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CONTENTS

Lex ET Scientia. Juridical Series

DECISIONS OF THE ECHR AFFECTING DOMESTIC LAWS IN THE FINANCIAL AND TAX FIELD
María Amparo Grau Ruiz 9

OVERVIEW OF THE PROHIBITION OF REFORMATIO IN PEIUS IN THE HUNGARIAN CRIMINAL PROCEDURE
Csongor Herke, Csenge D. Tóth 18

STANDARDIZATION OF JUDICIAL PRACTICE AND HARMONIZATION WITH THE ECtHR JURISPRUDENCE – HUNGARY
Erika Róth 29

STANDARDIZATION OF MACEDONIAN'S JUDICIAL PRACTICE WITH THE ECTHR JURISPRUDENCE
Elena Andreevska 37

THE RIGHT TO AN INDEPENDENT COURT OF LAW. THEORETICAL ASPECTS. THE EUROPEAN COURT OF HUMAN RIGHTS CASE-LAW
Mircea DAMASCHIN 46

ADMITTING GUILT IN COURT CASE IN ACCORDANCE WITH NEW LEGISLATIVE CHANGES
Simona Tache 61

INSTRUMENTS TO ASSURE THE UNITY OF THE JUDICIAL PRACTICE IN ROMANIA
Mihai Adrian Hotca 75

THE ENTERPRISE - THE LEGAL FORM FOR CARRYING ON AN ACTIVITY HAVING A PROFESSIONAL NATURE
Stanciu D. Cărpenaru 83

THE DETERMINATION AND THE IMPACT OF THE PREFIGURED MODIFY OF ROMANIAN LABOR CODE ON THE LABOR INDIVIDUAL AND COLLECTIVE RELATIONSHIPS
Aurelian Gabriel Uluitu 88

CONSIDERATIONS REGARDING THE DEFINITION AND CLASSIFICATION OF COMMERCIAL INTERMEDIATION
Dan-Alexandru Sitaru 97

PRINCIPLE OF PROPORTIONALITY, CRITERION OF LEGITIMACY IN THE PUBLIC LAW
Marius Andreescu 113

REVOCATION OF ADMINISTRATIVE ACTS - THEORETICAL AND PRACTICAL CONSIDERATIONS
Elena Emilia Ştefan 121

THE REQUIREMENTS FOR PROTECTION OF THE COMMUNITY DESIGN
Alina Mihaela Conea 129

THE HARMONIZATION OF THE EUROPEAN LAWS ON INSOLVENCY
Luminița Tuleaşcă 144

EFFECTIVENESS OF EU LAW IN MEMBER STATES
Anca-Magda Vlaicu 162

NEW DISPOSITIONS WITH REGARD TO FILIATION
Dan Lupaşcu, Cristiana Mihaela Crăciunescu 174

Lex ET Scientia. Economics Series

MANAGING CHANGE: THE PRIVATE UNIVERSITY SECTOR IN CYPRUS, OPERATIONS WITHIN THE EUROPEAN CONTEXT. A CASE STUDY
Simona Mihai Yiannaki 191

ON ORTHODOX/HETERODOX AND AUTISTIC/POST AUTISTIC ECONOMICS – A VIEW FROM THE ROMANIAN ACADEMIC LANDSCAPE
Rodica Ianole, Mihaela Sandu 208

FINANCIAL ASPECTS OF DECENTRALISATION
Emilia Cornelia Stoica, Andrei Cristian Stoica 216

COMPARATIVE ANALYSIS OF VAT EVOLUTION IN THE EUROPEAN ECONOMIC SYSTEM
Mihaela Andreea Stroe 223

ASSUMPTIONS ABOUT THE ROLE OF ECONOMIC GROWTH IN THE DEVELOPMENT OF CONSUMER BEHAVIOR IN ROMANIAN ECONOMY
Cristina Teodora Bălăceanu, Cosmin Stoica..237

ROMANIA'S MACROECONOMIC ACHIEVEMENTSFOR JOINING THE UNIQUE EUROPEAN CURENCY
Silvia Popescu 243

FROM EXTERNAL DEBT TO ECONOMIC GROWTH AND BACK
Oana Simona (Caraman) Hudea 252

THE INFLUENCE OF LENDING ACTIVITY OVER CONSUMER'S BEHAVIOR
Viorica Mirela Stefan-Duicu, Adrian Stefan-Duicu 261

IMPERFECT INFORMATION AND ENTREPRENEURS' CHOICE ON PROVISION OF HOUSE FITTINGS
Rita Yi Man Li 269

Lex ET Scientia. Administratives Series

INTERNATIONAL SECURITY RELATIONS AND POST-IMPERIAL ORDERS
Radu-Sebastian Ungureanu 277

THE ROLE OF THE UNIVERSITY IN THE KNOWLEDGE SOCIETY: ETHICAL PERSPECTIVES ON ACADEMIC RESEARCH IN THE AGE OF CORPORATE SCIENCE
Maria Cernat 293

MODELING AND SIMULATION OF QUEUE WAITING THROUGH THE CONCEPT OF PETRI NETS
Emilija Kamceva, Filip Tancev 303

THE EVALUATION OF THE INTERNET USAGE HABITS OF PUBLIC EMPLOYEES IN KASTAMONU
Ersin Kavi, Orhan Koçak 310

FEMINISM AND COSMOPOLITANISM: SOME INEVITABLE CONNECTIONS
Diana Elena Neaga 323

A STUDY OF SYMBOLIC RELATIONS IN PUBLIC TRANSPORT
Andrei Bălan..332

COMBINING MULTI-LEVEL AND NETWORK GOVERNANCE WITH A SPILLOVER EFFECT: THE CASE OF THE EUROPEAN „INNOVATION UNION" FLAGSHIP INITIATIVE
Andra Maria Popa, Ioana Dodi, Oana-Andreea Ion 340

DECISIONS OF THE ECHR AFFECTING DOMESTIC LAWS IN THE FINANCIAL AND TAX FIELD

María Amparo GRAU RUIZ*

Abstract

Some would say that taxation and human rights is an oxymoron. An oxymoron is, of course, the conjunction of two otherwise apparently irreconcilable concepts. I personally do not believe that taxation and human rights are in any way irreconcilable or conflicting; I think human rights are a fundamental aspect of taxation. Human rights limit what governments can do to their citizens - to people affected by their decisions. I think at the moment we are at a very exciting stage, where we are seeing the extension of human rights principles into the tax field, to provide limits to what governments can do to taxpayers. It is part of the balance between the powers of the State and the rights of taxpayers[1].

Keywords: *taxation, human rights, taxpayers, ECHR, authorities.*

I. Preliminary remark

The current situation shows how apparently trivial issues in tax procedures reach the European Court of Human Rights (ECHR). There has been a growing trend in controversies, which seems to have experienced some changes regarding certain matters.

Among the main causes explaining the current situation, we could point out, first, the general resistance to taxation that has been aggravated by the economic crisis. When the public authorities have to fight against deficit, the tax officials may appear more anxious to recover tax claims. Secondly, the creation of Agencies complicates the administrative structure. In addition there are increasing international efforts to combat fraud. In the international context the cooperation among administrations in international tax matters to fight avoidance and evasion has lead to a huge exchange of information, with different standards.

The effects can be observed from a double perspective, in theory to reinforce the categories, and in practice to try to solve the problems faced by professionals. Any effort to place taxation within the rule of law is to be welcome, increasing the legal certainty. With the involvement of lawyers and judicial authorities, the number of issues brought before Courts rises, but sometimes there is a lack of expertise in this field and it is difficult to manage the existing workload.

The core issue is the fair balance between the duty to pay taxes and individual rights, clarifying the legal statute of the taxpayer. In accordance with some Constitutions (i.e. the Spanish one), the contributions to sustain public expenditure may find limits on the respect of fundamental rights[2]. Therefore, the obligation to contribute with taxes is a public obligation and finds limits in the application of article 6 of the European Convention on Human Rights.

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[1] Inspiring words by Professor Philip Baker that can be found at http://www.taxbar.com/gitc_review/gitc_review_v1_n1.pdf (visited the 26th of June 2011).

[2] In this sense, the Spanish Constitutional Court has discussed much about the bank secrecy and the search in the taxpayers' premises.

Other important aspect to take into consideration is the possible application of the criminal safeguards in the tax area. Of course, an automatic extrapolation cannot be made. The doctrine might be applicable *mutatis mutandis*.

II. Main cases dealt regarding the application of the Convention in tax matters

The effective development of the Convention during the last years has depended on several additional protocols (i.e. the first protocol in article 1 explicitly deals with the need to pay taxes, charges or fines; the fourth includes *non bis in idem* for administrative or judicial tax penalties; the seventh opens the right to appeal in case of conviction with a criminal charge applicable to tax penalties). However in the coming future, it will be very difficult to reform the system through new Protocols due to the heterogeneous situation in all the Contracting States, which leads to strong differences related to their ratification).

Before reviewing the recent case law applicable in tax matters, it is convenient to take a look into the past and mention some leading cases.

In *Bendenoun*[3] was shown that tax penalties have a deterrent and punitive purpose, and that the administrative procedure to impose tax penalties had a criminal nature. France was not condemned. Some special Customs regulations could not disregard the right to remain silent. Though not expressly mentioned, this was linked to the innocence assumption. The balance has to be carefully made. On the one hand, the duty to cooperate in order to determine the tax debt obliges to provide some information, but later its possible use to impose penalties recommends keeping both procedures separated (determination of the tax debt and sanction). The lack of cooperation may entail another risk: to forget the ability to pay principle and employ alternative means to calculate the tax debt, such as negotiations or indirect estimations.

It is worthwhile to add that the burden of proof is closely linked to innocence, and the defendant should not be obliged to give proofs to self-incrimination[4].

In *Ferrazzini*[5] was clearly stated that tax disputes fell outside the scope of civil rights and obligations.

In *Funke*[6] the French tax authorities were condemned because of the lack of a judicial order to enter in premises and domicile. The legal conditions were too wide and it was important to achieve prior judicial authorization.

In *Hardy-Spirlet*[7], affecting privacy, the Commission's decision was that the Belgian tax authorities had employed proportionate research powers for the adequate protection of the economic welfare.

In *Dangeville*[8], on the Article 1 of the First Protocol, the French authorities did not want to compensate damages when a company had paid the Value Added Tax (VAT) in accordance with the domestic legislation, which was not compatible with the Community rules. The refund of an illegal tax unduly paid is a part of the property right. This credit has a patrimonial value. The Protocol applies to this asset. Therefore it would be possible to ask for the legislator's patrimonial responsibility.

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[3] ECHR 24-2-1994. Bendenoun v. France, application number 12547/86, reported in 1994 18 EHRR 54.

[4] The European Association of Tax Law Professors has dealt with the subject of burden of proof in its Annual Congress held in Uppsala in June 2011.

[5] Ferrazzini v. Italy, application number 44759/98, reported in 2001 3 ITLR 918.

[6] Funke, Miailhe and Crémieux v. France, ECHR 25-2-1993, application numbers 10828/84, 12661/87 and 11471/85. 1993 16 EHRR 297, 332 and 357.

[7] X (Hardy-Spirlet) v. Belgium , application number 9804/82, 7-12-1982, DR 231.

[8] S.A. Dangeville v. France, ECHR 16-4-2002, application number 36677/97. ECHR 2002-III.

III. Overview of the recent case-law related to taxation

In the last years, the ECHR seems to have been quite sensitive to taxpayers' claims. However, it is important to keep in mind the *ratio decidenci* in each case, without trying to extrapolate any decision or any statement, assessing the different circumstances existing in a set of similar cases.

Regarding the property right (article 1 of the First Protocol), there are some clear lines of jurisprudence.

The right to deduct VAT is a legitimate expectation to recover amounts paid in excess and avoid the unjust enrichment by the tax administration. In *Bulves AB*[9] the deduction prevails over formal conditions set for the functioning of the VAT system. There is a general interest in it. And there is no ability to secure compliance by the supplier with VAT reporting obligations. In *Business Support Centre*[10], if the supplier does not fulfil his obligation, the taxpayer cannot deduct and must pay VAT twice, which turns into an excessive burden.

In *Moon*[11] after not having declared certain amounts of money in the border to the Customs' authorities, they were retained, the taxpayer was forced to proof that their origin was not illicit and an additional fine was imposed. This was a confiscatory measure.

In *Joubert*[12] the financial interest of the State to avoid complaints for the high cost to the Treasury if many assessments were declared invalid was not found a sufficient justification. In affecting the legal certainty regarding the entry into force, there was a lack of proportionality between means and goals, as an additional determination plus a 40% fine shows.

With respect to article 5, related to safeguards in case of tax crime (in particular, detention, motivation, length of the procedure and appeal) some questions have arisen.

On provisional measures, in *Mooren*[13] the German authorities took too long preventive detention in tax fraud; in *Marian Sobczynski*[14] the Polish authorities were diligent in a complex case where a serious penalty was imposed; in *Zurawski*[15] three years of preventive detention was too much for a falsification.

Regarding legal aid, a couple of Swedish controversies were solved. In *Persson*[16] if the tax case involves the determination of a criminal charge, the equality of arms principle applies. However, in this case, there was no evidence that the taxpayer had asked it and was refused. In *Barsom and Varli*[17] the imposition of surcharges concerned minor penalties and the Court decided that the applicants could have presented their cases without legal assistance.

The article 6 of the Convention comprises several detailed rights that together allow a fair procedure. Let us recall some of the main judgments.

In *Matsyuk*[18], referred to access to justice, the Ukrainian national courts denied the appeal made against a fiscal police's decision, notified by post by means of a simple letter without formalities in a tax crime.

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[9] Bulves AD v. Bulgaria, ECHR 22-1-2009, application number 3991/03.
[10] Business Support Centre v. Bulgary, ECHR 18-3-2010, application number 6689/03.
[11] Moon v. France, ECHR 9-10-2009, application number 39973/03.
[12] Joubert v. France, ECHR 23-7-2009, application number 30345/05.
[13] Mooren v. Germany, application number 11364/03 (Sect. 5) ECHR 13.12.07; Mooren v. Germany [GC], application number 11364/03, ECHR 9-7-2009.
[14] Marian Sobczynski v. Poland, ECHR 2-2-2010, application number 35494/08.
[15] Zurawski v. Poland, ECHR 24-11-2009, application number 8456/08.
[16] Persson v. Sweden, ECHR 27-3-2008, application number 27098/04.
[17] Barsom and Varli v. Sweden, ECHR 4-1-2008, application numbers 40766/06 and 40831/06.
[18] Matsyuk v. Ukraine, ECHR 10-12-2009, application number 1751/03.

In *Feldman*[19], a bank owner was charged with a tax crime, the case was reallocated before Courts without paying attention to strict rules and motivation.

The timely resolution depends on factors, such as the behaviour of the taxpayer (i.e. if he changes his lawyer) or the tax authorities (i.e. if they try agreements or ask reports) and the complexity of the interests involved. There is a series of cases on this matter: *Nielsen* (in tax asset stripping cases that took too long in Denmark)[20], *Smirnov* (where no complexity was appreciated)[21], *Yefanov* (where the administrative behaviour was scrutinized)[22], *Knaster* (when international assistance was sought from Luxembourg)[23], *Petroff* (where the tax authorities did not check the domicile)[24], *Niedzwiecki* (twelve years were too long in a case without complexity)[25], *Impar Limited* (the Vilnius city tax authorities faced fraudulent book keeping, the deterrent and punitive fine was reduced to 5%, but with many delays)[26].

The inviolability of premises, both business premises and homes, has been dealt with in French cases like *Ravon*, *Société IFB*, *Maschino, Kandler*, and *SA LPG Finance Industrie*[27]. In Ravon, any search by revenues authorities involves a potential infringement, so any challenge requires access to an independent Tribunal, to know whether it should take place and how it must be conducted. The dispute is over a civil right, the taxpayers were not informed of this right and other routes for complaint were not effective. Notwithstanding this decision, in SA LPG is said that the previous doctrine could be maintained until the Winkler case, when a new route was open by the Conseil d'Etat, because afterwards there had been no exhaustion of all the available domestic remedies.

The tax administrative penalties may constitute a criminal charge for the purposes of the Convention, as some cases reflect: *Västberga Taxi Aktiebolag*[28] or *Jussila*[29]. In the former a 20% tax-geared penalty was a criminal charge (and a 10% might also be); in the latter, which implied the end of the Bendenoun doctrine, a focus is placed on the administrative penalty (i.e. 10% VAT surcharge imposed for errors in book-keeping). It is necessary to check the nature of the offence (all citizens as taxpayers) and the degree of severity of the penalty (if it is deterrent, in spite of not being a substantial amount). This means that virtually all penalties calculated as a percentage of the tax under-charged will engage criminal guarantees in article 6, though they will not necessarily apply with their full stringency.

Other articles in the Convention refer to various matters, sometimes linked to taxation in practice. The article 7 contains the principle *nulla poena sine lege*, in the *Yukos*[30] case the applicant claimed its application in an indirect acquisitions by a State-owned entity (from a tax audit until the auction of the shares). The article 8 refers to the right to privacy and the professional

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[19] Feldman v. Ukraine, ECHR 8-4-2010, application numbers 76556/01 and 38779/04.
[20] Nielsen v. Denmark, ECHR 2-7-2009, application number 44034/07.
[21] Smirnov v. Ukraine, ECHR 30-7-2009, application number 1409/03.
[22] Yefanov and others v. Ukraine, ECHR 30-7-2009, application number 13404/02.
[23] Knaster v. Finland, ECHR 22-9-2009, application number 7790/05.
[24] Petroff v. Finland, ECHR 3-11-2009, application number 31021/06.
[25] Niedzwiecki v. Germany, ECHR 1-4-2010, application number 12852/08.
[26] Impar Limited v. Lithuania ECHR 5-1-2010, application number 13102/04.
[27] Ravon & others v. France, ECHR 21-2-2008, application number 18497/03. Société IFB v. France, ECHR 20-11-2008, application number 2058/04. Maschino v. France, ECHR 16-10-2008, application number 10447/03. Kandler & others v. France, ECHR 18-9-2008, application number 18659/05. SA LPG Finance Industrie v. France, ECHR 19-5-2009, application number 43387/85.
[28] Västberga Taxi Aktiebolag v. Sweden, application number 36985/97, reported in 2002 5 ITLR 65.
[29] Jussila v. Finland, application number 73053/01, reported in 2006 9 ITLR 662.
[30] OAO Neftyanaya Kompaniya Yukos v. Russia, admissibility decision 29-1-2009, application number 14902/04. Application number 137772/05, ECHR judgment of 27-5-2010.

privilege, which is fundamental to the proper operation of the judicial system. In *André and another v. France*[31] was stated that any infringement at a lawyer's office must be necessary and proportionate. In the case there was no suspicion of participation in the fraud made by his client.

