. following a series of separate products costs and using standard costs and flexible cost budgets, which enables the detailed analysis of deviations on places, types, causes and responsibilities.

Due to mechanization and automation of production processes, information about the costs of maintenance and operation of equipment, those on intensive and extensive use of surface capacity and production, on costs during breaks, on the profitability of each machine or production center, is becoming increasingly necessary for management. All this information is obtained by the management by applying the MHR method (Machine-Hour Rate). By the information provided, this method allows the exercise of operational control over the use of production capacity not only on the whole company, but on each division, group of machines (production facility) and even on each machine, which reinforces the responsibility of employees to efficient use of each machine or machine group. This method also provides information about the deviations of the actual material expenditure from the standard ones and the end of the period provides information about the deviations of actual expenditure from the standard ones of the production centers as places of expenditure, on types of costs and causes, which contributes to strengthening the responsibility of employees.

Decisions for the rational use of materials and financial resources and cost optimization are facilitated by PERT-COST method. This method is both providing management information about the forecast lead times, production costs, unit cost of a particular goal (product, work, service) and an operative method by which to determine and pursue infringements on time and phase. By the continual updating of projections based on actual data, replacing original data with the real objectives during the execution, the PERT-COST method gives management the opportunity to continuously monitor the developments and to intervene with corrective measures when there are disturbances and deviations the original provisions. So, it is a way to provision and control of execution time and cost.

All these methods presented here can be adopted only as regards their nature and their greater power of operational analysis and information; the fact that their technique can not give a full charge (in full) which must incorporate all actual expenses requires some improvements that are to be implemented successfully.

Improvements of the costing methods is necessary because in terms of today's technical progress, when most production costs are direct costs and the share of direct and indirect costs is changing with a bias for the direct. In such circumstances, information on the nomenclature and share of the items or items of expenditure in the cost structure of production is of key importance

for managerial work, not only for understanding the directions in which it should act mainly to detect and mobilize internal reserves, continuous and systematic reduction of costs and, on the basis of economic efficiency but also to know the accurate cost of production. The latter is necessary to achieve, whereas, as indirect costs have a higher share in total production costs, the production cost is less accurate and therefore in such cases, management needs to know the costing methods and the criteria for allocating indirect costs to be taken to determine the actual cost of products as much as possible. This is required, especially since the conditions of technical progress creates the possibility of adopting operational costing methods such as standard cost method, the direct-costing method, PERT-COST method, MHR method, ABC method, etc., and criteria for allocating indirect costs in product cost such as the number of machines, operating hours of machines (given that the largest share of indirect costs is due to machinery maintenance and operation costs), differential allocation criteria on each item of expenditure, etc.

We appreciate that from this point of view, *the standard cost method in standard single cost variant* is the best method for costing because it allows calculation with efficiency of the costs of deviations from the pre-effective costs and therefore the usage of the exception management method, cost analysis for determining subtasks costs, inspection of the budget and the separation of variable and fixed costs in order to determine the stiffness of the company, as well as it provide other indicators for the management by the direct-costing method, such as yield or equilibrium point threshold, the threshold for optimal activity or optimal point, coverage factor, safety factor and period etc.

The information given by the value analysis method are very important for the company's management, which aims to identify unnecessary costs, which have no influence on function, quality or service life of products. Based on information provided by this method, it can be determined an optimal ratio between the usage value, product function and manufacturing costs. This allows the company to achieve high profitability, especially the reduction in production costs and increase product quality and their functions that make them competitive on the market, even if the selling price increases.

This method seeks to optimize production costs from product design phase, based on thorough analysis and provide technical and economic solutions to manufacturing processes of each product under conditions that ensure minimum costs. The cost of the product should be optimal variant of the reunion of information on the costs of design, those with the consumption of materials and workmanship and to those caused by manufacturing technology, under the optimal performance of its functions and usefulness to consumers end.

So, the basis of the value analysis method is information on production costs. Therefore, the basic source for providing information necessary to decide on production costs is management accounting and cost calculation and, therefore, improving existing costing methods and careful study of the possibilities of adopting new methods or elements of these are issues that need to stay permanently in the management's attention.

Based on information on production costs one can take decisions about the price of products on ensuring economic efficiency of activity centers and on the organization and conduct of the production process. Therefore, information on production costs are strictly necessary elements for management work because it provides control based for economic activities, and on their basis the decisions for future work can be achieved and provides a control method of decisions.

To achieve all these objectives, relevant information must meet several requirements: to be of sufficient quality, real, accurate and contain data strictly necessary, to be operational, i.e. to reach the soon as possible, moving through the direct channels, to prove timely opportunity.

Given the nature of expenses to does not identify on the product (CIFU, CGS, GBC), it means that never information about the cost of production will be absolutely accurate, but they must be as close as possible to reality to serve in good condition to making the decision.

As regards their contents, information on production costs must contain exactly the data strictly necessary for deciding a particular issue, both in relation to actual costs and expenses in connection with standard total expenditure, on items and articles on places of expenditure, on products, etc.

Only under such conditions may be optimal decisions adopted - whether on short or long term - that contribute to raising economic efficiency, as incorrect information, insufficient or late, is tantamount to lack of information, whose effects are most negative for decision making activity and, therefore, for enterprise efficiency.

It can be shown therefore that the multiple implications that knowledge of information have on production costs in the management of economic units should increase to improve the economic information system of enterprise management and accounting so that its main source of data.

From the results presented it results that the managerial accounting contributes to providing information regarding the composition of costs and outcomes, which is of particular interest to managers. To achieve these goals is important to obtain and use operative information to enable decisions scientifically. Obtaining this information requires considerable financial efforts to create its own economic and development information systems, characterized by resilience, flexibility, precision and efficiency in which an important place is occupied by general accounting and managerial accounting mainly.

Managerial accounting information are confidential and are for internal use of the managers at different levels of economic organization. Only with such information is possible to take timely decisions for all types of unit to allow adaptability to competitive market conditions, to counter the disruptive exogenous and endogenous factors of each economic unit. To know the cost and profitability it must penetrate within the economic entity making use of managerial accounting. The need of information is fully supported by the developed market economy countries, where the provision of confidential information on costs and outcomes is the main attribute and stated purpose of managerial accounting.

So, the management work in contemporary stage of scientific and technical progress is inconceivable without comprehensive information, timely and accurate, that is the rationale underlying the decision. Both theory and practice demonstrates that, regardless of the economic system of which the company, its management, in order to achieve good results it has to know accurately, completely and timely the cost of the production.

The cost of the production is therefore of vital information by business entities in any industry.

The management by costs serves for modeling the entity's business processes in all its phases, from purchasing activity and ending with the sale and collection of product value.

Modern enterprise requires continuous knowledge of production expenses and on this basis, the cost of production. Thus, it can realize the economic efficiency of its work in order to determine the responsibilities and grant on a fair basis of material incentives to the employees.

Measures taken on line of improving national economic management, organization of production and work in industrial enterprises, require a substantial improvement in the calculation, record and analyze of production costs. This is because the cost is a synthetic indicator of the most important of the economic information system of enterprise seeking attainment of the principles of economic management. Information about the production costs show how material and financial resources of the enterprise are managed at every stage and operation of the technological process, at each expense or cost center, within each business or activities for each product, work or service which can be obtained in this activity, shows the conditions for the conduct of all activities of production and sale of the company. Therefore, the major goal of collecting, processing, transmission and systematic analysis of information regarding the level of production costs is the pursuit of economic efficiency of production as a result of the organization and management of this business and ultimately as a result of how it performs its duties as part of each employee.

However, information about the size of the cost of production is of great importance to the management of the company because it offers the possibility to know how much of the product

value is the value of inputs consumed in producing and selling the product and how much is the new value created.

Strict determination of the different kinds of expenses necessarily requires the application of the appropriate methods and techniques of accounting and costing, able to provide information necessary to monitor the process, "on the fly" and the operative deviations from standard costs; based on the analysis of the causes that led to those violations, the management of the company can adopt the most appropriate decisions on the future of business. The effectiveness of these methods depends also the efficiency with which they provide information needed by the management to take timely decisions.

That is why a different direction to improve the managerial accounting and cost calculation is to move away from the monthly calculation of final cost carriers, which requires a large amount of work. This operation will be performed at longer intervals of time, quarterly or annually, for calculation of expenditure on places of work or cost centers. This lead to the strengthening of the responsability for expenditure and hence the efficiency of the business.

Since those costs are reflected throughout the enterprise, managerial accounting should be seen as a basic management information system. The importance of managerial accounting for each level lies in the fact that:

• managerial accounting is the only way to explain the effectiveness of economic and reaching or departing from the purpose;

• the information provided by managerial accounting is management information for all costs generating sites;

• liability for the level of the costs regards all the hierarchical levels of management within the enterprise;

• each manager is responsible for the costs of the department which he leads.

The production cost is the most synthetic indicator of business activity characterization, which is why the permanent control of costs can track the quality level of the activity. Without permanent monitoring of costs it is not possible to ensure a rational management of the company. Control on costs, constitute a central problem of management for observing the management of materials and use of means of employment and business efficiency. This inspection is based on managerial accounting, the only one able to provide all the necessary knowledge of the costs, deviations from standard costs and the causes which generated them. It is clearly seen how the information relating the costs are the basis of the business control.

With modern management of the enterprise the managerial accounting information is taken into account in the analysis and control of the activity.

Thus, in the stage of production scheduling based on information provided by the calculation of costs the measures and the limits under the production costs will have to evolve are established. During the course of the production process the cost items are collected by some criteria, and periodically - or simultaneously - there is actual calculation of the cost of production. For knowledge or deviations from budgeted costs, per seat, influence factors and responsibilities are carried out comparative calculations of deviations. The results of the deviation analysis serve as a basis for substantiating the budgeted or standard costs for the next period. This method of tracking, analysis and production control is part of a cyclic circuit based on information provided by managerial accounting, known in literature as cyclic control specifically for cost management, control that is exercised:

• before the occurrence of costs, namely cost budgeting phase;

• concurrently with the development of costs, by pursuing usingit advanced accounting methods and calculation;

• after developing the costs based on effective calculation, performed using the methods of calculation.

Of these, the most important and effective cost control is performed before the onset of it and the least efficient, cost control after emergence, which can influence not last. It remains

necessary both for showing weaknesses and take necessary measures to eliminate them, and to consider the budgeting of the production costs of next periods. Hence as the cyclic control ends with no follow-up cycle of production, but it is resumed in the next cycle. Thus, in Romanian manufacturing industry the business cycle in terms of production cost control is generally a period of a month. In the cycle set, each manager, regardless of the hierarchical stage, is responsible for monitoring, control and adjust, based on information on costs, of the business sector or department within its responsibility.

Conlusions

Located at the enterprise level, and thus improve the economic information system of record production costs and cost calculation is necessary since the enlargement of functional autonomy is accompanied by the creation of conditions to exercise a higher level management functions.

Managerial accounting should not be viewed as an end in itself but as an important source for providing information related to costs, and act decisively to ensure a modern business leadership.

Hence, in the economic information system a central place is occupied by the information related to costs. Given this role, managerial accounting has become an important issue in an enterprise.

Regardless of the costing method used, in order to provide all necessary information decision system, a special attention should be paid to a more rational organization of the collection, storage, processing and transmitting of the information to all levels of decision. Computing techniques has produced major changes in how to do these activities contributing to achieving an effective system of cost control.

The cost information as part of the economic information system comprises a set of information from the cost and means of collecting, storing, processing and transmitting them to the decision-making system.

The process of data collection is particularly important to obtain quality information. To achieve rapid and accurate collection of data it is necessary to perform it at the places generating the costs.

Information on consumption factors are obtained by processing data on costs and pragmatic analyzing of the results. Information on costs of production must be made available to decision-making system as soon as possible, accurate and with real economic significance. To avoid unsignificant information to block channels of information and hinder the work of the leadership they should filtered. For this purpose, for each place of decision, his hierarchical level, the importance of items or cost categories considered representative, and the degree of variation in the level of costs of some products specifically pursued are envisaged.

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CHALLENGES OF INCREASING THE ECONOMIC AND SOCIAL RELEVANCE OF ROMANIAN R&D AND INNOVATION.

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Abstract

The topic of this paper is of special importance in the current context, when Romania has to cope not only with the effects of the economic and financial crisis but also with the EU Lisbon Agenda 2020 challenges, presented by the European Commission on the 3rd of March 2010 and recently adopted by heads of state and government leaders. Improving research-development and innovation activities is a central issue in reaching the Agenda 2020 objectives. The present situation is different from the one ten years ago when the previous Lisbon Strategy 2010 was launched. This new global landscape is to try not only the 2020 Europe Strategy, with its central point research-development and innovation but also the functioning of the economy in various member states, including Romania. Therefore, it is a dire need nowadays that the research, development and innovation activities at all levels be understood as instruments able to design solutions to economic and social challenges, even for recovery the economic growth. Based on the studying a vast specialized literature, the present paper asserts that the congruence between scientific activity's results and their ability to specifically address the needs of the society it serves, depends on various factors concerning the scientific knowledge providers, knowledge potential users, knowledge infrastructure and environment. The purpose of this paper is to analyse and assess how challenges related to the provision of inputs for research activities are addressed by the national research system, especially in the new condition of economic crisis. Its actors have to ensure and justify that adequate financial and human resources are most appropriately mobilised for an efficient R&D operational system, having in view the time horizon required until the effects of the R&D investment become visible by increasing R&D system performance and, also, for transferring the knowledge results into economy. Another aim of the paper is to analyse and assess specific barriers faced the circulation of the financial flows and research results: weak relation between university and industry, financing and barriers that must be overcome by business sectors, low absorptive capacity of knowledge users etc. Depicting the current strengthens and weaknesses of R&D mechanisms the authors intended to offer a scientific basis for decision-makers answers to the major challenges of 2020 Lisbon Agenda.

Keywords: *R&D financing, crisis an opportunity for innovation, academy-industry relations, absorption capacity, responsibility of researchers.*

Introduction

The Lisbon Strategy 2000 has had some positive effects on the EU economy but one of its main targets, i.e. 3% of GDP spent on R&D are not being reached. Total R&D expenditure in the EU, expressed as a percentage of GDP, only improved marginally (from 1.82% in 2000 to 1.9% in 2008).

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According to the evaluation documents[1] of the Lisbon Strategy's objective, the EU to become a knowledge economy was centered on an ambitious research and innovation agenda. The introduction of a 3% EU of GDP spending target for research and development (R&D) represented a gradual change in the importance and visibility of research and innovation policy at the EU level. There is evidence that many

Member States have prioritized public R&D investments.

The EU's key challenge remains making it more attractive for the private sector to invest in R&D in Europe rather than in other parts of the world.

European Research Area represents a shift towards a more holistic policy approach, promoting greater co-operation between Member States and industry, a stronger emphasis on excellence and smart specialization and removal of obstacles to researchers' mobility.

Lisbon Strategy included research policy (CREST[2]) began in 2001 to support the implementation of the policy frameworks on researcher mobility and careers, and which gave rise to the headline Lisbon target of spending 3% of EU GDP on research and development in 2002 at the Barcelona European Council. A 2008 evaluation concluded that the open method of coordination in research policy had proven to be a useful tool to support policy learning, but that it had only given rise to a limited amount of policy coordination.

Starting from these insufficiencies of the 2000 Lisbon Strategy implementation in the field of the R&D and innovation, the majority of the European Commission recommendations refer to the speeding up of the improvement of the situation in this field. The objective of reaching 3% of the GDP till the year 2020 ranks among the priority objectives, taking into account that a large majority of member states (19) still considers investment in R&D and innovation as a key challenge for the future. The achieving of this objective is quite difficult if we take into account that, according to statistical data during the 2000-2008 period, the public spending in these fields does not represent any actual increase in EU.

In this context, the challenge to reach the objective " 3% of GDP to research and development" is all the more difficult for Romania. In 2008, the share of R&D in GDP was only 0.58% in comparison with the EU average of 1,9%. The participation of the private sector, which ought to reach 2% of the GDP by 2020, is of only 0.13%, in decreasing compared to 2003, when it represented 0.18 % of the GDP.

1. Challenge of increasing the RD expenditure to 3% of the GDP

1.1. The Current Economic-Financial Crisis-Opportunity or Risk for the financing research, development and innovation?

When Joseph Schumpeter lectured on the economy at Harvard in the midst of the depression, he would stride into the lecture hall, and divesting himself of his European cloak, announce to the startled class in his Viennese accent, "Gentleman, you are worried about the depression. You should not be. For capitalism, a depression is a good cold shower."[3]. The present crisis can be also for the economic system like a cold shower, having positive effects, urging companies to come up with the best solutions for the enhancement of efficiency, by means of cutting waste and reshaping action directions.

[1] European Commission: SEC(2010) 114 final, COMMISSION STAFF WORKING DOCUMENT, Lisbon Strategy evaluation document, Brussels, 2.2.2010

[2] Commite de la Recherche Scientifique et Technique

[3] Robert Heilbroner : *The Worldly Philosophers* :The Lives, Times and Ideas of the Great Economic Thinkers, Penguin 2000

Under crisis circumstances, is a natural tendency to cut company costs, but the distinction between the types of expenditure that needs to be kept and the ones that can be done away with, constitutes a great challenge for decision-makers[1].

One of the victims most likely to occur when it comes to cutting expenses be they private or public, especially in economic and financial crises, is the field of research and innovation.

The practice of countries that managed to overcome economic crises successfully has proved that the stimulation of innovation is the most important condition to turn the crisis into opportunity. When private companies cannot invest in innovation anymore, governs should do this, having in view that innovation systems, with all its components (academic, industrial and public), are strategic national assets that need to be protected as much as the financial or the building sector.

The government of some EU countries have taken important measures in order to prevent the knowledge base contraction. In Germany, the Mittelstand Innovation Program (ZIM)[2], initially designed only for small enterprises, was expanded, under the current crisis circumstances, to December 31st, 2010, including enterprises of up to 1000 employees, supplementing the budget with 900 million Euros. The European Commission has appreciated Germany's initiative, considering that, even though research projects run a considerable degree of risk, it is necessary to sustain a level of industrial research that would maintain competitiveness during crises.

The experts in the field [3] present a series of recommendations for the R&D&I policies so that national economies may get out of the crisis as "winners" not as "losers":

1. Reshaping of priorities and allotting investments in strategic fields of science and technology, such as: nano-technologies, alternative energy, health, and life sciences;

2. Global thinking, that would encourage international investments in R&D programs, especially of countries that are not profoundly affected by the crisis, such as China, the Golf countries or Japan. These programs can become in the long run new platforms for complex cooperation;

3. Focussing on public programs, with the view to maintain and develop the knowledge basis of any economy, as a support for the launching of economic growth.

4. Supporting of performance, by means of the education system and the allotment of funds for research, development and innovation according to this criterion.

Unfortunately, in Romania after an increasing of the public RD expenditures starting with 2005, the share of RD in GDP is in a sharp decreasing since the last year if it will continue, many of strategic objectives should be compromised.

1.2. Relation between public and private financing

The most sensitive aspect of the financing R&D in Romania is stimulating the private sector to increase its contribution to total expenditures, taking into account the objective of raising its contribution to 2% of the GDP in 2020 and the fact that during the 2000-2008 period, the weight of the business sector significantly dropped, especially after 2003.

The issue of the measure in which the public support complement or substitute the private R&D expenditures is fundamental for the elaboration of consistent policies. From a theoretical point of view, there are pros for both hypotheses. Public support can constitute an incentive for companies with a view to launching or increasing the resources designed for R&D, since public

[1] Roger Smith : "R&D in the Financial Crisis", in *Research Technology Management,* May-June 2009

[2] EUROPEAN COMMISSION Brussels, 13.2.2009 C(2009) 1073 final, Subject: State aid No N 65/2009 − Germany, Temporary budget increase and extension of the R&D&I-scheme

[3] Sami Mashrom : "Innovate out of the economic downturn", Business Time, 30 December 2008

subsidies cut marginal costs and raise the profitability of research and development projects (complementarity effect). On the other hand, public support can reduce the private effort for this field so as the company may substitute its own financing of projects by means of public funds (substitution effect).

During the past decades, the literature [4]enriched with a series of studies that approach from various points of view and using specific methodologies, the issue of the relation between public and private financing of research and development and the impact of the subsidies over the dynamics of the private sector investments in this field. As a consequence of the general positive perception over the role of research and development in the economic growth, in all the developed countries the public support is strongly promoted. Governments encouraged in various ways the research and development activities from their own laboratories and institutes, financed university research and the research of non-profit organizations, offering contracts to public and private institutions and even grant subsidies to various private companies, being it directly or by means of fiscal incentives.

Governments are, also, concerned with the transfer and dissemination of technologies and the promotion of innovating companies, based on new technologies or products. Economic theory[5] has contributed to the gaining of consensus regarding the necessity of public support for the private R&D, claiming that research and development activities are, generally, more difficult to finance on a competitive market.

The need to correct the market failures that affect R&D field, the distinction between the private benefits gained from the R&D activities (impossible to be acquired on the whole) and the social activities, due to the nature as public goods of the R&D results, the appearance of the dissemination effects as well as the sub-optimum level, from the social point of view, of the private investments in R&D constitute powerful arguments, both in theory, as in practice, for the necessity of the subsidies from the public sector, that would supplement the private resources for the research and development field.

Even if the existence of market failures is accepted as a justification of the public support granted to R&D, including for the private sector, it is necessary to prove that the public R&D programs financed by public resources are efficient. That means that the principle of additionality is obeyed, namely the public subsidies are transformed into increases of "in- house" R&D resources but not to substitute the private expenditure, which at any rate ought to have been made by the companies.

The public support granted to the research and development performed by the business sector has to meet the criterion of economic and social efficiency, namely their research results have technological, economic, social and environmental impact.

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[4] OECD, 2001, Changing Patterns of Public and Private Financing of R&D; TIP, (2004), Input Additionality Effects of R&D Subsidies in Austria; Klette J., J. Moen, Z. Griliches, (2000) Do subsidies to commercial R&D reduce market failures? Microeconomic evaluation studies, "Research Policy", 29, p. 471-495; David P., B. Hall, A. Toole (2000): Is public R&D a complement or substitute for private R&D? A review of the econometric evidence, "Research Policy", 29, pag. 497-529; European Commission, ProInno Europe, INNO Metrics, European Innovation Scoreboard 2006, Comparative Analysis of Innovation Performance, p.8 şi 12; European Commission, European research Area: A More Research Intensive and Integrated European Research Area, Science, Technology and Competitiveness, Key Figures report 2008/2009, p.22, p.33, p.63, p.71.

[5] European Commission: ProInno Europe, INNO Metrics, European Innovation Scoreboard 2006, Comparative Analysis of Innovation Performance, p.8 şi 12; European Commission, European research Area: A More Research Intensive and Integrated European Research Area, Science, Technology and Competitiveness, Key Figures report 2008-2009, p.22, p.33, p.63, p.71.

If public funds are directed to projects that the company would have executed anyway, a faulty allotment of public R&D resources occurs. Only a relation of **complementarity** between the public and private financing that would legitimate the public intervention.[6]

The majority of EU member states decided to focus on the consolidation of a portfolio of mechanisms of maintaining the level of direct financing, simultaneously expanding and perfecting fiscal incentives. In countries like Spain, Portugal and Great Britain, this extension of fiscal incentives was mixed with a growth of direct subsidies. Even if there is currently no convergence towards an optimum level of fiscal treatments concerning R&D in EU countries, governments are acknowledging more and more the importance of fiscal incentives as a complementary mechanism of direct allotments for R&D.

In November 2006, the European Commission, in the paper "Towards a more effective use of tax incentives in favor of R&D" has underlined the necessity of new tax instruments that would encourage investments in R&D as well as the substantial improvement of the existing ones. There were defined the major components of a fiscal instruments, more efficient, stable and oriented to the European research and development. Tax incentives are considered as an important part of the general public effort that supports the research and development from the business sector in the European Union member states.

These orientations are more important for Romania as the experience regarding tax incentives granted to companies in order to supplement the R&D investment is reduced. The identification and dissemination of good practices can improve the situation of private R&D financing in Romania, even by efficiency of tax systems.

Is there a substitution or a complement effect of public funds over the private financing of research and development in Romania? To what extent can the supplementing of public funds have positive effects on the increase of R&D expenditures of the private sector? The answer to this important question needs a clarification over the specific features of private RD sector in Romania.

In Romania, the largest number of research and development organizations (approximately 63 % in 2006, according to the data of INSEE) can be found exactly in the « business sector », which features a very diversified structure, both from the organizational and the property rights point of view. Financed in a centralized manner before 1989 and left without any financing perspectives after 1990, at the mercy of an almost non-existent research and development market, the large institutes chose, under the pressure of a vague legislation, organizational forms of the most varied structures, some of which were straightforwardly strange. By means of joined pressures on the government, the R&D unions as well as on the professional researchers' societies, in 1994-1995, there came a financing at survival level, from a Special Fund, constituted from the compulsory legal prelevation of 1% of the turnover of private and public companies, under the claim that the research results were addressed to them.

Actually the inclination to invest in research was non-existent during that period of profound restructuring which led to the lack of desire to feed the special fund and therefore it was cancelled.

The dependency on public financing of the institutes from the business sector became manifest during the following period as well, although competitive financing, on the basis of programs, had as its consequence a relatively unimportant effect of « behavioral additionality »

Unfortunately, the manner of appointing evaluating committees, part of which were the managers of the institutes who applied for financing, the majority being from institutes from the

[6] In his presentation to the Berlin Conference in October 2007, Markus Koskenlinna, general manager of Tekes mentioned that, according to the research results, one euro of public R&D funding increases private R&D investments by 0.40-0.93 euros . In other words, the overall additionality of public R&D funding is 1.40-1.93 euros. One euro adds 0.93 euro.One euro adds 0.62-0.86 euro in Finland, 0.40 euro in Austria, 0.70 euro in OECD countries, 0.41 euro in Israel.

industrial sector, often transformed the evaluation in negotiation, according to vague and unclear criteria, of the crumbling of public funds, allotted in extremely reduced amounts, to a multitude of beneficiaries of public funds. The progressive improvement, both of competition financing on national programs within the National Plan for Research, Development and Innovation, 1999-2006, of the evaluation system, which established clearer and clearer criteria, more and more focused on the scientific value of the project, on its applicability and the competence of the team that sets up the research consortium, has done away with a series of drawbacks from the system of R&D public funds allocation.

Nevertheless, due to the way in which the proposal of projects have been evaluated in the framework of the National Plan for Research, Development and Innovation 1999-2006 programs, the largest part of the public funds was allotted to the technological institutes from the business sector, namely 60% in 2001 and 42 % in 2006 (INSEE, 2006).

Another important barrier in the way of research and development investment by the private sector has been, also, the low level of innovation culture, un- sustained by a system of technological transfer policy (institutes, transfer mechanisms, adequate legislation) or by risk capital policy.

The Research Program of Excellency, launched in 2005, with the purpose of it being an incentive for the growth of private research and development expenditure, failed to have visible effects in this respect. At the same time, the lack, up until now, of serious tax incentives for the investors in this field as well as of financial services and instruments that would diminish risks, as well as their inability to make up for the financial and commercial risk, has led to a reduced level of company research. The risk capital, in its incipient phase in Romania, had no visible contribution to the stimulation of the research and development activity.

All this triggered a contradictory evolution of the GDP weight for the R&D expenditures of the public and private sector in Romania. On the background of the increase of the R&D public expenditure, one can notice a decrease of the weight of the business sector, especially after 2005, when the total amount of R&D expenses represented 0.46% of the GDP in 2006, compared to 0.39% in 2001.

International or European institutions' reports regarding Research-Development-Innovation (R&D&I) either mention Romania as ranking last or last but one as far as performance is concerned, or include it in the "losing ground" countries[7].

The reconfiguration of the national R&D&I system in keeping with the international and European requirements called for substantial efforts in order to transform the Romanian R&D&I system into one whose institutions, mechanisms and instruments be compatible to international and especially European standards. The current stage of Romanian R&D system is the result of progressive improvements regarding institutional structure, mechanisms of financing, evaluating and monitoring, through the refining of R&D policies and their adaptation to the requirements of integration into the European Research Area.

The adoption of competitive financing, within the various R&D national programs that were run up to the present, starting with Horizont 2000, has been a expression of a new vision in the R&D funds allocation even if inevitable difficulties and sometimes unavoidable or avoidable errors have arisen. As a result of the extremely small amount of funds as compared to the demands, it was difficult for the evaluators, also involved in projects themselves, to select out of the thousands of project proposals applied within the national R&D programs the ones that would be given financing priority.

[7] European Commission, trend Chart, Innovation Policy in Europe, European Trend Chart on Innovation, European Innovation Scoreboard 2005, Comparative Analysis of Innovation Performance, p10.

The changes that occurred after 2005, with the set uo of the Excellence Research Program, have considerably reduced the tension between the R&D resources and the needs for funds. According to official statistics, the R&D investments grew significantly from 0.38% in the GDP in 2002 to 0.41% in 2005, 0.46 % in 2006, 0.53 % in 2007 and 0.59 in 2008. However, there is still much more to recover in order to reach the medium financing level of EU27.

A special challenge for Romania is reaching the innovation performance of the EU average level. It could be encouraging to mention the notice of European evaluators regarding the dynamics of the indicators that make up the Summary Innovation Index, which contributed to the increase of its value from 0.209 in 2004 to 0.277 in 2008[8].

During the past years however, Romania has lagged in the cluster of the "catching-up" countries from the innovation performances' point of view. If the situation should not be changed in the future, especially concerning certain indicators where Romania ranks among the last (for instance "publications per one million inhabitants" or "demands for licences per one million inhabitants") then it would be possible that European evaluators' estimations regarding the number of years that Romania needs to reach the average of European performances to come true, that is 22 years or more[9].

Innovation is also a major component of competitiveness. The Global Competitiveness Indicator, annually published by the World Economic Forum, offers a general image on the place of innovation with a view to increase competitiveness. If in the 2004-2005 report, Romania was mentioned as one of the countries that took a spectacular step in 2004, going from ranking 78 to 56 in the countries' top according to the Global Innovation Indicator[10], the latest 2009 Report[11], mention Romania on the 64 position, with a less favourable position concerning the Innovation indicator, namely ranking 75. Sub-indicators regarding the "innovation capacity" and the "availability of the workforce (scientists and engineers) necessary to innovation activity make it rank more favourably (64 and 56), but the "quality of research institutes" and the "cooperation between universities and the industry" are the most important weaknesses of the system (ranking 82 and respectively 73).

In the hierarchy of countries according to the type of economic competitiveness, Romania is included in the group of countries undergoing the transition from the "efficiency driven" stage to the "innovation driven" one. In our opinion it is of special importance that duration of this transition towards the group of innovation competitive countries to be as short as possible.

Beyond the responsibility of political decision-makers to raise the budgetary allotment for the R&D&I field which is totally unsatisfying for 2009 and 2010, or to pass incentive legislation for private investment in the field, beyond the responsibility of managers of institutes, research laboratories or university research centres for the efficient management of funds and the stimulation of researchers, there are aspects that pertain to the raising of awareness of each researcher with a view to raise the performance of the R&D&I system.

Even if the majority of studies[12] referring to the scientist's responsibility mostly deal with ethical and social issues, with the concern to avoid the noxious effects of the implementation of the

[8] ProInnoEurope, INNOMETRICS, European Innovation Scoreboard 2008.Comparative Analysis of Innovation performance, January 2009,p.58.

[9] See : ProInnoEurope, INNOMETRICS, European Innovation Scoreboard 2007. Comparative Analysis of Innovation performance, ; Steliana Sandu, Cristian Paun, "The Evaluation of the Possibilities to Recuperate the Discrepancies between Romania and the EU in the R&D&I Field, Working Papers Series, no.19/ 2008,The Romanian Academy

[10] 2005 World Economic Forum: The Global Competitiveness Report 2004-2005, Executive Summary, pdf. Version, p.18.

[11] 2009 World Economic Forum: The Global Competitiveness Report 2009-2010, p267

[12] European Commission: Responsible Science at the heart of policy making" in : Science and Society. Action Plan, Brussels, 2002, p.21; Michael C.Loui: "Ethics and Social Responsibility for Scientists and Engineers" in Friday Forum, University YMCA, Illinois, February 2009

research results into the society and the economy, with scientific rigor and cautiousness in the collection and usage of data and information, the individual responsibility is very important for increasing the scientific prestige of the R&D field embraced by each researcher.

As highlighted by Janez Potocnic, the European Commissioner for Science and Research [13]," "the opportunities offered by the research field also imply responsibility and obligation while ethics is a vital part of the research, from draft to publishing." The turning of research results into publications in international recognised journal or patents- one of the weak points of the Romanian R&D&I performance system- must become a personal concern, having in view, also, the higher demands regarding the periodical evaluation of researchers and professors.

Statistical data regarding the evolution of the demands for invention patents, as well as for granted and published patents, reveal an unfavourable situation. According to the Romanian Statistical Yearbook for 2010, the published and granted patents dropped from 876 in 2003 to 489 in 2008. The demands for submitted invention patents dropped from 1046 in 2003 to 1031 in 2008. Despite of these, only 230 come from research institutes and 178 from universities, individuals being the ones the most concerned with the patenting activity (466)[14]

Another major challenge is increasing the capacity of R&D&I European funds absorption, especially from Framework- Program 7. The increasing the absorption rate could supplement the current insufficient R&D&I investments. According to the European Commission data referring to the Framework Programme 6, the success rate from the point of view of the number of submitted projects is of 11.5%. As to the financing success rate, the figures are even smaller: 7.75%. If we compare it to the Romanian contribution to the FP 6 during the 2003-2005 period, there results a recovery rate of 66% of total funds. However, these amounts also take into account the support received by Romania by means of the PHARE program, which covers half of the Romanian contribution to FP 6. Without this money, only a third of the funds paid from the state budget would have been recovered.

The rate of success of Romania's participants in FP7 is only 14.18% compared to 15.98% Bulgaria, 23.20 % France, 15.42 % Greece, 17.94 % Poland, 18.19% Portugal, 18.74 % Hungary and 21.59% EU.

2. Strengthening research - industry relations and increasing the absorption capacity of research results

A critical problem for Romania is the still weak cooperation between the different types of research institutes and the industry. Public instruments seem insufficient to enhance the collaboration between the research sector and industry. At present, the main cooperation framework between research and the productive sector consists of the national RDI programmes and direct orders (RDI procurement). The legal framework and the financial instruments to stimulate research activity and the application of research results in the economy (i.e. risk capital funds for high-tech start-ups, and spin-offs) are weak, as are tax incentives to foster innovation activities in enterprises. There is a strong need for a friendly environment (legal, institutional) with respect to innovation in the private sector and for a coherent and attractive package of incentives for clustering and networking[15].

[13] European Commission: Ethics for researchers, Facilitates research excellence in FP7, 2007, p.5

[14] The National Institute for Statistics, The Statistical Yearbook , Romania 2010, p.54.

[15] Sandu S., Zaman Gh,Gheorghiu R, Modoran C (2009): JRC Scientific and technical Reports, ERAWTCH Coountruy Report 2008, An assessment of research system and policies, ROMANIA, JRC-European Commision, IPTS, EUR 23766EN/2, 2009

R&D projects achieved within national programmes exhibit a serious weakness in the exploitability of results. This is partially due to the fact that the projects are not sufficiently market-oriented, but also to a lack of consistent ex-post evaluation and monitoring of research results, which reduces the incentives for researchers to produce high quality, exploitable research outcomes. The intensity of patents, as one of the central indicators of the quality of knowledge production, is at a very low level in Romania, representing only about one percent of the EU average patents registered with both EPO and USPTO. Romania also ranks low among EU countries regarding the number of publications.

The technology-transfer and innovation infrastructure, namely the organisations specialised in the dissemination, transfer and valorisation of R&D results is still in its early development stages. The future development and consolidation of TTI infrastructure by the new specialised programmes might ensure a favourable framework to strengthen the partnership between enterprises, universities and R&D institution.

The focus on R&D mechanisms to stimulate an increase in the quality of human resources and of the research results, on intensification of knowledge transfer through closer relations between academy and industry are an important concern for different government bodies, NGOs and R&D institutes. The new instruments of financing, put in place since 2005 and improved with the new National Research, Development and Innovation Strategy and Plan 2007-2013, allow access of all R&D system actors to public funds, promote multi-annual funding and stimulate collaborative and multidisciplinary research and co-funding from a variety of funding sources.

Despite these good developments, the R&D system is still confronted with serious weaknesses regarding its performance and the governance of research activity. While the public financing system is gradually being transformed into a competitive one, the dynamics of business R&D funding are not positive. The contribution of the business sector to R&D financing has decreased starting in 2004 from 0.18 % of GDP to 0.14% in 2006, which is far from reaching the recent Lisboan Agenda target till 2020. The recent R&D and Innovation strategies and policy instruments aim to correct this situation. They include measures focused on stimulating the role of the business sector in R&D by means of fiscal incentives and venture capital for the development of innovative industries[16].

The results of the research performed in universities and laboratories of public scientific research, having a mainly fundamental and investigational nature, make up a research input important for many economic sectors (pharmaceutical, biotechnologies, etc).

Universities generate scientific knowledge, often lacking specific orientation towards a certain type of users, whose value can be considered as directly dependant on the capacity of the potential receivers to evaluate, assimilate and turn them into account. That is why, regardless of the external knowledge source, public or private, scientific or industrial, its absorption and assimilation at the level of the company cannot be achieved without effort, expertise and pro-active actions on the part of the researchers within the company.

A series of studies [17]have reached the conclusion that companies featuring a high level of absorption capacity have developed more numerous and sustained relations with research institutes than companies having a low absorption capacity. At the same time, their high absorption capacity increases the ability of the company to turn into account new scientific knowledge, of basic nature.

[16] Sandu S, Dinges M (2007):Impact of policies and public financing instruments on R&D investments, in Romanian Journal of economics, nr.1/2007, p.47

[17] Criscuolo P., Narula R (2002): A novel approach to national technological accumulation and absorptive capacity: Aggregating Cohen and Levinthal,., MERIT, 2002; Narula R.(2004): Understanding absorptive capacities in an "innovation systems" context: consequences for economic and employment growth, MERIT – Infonomics Research Memorandum series, cod 2004-00

The economic importance of the transfer of research results achieved in public research institutes or universities into the economic sectors represents a topic of special significance, especially under the circumstances of the current economic crisis.

The need for an ever more efficient cooperation between research and industry has made its mark into the consciousness of the governments of the European countries as well as of the United States throughout the ninth decade, being mirrored by the strategies and policies focusing on the diversification and strengthening of these relations that radically altered the theoretical models and enriched the practice from the field of innovation and technological transfer. The multitude of books and articles written on this topic during the latest years reveal that the issue of the relations between research and industry rose in the literature as a major topic[18].

In the case of knowledge transfer from the research undertaken in universities and research institutes, certain determinants of the receiver's absorption capacity have supplementary: the weight of higher education personnel, of the individuals functioning as an interface between the source of scientific knowledge and the business organization, research– mainly fundamental – having a ongoing, sustained nature, the existing specialized knowledge stock, similar to the ones already absorbed, etc.

There also arises the need to set up a shared platform of internal and external research in order to foster an efficient transfer of knowledge. This basis for shared scientific knowledge supports researchers in the company to identify and turn into account the results of the research undertaken in universities, allowing at the same time a more efficient communication process between the personnel of the knowledge source and the staff of the receiver.

A company having an high intensity for the fundamental research there will be able to turn into account, innovating, more efficient and promptly, the results of the scientific research from universities or research institutes.

When knowledge is mainly of mutual nature it is of vital importance to achieve direct interaction between the parties in order to establish an optimum transfer of knowledge. The more intense the relations between companies and scientists, researchers from universities and research units, the more capable a company will be to turn into account the results of public research in its innovating activity.

In the specific context of the relation between the public sector and the industry there can be noticed the need for the creation of certain support institutions – structures that would facilitate the link between knowledge creators and receivers, maintaining the absorption effort at the level of the company. In this respect, numerous authors have underlined the importance of clusters, of technological platforms, of transfer networks, of partnerships between universities and public research units, on the one hand and potential users, business organizations, on the other hand.

[18] Mansfield, E.(1991): Academic research and industrial innovation, in Research Policy, 20, 1–12; Mansfield, E. (1995): Academic research underlying industrial innovations: Sources, characteristics, and financing, in The Review of Economics and Statistics, nr. 77, p 55–65; Mansfield, E.(1998): Academic research and industrial innovation: An update of empirical findings, in Research Policy, nr .26, p.773–76; Mansfield, E. and Y. Lee (1996): The modern university: Contributor to industrial innovation and recipient of industrial R&D support, in:Research Policy, nr. 25, p 1047–1058; Grossman, J. H., P. P. Reid, and R. P. Morgan (2001): Contributions of academic research to industrial performance in five sectors, in Journal of Technology Transfer nr.26, p. 143–152; F. Narin, and D. L. Deeds (2000): An analysis of the critical role of public science in innovation: the case of biotechnology, in Research Policy,nr.29,p 1–8; Narin, F. and D. Olivastro (1992): Status *report:* Linkage between technology and scienc, in. Research Policy, nr.21 p.237–249, Henderson R.Jaffe A.and Tratjtenberg M (1998) : Universities as a source of commercial technology: a detailed analysis of university patenting, 1956-1998, în Review of Economics and Statistics, nr.80, p.119-127.

The literature in the field comes up with the notion of ***connectivity,*** arguing that it is the most important ingredient in the making up of the absorption capacity. Internal research and development also constitutes a mechanism that can stimulate connectivity and can also generate the absorption capacity.

The authors identify three additional mechanisms for the stimulation of the connectivity as follows: the nurturing of relations between companies and universities by means of research sponsorship, cooperation with colleges and graduates recruitment; research consortiums participation; teaming up with other companies that work on complementary research.

On the background of efforts on the part of developed countries governments with a view to improve fundamental research after 1990, the relations between the industry and the research organizations intensified, acquiring new characteristics, both theoretically and practically.

The new concepts of "strategic research" or "mission oriented" or " applied oriented" were considered as much more relevant for the description of nature transformation that occurred in the approach of the issue of innovation, where the borderline between fundamental and applied research is getting more and more blurred while basic research is preferred stimulated in those fields that have an applicability potential based on new principles or discoveries.

At present in Europe there are approximately 1,400 technological transfer units[19]. These started out as « industrial relations units » that would encourage the trading of research results. In time, many of these developed authorized personnel and services for the evaluation of inventions, patenting, licensing, and the spin-off and start-up development and financing, but also for an active approach of companies with a view to contracting based on arrangements. Based on a legislation of the Bayh-Dole type, implemented in many countries, universities were called to practice a policy of industrial property rights based on patenting and licensing, which led to the growth of the number of technological transfer offices.

The direct transfer of knowledge from higher education and research into the industry can be practically achieved in various ways, depending on a series of factors, among which the most important are the degree of transferability of the research results and the capacity of the industrial unit to absorb or use the new technologies.

It is generally considered that there are four **possible knowledge transfer methods** :

a) The direct transfer of the knowledge and technologies towards existing companies;

b) The offering by researchers of certain specialized services based on the know-how generated in the academic environment. These sometimes lead to the appearance of small companies that often (but not necessarily) live in symbiosis with universities;

c) "Spin offs, namely companies that spin off from an institute and have a well-defined market profile as well as a good start-up potential. Some of these need an incubation period within the university;

d) "Proto-companies", that are, generally, of high technological intensity, but which have got insufficient knowledge regarding marketing, production or management.

Universities could develop R&D strategies that would transform the above-mentioned centers in "excellency centers" on certain technology fields. Scientific parks can also constitute natural environments for many R&D and educational activities and they can be transformed into strategic instruments of universities for the increase of the degree of technological concentration of the area where they are placed.

[19] Hermans J and Castiaux A (2007) "Knowledge Creation through University-Industry Collaborative Research Projects" inThe Electronic Journal of Knowledge Management Volume 5 Issue 1, pp 43 - 54, available online at www.ejkm.com

The major benefits ensured by the incubators, technological transfer centers or industrial relations units, that would be difficult to obtain under different circumstances, especially by the new spin-off and start-up companies, are the following[20]:

a) Increasing of credibility;

b) Shortening of the training period;

c) Quicker solving of technological, organizational and financial problems;

d) Ensuring the access to an entrepreneurial network.

In many countries where there has been conducted a serious policy of development of all means of mediating the relations between research and industry, they proved to be viable sustaining mechanisms, by means of various methods, both of new companies, and of the ones already existing. That is why, it is considered that these relations offer an alternative of economic development stimulation by means of the implementation of new products and technologies generated by the research and development activity and of the encouraging of the entrepreneurial initiative that lies at the basis of the creation and development of small and medium innovating enterprises.

In Romania, at the beginning of the 90's, there have been adopted some models from developed European countries, that functioned well in these countries. In Romania, due to a improper conjecture and bad management they stopped functioning one by one, only surviving those that featured intelligent management, able to adapt to the specific local circumstances.

There is currently a concern of the National Agency for Scientific Research to intensify the links between the research institutes and the industry, links that are more and more difficult to establish under the circumstances of the current economic crisis. It ought to be taken into consideration that, also during crisis situations, countries like Netherlands, Germany, France, witnessed an economic revigoration of those regions where the scientific research results were transferred onto spin- offs. Naturally, a vital condition for successful steps in this direction is for scientific research to meet the needs of business organizations.

Conclusions

In this paper we provide an expert assessment of the convergence between the R&D challenges of Lisbon Agenda 2010 and polices and instruments in place in Romania, analyzing how the research system fulfils its fundamental role to create and develop excellent and useful scientific and technological knowledge.

A response to economic and social demand has to balance two main challenges. On the one hand, ensuring knowledge quality and excellence as the basis for scientific and technological advance, requires considerable prior knowledge accumulation and specialisation as well as openness to new scientific opportunities, which often emerge at the frontiers of scientific disciplines. Quality assurance processes are mainly the task of scientific researchers due to the expertise required, but it is also the subject of institutional rigidities.

On the other hand there is a high interest in producing new knowledge, which is useful for economic and other problem solving purposes. The low R&D financing in the last two years, lack

[20] Sandu S (2002): Transferul de cunostinte si tehnologie de la cercetare la industrie(The transfer of knowledge and technology from research to industry , in the book : Inovare, competenta tehnologica si crestere economica (Innovation,technological competence and economic growth), Editura Expert, Bucuresti, p.168

of incentives for scientific actors to link their research to economic and societal demands, lead to a corresponding weak exploitability challenge.

If "improving scientific research is part of the crisis's solutions"- as recently the minister of Education, Research, Youth and Sport stated, than a deep analysis of the strengths and weaknesses of Romanian R&D system is a basic point for the future architecture of the R&D system. Despite the good developments, the R&D system is still confronted with serious weaknesses regarding its performance and the governance of research activity.

A first conclusion of the paper is that the policy makers did not mange well in order to transform the crisis into an opportunity for the R&D. Instead of increasing the investment in this field, as a solution for crisis recovery, in Romania, after an increasing of the public RD expenditures starting with 2005, the share of RD in GDP is in a sharp decreasing since the last year. If this trend will continue, many of strategic objectives derived from the Lisbon Agenda 2020 should be compromised.

The medium and long-term impact of research scarce financing would deepen the economic crisis, as well as narrowing of the solutions for it's solving. The deliberate reduction of the competences level in the economy by marginalizing scientific activities is hostile to any feasible strategy of economic recovery.

Contrary to the best practice of developed European countries and of experts opinions, in Romania, due to specificity of R&D system, still past dependent, the public financing has not an effect of complement the private funding but an effect of their substitution. Consequently, starting with 2003 there is a decreasing trend of private R&D financing. While the public financing system is gradually being transformed into a competitive one, the dynamics of business R&D funding are not positive. The contribution of the business sector to R&D financing has decreased starting with 2004 from 0.18 % of GDP to 0.13% in 2008, which is far from reaching the Agenda Lisabona 2020.

The recent R&D and Innovation strategies and policy instruments aim to correct this situation by including measures focused on stimulating the role of the business sector in R&D by means of fiscal incentives and venture capital for the development of innovative industries. Unfortunately, the effects are still less visible than expectations.

There also a need for avoiding the future waste of funds allotted to research by rethinking the manner of evaluation of the granting projects, by selection those that respond to economic and social priorities, imposing certain minimal quantitative and qualitative indicators of international relevance for the project managers, improving the project management system and to handle more transparently the public money allotted to research activity.

A critical problem for Romania is still weak cooperation between the different types of research institutes and the industry. Public instruments seem insufficient to enhance the collaboration between the researchers from universities, research institutes and industry, on one hand and between researchers and users of output, on the other hand. At present, the main cooperation framework between research and the productive sector consists of the national RDI programmes and direct orders (RDI procurement). The legal framework and the financial instruments to stimulate research activity and the application of research results in the economy (i.e. risk capital funds for high-tech start-ups, and spin-offs, tax incentives to foster innovation activities in enterprises) are weak.

There is a strong need for a friendly environment (legal, institutional) with respect to innovation in the private sector and for a coherent and attractive package of incentives for clustering and networking.

R&D projects realised within national programmes exhibit a serious weakness in the exploitability of results. This is partially due to the fact that the projects are not sufficiently market-oriented, but also to a lack of consistent ex-post evaluation and monitoring of research results, which reduces the incentives for researchers to produce high quality, exploitable research outcomes.

The intensity of patents, as one of the central indicators of the quality of knowledge production, is at a very low level in Romania, representing only about one percent of the EU average patents registered with both EPO and USPTO.

The technology-transfer and innovation infrastructure, namely the organisations specialised in the dissemination, transfer and valorisation of R&D results is still in its early development stages. The future development and consolidation of TTI infrastructure by the new specialised programmes might ensure a favourable framework to strengthen the partnership between enterprises, universities and R&D institutions. The strengthening of the absorption capacity of the firms depends both, of the macro end micro economic factors. The quality of research production and its relevance for the firms is important but the firm decision is crucial in transferring research results to the industry.

Romania could more easily surpass the economic crisis if the R&D system should have adequate programs and funds for stimulating that scientific research projects able to offer innovating technologies and products, which would meet the market requirements.

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MODERNIZATION OF FINANCIAL RELATIONS BETWEEN PUBLIC CENTRAL AND LOCAL AUTHORITIES

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Abstract

Financial relations improvement between public central authorities and public local authorities represents, at the same time, a need for the modernize the state administration and a challenge for the policy makers. In this respect, many governments successfully applied performed structurals reforms, from their experiences we can highlight some principles and good practices which can be used to rise the performance of the public financial management.These principles and good practices refer to some aspects that deep the devolution, such as:

- emphasizing the public local authorities responsibilities regarding public expenditures;
- improvement local taxation and other own local revenues;
- better enforcement central – local grants mechanisms;
- rising indebtedness capacity, including local public entities repayment capacity.

Among the improvement solutions to finance devoluted public services, financial grants from central budgets and funds to local budgets have multiples forms, which present both advantages and disadvantages, depending on economic and social conjuncture and keeping in mind the needs of transparency in public administration.

Keywords: *devolution, taxation, equilibrum, grant, indebtedness*

Introduction

Achieving the economic development of a locality or region is a complex undertaking, insofar as it is subject to the influence of factors beyond local, regional or national have no control. The tools available to finance local development vary significantly from one jurisdiction to another, even when they are designed for similar purposes. There are significant differences between States as to how public funds are collected and distributed to local goverments - that is to say regarding the amount of taxes collected or spent at the local level and the extent to which local communities are dependent on transfers from higher levels of government.

The countries where the tax burden is higher tend to rely on public funding to support economic development efforts made under the government management, while countries where taxes are lower tend to assume that the private sector more involved in economic development.

Where local governments depend heavily on local taxes to fund their budgets, they are more likely to consider the local economic development as a means of broadening their tax base to finance services, asset and local amenities.

When the local government budget is supplied largely by the national administration, they are more likely to see local economic development a remedy for social and spatial disparities. This type of local development is often focused more on the activities of public and social sector - to

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help the unemployed find jobs and find new sources of entrepreneurship and employment. In this case, the financing of economic development is primarily related to investments in infrastructure to promote private investment, and often requires close relationships with higher levels of government for funding.

Intergovernmental fiscal relations analysis

The analysis of the new financial relations between the levels of deliberativ and executiv power varies from country to country. The internationally proposal differences between the means of descentralization can be approached from two viewpoints: by comparision with the relevant exemplary practices revealed by the studies undertaken by the international financial institutions-first of all The World Bank, and also the prolonged experience of some european developed states[1]

In terms of public services quality, the decentralized financial systems achieved statisticaly best results, because the action of various factors, among which the most relevant are:

- participation of citizens in the act of decision, because of stability and political liberties enjoyed by people of local communities;
- guide local authorities by act of government effectiveness, both in its legal, administrative and management capacities, including a very low phenomenon of corruption;
- the development of community from the social point of view, this assumption of human resources performance improvement, with an equitable distribution of income;
- the realization of economic management orientated outward, together with the existence of a of a genuine autonomy from the monetary state authority.

By analyzing the best practices of local government they are refering to some key issues:

- the responsibility of local public authorities regarding effective and efficient manager of public expenditure;
- their own sources of income, taking into account, taking into account the restrictions and tax incentives;
- mechanisms for financial transfer, mainly from central public authorities towards the local one, by many responsibilities, which have been decentralized to achieve and / or distribute the public services;
- debt capacity, which can measure the economic entity capacity, whether public or private, to repay the loan and pay the costs (interest, commissions, etc..)
- their own benchmark entities involved. The benchmark refers generally to the performance indicators, the creditworthiness of the entity in terms of financial stability to business functionality, plus, with an impact at least as important, the restrictions introduced by the tax environment and / or economically.

Of major importance are the responsibility assumed, first by the central government, on the other side by the local one in public expenditure management:

- sharing duties in the public expenditure and taxation between different levels of public authority represents a fundamental problem in a public administration that implements decentralization as a key reform of the state;
- following the example of good practice on the transfer of responsibilities for public services from central level to the local authority must take into account some benchmark, so as to determine whether:
- volume of general transfers causes an easier management of business;
- such transfers favors economies of scale;
- public services must meet a minimum standards of performance;

[1] Anwar Shah et Jeff Hunter, "A Simple Measure of Good Governance and It's Application to the Debate on Appropriate Level of Fiscal decentralization", World Bank, Washington DC, 2007

- these transfers are accompanied by a new revenue-sharing of the public incomes;
- it is being taken into the account of local or regional community preferences.
- the central public authorities should be responsible for implementing / distribution of public services that have targeted the entire population of the country, as follows:
- they are being addressed the whole population, as, for example, national defense;
- they are having national effect, as the monetary policy;
- it creates economies of scale, for example, infrastructure networks;
- it is aimed at income redistribution, such as the implementation of social assistance and protection programs;
-etc.
- the local authorities must be responsabiles only for the public services whose aplicability domain is limited to the teritory of the respectiv local communities, so that they can exercise without limits the authority and, implicitly, to asume the responsibility for the quality and quantity of the distributed service. The clear example are the preuniversitary invatamant, the health public services, the local transport networks, the protection of the older persons etc.;
- local public authorities should be responsible only for public services whose scope of applicability is limited to within the local community, so that they could freely exercise their authority and thus to take responsibility for quality and service quality available. Telling examples are those of undergraduate education, public health services, local transport networks, protection of elderly, etc.

The main objective of local authorities in financial management is to achieve a balance between spending responsibilities and ability to attract financial resources in order to reduce the need for consolidated shipments[2] likely to introduce distortions.

If they can`t be avoided, however, transfers with the lowest negative impact on local autonomy are unconditional transfers, in which the local authorities have the greatest power of decision.

Conceptually, the basic principles of fiscal transfers between local and central public concern:

- equity between the territorial-administrative units, which must be treated according to the same criteria during the approach of the transfers;
- neutrality, meaning that a local authority must not- be able to exercise influence on the subsidy enjoyed by actions on local expenditures or the tax that she applies;
- simplicity of the transfer mechanism so as to be easily understood and applied;
- consolidated transfers predictability and flexibility, to accommodate cyclical economic and social developments, ensuring also the possibility of elaboration of budgets and development plans in the short to medium term;
- autonomy of local public authorities to set their own priorities and manage local public services to meet the needs of the community;
- stimulate local authorities to conduct an effective financial management of decentralized public services, without the result that the application of the transfer mechanism will penalize the very communities that are well managed in financial terms;
- transparency in granting the transfer and use by the responsible authority for people to be able to consider the effectiveness of community use of public funds in their interest.

You can notice some contradictions between the basic principles that apply to financial relations between public authorities - for example, the principle of fairness tends to complicate the

[2] Acording to the in place legislation (The Law nr. 200/2002 of the public finance, The Law nr. 273/2006 of the local public finance etc.), by consolidated transfer is being understood the sums transfer between the public budgets, from the state budget to the local budget.

mechanism of transfer beeing required, among other things, the regression statistical calculations, which affects the simplicity of approach - but integration of all principles, in fact of the rules of good practice in public government actions leads to a performance management of local and central public authorities.

Regarding the fiscal relations between levels of government are emerging two kinds of models:

- a type model where local government authorities receiving an average fiscal asieta[3] per capita wich top the national average transfers funds to the authority which records asiete per capita under the national average. This model is much disputed by rich communities, but that formula makes an equity very close to perfection, especially since it does not involve additional financial efforts from the central government;

- a group of models by which local authorities that show a asietã fiscalã per capita under national average receive a subsidy that provides full or equity, or a subsidy corresponding to a certain percentage of the national average in order to reach that average[4]. This model meets most of the interests of local communities, because the poor communities have the impression of winning, the richest communities have the impression that they are not losing.

The need to spend is more difficult to define and administer than tax capacity, for various reasons: to define a standard of equalization has serious problems, identify cost differentials from input-output relationship is not easy; understanding the differences in service areas, between the populations, and draw on local needs require the trial, and finally obtain the necessary data can cause significant problems.

Regarding the problem of needs in terms of transfer costs, the designers have a choice between the same two models - the first model in which the jurisdictions where costs are lower accepted to transferre sommes to jurisdictions where costs are high and the model donor, as in the case using the component of fiscal capacity. In each of these two models, there are various possible alternatives, including the following:

- historical spending levels are the basis for calculations and this base is adjusted each year using an appropriate index this index consisting of a set of factors such as population growth and the average growth in spending in the provinces and territories;

adopt as standard the average expenditure per capita - this approach ensures that each sub-national government has sufficient resources to meet the average spending levels, but it is of no help when needs are greater than the average;

adopting an average expenditure per capita, weighted with a factor or an index - for example, if in an entity, the lower density of population means higher costs, so in a given level, the entities whose population density is less would benefit from additional grants;

adoption of uniform spending levels for municipalities grouped according to their similarities - entities may be grouped according to size and population density, according to their location, employment levels and others, and within each group, provided that each entity has different needs and similar costs;

- a combination of the above three approaches - for example, group the municipalities with a set of basic similarities, and provide an index of corrections to take into account some additional factors.

[3] Asieta (the way to put the impôt)-all the measureas that is being taken by the tax organs taxable related to each subject, for the identification of the taxable object, the establishment of the level of the taxable mater and the deternmination of the tax due to the states (Iulian Vãcãrel-coordonator, Finanţe Publice, Editura Didacticã şi Pedagogicã, Bucharest 1999

[4] This model of local community financial balancing applies, for example, in Canada, where provinces whose fiscal capacity is below average per capita is given a subsidy the from federal authorities that allows them to achieve the average per capita.

Regarding the implementation of best practices related to financial transfer schemes, the following aspects stand:

- it would be wise to adopt a gradual approach and begin by setting up a representative tax system for a period of five years, then moving a representative system of expenditure;
- a system fully based on costs requires much effort, it is an exercise of significant judgments, and requires a high degree of cooperation between the parties to find an effective implementation;
- it is understood that a less ambitious approach as regards the expenditure side would be desirable in the short term - one might use such general indicators of relative need or limit equalization payments to poorer entities;
- it will probably be easier to get hold of data for measuring expenditure needs caused by different sides, unless measuring expenditures arising from incremental costs - this requires a different approach, namely that it must use available data to measure the needs of the demand side and make common sense and practicality to assess cost differences;
- generated data and analysis that is made, which are somehow sub-products of detailed spending plans, can be leveraged to achieve efficiencies in the public sector.

The transfer of responsibilities to local government must be accompanied by the resources spent by the central government to the exercise of powers transferred. This principle was introduced in the laws of local finances[5], which provides that "any transfer of powers between the state and local governments is accompanied by the allocation of resources equivalent to those which were devoted to their exercise."

The principles of compensation

Financial compensation for expenses resulting from the transfer of powers enshrined in the Laws of local public finances responds to a number of principles aimed at ensuring the neutrality of such transfers, both on the state budget than that of local government beneficiaries.

The compensation is as follows:

- entirely: the resources transferred are equal to the expenditure incurred by the central government under the powers transferred. All expenses, direct and indirect, related to the exercise of powers transferred are taken into account;
- in the same time: any increase in charges resulting from the transfer of powers is accompanied by a concomitant transfer of resources necessary to exercise these powers. Financial compensation for transfer of competences is established in two stages, in strict compliance with the principle of the simultaneous transfer of obligations and resources:
- from the Law of local public finances the transfer of competences, budgetary appropriations are enrolled on a provisional basis to give local authorities the financial means to exercise their new obligations;
- the amount of the right to compensation is finalized, it is making the necessary corrections, also in tax laws, and in the laws in local public finance.

In many countries, local administrations and national public agencies are also key financial partners in the local economic development. Another type of funding is for local authorities to borrow to support investments in productive infrastructure of a local economy.

Borrowing capacity

In general, governments should borrow only for the purpose of making investments, otherwise future generations will be restrained by the obligations of the benefits enjoyed by previous generations. That said, there is a wide diversity of approaches to control by central government the loans made by the subnational governments, for various reasons ranging from the

[5] In Romania, Laws no.273/2006 regardind local public finances.

state of development of financial markets of a country to the other question which is whether there are serious macroeconomic problems (eg., problems that may be linked to exchange rates, management of foreign exchange reserves and others). In this regard, four générales approaches, each with its advantages and disadvantages, is defined as follows:

- rely on market discipline - is the approach recommended by many developed contries regarding provincial borrowing;
- cooperative approach in controlling debt - in the context of this approach, subnational governments participate in the formulation of macroeconomic policies, including the establishment of borrowing limits to be observed by sub-national entities;
- approaches with well known rules for the control strategies being adopted by subnational governments - a number of countries, both unitary and federal, have adopted rules in their constitutions or their laws, which contain, among other things, limits on debt levels or that specify the objects of loans;
- direct controls on borrowing by subnational entities - these controls take many forms, including the establishment of annual borrowing limits, permission to borrow a part and the centralization of all loans with terms of surrender to subnational governments for purposes approved.

The main conclusions on control of subnational government borrowing are:

- though attractive in principle, the option is to capitalize on market discipline is unlikely to agree in many situations because one or even more of the conditions for its effective functioning will be absent (eg. the existence of free and open markets, the availability of reliable data on the outstanding debt of the borrower, the apparent lack of opportunities bailout in case of default, and others);
- it is expected, according to the current global trend to devolution, there is a reduction of administrative controls that are exercised on subnational borrowing in the domestic market;
- borrowing abroad by subnational governments should be strictly limited, inter alia, macroeconomic considerations;
- all loans should be made solely for investment purposes;
- even in the context of approaches to matching rules, there is room for greater cooperation from all levels of government regarding the issue of debt levels.

The reform of financial relations between governments requires institutional mechanisms comparable for purposes of coordination, planning, budgeting and implementation between the different .

Almost any system that is established on the basis of a consensus can work, insofar as those who are concerned show goodwill, they will make the necessary efforts and demonstrate the flexibility that fits. These conditions are more likely to be met, whether formal coordination mechanisms are in place.

Similarly, any system of intergovernmental transfers should be explicit about who is responsible for conducting audits, program evaluations and other mechanisms for monitoring the performance of subnational governments. These functions are often performed by several agencies, although efforts are coordinated, to ensure that their implementation is entrusted to a single agency would improve overall efficiency.

The decentralization of responsibilities and the rationalization of intergovernmental transfers should be accompanied by a strategy to strengthen the institutional capacity of subnational governments. Central government (or associations of subnational governments) can identify training needs, provide training programs, providing guidelines about management issues, establishing twinning arrangements with more experienced entities, provide technical assistance and provide operational tools for the needs of a range of functions, from managing staff to monitoring programs.

Conclusions

There is not "ideal path" or magic formula to apply to the establishment of financial relations between levels of government. Economic principles and best practices on the international scene can provide useful insights, but the political and historical factors may be equally or more important for the establishment of financial relations. Accordingly, a highly egalitarian approach to equalization, modeled on the first pattern can operate properly in developed north european countries like Sweden, but they may well not be appropriate for a federal state like Canada, in which regional differences are important.

Balancing expenditures, as opposed to the equalization of income, is an option that seems to be controversial politically, for a variety of reasons, some indices are at best approximations of what is to be measured, and the data are often outdated or are not available, the mathematical aspect becomes complicated (eg. the use of regression analysis, statistics) and, more fundamentally, the cost differences between different jurisdictions are sometimes difficult to understand or explain, so that equalization of spending two features somewhat contradictory: on the one hand, it is highly technical and yet, on the other hand, it is highly political. Given the nature of the analysis - which is to allocate a specific amount of funds from a given number of entities – considered essential to the financial agreement, controversy still exists and is likely to be even more serious in the contries where own fiscal sources of income are relatively modest. In addition, one should consider the use of equalization to the extent that the principle of equity spending supports a broad consensus.

A contentious aspect of any financial relationship between levels of government concern the algorithm to determin the total amount to be transferred to subnational governments. Generally, the central government fixes the amount in its budget process, but there are different ways, for example, in the UK, the amount is set according to a set of factors which are made public, in Denmark, it is done under a set of principles, with the support of a joint forum for the debate of the issue, in Australia, the amount is determined at a Annual Premiers' Conference.