The article 9 on freedom of religion was claimed in *Tamara Skugar*[32], regarding the use of the taxpayers' identification numbers, though the Orthodox Church did not find it against the religious practice. Moreover, the revenue authorities allowed the taxpayers to use their personal details instead. Therefore, the databases to organize State taxation do not interfere with this freedom. This was in like with the decision adpted in *C v. UK*[33], when the quakers objected to their taxes, because they were used in part to pay military expenses.

On the freedom of expression, the article 10 was discussed in *Mariapori*[34], where a tax expert in a court said that the tax inspector had intentionally made mistakes, and later did so in a book. She was charged with aggravated defamation and punished with a fine and conditional imprisonment. The ECHR decided that revenue officers in a democratic society must be expected to tolerate criticism and accepted wider limits.

The article 11 includes the freedom of association, in the case *Vördur Olafsson*[35] a mandatory payment of an industry charge was levied. The law imposed it for the promotion of a general interest, the Treasury collected it and transferred the revenue to the Federation of Industries. However, it was not designed as a private subscription. The citizen did not belong to that Federation and there was a lack of transparency on the use of the funds.

The article 14 focuses on non-discrimination, and a number of cases shows how fluctuations appear in the Court's reactions regarding this matter. In *Glor*[36] a man suffering diabetes was declared unfit for the military service, but was obliged to pay the 'military service exemption tax', because the disability threshold was arbitrary. In *Cristopher Crossland*[37], his wife died and he had to give up his full time work to care for their children, he asked for a tax allowance -granted usually to women, and it was denied, then he went to Strasbourg and the UK Government offered him a friendly settlement. In *Willis*[38] the refusal to grant a man the allowance was unjustified and the Court awarded pecuniary damage. On the contrary, in *Hobbs, Richard, Walsh & Geen*[39] a violation was found, but the Court did not award financial compensation due to a change in the circumstances (the legislation was eliminated).

The article 1 of the First Protocol sets that any interference with the peaceful enjoyment of possessions should be lawful. It requires minimum quality standards in laws, i.e. in *Shchokin*[40] there were inconsistent legal acts applied by the tax authorities (an instruction fixing progressive taxation and a ministerial decree establishing a flat rate were clearly conflicting rules, and they were applied at a time). In *Spacek*[41] the company failed in its claim because it did not seek professional advice.

[31] André and another v. France, ECHR 24-7-2008, application number 18603/03.
[32] Tamara Skugar & others v. Russia, ECHR 3-12-2009, application number 40010/04.
[33] ECHR 15-12-1983 Commisioner Decision, application number 10358/83.
[34] Mariapori v. Finland, ECHR 6-7-2010, application number 37751/07.
[35] Vördur Olafsson v. Iceland, ECHR 27-4-2010, application number 20161/06.
[36] Glor v. Switzerland, ECHR 30-4-2009, application number 13444/04.
[37] Christopher Crossland v. United Kingdom, application number 36120/97, admissibility decision 8-6-1999, ECHR 9-11-1999, resolution by the Committee of Ministers Resolution DH 2000 81, 29-5-2000.
[38] Willis v. United Kingdom, ECHR 11-6-2002, application number 36042/97.
[39] United Kingdom, ECHR 14-11-2006, application numbers 63684/00, 63475/00, 63484/00 and 63468/00.
[40] Shchokin v. Ukraine, ECHR 14-10-2010, application numbers 23759/03 and 37943/06.
[41] Spacek sro v. Czech Republic, ECHR 9-11-1999, application number 26449/95.

The retrospective legislation is not forbidden as such, however if it imposes an excessive burden it might be. In *Belmonte*[42] an Italian municipality compulsorily acquired some land, there were delays in compensation for the expropriation and a new legislation was passed with retrospective effects imposing a withholding tax at source. The ECHR found in the case a breach of the individual rights.

The ECHR has had the opportunity to consider the proportionality principle in a case of cumulative fines. In *Monedero*[43] there was gambling activity without license and some duties were evaded, doubts may arise regarding an excessive charge that undermines the individual's financial situation, taking into account all the money laundering regulations and the possible interference in witnesses' declarations.

A clear case shows that it is quite difficult to clarify the notion of an excessive tax burden, this happened with *Imbert de Tremiolles*[44]. Regarding the French capital tax, the payable amount exceeded the net income obtained from the property, but the ECHR concluded in favour of a wide State's margin of appreciation.

The article 4 of the Seventh Protocol contains the principle *non bis in idem*. In *Ruotsalainen*[45] a 'low tax' petrol was unduly used and a criminal judgment leaded to a sanction through a quick process for a minimal fraud, but in addition an administrative procedure ended with a fine of three times the tax debt for driving without notifying it. It was an identical breach, with the same subject, the same facts and at the same time. A question could have been posed if a possible discount among the fines had made things vary.

IV. Balance on the issues to solve

As Professor Philip Baker says, we should ask ourselves: How many tax systems are based in laws that are in every respect accesible, precise and foreseeable in their application? Obviously, there is here room for improvement.

Paradoxically the case-law shows how big disputes regarding the quantum of the liability to tax do fall outside article 6 of the Convention, but some small penalties may fall inside its scope. This has enormous consequences and affects mixed cases, which are quite common.

In facing so many ‘criminal charges’, a distinction among them is made in accordance with their differing weights (tax surcharges differ from the hard core of criminal law, so one could argue how far does the right to silence applies in tax matters, for instance).

Another curious fact is that, in the current state of the art, the ECHR seems to accept retrospective changes to substantive law, and be reluctant when they affect procedural tax rules.

However, for the taxpayers the crucial issue is that of compensation. The failure to grant it might reduce applications to the ECHR in the near future. This is a complicated issue, because the ECHR could not delegate it, though some proposals have been made in this sense, due to possible divergences in its application within each national system.

The main findings in a recent study by *Keller & Stone Sweet*, which are summarized in the following paragraphs, may help us to understand the situation of the ECHR nowadays.

We are dealing with a kind of transnational or constitutional jurisprudence. The ECHR helps to define rights that overlap with national provisions, or fill a constitutional gap (acting as shadow Constitution). The national judges act as gatekeepers between domestic legal orders and the Court (proportionality must be enhanced, notwithstanding the subsidiarity and their margin of

[42] Belmonte v. Italy, ECHR 16-3-2010, application number 72638/01.
[43] Monedero & others v. France, ECHR 2-2-2010, application number 32798/06.
[44] Imbert de Tremiolles v. France, ECHR 4-1-2008, application numbers 25834/05 and 27815/05.
[45] Ruotsalainen v. Finland, ECHR 16-6-2009, application number 13079/03.

appreciation). We must realize that today, national officials routinely participate in a transnational judicial process whose reach into domestic law and politic is limited by the ever-widening scope of the Convention itself, as determined by a transnational Court.

There is a clear trend: the Court's emphasis on procedural guarantees for defendants. The accusatorial civil law systems (differing from the adversarial Anglo-Saxon model) are sometimes criticized due to lack of impartiality or transparency and the accumulation of functions. The implementation of the Convention often requires changes in the judicial organization and operation. In this line, some constitutional courts make express requirements to the judiciary. When courts are open to enforce the Convention and the case-law (binding for the State and its officials), consequently there are less applications to the ECHR.

Of significative relevance are the generalized failures across Europe to ensure trial within a reasonable time period. Now it is worrying too the lenght of the proceedings before the ECHR.

This might be connected with the standard technique of judicial prudence in rights adjudication. Its effects vary for the individual (as retrospective judge, if compensation is awarded, possible feedback loops may happen, because positive decisions may attract new petitioners) and for other States (as prospective lawmaker seeking patterns for reform).

Of course, the national legal orders are porous to the ECHR's influence, but with different intensity in an open-ended process, and the impact depends on each legal domain. For the domestification of the Convention rights, it is wise to develop rules in order to better coordinate the national legal order and the ECHR.

V. The ECHR's decisions and the Financial Law

The ECHR has had an impact not only on the public revenue side, but also in the public expenditure. These minor 'collateral effects' are worth to be outlined at least briefly. Several national State Audit Offices have had to adapt to article 6.1 of the Convention. In particular, this has happened in France, Belgium, Greece and Italy.

If we have a look at the French experience[46], we will notice that since 1807 the French financial jurisdiction proceedings had features against the ECHR case-law. In principle, it was compulsory and reserved a marginal role to the parties. There was a lack of communication to the parties of the submissions made by the public prosecutor or the 'rapporteur' judge. The Decree of the 27th of September, 2002 solved the issue of the participation in the deliberations.

After some changes to renew the judgment proceedings of public accounts, one could ask if it is already in conformity with the article 6.1 of the Convention. On the one hand, an internal regulation of the 16th of May, 2006, issued by the President of the State Audit Office, imposed the respect of equality of arms and the adversarial principle. On the other hand, the Act of the 28th of October, 2008 aimed at compatibility with the fair trial. Accordingly, it modified the role of the public prosecutor of the State Audit Office and the Regional Audit Office. He/she had the exclusivity of the prosecutions. But there were still risks regarding the 'ordonnance de décharge' and the intervention of the Minister of the Treasury in the execution of the decisions.

Due to the exclusivity in the dispute phase and the increase of the prosecutor authority, it is necessary to clarify his/her independence. The role cannot be exactly assimilated to the prosecutors of the judiciary (with wider competence than a public accusator). And regarding impartiality, some aspects deserve careful attention: the participation of the 'rapporteur' judge in the financial jurisdiction deliberation, the composition of the 'Cour de discipline budgétaire et financière', and the beginning of the process.

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[46] The issue was thoroughly analysed in the *Revue Française de Finances Publiques*, No.106, 2009.

The *Martinie*[47] case-law modifies the responsibilities established in France concerning persons entitled to make payments, public accountants, financial judges and the Minister of the Treasury, because the judgment of accounts becomes an ordinary law financial trial.

The financial jurisdiction has both judicial and non judicial competences, so eventually a structural partiality remains related to its dual function. The Minister of the Treasury may reject the force of judicial decisions given by the financial judge, that are contrary to public Law and European rules (while not modified, but probably it will be challenged).

References

- BAKER, P.: "Some recent tax decisions of the European Court of Human Rights", *European Taxation*, December, 2010, Vol. 50, No. 12, p. 568.
- BAKER, P.: "Some recent tax decisions of the European Court of Human Rights", *European Taxation*, June, 2010, Vol. 50, No. 6, p. 259.
- BAKER, P.: "Some recent decisions of the European Court of Human Rights", *European Taxation*, December, 2009, Vol. 49, No. 12, p. 596.
- BAKER, P.: "Some recent cases from the European Court of Human Rights", *European Taxation*, June, 2009, Vol. 49, No. 6, p. 326.
- BAKER, P.: "Widowers' bereavement benefits and tax relief: a survey of some recent case law of the European Court of Human Rights", *European Taxation*, December, 2008, Vol. 48, No. 12, p. 643.
- BAKER, P.: "Some recent decisions of the European Court of Human Rights", *European Taxation*, June, 2008, Vol. 48, No. 6, p. 315.
- BAKER, P.: "The determination of a criminal charge and tax matters", *European Taxation*, December, 2007, Vol. 47, No. 12, p. 587.
- DESCHEEMAEKER, C.: "La réception des exigences de la Convention européenne des droits de l'homme par la Cour des Comptes", in La réforme des procédures des jurisdicitons financières et la Convention européenne des droits de l'homme, *Revue Française de Finances Publiques*, No. 106, 2009, p. 113.
- FALCÓN Y TELLA, R.: "La responsabilidad patrimonial del Estado-legislador en los supuestos de leyes inconstitucionales o incompatibles con el ordenamiento comunitario: la Sentencia Dangeville del Tribunal Europeo de Derechos Humanos", *Quincena Fiscal*, julio 2002, I, p. 5.
- FLIZOT, S.: "Les jurisdictions financières et article 6.1 de la CESDH: confrontation des expériences européennes", in La réforme des procédures des jurisdicitons financières et la Convention européenne des droits de l'homme, *Revue Française de Finances Publiques*, No. 106, 2009, p. 183.
- HERTZOG, R.: "La juridiction financière en mutation", in La réforme des procédures des jurisdicitons financières et la Convention européenne des droits de l'homme, *Revue Française de Finances Publiques*, No. 106, 2009, p. 247.
- KELLER, H.; STONE SWEET, A.: *A Europe of Rights. The Impact of the ECHR on National Legal Systems*, Oxford University Press, Oxford, 2008.
- MARCOS CARDONA, M.: *El procedimiento sancionador tributario*, Iustel, Madrid, 2005.
- MARTÍNEZ MUÑOZ, Y.: *La aplicación del Convenio Europeo de Derechos Humanos en materia tributaria: un análisis jurisprudencial*, Aranzadi, Cizur Menor, 2002.

[47] Martinie v. France (dec.), ECHR 13.1.04, application number 58675/00, ECHR 2004-II (extracts); Martinie v. France [GC], ECHR 12.4.06, application number 58675/00, ECHR 2006-VI.

- MARTÍNEZ MUÑOZ, Y.: "Jurisprudencia del Tribunal Europeo de Derechos Humanos", *Cívitas Revista Española de Derecho Financiero*, No. 147, 2010, p. 785.
- PALAO TABOADA, C.: *El derecho a no autoinculparse en el ámbito tributario*, Thomson-Cívitas, Cizur Menor, 2008.
- PICHERAL, C.: "Le principe d'egalité des armes et la position du ministère public", in La réforme des procédures des jurisdicitons financières et la Convention européenne des droits de l'homme, *Revue Française de Finances Publiques*, No. 106, 2009, p. 137.
- PIJL, H.: "Human Rights and admissibility in trivial tax matters", *European Taxation*, June, 2007, Vol. 47, No. 6, p. 299.
- PIJL, H.: "Netherlands Tax Law meets Human Rights Law", *European Taxation*, September, 2006, Vol. 46, No. 9, p. 453.
- RUIZ ZAPATERO, G.: "El TEDH y el bis in idem en el ámbito tributario (Ruotsalainen v. Finlandia)", *Quincena Fiscal*, No. 22, 2009, p. 50.
- SANZ DÍAZ-PALACIOS, J. A.: *Derecho a no autoinculparse y delitos contra la hacienda pública*, Colex, Madrid, 2004.
- SANZ DÍAZ-PALACIOS, J. A.: "Las sentencias del Tribunal Constitucional 18/2005 y 68/2006 y los pronunciamientos del Tribunal de Estrasburgo Shannon, Weh y Allen", *Impuestos*, No. 20, 2006.
- SARRÓ RIU, J.: *El derecho a no autoinculparse del contribuyente. Vigencia de las garantías frente a la autoincriminación en los procedimientos ante la Inspección de Hacienda*, Bosch, Barcelona, 2009.
- SOLER ROCH, M.T.: "Deberes tributarios y derechos humanos", *Revista Técnica Tributaria*, No. 30, julio-septiembre 1995, p. 101.
- SUDRE, F.: "L'applicabilité de l'article 6.1 de la Convention européenne des droits de l'homme aux procédures des jurisdictions financières", in La réforme des procédures des jurisdicitons financières et la Convention européenne des droits de l'homme, *Revue Française de Finances Publiques*, No. 106, 2009, p. 55.
- SURREL, H.: "Le cumul des fonctions et l'impartialité objective", in La réforme des procédures des jurisdicitons financières et la Convention européenne des droits de l'homme, *Revue Française de Finances Publiques*, No. 106, 2009, p. 173.
- VAN HERZELE, P.: "Sur le principe d'egalité des armes et la position de ministère public", in La réforme des procédures des jurisdicitons financières et la Convention européenne des droits de l'homme, *Revue Française de Finances Publiques*, No. 106, 2009, p. 161.
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OVERVIEW OF THE PROHIBITION OF REFORMATIO IN PEIUS IN THE HUNGARIAN CRIMINAL PROCEDURE

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Abstract

The prohibition of reformation in peius has two meanings in the Hungarian legal terminology, such as the prohibition of increasing punishment and the so called reformation in peius. In the effective Hungarian legal system it is regulated, within the rules of the criminal procedure, regarding the ordinary and extraordinary legal remedies, separate procedures and, in addition to the criminal procedure, it is regulated even regarding the law of minor offences. Furthermore, the reformation in peius is not an inevitable consequence of the rule of law, but only a legal favour, and many questions and problems emerge in the light of fundamental principles and constitutionality concerning this prohibition. The prohibition of reformation in peius may be regarded as a legal guarantee for the defence to be able to file an appeal without the risk that the judgment might be altered to detriment of the accused. Therefore, it is a case of favour defensionis and as such it plays a huge role in sentencing, especially when the judgment was appealed in order to increase the severity of sentences.

This paper examines the connection between the prohibition of reformation in peius and the principle of constitutionality, as well as the its relation to the aggravating and mitigating factors of sentencing taken into account by the court of appeal.

Keywords: *Reformatio in Peius; Criminal Procedure; Constitutionality; Waving the Prohibition of Reformatio in Peius, Sentencing, Criminal-Policy*

Introduction

The expression „reformatio in peius" was mentioned for the first time in a roman legal case connected to procedural law, however it was unknown to the criminal procedure law in the 18th century (KLEINSCHROD). At the beginning of the 19th century, GONNER pointed out that the alteration of the judgment to the detriment of the accused through ordinary legal remedy (reformatio in peius) should not be required. These two sources led to ineffectual debates regarding the origin of the expression.

The prohibition of reformation in peius describes, in a wider sense, the right of state bodies entitled to permit the alteration of a decision to the detriment of the receiver (KOPP). In procedural law, reformatio in peius is mentioned in case an organ of higher degree passes a decision to the detriment of the accused, while a more favourable decision was expected to be passed thereby (SARTORIUS). In the course of time, more differentiated opinions were born regarding the expression, and the prohibition of reformation in peius was determined as the alteration of every

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single decision passed by the new court, and concerned the main question of the case to the detriment of the person against whom it was taken, however in favour of the person by whom the appeal was filed (RICCI). The restriction of reformation in peius focused only on the main questions of the decision.

In Hungary the prohibition of reformation in peius has two meanings which derived from the German influence where it is defined with the same differences: prohibition of increasing punishment and the prohibition of reformation in peius.