An important conclusion is needed to get out, namely that the size or scale of subnational governments appears to be important. One of the benefits arising from expenditure equalization schemes is the fact that countries are more accurate, albeit imperfect, factors that influence the cost of services in the public sector. The number of people present in a particular jurisdiction and their geographical dispersion also seem to be important factors. In the unitary countries, the trend seems to have been to reduce the number of local governments, primarily for reasons of scale and efficiency.

An important conclusion is needed to get out of the exemples from developed and developing countries, namely that the size or scale of subnational governments appears to be important. One of the benefits arising from expenditure equalization schemes is that countries are more accurate, albeit imperfect, factors that influence the cost of services in the public sector. The number of people present in a particular jurisdiction and their geographical dispersion also seem to be important factors.

The public authorities involved in the strategic economic building should carry out research on the experience in other entities regarding the funding mechanisms, particularly to determine how we could adapt the most effective these mechanisms to the context of a relationship between the central government and local authoritees:

- systems of performance indicators and comparative reporting methodologies;
- mechanisms for audit and other review mechanisms similar to a set of entities;

- common systems of accountability and financial reporting;
- mechanisms of action, eg. an ombudsman[6].

As final conclusions, we can enunciate a few principles:

- the concept of "neutrality" should be central to any system of financial transfer, neutrality is understood here in the sense that the recipient government should not be able to influence the amount of subsidies it receives by groping for spending or tax decisions;
- any statement of principles should recognize that certain principles may be contradictory - in particular, applying the "principle of fairness" seems to have the effect of removing the transfer mechanism of the "principle of simplicity";
- the proper functioning of a financial agreement requires a commitment from all parties to the ongoing management of this relationship, because of the ever-present possibility of conflict between Aboriginal governments and federal governments and between Aboriginal governments themselves , about the implementation of the compensation system.

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[6] An **ombudsman** is a person who acts as a trusted intermediary between an organization and some internal or external constituency while representing the broad scope of constituent interests. The word 'Ombudsman' is based on a Swedish word meaning 'Agent' (http://en.wikipedia.org)

POSITIVE AND NEGATIVE EFFECTS OF GLOBALIZATION

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Abstract

We still live in Europe, in one of the richest regions of the world. Most of us still have a well paid and secure job. And yet social security is ensured for all of us, even for the less privileged persons. These gains seem to be endangered by the growing competition from abroad, which steals the productive potential and the jobs of the European economy. Has the pressure on the European economy by means of the internationalization of the economy really intensified in as far as it is claimed? Is it true that globalization has enhanced in recent years in such a dramatic way? The analysis shows us that we should make some distinctions.

Keywords: *The global market, international trade, interregional, economic location, capital liberalization, global players, financial flows, direct investment exchange*.

Introduction

Since the early '80s trade has developed a lot, increasing by approx. 7% per year. This impressive growth is relative, if you consider historically the development of international trade and the share of world export in the achievements of the global economy.

Since 1870 5% of world production has been exported. Only after 1960 the internationalization of world trade has taken place and this made the connection with the level reached before the period immediately preceding the First World War. It was an ongoing and difficult process, until world trade increased and reached today's record levels. In recent years the share of the world export in the world economy has increased by 15% (85% – so, the biggest part of the global social product – remains as before on the national markets for domestic consumption).

An analysis of the countries shows that domestic markets have a much greater role for national markets than it has been considered till now.

Japan's foreign trade is not more than 10% of the gross national product. The orientation of the U.S. economy towards domestic markets is well known. Only maximum 10% of the U.S. economic achievements go abroad. And, although it may arouse surprise, the European Union is not less oriented towards its own market. The contribution of foreign trade to the gross domestic product has a value of up to 10%.

As a result of a more attentive analysis, the figures of foreign trade become relative also for Germany. With a share of more than 25%, the German economy is still relatively export-oriented. But almost two thirds of the foreign trade is conducted on the European internal market, in other words, interregionally. Thus the export in the extra-European countries is reduced up to almost 10% of the domestic product.

In coming years, the volume of the world trade is likely to resume its trend. The conventions within GATT, the Customs and General Conventions liberalized global trade in key areas. It is expected that it will increase more than the global social product.

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In future, interregional trade will grow more than the trade with countries outside the region, because the markets within the regions have developed to an extent far greater than those between the blocks. The European Union is the most advanced on the way to free interregional trade. Other initiatives known as the North American Free Trade Association (NAFTA) - comprising the U.S.A., Canada and Mexico, Asia-Pacific Economic Cooperation (APEC) - with 18 countries of the Asian and Pacific areas (including USA and China) and MERCOSUR with Argentina, Brazil, Paraguay and Uruguay, will form a conjoint market for a middle and long term. This forecast is also valid for many other regional economic unions.

The lack of action of the states

Not only the World Bank believes that the globalization of the economy makes "opportunities to make decisions increase in the case of individuals and businesses and decrease in the case of politicians."

The alleged "Constraint of the global markets" seems to expose states to a ruthless economic competition for the economic location. Governments are responsible for this situation. Because they founded internationalization by liberalizing trade and capital and by encouraging the almighty concerns, that may also exist on the world market.

Transnational firms cannot be judged if they behave according to the maximum increase of earnings. This fully accords with the theory of national economy.

The problem is that these companies have no obligations to anyone and they can be controlled with difficulty.

The management of transnational companies suggests that they work for the benefit of the national states and invokes employees' solidarity and state support "for the common weal". And they get it in many forms.

"Global Players" need free trade. It allows them to produce where it is cheaper and to sell where they can obtain the highest prices. Thus, there is pressure on the economic sectors that can not cope with international competition. Internationally, the state should skillfully handle the situation in between widening free trade, in order to ensure exports, and a form of protectionism, that protects the industries endangered by imports. On the national level it must act against the disappearance of individual industries and mitigate the loss of jobs from a social point of view. These constraints lead to subsidies in the sectors of agriculture, coal and steel, shipbuilding and aviation. And the competition for foreign investments triggers expenses for the state. In order to attract national and international capital, governments compete promising advances made by the State to economy. They consist in the provision of facilities, special services in infrastructure, fast approval procedures and reduced taxes. To these there are also added the capacity to recover, in the ratio of 100 %, the costs of construction of corporate and income tax, an exemption for ten years from the tax on land and minimal expenses of planning and production.

Referring to global competition, the economy tries to impose on governments the reduction of taxes on business. It requires capital market and labor market deregulation to diminish costs - such as the cancellation of the protection from layoffs or limiting employment contracts, and the reduction of social protection measures, in order to cut side payroll expenses.

For its own interests, the economy handles even high-level politicians. State presidents or prime ministers regularly travel abroad, being accompanied by an escort of managers, in order to attract large contracts for their economy. And the French and the Americans consider this to be an important field for foreign policy.

In the field of financial and monetary policy, the possibilities of action of the states are severely limited by the expansion of the international financial markets. The national monetary

policy becomes more difficult. Smaller and weaker national economies are already deprived of the political-economic tool - which is called the financial and monetary policy.

Even if the states obey the constraint of the global market, they can not be sure of success in the form of jobs and tax revenues. Businesses do not make promises for long-term jobs, invoking the uncertainty of the medium and long term business. They avoid the profit taxes by transferring profits to countries with low taxes or tax-free oases.

Free trade: a danger to prosperity and social justice?

Trade and the international division of labor have increased. At the same time, the gaps between the rich and poor have widened.

The gap between the lower stratum and 20% of the upper layer of the world's population has increased since 1960 more than two times from 1:30 to 1:61, the number of poor people has increased since the 70s, and it has been emphasized since 2007, after the financial and economic crisis, with several hundred million. Clean water, adequate nutrition, healthcare and school education are missing for 1.3 billion people.

Unregulated free trade contributes to this misery. According to a Worldwatch Institute research project, production for rich countries destroys the life of the poor.

And as regards the application of the decisions of the last GATT round, the experts on development issues suspect that the situation regarding the food supply for the third world will be worse. The continuation of the export of cheap food surpluses from the U.S. and the EU towards developing countries causes the destruction of the local agriculture and increases the dependence on foreign food suppliers.

Developing countries try to balance the negative consequences of free trade. They attract foreign investments by means of favorable conditions of the economic location, such as low costs for their work, low or nonexistent social and environmental standards. Industrialized countries oppose this competition, lower production costs. They rationalize.

Both production in the countries where wages are low and the destruction of well-paid jobs, result in loss of income for employees. But if the masses' incomes decrease worldwide then the demand also decreases. The danger of a recession, and of a global economic crisis, as that one in the early 30s, can not be excluded at present anymore.

A free trade without order hides the danger of an international competition to reduce costs and a destructive competition as regards the economic location. Thus mass welfare is endangered, social security is broken and the state is in debt. For a long term businesses do not take advantage of this either. They may earn something only as long as they can sell.

And the level of social security has been increasingly questioned. Businesses and employees can not be further burdened by growing taxes and social charges. The conclusion is therefore that we should save even more. This austerity policy is tightened by the agreements related to the European monetary union. They require that States participating in the monetary union to have a low inflation rate (1.5-2%) and to maintain the official deficit at a low level (3% of GDP). However, the consequences of a recession provoked by an exaggerated policy focused on saving and production costs reduction, represent a loss of wealth and a higher unemployment rate.

The dominant opinion is that the global market requires the elimination of rules and more flexibility. The normal labor relationship is eliminated widely. More and more people are working unprotected, often without social protection and without their consent, with a reduced term.

Accelerated globalization can enhance welfare on earth. For this, we must give up the competition regarding lower production costs and the misunderstood competition concerning the economic site/location. The dumping on wages, the environment and social protection endanger

the welfare attained by industrialized countries, hampers the improvement of living conditions in developing countries and may even end up with an economic crisis. Therefore, the economic policies of all the countries participating in international trade should seek to guide their national economies and the global economy on the whole, on the road towards a prosperous development.

Conclusions

World trade and extra-economic interdependence of businesses have started after the Second World War at a low level, but continuously increasing in the meantime. This trend has continued in recent years, but has not increased in any case dramatically.

Trade and financial flows and the exchange of direct investments essentially represent the triad of U.S.A., Japan and the European Union. And China comes immediately after them. Within the regions mutual ties grow. For the European economies it is more appropriate to talk about "Europeanization" rather than "globalization."

Within the triad of U.S.A., Japan and the European Union, completed by China, there began a competition to lower the expenses of production costs. It can not be justified by the growing competition of the countries that do pay lower wages, but it is the result of a wrong economic policy, promoted by industrialized countries. It jeopardizes economic growth.

In Europe, international competition has resulted in a redistribution of income and assets. In the group of employees, those with high qualification earn more and more, while those less able to have good results and the growing number of unemployed workers must accept lower revenues. The significant redistribution of income is that from those who have capital, because the free movement of capital allows the capital owners to blackmail the employees and the unions, threatening them with outsourcing.

In this way, we reach an apparent shift of power from labor to capital. This is actually "globalization." In Europe, it can be controlled through a policy-oriented economic growth and employment. Beyond this we need international agreements to prevent competition, to lower costs through wage dumping, environment and social protection and to help all countries and the world economy to move towards a prosperous development.

Nowadays, a key issue is the stabilization of the European financial-banking markets in U.S.A. and Asia, by strengthening the regulations and supervising the coordinates prudentially.

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BANKS AND FINANCIAL INTERMEDIATIONS' GLOBAL ROLE OF IN MARKETS' GENERAL EQUILIBRIUM

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Abstract

Due to globalization factors, financial intermediations still create many problems to national economies as far as the markets' general equilibrium is concerned. Although the world is divided into more than 200 nations with unequal power, there is less than half a dozen key currencies to go round to facilitate the international financial transactions. Considering that the combinations between the flexible exchange rates and the free circulation of capital and information have made the financial system be strongly interconnected internationally, however, some national economies preserve financial circuits that are not indirectly integrated in the world system.These aspects have led to the analysis of the relations between the financial intermediaries on domestic and foreign markets, the banks and financial intermediations' global role in national economies and internationally.

Keywords: *Neoclassical equilibrium model, Walraien model, Neoclassical financial market, financial system, capital marginal efficiency*

Introduction

Markets mainly function based on two models:

The Neoclassical perfect equilibrium model that comprises the general equilibrium properties belonging to goods markets and the production factors, those belonging to financial markets as well. Both properties have the same form: the atomicity of supplies and demands, the homogeneity of the products, the transparency of the exchanges and the mobility of the financial resources.

In perfect competition, the free allocation of capital allows that its economic performance rise to an optimum level

The basic Walraien model that has several characteristics: the economic and financial decisions are made by rational individuals that are perfectly informed on market conditions at any moment; the so called pure and perfect "competition" excludes all the forms of power on prices; equilibriumd prices are the result of anonymous forces.

In a perfect information system, in other words in a world without any risks and private information, the financial capital is an item with homogeneous and constant quality; pro temporis interest rates are enough to remunerate the lender; the saving supply depends on the preferences for the present and on the consumption desires. The revenues are split up between the payment of capital loans and that of the employment. There is no reason for profits to exist. Companies lose their last individual supplies. Economic agents keep their goods supplies and their accounts that overtake market prices; deficits are stopped without leading to bankruptcy. They become suppliers of different goods; the reconversion is done without unemployment.

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The model offers a possible answer to one of the problems that has been around for more than a century now. This model gives us the opportunity to specifically approach the nature of the relations between the financial market and economic results, considered as a whole.

Literature review

The Neoclassical financial market organizes the meeting between the agents having financing capability and the agents that need financing. Producers, goods sellers are not in the situation of 100% self-financing their equipment expenses. They could spare placing their available capital taking into consideration the supplies. In the model under discussion, the capital supply meets the corresponding demand without intermediaries. One could balance all the savings supplied by the capital and investment market without any loss, with zero intermediation costs. The market could tell between the various possible equilibriums.

Keynes' general theory broke up with the unifying visions summarized under markets' general equilibrium. Consequently, two market sides are totally different. The companies and the private persons are not in the symmetry rapport adopted through Walras to represent the supplies and demands addressed to goods and factors markets. Companies, on the one side, spare their primary savings, and, on the other side, they play a too radical role, differentiated to be able to borrow a very similar rational behavior: companies are mainly collectivities involved in production; their behavior surpasses the strict individual rationality frame. Industrial investment represents a risky action which, in particular, is not directly exposed and which is rarely in the position of being appreciated by means of simple saving.

Under these circumstances, the capital market functions according to all the methods that make this difference as Neoclassical methods that can be imagined. Referring to the orthodoxism characterizing his era, Wicksell outlined the banks' role on the loan market: his distinction between the natural interest rate and the monetary rate asked by banks forecasts the Keynesian developments on the marginal efficiency of capital and the use, which is also available nowadays, of the return on equity.

The duality between the fixed revenues and the variable revenues of financial capital is finally integrated in a repartition theory, which does not comprise opposition of the salaries out the property's revenues.

The capital interest rate includes the first variable risks according to the quality of the debtors. The aversion to risk leads to prudence and restraint; the distrust in the exchange amount, the rationale used to obtain loans and the miracle of capital operations, all these make the economy follow the sub-investment type, if we take into consideration the Neoclassical scheme as reference point.

The imperfections characterising the market information lead to Maltusian practices, which put a hold to growths and degradation that have no use[1].

The global role of banks and of financial intermediations, more widely, is positive when adjusting the capital supplies and demands[2]. As far as the expression "financial system", it also covers the capital market.

A system in which specialized organizations, banks and other financial intermediations facilitate the circulation and the distribution of capital makes a link between these two activities. In general, sparing primary savings is usually done by means of depositing them with some financial

[1] Akerlof, Spencer, Stiglitz
[2] Gurley&Shark

institutions, which act as institutional investors: pension funds, mutual and SICAV funds, speculative funds, insurers, private equity funds, real-estate endorsers, etc.

Banks represent the first source for foreign funds that companies might call for.

Or, banks act in a universe with double risk. On the one hand, like all other companies, the bank has to conform to the constraints imposed by the financial equilibrium; they are concerned with conquering parts of the profitable markets; they compete and cooperate with syndicates on competing markets; they take into account their shareholders: they fully participate in mergers, acquisitions and restructuring[3]. Consequently, they diversify their activities (loans, deposits, conciliations, company re conciliations, financial constructions, portfolio management, etc.), they create different products and services to make better use of their distinctive advantages. The monetary market places new financial tools under circulation; the alternative financial procedures allow corporations to be less dependent on the credit institutions for their treasury needs. To serve corporate clients, banks exploit their compared advantages. The specific advantage of a bank as compared to other financial intermediaries is that of offering two services instead of one: that of endorsing and getting payment tools, which is generally represented by currency, and that of granting loans. Together these activities lead to a reduction in the costs assessing the credit risk, because the history of a deposit account informs the banker on the financial situation of the depositor. The bank is also a coalition of lenders who diversify the credit risks. Taking in consideration their market shares, companies accept indebtedness after banks offer an interest rate inferior to market price, because the bank uses its own confidential information, that in this case signals the company's favorable situation; this confidential sign gives the company the possibility to find financing means on the market. Banks discover that the stock exchange index of a listed company that wants to renew a contract diminishes the banking cost.

These advantages are even more obvious with small and medium-sized companies, known on the financial market as quoted groups (Cotin). On the other side, banks encourage the groups of specific risks, the credit risk and the liquidity risk, respectively. A debtor's insolvency is different from the risk that it is exposed to by buying some common goods whose quality is generally stable and acknowledged.

The bank's relation with its client constantly evolves taking into account the business environment and its solvency.

Banks should offer high-quality services to their clients, services that should provide return, and they should not grand suspicious loans: the liquidity of the deposits should be guaranteed; the assessment of the credit risks and the operational risks should be competently supervised; the clients should be able to partially calculate their loyalty in case the bank gets into difficulty. In case of bankruptcy, a banker seriously affects its clients. It is healthy to keep a low competition on credit market when the debtors' weakness probability stays within tolerable limits.

Foreign currencies, loans and reimbursements on the capital market are a collective product: they are not only accepted to be liberated, to respond to the explanation that Keynes used to summarize the Neoclassical model[4]. The currency value dominates the relations between the creditors and debtors. The Central bank tries to find the middle way in order to balance its lender of last resort role with its "inflation master" mission; this implies that as a "master" it has to increase monetary mass, to supervise the quality of the credits granted within the economy[5].

To summarize, banking and financial intermediations have some particularities in common. They represent various activities that globally allow a decrease in the uncertainty of the depositors, of those that make primary savings and of all potential investors.

[3] Bienayme, 1998
[4] Skidelsky
[5] Allen&Santomero

Multiplying financial products and their securitization possibilities for a future market resale finally allows adapting market supplies and demands. Financial intermediations aggregate the various small savings, they diversify and mutualize the risks. At the same time, they have functions which, if they are competently and honestly used, generally favor economic efficiency, they stimulate growth and employment usage.

Certain financial intermediation activities characterizing banks generate **functioning costs**. This is due to the fact that the savings belonging to their clients are not wholly transformed into lucrative investments through loans. They can produce a real loss that would lead to a lack of return for the national economy in rapport with the optimum of the Neoclassical type? Of course no, because one does not label financial intermediations as lacking return in cases that are characterized by uncertainty, information asymmetry and other various morally hazardous business situations. These presumably competent and well-reputed specialized intermediaries use the pulled savings, without which they cannot pay off their liabilities.

The financial market is congenitally opaque because the exchangeable assets bear eminently fortuitous future return on investments. Well-experienced financial intermediaries that pool unexpected primary savings bring about security and trust that capital raise needs, otherwise production cannot develop.

Conclusions

In order for the financial intermediation relations to ensure the general equilibrium of goods and financial markets they have to belong to an efficient financial market that should favor instant allocation of resources.

The analysis outlined the fact that only a profound, liquid and transparent market could favor capital allocation and provide more information concerning the resulted value of the daily loans, as well as the projects of the companies with an open market. Moreover, one emphasized the positive global role that both banks and financial intermediaries have when capital supplies and demands are adjusted. This very important role is continued by multiplying the financial products and by securing the debts for being resold on the financial market, which finally allows choosing the capital supplies and demands on the market.

So, the banking and financial intermediations have several particularities, as they are various activities that globally allow risk reduction of uncertainty as far as depositors, those that make primary savings, as well as all potential investors are concerned.

PRINCIPLES OF A NEW MODEL FOR EDUCATION IN THE KNOWLEDGE SOCIETY

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Abstract

Education is a social effect of millenary human action, stemming from the human experience throughout its existence, but also scientific and technical knowledge, who put their mark on human evolution and society. Sociology of education, scientific discipline border, studying the social effects on the development of education, has taken great theoretical and practical connotations of centuries XIX and XX century and we now consider the early Millennium III , an important scientific discipline, scientific accumulation products through all this time, the disciplines of Humanities and Nature, accumulations which sums up their brilliant education. We appreciate that, as human society, but nations have better access to knowledge and scientific information, education in general, exerted on the human individual through classical or modern methods, the development of education is more important for that society . The more advanced a society is an educational and scientific, so it is better to plan social activities. Knowledge society, the current type of planetary human society needs a new model for education, including some cases that the old educational models, whose viability has been demonstrated from antiquity to the present in historical periods, locations and areas geographical. Never been more important that education for human society in this period. Knowledge by all members of society the full set of information accumulated by mankind over time and how they are used for positive conduct of all human activities on the planet is very important. This finding generates the particular importance of the role of education in human progress.

Keywords*: JEL Clasification: education, new educational model, knowledge society, lifelong learning, education throughout life.*

Introduction

Like all human experiences, accumulated and transmitted from generation to generation, education is part of the overall social system. The purpose of education is done in society, both within the family as the primary purpose entity for the transmission of accumulated knowledge in the education system (institutional social system of education), in its various stages, but above all the lifelong the individual, through continuing education. All three sequences - stage of education as a subsystem of the overall social system are directly dependent on the economic stage of development of each society and are influenced by all the accumulated knowledge, ideas and doctrines of specific historical periods, which put their stamp on education in each type of company to lower the level of individual and institutional entities in society.

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Education is specific to each individual development of characteristic periods (childhood, adulthood, old age) but also historical periods experienced by each individual. Education is thus an epoch of spirit and quintessence of all that mankind has created valuable so far.

Perennial elements of social ideal educational

Social ideal represented in each historical period covered the peak of humanity, a dream, a higher standard every time another, higher quality than previous standards, by which the most enlightened people turned using all his skills and knowledge. Similarly, education was and is ideal for each type of society, everything is better and more valuable time in thinking that the accumulations removed from reality, spiritual. There is a mutual inter-relationship between social and educational ideal - the first tangible achievement of all interpersonal factors and social effects, the second illustration of the knowledge and thinking of these achievements materials.

General functions of education are to: transfer of knowledge acquired by mankind through the work of each generation, development and training of professional training, specialization of each person able to work in a profession or occupation. Special functions are related to creative adaptation, continuous enrichment of knowledge gained by each of us in the learning process and their daily application. General and special functions is done through institutional social system of education. Both the social system of institutional education (nurseries, kindergartens, schools, colleges, continuing education system, improving the training system) and across all other social organizations and institutions provides a intermingling between the transmission of knowledge and information gained overall, individual and specific. If education achieved by the education system is considered vital and most important to education offered by other social institutions we can consider special education, appropriate institutions. We believe that human societies most productive and efficient, so that there was a long period of time as, are those members of those societies in which education takes place in a constructive manner in all types of organizations and social institutions, primarily schools.

The evolution of human society so far has shown that education and its efficient transmission to those members of society, is the primary factor, the principle of its operation at the highest settings. Social factors exert educational instructors in all institutions of society are those that ensure the positive development of all persons, taken individually or for overall level of human society in question. Ongoing renewal of education and teaching content is dictated by the constant accumulation of knowledge and human achievement, which is the basis of human society these future developments. Peoples who, for various reasons, are not accumulations of material and spiritual knowledge were, are and will be removed from history. On this basis the ongoing development of a society, renewal must be continuous adaptation to new needs of the education system and education.Everything is found, the catalog and apply from the sciences and humanities is contained implicitly in education and training of the company. Applies to any human society, especially for the Romanian society in the last hundred years, which gave special attention to acquisition, learning and applying knowledge of natural sciences and humanities.

Throughout the historical development, all human societies have known and adopted, sooner or later, changes imposed by scientific thought and progress. These changes are reflected in particular in content professionals in occupational and social mobility, which stresses the need for lifelong learning. If education as socio-cultural phenomenon, can be addressed both from a historical perspective, but also ontogenetic perspective (access to education for every person in its progress), lifelong learning is a necessity of modern man, forced to cope with change inherent in education itself, due to dynamic developments in existing knowledge in the bottom of his time.

While education is a historical phenomenon, scientific and socio-cultural, lifelong learning is only a scientific and socio-cultural phenomenon of the contemporary world. It is a concept and a trial of topical, illustrating the work of the integrator of all acts and forms of education, in a space-time continuum. Acknowledging that education includes ideas and knowledge about what mankind has created valuable during its millenary existence and passing the spiritual quintessence from generation to generation, man is merely to perpetuate their own physical and spiritual existence. Scientists have not yet managed to determine the existence of the human genome and to isolate the gene responsible to a person with education (self-education, lifelong learning, education throughout life). This means that education, as a social phenomenon multipolar record was not yet in our chromosome structure, because it continues to be exercised since the first and last moments of life to that person. A special place in exercise of the phenomenon of lifelong education is the socialization of the young generation person. Achieved in ways unique in space and time, subject in particular economic, education has a decisive contribution to the formation of the human individual, then, by repeating them by each individual, the phenomenon of breeding of education, its influence throughout society. Science has shown that hereditary factors and social risk factors are equally important in the life of each individual. Numerous cases of feral children and people discovered, measured and evaluated, showing that man can not form the man, without education in family and society, remain at or just slightly beyond the stage of animality.

All historical periods and all human societies have used education to control those people development and manifestations. The great religious systems of mankind are not only the essence of education millennial respective peoples, found in the everyday life of human societies in question. Spirit that always found time for the range of representations to the economic and ideological education merely represent what is allowed and what is forbidden members of that society.

As a form of social control, education became a means of social control and underlies all the changes that happen in society. We might call this „vicious circle" of education, is a system that creates norms and values imposed on them and modify them according to the stage reached by the science, technology and knowledge, there is a danger that at some point to experiments worldwide out of control. So every society and every human being are the result of education who knew her. Education effects and generate results that should be higher, exceeding the previous level of knowledge.

The evolution of modern societies has a strong impact on education. All the phenomena of economic, social, political and cultural relations with the countries concerned or the entire planet is facing, shall be without prejudice, directly or indirectly on multiple and complex phenomenon of learning. Education is itself sui generis synthesis of these phenomena of the contemporary world. Therefore, it would be desirable for countries in the world and the planet itself should be subject only to such phenomena and positive influences, unfortunately prevails appreciate phenomena and negative influences, leading to negative structuring educational phenomenon on the planet. Such negative influences are generated to the physiological minimum coverage for most of the planet's inhabitants, who live in poor countries and very poor (out of 178 UN member states, about 150 are large and very large problems caused by endemic poverty and lack of resources for education), the major economic and social problems these countries face (economic underdevelopment, quality of life below acceptable standards, etc.).

At the beginning of this new century and millennium, education is profoundly marked by the phenomenon of hyper media: media attention tends to exceed, for most people, the focus of education. Although the media should be made at least part of educating children, youth and adults, reality shows that, except some sporadic positive initiatives, among which lies open and distance learning (ODL), hyper-media harmful influences, being humans, education and personality.

Numerous studies and examples demonstrate this. Furthermore, an objective self-analysis as each of us emphasize the negative consequences they endure because of hyper-media phenomenon.

Paramount importance on the education of the future or the future of education have a system of values and norms, evolving and transforming in step with changes in economic, social, political and cultural. Obviously, as has happened over time, changes in national and international value systems will make its mark in the future of education understood in its most general meaning, as a social activity aimed at sending individuals to the collective heritage society in which they are inserted.

American model of education is no longer current

„Consume, consume ! You have no money? Give you credit. You can not afford credit? We have the solution: another loan to pay by credit first! You just need to consume, we take care of the rest. And the rest is history, even today is History[1], including us, romanian."

Mr Samuel Whybrow, head of the Institute of Neurological and Behavioral Sciences at UCLA Semel, has stated, argued, a theory on how justified, so disturbing. In fact, man is incapable of biologically, to live the American dream ..."We was taught" says Whybrow, that: „happiness comes at the end of a rolling road after an accumulation of material goods, which have been handled we want them to". The title of his book - *American Mania*: *When More Is Not Enough* - said almost all. Primary human behavioral tendencies produced by millions of years of evolution driven by poverty, the place no longer fit the modern world that we built. In this context, our nervous system, based on the dopamine reward became addicted to immediate gratification. This led to the destruction of the natural balance between past and future.

We stuffed with junk food, rich in cholesterol and E's using credit cards to purchase goods which, in fact, normally we could not allow us. And then, exhausted by work, sleepless and chase, us sick with anxiety and depression. Get to sleep that anesthesic vigilance. Actually, the credit means that you put a slave in a utopia, since after you bought everything you wanted - mortgage your future - find that it is actually happy. Markets ... we place no limit excesses, but rather encourages them. That sounds something like: „eat more and more, can give credit to others that he consumed more and more. Instinctive brain is well ahead of the intellectual" ... What would be the solution? ... One of them caught my particular attention: „People should be able to teach children to live modestly and to correctly identify needs".

American or European consumer model of „general welfare state" live their last moments (days, weeks, even several years ...). The more „moments" will be shorter, the mankind will recover faster in a direction that has never been an evolution in a direction that would allow the return of deep and there is no formal scale and becoming perennial. And, for this is the need for a new education from the earliest age and up to the largest, a new way of conceiving the existence of each of us, as we have not done so now some (very few, initiates this new thinking and action) or others (the many, not only to think of physical competence, which unfortunately fail to reach all ...).

Poor education - the real cause of recurrence of seizures

Despide, in support of the above, the issue of financial education on the agenda was the European Commission and Member States well before the credit crunch since summer 2007, but was

[1] Cristian Crisbăşan, *Mortgage the Future*, The newspaper of Sunday, November 7, 2008, p. 8

not sufficiently disseminated and raised. Thus, European policies were formulated in order to achieve closer targets, such as better communication and consumer financial information and better protect them. Instead, there not have been too much for long-term educational goals, the EU in this area because the power is, in fact, quite limited. Although the subject has clear financial implications and a direct impact on the common market, education is still a matter of national competence.

European Commission noted the key role of education in a number of documents since 2005, supporting Member States to adopt effective measures to improve financial skills. On two occasions in 2006 and 2007, EU Ecofin Council stressed "the importance of supporting financial education and consumer awareness of Member States". Introduction of new pension systems in different Member States, which employees more responsible investing autonomous part of their pension funds, the issue has particular importance of financial education. Many observers argue that the lack of financial understanding among American consumers has fueled the crisis. Informed consumers could avoid purchasing hazardous products offered by managers tend to assume certain risks. Thus, a weak consumer information and essentially uncontrolled sale of complex and risky products gave rise to the maximum downside of the financial crisis of September-October 2008.

Consumer organizations also stresses the importance of financial education. Under European rules, banks must properly inform their customers when selling financial products and to warn of the risks assumed. And consumers should be able to easily compare different banking products whose characteristics make them aware. European Council of Ministers in April 2008 approved a revised directive on consumer credit, which has sought increased protection and harmonization of European citizens who are borrowing. Directive seeks standardization of information to be released to facilitate comparison of different loan offers to consumers.

Crisis is the real cause of recurrence in individual and social reality EDUCATION defective. It must therefore change the way people are educated throughout their lives. Albert Einstein, one of the largest earth spirits, said about the crisis: "The crisis is the most blessed event which may occur for countries and people, for it entails progress. Who is exceeded crisis than himself, but still exceeded. The real crisis is the crisis of incompetence. Problem people and countries in crisis are laziness and indifference to find solutions and output from such situations. Without is no value crisis. Blooms during the crisis better what each ... If we talk about crisis - promote. Instead, however, work better. The only crisis is a tragedy not wants to struggle to overcome the crisis."

At the beginning of the last decade of November 2009, MEP Lothar Bisky (EUL / NGL, Germany) asked if the Commission President was ready "to learn the lesson that the new Commission false market economy". Barroso stressed that the focus will be on education, training, worker mobility and combat social exclusion and poverty.

Conclusions

I thought that required a new educational model, the following principles, methods, means and measures for its realization:

Principles

1. Explain the meaning and the meaning „knowledge society"
2. Greater importance of innovation and discovery to acquire knowledge and mechanical repetition.

3. Adequacy of educational policies with a company through the period.
4. Education planning and predictability.
5. „Extending critical"distance education.
6. Primacy of practice before theory.
7. Evaluation and quantification of effects.