Although the first Hungarian Criminal Procedure Code (henceforth CPC) of 1896 included provisions regarding the prohibition of reformation in peius, these rules had been abolished by the following CPC on the grounds that the purpose of the legal remedy is the enforcement of substantial justice and not the safeguarding of the position of the accused (”the substantial justice prevails over all” as stated by CSÉKA). The situation changed when in 1954 the Modification of the CPC introduced the relative prohibition of reformation in peius which was improved by the following CPCs (of 1958, 1962). After the historical improvements, the effective CPC of 1998 (Act XIX of 1998) still did not succeed to have the perfect rules regarding this legal institution which may arise out of ordinary and extraordinary legal remedies, separate procedures and, in addition to the criminal procedure, it is regulated even regarding the law of minor offences. Even the Civil Procedure Code (Act III of 1952) specified in its section 253 (3) that the court of second instance shall alter the decision of the court of first instance only within the limits of motion for appeal (joint appeal) and the counter-motion for appeal (section 247). According to this rule the court of second instance may pass a decision on matters concerning rights enforced in the course of the law suit, as well as matters set up as a defence in contradiction of such rights and has not been heard by the court of first instance or no decision has been passed thereon.

The prohibition of reformation in peius as a basic requirement can be traced back to several fundamental principles of the criminal procedure. The most important one is favour defensionis which includes several favours granted for the defence, therefore it is closely linked to the principle of defence. In addition, it is also connected to the principles of legality, opportunity, right to legal remedy. The other very important principle is the principle of prosecution, given that the aggravation of the punishment is only allowed in cases where the prosecutor filed an appeal for this reason. It can be stated, that this prohibition is a “procedural protection-right”, as GRETHLEIN said, which shall balance the factors hindering the submission for legal remedy, furthermore, L. MOLNÁR calls the prohibition of reformatio in peius the “principle of appeal without fear” with good reason. Some other quite popular principles should be mentioned as well, such as the requirement for fair trial, and the principle of constitutionality.

1. The prohibition of reformatio in peius and the principle of constitutionality

According to KORINEK, as for the constitutional procedure, this key-definition came into the limelight basically in the German legal literature. The prohibition of double jeopardy and the command of equity are the basis for the prohibition of reformatio in peius. However, the prohibition of reformatio in peius is not an inevitable consequence of the rule of law, ~~but~~ only a legal favour.

The mostly proclaimed counter-argument against the prohibition of reformatio in peius is that in certain countries (some provinces of Switzerland, Great-Britain) this institution is unknown, but still there is no doubt about the constitutionality of these countries. Though, this cannot be a conclusive argument against the definition deriving from the principle of constitutionality. The reference to the legal order of other countries solely does not give grounds to refuse the constitutional basis for the prohibition of reformatio in peius, as a criminal procedural institution. The required persuasive power of this argument is shown by HAUSER, when he says, that on such

grounds the CPC of Luzem province is not constitutional, because it has a provision saying that the accused does not have the freedom of confession during interrogation. It cannot be stated that the criminal procedure law is not constitutional for the lack of one detailed provision, although the right to remain silence (nemo tenetur se ipsum accusare) belongs to the basic principles of the criminal procedure, and expresses the human dignity as well. The admission of the right to remain silence is a necessary element of the fair process. However, not only Luzem province, but most of the provinces of Switzerland have no regulation on advising the accused of such rights, but still, Switzerland is a state founded on the rule of law. This reasoning justifies that the definition of constitutional principles cannot be determined by the mere comparison of legal institutions.

The principle of constitutionality is found in the development of specific law and order, which is not constant and is not laid down in writing for ever. MEYER-GROßNER indicates many clauses which support the 'general fundamental principle'-character regarding the meaning of prohibition of reformatio in peius. First of all, the prohibition of reformatio in peius is restricted by several provisions which allow the aggravation de lege lata, notwithstanding that the judgment was appealed only in favour of the accused. In German law such restriction is the order of hospitalizing in a psychiatric institution or in an institution suitable for detoxication cure, which can be ordered if the judgment of first instance did not stipulate such measure, and no appeal was filed to the detriment of the accused against the judgment of first instance. Both measures can be taken posterior in the procedure of legal remedy or beside other punishments or measures. The prohibition of reformatio in peius does not restrict this in Germany either. This regulation is therefore an exception to prohibition of reformatio in peius. In Hungary the law gives even more possibilities to increase the severity of setences despite the prohibition of reformatio in peius, since in the procedure of the second instance several detrimental decisions can be taken for the lack of appeal filed to the detriment of the accused (but e.g. in the course of extraordinary remedies, all kinds of increase is forbidden by law if the extraordinary remedy was initiated in favour of the accused).

2. The right to wave the prohibition of reformatio in peius

The question arose in the scientific literature that can the accused wave the defence provided by the prohibition of reformatio in peius, well, in some cases he may live to see like the prohibition of reformatio in peius hinders the possibility to pass a subjectively favourable decision for him (e.g. if the suspended imprisonment means smaller harm to him than the fine to be executed). Two groups have been formed regarding the question of the permissibility of waiver: who agree with it and who don't. The second group allows some exception when defining the disadvantage from a general objective point of view, such as the factual surveillance (FRISCH, SCHLÜCHTER); the wish of the accused (GRETHLEIN), the attitude oriented to the case (PAULUS). Usually who refuse the right to waiver, stipulate the possibility to replace measures. We think that there is no need for the possibility of right to waiver because the actual request of the concerned party has been considered at the first level of adjudication of increase. FRISCH regards the structure of waiver as a solution that one is forced to adopt. GRETHLEIN reject the possibility of waiver due to loss of rights, which considered to be a dogmatic ground, because the criminal claim of the state is independent of the influence of the accused, therefore the state cannot enter into an agreement with the accused on the extent of punishment permissible by law.

The group of objectivity thinkers, on the contrary, explicitly suggests the possibility of waiver, because they take the general objective judgment of prohibition of reformatio in peius as its starting-point, which either does not render at all or renders only possible to replace measures in a restricted manner. Thus, e.g. the right to waiver is emphasized as a protective order of the

criminal procedural instructions of prohibition of reformatio in peius by GERHARDT, i.e. it allows the accused to waive the rights protecting him.

From our point of view, the accused is not allowed to waive the prohibition of reformatio in peius in a state founded on the rule of law. The prohibition of reformatio in peius provides certain boundaries for the state regarding the extent of punishment. These boundaries cannot be shifted, and it shall be not permitted on the basis of the subjective choice of the accused. The requirement of legal security and predictability of procedure of the second instance shall always prevail. If the waiver of the effects of prohibition of reformatio in peius was permissible, then its boundaries should also be determined.

3. The prohibition of reformatio in peius and the factors related to imposition of punishments

The general preamble of the opinion No. 56/2007 of the Penal Council, entered into force on November 14 2007, on appreciable factors in the course of imposition of punishment, lays down that the Penal Council of the Supreme Court took the Recommendation No. R (92) 17 of the Committee of Ministers of Council of Europe concerning consistency in sentencing and several decade-old judicial practise, as a starting-point. The Appendix of this Recommendation specify in 11 points the viewpoint of the Committee of Ministers of Council of Europe related to the imposition of punishment, from among these points only two concerns the question of increasing and mitigating circumstances. Point 3 of Part B deals with the penalty structures and records that the “sentencing orientations” shall indicate ranges of sentence for different variations of an offence (according to the presence or absence of various aggravating or mitigating factors), but leave the courts with the discretion to depart from the orientations. The so called “starting points” indicate a basic sentence for different variations of an offence, from which the court may move upwards or downwards so as to reflect the aggravating and mitigating factors.

Part C of the Appendix of the Recommendation deals with the aggravating and mitigating factors. According to this, the factors taken into account in aggravation or in mitigation of sentence should be compatible with the declared rationales for sentencing. The Recommendation does not render obligatory to clarify the major aggravating and mitigating factors only in law, but makes explicitly possible to determine these in legal practice. Where a court wishes to take account, as an aggravating factor, of some matter not forming part of the definition of the offence, it should be satisfied that the aggravating factor is provided beyond reasonable doubt. In the same manner, the principle of favour defensionis prevails regarding the provision of the Recommendation which says that before a court declines to take account of a factor advanced in mitigation, it should be satisfied that the relevant factor does not exists.

The imposition of sentence is always the task of the court, which requires complex evaluative work. Pursuant to the Commentary, the personality of the judges obviously gains importance in the course of this evaluative work, but the consistency and uniformity of the sentencing practise are both important requirements and social interests. This job demands remarkable thoroughness and responsibility from the court, since the imposition of sentence cannot constitute a reason for review itself, just like the fact that the provisions of section 37 and 83 of the Criminal Code (CC), the aggravating and mitigating factors and Opinion taken into account either.

The section 83 of the CC determines the principles of imposition of punishment. On the score of this, the following should be taken into account when sentencing:

- the purpose of the sentence: such as the protection of society, the special and general prevention factors (BALOGH-KŐHALMI);
- restrictions set forth by law: besides the upper and lower limit of the sentence available, it includes all the provisions of the General Part of the CC which made it possible for

the courts to impose a sentence above the upper limit or under the lower limit (Commentary);

- the danger posed to society by the offence: cf. "sentence proportionate to the act" (M. TÓTH);
- the level of the danger posed to society by the offender: the offender poses a potential danger to society not in general, but because of committing a specific crime (F. NAGY);
- the level of guilt: intention or negligence (KIS), and the levels of these, which, according to F. NAGY, is a competition to the danger posed to society by the offender. Though the danger posed to society by the offender is similar to guilt, because – according to GYÖRGYI – it means the psychic relation to the specific crime, therefore it is necessary and reasonable to separate these by law;
- other aggravating and mitigating factors.

The application of the word "other" before the aggravating and mitigating factors means that the legislator constitutes the danger posed to society by the offence and by the offender, furthermore, the level of guilt as aggravating and mitigating factors. However, it highlights these factors due to their importance from among the normative factors of imposition of punishment.

The aggravating and mitigating factors – with the exception of the above mentioned highlighted factors – were not mentioned by the former Criminal Codes on substantive criminal law, and so it is in the effective CC. The list of examples was drafted partly by the scientific literature and partly by the Supreme Court. In the following table the attempts at classifying the aggravating and mitigating factors are summarized:

SCHULTEISZ	MOLNÁR	KÁDÁR	ANGYAL- RÁCZ	FÖLDVÁRI	Opinion of the Supreme Court
1. factors affecting (increasing or mitigating) the danger posed to society by the offence 2. factors affecting the danger posed to society by the offender 3. factors affecting guilt 4. factors affecting the materialization of the aim of punishment	1. factors related to the subjective side of the crime 2. factors related to the objective side of the crime 3. indifferent factors related to imposition of punishment 4. factors effective regarding certain crimes	1. factors increasing the danger deriving from the crime to the society 2. factors increasing the danger deriving from the personality of perpetrator to the society 3. factors increasing guilt 4. factors not provided by the legal definition of other crimes	1. level of guilt 2. the objective importance of the crime 3. the accused person 4. exogenous factors of crime 5. objective and subjective factors arose after the commitment of crime 6. aggravating and mitigating factors typically effective regarding special crimes	1. the danger posed to society by the the offence and the offender 2. perpetrator's crime 3. aggravating and mitigating factors of objective nature 4. aggravating and mitigating factors of sub-jective nature	1. subjective factors affecting the sentence 2. objective factors affecting the sentence

As it's evident according to the table, the Opinion, which is normative for the present legal practise, contains much easier classification than the legal literature when it examines only from two points of view (objective or subjective circumstances) the aggravating and mitigating factors which are normative for the imposition of punishment. On the other hand, the factors highlighted by the legislator (danger posed to society by the offence and the offender, level of guilt) is not regarded to be emphasized by the Opinion, but it discusses them within the scope of the two main groups. Besides, the estimation of several circumstances accepted in the legal literature (HONIG, SCHOTT). Such circumstances e.g.:

- collective evaluation of the attacked social conditions;
- examination of collective evaluation;
- the termination of the demand directed to the defence of society (FÖLDVÁRI);
- the heavier injury fails to come off;
- perpetration under the influence of force and threat;
- repeated perpetration (even is it does not constitute legal unity);
- different forms of perpetration attained simultaneously;
- perpetration encumbering the discovery;
- circumstances related to the place of the commitment of crime;
- circumstances related to the time of the commitment of crime (at a definite hour; circumstances existing at certain moment; other dates and intervals) etc.

The evaluation of these circumstances made in the course of the imposition of punishment is not excluded by the Opinion, since the enumerated factors give only basis for the judge when he passes his judgment in a special case. Furthermore, the same circumstances shall also be evaluated by the court of appeal, when it decides on whether the court of first instance had judged the normative factors for the imposition of punishment properly, or the mitigation – if the prohibition of reformatio in peius did not take effect - or increase of severity of sentences shall take place besides the accurate evaluation.

4. The prohibition of reformatio in peius within the restrictions of criminal-political ideas

From among the three levels, distinguished by FINSZTER regarding criminal-politics (1. respondent criminal-politics: the answers of the investigating and the judiciary bodies to the committed violence of law; 2. structural criminal-politics: legislative plans, ideas of system-development and financing the operation of the legislator and government based on the prediction of delinquency; 3. strategy on public safety: political sphere, institutions and actions of the civil society and economy), the first level has special significance in terms of the prohibition of reformatio in peius. According to FINSZTER, the guarantee of legality belongs here among others, like the differentiation of enforcement of the criminal claim of the state, the speed of the procedures and the trial-parsimony. Nevertheless, these factors crucially specify the scope of prohibition of reformatio in peius.

BÁRD laid down three criminal-political basic models in the Criminal-political Conception published in 1993:

- The first is a restrictive-intervening model which protects the collective interest in the first place, and concentrates on the change or isolation of the convict (so-called strict right-wing approach).
- The second model (liberal approach) is the assisting-supporting alternative, which places the personal interest at the first place, and the public interest just behind this (not the

treatment-segregation of a certain convict, but the prevention of opportunity of crimes, general prevention). When interpreting the definition “public interest”, ADAM’s conclusion shall be taken into account, whereas the constitutional interest contains requirements and limits for the state and citizens, and attention shall be payed at all times to not to let these values to “sink into unworthy, formal category”. SAJÓ came to the conclusion that the “public interest” definition serves as suppressing or ruining the private interest and privacy, and it is applied only in order to let certain private interest get advantage in comparison to others.

• The third one is the state founded on the rule of law or constitutional alternative, which selects the behaviours to be criminally punished originated from the primacy of law. In terms of prohibition of reformatio in peius, it is obvious that only the second and the third model has significance, since the conception, which regards the convict crazy from the beginning and applies forceful retribution, cannot be made consistent with the restriction of the judicature of second instance.

In the last two decades of the 20th century and in the first decade of the 21st century, five main events took an unexpected turn regarding criminal legislation:

• In the 1980-1988 period, MÁRKI thought that the criminal-politics drifted away from reality, because the ideal of “strong state” of the party-state could not keep a tight hand on crime. Anyway, the requirement of re-socialization is attached to this period as well.

• In the 1989-1992 period the constitutional criminal law appeared, however, MÁRKI said this was, regarding the criminal-politics, the “age when the rein was thrown among horses”: the prisons became somewhat empty, but this could be attributed to general pardon and de-criminalization (GÖNCZÖL).

• The main point of the change in 1993 (Act XVII of 1993) was liberalization, but to some extent this period can be described both by increase of severity and additional criminalization. Though the requirement of change in conception can be placed to this period regarding criminal procedure law. The requirements for the new CPC were determined by the Ministry Decision 2002/1994. (I. 17.). BÓCZ mentions the stronger expression of right of disposal as a requirement as well, which supports the existence (and incidental amplification of its scope) of prohibition of reformatio in peius anyway.

• The Act LXXXVII of 1998 broke radically away from liberalization (though it kept some part of it), which was based on the requirement of proportionality composed by the Constitutional Court: if it is necessary and expected by proportionality (for the constitutional examination, see SZABÓ), the aggravation of the amount and conditions of penalty shall be demanded from punitive-politics.

• A newer change in 2003 (Act II of 2003) turned to liberalization without the termination (setting aside) of every strict criminal-political provisions.

The provisions of prohibition of reformatio in peius were not concerned specifically by any of the criminal-political changes, its modifications were exhausted by enacting the principles of former authorative ruling of the Supreme Court, but these did not constitute essential change. One cause thereof is hidden in a critique composed rightly by FINSZTER of criminal procedure legislation, whereas, the legislation urged the new act to become early effective without cause instead of having a thorough impact-research and condition-analysis completed.

None of the reasons laid down by legality and opportunity, in their debate, can be supported exclusively insomuch that one of them could be excluded completely when passing a judgment regarding a precisely stated situation. The development between legality and opportunity requires the legal-political evaluation of multitude counter-arguments, especially if it concerns the constitutional balance between legal security and legality of a certain case. This statement is effective, in the first place, regarding in what manner the aims of criminal-politics can be fulfilled

the best. The interests of trial-efficiency are favourable to loosen the principle of legality as possible, but then a problem arose that how can the law-enforcement display subjective, individual approach in the course of judging a case, since the requirement of uniform criminal investigation can be curtailed easily. This can be offended even in the case of prohibition of reformatio in peius, whereas the omission of an appeal, which should have been filed by the prosecutor acting alongside the court of first instance (to the detriment of the accused), can cause that the court of the second instance shall impose such sentence to the accused which would be significantly aggravating in other case.

It shall be officially admitted that a certain limitation of the principle of legality is inevitable. This requires from the legislator to provide alternative solutions (better personnel and financial possibilities, de-criminalization measures) in order to hinder this development whenever it is possible. This is even more effective if the principle of opportunity becomes primary in comparison to the principle of legality (due to necessary diminishing of the principle of legality because of economical reasons).

No exact boundaries can be determined where does the territory of "enemy of the rule of law" starts, but the solution (aside from obvious cases) shall be left to the legal-political decision of the legislator and the law-enforcement bodies. This circumstance does not constitute a speciality of the difference between the principles of legality and opportunity, but it is a rare phenomenon which describes a general weak point of the constitutional argument. The possibility to develop the adequate relation between the principle of legality and opportunity cannot be given up. Therefore, the clause of the prohibition of reformatio in peius is necessary on the condition, that it should better fit the constitutional considerations, while accepting the critical observations, in order to not to let the prohibition of reformatio in peius to become – by using ERDEI's comparison related to another legal institution - only a birdlime, which has mighty little honey.

Conclusions

Theoretical and practical problems arise in case a detrimental alteration of the judgment is initiated, not like in case of reformation in melius which means exactly the opposite, hence, the alteration in favour of the accused no matter that the appeal was filed in favour or to the detriment of the accused. The topic of reformation in peius and the prohibition thereof have not been discussed thoroughly, and as it was shown above, some countries do not even either know or have regulation concerning it. This fact was brought up as one of the most proclaimed counter-argument against the prohibition of reformation in peius stating that these countries are still constitutional regardless to having or not any regulation about this prohibition. However, the criminal procedure law cannot be deemed to be unconstitutional for the lack of only one legal institution, if some other instructions of the law may cover it, even if it is not detailed. Furthermore, even in Hungary, despite the prohibition of reformation in peius exists; there are several possibilities to increase the severity of sentences.