Methods

1. Individual energies to education.
2. Promoting learning through discovery.
3. Develop programs and clear responsibilities for implementation.
4. Time-bound plans for implementation.
5. Permanent and continuing education.
6. Promoting learning through visits to nature or objective.
7. Applying classification and evaluation systems.

Routes

1.Allocation of at least 3 percent of GDP for education.
2. A new education law, as comprehensive.
3. Curriculum related teaching practice, not theory.
4.Designing the educational activity through media and information and communication technologies.
5. Encourage and support institutions that promote effective educational instrument.
6. Using the experience of NGO's in education.
7. Promoting competition and rankings in education.

Policy makers and individuals directly involved in the globalization race is concerned, directly or indirectly, of thinking and application of measures affecting education and educational effects on individuals from different countries of the planet. In the process of globalization, the devastating nature of the planet and human beings, the most urgent necessary measures to be taken on line education in each country to propose the following [2]:

Deep involvement, thorough and professional societies prognosis, as the new Society of Mathematics, Physics Society, Chemical Society, Biology Society, the educational process.

1.Increased education on practical training phenomenon, the formation of skills through laboratory experiments (even demonstration, where there is the material basis). A special concern should be given to equipping the minimum standard of school laboratories.

2. School on its various levels, providing access and opportunities to all, but to cultivate and elites. There special programs for gifted students and - reciprocally - for students with difficulties.

3. Teacher manual and computer must support and exploited each other in the modern education. Computer and Informatics Communication Technologies (ICT) should be seen as part of the educational process and not as a substitute for formal textbook or teacher.

[2] *apud * * *, Report summarizing the public hearing from October 28. 2009, on skills training: a necessity for the XXI century society? (Selective) website* www.Sinteza_SAR_AA_Siveco_11091752.pdf, visited on the day of 17 December 2009

4. Computer to be used as a tool for teaching and learning, not be an end in itself. Using the computer to be dynamic and teacher to verify hypotheses by computer, in an attempt to justify theoretically, but not just to read text on screen to present a documentary film or make simple comments.

5. Printing a trial basis in humanities teaching, but especially those belonging to natural sciences. Understanding of sciences and education, especially in mathematics - mainly middle to form the major powers of modern man: the possibility of correct thinking and logical reasoning in situations of any kind.

6. Using deeper exploratory nature of science to training the ability to switch from private to general. Enhancing the role of experiments to analytical thinking as subjects and not only to cultivate their practical skills

7. Develop educational programs with less detail than is currently loaded, which rely more on private crossings in the general and the appeal to intuition, experiment and critically. Abandoning the educational process focusing on memorization and transmission of information or the automatic playing their review processes / evaluation. Elimination of all, whatever that school levels, the test subjects and pre-published solutions and switching solutions, in the latter case, the trials with random allocation (computer) covering all relevant educational programs.

8. Acquisition of key skills in natural sciences and the Humanities, such as practical skills, learning skills throughout life, digital skills, the handling of computer or laptop.

9. Focusing on the needs expressed by business and the demands of the labor market, the study and acquisition of business needs in curriculum design.

10. Introducing innovative education, jump to pedagogy based on inquiry and discovery, observation, analysis and synthesis. Developing reasoning ability of the subject, understanding the phenomena and not saving their deployment.

11. Develop skills to act in a given situation based on information and previously acquired skills, education must be trained actor to independently judge the real problem, to form an opinion and find an answer.

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THE POLITICS OF CARE IN A STATE OF CRISIS: THE ROMANIAN CASE

Alice IANCU[*]

Abstract

The present paper aims to investigate the Romanian public discourse and policy-making regarding care during the post-communist transition and its possible implications in the context of the present financial crisis and Romanian political realities. The paper is divided into three main sections, corresponding to the three main dimensions of analysis: one detailing the theoretical framework used in the present approach, one presenting a brief overview of the politics of care during the Romanian transition and one addressing the new issues put forward by the present context. Drawing from the insights of feminist scholarship on the ethics of care, the analysis of Romanian policies and discourse will be broken down along three distinct but interdependent research variables: the status of care-taking activities and the situation of care-takers and care-receivers themselves, especially related to their risk of social exclusion. A list of priorities will be put forward, both for future research and policy-making.

Keywords: *Care, ethics of care, financial crisis, reconciliation, social exclusion*

Introduction

The present paper aims to investigate the Romanian public discourse and policy-making regarding care during the post-communist transition and its possible implications in the context of the present financial crisis and Romanian political realities. The analysis follows the theoretical insights of feminist research, particularly the ethics of care.

How and if care is integrated into the wider domain of political research and theorizing is directly connected to how it addressed through public policy. The question of care highlights both the connection between the welfare state and gender and draws attention to particular aspects relevant especially in the current crisis: the gendered levels of income, women's presence in the labor market and the priorities in the redistribution of resources.

The paper is divided into three main sections. The first section briefly presents the theoretical framework used, mainly pertaining to the feminist ethics of care. The second part consists of a brief overview of the politics of care during the Romanian transition. The analysis of Romanian policies and discourse will be broken down along three distinct but interdependent research variables: the status of care-taking activities and the situation of care-takers and care-receivers themselves, especially related to their risk of social exclusion. One final section addresses the issues put forward by the present context, mainly the present financial and political crisis. A list of priorities will be put forward, both for future research and policy-making, as part of the concluding remarks.

The feminist literature on care is extensive and it is not the purpose of this paper to offer a comprehensive presentation of these contributions. Rather, I aim to identify the main theoretical

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insights pertaining especially to the ethics of care and apply them to the specific Romanian present context. Recent feminist analysis has focused more on specific state policies and how they address the issue of care, both as part of national or cross-national research. The current paper follows a similar path, using available data and drawing on previous research on the issue.

1. Theoretical framework

The theoretical approaches to care briefly presented in this part of the paper do not seek simply to affirm the value of care as it is understood and addressed within traditional gender roles discourses- where care is a natural, often instinctual activity, usually attributed to women and belonging to the private sphere. What is at stake is the valorization of care as a publicly relevant, deeply political activity.

1.1 The caring self and the value of care

The current debates concerning care have feminist theorists and research at the center, since the value of care and how politics is related to it usually affects predominantly women's lives. These debates run along three interdependent but distinct lines: 1. they are ontological in their focus, because what lies at their centre is a particular conception about the self 2. They discuss the ethical implications of taking the embedded subject seriously and 3. They have distinct policy implications, which is the part I will focus mostly on.

The ontological line of argument follows from taking women's life experiences seriously and considering them relevant to political and philosophical inquiry. An important part of women's lives is dedicated to care-taking activities and the implications for political thought are substantive. While most political theories address the subject from the standpoint of an independent public self, proponents of an ethics of care argue that this independent self should not constitute the basis of political thinking. Since most people's lives are actually marked either by the care they receive (most of our lives we receive care, as children, elderly, sick or disabled) either by the care they give (especially in the case of women) a relevant political theory should begin with an embedded conception of the self[1], In this context Whitbeck argues for a "feminist ontology" that "has at its core a conception of the self-other *relation*[2] that is significantly different from the self-other *opposition*[3] that underlies much of the so-called "Western thought"[4]. This opposition has lead to two conceptions of the person that Whitbeck considers related to one another: patriarchy and individualism. What relates them is the use of dualisms[5] long favored in Western philosophy. In response feminists proponents of an ethic of care offer a different view of the person. A feminist ontology would offer a vision of society based on "mutual realization"[6],

[1] Caroline Whitbeck, "A Different Reality: Feminist Ontology" in *Beyond Domination,* ed. Carol Gould, 64-88 (New Jersey: Rowman&Littlefield Publishers, 1989), 64; Virginia Held, *The Ethics of care. Personal, Political and Global. (*New York: Oxford University Press, 2006), 13; Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care, (*New York: Routledge, 1993),162.

[2] Author's emphasis

[3] Author's emphasis

[4] Caroline Whitbeck, "A Different Reality: Feminist Ontology" in *Beyond Domination,* ed. Carol Gould, 64-88 (New Jersey: Rowman&Littlefield Publishers, 1989), 64

[5] There is long list of dualisms feminists contest: private/public, nature/culture, reason/feeling, spirit/matter, mind/body, all conceived as part of a conception treating the male/female distinction in the same oppositional hierarchical manner. See Caroline Whitbeck, "A Different Reality: Feminist Ontology" in *Beyond Domination,* ed. Carol Gould, 64-88 (New Jersey: Rowman&Littlefield Publishers, 1989), 64

[6] Caroline Whitbeck, "A Different Reality: Feminist Ontology" in *Beyond Domination,* ed. Carol Gould, 64-88 (New Jersey: Rowman&Littlefield Publishers, 1989), 65

focusing on practices mostly common to women's life experiences. This new view of the person would be historical and relational, seeing the subject as a part of social relationships and the process of becoming a person as conditioned by those relationships[7].

Thus taking such a view of the person as a starting point implies a significant change in political ethics and theorizing (For example the relationships that exist between actual persons are usually more scarcely analyzed in political theory because of their more "private" nature.) Feminist theorist differ in their approach to this particular issue: some argue for a radical change in the way political theory and ethics is constructed, others seek to integrate these insights into wider already accepted categories in political theory.

Virginia Held and Caroline Whitbeck, for example, argue for a complete shift in focus. What appears as "exceptions" in traditional ontology, instances where all members of the family, for example, take turns in caring for one another or how health can be relational- mother-child care is a prime example, would find adequate representation in a feminist ethics of care[8]. All this would in turn lead to a new ethics of responsibility, in place of a "rights and obligations" language, responsibilities that arise from everyday lived relationships[9]. While rights and obligations are not entirely discarded, they have more of a subordinated and instrumental character: they are necessary if people are to meet their personal responsibilities to one another[10].

Virginia Held stated the case for such an ethic in terms similar to Whitbeck's: An ethic of care "characteristically sees persons as relational, and interdependent, morally and epistemologically."[11]. There are several traits of the ethics of care in Held's view: First, we should put the needs of those we are responsible for at the center of our moral reasoning: "the central focus of the ethics of care is on the compelling moral salience of attending to and meeting the needs of the particular others for whom we take responsibility."[12] Second, in contrast with most dominant moral theories, epistemologically emotion is just as valued as reason. Third, lived relationships enable moral reasoning in no way inferior to abstract thought. While abstract thought is believed to lead to greater impartiality, and lived relationships seen as impeding such impartiality, within the ethics of care the responsibilities a person has within her relationships carry greater weight. While not all theorists agree on how and if this would ensue in a tension between care and justice, for example, they question the ontological assumptions at the basis of claiming the superiority of abstract reasoning. Such superiority would be valid only if one presupposes an egotistical and competitive world with only universal moral claims to keep it in check. Fourth, an ethic of care challenges the public/private divide and bring the care-taking activities of women into the public sphere. Fifth, it begins with a different account of the person.[13]

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[7] Caroline Whitbeck, "A Different Reality: Feminist Ontology" in *Beyond Domination,* ed. Carol Gould, 64-88 (New Jersey: Rowman&Littlefield Publishers, 1989), 77-78

[8] Caroline Whitbeck, "A Different Reality: Feminist Ontology" in *Beyond Domination,* ed. Carol Gould, 64-88 (New Jersey: Rowman&Littlefield Publishers, 1989), 77-78

[9] Whitbeck takes care in stating that these are not seen as contractual relationships, since some type of relationships such as those between parents or children are not adequately illustrated in a contractual view and since a contractual view is poor at addressing the changes the parties go through, like children growing up. See Caroline Whitbeck, "A Different Reality: Feminist Ontology" in *Beyond Domination,* ed. Carol Gould, 64-88 (New Jersey: Rowman&Littlefield Publishers, 1989), 80.

[10] See Caroline Whitbeck, "A Different Reality: Feminist Ontology" in *Beyond Domination,* ed. Carol Gould, 64-88 (New Jersey: Rowman&Littlefield Publishers, 1989), 79-80

[11] Virginia Held, *The Ethics of care. Personal, Political and Global. (*New York: Oxford University Press, 2006), 13

[12] Virginia Held, *The Ethics of care. Personal, Political and Global. (*New York: Oxford University Press, 2006), 10

[13] Virginia Held, *The Ethics of care. Personal, Political and Global. (*New York: Oxford University Press, 2006), 9-14

Joan Tronto also emphasizes that an ethic of care would place attentiveness, responsibility, competence and responsiveness at its center[14]. In her view the relevance of the debates concerning the ethic of care goes beyond metaphysics or moral reasoning. This is why I will insist on Joan Tronto's approach to care, one that she argues is distinct because of her "insistence that we cannot understand an ethic of care until we place such an ethic in its full moral and political context."[15]In this way several key features of a political ethics of care emerge: First, valuing care politically displaces it from older traditional sentimental frameworks[16]. The distance between an ethic of care and traditional ways of thinking about caring is emphasized by Tronto, who underscores the fact that if care is thought of in terms of "natural" or "cultural"-conditioned behavior it loses all relevance for a moral theory[17]. Care emerges as an activity that involves competences, judgments and socially valuable work, not as a natural instinct. For Tronto care transcends Whitbecks' lived relationships, since judgments and decisions formulated within a care-taking context go beyond that and "require an assessment of needs in a social and political, as well as a personal, context."[18]

Second, valuing care politically would recognize what is essentially a central aspect of human life, one that, if left unanswered for, would deem a political approach inadequate. Since all humans are dependent and in need of care (as children) and others need care more or less even as adults (in case of sickness, old age or disability or other types of needs), they should be regarded as interdependent[19]. This approach displaces three interdependent boundaries found in political theory: the private/public, the ethics/morality and the "morality point of view" boundary that places morality in a world of emotions and irrationality.[20]

Third, the relation between ethics and politics is put into question. Tronto rejects a "morality first" approach. Care is not to be thought in terms of virtues or moral merits [21] nor would a universal principle of care in the form advocated by some be appropriate [22]primarily because what is needed is a workable principle of care that would transcend lived relationships.

Fourth, a political view of care would allow for a moving of the private-public boundary. However for the private to become public, ethics and politics should be conceptualized as informing each other. Any time they do not, care is devalued, since "Care seems inevitably private and parochial because we now construct social institutions so that care only occurs in these contexts. Care seems irrelevant to public life because politics has been described as only the protection of interests." (Tronto, 1993, p.178). A political conception of care would lead to both a recognition of work that is not public (since care-work is often informal) and to an awareness that

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[14] Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care, (*New York: Routledge, 1993), 127.

[15] Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care, (*New York: Routledge, 1993), 125

[16] Whitbeck also explicitly rejects the use of "nurturing" activities as a useful concept, deeming it too associated with "a sentimental picture of a woman doing a variety of mindless tasks in response to the demands of others" (Whitbeck, 1989, p.65).

[17] Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care, (*New York: Routledge, 1993), 125

[18] Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care, (*New York: Routledge, 1993), 137

[19] Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care, (*New York: Routledge, 1993), 162

[20] Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care, (*New York: Routledge, 1993), 8-11

[21] Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care, (*New York: Routledge, 1993), 154

[22] Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care, (*New York: Routledge, 1993), 159-160

care needs institutional settings. For example, I would argue that the public policies concerning the reconciliation between career and the family stem from exactly this understanding.

Whether or not one accepts the more radical theoretical accounts of an ethics of care or leans more towards a theoretical framework such as Tronto's there are clear implications such an approach would bring in terms of how the welfare state and policy-making is understood. These consequences following the addressing of care as a politically relevant subject, as an activity both public and socially valuable, are the subject of the next sections of this paper.

1.2 Gender, care and the welfare state

The welfare state is understood at a general level as a sort of equilibrium factor between market capitalism and social demands. In this context "The objective of capitalist welfare states is to combine economic dynamism with social cohesion, prosperity with social justice"[23].While historically the role of the welfare state has varied, recently its role in social investment and active measures have been restated as necessary[24]. The vision of a welfare state there to correct the inequalities resulted from the market is seen as inappropriate and insufficient. This would be a passive welfare state, based on a clear separation between economic and social factors, which, in light of research on new exclusionary phenomena, would deem its compensatory function insufficient[25]. Rake and Daly propose a vision of the welfare state as a "social face of the state. It is to be understood as a particular state form, whereby the public authorities garner resources and assume responsibility for organizing their redistribution". Aside from this redistributive aspect, the welfare state also establishes the framework for the offering of services, such as education, health and social services, becoming an *active actor* impacting social reality[26].

Daly and Rake make the distinction between three main approaches to the welfare state: social policy, political economy and feminist approaches[27]. The social policy approach is mostly developed in Great Britain and it focuses on the functions of policy and the relation between social policy and the law. It lacks a comprehensive concept of the welfare state and is mostly procedural and detail-oriented, unfitted for comparative cross-country studies, for example[28]. The political economy approach turns to the organization of welfare states and the role of political actors and politics. Ideologies are given special importance within this type of analysis as welfare states are envisioned as the backround for ideological positioning, struggle and negotiation and how they affect power relations. One of the criticisms with wider gendered implications is that this types of studies "have adopted a narrow definition of power, understanding it mainly in terms of the formal political arena"[29], sidelining issues concerning women's and feminism's influence on the welfare state[30].

The feminist approach focuses on the relation between welfare state and gender, more specifically gender relations[31]. This approach is encompassed in a larger trend in feminist

[23] Peter Taylor-Gooby, " The New Welfare State Settlement in Europe", *European Societies* 10:1 (2008), 3

[24] Peter Taylor-Gooby, " The New Welfare State Settlement in Europe", *European Societies* 10:1 (2008), 5

[25] Pierre Rosanvallon, *The New Social Question. Rethinking the Welfare State, (*Princeton: Princeton University Press, 2000), 5

[26] Mary Daly and Katherine Rake,*Gender and the Welfare States. (*Cambridge: Polity Press, 2003), 14

[27] Mary Daly and Katherine Rake,*Gender and the Welfare States. (*Cambridge: Polity Press, 2003), 11, 31-37

[28] Mary Daly and Katherine Rake,*Gender and the Welfare States. (*Cambridge: Polity Press, 2003), 11-12, 32-33

[29] Mary Daly and Katherine Rake,*Gender and the Welfare States. (*Cambridge: Polity Press, 2003), 33

[30] Mary Daly and Katherine Rake,*Gender and the Welfare States. (*Cambridge: Polity Press, 2003), 32-37

[31] The term "gender relations" is preferred by Daly and Rake both because the concept of "gender" evokes a dichotomous female/male reality and it is often a metaphor for a "woman-only" approach. Approaching the issue in terms of gender relations allows for a delineation from these problematic aspects (Daly and Rake, 2003, p.12, pp. 37-342).

scholarship which treats the state as embedded in society, and not as a separated actor. Feminist accounts of the relation between the welfare state and gender focus on the normative principles that characterize different welfare regimes, the policies employed by the welfare state and their effects.

In the context of the ethics of care debates the feminist approaches to the welfare state fall within the equality/difference debate: should women be treated the same as men (with men and men's lives and experiences being the norm) or should gender difference be the starting point? Nancy Fraser's investigation of different welfare regimes presents the principle of gender equity within the difference/equality debates concerning women and gender relations. Two main feminist models of the postindustrial welfare are juxtaposed to the equality/difference debate: the universal breadwinner model and the caregiver parity model. Fraser maintains that a new model must be found, one that would reshape the debate. Neither model encompasses women's experiences fully since "Women today often combine breadwinning and care-giving, albeit with great difficulty and strain. A postindustrial welfare state must ensure that men do the same, while redesigning institutions so as to eliminate the difficulty and strain."[32]. This would come from taking women's lives as the norm, instead of men's, leading to a deconstructing model, where the distinction between the two presented models is broken down[33]. While Fraser does not go into greater detail about this deconstructed model, what is clear from her analysis is that the existing feminist welfare models can't account fully for gender equity.

However this account would have to reflect both western European as well as East-European realities. While Fraser frames her analysis starting from the Western reality of a shift from a single-breadwinner welfare model, such a model has not been part of the Eastern-European reality. Women in Eastern Europe did not strive to go beyond a housewife role because this role has not been part of women's experience in the region until recently. After 1950, in the Eastern communist block, women at the same time mothers, wives and workers. Also women's relationship with the state in Eastern-Europe followed a different path, that went through three phases: a totalitarian state where women and men's lives were invaded by the state, an abrupt redrawing of the state services after 1989 and the present repositioning phase where a middle ground between the two is searched. A feminist welfare state account would have to acknowledge this difference and aim towards a welfare state approach that would encompass all European women's experiences, western and eastern. And both Eastern and Western women's lives are marked by a combination of paid work on the labor market and unpaid care work done informally within the family, or poorly paid in the labor market.

1.3 Care and the welfare state

The relation between women and the welfare state is connected to the way the welfare state shapes family, care and social relations. Feminist theorists and researchers have varied widely in their approach of the issue. One approach contests the understanding of the welfare state as benevolent and focuses on the perpetuating of patriarchy by the state, whether through control maintained over women's choices (through provisions regarding motherhood, for example) or through the exclusion of women from certain entitlements and benefits, usually by appealing to a public/private separation the feminist literature contests[34]. Other analysis focus on the active role

[32] Nancy Fraser, "After the Family Wage: Gender Equity and the Welfare State", in *Political Theory*, 22: 4 (1994), 612

[33] Nancy Fraser, "After the Family Wage: Gender Equity and the Welfare State", in *Political Theory*, 22: 4 (1994), 612-613

[34] Mary Daly and Katherine Rake,*Gender and the Welfare States. (*Cambridge: Polity Press, 2003), 15-16

women play in shaping the welfare state and treat them less as passive recipients of the welfare state's services[35]. Still another avenue of research focuses specificly of welfare state intervention and on how this intervention shapes women's relations to the family and larger social networks. In this sense feminist criticism has focused on particular policies and their implications and on current welfare analysis which tended to sideline such issues as the family[36]. The welfare state's role is crucial in defining caring relations, because " not only does it serve to define the location of care, it exerts a singular influence on whether care is paid or unpaid and on general conditions under which it is carried out and experienced"[37]

Should the welfare state be serious about addressing women's life experiences and work it can not avoid the issue of care. In the context of social exclusion the central focus of feminist research and policy-making relating to women's social exclusion remains on women's role and work as informal care-takers and on specific women's experiences, such as maternity. Informal care work has a significant impact on women's access to the labour market and even access to social networks- should the double-burden leave insufficient time for forming and maintaining social relations outside the household. The forming and maintaining of such relations can become a valuable support system[38]. The status of care (paid or unpaid) as well as the repercussion women's care-work has on their labor market position, their leisure time and future incomes justifies the central position care occupies in many feminist studies[39].

Other analysis focuses on national-wide policy approaches, while its conclusions are limited by the cultural and normative framework specific to these contexts[40]. Another strand of feminist research analyzes actual welfare state policies and their consequences, through transnational comparative studies. This is especially important in the context of gendered social exclusion since care activities impact women's time, access and career path on the labor market, their education

[35] Ann Orloff, "Gender in the Welfare State", in Annual Review of Sociology, 22 (1996), 57-58

[36] Ute Gerhard; Trudie Knijn and Anja Weckwert, " Introduction: Social Practices and social policies" in *Working Mothers in Europe. A Comparison of Policies and Practices,* edited by Ute Gerhard, Trudie Knijn and Anja Weckwert (Cheltenham: Edward Elgar Publishing Limited, 2005), 4

[37] Mary Daly and Katherine Rake,*Gender and the Welfare States. (*Cambridge: Polity Press, 2003), 18

[38] Constanza Tobio and Trifiletti Rossana, "Strategies, everyday practices and social change"*,* in *Working Mothers in Europe. A Comparison of Policies and Practices,* edited by Ute Gerhard, Trudie Knijn and Anja Weckwert (Cheltenham: Edward Elgar Publishing Limited, 2005), 58-73; Constanza Tobio; Arnlaug Leira and Rossana Trifiletti. "Kinship and informal support: care resources for the first generation of working mothers in Norway, Italy and Spain" in *Working Mothers in Europe. A Comparison of Policies and Practices,* edited by Ute Gerhard, Trudie Knijn and Anja Weckwert, (Cheltenham: Edward Elgar Publishing Limited, 2005), 74-96

[39] Jenson, Jane and Sineau, Mariette " The Care Dimension in Welfare State Redesign" in *Who cares? Women's Work, Childcare and Welfare State Redesign,* Edited by Jane Jenson and Mariette Sineau, (Toronto: Toronto Press Incorporated, 2001), 3-18 ; Jenson, Jane and Sineau, Mariette " New Contexts. New Policies" in *Who cares? Women's Work, Childcare and Welfare State Redesign,* Edited by Jane Jenson and Mariette Sineau, (Toronto: Toronto Press Incorporated, 2001), 20-42

[40] See Bimbi, Franca and Della Salla, Vincent „ Italy: Policy Without Participation" in *Who cares? Women's Work, Childcare and Welfare State Redesign,* Edited by Jane Jenson and Mariette Sineau, (Toronto: Toronto Press Incorporated, 2001), 118-145; Daune-Richard, Anne-Marie and Mahon, Rianne „ Sweden: Models in Crisis" in *Who cares? Women's Work, Childcare and Welfare State Redesign,* Edited by Jane Jenson and Mariette Sineau, (Toronto: Toronto Press Incorporated, 2001), 146-176; Jenson, Jane and Sineau, Mariette " France: Reconciling Republican Equality with "Freedom of Choice" in *Who cares? Women's Work, Childcare and Welfare State Redesign,* Edited by Jane Jenson and Mariette Sineau (Toronto: Toronto Press Incorporated, 2001), 88-119; Letablier, Marie-Therese and Jonsson, Ingrid " Caring for Children: The Logics of Public Action" in *Working Mothers in Europe. A Comparison of Policies and Practices,* edited by Ute Gerhard, Trudie Knijn and Anja Weckwert, (Cheltenham: Edward Elgar Publishing Limited, 2005), 41-57; Marques-Pereira, Berengere and Paye, Olivier „ Belgium: The Vices and Virtues of Pragmatism" in *Who cares? Women's Work, Childcare and Welfare State Redesign,* Edited by Jane Jenson and Mariette Sineau, (Toronto: Toronto Press Incorporated, 2001), 56-87

advancement and participation in community and society life. It also explicitly impacts the chances of exclusion of those requiring care. The right to receive care and more importantly good quality care has been the central argument for state's increased involvement in the issue of care[41]. The acknowledgement of care rights does not lead to one single model of welfare-supported care and in fact wide variations do exist. This type of analysis focuses on the transnational level, on national level-situations and on the general framework of the European Union.

Daly and Rake propose a transnational analysis of welfare policies concerning care. They place their discussion in a cross-country framework, focusing on the USA and seven European Union states: France, Germany, Ireland, Italy, Great Britain, Holland and Sweden. The support offered by the state is measured by four main variables: social and monetary benefits, strategies related to the labor market, state services and stimulants for social actors who are potential or actual care-givers[42]. An analysis encompassing indicators of income and other resources is especially valuable in the context of social exclusion, where these remain a central focus. The main problem with such approaches however is the lack of statistical relevant and recent data. While Daly and Rake are able to formulate some conclusions about the way welfare state policies impact women's situation, underlining especially the importance of resources allocation for care-activities, important variations in terms of political culture, normative principles and national contexts make it difficult to draw definitive conclusions about the best welfare state provisions.

Monique Kremer's analysis of the principles that should inform a welfare state's approach to care is set in the context of citizenship rights. She begins her account from Marshall's conception of citizenship, that stressed the necessity of assuring certain rights that would allow greater participation in community life and attaining an acceptable life standard, a common departure point for other feminist theorists as well[43]. Kremer's approach could be considered an application of Joan Tronto's proposition regarding the ethics of care. Kremer maintains the specificity of care-taking activities while integrating them within current debates on the relation between welfare state and her viewing of citizenship and rights through the lens of care has one major advantage: it allows for a disruption of the private/public dualism that proponents of an ethic of care call for. Kremer addresses formerly conceptualized private-public concerns as parts of the same continuum. The private/public divide is avoided because it is irrelevant in the context of care since care transcends its rigidity and several spheres of participation are approached as not only equally important, but also interdependent.

Kremer draws attention to the fact that social rights entail not only access to social protection or education services but also access to public participation (thus linking it explicitly to issues of social exclusion). Kremer approaches three social spheres where citizens should participate: the state, the market and the family[44]. Care is defined as „ the provision of daily, socio-psychological, emotional and physical attention to people"[45] and under this broad definition both paid and unpaid work is acknowledged. Women do most of the caring, should it be paid or unpaid. [46]Care is valuable in itself because it is a fundamental activity not only for women, but for society in general.

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[41] Marie-Therese Letablier and Ingrid Jonsson, " Caring for Children: The Logics of Public Action" in *Working Mothers in Europe. A Comparison of Policies and Practices,* edited by Ute Gerhard, Trudie Knijn and Anja Weckwert, (Cheltenham: Edward Elgar Publishing Limited, 2005), 41

[42] Mary Daly and Katherine Rake,*Gender and the Welfare States. (*Cambridge: Polity Press, 2003), 50-68

[43] Ruth Lister "Citizenship: Towards a feminist synthesis",in *Feminist Review*, 57 (1997), 29

[44] Monique Kremer *How Welfare States Care. Culture, Gender and Parenting in Europe*, (Amsterdam: Amsterdam University Press, 2007), 36-37

[45] Monique Kremer *How Welfare States Care. Culture, Gender and Parenting in Europe*, (Amsterdam: Amsterdam University Press, 2007), 28.

[46] Monique Kremer *How Welfare States Care. Culture, Gender and Parenting in Europe*, (Amsterdam: Amsterdam University Press, 2007), 29

This value legitimizes the acknowledgement of care rights, both the right to give care and to receive care. Her focus is on constructing an account of care rights: the right to give care and the right to receive care. Thus care rights are explicitly relational, and one would make little sense without the other. The two rights cannot exist independently; their relation is one of interdependence. And caring rights, just like any rights „ only become rights when they can be used in practice"[47]The right to care entails participation-in caring activities, receiving an income (an issue crucial for women) and having time to give care (an issue which could prove more important for men „ insofar as it can help them to legitimize taking care of their children and dependent others"[48]). This time is given through provisions regarding paid leave for care, which should be equally available to both men and women.[49]

Monique Kremer focuses her analysis on several care models and I will present her evaluation of the Flanders and Denmark child care models. Both the right to give care and the right to receive care are contextualized differently by welfare states at a national level and incorporated into different types of „care ideals". While both states could be considered a success story in terms of respecting care rights, their models are radically different. Denmark adopted a professional care ideal (associated with social democracy) while Flanders opted for a surrogate-mother ideal (more fitted with Christian democracy). Denmark opted for a professional care-takers system, underlining the right of children to get the best care. The professional caretakers became members of powerful unions and enjoyed a good relation with the women's rights organizations. Flanders preferred a system that would be as close to a replica of the family and community as possible. Thus childcare is performed by „surrogate families" (surrogate mothers, actually) in a less institutionalized framework than in Denmark. It was a less costly system and no expensive facilities were necessary. One of the noted consequences was the almost total elimination of informal care. The care workers were initially not taxed but they were also not included into social security systems. Later they received more support for improving the quality of care, which became more professionalized and were granted social security benefits.

Although they are based on radically different contexts both care ideals are rated by Kremer as having some of the best care provisions. Both models have contributed to the decrease of care-takers' informal work because, albeit for different reasons, both states deemed care a *priority*[50]. This point is one that needs particular emphasis in the context of care in Eastern Europe. With the revival of neo-liberal discourses after the fall of communism the state has redrawn much of its support for care. In Romania the present situation reflects a complete ignorance of the issue of care and denotes a view of care as *apolitical.* In Western Europe there is a recent generalized tendency that reflects „ a transfer of childcare responsibilities form the family towards the collective"[51]. In Eastern Europe the trend went in the opposite direction.

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[47] Monique Kremer *How Welfare States Care. Culture, Gender and Parenting in Europe*, (Amsterdam: Amsterdam University Press, 2007), 40

[48] Monique Kremer *How Welfare States Care. Culture, Gender and Parenting in Europe*, (Amsterdam: Amsterdam University Press, 2007), 41

[49] Monique Kremer *How Welfare States Care. Culture, Gender and Parenting in Europe*, (Amsterdam: Amsterdam University Press, 2007), 41

[50] Monique Kremer *How Welfare States Care. Culture, Gender and Parenting in Europe*, (Amsterdam: Amsterdam University Press, 2007), 185-197

[51] Marie-Therese Letablier and Ingrid Jonsson, " Caring for Children: The Logics of Public Action" in *Working Mothers in Europe. A Comparison of Policies and Practices,* edited by Ute Gerhard, Trudie Knijn and Anja Weckwert, (Cheltenham: Edward Elgar Publishing Limited, 2005), 41

2. The Politics of Care during the Romanian Transition: brief overview

The analysis of Romanian policies and discourse will be broken down along three distinct but interdependent research variables: the status of care-taking activities and the situation of care-takers and care-receivers themselves, especially related to their risk of social exclusion[52].

These three dimensions influence each other and it would be difficult to address one without the other: how care-taking activities are addressed or not through state policies, for example should they be paid or unpaid, has a direct effect on the status of care-takers and on the quality of care those in need of it receive. While separate state strategies could focus on one aspect, more than the other, treating them as separate issues is not appropriate and a holistic approach to the issue of care, like the one apparent within the ethics of care, would allow for more efficient policy-making. In this sense it becomes imperative for care to be regarded as a *relational* issue, with care-takers and care-receivers' status and lives analyzed within one broader context of care relations. Formal and informal care should addressed also interdependently, thus going beyond the private/public distinction. For example when approaching the issue of care-takers, I will be referring both to informal care-takers (for example women doing unpaid caring activities for their family members) and to institutionalized care.

Eastern European countries saw a revival of the traditional values discourse after the fall of communism that impacted directly on gender roles and on how these gender roles were (or not) addressed by the state[53]. A survey conducted in 1998 within the International Social Survey Program showed that more than half of the population in the surveyed CEE countries[54] supported the traditional division of work between genders, with women and men holding comparable views even across age groups[55].While Romania was not included in the named survey, data is available on Romanian's attitudes towards gender roles. Work divisions within the family strongly indicate that women take up most of the domestic tasks (in terms of childcare in almost 70% of Romanian households women are the only ones caring for children[56]) even if theoretically 71% the respondents agree that the work should be divided equally-the difference between what Romanian men declare and what they do is connected by some researchers both to their desire to legitimize their authority over the children and to their understanding of how they should care for their children, since they understand their care responsibility mainly as breadwinning[57]

The care-taker/care-receiver relation is relevant for the lives of most women in contemporary Romania since current traditional cultural practices, coupled with lack of or insufficient institutional care translate into a social reality where women are the overwhelming majority of informal care-takers, especially for family members in need of care. Considering that

[52] The definition of social exclusion, as the concept is used in this paper draws on European Union's way of defining exclusion in its official policy documents: "Social exclusion is a process whereby certain individuals are pushed to the edge of society and prevented from participating fully by virtue of their poverty, or lack of basic competencies and lifelong learning opportunities, or as a result of discrimination. This distances them from job, income and education opportunities as well as social and community networks and activities. They have little access to power and decision-making bodies and thus often feeling powerless and unable to take control over the decisions that affect their day today lives." (*Joint Inclusion Report,* European Commission-European Council, 2004, p.10)

[53] Sylke Viola Schnepf, Women in Central and Eastern Europe. Measuring Gender Inequality Differently, (Saarbrucken: VDM Verlag Dr. Muller, 2007), 90-91.

[54] The surveyed CEE countries refered to are Eastern Germany, Hungary, the Czech Republic, Slovenia, Poland, Bulgaria and Russia. See (Schnepf, 2007, p. 93)

[55] Sylke Viola Schnepf, Women in Central and Eastern Europe. Measuring Gender Inequality Differently, (Saarbrucken: VDM Verlag Dr. Muller, 2007), 97-99

[56] Data from the *Gender Barometer,* from 2000, the first survey of its kind conducted in Romania.

[57] Vladimir Pasti *The Last Inequality,* (Iasi: Polirom, 2003), 122-123

there is a great proportion (43.9%) of Romanian households living with dependents *within*[58] the household[59] the number of women carrying a significant double burden[60] is especially high. This has a significant impact on women's time, labor market participation, with long-term consequences on their professional experience and incomes, leading into their retirement benefits.

Apart from the implications for women's informal workload, unpaid caring activities' consequences could be analyzed in terms of access to the labor market and in terms of income effects. The European Union's report on equality between men and women from 2009 stated that "if one compares the **employment rate of women and men with children** under 12 to care for, this gender gap is almost doubled. Also, the employment rate of women falls by 12.4 points when they have children, but it rises by 7.3 points for men with children reflecting the unequal sharing of care responsibilities and the lack of childcare facilities and work-life balance policies"[61].

An earlier analysis on gender and the welfare state from 2003[62] indicated that the number of children is a significant variable when discussing women's participation in the labor market and that parenting (especially motherhood) has a significant impact on women's incomes. It is clear that not only being a parent, but also that the *gender* of the parent is a determinant factor in relation to the risk of poverty. While in the USA and UK being a father also increases the risk of poverty, this increase is much weaker than in the case of women. The analysis focused on evidence from eight western countries, seven from Europe and the U.S.A[63].

From available data we could determine that the presence of dependents is indeed coupled with a lower income for women. Households with only one earner run a higher risk of falling under the poverty threshold. Thus "The observed polarization of employment towards a generic model of households with two earners underlines the rising necessity of a second wage among European households in order to have a decent level of living"[64]. Members of Romanian households with dependents in need of care, especially children, identify their main problem in 2006 as "lack and insufficient income". Also three out of the top five problems are related to the labor market in terms of finding a job, assuring a decent income and job-related stress.[65] The presence of children in the household women's poverty risks by raising the costs of the household and by having a negative effect on women's participation in the workforce and income. This is not due to Romanian women's own preferences, with women having children aged under 14 showing greater desire to enter and advance in the workforce than women with no children.[66] Still, in

[58] Emphasis mine. The data does not account for dependents in need of care (such as elderly persons) living outside the household.

[59] The data only accounts for older dependents described as "Older members of the households who cannot take care of themselves" and children under the age of 18. Other types of dependents such as people with disabilities or the sick were not taken into consideration.

[60] More severe than before 1989, when the state was involved in offering day-care for children.

[61] *Report from the Commission to the Council, The European Parliament Equality between women and men — 2009, The European Economic and Social Committee and the Committee of Regions, Brussels, 27.2.2009,* p. 4.

[62] The eight countries are France, Germany, Ireland, Italy, the Netherlands, Sweden, the United Kingdom and the United States of America. (Daly and Rake, 2003, pp.59)

[63] Mary Daly and Katherine Rake,*Gender and the Welfare States. (*Cambridge: Polity Press, 2003), 58-66

[64] *Working Poor in the European Union,* European Foundation for the Improvement of Living and Working Conditions, http://www.eurofound.europa.eu/pubdocs/2004/67/en/1/ef0467en.pdf, p.24

[65] The top five problems identified were: *Lack of income/Low income, Health-related problems, Finding a job, Buying/building a house and job-related stress*. The data was obtained through a national-representative survey conducted as part of the CNCSIS (National Centre for Scientific Research in Higher Education) Project No.964 *Gender, political interests and European insertion,* developed by the National School of Political Studies and Public Administration.

[66] The data was obtained through a national-representative survey conducted as part of the CNCSIS (National Centre for Scientific Research in Higher Education) Project No.964 *Gender, political interests and European insertion,* developed by the National School of Political Studies and Public Administration.

Romania, women with children are less present in the labor market than women without children[67]. Women's income is significantly lower than men's within the general population of Romanians living with dependents in need of care (children or elderly people in need of care) in the household. Women make up a worrying majority of people with dependents to take care of who face lack of income or low income of their own. A significant part of women with dependents to take care of declare they have no income, thus raising the question of how or if access to the labour market is made available to them (61% of women living in household with dependants declared that they do not have their own income; in households with no dependents only 38% of women declared the same thing[68]

While women's participation in the labor market is governed by a broad variety of factors, policies concerning the family occupy a central role in feminist analysis of women's occupation patterns in the market. Most feminist analysis focuses on child-care policies, although children are not the only category women care for: the sick and the elderly are also cared for by women. The choice to focus mostly on childcare is because this work tends to become full time, is more visible and more information exists about it. In the meantime "informal care for ill and elderly adults is especially hidden. Only rarely likely to be full-time, it is often fitted in around economic and other activities, including retirement"[69]. More than one model of child care policies can be found in European welfare states and the differences can be significant, but what appears to be a constant feature is that when state policies offer women a choice most choose to work[70]. However in states where the family is not a political concern and traditional gender roles are predominant, such as the Mediterranean countries and the Eastern-European countries, such a choice is much restrained[71].

The main contribution of the European Union is the promotion of policies on reconciliation between work, family and private life as a central policy concept, one adopted by most member states. The European Women's Lobby links care with social exclusion explicitly: " The lack of affordable, accessible and high quality care services in most European Union countries and the fact that care work is not equally shared between women and men have a direct negative impact on women's ability to participate in all aspects of social, economic, cultural and political life."[72] and particularly with women's difficulty in accessing the labor market and earning a good income**.**

Reconciliation between work and private life is not a priority for Romanian policy makers, the transition years being marked by a shift of responsibility for childcare from state-funded facilities to the family (women). The number of state-funded care facilities decreasing

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[67] *Report From the Commission to the Council, The European parliament, The European Economic and Social Committee and the Committee of the Regions* ***Equality between women and men-2008,*** http://ec.europa.eu/employment_social/gender_equality/docs/com_2008_0010_en.pdf, p. 19.

[68] The data was obtained through a national-representative survey conducted as part of the CNCSIS (National Centre for Scientific Research in Higher Education) Project No.964 *Gender, political interests and European insertion,* developed by the National School of Political Studies and Public Administration.

[69] Mary Daly and Katherine Rake,*Gender and the Welfare States. (*Cambridge: Polity Press, 2003), 58

[70] Mary Daly and Ute Klammer „ Women's participation in European Labour Markets" in *Working Mothers in Europe. A Comparison of Policies and Practices,* edited by Ute Gerhard, Trudie Knijn and Anja Weckwert, (Cheltenham: Edward Elgar Publishing Limited, 2005) 130-134

[71] Mary Daly and Ute Klammer „ Women's participation in European Labour Markets" in *Working Mothers in Europe. A Comparison of Policies and Practices,* edited by Ute Gerhard, Trudie Knijn and Anja Weckwert, (Cheltenham: Edward Elgar Publishing Limited, 2005), 131; Ute Gerhard; Trudie Knijn and Anja Weckwert, " Introduction: Social Practices and social policies" in *Working Mothers in Europe. A Comparison of Policies and Practices,* edited by Ute Gerhard, Trudie Knijn and Anja Weckwert (Cheltenham: Edward Elgar Publishing Limited, 2005), 11-12

[72] *Who Cares?,* European Women's Lobby, May 31st 2006, http://www.womenlobby.org/SiteResources/data/MediaArchive/policies/Economic%20and%20social%20justice%20for%20women/EWL%20Position%20Paper%20on%20Care_EN.pdf, p.1

dramatically: from 1991 to 2006 the number of state-funded kinder gardens more than halved[73]. During the health system's reform the number of hospital beds and crèches decreased continuously, and the informal care resulted was placed again on women's shoulders[74]. In terms of care for the elderly the state again places responsibility on "the family" (the women in the family). The Romanian governments seeked to minimize their role in the care of elderly and an official report from September 2006[75] stated that the problem lied in the *decreasing availability of the younger generations to care for the elderly*[76]. Not only does this show that the Romanian state does not appear think of itself as having any significant role in caring for its elder citizens, it also indicates that the Romanian social reality itself is ignored by our representatives. According to the *First European Quality of Life Survey: Quality of life in Romania and Bulgaria,* Romanian families are tightly nit together and the first institution people turn to in need of help is the family. The only thing Romanians do not ask for from their families is financial support, most likely because of the fact that the family itself does not have the resources to comply with such a request[77].

Moreover, reconciliation policies' absence cannot be blamed on an overall skepticism of the population and social actors' towards such initiatives. A research conducted as part of the *Equal Opportunities through Reconciliation between family life and career* project, conducted in 2006 by the Center for Gender Studies and Curriculum Development: FILIA[78] investigated different social actors' positions regarding reconciliation between work, private life and family policies. Through this project we aimed at identifying the position of unions, senators, businesses and academics on reconciliation policies and we focused on determining some commonly agreed on reconciliation policies that would receive the support from all the relevant actors. The research was conducted using a structured questionnaire grid and the results were discussed within a public debate where representatives of the social institutions involved had the opportunity to further discuss and debate their opinions. The results of the research[79] revealed that multiple social actors, may they be senators, union and business representatives or academics, agreed on a set of policy measures aimed at improving reconciliation between work and family life[80]. While the degree of skepticism

[73] Băluță, Oana „ The Gender Dimension of Reconciliation Between Work, Family and Private Life" in *Equal Partners. Equal Competitors,* coordinated by Oana Băluță, Bucuresti: Maiko, 2007, 114-116

[74] *National Development Plan 2007-2013, (*Planul National de Dezvoltare 2007-2013), http://www.inforegio.ro/user/File/PND_2007_2013.pdf, p.157

[75] *National Strategic Report on Social Protection and Social Inclusion (*Raport National Strategic privind Protectia sociala si Incluziunea Sociala), *Ministry of Labour, Social Solidarity and Family,* Bucharest, September 2006, http://www.mmuncii.ro/pub/imagemanager/images/file/Domenii/Incluziune%20si%20asistenta%20sociala/Proiecte_cu_finatare_externa/6%20-%20Raportul_National_PSIS_final.pdf, p.18

[76] My emphasis

[77] *First European Quality of Life Survey: Quality of life in Romania and Bulgaria, http://www.eurofound.europa.eu/pubdocs/2006/67/en/1/ef0667en.pdf,* pp. 39-41

[78] The project was funded by the Chamber of Deputies, within the " Partnership with the Civil Society" program.

[79] The research results and policy recommendations were published in the volume *Equal Opportunities through Reconciliation between family life and career* , Bucharest: Maiko Publishing, 2007

[80] The various social actors were asked to determine between the *desirability* and the *feasibility* of variable policy proposals. While respondents believed that most policy proposals presented to them were highly desirable the top choices that were considered both desirable and feasible were "state funding for kinder-gardens and crèches", "subventions for single parent families for access to childcare facilities", " Support for employer funded childcare facilities", " Introducing a voucher system" and " Programs for training support for parents returning from parental leave". See Băluță, Oana and Mocanu, Cristina *Common Directions for Action* (Direcții Comune de Acțiune) in *Equal Opportunities through Reconciliation between family life and career* , coordinated by Oana Băluță, Bucharest: Maiko Publishing, 2007, p.56

concerning the actual feasibility of the policies varied among respondents, with the business representatives being the most pessimistic and the deputies arguing for a higher desirability of private business-supported solutions, the research was a great step forward in two ways: first, it facilitated the introduction of reconciliation policies in public discourse. Second, it showed that some level of consensus between different social actors could be reached, should there be a political will to take reconciliation seriously.

Kremer's analysis is most relevant point in the context of Romania in that while more than one model could prove effective in addressing the issue of care, the key variable is that care is considered a priority and that it is viewed as a politically-relevant issue. The Romanian state's ignorance on the issues of care throughout the transition period reflects a vision of the welfare state that is eminently gender-blind.

3. The Politics of Care in a State of Crisis

It is crucial that the importance of care-centered policies, particularly in the context of the current financial crisis, be recognized. At the European Union Level, the Advisory Committee on Equal Opportunities For Women and Men released in June 2009 its *Opinion on the Gender Perspective on the Response to the Economic and Financial Crisis.* Among the recommendations put forward was the continuing of reconciliation measures[81]. In the Romanian context, analysis of recent strategies concerning care is made difficult by the fact that the current government has yet to produce an official governing strategy, while its actions in recent months appear to distance themselves from the original governing program.

The Governing Program 2009-2012 initially envisioned coherent and particular reforms for the education and healthcare system, as well as special strategies for families, children and equal opportunities (the last three domains were addressed together)[82]. It specifically mentioned the need for increasing the institutional capacity for implementing gender policies and eliminating discrimination against women in the labor market and the larger social context.

The National Agency for Equal Opportunities Between Women and Men addresses issues such as reconciliation between work and private life specifically in its *National Strategy for Equality Between Men and Women 2010-2012.* Even more, the promotion of reconciliation is a specific objective within the Strategy and the recommended priorities are a greater valorization of paid and unpaid work, while both the importance of flexible and alternative work schedules and legislation on paternal leave is underscored[83].

However, as stated previously it is hard to establish a serious commitment both from the part of the Romanian government and other state institutions for gendered care policies. The National Agency for Equal Opportunities Between Women and Men's budget is insufficient for allowing for any substantive progress, while its planned activities in the field of reconciliation for the 2010-2012 period at best lack ambition. These are mainly awareness raising activities, for the wider population and institutional actors- including one campaign aimed at raising the awareness of fathers about their own responsibilities in the raising of children. While such a campaign is welcomed, it does not go beyond the public/private divide, not does it allow for an understanding of the state's recognition of care's *political* implications. Romanian mothers and fathers should

[81] Advisory Committee on Equal Opportunities For Women and Men, *Opinion on the Gender Perspective on the Response to the Economic and Financial Crisis,* 10 June 2009, p. 11.

[82] *Governing Program 2009-2012,* http://www.gov.ro/programul-de-guvernare-2009-2012__c12l1p1.html

[83] The National Agency for Equal Opportunities Between Women and Men, *The National Strategy for Equality between Men and Women 2010-2012,* p.13

care together for their children; however focusing on this aspect obscures the state's own responsibilities both toward the care-takers and the care-receivers.

At the same time it is difficult to assess the current Romanian Government's commitment for care-oriented gendered policies, in the absence of an official strategy. In the context of Romania's political crisis[84] and the government invoking its agreement with the International Monetary Fund[85] as if it were the governing strategy, I would venture to speculate that the priority given to care-oriented policies is low and will remain even lower. The reforms announced since the beginning of last year- concerning the education system, healthcare and social protection- are still being announced. In a *Letter of Intent and Technical Memorandum of Understanding* dated February the 5th 2010, the Romanian government repeats again its commitment to reform in these areas. The "reforms" however are all informed by the broader commitment of the Romanian Government to reduce public expenditures[86]. Concern for the quality of healthcare and education is secondary and responsibility is placed mostly on the people working in these sectors[87]. Whatever reforms are envisioned these do not presuppose any increase in the already insufficient funds the education and healthcare systems benefit from, while the latest government miss-steps (including payment reductions) have caused great anxiety among employees of both sectors. As far as institutionalized care facilities are concerned, these are not on the current government's list of priorities.

Conclusions

The lack of attention given to care could be stated to be the one common feature of Romanian policies throughout transition. The implications of the feminist ethics of care are twofold: first, that care should become a priority for policy makers and that no gender equitable welfare state could be reached without this. Second, that care should be thought-off in relational terms: the status of care-taking activities, the well-being of care-receivers and the status of care-takers should be understood as interdependent.

The Romanian policies during transition ignored both these aspects. Recent Government policies and actions signal that institutionalized care is not a priority for policy makers and that they tend to regard the three previously stated dimensions of care as separate. The low status care-givers from the healthcare and education system have in the governments vision could not result in quality care. Moreover, the adding of pressure on these care-givers masks the lack of substantial state-involvement in institutionalized care. Constant gender budget monitoring should be available in the future, so that the redistributive activities of the state be analyzed by how they relate to gender equity. Otherwise concern for the vulnerable groups in society, those most often in need of care, would prove to be either inefficiently translated into policy-making, either empty rhetoric.

[84] After months of political unrest, following the latest presidential elections DLP (The Democrat Liberal Party, a popular party, member of the European Popular Party) managed to barely pass a government by allying itself with DAHR (the Democratic Alliance of Hungarians in Romania, member of the member of the European Popular Party) and benefits from the strong support of the current president.

[85] The Romanian Government took out a loan from the International Monetary Fund as a measure against the financial crisis

[86] *Letter of Intent and Technical Memorandum of Understanding,* Romanian Government, February 5th 2010, http://www.imf.org/external/np/loi/2010/rou/020510.pdf

[87] As an example *Prime Minister Emil Boc's Intervention During the Debate on the National Education Law, in the Chamber of Deputies,* http://www.guv.ro/interventia-premierului-emil-boc-in-cadrul-dezbaterii-cu-tema-legea-educatiei-nationale-desfasurata-la-camera-deputatilor__l1a108514.html

The present financial crisis calls for a serious commitment to care-policies, especially with growing social vulnerabilities.

Future research should focus more on policy-effects on care the government strategies have. Lack of available reliable data is a problem for social research in this field in Romania. More studies should be conducted emphasizing the need for a holistic approach underlining the need for the valorization of care, received and offered, and the public/private divide in understanding care should be displaced and replaced by a deeper commitment and understanding of the interdependence between the two.

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THE DINAMICS ON CITIZENSHIP – A THEORETICAL APPROACH

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Abstract

In this paper I argue that the concept of citizenship is fundamentally a dynamic concept, a reflection of the society in which we live in. Thus, I identify participation as the main element of this dynamics. Starting from a simple definition – citizenship as the connecting point between individuals and the state trough rights and obligations – I note that citizenship is called upon on one hand in order to legitimate a political community's authority, and on the other hand, in order to protect the individuals trough guaranteeing a set of civil, political and social rights. In order to fulfill these functions, the institution of citizenship must permit a continuous negotiation and re-negotiation of the social contract, in a well-defined framework (in terms of time and place coordinates). Thus a particular mechanism emerges, transcending the classical theoretical approaches meant to explain who, how, for whom and why we discuss he issue of citizenship. My paper follows a three-step argument: first, I will start by deconstructing the concept of citizenship to its component elements, stressing out those aspects I consider to be relevant in terms of dynamics. Secondly, I will look at the main theoretical approaches regarding citizenship, considered as the results of a modeling process which establishes particular relations between various elements composing a system. Finally, I will underline the importance of participation (active or/and passive) in the process of (re-)constructing the concept of citizenship. Also, in this last part, I will try to synthesize the main elements that contribute to the dynamics of citizenship.

Keywords: *citizenship, theories of citizenship, active participation, passive participation, dynamics.*

Introduction

The main thesis of my paper is that citizenship is essentially a dynamic concept, fundamentally depending on the context within it functions. Thus I argue that one of the core elements composing this dynamics is participation which, in relation with citizenship, develops at least two dimensions: *active participation* – implying effective and sustained implication of individuals and groups in the governing processes affecting their lives, and *passive participation*, which implies that the lack of action is a form of response or an implicit evaluation of the social contract at one given moment, thus o form of agreeing on the status quo.

Studying the dynamics of citizenship has in my view at least two major implications: first, it makes available the proper analytical tools with which one can understand the historical changes of the concept, and secondly, it may provide researchers with the ability to forecast future directions in which the concept may change and evolve.

Thus, in this paper I want to reveal the flexible points or aspects present in the concept of citizenship that can reveal its dynamic nature. I consider such an approach as necessary due to the

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fact that up until now, the relevant literature concerned with the concept of citizenship developed an integrated model of the concept's inner dynamics, therefore this essential aspect being taken into consideration only as a secondary element or as part of a wider context, but never as a core dimension of the concept.

On account of clarity, I find it necessary to draw up a first subchapter in order to ensure a clear definition of the concepts I will relate to and make use of along this paper, starting with citizenship and proceeding onwards with the concepts resulting from its deconstruction. At the same time, at this stage, my purpose would be to provide an analytical approach to the discussed concepts by a permanent reference to the core of this paper, namely citizenship as a fundamentally dynamic notion. The concepts that will be discussed hereafter are: citizenship, individual, political community, relationship, rights, obligations, participation.

What does citizenship stand for?

Isin and Turner define citizenship as a legal status held under the authority of a state[2], a social process by means of which individuals and groups undertake to follow their interests by shaping obligations and rights[3]. Stressing the participative dimension of citizenship, Richard Bellamy refers to it as a particular set of political practices involving specific rights and obligations with respect to a political community.[4]

Other scholars emphasize the membership status entailed by citizenship and the relation between individual identities and the citizenship building process. For example, Thomas Janoski and Brian Gran approach citizenship from the membership standpoint, be it passive or aggressive, by the individuals to a nation-state that guarantees them universal rights and obligations on a certain level of equality[5], a process in which each persons sees the relation between rights and obligations as an exchange and a swing by which the self develops in relation to the state and to a manifold of political groups[6]. Faulks stresses the importance of citizenship as mediating factor in the relationship between the civil society and the state and the fact that the citizens' understanding of how they are to exercise their rights and obligations is crucial to the soundness and stability of any system of government[7].

We can see therefore that the definitions of citizenship are manifold, with certain elements however remaining constant, namely the *relation* between individuals and a *political community* embodied in a set of *rights* and *obligations*, elements that will be discussed in what follows.

What is the individual or to what sort of individuals do we refer to when taking radiography of the dynamics of citizenship?

In the existing literature on the matter, a distinction is set between two different approaches to the concept of individual, approaches which are complementary in my perspective, namely the bio-sociological[8], emphasizing the social and/or biological determinism and the philosophical-

[2] Isin, Engin F. şi Turner Bryan S. "Citizenship Studies. An introduction*",* in Isin, Engin F. şi Turner Bryan S, *Handbook of Citizenship Studies*, (Londra: Sage Publication 2002), p. 2;

[3] Idem 2, p. 4;

[4] Bellamy, Richard. *What is Citizenship. A Very Short Introduction, (*New York: Oxford University Press, 2008), p. 3;

[5] Janoski, Thomas şi Gran, Brian. "Political Citizenship: Foundation for Rights", *",* in Isin, Engin F. şi Turner Bryan S., ed., *Handbook of Citizenship Studies*, (Londra: Sage Publication 2002), p. 13;

[6] Idem 6, p. 14;

[7] Faulks, Keith. *Political Sociology. A introduction,* (Edinburgh: Edinburgh University Press, 1999), p. 126;

[8] See Budon, Raimond, coord., *Tratat de sociologie*(*Treatise of Sociology*), (Bucureşti: Humanitas, 1997), p. 251);

political[9] approach, grounded on a conception regarding human condition. Reality, or better said the perception of reality, is generated by the manner in which the manifold of the aspects related to biology, sociology and political philosophy configures itself, thereby engendering a model of the individual, or representing an Weberian ideal type. At the same time, one could easily guess that there is no single equilibrium point leading to the stabilization of the model, therefore that we are dealing with multiple equilibrium states intensified by the context in which the calibration of the model takes place[10]. The perspective that places the individual at the intersection between the philosophical-political approach and the bio-sociological one could prove very useful in providing answers with regard to the scope of the concept of citizenship, i.e. with regard to *who* and *why* should or shouldn't be citizen.

What does a political community stand for or what do we bear in mind when we speak of a political community with regard to citizenship?

Max Weber characterizes political structures depending on the source of the legitimacy, territoriality, available means of coercion and degree of institutionalization of the authority system[11]. Setting out from the assumption that power is part of any society and not just a mere derivative of economical domination and that, besides administration, it also involves governing people, power becomes as such a basic element for the construction of a political society[12]. The manner in which the aforementioned elements combine and/or merge has a fundamental impact on the nature of the political community we refer to at any give moment.

The authors concerned with this issue especially refer to certain political communities when approaching the problem of citizenship, mainly discussing the ancient and the modern citizenships with respect to the specific organization of the fortress cities of Ancient Greece and Roman Empire[13], respectively the city-state[14], as within these communities first takes place the

[9] In this case we operate with four fundamental perspectives on human nature: the **optimistic view**- mainly related to the liberal ideology and according to which humans have an intrinsic value deriving from their being reason-endowed (Țăranu, Andrei. *Doctrine politice moderne şi contemporane* (*Modern and Contemporary Political Doctrines*), *(*Bucureşti: Fundației Pro, 2005), p. 17); the **pessimistic view**- mostly assumed by the conservative perspective, setting out from the assumption that the human being lacks a general inclination towards altruism, being more of an egoistic being, bound rather for idleness and acting only by virtue of self-interest, according to this approach individual rationality being profoundly marked by emotions (Socaciu, Mihail, coord., *Filosofia politică a lui Thomas Hobbes (Thomas Hobbes Political Philosophy),* (Iaşi: Polirom, 2001), p. 37-38); the **rationalist view**- formulated by Grotius according to whom the innate sociability of human being represents its essential characteristic, adding up to the fact that everybody rigorously respects the promises and conventions they pledged themselves to (Turchetti, Mario. *Tirania şi tiranicidul. Forme ale opresiunii şi dreptul la rezistență din antichitate până în zilele noastre (Tyranny and Tyrannicide. Forms of Oppression and the Right Resistance from Antiquity to Present),* (Bucureşti: Cartier, 2003), pp. 615-618)); the **Marxist view**- Marx's deterministic historic-materialistic approach also shapes its view of human nature- the existence determines consciousness.

[10] Two such equilibrium states are elaborated in Locke's and Rousseau's theories of natural and civil right.

[11] Weber, Max, *Politica, o vocație şi o profesie, ,* (Bucharest: Anima, 1992), p. 8;

[12] Chazel, Francois, *Puterea* (*Power*), in Budon, Raimond, coordinator, *Tratat de sociologie* (*Treatise of Sociology*), (Buccharest: Humanitas, 1997, p. 248;

[13] The perspective on the organization of the *polis* was a pure utopia, the reality of the political life being completely different. The fact that the basis for its construction was represented by a small number of citizens, that should have had sufficient common interests, further enforced directly by participating in the decision making resulted in the fact that Greek citizenship was rather exclusive than inclusive. As such, women and long term residents enjoyed only partially the civil rights, while slaves were denied the citizenship. Another source of exclusion resulted from the fact that freedom and equality were profoundly bound to the membership to the polis, more precisely to land ownership. See Dahl, Robert A. *Democrația şi criticii ei* (*Democracy and its Critics*), (Bucharest: Institutul European, 2002), pp. 31-32;

[14] See Schulze, Hagen, *Stat şi națiune în istoria Europei* (*State, Nations and Nationalism: from the Middle Ages to the Present*), , (Iaşi: Polirom, 2003), chap.1, 2;

coming of the individuals in the political sphere, identified and specified as such and having as fundament the equality of the citizens as members of a political community, which is a result of the replacement of the hierarchical and dominance relationships with reciprocity ones[15].

In this context the gained legitimacy becomes very important, but it "must be constantly maintained and renewed by the legitimizing process […] the mixed character of the political power is bestowed by this joint and not necessarily harmonious dynamics"[16]. As such, we are dealing here with a political arrangement that stabilizes itself by its very capacity of continuously adapting to the needs of the governed.

What does a relation consist of and what kind of relation does citizenship entail?

By its simplest definition, a relationship is a link, a connection between things, ideas, facts, processes, terms etc. In the corresponding literature, the relation between individuals and the political communities they belong to is defined as an inclusion relationship that, with respect to the view of the individuals and of who must or deserves to be a citizen, and to territoriality[17] as well, automatically entails an exclusive dimension. The inclusion relationship entailed by citizenship is one of order, even of complete order[18] as citizens are considered to be equal with respect to their rights and duties, therefore comparable in this respect. As such, the assumption by which we proceed is that given the class of the individuals, one of its subclasses is represented by the included individuals and the other by the excluded ones. In the next step of the analysis, the inclusion criteria become important, assuming that citizenship is desirable. Further, the desirability of citizenship as against the inclusion relationship it entails, involves the fact that the inclusion relation has value, value that I personally find mainly instrumental, therefore extrinsic[19], in nature, as long as the citizen status represents both the basis for the guarantee of the civil rights and for the enforcement of the obligations, desirability that entails a permanent process of forcing the *boundaries* of citizenship, therefore dynamic in nature.

Citizenship: rights and obligations

Citizenship is also seen as "the right to have rights"[20], namely that certain something that conditions the access to certain rights upon the belonging to a political community. In the specialized literature we basically find two approaches to the citizen's rights, the first from the standpoint of the functions of the rights, the second from that of their scope. With regard to their corresponding validity domain, and we are mainly speaking here of *legal or civil rights* (personal

[15] Bachelier, Christian, *Ce este cetăţenia?,* (*What is Citizenship?*), *(*Iaşi: Polirom, 2001), p. 7;

[16] Bachelier, Christian, *Ce este cetăţenia?,* (*What is Citizenship?*), *(*Iaşi: Polirom, 2001), p. 7;

[17] Reality still compels us to refer to city states, even if in the specialized literature there are ample elaborations of the theories concerning cosmopolitan citizenship.

[18] An order relationship in which any two given elements are comparable bears the name of *total order relationship*.

[19] One could also find arguments for an intrinsic value of citizenship to the extent that, for example, in a world of citizens one could want to be a citizen just for the sake of being released of any ulterior benefits and obligations, citizenship thereby gaining intrinsic value. However, I personally find this aspect to be of lesser importance in the analysis I set forth, as I believe it can be subsumed to the multitude of possible arrangements in the configuration of the individual and, as such, the effects of the swing on this dimension are to be felt in the dynamics of the citizenship irrespective of its being included in the characterization of either the relation, or the individuals.

[20] Bellamy, Richard. *What is Citizenship. A Very Short Introduction,* (New York: Oxford University Press, 2008), p. 15;

security, access to justice, consciousness and choice), *political rights* (personal political, organizational, membership rights), *social rights* (empowering rights, opportunity development rights, redistribution and compensation rights) and *participation rights* (labor market rights, consultative or determinative rights mostly referring to rights resulting from collective negotiation and co-determination rights, capital control rights). From the standpoint of their *validity domain* we can speak of *universal rights* (involving all citizens found in the capacity to make use of them) and of *particular rights* (applicable to a small body of citizens by virtue of some specific differences separating the respective group from the mass of the citizens)[21].