Concerning the question whether the accused can or cannot waive his right to prohibition of reformation in peius it shall be taken into consideration that in case it was allowed the state would have gain even more power and the aim of the CPC trying to balance the position of the prosecution and defence would lose its significance.

Since the imposition of a heavy or light sentence lay in the hands of the judge, the factors playing a role in the evaluation process thereof shall be determined both by the legislator and – more detailed - by judicial practice, as it is in Hungary; the examples were drafted mostly by legal literature and the Supreme Court. The mitigating and aggravating factors shall be considered wholly and complexly, especially because the imposition of a sentence does not create a cause for

review itself. These circumstances shall be considered by the court of first instance and also by the court of appeal when it examines whether these normative factors were properly adjudicated concerning the imposition of punishment.

The requirement of prohibition of reformation in peius was not concerned expressly by the criminal-political changes. The different criminal-political ideas vary according to the range of interest of the state (public) or of the person. The debate between the principle of legality and opportunity calls for a legal-political evaluation of several counter-arguments, but it shall be high lightened that certain limitation on the principle of legality is necessary, such as even the prohibition of reformation in peius.

References

- ÁDÁM Antal: Alkotmányi értékek és alkotmánybíráskodás. [*Constitutional Values and Constitutional Judicature*.] Osiris, Budapest, 1998. (In Hungarian)
- ANGYAL Pál – RÁCZ György: A büntetés kiszabása bírói gyakorlatunkban. Az enyhítő és súlyosító körülmények rendszeres feldolgozásban. [*Sentencing int he Hungarian Judicial Practice. Systematic Elaboration of the Aggravating and Mitigating Factors.*] Budapest, 1937. (In Hungarian)
- BALOGH Ágnes – KŐHALMI László: Büntetőjog I. Általános rész. [*Criminal Law I. General Part.*] Dialóg-Campus Kiadó, Budapest- Pécs, 2007. (In Hungarian)
- ERDEI Árpád: A trónfosztott királynő uralkodása, avagy a bizonyítási elmélet szent tehene. [*The Reign of the Queen Without a Crown, or else the Sacred Cow of the Evidence Theory.*] Magyar Jog 1991/4. (In Hungarian)
- FEZER, Gerhard – PAULUS, Rainer: Kommentar zur Strafprozeßordnung.[*Commentary on the Criminal Procedure Code.*] Neuwied – Kriftel – Berlin,1993. (In German)
- FINSZTER Géza: Kriminálpolitika tegnap és ma. [*Crimnal-politics Yesterday and Now.*] Rendészeti Szemle, 2006/12. (In Hungarian)
- FÖLDVÁRI József: Kriminálpolitika. [*Criminal-politics*.] Budapest, 1987. (In Hungarian)
- FRISCH, Wolfgang: Das Verschlechterungsverbot – Grundfragen und neue Entwicklungen, [*The Prohibition of Reformatio in Peius – Basic Issues and New Developments.*] Juristische Arbeitsblätter, 1974. (In German)
- GERHARDT, Bernd-Peter: Das Verbot der reformatio in peius bei den Nebenstrafen, Nebenfolgen, Maßregeln der Sicherung und Besserung des Strafgesetzbuches. [*The Prohibtion of Reformatio in Peius Regarding Collateral Penalties, Accompanying Punishment, Measures for Protection and the Improvement of the Criminal Code.*] München, 1970. (In German)
- GÖNCZÖL Katalin: A bűnözés és a bűnmegelőzés Magyarországon a rendszerváltás időszakában. [*Crime and Crime Prevention in Hungary during the Democratic Transformation.*] Magyar Jog, 1991/11. (In Hungarian)
- GÖNNER: Handbuch des deutschen gemeinen Prozesses, in einer ausführlichen Erörterung seiner wichtigsten Gegenstände. [*Detailed Manual of the German General Procedures and their Main Objects.*] Bd. III. Erlangen, 1804. (In German)
- GRETHLEIN, Gerhard: Die Problematik des Verschlechterungsverbotes im Hinblick auf die
- besonderen Maßnahmen des Jugendrechts. [*The Problems of Prohibition of Reformatio in Peius with Regard to Certain Actions of Juvenile Justice*] Neuwied am Rhein, 1963. (In German)

- GYÖRGYI Kálmán: A büntetéskiszabás elvei. [*Principles of Sentencing*.] Jogtudományi Közlöny, 1980/3. (In Hungarian)
- HAUSER, Robert: Anmerkung zu BGH, Urteil vom 10. 8. 1994 -3 StR 53 / 94. [*Note o BGH, Judgment of 10.8. 1994 -3 StR 53/94.*] Juristische Rundschau,1995. (In German)
- HONIG, Richard: Der ungleichartige Rückfall als allgemeiner Strafschärfungsgrund. [*The Incomparative Realpse as a General Ground for Aggrevation*] Fraustadt, 1914. (In General)
- KÁDÁR Miklós: A súlyosító körülmények. [*The Aggravating Circumstances*.] Jogtudományi Közlöny, 1965/4. (In Hungarian)
- KIS Norbert: Helyteleníthető-e a büntetési rendszer szigorítása? [*Should the Rendering of the Penal System Stricter Be Disapproved?*] In: HOLÉ Katalin (szerk.): A Büntető Törvénykönyv és a büntetőeljárási törvény módosításának elméleti és gyakorlati kérdései. Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, Budapest, 2003. (In Hungarian)
- KLEINSCHROD, Gallus Aloys: Über die Rechtskraft peinlicher Urteile. [*About the Legal Force of Disadvantageous Decisions.*] In: Archiv des Criminalrechts, Bd. II, 3. Stück, 1800. (In German)
- KOPP, Ferdinand: Verwaltungsgerichtsordnung mit Erläuterungen. [*Administrative Proceduer Law with Exlanations.*] München, 1988. (In German)
- KORINEK László: A nyugatnémet bűnmegelőzés története, felépítése és működése. [*The History, System and Operation of the West-German Crime Prevention.*] Belügyi Szemle,1989/10. (In Hungarian)
- MÁRKI Zoltán: Ciklusok a büntetőpolitikában. [*Periods of Criminal-politics*.] In: HOLÉ Katalin (szerk.): A BüntetőTörvénykönyv és a büntetőeljárási törvény módosításának elméleti és gyakorlati kérdései. Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, Budapest, 2003. (In Hungarian)
- MEYER-GOßNER, Lutz: Einstellung des Verfahrens und Verschlechterungsverbot. [*The Proceedings and the Prohibition of Reformatio in Peius*.] In: GÖSSEL, Karl Heinz – KAUFMANN, Hans (szerk.): Strafverfahren im Rechtsstaat. Festschrift für Theodor KLEINKNECHT. München, 1985. (In German)
- MOLNÁR László: A reformatio in peius tilalmának érvényesülése a Bp. 202. § a)-c) pontjára alapított hatályon kívül helyezést követőúj eljárásban. [*Predominance of the Prohibition of Reformatio in Peius in the New Procedure Conducted due to a Repeal Based on Section 202 a)-c) of the Criminal Procedure Code*] Magyar Jog, 1956/4. (In Hungarian)
- NAGY Ferenc: A magyar büntetőjog általános része. [*The General Part of the Hungarian Criminal Law.*] Korona, Budapest, 2004. (In Hungarian)
- RICCI, Hans-Peter: Reformatio in peius unter Anschliessung an das Rechtsmittel im Zivilprozeß (unter vergleichsweiser Heranziehung des Strafprozesses und des Steuerjustizverfahrens). [*Reformatio in Peius Regarding the Appeal in Civil Procedure (in Comparasion of Criminal Procedure and Tax Procedure)*] Zürich, 1955. (In German)
- SAJÓ András: A közérdek-fogalom. (Értelemadási kísérlet) [*The Definition of Public Interest. (Attempt to Make Sense Thereof.)*] In: LAMM Vanda (sorozatszerk.): Van és legyen a jogban. Tanulmányok PESCHKA Vilmos 70. születésnapjára. MTA Jogtudományi Intézete, Budapest, 1999. (In Hungarian)
- SARTORIUS, J.B.: Beiträge zur Geschichte und Theorie der reformatio in peius. [*Contributions to the History and Theory of Reformatio in Peius*.] Archiv für
- civilistische Praxis, 1848. (In German)
- SCHLÜCHTER, Ellen: Das Strafverfahren. [*The Criminal Procedue.*] Köln – Berlin – Bonn – München, 1983. (In German)

- SCHOTT, Albert: Zufälliger Erfolg als Strafschärfungsgrund. [*Accidental Success as Ground for Aggravation*.] Göttingen, 1895. (In German)
- SCHULTEISZ Emil: A büntetés kiszabása. [*Sentencing.*] Budapest, 1953. (In Hungarian)
- TÓTH Mihály: A „tettazonosság" újabb dilemmái – meghalad ott dogma vagy értékes tradíció? [*New Dilemmas of "identy of the facts stated in the indictment and the judgment" – Transcended Doctrine or Valuable Tradition?]* In: FENYVESI Csaba – HERKE Csongor (szerk.): Minúciák. Tanulmányok TREMMEL Flórián professzor 60. születésnapjának tiszteletére. Pécs, 2001. (In Hungarian)

STANDARDIZATION OF JUDICIAL PRACTICE AND HARMONIZATION WITH THE ECtHR JURISPRUDENCE – HUNGARY

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Abstract

This paper is a little bit unusual. Questions were put by the organisers of the conference in order to obtain information about the practice of administration of law and elaboration of legal norms. The central problem touched by the studies prepared for the conference is the uniformity of legal practice. The author tries to describe shortly the Hungarian solution answering most of questions but using a partly modified structure: when information would have been similar concerning different questions she joined them together. Topics of the questionnaire partly cover problems the author has discussed in her lecture last year.[1]

Keywords: *criminal justice, court system, Hungarian law, jurisdiction, jurisprudence, legal practice, legal remedies, uniformity of practice*

1) Court system of Hungary and levels of jurisdiction

Local courts mean the first level of the Hungarian judicial system. These courts are located in the major towns (105) of Hungary and in Budapest (6).[2] The local court shall proceed as single judge or in chamber (one professional judge and two lay judges or – as a new possibility - two professional judges and three lay judges).

The second level of the Hungarian court system consists of 19 county courts and the Metropolitan Court of Budapest (hereinafter jointly referred to as county court). These county courts are competent to hear as first instance courts the cases established by an Act, and review appeals lodged against the decisions of local courts in the second instance.[3]

In some cases defined by law only the county courts have exclusive jurisdiction, they are competent to hear for example homicides, acts of terrorism, trafficking of human beings. As a first instance court the county court shall hear cases in chamber composed by one professional judge and two lay judges or two professional judges and three lay judges (depending on the complexity and seriousness of the cases). As a second instance court the county court shall review appeals in chamber composed by three professional judges.[4]

Regional courts of appeal are the 'youngest' actors of the administration of justice**.** In Hungary 5 regional courts of appeal are seated in Budapest, Debrecen, Győr, Pécs and Szeged. These courts have competence to render judgment on legal remedy submitted against decisions of

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[2] http://www.birosag.hu/engine.aspx?page=birosag_english_03_judicial

[3] http://www.birosag.hu/engine.aspx?page=birosag_english_03_judicial

[4] http://www.birosag.hu/engine.aspx?page=birosag_english_03_judicial

local or county courts. The court of appeal re-examines the facts of the case and reaches its own conclusions.[5]

The Supreme Court is the supreme judicial body of the Republic of Hungary. The Supreme Court adjudges legal remedies submitted against decisions of the county courts or the regional courts in cases set forth by an Act; adjudges petitions for review; adopts obligatory uniformity decisions applicable to the courts.[6]

Normally decision of the first instance court may be appealed and in some exceptional cases entitled persons may lodge an appeal against the judgement of the court of second instance. As the Hungarian court system is of four levels cases usually finished at the county or the regional court. If those entitled to lodge an appeal do not do it the judgement of the court of first instance may become final.

The court of second and third instances and courts rendering extraordinary remedies (re-trial, judicial review, appeal on legal grounds and uniformity proceeding) are authorized to repeal the decision of the lower courts.

2) Jurisprudence as a source of law or what is the value of the legal precedence

Generally decisions of upper courts are not binding for lower courts, except the uniformity decisions of the Supreme Court, although in practice the case law is taken into account when courts make decisions. The reason of it is that upper courts adjudge appeals submitted against the decisions of lower courts and in these proceeding they –most likely - do follow their previous practice and principles laid down by them in former cases.

Precedence may be referred by the participants of the criminal procedure – e.g. by the defence lawyer or the prosecutor when they speak for the defence or for the prosecution (closing arguments), and the court may cite previous decisions of other courts but it happens very rare.

In Hungary – as in other countries of the continental law system – there is not any legal rule which compels a judge to follow the decisions of higher courts, but the reality shows that they do it.[7]

The justification of the court decision shall contain reasons of all provisions and applied legal norms in order to inform all actors of the procedure about the facts and the law on which the decision is based. As it was mentioned earlier the court has no legal obligation to consider the practice, the known decisions of the other courts, but they usually shall take into account cases published in compilation (collection) of court decisions or the judgements of the upper courts which concerned their own cases. But jurisprudence is more frequently referred as 'due to the consequent practice of judiciary'.

Only decision pronounced in the uniformity procedure binds the lower courts. Constitution of Hungary states that "...uniformity resolutions shall be binding on all courts." [8]

3) Mechanisms providing legal practice coherence or unit

I hardly believe that there is any country in Europe which has an absolutely uniform legal practice. Non-unity means that sometimes different courts understand norms in different ways.

[5] http://www.birosag.hu/engine.aspx?page=birosag_english_03_judicial

[6] http://www.birosag.hu/engine.aspx?page=birosag_english_03_judicial

[7] This and other questions of the recent study were discussed in detail and published in: Erika RÓTH: Ensuring uniform administration of law in criminal matters – the Hungarian way. Lex et Scientia. International Journal. Nr. XVII. Vol.1/2010. pp. 41-51

[8] Article 47 Section (2) of the Constitution of the Republic of Hungary (Act XX of 1949).

May be that the rule is not clear enough and make possible different interpretation. But sometimes not only ambiguous rules are the reason of the non-unit. It happens quite frequently that the punishments imposed for the very similar offence without any specialities in the personal background of the offender diverge in different parts of a country. If this phenomenon is constant and significant it might violate the principle of equality before the law.

Ensuring uniform application of law by the courts is the duty of the Supreme Court. Within the framework of performing its duties, the Supreme Court shall adopt uniformity decisions and publish decisions of theoretical importance.[9]

Uniformity decision is applicable in order to provide unity of judicial practice. This procedure shall be conducted

a) in order to develop legal practice or ensure uniform sentencing policy a harmonisation decision is required in a matter of doctrine,

b) if a panel of the Supreme Court intends to deviate from the decision of another adjudication panel of the Supreme Court with respect to a legal issue.[10]

The procedure may be initiated by the President or the head of the criminal division of the Supreme Court, or the Prosecutor General, and in the second case - specified in subsection *b)* - by the panel of the Supreme Court.

The harmonisation panel of the Supreme Court consists of five professional judges. Seven professional judges shall adjudicate the motion if the question affects different fields of law (e.g. civil and administrative or civil and criminal etc.).

4) Appeal in the law interest

Appeal against the decision of first instance court may touch question of law and question of fact as well, but in the procedure of third instance only the question of law may be discussed. The breach of law is the basis mostly of the judicial review which is a special (extraordinary) legal remedy procedure in Hungary. There is another one special remedy in the Hungarian criminal procedure called appeal on legal grounds. This may be lodged by the Prosecutor General at the Supreme Court against the unlawful and final decision of the court, unless the final decision may be contested by other means of legal remedy.[11]

Upon establishing the violation of law, the Supreme Court may acquit the defendant or make other decisions concerning the sanctions applied in the procedure favorable for the defendant, but in other cases the decision of the Supreme Court may establish only the fact of unlawfulness.[12]

Decision made in the procedure of ‘appeal on legal grounds’ - which means appeal in the interest of law - is not compulsory for lower courts so the independency of the judge is not influenced. But the fact is that if a judge or a chamber does not want their decision to be quashed they will follow the principles and interpretation of rules published by the Supreme Court in the procedure of ‘appeal on legal grounds’.

5) Preliminary ruling procedure before the Court of Justice

Preliminary ruling procedure was established to ensure the uniform interpretation of the community law.

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[9] Act N° 66 of 1997 on the Organization and Administration of Courts Article 27. The Act is available in English on page http://www.birosag.hu/engine.aspx?page=birosag_english_01_act

[10] Act XIX of 1998 on Criminal Procedure Article 439 Section (1)

[11] Act XIX of 1998 on Criminal Procedure Article 431

[12] Act XIX of 1998 on Criminal Procedure Article 437

The court shall suspend the criminal procedure ex officio or upon a motion, if the preparatory inquiry of the European Court of Justice is initiated according to the rules set forth in the Treaty establishing the European Union or the Treaty establishing the European Community. In its decision the court specifies the question requiring the preliminary ruling of the European Court of Justice and – to the extent required for answering the question – describes the facts and the Hungarian legal regulations concerned. The decision shall be sent to the European Court of Justice, as well as for the information to the minister responsible of justice.

6) Relationship between the jurisprudence of the Strasbourg and Luxembourg Courts and that of other international courts

Although there is no 'official' connection between the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ) to some extent a mutual effect might be observable. EU institutions are bound to respect human rights. The European Court of Justice has jurisdiction over member states, EU institutions, businesses and individuals within the geographic boundaries of the European Union which is a narrower territory than the territory of the Council of Europe. The European Court of Human Rights has jurisdiction over member states of the Council of Europe that have accepted the Court's jurisdiction. The European Court of Justice ensures that EU and EC treaties are respected and that the laws are being followed. The Court of Justice takes into consideration decisions of the ECtHR as guidance in its decision making on human rights issues.[13] While all members of the European Union are member states of the Council of Europe and subject to the jurisdiction of the ECtHR the connection – at least in human rights questions – is obvious. Sometimes the ECJ refers the case law of the ECtHR and treats the Convention on Human Rights as though it was part of the EU's legal system.

7) Competence of the Supreme Court in Hungary

The Supreme Court – as it was mentioned earlier - is the supreme judicial body of the Republic of Hungary. It operates judicial and uniformity chambers, as well as criminal, civil and administrative judicial colleges.

It has competence as court of second and third instances (court of appeal) and deals with extraordinary remedies (judicial review, appeal on legal grounds and harmonisation/uniformity procedure). As it is regulated in the Section 25 of the Act N° 66 of 1997 on the Organization and Administration of Courts

the Supreme Court shall

a) adjudge the legal remedy submitted against the decision of the county court or the regional court in the cases set forth by an Act,

b) adjudge petitions for review,

c) adopt an obligatory uniformity decision applicable to the courts,

d) proceed in other cases referred to its jurisdiction.[14]

8) The role of jurisprudence and legal theory in the legislation process and in development judicial practice

Jurisprudence is continuously developing and may support the work of the legislator and the administration of justice as well. If we speak about the necessary changes of justice and legal

[13] See http://www.hrea.org/index.php?doc_id=365

[14] http://www.birosag.hu/engine.aspx?page=birosag_english_01_act

practice, I think that it is a current topic in all countries. Good as it is the regulation if the practice is not on the top. Jurisprudence and legal theory may especially be important in a preparation of a draft or when interpretation of a rule is ambiguous.

The judicial practice usually does not rely on the scientific results. However it is not rare that actors in the closing speech cite sentences from text books the court is not very keen on accepting those efforts.

Legislator quite frequently asked opinion of academics in the past and I hope that in the near future the new government will rely on well based, rich knowledge of law teachers and researchers. The cooperation would be fruitful for both partners.

9) Involvement of judges in the law drawing up and adoption process

In Hungary construction of the law has a statutory basis. The law CXXX of 2010 on the construction of law regulates steps of the legislative process. Not only the act on construction of laws contains rules on the process how a norm should be prepared but the Act CXXXI of 2010 on the participation of the society in the preparation of laws as well. Almost all important laws have to be made available on the website of ministries in order to provide opportunity for all citizens and for professional circles to explain their opinion. Depending on the topic of the planned law the draft should be sent to scientists and practicing lawyers in order to get acquainted with their points of view.

Usually an ad hoc committee supports the work of the official law makers. Members of this committee represent the main fields of legal profession: lawyers, judges, prosecutors and academics take part in this activity. They are entitled to make a draft. If the time devoted to the drawing up procedure is limited, only the officials of the ministries are involved into the work but the prepared draft is circulated and all authorities which participate in the administration of justice and professional circles, departments of universities have opportunity to write comments, proposals. These may only help the work of the ministry and have no binding character. The same is the aim of the duty prescribed for authorities responsible for preparation of an act. They have to make available the draft for all citizens on a website.

10) Administrative mechanisms for unifying the jurisprudence

As it was mentioned earlier ensuring uniform application of the law by the courts is the duty of the Supreme Court. Within the framework of performing this duty the Supreme Court shall adopt uniformity decisions and publish decisions of theoretical importance. But not only the Supreme Court but lower courts have role in unifying the administration of justice. As the Act 66 of 1997 on the Organization and Administration of Courts says if a chamber or a single judge of the lower courts has rendered judgment in some theoretical question and that decision has become final, it/he is obliged to introduce the decision of theoretical importance to the president of the court.[15]

The president of the court and the head of the judicial college shall continually monitor the administration of justice in the courts. If he is informed of the decision during the examination held in the courts or in any other way that the court has developed a contradictory practice in a theoretical question or final decisions have been adopted on the basis of contradictory theoretical bases, he shall inform the president of the higher level court regarding this fact, together with the submission of the decisions and the other documents as necessary.[16]

[15] Act N° 66 of 1997 on the Organization and Administration of Courts Article 28 Section (1)
[16] Act N° 66 of 1997 on the Organization and Administration of Courts Article 28 Section (2)

11) Involvement of the legal council in the jurisprudence unifying process

There is no legal council in Hungary. The Hungarian Constitution created the National Council of Justice as a constitutional organisation to reinforce of the independence of justice. It started its activities in 1997. The National Council of Justice fulfils the central duties of administration of courts with the observation of the constitutional principle of judicial independence and exercises supervision of the administrative activities of the presidents of the courts of appeal and the county courts. This body has no role in the unification process.[17]

12) Databases regarding legal decisions

On the website http://www.birosag.hu/engine.aspx?page=anonim the collection of court decisions are available in anonym form. It has to be mentioned that this collection does not contain all decisions. The Law XC of 2005 on the freedom of electronic information prescribes the duty of the court in that relation. Due to the regulation publication of decisions of the Supreme Court and regional courts is compulsory but presidents of lower courts may order to publish any other decisions on the website. There is statutory deadline for doing this: within 30 days after the court put down its decision in writing.

Decisions of the Constitutional Court are available on the website of that court – some most important decisions in English as well.

13) Professional training of judges

Although the National Judicial Council (and earlier Ministry of Justice) organised conferences and short term courses for judges – mostly in order to discuss new laws and current questions of administration of law - in Hungary judges have never had an institution of further education to help them in acquiring practical knowledge necessary for this profession till 1 September 2006 when the Hungarian Judicial Academy was opened. This Academy is a unique institution in Hungary's history. It intends to offer high quality, effective education to the members of the Hungarian judiciary (not only to judges but to clerks and the administrative staff as well). Relying on the Academy's institutional potential, the main goal is to support the functioning of courts with a scientific and educational centre of European standards. Its work is helped by the guidance of Educational Scientific Council and on the central training plan adopted by the National Judicial Council.

14) Types of specialisation of judges or law courts

Judges work in criminal, civil, economical, administrative and labour chambers. It means that a judge trying criminal cases does not deal with civil and labour law cases. Special types of chambers within criminal division mean juvenile court and military court. Above it in larger courts there are some kinds of specialisation within the criminal division as well: judges trying transport cases, economical crimes etc. This solution provide basis to become good specialist of a narrower field.

[17] See more about the National Council of Justice on page http://www.birosag.hu/engine.aspx?page=birosag_english_02_national

15) Controlling constitutionality of the laws

The Constitutional Court is the supreme organ for protecting the Constitution. Its tasks are reviewing the constitutionality of laws, protecting the constitutional order and fundamental rights established in the Constitution. The Constitutional Court is not part of the "normal" court system.

Considering the adopted statute unconstitutional, the President of the Republic refers it to the Court instead of signing it (constitutional veto). In such a case, the Court decides on the constitutionality in extraordinary proceedings. (Preliminary - ex ante - review)

The Act XXXII of 1989 on the Constitutional Court assures the possibility of constitutional supervision of international agreements prior to their ratification.

The posterior review is the most general competence of the Court, directly deriving from the Constitution. Anyone, without legal interest can submit a petition asking the constitutional review of a legal norm. If, upon the petition, the challenged law is found to be unconstitutional, the Court annuls it. Generally, in such a case, the annulled law remains in force until the publishing of the Court's decision and the annulment does not concern the existing legal relationships. In exceptional cases, the Court may order the retroactive or the pro futuro annulment of the unconstitutional law, for the sake of legal certainty.

The Court interprets its competence for posterior review extensively. It stated that the competence covers all normative acts, including laws implementing international treaties and law uniformity resolutions.[18]

16) Influence of globalisation on the jurisprudence

It is not easy to speak shortly about the influence of globalisation on the jurisprudence in general. In my opinion the importance of the knowledge of scientists became more important because the practice and experiences of foreign countries now are better and easier acceptable. Theoretical basis of the proper implementation of foreign solutions is important and that fact may enhance the appreciation of scientists.

In practice the cross-border crime is the most significant influence of globalisation. That phenomenon raises the importance and need of judicial cooperation and the role of international organisations.

17) The „quality of laws" in Hungary

The fundamental problem is that there are too many regulations in Hungary. Laws change very frequently and not only an average citizen but even the practicing lawyers and scientists are not able to follow modifications. Sometimes different acts are not harmonised and that controversy does not help the work of administration of justice. Despite this fact I can say that the quality of law – concerning norms of criminal law and criminal procedure - is high in Hungary. The legislator respects human rights and international requirements. When a new law is under construction the harmony with EU law always are examined.

18) The weight of the budget destined to justice in GDP

In 2009 the GDP of Hungary was 26 054.3 billion HUF and the amount of support the judiciary received from the state budget was 67 643 million HUF. It means that 0,2 % of the state budget was spent for the judiciary in 2009. [19]

[18] http://www.mkab.hu/index.php?id=introduction

[19] The annual budget of the judiciary was 272 938 288 Euro in 2008. http://www.birosag.hu/engine.aspx?page=birosag_english_03_judicial

19) Responsibility of judges when laws are violated

Criminal proceedings and proceedings for petty offenses may, based on an action related to a professional judge and his participation in justice only be instituted or compelling measures only applied in such proceedings against a lay-judge - with the exception of flagrant cases - with the approval of the appointing party or the party entitled to elect such persons. Professional judges and lay-judges may waive their immunity in relation to proceedings for petty offenses.

Against professional judges and prosecutors, as well as associate judges criminal proceedings for a criminal offence committed in their capacity as such, may only be instituted after the prior consent of an authorized person.

As the employee the responsibility of judges is based on the Act LXVIII of 1997 on the service relations of the court employees. The latter type of responsibility is similar than the responsibility of average employees. The upper limits of the responsibility I exactly defined. If e.g. a suspect suffered damage during or as a consequence of a court process or decision the court is responsible for its judge. It could be the second step to call the judge to account e.g. in a disciplinary procedure.

Conclusion

The Constitution of Hungary says: '… the legal system of the Republic of Hungary shall adopt the generally accepted rules of international law, and shall ensure harmony between the assumed international law obligation and domestic law'. Studying the case law of the ECtHR we can realize that Hungary is really ready to accept these requirements and does its best in order to avoid the impeachment in Strasbourg and always examine the harmony with the EU law when a new draft is under preparation.

References

- RÓTH Erika: Ensuring uniform administration of law in criminal matters – the Hungarian way. Lex et Scientia. International Journal. Nr. XVII. Vol.1/2010. pp. 41-51
- Act N° 66 of 1997 on the Organization and Administration of Courts
- Act XIX of 1998 Code on Criminal Procedure
- http://www.birosag.hu/engine.aspx?page=birosag_english_01_act
- http://www.birosag.hu/engine.aspx?page=birosag_english_02_national
- http://www.birosag.hu/engine.aspx?page=birosag_english_03_judicial
- http://www.mkab.hu/index.php?id=home_en
- http://www.mkab.hu/index.php?id=introduction
- http://www.lb.hu/english/index.html
- http://www.hrea.org/index.php?doc_id=365

STANDARDIZATION OF MACEDONIAN'S JUDICIAL PRACTICE WITH THE ECTHR JURISPRUDENCE

Elena ANDREEVSKA[*]

Abstract

The role of the Strasbourg Court acquires controlling dimension in the application of human rights. Measures taken at national level, should provide effective domestic remedies, to strengthen the national legal order and to bring it closer to compliance with the European Convention on Human Rights (ECHR) and the legal practice of the Court. Macedonia amended the Law on Courts in 2008, and accepted a very significant solution, thus enabling direct application of the ECHR case-law by the Supreme Court of the Republic of Macedonia, when deciding on trials within a reasonable time. However, should be keep in mind that the Committee of the Ministers, in 2004 already, noted that Convention is integral part of the national law in totality of the States Parties. The consequences of this integration are of primary importance in the context of Macedonian's judicial practice. Thus, a fundamental question which arises today consists in knowing if the national judge can really apply not only Convention but also the decisions of the Court, if necessary with the detriment of the contrary national law. In this respect, I took note with the country experiences where the decisions of the Court are applied directly by national authorities, the Macedonian legal system and in this context the needs of judicial reforms.

Keywords: *ECHR, ECtHR, Macedonia's legal system and the judiciary, Macedonian's judicial practice, subsidiarity.*

Introduction

The ECHR was drafted within the Council of Europe, a political organization founded in the aftermath of the Second World War in order to defend democracy, the rule of law, and human rights in Europe. The Convention is now more than 50 years old.[1] Since 1998, the European Court of Human Rights (ECtHR) has had exclusive jurisdiction to receive individual applications. The recognition of the right to individual application before the Court is compulsory for all Member States and the judgments of the ECtHR are binding.[2] In international human rights law, the European system is considered to be a model of effectiveness.[3] Its success is manifested in many ways, both in the effect it has had on domestic law[4] and in the increasing number of applications being lodged before the ECtHR that has over the years generated a rich and extensive human

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[1] It opened for signature in Rome on 4 November 1950 and entered into force in September 1953.

[2] On the reform of the system by the 11th Protocol see, Drzemczewski A, The European
Human Rights Convention: Protocol No. 11—Entry Into Force and First Year of Application' 21Human Rights Law Journal (2000) 1.

[3] See Ryssdall R, The Coming of Age of the European Convention of Human Rights' 18 European Human Rights Law Review (1996) 18.

[4] See Bernhard R, The convention and domestic law in Macdonald R, Matscher F, and Petzold H (eds) The European System for the Protection of Human Rights (1993) 25.

rights case law, unique in international law. Rolv Ryssdall, one of the Court's former presidents, described the ECtHR as 'a quasi-constitutional court for the whole of Europe'.[5]

In the last 10 years, however, the effectiveness of the European system has been under threat from two directions. First, the Court became a 'victim of its own success',[6] having difficulty managing the ever-increasing caseload.[7]This is partly to do with the increased awareness of the right to individual application within Contracting States and partly with the enlargement to Eastern Europe, following the collapse of the Eastern bloc.[8] Secondly, the enlargement to Eastern Europe raised questions about the human rights records of the new Member States and the Court's prospects of applying the same human rights standards to cases coming from the new members as those developed for the older western European ones.[9]

These developments only added to problems that the ECtHR was already facing in interpreting the ECHR. By looking at the relevant literature and the case law, one finds a series of important jurisprudential issues that have been raised in relation to the interpretation of the ECHR. One way or another, these issues point to the relationship between the two foundational principles of a supranational human rights system: state sovereignty on one hand and the universality of human rights on the other.

The problem of the length of judicial proceedings has become more and more important because for decades it has continued to be on the regular increase and has expanded geographically in Europe.[10] Upon close glance, the European situation can tentatively be characterized by distinguishing two groups of states affected in substantially different ways by the "malaise" of protracted proceedings.

A first group of states have shown apparent symptoms of a more serious stage of development of this "malaise" – a structural stage.[11] It affects widely and profoundly the whole organizational and functional system of judiciary bringing about multidimensional and persistently paralyzing effects and consequently a large-scale denial of fair trial. Such a situation has

[5] Ryssdall R, The Coming of Age of the European Convention of Human Rights' 22.

[6] See Dembour MB, '"Finishing Off" Cases: ' Radical Solution to the Problem of the Expanding ECtHR Caseload' 5 *European Human Rights Law Review* (2002) 604.

[7] To solve the problem of the caseload, the system is currently under reform by Protocol 14, which opened for ratification in May 2004. One of the most controversial provisions in Protocol 14 is the introduction of a new admissibility criterion. According to the amended art 35 ECHR an application will be inadmissible 'if the applicant has not suffered a significant disadvantage'.

[8] Membership doubled within 14 years, from 23 in 1990, to 46 in 2004. These are: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova , Monaco, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, and the former Yugoslav Republic of Macedonia.

[9] See Leuprecht P, 'Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?' 8 *Transnational Law and Contemporary Problems* (1998) 313.

[10] The submission that excessive length of judicial proceedings is an all-European issue was made by O. Jacot-Guillarmod, "Rights Related to Good Administration of Justice (Article 6)", in R. St-J. Macdonald *et al.* (eds.), *The European System for the Protection of Human Rights*, Dordrecht-Boston-London: Martinus Nijhoff Publishers, 1993, pp. 394-395.

[11] The notion of "structural" phenomenon stems from the concept of "structural violence" submitted by Johan Galtung, who points to the profound and comprehensive nature of political, socioeconomic and cultural obstacles to the enjoyment of human rights. Another definition of structural violation was proposed by P. Jambrek, "Individual complaints v. structural violence: reactive and proactive role of the Strasbourg court of law", *In our hands. The effectiveness of human rights protection 50 years after the Universal Declaration.*
Proceedings, European regional colloquy (Strasbourg, 2-4 September 1998), Strasbourg: Council of Europe Publishing, 1998, pp. 75-81.

traditionally been discernible in Macedonia (albeit predominantly in civil cases).[12] A second group is made up of established and well-functioning democracies traditionally renowned for their efficient administrations of justice.[13]

From yet another perspective it is often submitted that most of the cases involving breaches of the "reasonable time" guarantee come from civil law jurisdictions and involve much longer periods of time than would normally be found in common law courts.[14] Such a "record-breaking" length of proceedings might actually be perceived in many other countries as a reflection of very high performance of the administration of justice.[15]

One may cautiously submit about the whole of Europe that excessively long judicial proceedings have been caused above all as a side-effect of gradual strengthening of the judiciary as the "third power". It has appeared to be a natural, though delayed, reaction against gradually increasing strength of the "second power". This process has thus been generated by the increased importance of the rule of law leading to increased calls for controls of the legality of government action by the courts as well as the development of complex economies and technological innovations calling for more conflict resolution by the state, including through the courts.[16]

The second category of powers demonstrates extensions of judicial guarantees to pre-judicial stages (e.g. determinations on pre-trial detention, their further extensions, appeal to courts against certain decisions of prosecutors in the course of the investigative stage of proceedings).

The third category of powers shows the extension of judicial guarantees to post-judicial phases, such as questions falling within the enforcement, executive and penitentiary proceedings, as reflected in the activities of bailiffs and penitentiary courts.

In brief, it may be submitted that we have to do with a fairly diversified range of causes of the lengthy judicial proceedings. Before addressing them they must first be precisely identified. Otherwise the recommended countermeasures may prove to be futile and ineffective.[17]

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[12] But it has recently made substantial progress in Austria, France, Croatia, Czech Republic, Greece, Hungary, Poland, Portugal, Slovakia, Ukraine, Russia and others.

[13] Nordic countries, Germany, the Netherlands, Ireland or the United Kingdom. Although some increase of length-of-proceedings cases has been recorded in these countries, on the whole however they still show the ability to counteract symptoms of unreasonable length of proceedings before their courts.

[14] See D.J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, London, Dublin, Edinburgh: Butterworths, 1995, p. 229. Also, as established by the European Court of Human Rights, the very trial took place "between 28 June 1994 and 13 December 1996. It lasted for 313 court days, of which forty were taken up with legal argument, and was the longest trial (either civil or criminal) in English legal history". See *Final Decision as to the Admissibility of Application No. 68416/01, 6 April 2004*, pp. 8-9, and the judgment: Case of *Steel and Morris v. the United Kingdom,* judgment, 15 February 2005, para. 19. The complex character of this record-breaking trial is also reflected in the following facts: transcripts of the trial ran to about 20 000 pages, there were about 40 000 pages of documentary evidence, and in addition 130 witnesses gave oral evidence.