Just as in the case of the rights, the discussion regarding the obligations involved with citizenship depends on the manner in which the different approaches to the individuals and the political communities, configure around the inclusion relation, thereby together modeling the substance of citizenship in different theoretical configurations. It is certain however that irrespective of the theoretical approach, the obligations mainly involve the submission to and equality of the citizens with respect to the law, law which is devised in such a manner as to satisfy the needs of the citizens at a given time. Obligations, just as rights, are shaped along a continuous process of adaptation to reality, process that provides the substance of the political construction within which these are undertaken by the citizens, thereby legitimating the government.

Five basic theories of citizenship

Essentially, in the presentation of the five basic theories, I will attempt at providing an analysis of the manner in which the elements I have presented in the previous pages, come together in the form a unitary explicative vision of citizenship, more to the point, of the manner in which a certain vision on human nature, political edification, the nature and the role of the relationship between individuals and political community is embodied in rights and obligations that, in their turn, become apparent in the institutionalization of the state by the citizen. The multitude of the existing theories[22], is proof to the diversity of the answers that can be given to this question and to the intense current debates, enlivening the scholarly field concerned with citizenship. They will be presented hereafter.

The liberal theory of citizenship. The edification of the liberal citizenship[23] sets out from the individuals, as they are the ones who, by association, set up all the other constructions pertaining to citizenship. The placement of the individual before everything else is grounded on an optimistic view with respect to human nature, namely by virtue of the rationality bestowed upon equal and free individuals. Thereby they are the most qualified to administrate their own lives, the aims of which limit themselves to the optimal satisfaction of the personal interests[24]. The development of the conception of the individual has obvious effects upon shaping the criteria for the right government. Therefore, what we are dealing here with is a relativization of the *best*

[21] See Janoski, Thomas and Grant, Brian " Political Citizenship: Foundation for Rights*",* in Isin, Engin F. and Turner Bryan S., ed., *Handbook of Citizenship Studies*, London: Sage Publication 2002; Janoski, Thomas, *Citizenship and Civil Society: A Framework of Rihts and Obligations in Liberal, Traditional and Social Democratic Regimes, (*Cambridge: Cambridge University Press, 1998), pp. 28 - 35;

[22] See Beiner, Ronald, *Theorizing Citizenship,* (New York: State University of New York Press, 1995), Introduction;

[23] The liberal doctrine knows nuance differences that became apparent in the distinction between classical, social and neoclassical liberalism; the same assumptions however are subjacent to each of them. For further details see Ţăranu, Andrei. *Doctrine politice moderne şi contemporane* (*Modern and Contemporary Political Doctrines*)*, (*Bucureşti: Fundaţiei Pro, 2005), pp. 23 – 30;

[24] Ţăranu, Andrei. *Doctrine politice moderne şi contemporane* (*Modern and Contemporary Political Doctrines*)*, (*Bucureşti: Fundaţiei Pro, 2005), pp. 17 – 18;

government, as the latter is permanently being set against the interests of the individuals, interests that, in the extent in which they can be satisfied by the market, by the regulation of the invisible hand, involve the maximum possible reduction of the state's attributions by virtue of its incapacity to properly estimate the nature of a government just by the legitimacy bestowed upon it[25].

Setting out from this basis, liberal citizenship can be defined as that distinct view on citizenship having as main finality the maximization of the citizens' individual freedom[26]. In such a structure, the individuals act in keeping with the rights being guaranteed by the political community, by their own beliefs and values. They are free to choose whether and how they participate, civically or politically, in what sort of market transactions they partake, thereby also assuming the effects of the choices they make. The individual rights are universal and precede both the obligations and the state, but at the same time, the liberal citizens are tolerant with respect to the obligations deriving from the necessity of respecting the rights of the others. Collective rights are secondary to the individuals and are not attributed to some abstract entities. The state must provide for a climate in which the citizens can enjoy equal opportunity, climate that is best generated by mainly ensuring the civil and political rights. By providing civil and political equality by virtue of the rationality of the citizens, the liberal citizenship tolerates inequality in wealth and income gained from the performance on the market, fact leading to an incompatibility with the redistributive policies.

The communitarian theory of citizenship. An alternative to the liberal view on the citizenship is provided by the communitarian theories[27]. The ground pillar around which the communitarian citizenship is constructed is the community[28], which is considered to precede the political order and the state.

With regard to human nature, the communitarians claim[29] that there is no immutable reference system and that it would be more pertinent to speak of a dynamic, gradually developing human nature. As such, according to this view, we do not get born humans, but become as such. Setting out from this assumption, the communitarians, totally opposed to the conservatives, believe that individuals, in the extent that they are being embedded in a favorable, moral environment, which is rich in values, develop ever more virtuously. Socialization, namely *right socialization*, becomes essential and along with it, the socialization environments become the focal point of the communitarian approach. Family, school, community and communities of communities are the basic moral infrastructure for the shaping of the individuals.

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[25] The aim of the liberal conception on the role of the state is to avoid the risks entailed by the fact that the relation between the individuals and the political community in which they act is regulated by the legitimacy that covers only the good part of the government, the bad part thereby eluding control. Therefore, according to the liberal conception, as long as there is an alternative formula guaranteeing the promotion of the interests of the individuals, namely the market, the role of the government can be limited, thereby also minimizing the risks of the emergence of illegitimate governmental actions.

[26] Suck, Peter. H., "Liberal citizenship", in Isin, Engin F. and Turner Bryan S., ed., *Handbook of Citizenship Studies*, (Londra: Sage Publication 2002), p. 132

[27] "The main foe of communitarians is liberalism. This adversity is not gregarious in nature, of in corpore rejection of the liberal ideas, it is a process of dynamical borrowing of concepts and of relocating them in a new space- the social space". (Ţăranu, Andrei. *Comunitarismul – doctină contemporană. O filosofie a binelui comun – Communitarianism – a Contemporary Doctrine. O Philosophy of the Common Good*- (Chişinău: Arc, 2005), p. 33);

[28] "The community therefore becomes a group of persons tide together by specific interests in a social group, characterized by a specific structure and culture, resulting from the relationships and psychosocial processes within. Ţăranu, Andrei *Comunitarismul – doctină contemporană. O filosofie a binelui comun – Communitarianism- a Contemporary Doctrine. O Philosophy of the Common Good,* (Chişinău: Arc, 2005), p.11);

[29] Several nuance positions emerged within the communitarian perspective- communitarians, civil republicanism, liberal communitarians. These differences do not concern this study, that attempts at providing a general perspective on the communitarian theory with respect to the elements that are related to citizenship.

Regarding the political community, the state, the communitarians claim that we should dispense with the idea that the state should be neutral, backing the conception that the state should be involved in the life of the community, in the production of the common good, by its capacity to impose certain limitations on self-determination, "which are necessary for preserving the social conditions capable of generating and strengthening self-determination"[30].

According to this approach, citizenship emerges within a community characterized by a specific cultural dimension, thereby stressing the social dimension of the rights and obligations. For the communitarians, citizenship involves the participation to the political life of the community, while, at the same time, accounting for a way to preserve its identity, thereby representing, in one way or another, a challenge to the universalism of the liberal citizenship that, from this standpoint, becomes rather problematic with respect to the integration of a set of very different identities.[31] Mindful of the differences, the communitarians support the equal dignity of the citizens and find that the majority should make concessions in favor of the minorities and, very important, claim that the state should grant them formal recognition.

The republican theory of citizenship. The republican tradition, according to Dahl, sets out from the assumption that the human being is, by its very nature, a social and political being that must cohabitate within a political association. "[…] a good man must be a good citizen; a good political organization is an association made up of good citizens; a good citizen is one endowed with the quality of civic virtue; virtue is the predisposition to seek everybody's wellbeing with respect to public issues; therefore, a good political organization is one that not only reflects, but also promotes the virtue of its citizens"[32]. Therefore, the republicans emphasize in great extent the *civic virtue*, but at the same time they stress the fact that it is not immutable, but, au contraire, a people or its leaders can become corrupt, the greatest danger being represented by the emergence of certain political factions promoting a state of conflict within the republic[33].

The republican citizenship is set somewhere between the liberal and the communitarian one, attempting at finding a balance between rights and obligations, individual and community, by promoting both cooperation and competition. The republicans find that the best instrument for promoting this balance is the participation, be it civic, political or on the market, criticizing liberal theories for their over-stressing of privacy, individual rights and underrating of the promotion of the civic virtues, which can lead citizens to a better performance of their duties.

Another important aspect of the republican citizenship regards its legal status. The republican tradition sees freedom as a product of the laws generated by the citizens through participation, unlike liberals who claim that laws are a necessary evil the function of which would be to preserve that much freedom for the individuals as to enable them to live together[34]. Therefore, while liberals emphasize individual autonomy, the republicans support the cohesion of the community, which governs itself on the basis of the legality resulted from the participation of the citizens in the very laws they are subject to[35].

In nuce, republican citizenship seeks to become a *via media* between the communitarian and the liberal approaches, by the fact that: both individuals and communities are important and

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[30] Țăranu, Andrei. *Comunitarismul – doctină contemporană. O filosofie a binelui comun – Communitarianism-a Contemporary Doctrine. O Philosophy of the Common Good-* , (Chişinău: Arc, 2005), p. 109;

[31] Delanty, Gerard. „Comunitarism and Citizenship", în Isin, Engin F. and Turner Bryan S., ed., *Handbook of Citizenship Studies*, (London: Sage Publication 2002), pp. 159 – 175;

[32] Dahl, Robert A, *Democraţia şi criticii ei, (Democracy and its critics), (*Bucharest: Institutul European, 2002), p. 39;

[33] Idem 32;

[34] Bellamy, Richard. *What is Citizenship. A Very Short Introduction, (*New York: Oxford University Press, 2008), p. 43;

[35] Ciprut, Jose V., Citizenship: Mere Contract, or Construct for Conduct?, in Ciprut, Jose V., ed., *The Future of Citizenship, (*London: The MIT Press, 2008), p. 11;

therefore participation represents the best way to consensus; groups must respect the rights of the individuals, which, being underrepresented, must form groups so that their interests can find representation, as groups have a higher negotiation capacity; there is a complex balance between rights and obligations, between the universal and the particular, that is being generated through the rule of law; the institutions resulting from such an interaction between the individuals and the political community create the necessary spaces for the citizens to actively participate in the decision making.

Cosmopolitan citizenship, multicultural citizenship. In the end of this section, I find it necessary to draw up a short presentation of two approaches that are often considered to be antithetical and that become ever more apparent within the field of citizenship, namely the cosmopolitan and the multicultural approaches[36].

Cosmopolitan citizenship originates with the philosophy of Immanuel Kant who, being strongly influenced by the Cartesian philosophy, by the logic according to which there is a certain *a priori*, an undeniable essence, set the basis for a universal system of ethics having as fundament the aforementioned "essence", namely the very capacity as human being, especially by postulating the categorical imperative- *Act only according to that maxim whereby you can at the same time will that it should become a universal law!*, respectively *Act in such a way that you treat humanity, whether in your own person or in the person of any other, always at the same time as an end and never merely as a means to an end!*[37] This universal ethics is guided by a principle according to which any human being must be treated humanely, that is according to an inalienable dignity that becomes in turn a global attachment to a culture of non-violence and respect for life, to a just economic order, to tolerance, to a life guided by truth and, last but not least, to the principle of equal rights[38]. In the definition of citizenship, Alejandro Colas makes use of the following three principles: 1. all individuals are members to a single moral community by virtue of their humanity; 2. as such, they are morally bound to each other and these obligations transcend the boundaries of ethnicity, nationality or of any other particular definition of identity and 3. these obligations require political involvement with respect to their being put into practice[39].

The cosmopolitan approach to citizenship is most often criticized for the alleged fact that it imposes a rather utopian view of citizenship instead of a pragmatic one, namely one that could be actually embodied in exercisable rights and obligations. Assuming some of these criticisms, the theoreticians of the cosmopolitan citizenship continue to challenge the traditional approaches that restrict citizenship to the nation-state, emphasizing the fact that individuals are members to the international society and subjects to international law[40].

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[36] In the literature one could also find references to other approaches to citizenship, such as sexual citizenship, cultural citizenship, and ecological citizenship. However, I have found it more important to draw up a presentation of the cosmopolitan and of the multicultural citizenships with respect to the manner in which the redefinition of the relationship between individuals and the political community they belong to, takes place, namely by challenging the nation-state as sole political entity for the citizenship to develop in (the cosmopolitan approach) and by stressing the importance of the processes by which the identity of the citizens is built (the multicultural approach).

[37] Kant, Immanuel; trans. Ellington J.W. [1785] (1993), p. 36;

[38] Dallymar, Fred. Cosmopolitanism. Moral and Political, *Political Theory*, Vol. 31, No. 3 (Jun., 2003), pp. 421-442, p 6;

[39] Robinson, Fioana Cosmopolitan Ethics and Feminism in Global Politics, *All Academic Research*, accesat pe http://www.allacademic.com//meta/p_mla_apa_research_citation/0/7/4/3/8/pages74386/p74386-1.php

[40] An important step to the consolidation of the cosmopolitan citizenship is represented by the *Nürnberg Chart* giving army men the right to refuse compliance with the orders of the superiors if these lead to crime against humanity. At the same time, the CONVENTION FOR THE PREVENTION AND PUNISHMENT OF GENOCIDE (1948), the CONVENTION AGAINST TORTURE, INHUMAN AND DEGRADING TREATMENT (1984), the UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948), THE INTERNATIONAL CONVENTION FOR SOCIAL AND POLITICAL RIGHTS (1966)

Multicultural citizenship. The theoreticians of multicultural citizenship claim not only that universal citizenship and its classical, nation-state bound, form are unrealistic alternatives, but that these forms of citizenship are *a priori* undesirable. As such, setting out from the assumption that any society is essentially multicultural, made up of a manifold of populations of different religions, genders, social environments or ethnicities, citizenship should provide a favorable space for the management of these differences so as to guarantee, in equal measure, the identity development of all the citizens. Multiculturalists claim that the rights of the minorities cannot be subsumed to the human rights as the international standards to which the latter are subject to, cannot provide answers to questions such as: What language should there be used in administration? Should any ethnic group receive financing for native language education? Should the inner boundaries of states be drawn in such a manner as to insure, within them, the majority of the various ethnic groups? Should governmental authority be decentralized? Should attributions be imparted in proportion to the ethnical diversity within the respective state? Should minorities become integrated? Is it their responsibility to do so? etc.[41]. Therefore, common civil rights, originally devised by and for the white christian male, cannot cope with the specific needs of other groups, while an integrative citizenship must take into account these differences[42].

Kymlicka separates between three types of group rights bound with differentiated citizenship: a) the special representation rights within representative political institutions; b) self-government rights (the right of the respective minorities to decide with respect to the aspects of the outmost importance for the respective community- such as education, language, family etc.), c) multiethnic rights (the protection of the specific religious and cultural practices of the community in question, protection that isn't provided by the existing legislation)[43]

In nuce, the grounding framework for the multicultural citizenship would reside in the following claims: the complex identities of the individuals must be reflected by civil rights and obligations; the groups identified by ethno-cultural characteristics may benefit from collective rights; universal rights are not sufficient, as they cover only part of the needs of the individuals in an anifold society; citizens build their identities within groups with the help of group rights, so they may and must militate for gaining them.

Citizenship and participation. Modern citizenship is necessarily grounded on democratic principles[44]. Irrespective of the citizens' actually participating or not in the decision making process, the very fact that they can do it, fundamentally changes their position within the respective political community and the manner in which individuals shape themselves and their political identity. The existence of the mechanisms which are necessary to make participation to

constitute important steps in defining cosmopolitan rights. Another very important step is represented by the implementation of the individual petitioning system, allowing an individual to call for the international law system against his/her own state. See Linklater Andrew. *Critical Theory and World Politics. Citizenship, sovergnity and Humanity,*(Londra: Routledge, 2007), chap.7; Linklater, Andrew. "Cosmopolitan Citizenship", in Isin, Engin F. and Turner Bryan S., ed., *Handbook of Citizenship Studies*, (London: Sage Publication 2002);

[41] Kymlicka, Will, *Multicultural Citizenship: a liberal theory of minority rights,* (Oxford: Oxford University Press, 1995), p. 5;

[42] Idem 41, p. 181;

[43] Idem 41, p. 37;

[44] The fact that we would find it hard calling democracy what was so called in Ancient Greece or even one century ago has to do with the manner in which the concept has evolved. However, as democracy grew ever more inclusive, citizenship developed alongside. In time, the concept of citizenship changed aside with the transformation of the manner in which political communities were build and also by virtue of the loosening of the necessary conditions that had to be fulfilled in order to become citizen: starting with Ancient Greece, the Roman Empire and ending with the nation states and the challenges brought upon them by multiculturalism and cosmopolitanism.

the governing process possible[45], by virtue of the sovereignty derived by the people and for the people, engage two mechanisms that are fundamental, in my opinion, for regulating the democratic construction and, at the same time, the rights and obligations involved with the citizen status: *legitimacy* and *responsibility*. As such, in a democratic regime, even if there is no generally shared vision of the way in which equality, freedom and security may combine, thereby generating the optimal conditions for the citizens, we can speak of an arena for the debate with respect to these aspects and within which consensus can be built. By this consensus the citizens legitimate a form of government, that, in turn, by virtue of this legitimacy, must act responsibly with respect to the mandate by which it has been legitimated. At the same time the citizens, having the possibility to negotiate their contract, must in turn act responsibly with respect to the political community to which they became subjects of by virtue of its legitimacy. Thereby the civil rights and obligations are born.

In this context I find it necessary draw attention on the fact that when I say participation I refer to at least two dimensions of it[46]: a) *active participation*, calling for actual, involved participation by the individuals and groups in the governing process affecting their lives[47], b) *passive participation*, involving the fact that lack of action is a form of answer or of evaluating the social contract at a given time, a form of acceptance of the status quo[48]. Both participation forms respect the rules of the game[49], they involve legitimacy, responsibility and accountability.

Correlating the way in which individuals make value judgments with respect to the government, to the way in which they act, Thomas Janoski and Brian Gran advance the following citizen typology, that I personally find very useful to understanding the way in which the negotiation and renegotiation mechanism of the contract between the individuals and the political community in the edification of the rights and obligations, operates: the incorporated citizen- he is part of the elite, or at least feels himself to be, actively supports the party interests, belongs rather to the power than to the opposition, has a great deal of trust in the leaders, operates somewhat selflessly as benefits by the very fact of being part of the political system in power; *the active citizen*- takes part in several political activities, is interested in the other members of his group, at many times he is in conflict with the establishment's elites, may belong to a party or to an organization, he tends to be in the opposition, is to a certain extent radical, reformist, altruist; the *deferential citizen*- non-participative, accepts the authority of the exiting elites, does not internalize the goals of the party or the state, easily manipulable, has the tendency for trusting the leaders as he has the impression that they work at his advantage, leaves political participation at the hands of the elites, but goes to vote and contacts the politicians if he/she needs to; *the cynic citizen*- he/she acts similarly to the active citizen, but does not participate as he completely lacks confidence, is rather passive and very critical; *the marginal citizen*- he/she is detached, alienated with the system due to lack of material resources and power, stressed, votes rarely and

[45] I refer to the representative government in particular.

[46] Janoski speaks of the *legal status of being*- represented by civil rights that involves a rather passive position, and of the legal *status of doing*- represented by the political rights, entailing a meta-right of creating rights and calling for an active position by the citizen. He also reminds of Hohfeld's classification of rights- freedoms, claims, powers and immunities, situating participation among the powers. For further details see Janoski, Thomas, *Citizenship and Civil Society: A Framework of Rihts and Obligations in Liberal, Traditional and Social Democratic Regimes,*(Cambridge: Cambridge University Press, 1998), pp. 29 – 30;

[47] Starting with an informed and responsible vote and continuing with an active involvement in voluntary activities, ONG activism or various causes, lobbying, protesting etc..

[48] The leaders' actions do not displease me so much as to take steps in this respect and I do not act though I have the necessary instruments to do so to my disposal.

[49] The fact that I do not participate does not place me outside the contract, it only makes me subject to obligations and duties in the negotiation of which I did not want to take part.

stochastically, oriented towards family and friends (the immigrants); *the opportunistic citizen*- makes rational decisions concerning the fulfillment of short term material interests, participates only when being directly interested in doing so, more of a free rider.[50]

The typology above draws attention on an aspect which I find of the outmost importance, namely the symbolical construction of citizenship, more precisely the fact that citizens, in relation to the state, form a personal concept with regard to the rights and obligations they perform[51]. Therefore, the construction of citizenship is at many times symbolical and indirect, citizens being indirectly informed and interested on what is happening within the political sphere, but acting depending on the way in which they personally perceive and interpret the information which they encounter. This symbolic construction of citizenship does not weaken in the very least the responsibility, either of the citizens, or of the members of the government.

The way in which citizenship squares and embodies itself in a set of rights and obligations represents a reflection of the wishes of the members of a community, transmitted through the mechanisms that guarantee their participation in the decision making, more precisely the guarantee of the participation rights. Therefore, three aspects of citizenship- the belonging to a democratic community, the rights and obligations deriving from the membership status and the participation in the political, economic and social processes taking place within the respective community- they combine in various forms to generate the social layout specific to a certain moment.

The dynamics of the concept of citizenship. As resulting from the issues discussed so far, citizenship is a complex, multidimensional concept, that, beyond the theoretical approaches, has a very specific practical finality resulting from the creation of an instrument devised to ensure a good government, on the basis of the participation of the citizens in the decision making process, government that is embodied in the guarantees of the civil, political, social and participation rights and through the promotion of the policies resulting from the contract between the citizens and those in power.

The instrumental quality of citizenship has to do with the fact that "it is not an immutable essence, that we should maintain and pass on. It represents a historical construction"[52], a product found at the intersection between the various perspectives on human nature, on the types of political communities, and of relationships that can be established between the individuals and the political communities, on the materialization of this relationship in rights and obligations, on the source and nature of legitimacy etc.. Therefore, we can identify, for the moment, at least two practical dimensions of the concept: one derived from the fact that the very comprising elements can take various forms, the second resulting from the establishment of directed relations between these components. Various arrangements thereby emerge, that are best grasped in the main theories of citizenship. At the same time, theories find themselves in a continuous reconstruction process so as to be able to offer the best possible explanation to the way in which the concept of citizenship evolved- therefore they are dynamical as well.

A historical retrospective on the development and edification of citizenship brings out the fact that it is fundamentally bound to the various democratic organizations of the society. Participation is therefore bound with citizenship, it is guaranteed through the civil and political rights and becomes, at the same time, both an internal factor (through rights) and an external one (as the substance of citizenship is subject to the people's sovereignty principle) that determines the

[50] Janoski, Thomas and Gran, Brian. „Political Citizenship: Fundations for Rights", in Isin, Engin F. and Bryan S. Turner, eds., *Handbook of Citizenship Studies*, (London: Sage Publication 2002), pp. 39 - 41;

[51] The case of the ritualization of the vote in 19th century France in Schnapper, Dominique and Bachelier, Christian *Ce este cetăţenia?* (*What is citizenship?*)*, ?,* (Iaşi Polirom: 2001), pp. 97 – 98;

[52] Schnapper, Dominique and Bachelier, Christian. *este cetăţenia?* (*What is citizenship?*)*,* (Iaşi Polirom: 2001), p. 95;

dynamics of the construction of the concept. In representative democracies, participation involves, in a sketchy representation, a mere electoral mechanism, but that allows citizens to control the governing process. If the elected govern well, the citizens have the possibility of reiterating their legitimacy with the next elections, granting them their vote anew, while if their government is poor, they loose their capacities along with the elections. Outside the electoral process, the citizens can resort to a multitude of ways to influence decision making: trade unions participating in the negotiations with the government, NGO militating for various causes etc..

As such, we are speaking of efficient, or less efficient governments depending on their actual capacity to guarantee citizens' rights and obligations, capacity dependant on the resources administration, on the extent to which those in power abide by the rules of the democratic game, on the ideology at hand, on the citizens' civic culture and on the way in which they take part in the edification of the government power etc., therefore on a multitude of factors that shape the context in which that political community acts.

By way of conclusion.

What changes? The following do change: a) individuals- on the one side, with respect to assuming one of the understandings of human nature, on the other, the product of the social construction of the individuals changes, while, last but not least, individuals have an impact on the dynamic of citizenship by the way in which they relate to it in the participation process, and I refer here especially to the symbolic construction of citizenship; b) political communities- they can be more or less effective; c) the nature of the inclusion relationship, more precisely the criteria by which the citizen status is granted and, implicitly, the scope of citizenship; d) rights and obligations- they vary a great deal from one state to the other, precisely because they are the product of a complex of factors depending much on the economical, political, and social context in which they are negotiated; e) the theoretical perspectives- they always face new challenges, such as the new right, the new left, the feminist, multiculturalism, environmentalist, movements, post-modern theories that stress identity, sexuality, life-stile etc..

What causes change? Citizenship has a mainly instrumental value. By its means the relationships between individuals and a political community are regulated, the purpose being the creation of a good government. A good government is a government by the people and for the people. Therefore, citizenship represents the reflection of a permanent adaptation to new contexts- the passing from the traditional legitimacy of the government to the legal-rational one, the industrialization, the emergence of the state, the recent challenges contesting the organization of the state, the various social movements such as the slave liberation movement, the feminist movement etc..

How does change take place? As it is directly bound to the democratic regimes, the reshaping of citizenship takes place by the abidance by the rules of the democratic game, entailing that the people are the owner of sovereignty and, by virtue of this fact, those entitled at most to rule, hence to self-government. The effective enforcement of this principle occurs through representation and direct participation in the civic and political community. As such, the driving force of change consists in safeguarding the participation mechanisms, fact that has major impact both upon the individual (the awareness of the possibility to participate is in itself empowering, while the symbolic edification of citizenship takes the shape of various types of action), and upon society as a whole (participation, be it active or passive, translates into equal rights and obligations for all the citizens).

From a dynamic perspective on citizenship, it becomes evident that it is a regulatory instrument of the relation between individuals and the political community, a relation which is meant to assure a good government or those being sovereign and which are the legitimating agents

of the governing power, for the citizens. In conclusion, a clear identification of the component elements of citizenship that can regulate a stable and solid equilibrium regarding citizen's interests at a given moment it is absolutely necessary in order to provide a better understanding of the historical evolution of citizenship and also in order to enable the researcher to anticipate future transformations of the concept.

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COMPREHENSIVE COMMUNICATION AND THE QUALITY OF INTERPERSONAL RELATION BUCHAREST STUDENTS BEHAVIOURAL PATTERNS IN INTERPERSONAL COMMUNICATION

Elena NEDELCU *

Abstract

The first part of this paper will deal with the quality of interpersonal communication in a world in full process of technologization – globalisation. Without underestimating the benefits of information technology and "plethoric" communication we outline the unwanted impact they have when used excessively and exclusively in interpersonal communication. In the second part, we will talk about the connections between the quality of interpersonal relation and the behavioural options of the interlocutors in communication. We will show that achieving a high relational coefficient is an aspect conditioned by practicing comprehensive communication, and empathic listening. The third part synthesises the results of a social survey based on questionnaire. The survey's goal was to find the behaviours of Bucharest students in their interpersonal communication and to find the way they perceive the quality of communication in Romanian society. It emphasises that in Romanian society the un-comprehensive behaviours are at all levels of society, which limits, blocks, distorts communication, maintaining a general low relational coefficient. Bucharest students experience an emphasised feeling of limitation. This restricts their freedom of expression, suffocating their aspiration to profound first-rate communication.

Key words: *,,tautism",* ***,*** *interpersonal communication, relation coefficient, comprehensive communication, empathic listening*

Introduction

Communication from Explosion to Implosion / Are We Happier in the "Society of Communication"?

Society, as the sum of human interactions, of intricate networks cannot be imagined outside communication. Human relations are possible and negotiated through communication. Special studies show that out of the 24 hours, we communicate for 11 hours [1]. We could say that we exist through each other as we communicate. We are constantly facing various problems and in order to solve them we must communicate.

No matter what the frame of reference in communication is, the quality of the inter-human relations relies quite a great deal upon the quality of communication. Too often used to explain the successes and failures of interactions, communication created the illusion that it is a universal cure-all. Thus, we fail to see the importance of other factors (economic, psychological, and cultural) in shaping the human interactions.

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[1] Giblin, Leslie, *The Art of Human Relations Development*, Curtea Veche Publishing House, 2005, p.28

On the other hand, even if it is not a universal cure-all, the importance of the quality of communication shouldn't be underestimated: it plays a major role in personal development as well as society. That is exactly why the analysis of the way in which the quality of communication evolved was of interest for many researchers.

To what extent we can talk about an increase in the quality of communication in today's society compared to traditional society is a question that raised numerous polemics. Contemporary society is facing two apparently paradoxical phenomena: on the one hand, the boom of communication forms and technologies, the emergence of new dimensions in communication, new global dimensions, and on the other hand, a deficit in the quality of interpersonal relations which often remain embrionary, superficial, conventional. Authors like L. Sfez, A. Mehrabian, M . Wiener associate the plethoric character of contemporary communication with superficiality. The development of communication, technologies in general, and communication technologies in particular, was not doubled by increasing quality, authenticity of the interpersonal human interaction. The information society filled with its technologies has contradictory effects on the personal development of individuals: it facilitates communication at global level but it steals the time and diminishes the capacity to interact in a sustainable qualitative way. The French sociologist L. Sfez diagnosed with "tautism" this society oversaturated by information and means of communication, but poor in relational nutrients[2] He created the concept of "tautism" by combining the meanings of the two words – "Tautology" (the useless repetition of the same idea, but in different words) and "autism" (the pathological state characterized by losing touch with reality). Tautism is the disease of a world in which a lot is being said, but less and less is understood. It is a world in which the technological boom in communications is also responsible for the implosion of communication. [3]

In other words, although today's social actors have more instruments to communicate with, and even if they communicate more than ever before, the depth of the dialogue and the quality of the relations have considerably deteriorated. The multitude of communication instruments feed the idea that we are free like never before to communicate. In reality, these mediums are limited and limiting.

Television, for instance, with its variety of means of communication has created the illusion that it is an objective observer of reality. The audience, seduced by the TV image, has identified itself with the fragmented message transmitted by television, becoming just as limited as the message. (L. Sfez, 1988). Moreover, one of the first drawbacks of mass communication is that it significantly reduces the non-verbal dimension of communication.

The modern means of communication (phone, internet, etc.) have limited means for non-verbal communication. This leads to more talking, but with less information transmitted, thus making relations more superficial. The above-mentioned thinkers consider that the internet and online communication tend to distort the relations and to isolate individual[4]

By significantly reducing the non-verbal dimension of communication, the intermediate technologies impoverish and limit the human interaction. The artificial communication is more superficial, lacking a certain amount of savour and picturesqueness. On the other hand, superficiality and lack of consistency in communication is also due to an increase in difficulty when it comes to building common meanings in such a diverse world. Today's society is not just a society of diversity and individuality, but also one of confusion and disorientation. When talking about the confusion of values *Lucien Sfez* was bemoaning the destruction of consensus and of the

[2] Sfez, L, *Critique de la communication*, Seuil Publishing House, Paris, 1988. ,

[3] Sfez, L., *Comunicarea*, Institutul European, 2002, p.19

[4]Mehrabian, A. & Wiener, M., "Decoding of inconsistent communications", Journal of Personality and Social Psychology*, SUA, 1967)*

fusion of the *historical* and the *emotional* in today's world. (Lucien Sfez, 2002) Gianni Vattimo outruns L. Sfez. He emphasizes and salutes the present explosion of rationalities and differences which have an indisputable liberating role and which makes impossible the idea of a unique, homogenous reality. The variety of communication technologies gives birth to a multiplicity of interpretations, and points of view.

"There aren't only one or two interpreters like in the Middle Ages, when there were only the Pope and the King. Today we have CNN, but also Fox, and various other TV channels, newspapers (....). This multiplicity (chaos) contributes to the destruction of absolutism. The human dialogue replaces the *absolutes*." The condition is to face a real multiplicity, not a fake one [3]

In Vattimo's opinion, postmodernism represents a period of transition from unity to plurality. It is the product of communication development, which led to the discovery of historicity and the contingency of the value systems, and this *disorientation*, instead of being perceived as a deadlock should be considered the premise of freedom itself.[4] Going back to L. Sfez, we must admit that the stake of his book, "A Critique of Communication", is very up-to-date: genuine communication - which should ensure social cohesion - is threatened today by artificial communication, lacking content and presenting a sterile theoretical discourse. Lucien Sfez considers that the solution lies in a return to the humanist hermeneutics: "Against technological, artificial, transnational, and faceless communication there is only interpretation. So, let's practice together translation, commentary, searching critique. Let's interpret." (L. Sfez, 2002). The humanistic approach to communication can explain the human being's need for real and profound communication, the need to develop quality inter-human relations.

2. The Quality of the Relation, Behavioural Options in Communication, and Empathic Listening

2.1. What is RQ (quality of relation/ relation coefficient)?

Paradoxically, the so-called "society of communication" has created a system of relations which does not answer the human being's need for profound and genuine communication. J. Salome notices that "the relational system which dominates our culture and which is called the SAPPE system, favours the dominant/dominated relations thus inciting to regaining the power or to complying. It leads to oppositions and confrontations, cultivates dependence, mistrust and even doubt/suspicion of each other.