[15] Among the protracted proceedings the most "famous" is the Greek case of "olive grove", which within temporal jurisdiction of the European Court lasted "only" 9 years, although in the domestic proceedings it was instituted in 1933 – see the case of *Yagtzilar and others v. Greece,* judgment, 6 December 2001, paras. 27 and 31. Other well-known lengthy cases took, before reaching Strasbourg, 28 years – case of *Brigandi v. Italy* (19 February 1991); 18 years – case of *Tusa v. Italy* (27 February 1992) or 19 years – case of *Poiss v. Austria* (23 April 1987).

[16] The development of human rights protection largely through judicial guarantees contributed in itself to the increase of cases submitted to the courts, and consequently to longer duration of their judicial determinations.

[17] Macedonia made significant changes especially in the procedural legislation through creation of legal prerequisites for shortening of the court procedures. The implementation of the new Law on Misdemeanors, which provides basis for exemption of given type of typically administrative petty offences from court jurisdiction, should be important into the process of reducing of the number of cases.

1. The Legal System of the Republic of Macedonia: The Judiciary

Since the Macedonia implemented the European Convention of Human Rights,[18] judges and Scholars had to face the problem of the relationship between the rules of the Convention and those of the national sources of law. In particular, the core question is where to place the European Convention among the Macedonian sources of law.

In analogy with all other European Council member States, Macedonia was entitled to choose among four options: first, to either be bounded by the European Convention at the international level only, or, second, to recognize a constitutional significance to the Convention's rules, or, third, to regard them at an intermediate level between the Constitution and ... In accordance with Macedonian Constitution all ratified international legally binding instrument are at an intermediate level. Concerning the ECHR my opinion is that Macedonia should acknowledge a new position for the rules of the Convention and, at the same time, paved the way for a forthcoming constitutionalization of the Convention as a Constitutional charter of fundamental rights.

The Macedonian's Parliament has many competencies, of which most importantly: adoption and changing of the Constitution; adoption and interpretation of the laws; establishing taxes and other public expenditures; adoption of the budget of the Republic and its final account; ratification of international agreements.[19]

According to the Macedonian's Constitution,[20] the judiciary power is exercised by the courts, which are autonomous and independent.[21] The court system has a single organization, with no specialized courts. Emergency courts are prohibited. There are 27 Courts of First Instance, and three Courts of Appeal. The highest court is the Supreme Court of Macedonia. Courts must perform their adjudication function on the basis of the Constitution, the laws and international agreements ratified in accordance with the Constitution. A judge serves without restriction of his/ her term of office and he/she may be removed from office only in cases laid down in the Constitution. Judges enjoy immunity. The performance of the office of a judge is incompatible with other public office, profession or membership in a political party. Political organization and activity in the judiciary is prohibited. The court hearings and passing of verdicts are public, although the public may be excluded in cases determined by law. The courts try cases in chambers and only in cases determined by law. A single judge can try a case. Juries take part in trials in cases as determined by law. Special and independent role in the judiciary is given to the Judicial Council of the Republic, and the Office of the Public Prosecutor.

The Judicial Council of the Republic proposes to the Assembly the election and removal from office of judges in cases laid down by the Constitution, decides on the disciplinary accountability of judges, assesses the competence and ethics of judges in the performance of their

[18] Macedonia ratified the ECHR on 16 April, 1997. I want to emphasize the fact that, 13 years after the ratification of the European Human Rights Convention, which became a part of the national legislation, its implementation in Macedonia is far from satisfactory".

[19] The Parliament, until May 2006, has adopted most of the planned legislation and has realized the envisaged activities. With the adoption of the Law on Courts, the Law on the Judicial Council and the Law on the Academy for Training of Judges and Public Prosecutors has completed the legal framework in the area of the election of judges. The first elections for members of the Judicial Council were held, on which eight judges were elected to be members of this Body.

[20] The Constitution of the Republic of Macedonia with the Amendments has been adopted by the Parliament of the Republic of Macedonia in November 2001

[21] There are concerns about the independence and impartiality of the judiciary: no further progress was made in ensuring that existing legal provisions were implemented in practice. In this context it is important that graduates from the Academy for Training of Judges and Prosecutors be given priority in new recruitments. See EU Doc. *COM(2010)660.*

office, and proposes two judges in the Constitutional Court of Macedonia. The Judicial Council is composed of seven members that are elected by the Parliament from the ranks of outstanding members of the legal profession for a term of six years with the right to only one reelection.

According to the 14th constitutional amendment of 2001, three members of the Judicial Council are elected with an absolute majority of MPs, including an absolute majority of MPs who belong to the communities that are not a majority in the country. Members of the Judicial Council may not hold other public offices or professions and may not be members of a political party.

The Office of the Public Prosecutor is an autonomous state organ with single organization charged with the function of persecution of persons who have committed criminal and other offences as determined by law and with performing other duties as determined by law.[22]

The Constitutional Court of Macedonia is not part of the regular court system of the Republic, but a special organ of the Republic, which is established for the protection of the legal principles of constitutionality and legality. The Constitutional Court competencies include: decisions on the conformity of laws with the Constitution and on the conformity of other regulations and collective agreements with the Constitution and laws; protection of the freedoms and rights of the individual and citizen relating to the freedom of personal conviction, conscience, thought, and public expression of thought, political association and activity, and prohibition of discrimination of citizens on the basis of sex, race, religion, national, social, or political affiliation; decisions on conflicts of competencies between holders of offices in the legislative, executive and judicial branch of state power; decisions on conflicts of competency between the organs of the central government and organs of the units of self-government; decisions on the accountability of the President; decisions on the constitutionality of the programs and statutes of political parties and associations of citizens; and, decisions on other issues as determined by the Constitution. The Court has the power to repeal or invalidate a law if it determines that the law does not conform to the Constitution, as well as power to repeal or invalidate other regulations, collective agreements, statutes, or the program of a political party or association, if it determines that they do not conform to the Constitution or the laws. The decisions of the Court are final and executive. The Court is composed of nine judges, who are elected by the Parliament for a nine year term, without a right to reelection, and enjoy immunity during their term in office. [23]

2. Justice System Reforms

The process of transition of the Republic of Macedonia towards an economically developed, modern, democratic and legal state and civil society encountered certain weaknesses, hence, the need to intensify the reforms in all of the segments of societal life.

The weakness identified in the judicial system in the Republic of Macedonia, along with the directions of the future reforms and the specific actions are based upon numerous national and international analyses of the sector, comparative experience from countries with stable political systems, and, above all, on international standards stemming from relevant international documents.

[22] The duties of the Office must be performed in accordance with the Constitution and the laws of the Republic. The Assembly appoints the Public Prosecutor for a term of six years and during his/her term he/she enjoys immunity. The office of Public Prosecutor is incompatible with the performance of any other public office, profession or membership in a political party.

[23] In accordance with the 15th constitutional amendment of 2001, three of the judges are elected with an absolute majority of MPs, including an absolute majority of the MPs who belong to the communities that are not a majority in the country. The judges in the Court must come from the ranks of outstanding members of the legal profession. They may not hold other public office, profession, or membership in a political party and may not be called for military service.

The analyses on the functioning of the judiciary in the Republic of Macedonia up to date identify a significant number of weaknesses, which address judicial independence, judicial efficiency and judicial accountability that reflects on:

- slow procedures and inaccessibility of justice;
- difficult and prolonged enforcement of final decisions in the civil cases ;
- overburdened judicial institutions with minor cases;
- unorganized case management;
- obsolete IT equipment and insufficient use of IT;
- insufficient coordination between the Supreme Court, State Judicial Council and the Ministry of Justice;
- insufficiently skilled human resources, in professional and ethical terms.

The problems with the judicial independence seems to be connected with :

- the actual Constitutional and legal solutions for selection of judges and appointment of Public Prosecutors enable political influences;
- absence of detailed criteria for financing courts and the Public Prosecution;
- poor economic situation of the judges and court's employees;

The problem with the judicial accountability seems to be connected with :

- the lack of continuous education system of judges, public prosecutors and other staff of the judiciary and the Public Prosecution;
- instances of unprofessional and unconscientiously behaviour and corruption;
- underdeveloped public relations.

Despite the acceptance of contemporary conceptual paradigms of fundamental human rights and freedoms and of the rule of law, the judiciary in the Republic of Macedonia is in a permanent state of crisis, which is reflected in the lengthy and inefficient court procedures, generating a general lack of trust in the judiciary, ultimately resulting in an obvious erosion of values of the legal order overall.[24]

In the second area, alleviating the caseload by liberating the courts from misdemeanor cases has produced only seemingly increased court efficiency. Regretfully, it has been exactly the misdemeanor system reform that has brought about additional chaos and legal uncertainty and it is especially concerning that large part of the proceedings before the state bodies do not satisfy the basic standards for fair procedure envisaged under Article 6 of the ECHR, while these procedures ultimately end with high fines. Thus far efforts to increase the efficiency of courts have not brought results. [25]

[24] Strategy aimed at enhancing the independence of the judiciary and at increasing the efficiency of courts has not yielded genuine results, in any of these two areas. Hence, one can witness concerns that many have articulated about the possibility that instead of a guarantor of the independence of the judiciary, the Judicial Council becomes the opposite - a body exposed to strong political pressures, a non-transparent body used as a tool of the executive power. It is exactly the Judicial Council and the Council of Public Prosecutors that have become in the practice an instrument for and a catalyst of the domination of politics over the judiciary, as confirmed by the use of party-based assessments and criteria for election of judges, or by the covert or open pressures on the judiciary in order that it adopts politically convenient decisions, all exasperated by the creation of a long lasting climate of uncertainty and threats among the ranks of judges.

[25] It is especially concerning that the country lacks a comprehensive strategy that would cover the overall system (the judiciary and the police). Not only that the deadlines under the Justice System Reform Strategy and the

There is no doubt that the independence of the judiciary is formally guaranteed by the legal framework. Recent judiciary reforms have aimed at reducing instances of political influence on judges and of political appointments. Ever since the reforms were initiated in 2005, the independence and efficiency of the judiciary have been gradually strengthened. However, politicians from the governing coalition have not refrained from influencing judges and ongoing court proceedings.[26] In 2008, the Judicial Council assumed full responsibility for recruiting judges and presidents of the courts and appointed 115 judges, including 12 presidents of courts, as well as the president of the Supreme Court. The problem with the inefficiency of the judiciary remained in 2010. Although the basic courts managed to reduce the very big backlog of enforcement and misdemeanor cases as well as administrative cases dealt with by the new Administrative Court, there are hundreds of thousands of unresolved cases.[27] The courts are overburdened with administrative work and are also expected to deal with a high number of misdemeanor trials.[28]

Conclusions

One of the most important and up-to-date matters that involve lawyers is to understand at which level the ECHR should be placed among the Macedonian sources of law. The matter intersects several fields, including International law, European law, Constitutional law, Criminal and Criminal Procedure law. Macedonia should acknowledge a new position for the rules of the Convention and, at the same time, paved the way for a constitutionalization of the Convention as a Constitutional charter of fundamental rights.

Once this matter will be solved, the research will focus on other topics in the field of criminal procedure which are related especially on the effects of ECtHR decisions which sentenced Macedonia because of the unlawfulness of a trial. The core question is: if a trial whose decision is final didn't respect an article of the Convention, how and through which legal instruments should that trial be renewed?

In this context, should be keep in mind that the CE's Committee of the Ministers, in 2004[29] already, noted that Convention is integral part of the national law in totality of States Parties. The consequences of this integration are of primary importance for Macedonia. Thus, a fundamental question which arises today consists in knowing if the Macedonian's judge can really apply not only Convention but also the decisions of the Court, which unfortunately doesn't corresponded with Macedonian's jurisprudence.

Strengthening of the principle of subsidiarity is an essential element of the "Interlaken process".[30] The Declaration of Interlaken emphasized that, reiterating "the obligation of the States to ensure primary protection of the rights and freedoms guaranteed by Convention" at the national

accompanying Action Plan have long expired, but also the Police Reform Strategy (also with expired deadlines) has been designed and implemented independently from the justice system reform strategy.

[26] To a certain extent, these practices were noted by the EU Commission, which stated in its 2008, 2009 and 2010 Progress Report on Macedonia that "the Minister of Justice has made a number of public statements concerning the decisions of appointment of judges which could be perceived as an attempt to unduly influence the Judicial Council."

[27] See also Improving access to Justice, Helsinki Committee for Human Rights of RM, December 2009.

[28] While the number of judges and prosecutors has increased (632 and 187, respectively, compared to 597 and 186 in 2007), the number of employees in the judicial administration has dropped by 6%. Some lower courts still lack basic IT equipment, as do most of the public prosecutor's offices.

[29] 22 Mar 2011 **...** Committee of Ministers publishes decisions on the execution of judgments**.....** of the European Court of Human Rights of 8 July 2004.

[30] High Level Conference on the Future of the European Court of Human Rights Interlaken Declaration 19. February 2010.

level, while calling with a reinforcement of the principle of subsidiarity. By ratifying the Declaration and the Action plan adopted in Interlaken, the Committee of the Ministers raised the responsibility shared for the States Parties, the Court and the Committee of the Ministers in the implementation of the process thus launched.

On the national level, even if the international immediacy concerns the Government, the principle of subsidiarity implies a collective responsibility: all the national authorities are jointly and collectively persons responsible vis-a-vis the obligations undertaken by the State Parties of the Convention. That implies that as well at the regional or local level as well at the national level, the legislative powers must adopt laws in conformity with Convention and the executive powers must apply these laws in a way in conformity with Convention.

Another important pillar of subsidiarity - is the university education and the professional training. This formation is essential and it must touch all the people who, in one way or another, are brought to implement the ECHR.[31]

I come to the role of the Macedonian Parliament, which have to become a key element of the implementation of the principle of subsidiarity. The Parliament has to invest itself more in the thoughtful examination of the compatibility of the laws and the practices with the Convention, which can have a particularly positive preventive effect. In addition, the contribution of the Parliaments proves to be determining during the execution of many judgments, in particular the recent pilot judgments.

The setting up of effective remedy system is a complex and continuous process which implies at the same time the executive powers, legislature and judiciary. The introduction of a new internal remedy often requires negotiation and co-operation between various actors.[32]

The interpretative authority of the judgments delivered against other States has also an obvious relevance in the process of a complete and effective execution of a judgment of the Court: if the judgment indicates in general terms, the measure to be taken in the action plan to execute the judgment, it is often necessary to be based on general jurisprudence to refine this measurement concretely so that it is really effective and compatible with the requirements rising from Convention.

Finally, the Declaration of Interlaken recognizes it - and to my knowledge for the first time in such an explicit way in such a document -, the respect of the principle of subsidiarity relates to also the Court. For the Court, the principle of subsidiarity must be considered under two shutters. The first relates to the procedural subsidiarity, which wants that the Court shows a legal reserve ("judicial coilrestraint") in its examination of the rule of the exhaustion of internal grounds for appeal. The other shutter touches the material subsidiarity, which implies on the one hand that the Court should never set up in fourth authority it is indeed nor a revision or cassation, appelate jurisdiction - like, on the other hand, in the margin of appreciation which it is advisable to leave in the States. However, it is important to recall that this margin of appreciation is never unlimited. The task to decide *définivement* if there were or not violation of Convention always falls on the Court, guardian supreme of Convention. It is with it to bring corrective measures to sometimes

[31] See Recommendation (2004) 4. This recommendation refers to three complementary types of action, namely: the incorporation of appropriate education and training on the Convention and the case-law of the Court, notably in the framework of university law and political science studies, as well as professional training of legal and law enforcement professions; guaranteeing the effectiveness of the education and training, which implies in particular a proper training for teachers and trainers; and the encouragement of initiatives for the promotion of knowledge and/or awareness of the Convention system.

[32] The setting up of effective remedy system is a complex and continuous process which implies at the same time the executive powers, legislature and judiciary. The introduction of a new internal remedy often requires negotiation and co-operation between various actors.

erroneous interpretations of the national authorities, and which is charged to ensure an interpretation in conformity of Convention through all the European continent.[33]

References

- Bernhard R, The convention and domestic law in Macdonald R, Matscher F, and Petzold H (eds) The European System for the Protection of Human Rights (1993) 25.
- Committee of Ministers, Recommendation (2004) 4.
- Committee of Ministers decisions on the execution of judgments**.....** of the European Court of Human Rights of 8 July 2004.
- Conference – Strengthening of the principle of subsidiaruty – Integration of the ECHR Judicial Practice into the national legislation and practice, Skopje, 01-02 October 2010.
- D.J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, London, Dublin, Edinburgh: Butterworths, 1995, p. 229.
- Dembour MB, "Finishing Off " Cases: ' Radical Solution to the Problem of the Expanding ECtHR Caseload' 5 *European Human Rights Law Review* (2002) 604.
- Drzemczewski A, The European Human Rights Convention: Protocol No. 11—Entry Into Force and First Year of Application' 21Human Rights Law Journal (2000) 1.
- EU Commission Progress Report on Macedonia, 2008, 2009, 2010.
- EU Doc. *COM(2010)660.*
- European regional colloquy (Strasbourg, 2-4 September 1998), Strasbourg: Council of Europe Publishing, 1998, pp. 75-81.
- *Final Decision as to the Admissibility of Application No. 68416/01, 6 April 2004*, pp. 8-9, and the judgment: Case of *Steel and Morris v. the United Kingdom,* judgment, 15 February 2005, para. 19.
- High Level Conference on the Future of the European Court of Human Rights Interlaken Declaration 19. February 2010.
- Law on Courts, the Law on the Judicial Council and the Law on the Academy for Training of Judges and Public Prosecutors, May 2006.
- Leuprecht P, 'Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?' 8 *Transnational Law and Contemporary Problems* (1998) 313.
- O. Jacot-Guillarmod, "Rights Related to Good Administration of Justice (Article 6)", in R. St-J. Macdonald *et al.* (eds.), *The European System for the Protection of Human Rights*, Dordrecht-Boston-London: Martinus Nijhoff Publishers, 1993, pp. 394-395.
- P. Jambrek, "Individual complaints v. structural violence: reactive and proactive role of the Strasbourg court of law", *In our hands. The effectiveness of human rights protection 50 years after the Universal Declaration.*
- Ryssdall R, The Coming of Age of the European Convention of Human Rights' 18 European Human Rights Law Review (1996) 18.
- Ryssdall R, The Coming of Age of the European Convention of Human Rights' 22.
- The Constitution of the Republic of Macedonia with the Amendments, the Parliament of the Republic of Macedonia, November 2001.

[33] See Republic of Macedonia, Ministry of Justice Council of Europe Macedonian Chairmanship 2010.

THE RIGHT TO AN INDEPENDENT COURT OF LAW. THEORETICAL ASPECTS. THE EUROPEAN COURT OF HUMAN RIGHTS CASE-LAW

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Abstract

International specialized literature approaches the concept of court of law from two perspectives: on the one hand, this concept refers to the court of law, regarded as a key linking element within the unitary judicial system, and, on the other hand, to the panel of judges, regarded as the main subject of the criminal procedure, i.e. the judges who take part in trying a criminal case. In a criminal case, the court of law plays the most important role and its main attribute is the function of jurisdiction, which represents the sum of powers granted to a magistrate for the administration of justice[1]. The court of law plays a significant role in the rule of law state; thus, both at national and international level, attempts are made in order to set up a legal framework consisting of norms issued by national lawmakers or by official international institutions or by some magistrate associations or NGOs. All these efforts are meant to underline the significant role that the judiciary plays in a rule of law democratic society. In this study we shall try to analyse the concept of "independent court of law", as this is presented in the national system of law, in its specific norms that are provided by international normative acts and in the principles deriving from the ECHR case-law.

Keywords: *the right to a fair trial; the right to an independent court of justice; criminal case; the European Court of Human Rights (ECtHR); unification of case-law.*

Introduction

The concept of **independence of the court of justice** implies two aspects: the court's independence from the other state authorities and the court's independence from the parties involved in the trial.

The judge's independence from the other state authorities – particularly, from the executive power – depends upon the appointment procedure and the length of the term of office, the judge's protection from external pressure and the judges' appearance of independence.

The judge's independence means that litigations are settled in the absence of any interference from any state body or from any other person[2]. At the same time, the judge's main

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[1] V. Cădere, *Tratat de procedură civilă*, 3rd Edition, Cultura Națională Publishing House, Bucharest, 1928, p. 44, *apud* I. Leş *Instituții judiciare contemporane*, C.H. Beck Publishing House, Bucharest, 2007, p. 2.

[2] I. Leş, *Organizarea sistemului judiciar românesc. Noile reglementări,* C.H. Beck Publishing House, Bucharest, 2004, p. 38.

obligation is to *independently* and impartially interpret, clarify and protect the rule of law state[3].

Thus, almost all the UNO member states have adopted national constitutions and international agreements that have gradually extended the judges' power in most of the states and in international relations. The separation of powers – which is provided by the Constitution – is meant, among other things, to represent a strong judicial guarantee for the judges' independence.

Regional and international conventions on human rights, as well as other international juridical instruments, provide the right to "a public and fair trial within a reasonable term by an independend and impartial court of justice that is set up by the law." In addition to this, more and more international treaties continue to extend such individual rights of access to independent courts of law that should guarantee the fair implementation of the judicial procedures.

In this study we are going to approach the independence of the court of law principle from the Romanian legal system perspective, while taking into account international regulations and the standards imposed by the ECHR Convention and case-law.

1. Standards regarding the independence of the court of justice that are established by the Romanian system of law

National internal regulations on the independence of the judiciary are basically provided by the fundamental law of the state and they are also set forth by the laws on the organization of the judiciary.

Thus, according to Article 124 § 3 of the republished Romanian Constitution, "judges shall be independent and subject only to the law."

The judges' independence is ensured by other constitutional guarantees. We refer to the provisions of the Constitution that define the most important role played by the Superior Council of Magistracy, i.e. the guarantee of justice independence (Article 133 § 1 of the Romanian Constitution). In this respect, the Constitution also indicates the powers of the Superior Council of Magistracy, which are exercised in order to accomplish the most important role played by this council, i.e. the role of being the guarantor of justice independence[4].

Article 2 § 3 of the republished Law no. 303/2004 on the judges and prosecutors statute sets forth that "judges shall be subject only to the law and impartial."

Article 2 § 4 of the republished Law 303/2004 sets forth that "any person, organization, authority or institution shall abide by the independence of judges". At the same time, "the continuous professional training of judges and prosecutors shall guarantee their independence and impartiality in exercising their powers (Article 35 § 1)."

As to the judges' independence, Article 73 of Law 303/2004 provides that the judges' rights … shall be set forth in conformity with the place and role played by justice in the rule of law state, with the responsibility and complexity implied by the position of a judge…, with the restrictions and inconsistencies provided by the law as to these positions; the judges' independence is meant to *guarantee independence and impartiality*. ... The judges' and prosecutors' Statute also sets forth the role played by the Superior Council of Magistracy in "protecting judges…against any action that might affect their independence or impartiality or that might raise suspicion as to their independence and impartiality." "The judges or prosecutors who consider that their independence or impartiality is affected in any way by interference actions in their professional activity may address to the Superior Council of Magistracy for the necessary measures to be adopted according to the law."

[3] Ernst-Ulrich Petersmann, *Do Judges Meet their Constitutional Obligation to Settle Disputes in Conformity with Principles of Justice and International Law,* in European Journal of Legal Studies, vol. I, nr. 2/2007, according to http://www.ejls.eu/index.php?id=2.

[4] Similar provisions can be found in Law no. 317/1.07.2004 on the Superior Council of Magistracy – the law was republished in the Official Gazette of Romania, no. 827/13.09.2005.

Law 304/2004 on the organization of the judiciary also provides legal guarantees for the independence of judges. Thus, Article 10 sets forth that "all the persons shall enjoy the right to a fair trial and a solution to their cases within a reasonable term by an impartial and independent court, set up by the law." Article 46 § 2 provides that "The investigations made by presidents or vicepresidents personally or by especially appointed judges shall comply with the principle of independence of judges and they shall abide by the judges' subjection only to the law, as well as by the authority of the res judicata."

At the end of this subparagraph we underline the importance of magistrates' professional associations from Romania, which, without exception, have as an object of activity the obligation to ensure and reinforce the independence of the judiciary. We refer to the Romanian National Union of Judges, SoJust-Society for Justice, the Romanian Magistrates' Association and the Association of Romanian Judges.

Thus, at the end of 2008, the Romanian National Union of Judges elaborated a document entitled "Principles for consolidating and promoting the independence and impartiality of justice"[5], which includes a minimum set of norms that should guarantee the efficiency of these desiderata for justice (and for the whole society, at the same time):

a) the firm assumption by the lawmaker and executive power of a coherent legislation in all domains of social and economic life, so that the application of the legislative norms should no longer encounter difficulties which sometimes could not be dealt with by the judiciary; the public assumption – provided in the governing program that the new Parliament votes after the future executive is invested – that the judiciary will not be constrained by any action or omission;

b) the conscious assumption by the judiciary of its own independence and impartiality, especially by assuming its own responsibility for the magistrates' actions and deeds in exercising their constitutional powers;

c) the assumption by the political class of the necessity to revise Romanian Constitution, which is an insurance instrument and a safeguard of justice independence;

d) enhancing efficiency, responsibility and adaptability of the Superior Council of Magistracy to the constitutional role it plays;

e) excessive bureaucratization of the Superior Council of Magistracy and the Ministry of Justice;

f) underlining the role of lawmaker played by the Parliament from two perspectives:

1) adopting - as soon as possible and after adequate public debates attended by specialists in law both theorists and practitioners - the civil code, the code of civil procedure, the criminal code and the code of criminal procedure. It is necessary for the new realities that are pointed out by these codes to eliminate the constant modifications of these fundamental laws, a situation that was specific for the last 18 years. Judicial stability and security can not exist if legislation is permanently instable and incoherent; 2) annihilating the executive power's tendency to annex the legislature powers by excessively adopting emergency ordinances meant to amend or modify organic laws.

A problem for the Romanian criminal procedure system – which is linked to the independence of the judiciary – is represented by the system of military tribunals. In this respect, there existed cases in which Romania was accused of having broken the right to a fair trial when judging civilians for criminal matters by military courts.

Thus, judicial military criminal bodies play a well-defined role in the Romanian criminal judiciary system. This category includes: military tribunals, the public prosecutor's offices

[5] According to http://www.unjr.ro/comunicate/principii-de-intarire-si-promovare-a-independentei-si-impartialitatii-justitiei.html.

attached to these tribunals and special criminal investigation bodies, whose functioning is regulated in Article 208 a) – c), the Criminal Procedure Code; more precisely this category includes: the commanders of headquarters and officers that are especially appointed by their commanders, the heads of commandants' offices and the officers that are especially appointed by their superiors, commanders of military centres, as well as the officers appointed by their commanders. The competence of military tribunals was regulated while taking into account the quality of the offender and also the nature of the crime. In this respect, the powers of the military courts were exercised in accordance with the offences committed by the military staff and the offences committed by civilians (no matter if they are employed by military institutions or not); these offences were committed in connection to these employees' service duties or they were directed against the military bodies patrimony. All these offences were prosecuted in conformity with the procedure applied by the special criminal investigation bodies, military prosecutors and military tribunals.

As to the competences provided by the law in the special literature, opinions have been expressed according to which military criminal judicial bodies, even if they are special[6] bodies, are not granted a special form of competence[7]. In other words, special competence must not be mistaken for the competence of the special[8] bodies.

Thus, the inclusion of military tribunals in the category of judicial bodies that have special competence has been contested. Special competence is specific to judicial bodies that belong to a distinct judicial system and this aspect does not refer to the place occupied by military bodies within the national judicial system, which is unitarily regulated. In this way, for the military tribunals to be granted special competence, they should have been placed outside the system of courts and this hypothesis is not valid for military[9] tribunals.

This thesis is supported by another opinion according to which military tribunals do not have special competence because they also judge criminal cases that involve crimes which aggrieve various social relationships; consequently, these tribunals do not have special competence for a certain sector of social[10] activity.

However, military criminal bodies are specialized bodies whose existence is required by the particularities specific to military life. Over the last years, as to the Romanian criminal policy, there has been noticed a tencency to reduce the number military criminal judicial bodies and limit their powers. In this respect, we mention the fact that the Military Division of the High Court of Cassation and Justice was cancelled, its powers being taken over by the Criminal Division of the High Court. At the same time, the legal framework regulating the material and personnel competence of the ordinary military tribunals has been confined through many modifications that have been brought to the criminal procedure laws.

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[6] In this respect, e.g., military tribunals are considered to be courts with special jurisdiction (V. Dongoroz, in V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N. Iliescu, R. Stănoiu, *Explicații teoretice ale Codului penal român. Partea generală, vol. II*, the 2nd Edition, the Romanian Academy Publishing House and the All Beck Publishing House, Bucharest, 2003, p. 101).

[7] V. Rămureanu, *Competența penală a organelor judiciare*, the Scientific and Encyclopaedic Publishing House, Bucharest, 1980, p. 43.

[8] N. Volonciu, *Drept procesual penal*, the Didactic and Pedagogical Publishing House, Bucharest, 1972, p. 131.

[9] For example, the criminal procedure regulations prior to the present Criminal Procedure Code provided a large range of specialized judicial bodies (tribunals for the railways, maritime or fluvial tribunals), among which military tribunals occupied a distinct position. They held a special position in the judiciary system because they belonged to a separate judicial system, which implied the existence of a military supreme court.

[10] I. Neagu, *Tratat de procedură penală. Partea generală*, Universul Juridic Publishing House, Bucharest, 2010, pp. 360-361 (at present, however, as a consequence of the significant modifications brought to the norms regarding military competence, one can notice a more specific character of the cases judged by the military criminal bodies).

Thus, Law no. 281/2003 provides that crimes committed by civilians against the assets owned or administered or used by the Ministry of National Defence, the Ministry of Administration and Interior, the Ministry of Justice – the General Directorate of Prisons, Romanian Intelligence Service, Foreign Intelligence Service, Special Telecommunication Service and Protection and Guard Service, which have a military role or are linked through their nature to the defence capacity and security of the state – are no longer in the competence of military tribunals.[11]

In the same way, offences committed by the civil employees of military institutions and related to their service duties are no longer brought before military tribunals. Article I § 5 from Law no. 356/2006[12] provides that offences committed by civilians against the defence capacity of the state, according to the provisions of the Articles 348-354 of the Romanian Criminal Code, shall be brought before civil courts, as a consequence of abrogating Article 26 § 1 § b of the Criminal Procedure Code. Last but not least, it is of great significance, when mentioning the criminal policy principles that are applied in Romania, to point out the fact that offences committed by the military staff shall be judged by the military criminal bodies only if they are perpetrated in relation to their service duties (Article 26 and Article 28, the Criminal Procedure Code). The requirement to establish a connection between the illicit act that was committed by the military and the military's service duties is also provided in Article 28^2 of the Criminal Procedure Code. Thus, in the first instance, the Military Tribunal judges offences committed by the military staff against the security of the state and the offences against peace and mankind. The norm we are discussing about does not refer to the military's service attributions, but, obviously, these crimes usually imply the breach of the service attributions.

As an exception, according to Article 28^2 § 1 (c) of the Criminal Procedure Code, the Military Court of Appeal judges in first instance the crimes committed by military magistrates; this article does not provide as a condition the identification of a connection between the illicit act and the offender's service attributions. In this situation, however, the offender's quality of a magistrate is of major importance for establishing the competence of the Military Court of Appeal; the result is that a legal framework – similar to the one concerning offences committed by civil magistrates employed in courts of first instance, tribunals, courts of appeal, respectively public prosecutor's offices attached to these courts – is created.

We appreciate that the limits imposed on the jurisdiction of Romanian military tribunals are in line with the ECHR case-law, according to which criminal cases that involved civilians and were judged by the military courts were, in fact, mistrials.

2. Standards concerning the independence of the judiciary that are set forth by different international instruments

At international level, an impressive body of laws are issued by different world or regional organizations for protecting human rights, ranging from magistrates' international professional organizations to NGOs set up for this purpose, all of which militate for the independence of justice.

The ennumeration of the important international judicial instruments must start with a referrence to **the Universal Declaration of Human Rights** which, in Article 10, entitles any person the right to be judged by an *independent* court of law.

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[11] Prior to Law no. 281/2003, the material competence for offences committed by civilians against the assets owned by military institutions underwent another confinement, i.e. the provision that these assets must have a military destination or refer to the defence or security capacity of the state.

[12] Law no. 356/2006 on modifying and amending the Criminal Procedure Code, as well as on modifying other laws, was published in the Official Gazette of Romania no. 677/7.08.2006.

In 1985, at the 7th United Nations Congress on Prevention of Crimes and the Treatment of Offenders, a set of fundamental principles regarding the independence of the judiciary[13] were adopted. Thus, this document provides that the independence of the judiciary shall be guaranteed by each state and set forth in the National Constitutions. The judiciary systems shall be entitled to deliver judgements in the cases that are being tried, on the basis of the facts and in conformity with the law, without any direct or indirect restrictions, inappropriate influence, incentives, pressure, threat or interference coming from any party or for any reason. At the same time, the judicial systems shall have jurisdiction for all the legal matters and shall have exclusive authority to decide whether any potential case is within their competence, as the law sets forth.

The document also refers to the inconsistencies existing between the requirements imposed by a rule of law state and the courts of law that do not enforce the procedures that are provided by the law. At the same time, the document refers to those aspects that are adjacent to the independence of the judiciary and that are closely linked to non-determination. Thus, the following aspects are taken into account: the freedom of speech and assembly of the members of the judiciary, the selection and training process of magistrates, the conditions provided for magistrates as to the performing of their offices, as well as the length of their term of office, professional secret, immunity, respectively norms referring to magistrates' judicial liability.

In this respect, as far as freedom of speech is concerned, the document states that – according to the Universal Declaration of Human Rights – the members of the judiciary are entitled to freedom of speech, faith, association and assembly, as all the other citizens are; this means that when exercising these rights the judges will have to behave in a manner that implies the preservation of their dignity and impartiality and the independence of the judicial system. Judges will be free to form or join judges associations or other associations which represent their interests, promote their professional training and protect their judicial independence.

In order to be recruited as personnel for the offices available in the judicial system, these persons should enjoy a good moral reputation and should also have a high professional training. Their selection must be independent of any potential forms of discrimination, on grounds of race, colour, sex, religion, political orientation or any other opinion, property, birth or statute. However, the requirement that a candidate to a judicial office should be a citizen of that state is also regulated and it is not regarded as a discriminatory one.

The exercise of judicial powers implies the ensurance of those conditions that are necessary for creating a proper legal framework in order to make the performed activity more efficient. Judges (no matter if they are elected or appointed) have life tenure and the age limit is regulated in the national legislations. The promotion of judges shall rely on objective factors, such as professional training, moral integrity and experience.

The independence of the judiciary also implies the preservation of the professional secret.

Finally, the independence of the judiciary exists only on condition that judicial liability is strictly regulated with reference to the judges.

Recommendation no. 94 (12) issued by the Committee of Ministers of the Council of Europe to the member state regarding the independence, efficiency and the role of judges[14]

[13] Milano, 26.08-6.09.1985. The principles were validated by the Resolution 40/32 (29.11.1985) and the Resolution 40/146 (December 1985) by the United Nations General Assembly.

[14] Recommendation no. 94 (12) was adopted by the Committee of Ministers on the 13th of October 1994, at the 516th meeting of the state secretaries. The texts of the Recommendation project and the explanatory Memorandum were drawn up by a work group as regards the independence of civil justice. After these documents were examined by the European Committee for International Cooperation, they were sent to the Committee of Minister from the Council of Europe. The Committee of Ministers adopted the text of the recommended project and approved the publication of the explanatory memorandum.

was adopted in order to comply with the provisions of Article 6 of the Convention and also with the previously presented document

This regional document primarily refers to the concrete measures that are necessary to be adopted for the independence of justice to be guaranteed: the independence of judges shall be guaranteed by observing the provisions of the Convention and the constitutional principles; the national systems will comprise the following rules: 1) the judges' decisions shall not be subject to any revision except for the legal means of appeal; 2) the term of office and the remuneration of judges shall be guaranteed by law; 3) no other bodies except for the courts of law shall decide upon the specific competences of the judge, as provided by the law; 4) except for the decisions regarding amnesty or pardon, the government or public administration are not entitled to decide upon the retroactive invalidation of the delivered judgements.

A magistrates' decision forum is necessary to exist and it is regarded as a judicial authority (as the Superior Council of Magistracy is in Romania) that shall have the competence to select and train magistrates and to organize their career. It is very important for this authority to enjoy, in its turn, complete independence.

Norms that guarantee the independence of the judiciary are included, such as: regulating the sanctions for those who try to influence the judges' decisions in any possible way; the aleatory distribution of the cases; the minute regulation of the hypotheses according to which a case can be removed; inamovibility.