Against all moralising attempts coming from religion, socio-cultural codes or personal ethics, most of the time, this system pours a lot of violence and self-inflicted violence. In most so-called civilized countries it looks like there is an implicit culture of non-communication and human relations which does not favour the development of a high coefficient of relation for most individuals neither on family - school education level, nor social life."[5]

In such a society the individual's chances to have a high RQ are reduced as long as neither school, nor society don't prepare him for vivid, healthy relations. The above-mentioned author considers that under these circumstances the RQ could actually be developed through a personal

[3] *Andrei Marga in Dialogue with Gianni Vattimo*, Verso, cultural by-monthly magazine, 15 March -15 April 2007

[4] *Il pensiero debole et la fin de la métaphysique*, Une interview avec Gianni Vattimo par Marin Mincu, Paradigma, Nr.2-3, June-July 1993, according to Ovidiu MORAR, Postmodernism: Two Operational Concepts?

[5] Jacques Salomé, *Minuscules aperçus sur la difficulté d'enseigner*, Editions Albin Michel, 2004, ISBN: 2-226-15337-3

step towards raising awareness and through an effort to go deeply into the personal relational dynamics. What is actually RQ?

RQ is a new concept which shouldn't be mistaken for IQ or EQ. Maryse Legrand - the French clinical psychologist – considers that there is relational intelligence RQ, different from both rational (IQ) as well as emotional (EQ) intelligence, and can be evaluated in two directions: in relation to the self and in relation to the others. A quality relation, with a high RQ presupposes the intrinsic presence (existence) of cordiality, goodwill which make possible the respect for the other's alterity no matter who that is.

RQ is connected to the individual's more or less developed capacity to propose for himself or for the others, relations that actively contribute to the growth and development of both. We could say about an individual that has an increased RQ when we notice that it causes and develops energetic relations that are creative and stimulating for the others and for self. We could say that RQ is low when it triggers infantile relations, energetivore /toxic messages, alienating for the other and for the self.[6]

RQ is the art of creating mutual rewarding relations. Within a quality relationship we can see the human being's need to be accepted, to express himself in his singularity, to be recognised in his oneness and alterity, the need to feel appreciated. It is that kind of relation that ensures the development, the fulfilment, and the openness of the human being. At the same time, according to the French writer Olivier Clerc, RQ is about the personal capacity to manage disagreements and conflictual situations other than with violence.

In such a relation, our physical, affective and relational needs can be recognised/accepted and heard – which doesn't mean they are fulfilled. Our need for relations refer to our need to express ourselves, to be listened to, to get attention, to be appreciated (to feel useful), to be intimate with somebody (to be able to share personal secrets), to belong (to feel you are accepted in a group), to influence (to contribute to the creation of something new).

„The quality relation evolves within those positive meetings that tend to consolidate personal security, the feeling of a dignified existence and the certainty of personal value. At the same time, such a relation will stimulate openness, interest, curiosity ("the taste") for the others. RQ will value the desire to be oneself when meeting another person, thus being interested to give the best." [7]

2.2. The Comprehension Behaviour and the Quality of Interpersonal Communication

The quality of interpersonal relation is built upon the attitudes the speakers have when communicating. Some attitudes also favour attitudes that hinder the increase of the relational coefficient.

For communication the optimal situation is when "the one that expresses himself does not feel judged, analysed, interpreted, guided by tips, manipulated, harassed by questions, but feels just listened to"[8] . This is an essential condition for the increase of RQ.

In defining it, we can distinguish five fundamental principles: *the principle of non-interpretation, non-evaluation, non-counselling or of the no-help, non-systematic questioning*[9]. In other words, if a person wishes to allow the interlocutor to express himself in a genuine manner, he should avoid interpretations, judgement, advice, interrogation.

These attitudes narrow and minimise the speaker's expression or even more, they channel the discourse, belittle and manipulate it. They generate interactions based on "status differences",

[6] Jacques Salomé, *Minuscules aperçus sur la difficulté d'enseigner*, Editions Albin Michel, 2004.
[7] J. Salome, *Relation d'aide et formation l'entretien*, Septentrion, p. 27
[8] Jean-Claude Abric, *Psihologia comunicarii,* Polirom, 2002, p. 49
[9] Jean-Claude Abric, *op. cit.*, p.41-49

on unequal status (interpreter-interpreted, evaluator-evaluated, counsellor –counselled, investigator-investigated) blocking communication or giving birth to counterattack and aggressive behaviour. These are attitudes that deteriorate the quality of the relation, thus the low RQ. The relations created in such manner are ignorance, dependence, or inferiority relations. These relations favour only one of the interlocutors in the detriment of the other. Or, as we've shown before, a quality relation is a positive relation which answers the human being's need to express oneself, to be listened to, to get attention, respect, to be valued. Unfortunately, most of the time, these needs are not satisfied.

C. Rogers noticed that in interpersonal mutual communication there is a natural tendency to judge, approve, disapprove, tendency that can intensify in situations that are loaded affectively and emotionally. The stronger the feelings, the lower the possibility of a real feedback between interlocutors; there will be only two ideas, two feelings, two parallel judgements which psychologically do not meet. They will reunite (meet) and the tendency to judge will be avoided only within comprehensive listening, through the assimilation of the frame of reference and by entering the other person's universe.[10]

Comprehension behaviour means that one manifests interest for what the other says. It means that one tries to understand, not to judge, evaluate, and interpret. Understanding is the only type of attitude that focuses on the interlocutor, which creates a favourable relational atmosphere, ideal for profound communication. Understanding the other's words is not easy. Often we mistake understanding for interpretation. Or understanding doesn't mean interpreting, only deciphering, decoding the other's words, looking for the reasons he's pursuing. So, let us learn to listen!

"God gave us two ears and one mouth so that we listen twice and speak once." Thus, by paraphrasing Marshall B. Rosenberg - the founder of non-violent communication – let us give up "the jackal's eras for the giraffe's". While giraffe's ears are big, attentive, open, they know how to decipher the need behind the words, the jackal only hears critiques and answers to them with the same coin leading to violence.

The jackal's language is the expression of a biased relation – considers the author – it is a relation based on waiting, control and guiltiness. So, let us go for the giraffe's language, a language of goodwill, of non-judgement/labelling, of empathy through which the real, deep needs of the interlocutor are heard.[11] For this to happen we must show more interest in the other, we must try to understand from his position, to discover what facts, words, events mean for him. This presupposes an effort to overcome the self, to forget about the self at least for a few minutes, and to focus on the other person.

Experience shows us that we know more about how to speak, and less about how to listen. While the interlocutor talks, we do not think of what he tells us but what we will tell him, how we will impress, convince, seduce. If we happen to listen, we do it through the filter of our own values, feelings, principles, personal experience.

Comprehensive communication - considers C. Rogers – refers to our attempt to create communication bridges which allow the others to share their feelings, to share with us their universe as they understand it.

I try to reduce my fears, anxiety and need for protection, in this way allowing the members of the group to express themselves freely. I try to adopt an understanding attitude sensitive enough to see the other as he sees himself, according to his perceptions and feelings. Moreover, I'm ready to admit what is real in me and in the other without wishing to arrange things at all costs. To listen

[10] Carl Rogers, *Le developpement de la personne*, Dunod, Paris, 2005, ISBN 2100492381, p. 215-221

[11] Marshall B. Rosenberg, *Nonviolent Communication: A Language of Life,* **Elena Francisc Publishing**, www.efpublishing.ro

to myself and to listen without feeling the need to set things right, to place individuals in a pattern, to encourage them to take the way I see them walking on.[12]

The psychological and morale premises of comprehension are self-acceptance, courage, and generosity, abandonment of self-defence mechanisms by every interlocutor, or at least some of them. The comprehension behaviour has a double dimension: one refers to the connection with the self, the other to the connection to the others. In order to accept the others and to have quality relations with them, firstly one must be honest to oneself, accept and value oneself. The one who is unhappy with oneself cannot accept and understand the others either. The one who underestimates himself, "the complicated one, is a hungry ego, wicked, he's like a bad dog that bites"[13] . We cannot expect him to be generous with the others, to understand the others. Or, as J.Salome noticed, to be a good partner, one must first of all be a good partner to oneself.[14] We will never know how to change and how to relate to the others as long as we cannot accept ourselves in a profound manner. This is the only way to make relations grow and evolve easily. My intervention is more efficient when I listen to myself and I accept myself and I can be myself. Under these circumstances, the individual feels more free in expressing himself and tends to abandon all forms of protection[15]. Practicing comprehension needs a lot of courage and generosity: courage because by entering another's universe there is the chance to be influenced by his perspective and to change yourself; generosity because, in order to understand the other one needs to forget at least a bit about oneself and to devote oneself to the other.

Comprehension brings immeasurable benefits to communication, personal development and quality of relation. The defensive distortions of communication (dishonesty, exaggerations, lies, hypocrisies) – considers C. Rogers – stops with an amazing rapidity when people realise that the interlocutor only purpose of is to be understood, not judged, criticised, interpreted, etc.

When one of the parts abandons the defensive attitude, it opens the door for the other part to do the same thing next time, thus making progress in genuine communication. This procedure gradually leads to real mutual communication, to a situation where I get to see that you perceive things just as well as I do, and you see that I perceive the problem just as well as you understand it from your perspective. (C. Rogers, 2004, p.220)

In one way or another, this comprehension enriches me, giving birth inside me to changes that make me a different person. At the same time, the fact that I understand the other allows him to change. When somebody understands deeply another person's feelings, it makes it possible for this one to accept them inside. Feelings change inside that person too. (C. Rogers, 2004, p.16) Paradoxically, the more I would be myself in all complex life issues, the more I would try to understand and to accept what is real in my person and in the other's, the more changes will happen.

I am convinced that an individual, the better understood and accepted he is, the more he would give up the false protection he used to face life with and engage oneself in a progressive evolution. (C.Rogers, p. 23)

The same author concludes that in order to create the optimal structure of communication - which implicitly presupposes active listening or non-directive orientation – it is essential to have a special relational atmosphere, based on the following four components**[16]**.

The other's unconditional acceptance is about the refusal of any kind of judgement regarding what the other expresses and the acceptance of a possible silence of the other, the

[12] C. Rogers, *Le developpement de la personne*, Dunod, Paris, 2005, ISBN 2100492381, p. 215-221
[13] L. Giblin, *The Art of Human Relations Development*, Curtea Veche Publishing House, 2005 p.48
[14] J. Salome, *If I would listen to myself, I would understand myself,* Curtea Veche Publishing House, 2002
[15] *C. Rogers, Le develppement de la personne,* apud. R. Muchielli*, L'entretien de face a face dans la relation d'aide,*ESF editeur, Paris, 2004, p.14-15
[16] Jean-Claude ABRIC, 2002, *The Psychology of Communication, Polirom*, Iasi, pp. 51-53

acceptance of his words, the manner in which he expressed them or the fact that he doesn't want to show a certain feeling.

The affable neutrality does not presuppose a passive attitude and cannot be built on the investigator's refusal to get involved. This person must get involved in communication without judging, and his involvement must be positive and based on attention shown to the other, a kind of disinterested interest.

Authenticity is an essential condition for the development of a favourable climate; the interviewer (therapist) must be truly interested in what the speaker has to say. The authenticity of the interest shown to the other makes us available for him, responsive to what he says. It is a *sine qua non* condition of comprehensive listening.

Empathy is about sinking into the subjective world of the communication partner in order to see the situation with his eyes. It is not necessary to transport yourself into the other's shoes, it is sufficient to feel in the same way as the other. Empathy is defined by two components: receptivity to the other's feelings and the verbal capacity to communicate this comprehension.

By mentally situating ourselves in the speaker's shoes, it allows us to better understand the motivation, the objectives, the mentality, and to react with full knowledge of the case. In order to avoid confusions, J. C. Abric separated the concept of empathy by that of "laissez-faire". Empathy – unlike "laissez-faire" – characterises non-directivity and comprehensive listening in communication, and these are "active positions which need interior and exterior, verbal and nonverbal complex activity from those who use them."

3. Bucharest Students' Behaviours in Interpersonal Communication, and their Perception of the Quality of Communication in Romanian Society

While studying the students behaviours in interpersonal communication and the perception of the quality of communication in Romanian society we used our social survey with the help of a questionnaire and focus group. There was a random sample of 300 students found in the University premises and in the campus of the "Nicolae Titulescu" University (it houses students from more universities in Bucharest). Subjects interviews and the data collection and processing was made by a group of students from second year International Relations, under the supervision of coordinators at the Centre for Information, Counselling and Professional Orientation of the "Nicolae Titulescu" University.

The meaning students give to quality communication within a focus group (15 International Relations students) was identified. The principles for such communication are dignity, respect for the person/interlocutor, acceptance and encouragement of freedom of speech. Declarations/affirmations regarding the quality of communication relation with various social categories (educators, colleagues, acquaintances) were looked into.

At the same time, the present study took into consideration and compared certain data resulted from other studies such as The Study regarding the Situation of Youth and Its Expectations. Diagnosis 2007 - ANSIT, TEJACO Project – made by ISE, Leo Youth Project about youth lifestyle in big cities, The Study about the situation of the youth in Romania-Pro-Youth (ASUB), etc.

The present study will analyse the extent to which the valorisation of communication by young people - Bucharest students - is accompanied by the adoption of comprehension behaviour in communication and a positive perception of the quality of communication in Romanian society.

Sociological studies (ANSIT, 2007)* show that young Romanians give a lot of importance to communication, and relations with their peers. Thus, 80% consider that their relations with the family are very important and 18,8% are quite important. When talking about relations with friends, 43% consider them very important, and 44,6% pretty important. From the interactions with the others, young people expect communication.

Bucharest students (see the "Nicolae Titulescu" University social study) consider that, in their life, communication plays a major role. Most (86, 60%) of them value the quality of the relation, comprehensive communication, considering that it is important (30%), even very important (56, 6%), to understand their peers and, in return, to be understood by them (Table 1).

I. On how important is for students that their peers understand their feelings, ideas, experiences:

Very important	Important	Not that important	Unimportant
56,60%	30%	13,4%	0

During a conversation, 93% of the interviewed students feel they are listened to with a lot of attention by members of family, 86% by friends, 45% by colleagues, and 35% by acquaintances. Most of the students (91%) consider that family members and friends encourage them to express their feelings and thoughts more than their colleagues and acquaintances. (Table II)

II. The degree to which interlocutors listen carefully

	Very high degree	High degree	Low degree	No degree
Friends	40%	46%	14%	0
Family members	60%	33%	7%	0
Colleagues	8%	37%	51%	4%
Acquaintances	2%	33%	62%	3%

A big percentage of students declare that they are interested in developing some empathic attitudes in communication with their peers. Thus, 68% of the students intend – to a high and very high degree – to understand the interlocutor's perspective, his experiences, in other words, to experience the empathic dialogue. A significant percentage, 24% of the students, try only at times to set themselves in the interlocutor's shoes (to understand the other's position), and 8% don not do it at all. (Table III)

III. The frequency with which students manage to set themselves in the interlocutor's place / to understand their perspective from their position:

Very often	Often	Sometimes	Never
23%	45%	24%	8%

Most students declare that they listen to their interlocutor with a high and very high degree of attention and encourage them to express their feelings and thoughts: family members (92%), friends (89%), colleagues (71,5%), and even acquaintances (62%). (Table III.1)

III.1. The degree to which Bucharest students declare that they listen to their interlocutors / encourage them to express themselves:

	Very high	High	Low	No degree
Friends	60%	29 %	11%	0
Family members	68%	24%	8 %	0
Colleagues	16,5%	55%	28%	0,5%
Acquaintances	10,5%	51,5%	31%	7 %

Bucharest students consider that in Romanian society most people (62%) show little interest or no interest at all in empathizing with their peers. They consider that only in approximately 38% of their dialogues they tried to guess the other's mood, to understand their position by trying to take their place. (Table IV)

IV. The frequency with which students feel that their interlocutors manage to guess their mood:

Very often	Often	Sometimes	Never
18%	20%	54%	8%

In conclusion, ***students perceive themselves as more empathic than many of the people they talk to***. They feel that they understand their peers more than their peers understand them: 70% of them consider that they listen carefully or very carefully to their colleagues; less than half of the students feel that their colleagues and acquaintances listen to them.

On the other hand, we notice the existence of a ***significant difference*** between ***the students' aspiration towards comprehensive communication and practicing comprehensive communication***. Although 68% of the students declare that they are preoccupied with the practice and the development of active attitudes, comprehensive in dialogue, there is still a large percentage (43,9%) who manifest, to a certain extent, judgemental attitude, the need to label, condemn/encourage in their relation to the interlocutors. 50,4% are used to judging people to a little extent, and only 5,7% declare that they never do this. (Table V)

V. The frequency with which Bucharest students judge/condemn the words/actions of the interlocutor:

Very high	High	Low	Never
11,5%	32,4%	50,4%	5,7%

Bucharest students consider that they judge their interlocutors less than their peers do it. In conversations, they feel judged, classified/analysed to a high and very high degree by all categories of interlocutors: especially by family (58% of them), and by friends (46%), but also by colleagues (35,5%) and educators (24%). (Table VI)

If we keep in mind that they feel less judged by educators than the other interlocutors, we might think that they have a better relation of communication with them. However, after talking to the students from "Nicolae Titulescu" University- International Relationship Faculty within a focus group, we draw some different conclusions: their relations to the educators are most of them professional, formal-official, cold, distant. By the nature of the relations they have with the students, educators follow the scientific and educational performances of their students, and they do not do any other kind of evaluation.

Most of them do not get involved in friendly, personal talks with the students. The frequency of such discussions is very low. Although some think these talks might help, students are reluctant to starting such conversations with their educators. Students do not really perceive their educators as friends or colleagues with more professional and life experience. They consider the relation to their educators as a distant professional relation. The shorter the distance perceived in connection to the others, the more they feel judged. Students consider that they are labelled, and evaluated, more often in their informal relations rather than in the formal ones. In other words, in relation to them, the others are indifferent. They do not care (as a rule in formal relations), or if they care (family, friends) they do not know how to show it, do not know how to communicate in

a comprehensive way: they judge them, label them, condemn, proposing them an unequal relation, which is detrimental to them. Alternatively, in such a situation, the possible consequences would be the blockage of communication or the orientation by selection of the interlocutor's speech. (C. Rogers, Mucchielli, Salome, J.C. Abric) If they are harshly judged they feel offended and do not speak anymore. So, communication is blocked. When it comes to positive evaluation, because they do not want to disappoint their dialogue partner there is a so-called "orientation by selection" of the interlocutor's discourse.

In conclusion, students feel encouraged to freely express their opinions, feelings, experiences (restricted in their intention to communicate in a profound manner) both in formal relations, within which they are faced with cold/indifferent attitudes, and in informal relations, within which they are faced with evaluative/judgemental attitudes. In other words, students ***suffer from the existence of a great deficit in quality of their relation, and communication, at all levels.***

VI. The degree to which Bucharest students feel judged by various categories of interlocutors:

	Very high	High	Low	No
Family	30%	28%	28,5%	13,5%
Friends	12,5%	33%	40%	19,5%
Colleagues	8,5%	27 %	55%	9,5%
Educators	4%	20%	35 %	41%

Students consider that most of their interlocutors, be it family members, friends or colleagues, all interpret their opinions, feelings, decisions, by sharing with them their own meaning. (Table VII)

Interlocutors do not put forward or do not manage to understand what significance, what meaning, what importance some things, events have for students. They do not manage to understand the perspective they see things from.

Most students (74%) consider that friends sometimes interpret their gestures and assertions to a very high and high degree. 65% of the students consider that family has the same attitude; 54,5% of those interviewed blame their colleagues for interpretation, and 46%, their educators. Students consider that in Romanian society most people are prisoners of cultural stereotypes, mentalities, ways of thinking, and lifestyles that they cannot transcend in order to empathize with the others.

VII. The degree to which students consider that their messages are interpreted (as interlocutors they give personal meaning):

	Very high	High	Low	No
65% Family	31,5%	33,5%	17,5%	17,5%
74% Friends	18,5%	55,5%	22%	4%
54,5% Colleagues	10%	44,5%	33,5%	12%
46% Educators	12,5%	33,5%	33,5%	20,5%

We notice that there are meaningful differences regarding the perception of the relation of communication between the students with good educational achievement and the students with lower educational achievement. If we compare the low educational achievement students with the good achievement students we notice that a significant percentage of the latter tend to feel less judged and interpreted by their interlocutors. In other words, they have a better perception of the quality of the communication with the others.

Thus, more students with low educational achievement (61%) feel judged by family compared to the students with good educational achievement (55%). While 52% of the students with low educational achievement declare that friends tend to judge them, only 40% of the students with good achievement think the same. While 40% of the students with low educational achievement consider themselves judged by their colleagues, only 30% of the students with good achievement are in the same situation. There are significant differences between the two categories of students when it comes to the perception of the interpretation behaviour of the various interlocutors. The ones with good achievement feel less interpreted in relational communication than others. (See Tables VIII and IX)

VIII. The extent to which students consider that their messages are interpreted / Group of students with good educational achievement:

	Very High	High	Low	No
56,% Family	10 (33.33%)	8 (22.66%)	9 (30%)	2 (6.66%)
70% Friends	7 (23.33%)	14 (46.66%)	8 (22.66%)	0
53% Colleagues	2 (6.66%)	14 (46.66%)	10 (33.33%)	2 (6.66%)
50% Educators	5 (16.66%)	10 (33.33%)	11 (36.66%)	4 (13.33%)

IX. The extent to which students consider that their messages are interpreted / Group of students with low educational achievement:

	Very high	High	Low	No
74% Family	7 (30.43%)	10 (43.47%)	1 (4.34%)	3 (13.04%)
78% Friends	3 (13.04%)	15 (65.21%)	5 (21.73%)	0
56,5% Colleagues	3 (13.04%)	10 (43.47%)	8 (34.78%)	2 (8.69%)
43,5% Educators	2 (8.69%)	8 (34.78%)	7 (30.43%)	6 (26.08%)

When it comes to the habit of giving advice, or solutions to the dialogue partners, we notice that there are big differences between the categories of interlocutors: 80,5% of the students declare that family, and 74% declare that friends are in the habit of giving them advice, to a high and very high degree. Only 36 % of the students declare that their colleagues are in the habit of giving advice. (Table X)

We notice that parents and friends feel most entitled to give advice.

X. The extent to which interlocutors are in the habit of giving advice/solutions:

	Very high	High	Low	No
80,5% Family	35%	45,5%	8%	3,5%
74% Friends	31%	43%	23,5%	2,5%
36% Colleagues	6%	30%	44,5%	19,5%
22% Educators	0	22%	50,2%	27,8%

Between 65% and 60% of the students feel that during conversations they are not allowed to express freely, that both family members and friends are in the habit of directing, channeling the discourse. (Table XI)

XI. The extent to which the interlocutors intend to redirect the conversation (in a direction of their choice):

	Very high	High	Low	No
Family 65%	25%	40%	35%	0
Friends 60%	13%	47%	29%	11%
Colleagues 33%	4%	29%	48%	19%
Educators 42%	10%	32%	36,5%	19,5%

The paradox is that most students trust, feel listened to and understood by family members, but at the same time they feel judged, interpreted, rechanneled by them. 65% of the interviewed students declare that, within conversations with family, they feel interpreted to a high and very high extent. 58% of them feel judged to a high or very high degree. 65% consider that their discourse is redirected to a high or very high degree, and 81% consider that they are given advice-solutions from family to a very high and high degree.

Because they trust and perceive family as having good intentions, that's the place students feel listen to and understood. Yet, in most cases, it's about a different kind of understanding, different from the comprehensive one, an type of understanding automatically given, understanding as symbiosis of love and good intentions of the family for its members.

It is about understanding that allows judgement, interpretation, counselling, and rechanneling of the interlocutor because it is well-intentioned.

There are solid preconceptions in Romanian culture about what it means to educate, to communicate, and to relate to in a family. Understanding the young people is often mistaken for helping them, supporting them all their life, giving advice, even rechanneling them. According to Romanian mentality, perpetuated from one generation to another, giving advice/solutions to one's own children, even judging them is a form of permitted moral support, even welcome proof of love.

This explains the fact that young people have a higher degree of acceptance when it comes to interpretation, judgement and counselling from family, as opposed to other social categories. These are attitudes often considered somehow normal, being the result of care, love, and best intentions.

On the other hand, these are attitudes and mentalities which raise the risk for development of dependence relations between child-parent, and point the child in a wrong disadvantageous direction.

Conclusions

The main conclusion of the first part of the present paper is the existence of a correlation between the quality of the relation (RQ) and the behavioural options in communication. More accurate, the growth of the relational coefficient, of the quality of the interpersonal relation asks for the adoption of an honest, open, comprehensive attitude in the process of communication at least by one of the interlocutors.

Regarding Bucharest students attitudes in communication and the way in which they perceive the quality of communication in Romania, we can draw the following conclusions: Most Bucharest students (86, 60%) value the quality of the relation, and comprehensive communication**.** They consider that it is important (30%), even very important (56,6%) to have a sincere and profound communication, to understand their peers and, in return, to be understood by them. On the other hand, the study identifies the existence of a significant discrepancy between the aspirations of the students towards comprehensive communication and putting into practice the

requirements of comprehensive communication. Although most students (approximately 70%) declare that they want to practice and to develop active, comprehensive attitudes in dialogue, a significant percentage of them admit that, in practice, they don't manage to do it. Thus, only 5,7% declare themselves comprehensive, asserting that they are not in the habit to judge, interpret, channel their interlocutors, while 50,4% state that they are in the habit of doing this to a little extent.

There is a large percentage of students (43,9%) who admit that in effective communication they show to a greater or lower extent uncomprehensive judgemental, labelling, condemning/gratifying attitudes in relation to their interlocutors.

But over 30% of the students don't intend to communicate comprehensively and almost 44% would like to, but fail, which is not a happy situation. Still, in comparison with their interlocutors, irrespective of the social category they belong to, the interviewed students perceive themselves as being more interested, preoccupied with comprehensive communication. They have the feeling that they understand their peers more than their peers understand them: 70% of them declare that they are in the habit of showing attention to a high and very high degree to their colleagues. Less than half of the students feel that their colleagues and acquaintances listened to them.

Bucharest students perceive the existence of low quality of communication in Romanian society, at all levels, both formal, and informal. They feel the existence of an important deficit in quality of communication in school, in the street, at work, as well as in the family or in the group of friends.

They think that communication based on empathy, respect for dignity, appreciation of individual, encouragement of freedom of speech is missing in most cases. Students also consider that most people (62%) show little interest or no interest at all in empathising with their peers, and declare that in only approximately 38% of the communication relations, the interlocutors showed an active listening attitude. They tried to guess the state of mind, to understand their position by taking their place.

Uncomprehensive behaviours are ubiquitous in Romanian society and people come across them in most relations of communication. Students feel discouraged in freely expressing their opinions, feelings, experiences both in formal, cold, indifferent relations, and in informal, warm, close relation, but unfortunately impregnated with the habit of judging, channelling, interpreting. They experience an emphasised feeling of limitation, restriction of freedom of speech, and suppressing of aspiration towards profound quality communication. Although they show family most trust considering that they understand them better than anybody else, comprehensive listening is not very often encountered here either. But they show a higher degree of acceptance of the uncomprehensive behaviour of the family compared to that of other social categories.

In the end, we can say that this study demonstrates once more the need for constant and greater involvement of the agents of socialisation in delivering and putting into practice the active comprehensive non-violent communication techniques in interpersonal relations. By taking into account the fact that empathic comprehensive listening abilities can be learnt - if not inborn -, then the educational process should set as central goal the shaping of these abilities.

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CONSIDERATIONS REGARDING THE PROTECTION OF CLASSIFIED INFORMATION IN ELECTRONIC FORMAT

Teodor ŞTEFĂNESCU[*]

Abstract

A common understanding of activity regarding the protection of classified information based on standards and policies is critical. In this respect the classified information protection in electronic format (INFOSEC) plays a vital role. In general terms, information security means protecting information and information systems from unauthorized access, use, disclosure, disruption, modification or destruction. The terms as information security, computer security and information assurance are frequently incorrectly used. These fields are interrelated often and share the common goals of protecting the confidentiality, integrity and availability of information; however, there are some subtle differences between them. These differences cover primarily in the approach to the subject, the methodologies used, and the areas of concentration. Information security is concerned with the confidentiality, integrity and availability of data regardless of the form the data may take: electronic, print, or other forms. The paper describes the activity regarding the protection of classified information in electronic format (INFOSEC). The covered domains are as follows: Legal framework; Security classification for information; INFOSEC essentials; INFOSEC components.

Keywords: *Classified information, INFOSEC, vulnerabilities, threats, accreditation, certification*

Introduction

Computer security can focus on ensuring the availability and correct operation of a computer system without concern for the information stored or processed by the computer.

Governments, military, corporations, financial institutions, hospitals, and private businesses amass a great deal of confidential information about their employees, customers, products, research, and financial status. Most of this information is now collected, processed and stored on electronic computers and transmitted across networks to other computers.

Confidential information about a business' customers or finances or new product line could fall into the hands of a competitor, or a breach of security could lead to lost business, or even bankruptcy of the business. Protecting confidential information is a business requirement, and in many cases also an ethical and legal requirement.

For the individual, information security has a significant effect on privacy, which is viewed very differently in different cultures. The field of information security has grown and evolved significantly in recent years.

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Legal Framework

Below is a partial listing of governmental laws and regulations that have, or will have, a significant effect on data processing and information security. Important industry sector regulations have also been included when they have a significant impact on information security.

• UK Data Protection Act 1998 makes new provisions for the regulation of the processing of information relating to individuals, including the obtaining, holding, use or disclosure of such information. The European Union Data Protection Directive (EUDPD) requires that all EU member must adopt national regulations to standardize the protection of data privacy for citizens throughout the EU.

• The Computer Misuse Act 1990 is an Act of the UK Parliament making computer crime (e.g. cracking - sometimes incorrectly referred to as hacking) a criminal offence. The Act has become a model upon which several other countries including Canada and the Republic of Ireland have drawn inspiration when subsequently drafting their own information security laws.

• EU Data Retention laws requires Internet service providers and phone companies to keep data on every electronic message sent and phone call made for between six months and two years.

• The Family Educational Rights and Privacy Act (FERPA) is a USA Federal law that protects the privacy of student education records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education.

Generally, schools must have written permission from the parent or eligible student in order to release any information from a student's education record.

• Health Insurance Portability and Accountability Act (HIPAA) of 1996 requires the adoption of national standards for electronic health care transactions and national identifiers for providers, health insurance plans, and employers. And, it requires health care providers, insurance providers and employers to safeguard the security and privacy of health data.

• Gramm-Leach-Bliley Act of 1999 (GLBA), also known as the Financial Services Modernization Act of 1999, protects the privacy and security of private financial information that financial institutions collect, hold, and process.

• Sarbanes-Oxley Act of 2002 (SOX). Section 404 of the act requires publicly traded companies to assess the effectiveness of their internal controls for financial reporting in annual reports they submit at the end of each fiscal year. Chief information officers are responsible for the security, accuracy and the reliability of the systems that manage and report the financial data. The act also requires publicly traded companies to engage independent auditors who must attest to, and report on, the validity of their assessments.

• Payment Card Industry Data Security Standard (PCI DSS) establishes comprehensive requirements for enhancing payment account data security. It was developed by the founding payment brands of the PCI Security Standards Council, including American Express, Discover Financial Services, JCB, MasterCard Worldwide and Visa International, to help facilitate the broad adoption of consistent data security measures on a global basis. The PCI DSS is a multifaceted security standard that includes requirements for security management, policies, procedures, network architecture, software design and other critical protective measures.

• State Security Breach Notification Laws (California and many others) require businesses, nonprofits, and state institutions to notify consumers when unencrypted "personal information" may have been compromised, lost, or stolen.

• Personal Information Protection and Electronics Document Act (PIPEDA) - An Act to support and promote electronic commerce by protecting personal information that is collected, used or disclosed in certain circumstances, by providing for the use of electronic means to communicate or record information or transactions and by amending the Canada Evidence Act, the Statutory Instruments Act and the Statute Revision ActThant is in fact the case.

Romanian relevant laws in this regard:

• Law no. 51/1991- national security

• Law no. 182/2002- the national standards concerning the protection of classified information;

• Law no. 544/2001 – the access to public information.

• Law no. 677/2002; 682/2002;506/2004;102/2005- the protection of personal data.

•Law no. 8/1996; EO no 123/2005 – the copyright

• Law no. 161/2003; 64/2004- the computer crime.

Key Concepts

For over twenty years, information security has held confidentiality, integrity and availability (known as the CIA triad) as the core principles of information security. Many information security professionals firmly believe that Accountability should be added as a core principle of information security.

Confidentiality is the term used to prevent the disclosure of information to unauthorized individuals or systems. Confidentiality is necessary (but not sufficient) for maintaining the privacy of the people whose personal information a system holds.

Integrity. In information security, integrity means that data cannot be modified without authorization. This is not the same thing as referential integrity in databases. Integrity is violated when an employee accidentally or with malicious intent deletes important data files, when a computer virus infects a computer, when an employee is able to modify his own salary in a payroll database, when an unauthorized user vandalizes a web site, when someone is able to cast a very large number of votes in an online poll, and so on.

There are many ways in which integrity could be violated without malicious intent. In the simplest case, a user on a system could mis-type someone's address. On a larger scale, if an automated process is not written and tested correctly, bulk updates to a database could alter data in an incorrect way, leaving the integrity of the data compromised. Information security professionals are tasked with finding ways to implement controls that prevent errors of integrity.

Availability. For any information system to serve its purpose, the information must be available when it is needed. This means that the computing systems used to store and process the information, the security controls used to protect it, and the communication channels used to access it must be functioning correctly. High availability systems aim to remain available at all times, preventing service disruptions due to power outages, hardware failures, and system upgrades. Ensuring availability also involves preventing denial-of-service attacks.

In 2002, Donn Parker proposed an alternative model for the classic CIA triad that he called the six atomic elements of information. The elements are confidentiality, possession, integrity, authenticity, availability, and utility. The merits of the Parkerian hexad are a subject of debate amongst security professionals.

Authenticity. In computing, e-Business and information security it is necessary to ensure that the data, transactions, communications or documents (electronic or physical) are genuine. It is also important for authenticity to validate that both parties involved are who they claim they are.

Non-repudiation. In law, non-repudiation implies one's intention to fulfill their obligations to a contract. It also implies that one party of a transaction cannot deny having received a transaction nor can the other party deny having sent a transaction.

Electronic commerce uses technology such as digital signatures and encryption to establish authenticity and non-repudiation.

Security classification for information

An important aspect of information security and risk management is recognizing the value of information and defining appropriate procedures and protection requirements for the information. Not all information is equal and so not all information requires the same degree of protection. This requires information to be assigned a security classification.

The first step in information classification is to identify a member of senior management as the owner of the particular information to be classified. Next, develop a classification policy. The policy should describe the different classification labels, define the criteria for information to be assigned a particular label, and list the required security controls for each classification.

Some factors that influence which classification information should be assigned include how much value that information has to the organization, how old the information is and whether or not the information has become obsolete. Laws and other regulatory requirements are also important considerations when classifying information.

The type of information security classification labels selected and used will depend on the nature of the organization, with examples being:

- In the business sector, labels such as: Public, Sensitive, Private, and Confidential.
- In the government sector, labels such as: Unclassified, Sensitive but Unclassified, Restricted, Confidential, Secret, Top Secret and their non-English equivalents.
- In cross-sectoral formations, the Traffic Light Protocol, which consists of: White, Green, Amber and Red.

All employees in the organization, as well as business partners, must be trained on the classification schema and understand the required security controls and handling procedures for each classification. The classification a particular information asset has been assigned should be reviewed periodically to ensure the classification is still appropriate for the information and to ensure the security controls required by the classification are in place.

Infosec essentials

INFOSEC - all measures and structures for the protection of classified information processed, stored or transmitted through communications and information systems and other electronic systems, against threats and other actions that may endanger confidentiality, integrity, availability, authenticity and non- repudiation of classified information, as well as any actions that may affect the functioning of the information systems, no matter if they are accidental or intentional.

The INFOSEC measures cover computer security, transmission and emission security, cryptographic security, as well as detection and prevention of threats to which information and systems are exposed to.

Information in electronic format – texts, data, images, sounds, recorded on storage devices or magnetic, optical or electric supports, or transmitted as waves, tension, or electromagnetic field, in the atmosphere or communications networks.

System of automated data processing – ADPS - all interdependent elements including: computing equipment, basic software products and applications, methods, procedures, and, if applicable, the personnel, organized in such a way as to ensure the functions of storage, automated processing and transmission of information in electronic format, and which are under the coordination and control of a single authority. An ADPS can comprise subsystems some of which can be in their turn ADPS.

Specific security components of an ADPS, necessary to ensure an appropriate level of protection for classified information which is to be stored or processed in an ADPS, are:

- hardware / firmware / software functions and characteristics;
- operation procedures and modes;
- accountability procedures;
- control of access;
- definition of an ADPS operation area;
- definition of working stations operation area/remote terminals;
- restrictions imposed by the management policy;
- physical structures and devices;
- means of control for personnel and communications.

Data transmission networks – ***DTN*** – all interdependent elements including: communications equipment, programs and devices, hardware and software technique, methods and procedures for transmission and reception of data and network control, and, if applicable, the relevant personnel. They are organized to ensure the functions of transmitting information in electronic format between two or more ADPS - or to allow interconnection with other DTNs. A DTN may use the services of one or more communications systems; more DTNs may use the services of a single communication system.

The security features of a DTN comprise: security features of individual ADPS connected, together with all components and facilities associated to the networks - communication network facilities, mechanisms and procedures of identification and labeling, access control, programs and procedures of control and revision - necessary to ensure an appropriate level of protection for classified information transmitted through DTN.

Local DTN - data transmission network interconnecting more computers or network equipment, situated in the same perimeter.

Communications and informatics system - CIS - informatics system through which information in electronic format is stored, processed and transmitted, composed of at least an ADPS, isolated or connected to a DTN. It may have a complex configuration, made of more interconnected ADPS and/or DTNs.

ADPS, DTN and CIS security - implementation of security measures at ADPS, DTN and CIS in order to prevent or hamper extraction or change of classified information stored, processed or transmitted through them - by intercepting, alteration, destruction, unauthorized access with electronic means, as well as invalidation of services and functions, by specific means.

Confidentiality - to ensure access to classified information only based on the security clearance, in compliance with the secrecy level of the information accessed and the permission resulted from the enforcement of the need-to-know principle.

Integrity - interdiction to change - by deleting or adding - or to destroy classified information without authorization;

Availability - to ensure the conditions necessary to find and easily use classified information, whenever necessary, with the strict observance of its confidentiality conditions and integrity;

Authenticity - to ensure the possibility to check the presumed identity of an ADPS or DTN user.

Non-repudiation - measure to ensure that after the emission/reception of information in a secured communications system, the originator/beneficiary cannot misleadingly deny, that he sent/received the information.

Security risk - probability that a threat or vulnerability of ADPS or DTN - CIS actually exist.

Risk management **-** has as a purpose to identify, control and minimize the security risks and it is a continuous activity meant to establish and maintain a security level in the field of communication and information technology - (CIT) in an organization. Starting from risk analysis, the threats and vulnerabilities are identified and assessed, and appropriate measures are taken to counter the risks, designed at a cost price corresponding to the consequences deriving from disclosure, change or delete of information that should be protected.

The "two-men" rule - obligation that two persons cooperate to fulfill a specific duty.

Security informatics product - security component incorporated in a ADPS or DTN - CIS, used to increase or ensure confidentiality, integrity, availability, authenticity and non-repudiation of the stored, processed or transmitted information.

Computer security - COMPUSEC - implementation at the level of each computer of the hardware, software and firmware facilities, in order to prevent unauthorized disclosure, handling or unauthorized delete of classified information or unauthorized invalidation of certain functions.

Communication security - COMSEC - implementation of security measures in telecommunications with a purpose to protect messages in a telecommunication system that might be intercepted, studied, analyzed, and by reconstruction, may lead to disclosure of classified information. COMSEC represents all the procedures including:

- transmission security measures;
- TEMPEST security measures;
- cryptographic coverage measures;
- physical, procedural, personnel and document security measures;
- COMPUSEC measures.

TEMPEST - all measures of testing and ensuring the security against information leakage through parasite electromagnetic emissions.

Assessment consists in a detailed technical and functional examination of the security aspects of an ADPS, DTN - (CIS) or of the security products, by an appropriate authority.

The assessment process verifies:

(a) the existence of the required security facilities/ functions;

(b) the absence of compromising secondary effects resulting from the implementation of the security facilities;

(c) the overall functionality of the security system;

(d) the fulfillment of the specific security requirements for an ADPS and DTN-CIS;

(e) the determination of the trust level of ADPS or DTN-CIS or of the implemented computer security products;

(f) the existence of the security performances of the computer security products installed in ADPS or DTN-CIS.

Certification **-** the issuance of a finding document, to which an analysis document is attached, reporting the assessment and its results. This finding document mentions the extent to which ADPS and DTN-CIS meet the security requirements as well as the extent to which the computer security products meet the requirements referring to the protection of classified information in electronic format;

Accreditation is a stage when an ADPS or DTN-CIS is authorized or approved to process classified information within its operational environment/space.

The accreditation stage shall take place after all appropriate security procedures have been implemented and after a sufficient level of system resources protection has been achieved. Accreditation is mainly made on the basis of the Specific Security Requirements (SSR), including the following:

• justifying statement upon the objective of system accreditation; classification level(s) of information to be processed and handled; recommended protected operational mode(s);

• justifying statement upon the risk management - mode of risk treatment / accounting / solving - identifying the threats and vulnerabilities, as well as the adequate countermeasures;

• the detailed description of the security facilities and recommended procedures designed for ADPS or DTN - CIS. This description shall represent the essential element for completing the accreditation process;

• the plan for the implementation and maintenance of the security features;

• the plan for carrying on security test, assessment and certification stages, regarding ADPS or DTN - CIS;

•certificate and, where required, supplementary elements of accreditation.

ADPS area - represents a working area, containing one or more operating computers, their local peripheral and storage units, control units and specific network and communication equipment. ADPS area does not include the separate area in which remote peripheral devices, terminal or workstations are located, even though these devices are connected to the central computing equipment of the ADPS area;

Remote terminal/workstation area represents an area - separated from ADPS area - including:

(a) computing technique equipment;

(b) local peripheral devices, terminals or remote workstations connected to the equipment within the ADPS area ;

(c) communication equipment.

Threat - an accidental or deliberate potential compromise of ADPS or DTN - CIS by loss of confidentiality, integrity or availability of information in electronic format or by affecting the functions ensuring the authenticity and non- repudiation of information.

Vulnerability - weakness or lack of control that would allow or facilitate a technical, procedural or operational man oeuvre, which would threat a specific asset or target.

Infosec components

Hardware and software security

Computer security – COMPUSEC - is the implementation at the level of each computer of the hardware, software and firmware facilities, in order to prevent unauthorized disclosure, handling or unauthorized delete of classified information or unauthorized invalidation of certain functions.

Hardware, firmware and software security mechanisms can contribute individually as well as blended to computer security.

Hardware and firmware security uses security features that are provided by the manufacturer trough physical components of computers and refers to:

a) security procedures and documentation for start / stop computing equipment

b) instructions and safety procedures for connecting / disconnecting equipment in / from the network

c) procedures for periodic checks of the seals on equipment and ensuring that hardware modules are kept under lock and key, in case of equipment

d) pieces of the computer configuration to ensure the functioning in different conditions (for example, must be specified what terminals / workstations or peripherals can be connected or disconnected in a specific operational situation)

e) security procedures of configuration computer that is planned for maintenance and repair

f) procedures in case of hardware breakdown, including the commissioning of responsibilities and description of appropriate actions in order to secure the computer while disconnecting (also activities regarding the secure information and data stored on)

Software security comprises the use and control of any safety features provided by operating system, and utility programs as well as application programs, as follows:

a) identification methods of users, procedures for establishing user accounts (individual or groups), procedures for the allocation of user ID and delete user accounts whenever the situation requires

b) authentication methods, including protection of authentication information (eg, access password), control procedures and as well as procedures to change authentication mechanisms

c) access control mechanisms and procedures to implement user access control for the use of information systems services and resources

d) records of software, of versions of operating systems, of utility programs and those that will be used in special situations

e) control on copy or modify of data facilities related to: operating system, software tools and application programs

f) precautions before and after data processing or during preparation of various types of classified activities scheduled, including main memory erasing routines, declassifying rules or overwriting of previous versions and as well as procedures to ensure that buffers are cleared and all data files audit logs and records of open sessions of users are listed, and overwritten

Security of information storage media

In a computer and communication system the amount and density of information stored or processed, their accessibility, ease and speed of copying the information, sometimes from remote stations, underscores the need for measures to security of information, as well as the information storage media. These measures aim:

a) appropriate procedures for classification of media storage

b) responsibilities and procedures for recording, control and record storage media

All storage media classified as "secret of state" are identified and controlled according to appropriate level of secrecy (classification). For unclassified information or restricted information are applied separate internal security regulations. Identification, record and control storage and media require:

• means of identification consisting of: number, series and marking the level of classification, for each such storage media, separately

• well-defined procedures for issuing, receipt, removal, destruction or preservation information storage media

• existence manual or printed records concerning the content and classification level of information that is recorded on storage media.

For the levels "strict secret" and "strict secret de importanta deosebita", the detailed information on storage media, including the content and classification level of information, is held in an appropriate register

c) procedures for acquisition, storage, record and control storage media for computers

d) procedures to receive, exchange and dissemination of electronic documents, including procedures for checking for the existence of computer viruses and harmful software, applied to all media from outside the computer system

f) responsibilities and procedures for declassification / destruction of electronic documents and media storage.

When a storage media is planned to be unused (disbanded), it has to be declassified erasing any classification markings, then this can be used as an unclassified storage media

Classified information recorded on reusable storage media are deleted only in accordance with security operational procedures. If a storage media can not be declassified, then it must be destroyed by an approved procedure.

Declassification and reuse of storage media containing information " strict secrete de importanţă deosebită" are forbidden, they can be destroyed only in accordance with security operational procedures. Classified information in electronic form stored on a medium disposables, cards, punched tapes can be destroyed as provided for operational security procedures.

Communications security

Communications security consist of applying security measures in telecommunications in order to protect messages in a telecommunication system, which could be intercepted, studied, analyzed and, by reconstitution, may lead to the disclosure of classified information. Communications security is a set of procedures, including: transmission security measures, security measures against radiation (TEMPEST), cryptographic security measures.

Transmission security

All means used to transmit classified information through radio and are subject to communications security regulations issued by the designated national institution for protection of classified information. Security transmission mechanisms conduct to ensuring the availability and confidentiality information by appropriate means in order to counteracting unauthorized interceptions, jamming, interferences, misleading, traffic analysis

Specifically, for a computer system these problems occur on wireless networks when sharing data between the server and other components of the network is via radio equipment, not wired.

Emissions security

Emissions security is a set of all testing measures, as well as getting security measures, against leakage of information through stray electromagnetic emissions, TEMPEST.

Spurious emissions occur around cables that move electricity. At a sufficient distance (several meters) of these cables and depending on the current that flows through throe cables, the electromagnetic fields can be captured with special equipment, and information can be retrieved.

This situation is valid for cable networks that are not sufficiently protected and avoid is possible only to the extent that information and communications system installation or any major change it will be executed by authorized persons in terms of security provided by standards.

The works will be permanently supervised by qualified technical personnel who have access to information at the highest level of classification that computer system will store, process or transmit.

Cryptographic security

Computer system for processing, storage and transmission of data and information at "state secret" level must be provided with the grading system (methods, means and equipment to ensure integrity, confidentiality and availability)

The way how information is presented, even if transmission uses short code or binary representation, or other form of transmission must not influenced the classification given to that information.

Physical security

A special importance should be given physical security measures in order to prevent following actions: unauthorized access to classified information, to perform unauthorized operations, locking resources and services, as well as to protect computers and computer equipment (theft, destruction, etc.).

Physical security of computing and communication systems as a component of INFOSEC, is considering the environment in which they work (the rooms are located, power supply, temperature, protection against fires, floods, functioning in emergency situations), but staff access to areas where they are located.

Any person able to enter a place that contains computers can be in a position to interact or to damage the equipment, as well as may have access to classified information processed by it.

Computer security threats can come from anyone who has professional training and adequate knowledge of computer systems and can access them. In areas where systems that process classified information are located it is necessary to apply general security measures such as:

• entry personnel and materials, and departure to / from these areas to be controlled by appropriate measures

• areas and places where computers systems security can be affected, there should never be occupied by a single authorized employee (usually rule the two)

• people who require temporary or intermittent access to these areas must have authorized access as visitors being always accompanied in order to have the guarantee that will not access classified information or equipment used

• Antivirus protection as a component of the protection systems must contain procedures and virus protection measures both manual and automatic as follows:

•Verification of installed operating systems, software packages and software tools, the presence of viruses or other harmful software, having proper procedures for removing them and if their detection;

•Always check the files / data stored in computer systems, virus checking during processing, accessing, introducing / extracting data to / from computer systems or well-established intervals

• Verification of storage media (information and software) received from external sources, with their disinfection procedures

• Constantly updated versions of antivirus software and using several antivirus products (licensed), both servers and workstations

•Reporting of incidents caused by viruses, the sender of infected storage media and security structure.

Conclusions

Information security is the ongoing process of exercising due care and due diligence to protect information, and information systems, from unauthorized access, use, disclosure, destruction, modification, or disruption or distribution. The never ending process of information security involves ongoing training, assessment, protection, monitoring & detection, incident response & repair, documentation, and review.

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NEW TRENDS IN IT&C SECURITY EVALUATION

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Abstract

This paper focuses on the link between information security and cryptography represented by National Institute of Standards and Technology (NIST) cryptographic standards, Federal Information Processing Standard FIPS 140-2 (Security requirements for cryptographic modules) standard and Common Criteria for Information Technologies Security Evaluation (ISO 15408) standard. Information security is the science of protecting information and information systems from unauthorized access, use, disclosure, disruption, modification or destruction. Cryptography deals with design, implementation and evaluating cryptographic algorithms (e.g. NIST AES selection process, SHA-3 completion etc.) in order to be used by products (software and/or hardware) which are intended to protect information or information systems. Before using in information systems those cryptographic products need to be tested and evaluated also. One evaluation standard is FIPS 140-2. After this evaluation is obtained, from an accredited Laboratory, the system itself needs to be evaluated in order to have a image of the assurance level obtained. Usually these evaluation is made using ISO 15408 (Common Criteria for Information Technology Systems) standard.

Keywords: cryptographic algorithms, FIPS 140-2, ISO 15408, crypto modules, security evaluation.

1. INFOSEC

INFOSEC domain covers the following areas:

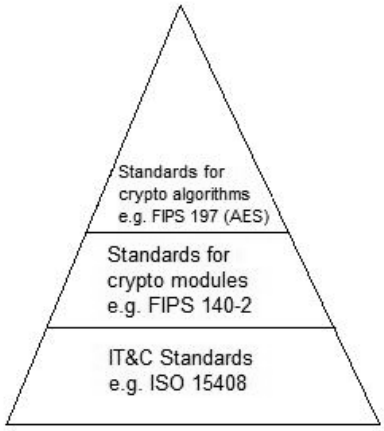

Figure 1: INFOSEC standards stratification

Physical security describes both measures that prevent or deter attackers from accessing a facility, resource, or information stored on a physical media and guidance on how to design structures to resist various hostile acts.

Personnel security describes the restriction of data which is considered very sensitive. Under need-to-know restrictions, even if one has all the necessary official approvals (such as a security clearance) to access certain information, one would not be given access to such information unless one has a specific need to know; that is, access to the information must be necessary for the conduct of one's official duties. As with most security mechanisms, the aim is to make it difficult for unauthorized access to occur, without inconveniencing legitimate access. Need-to-know also aims to discourage "browsing" of sensitive material by limiting access to the smallest possible number of people.

Procedural security deals with the establishment and enforcement of security procedures. Some of these procedures may be independent of the type or types of computers involved. Others may not. For example, perimeter security controls are usually similar for all type of systems. But desktop computers may require forms of antitheft protection not required by mainframes. Procedural security regulates the performance of duties associated with system operation and use, and with the physical storage of system information. Common security practices include partitioning computer operating duties, using several operators, and storing backup tapes at bonded, offsite depositories. Procedural security also encompasses and may regulate company policies that deal with information security, such as policies that regulate the way individuals manage their own passwords.

Communications security (COMSEC) describes the measures and controls taken to deny unauthorized persons information derived from telecommunications and ensure the authenticity of such telecommunications. Communications security includes crypto security, transmission security, emission security, traffic-flow security and physical security of COMSEC equipment.

Computer security is a branch of technology known as information security applied to computers. The objective of computer security includes protection of information and property from theft, corruption, or natural disaster, while allowing the information and property to remain accessible and productive to its intended users.

TEMPEST is a codename referring to investigations and studies of compromising emanations (CE). Compromising emanations are defined as unintentional intelligence-bearing signals which, if intercepted and analyzed, may disclose the information transmitted, received, handled, or otherwise processed by any information-processing equipment. Compromising emanations consist of electrical, mechanical, or acoustical energy intentionally or by mishap emitted by any number of sources within equipment/systems which process national security information. This energy may relate to the original encrypted message, or information being processed, in such a way that it can lead to recovery of the plaintext. Laboratory and field tests have established that such CE can be propagated through space and along nearby conductors. The interception/propagation ranges and analysis of such emanations are affected by a variety of factors, e.g., the functional design of the information processing equipment, system/equipment installation, and, environmental conditions related to physical security and ambient noise. The term "compromising emanations" rather than "radiation" is used because the compromising signals can, and do, exist in several forms such as magnetic-and/or electric-field radiation, line conduction, or acoustic emissions.

Information assurance (IA) is the practice of managing information-related risks. More specifically, IA practitioners seek to protect and defend information and information systems by ensuring confidentiality, integrity, authentication, availability, and non-repudiation. These goals are relevant whether the information are in storage, processing, or transit, and whether threatened by malice or accident. In other words, IA is the process of ensuring that authorized users have access to authorized information at the authorized time.

INFOSEC Standards

INFOSEC standards can be stratified like in Figure 1: standards for cryptographic algorithms, cryptographic modules and for IT&C security. In this chapter we focus on standards for cryptographic algorithms, crypto-modules (FIPS 140-2) and IT&C standards (e.g. ISO 15408).

2. CRYPTOGRAPHIC STANDARDS

Our discussion is based on National Institute of Standards and Technologies (NIST) cryptographic standards. These standards can be divided in four classes: symmetric key, public key, secure hash and random number generation.

In symmetric key we can found for example AES (FIPS 197), DES (FIPS 46-3) for block ciphers standards or HMAC (FIPS 198) for hashing and message authentication code. We remained that simple DES was replaced by AES, 3-DES being in use. In public key standards we can found Digital Signature Standard (FIPS 186-3), Key Establishing Schemes (DH&MQV, FFC&ECC SP 800-56A) and Key Management Guideline. Secure hash is referring to SHA-1, SHA-224, SHA-384, SHA-512 (FIPS 180-2). At this time there exists a draft for SHA-3 which will replace SHA-2.

One standard for random number generation standards is SP 800-90.

The following table gives the theoretical comparable strengths of symmetric and asymmetric cryptographic algorithms.

Sym Key	80	112	128	192	256
Hash functions (for signatures)	160	224	256	384	512
FFC and IFC	1K	2K	3K	7.5K	15K
ECC	160	224	256	384	512

NIST approved standards are referred by NIST Cryptographic Toolkit. Some of these standards are allowed to process classified information. For example, AES with 128 bit key can be used to protect SECRET classified information and AES with 192 or 256 bit key can be used to protect TOP SECRET classified information.

FIPS 140-2

Cryptographic controls are provided using cryptographic modules, which may include capabilities such as signature generation and verification, encryption and decryption, key generation, and key establishment.

An undetected error in a cryptographic module design could affect every user in the system for which it is supposed to provide protection. For example, the verification of a chain of public key certificates might not function correctly.

Verifying a chain of public key certificates helps a signature verifier determine if a signature was generated with a particular key. If the function is implemented incorrectly in a cryptographic module, the potential for the dissemination of weak cryptography could be introduced into the system, possibly allowing for signature forgery or the verification of invalid signatures. Therefore, it is important to have cryptographic modules tested before distributing them throughout a system.

The security requirements in FIPS 140-2 cover 11 areas related to the design and implementation of a cryptographic module:

• Cryptographic module specification includes definition of cryptographic boundary, approved algorithms and approved modes of operations;
• Cryptographic module ports and interfaces are referred to the specification of all interfaces and all input data paths. For security level 3 and 4 data ports for unprotected critical security parameters logically or physically separated from others data ports;
• Roles, services and authentication requires, for all security levels, logical separation of required and optional roles and services. For level 2 operators authentication must be role–based or identity–based. To achieve security level 3 and 4 operator authentication must be identity-based;
• Finite state model requires the specification of finite state model, required and optional states, state transition and specification of these transitions;
• Physical security is focusing to tamper evidence, detection and response (e.g. erasing critical security parameters);
• Operational environment is referring to evaluation, for example, of Protection Profile (PP) at (Evaluation Assurance Level) EAL 4;
• Cryptographic Key Management is referring to the key (secret, private and public) manipulation during its life time: generation, pre -activation, activation, usage, storage and deletion;
• EMI/EMC – electromagnetic compliance with Federal standards;
• Self – Tests includes power-up tests and conditional tests;
• Design assurance is referring to configuration management, secure installation, design policy and guidance documents;
• Mitigations of others attacks are referred to specification of mitigation of attacks for which no testable requirements are currently available.

Within most areas, a cryptographic module receives a security level rating of 1 to 4, from lowest to highest, depending on what requirements are met. For other areas that do not provide for different levels of security, a cryptographic module receives a rating that reflects the fulfillment of all of the requirements for that area.

An overall rating is issued for the cryptographic module, that indicates the:

1. Minimum of the independent ratings received in the areas with levels, and
2. Fulfillment of all the requirements in the other areas.

On a vendor's validation certificate, individual ratings are listed as well as the overall rating. It is important for vendors and users of cryptographic modules to realize that the overall rating of a cryptographic module is not necessarily the most important rating. The rating of an individual area may be more important than the overall rating, depending on the environment in which the cryptographic module will be used (this includes understanding what risks the cryptographic module is intended to address). Modules may meet different levels in different security requirement areas; for example, a module may implement identity-based authentication (level 3 or 4) and display tamper evidence (level 2).

At this time the draft for FIPS 140-3 where NIST has updated the standard to reflect changes in technology has a fifth security level. In this draft there is a special section dedicated to software security and specifying requirements to protect against non-invasive attacks. Also the reference to Common Criteria (ISO 15408) and requirements for the use of Common Criteria certified operating systems has been dropped. In this draft NIST improves the requirements for authentication for level 4 at two-factor authentication (at least two of three: something known, something possessed and some physical property). Also a greater importance is given to physical

security requirements to defeat non - invasive attacks/side channel attacks (protection to timing attacks (TA), differential power analysis (DFA) etc.)

3. CRYPTOGRAPHIC MODULE VALIDATION PROGRAM (CMVP)

NIST and the Communications Security Esablishment (CSE) of the government of Canada established the CMVP. The goal of the CMVP is to provide Federal agencies with a security metric to use in procuring equipment containing cryptographic modules. The results of the independent testing by accredited laboratories provide this metric. Cryptographic module validation testing is performed using the Derived Test Requirements (DTRs) for FIPS 140-2. The DTRs list of all the vendor and tester requirements for validating a cryptographic module are the basis of testing done by the Cryptographic Module Testing (CMT) accredited laboratories. Figure 2 illustrates the CMV process.

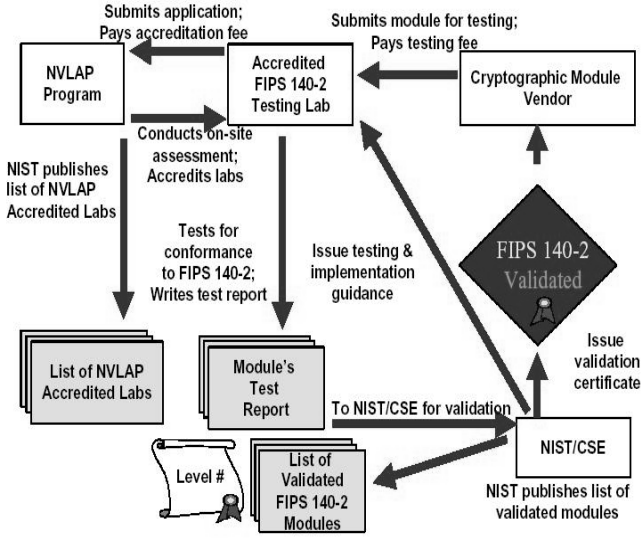

Figure 2: CMV process

4. IT&C ASSURANCE STANDARDS (COMMON CRITERIA)

Information Technology Security Evaluation Criteria (ITSEC), predecessor of Common Criteria for Information Technology Security Evaluation (abbreviated as Common Criteria or CC), is a structured set of criteria for evaluating computer security within products and systems. The ITSEC was first published in May 1990 in France, Germany, the Netherlands, and the United Kingdom based on existing work in their respective countries. Following extensive international review, Version 1.2 was subsequently published in June 1991 by the Commission of the European Communities for operational use within evaluation and certification schemes. Since the launch of the ITSEC in 1990, a number of other European countries have agreed to recognise the validity of ITSEC evaluations.

Thus Common Criteria is an international standard (ISO/IEC 15408) for computer security certification. It is currently in version 3.1. Common Criteria is a framework in which computer system users can specify their security requirements, vendors can then implement and/or make

claims about the security attributes of their products and testing laboratories can evaluate the products to determine if they actually meet the claims. In other words, Common Criteria provides assurance that the process of specification, implementation and evaluation of a computer security product has been conducted in a rigorous and standard manner. Common Criteria is performed on computer security products and systems and provides similarly-defined evaluation levels, implements the target of evaluation concept and the Security Target document.

Target of Evaluation

Target of Evaluation (TOE) - the product or system that is the subject of the evaluation. The evaluation serves to validate claims made about the target. To be of practical use, the evaluation must verify the target's security features. This is done through the following:

Protection Profile (PP) - a document, typically created by a user or user community, which identifies security requirements for a class of security devices (for example, smart cards used to provide digital signatures, or network firewalls) relevant to that user for a particular purpose. Product vendors can choose to implement products that comply with one or more PPs, and have their products evaluated against those PPs. In such a case, a PP may serve as a template for the product's ST (Security Target, as defined below), or the authors of the ST will at least ensure that all requirements in relevant PPs also appear in the target's ST document. Customers looking for particular types of products can focus on those certified against the PP that meets their requirements.

Security Target (ST) - the document that identifies the security properties of the target of evaluation. It may refer to one or more PPs. The TOE is evaluated against the SFRs (see below) established in its ST, no more and no less. This allows vendors to tailor the evaluation to accurately match the intended capabilities of their product. This means that a network firewall does not have to meet the same functional requirements as a database management system, and that different firewalls may in fact be evaluated against completely different lists of requirements. The ST is usually published so that potential customers may determine the specific security features that have been certified by the evaluation.

Security Functional Requirements (SFRs) - specify individual security functions which may be provided by a product. The Common Criteria presents a standard catalogue of such functions. For example, an SFR may state how a user acting a particular role might be authenticated. The list of SFRs can vary from one evaluation to the next, even if two targets are the same type of product. Although Common Criteria does not prescribe any SFRs to be included in an ST, it identifies dependencies where the correct operation of one function (such as the ability to limit access according to roles) is dependent on another (such as the ability to identify individual roles).

5. EVALUATION PROCESS

The evaluation process also tries to establish the level of confidence that may be placed in the product's security features through quality assurance processes:

Security Assurance Requirements (SARs) - descriptions of the measures taken during development and evaluation of the product to assure compliance with the claimed security functionality. For example, an evaluation may require that all source code is kept in a change management system, or that full functional testing is performed. The Common Criteria provides a catalogue of these, and the requirements may vary from one evaluation to the next. The requirements for particular targets or types of products are documented in the ST and PP, respectively.

Evaluation Assurance Level (EAL) - the numerical rating describing the depth and rigor of an evaluation. Each EAL corresponds to a package of security assurance requirements (SARs, see above) which covers the complete development of a product, with a given level of strictness. Common Criteria lists seven levels, with EAL 1 being the most basic (and therefore cheapest to implement and evaluate) and EAL 7 being the most stringent (and most expensive). Normally, an ST or PP author will not select assurance requirements individually but choose one of these packages, possibly 'augmenting' requirements in a few areas with requirements from a higher level. Higher EALs do not necessarily imply "better security", they only mean that the claimed security assurance of the TOE has been more extensively validated.

So far, most PPs and most evaluated STs/certified products have been for IT components (e.g., firewalls, operating systems, smart cards). Common Criteria certification is sometimes specified for IT procurement. Other standards containing, e.g, interoperation, system management, user training, supplement CC and other product standards. Examples include the ISO 17799 (or more properly BS 7799-2, which is now ISO/IEC 27002) or the German IT-Grundschutzhandbuch.

Details of cryptographic implementation within the TOE are outside the scope of the CC. Instead, national standards, like FIPS 140-2, give the specifications for cryptographic modules, and various standards specify the cryptographic algorithms in use.

Conclusions

This paper presented the connections between ISO 15408 (Common Criteria for information Technologies Security Evaluation), FIPS 140-2 (Security requirements for cryptographic modules) and cryptographic algorithms.

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