According to **Recommendation 94 (12)**, the meaning of the phrase "independence of judges" does not exclusively refer to judges but it covers the whole judiciary. The independence of judges is bound to be guaranteed according to the provisions of the Convention and in conformity with the constitutional principles of every national system. As to the measures adopted for implementing this principle, one should take into account several aspects, depending on the legal traditions of every state. The law should provide norms that regulate the situations which can be classified as appeals against the delivered judgements. The revision of the delivered judgements by the government or the administration outside this legal framework will obviously be inadmissible. Similarly, the judges' term of office and their remuneration should be guaranteed by law. As to the judges' term of office, Recommendation **94 (12)** comprises specific rules regarding the cases that classify the judges' suspention or removal from office as possible. Moreover, a specific recommendation is made for the judges' remuneration. Courts of law should also be entitled to decide upon their own competence, as the law provides it, and administration or government should not be entitled to make decisions that lead to the annulment of the delivered judgement, except for some special cases, such as: amnesty, pardon, clemency or other similar situations.

The judges' independence is first of all and mainly linked to the maintenance of the separation of powers in the state. The executive and legislative bodies have the duty to ensure that judges are independent. Some of the measures taken by these bodies might directly or indirectly interfere or might modify the way the judicial power is exercised. Consequently, executive and legislative bodies have to restrain from adopting any measures that could undermine the judges' independence. Moreover, pressure groups or other interest groups should not be allowed to undermine this independence.

The independence of judges must be guaranteed when judges are recruited and also during their whole professional career, without any discrimination. All the decisions regarding the judges' professional life should rely on objective criteria and even if every member state has its own method of recruiting, electing or appointing, the selection of candidates for the judiciary and the judges' career must be based on merit. Such decisions are important to be made only on the basis of objective criteria especially when the decision for appointing judges is made by bodies that are not independent from the government or from administration or, for example, from the Parliament or the Head of the State.

The independence of the judiciary must be observed not only when a judge is appointed but also during his entire professional career. For example, the decision of promoting a judge to another position might be, in fact, a disguised sanction of an “uncomfortable judge”. Such a decision is clearly incompatible with the terms of **the Recommendation 94 (12)**.

An important aspect for ensuring the fact that the most appropriate persons are appointed to the office of judge is represented by the lawyers’ training. Persons who build a career as a judge must enjoy an adequate judicial training. Furthermore, professional training contributes to the independence of the judiciary. If judges have appropriate theoretical and practical knowledge, as well as other abilities, it means that they could act more independently from the administrative and, if they intend to do so, they could change their professional orientation without being obliged to continue to work as judges.

Similarly with the **Fundamental Principles regarding the Independence of the Judiciary**, in the Contents of the **Recommendation 94 (12) on the independence, efficiency and role of judges**, dispositions regarding the judges’ authority, the conditions of performing the assigned job tasks, the right to association, the applicable judicial regime can be found in this document.

Thus, we shall make reference to the way in which the rules regarding the judges’ responsibility are set forth. In this respect, in order to protect the rights and obligations of all persons, the responsibilities of a judge are: a. To act outside any influence and in an independent way when judging all cases; b. To solve all cases in an impartial way and in conformity with the collected evidence and in accordance with the law, to ensure that each party is fairly heard during the trial and that the procedural rights of the parties are observed according to the provisions of the Convention; c. To dismiss a case or to decline competence whenever there are valid grounds that he must do so in conformity with the exhaustive provisions of the law (e.g. in case of health problems, conflict of interests etc.);

d. whenever necessary, to explain in an impartial manner judicial matters for the parties; e. whenever necessary, to encourage the parties to reach an agreement; f. To motivate his decision, using a plain language, except for the cases when the law or customs provide it differently; g. to undergo any training that is necessary for him to accomplish his tasks in an efficient way.

If these responsibilities are not fulfilled or they are fulfilled in a wrong way or with delay, measures are to be taken according to the judicial profile of the profession. E.g., the following measures are taken: a. the withdrawal of the case from the judge; b. the transfer of the judge; c. the judge is sanctioned with a salary cut; d. the judge’s suspension[15].

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[15] According to Article 100 of the republished Law no. 303/2004 on the Statute of Judges and Prosecutors, the disciplinary sanctions applied to judges and prosecutors - depending on the seriousness of their misconduct - are: a) warning; b) cut of the monthly salary with up to 15% for a period of up to 3 months; c) disciplinary removal for a period of 3 months to another court of law or a public prosecutor’s office in the constituency of the same court of appeal or in the constituency of the same public prosecutor’s office attached to one of these courts; d) exclusion from magistracy. As one can notice in the national system, the hypothesis of ordering for a case to be withdrawn from a certain judge is not regulated. These sanctions can be imposed by the Superior Council of Magistracy if a judge is accused of misconduct for: a) breach of the legal provisions regarding the statement of assets, the statement of interests, the incompatibilities and interdictions imposed on judges and prosecutors; b) intervening to satisfy certain requests, demanding and accepting to settle one’s own personal interests or the family members’ interests or other persons’ interests otherwise than the legal framework provides for all the citizens, as well as interfering in another judge’s or prosecutor’s activity; c) performing public activities that have a political character or expressing one’s own political orientation when exercising the service duties; d) disclosing the secret of deliberation and the confidential nature of the performed works; e) repetitive and guilty breach of the legal disposals regarding the obligation to solve the cases within a reasonable time; f) the groundless refusal to accept applications, conclusions, reports or other documents from one of the parties in the trial; g) the groundless refusal to accomplish a service duty; h) exercising the office and breaking the procedure norms in bad faith or out of gross negligence if the deed is not an offence; i) delaying the performance of the works on imputable grounds; j) unmotivated and repeated absence

The European Chart on the Statute for Judges was adopted with the same purpose[16].

Thus, this document reiterates a series of rules which have the value of principles and of which we point out those aspects that refer to the judges' inamovibility. The **Chart** sets forth the principle of the judges' inamovibility, according to which the removal of a judge is possible only if the judge agrees to be removed from office[17]. This principle is not applied if the judge's removal is provided as a disciplinary sanction in case modifications of the judicial organization occur and this implies the disappearance of a court of law or in case the judge is called to support a court that undergoes a difficult situation.

The temporary appointment stipulated in the last ennumerated case must have a limited duration which is defined in the statute. However, taking into consideration the delicate situation of transfering a judge when the latter did not express his consent, we must underline the fact that they have the right to an appeal before an independent court that has the obligation to check if the transfer was legitimate.

In the Romanian national system, according to the republished Law no. 303/2004 on the statute of judges and prosecutors, if a court of first instance, a tribunal or a specialized court of law can not function properly because of a temporary absence of certain judges or because of a vancacy or other similar causes, the President of the Court of Appeal, at the proposal of the court of law within that appellate court's constituency, can appoint judges from another court of law within the same constituency *on the basis of a written agreement signed by those judges.* The delegation of judges from courts of first instance, tribunals and specialized courts of law to another constituency can be decided on the basis of the written agreement of those courts, with the approval of the Superior Council of Magistracy, and if the President of the Court of Appeal requires this in the constituency where the delegation is necessary and with the approval of the President of the Court of Appeal within the constituency where these judges work. The temporary appointment of appellate judges in control positions is decided ***on the basis of the written agreement thereof,*** at the request of the Superior Council of Magistracy and of the President of the Court of Appeal until that position is occupied by appointment according to the present law. The appointment in control positions of judges at the High Court of Cassation and Justice is decided by the Superior Council of Magistracy ***on the basis of the written agreement thereof***, at the proposal of the President of the High Court of Cassation and Justice. The delegation of judges can be provided for a period of 90 days the most per year and it can be prolonged for other 90 days ***with the written agreement thereof.***

According to the same normative act, in Romania the removal or transfer of judges can not be accomplished without ***the written agreement*** of the judge.

At the end of this subparagraph we are going to mention a series of provisions stipulated in **the Bangalore Principles of Judicial Conduct**. Thus, the independence of justice is the premise for the rule of law state and it represents the fundamental guarantee of a fair trial. The judge,

from work; k) adopting a reproachable attitude during the exercise of the servive duties to the colleagues, lawyers, experts, witnesses or lawmakers; l) non-accomplishment of the obligation to transfer the basic norm to the court of law or the public prosecutor's office where the judge is employed; m) breaking the disposals regarding the aleatory distribution of cases; n) directly taking part or through the agency of other people in gambling activities or investment systems that avoid the transparency of the funds as the law stipulates.

[16] The preliminary project of **the European Chart on the Statute for Judges** was adopted in the spring of 1998 on the second multilateral reunion on the statute of judges from Strasbourg (8-10 iulie 1998).

[17] Regulations have a correspondent in Romanian national legislation. Thus, Article 2 § 1 and § 2 of the republished Law no. 303/2004 on the stature of judges and prosecutors provides that "The judges appointed by the President of Romania shall be irremovable according to the law. The irremovable judges can be removed by transfer, delegation, relocation or promotion only if they agree with this and they can be suspended or removed from office according to the provisions of the present law. "

consequently, must support and be an example for the independence of the judiciary and also from an individual and institutional point of view.

The fair enforcement of this principle requires the observance of the following rules: a) the judge shall exercise his judicial office independently, on the basis of his own approach of the facts, on the basis of a faithul interpretation of the law, without being influenced or persuaded, forced, threatened or without allowing any direct or indirect intrusion that might come from the part of certain circles, no matter what the reason for such an interference; b) the judge shall be independent in society, in general, and in relationship with the parties involved in the litigation that he has to settle; c) the judge shall not only avoid any improper relationship but he shall also be beyond any influence that might come from the executive or legislative powers, and he must be perceived as such by any outside observer; d) when exercising his juridical office, the judge shall be independent from his magistrate colleagues as to those decisions that he must make independently;

e) the judge shall encourage and support all those measures that lead to the accomplishment of the judicial obligations in order to maintain and reinforce the independent functioning of justice; f) the judge shall manifest and make proof of a judicial attitude of good quality in order to consolidate the public trust in justice, without which the independence of the judiciary cannot be maintained.

Last but not least, we mention the documents elaborated by the Consultative Council of European Judges at the Council of Europe.

3. Standards for the independence of the court of law set forth by the ECtHR case-law:

The European Court of Human Rights set forth that the independence of a court of law depends on the following aspects:

a) the appointment of judges;

b) the length of the judges' term of office;

c) the existence of a legal framework that offers judges protection against potential external pressures;

d) the possibility to check the judges' appearance of independence[18].

Thus, it has been established that the exigencies of independece are met by the Parole Board (a common law advisory body that can express opinion on the way in which the penalty must be executed by the convicts and that enforces a procedure which implies a set of major guarantees[19]), the Jury Court in Belgium (the Belgium legislation provides many guarantees that are meant to protect the Jury Court magistrates from external pressures, while the appointment of jurors is subject to certain very strict rules) [20], the Prison Visiting Committee (jurisdictional institution that is specific to the UK prisons and that has contentious powers and whose members

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[18] N. Mole, C. Harby, *Le droit à un procès équitable,* Conseil de l'Europe, Strasbourg, 2007, p. 33. See also, ECtHR, Decision adopted on 16.12.2003 in the case *Cooper vs. the UK ,* according to HUDOC; ECtHR, Decision adopted on 16.12.2003 in the case *Greaves vs. the UK ,* according to HUDOC; ECtHR, Decision adopted on 22.06.1989 in the case *Langborger vs. Sweden,* according to HUDOC; ECtHR, Decision adopted on 22.11.1995 in the case *Bryan vs. the UK,* according to HUDOC; ECtHR, Decision adopted on 2.06.2005 in the case *Zolotas vs. Greece,* according to HUDOC; ECtHR, Decision adopted on 21.09.2006 in the case *Maszni vs. Romania,* published in M. Of. nr. 585/24.08.2007.

[19] ECtHR, Decision adopted on 2.03.1987 in the case *Weeks vs. the UK*, in V. Berger, *Jurisprudenţa Curţii Europene a Drepturilor Omului*, 4th Romanian Edition, Romanian Institute for Human Rights, Bucahrest, 2003, p. 138.

[20] ECtHR, Decision adopted on 1.10.1982 in the case *Piersack vs. Belgia*, in V. Berger, *op. cit.,* p. 204.

are independent) [21]. The Bar Council of Antwerp was also considered an independent body on the basis of its administrative, disciplinary, contentious or advisory powers. At the same time, the independence of the Council members is undoubtable since they are subject to their own counsciousness[22] alone.

The ECHR appreciated that the Royal Air Force Court Martial meets the independence standards because this court is comprised of members who have superior juridical competence and are presided over by a highly qualified civilian who is appointed by the Minister of Justice and who is entitled to give directions as to the administration of evidence and the settlement of the legal problems according to public mandatory procedure he is subject to[23].

If these conditions are not met, the procedure set forth by the Crown (the Queen of the Netherlands and the Public Health Minister) does not meet the requirements regarding the exigencies for the independence of the court of law. In this respect, the royal decree - by which the Crown statuated the challenge - has the force of an administrative procedure act issued by a Minister who is responsible before the Parliament. This royal decree could not be subject to the control of a judicial body[24].

In the same way, the Austrian National Council for Persons with Disabilities or the Lausanne[25] Police Commission can not be considered independent bodies. As to the latter example, it has been pointed out the fact that the unique member of this commission is a high official from the police and thus he is likely to be required to accomplish other tasks, too. In this context, the lawmakers will tend to see him as a member of the police who is part of a hierarchical system and who is solidarious to the police forces.

In another case, the problem whether a court of law (The Turkish State Security Court) which is composed of two civil judges and a military judge meets the requirements of an independent court of justice. In this respect, the independence of the two civil judges can not be doubted, but the ECHR analysed the statute of the military judge who is a part of this court of law. Thus, although the military judges undergo the same training program as the civil judges and are protected from external pressure, they are, nevertheless, part of the army, an institution which is subordinated to the executive power. At the same time, military judges are subject to a disciplinary regime and are assessed within the military system they belong to. At the same time, military judges are appointed by the administrative system and the army. Taking into consideration these aspects, the ECHR held that this court of law does not offer guarantees of independence[26].

The court's lack of independence has also been pointed out as to the circumstances in which the members of the court were appointed and could be removed by the executive[27].

As to Romania's case, the issue regarding the independence of the court of law has been repeatedly analysed; in the following lines we are going to analyse some of these cases.

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[21] ECtHR, Decision adopted on 28.06.1984 in the case *Campbell and Fell vs. the UK*, în V. Berger, *op. cit.,* pp. 217-219.

[22] ECtHR, Decision adopted on 30.11.1981 in the case *H. vs. Belgia*, în V. Berger, *op. cit.,* pp. 226-228.

[23] ECtHR, Decision adopted on 16.12.2003 in the case *Coper vs. the UK,* according to HUDOC.

[24] ECtHR, Decision adopted on 23.10.1985 in the case *Benthem vs. the Netherlands*, in V. Berger, *op. cit.,* pp. 161-163.

[25] ECtHR, Decision adopted on 29.04.1988 in the case *Belilos vs. Switzerland*, in V. Berger, *op. cit.,* pp. 181-183.

[26] ECtHR, Decision adopted on 9.06.1998 in the case *Incal vs. Turkey*, in C 1, pp. 213-216; see also: ECHR, Decision adopted on 28.10.1998 in the case *Ciraklar vs. Turkey*, in M. Udroiu, O. Predescu, *Protecția europeană a drepturilor omului şi procesul penal român. Tratat*, C.H. Beck Publishing House, Bucharest, 2008, p. 574; ECtHR, Decision adopted on 8.07.1999 in the case *Surek vs. Turkey*, *ibidem*.; ECtHR, Decision adopted on 10.02.2004 in the case *Önen vs. Turcia,* according to HUDOC. See also: A. Mowbray, *Military Judges and The Right to a Fair Trial*, in Human Right Law Review, vol. 6, nr. 1/2006, pp. 176-183.

[27] ECtHR, Decision adopted on 3.03.2005 in the case *Brudnicka vs. Poland,* according to HUDOC.

Thus, the judges' obligation to comply with a case-law that was set forth by the joint divisions of a country's Supreme Court did not contravene the independence of a court of law because the reunion of the divisions of a high jurisdiction is meant to confer special authority to certain decisions adopted in important areas of the judiciary; this does not imply that the lower courts' rights and duties to independently examine the cases brought before them are aggrieved[28].

In the case Vasilescu vs. Romania[29], the ECHR held – according to Article 6 §1 of the Convention – that the Romanian prosecutors, as representatives of the Public Ministry, are first of all subject to the General Public Prosecutor, and then to the Minister of Justice, and thus, that they are not independent but subject to the executive.

In the case Maszni vs. Romania[30], the ECHR analysed whether the military tribunal – which tried an offence inflicted on a civilian – was an independent court of justice. Thus, basically, the ECHR held that military tribunals have competence to deliver judgements for the crimes directed against the military personnel on condition that the guarantees of independence and impartiality provided by Article 6 §1 of the Convention are met. However, a different hypothesis was formulated with reference to the situations in which national legislatures entitle military tribunals to judge civilians in criminal matters.

Thus, according to the text of the Convention, the competence of military tribunals to judge cases against civilians is not absolutely excluded on condition that the exigence implied by this competence should be minutely examined.

The ECHR underlined the fact that it analyses with utmost care the circumstances in which the military tribunal is exclusively comprised of career military magistrates; in this case, the compliance with Article 6 §1 of the Convention is possible only under exceptional circumstances.

Without denying the special role played by the army in the constitutional organization of democratic states (this role is limited as far as national security is concernced because the exercise of the judiciary lies with the civil institutes), the ECHR held that military tribunals should basically not have the competence to judge civilians. Thus, the state should oversee that the civilians accused of committing an offence, no matter what this may be, will be judged by civil courts. At the same time, the power of the military criminal justice should not encroach upon civilians unless there are solid grounds for justifying such a situation and only in conformity with the clear provisions set forth by the law. These grounds should be proved in every particular case *in concreto*. The *in abstracto* inclusion of certain categories of offences within the competence of military tribunals might not be sufficient. Such an inclusion might place civilians in a position which is different from that of the citizens who are judged by ordinary courts of law and this could lead to inequality before the law, a fact which should be avoided in criminal matters.

Referring to the enforcement of these principles, the European Court of Human Rights noticed that the Romanian lawmaker – without being loyal or subject to the army – was, however, quoted before the military court for common offences.

Analysing the statute of military judges in Romania, the European Court of Human Rights noticed that certain independence and impartiality guarantees are provided by our legislation.

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[28] ECtHR, Decision adopted on 16.07.2002 in the case *Ciobanu vs. Romania,* in C. Bîrsan, *op. cit.,* p. 493.

[29] ECtHR, Decision adopted on 22.05.1998 in the case *Vasilescu vs. Romania,* published in the Official Gazette of Romania no. 637/27.12.1999. For the same solution, regarding the lack of guarantees for the independence of Romanian prosecutors, see ECtHR, Decision adopted on 3.06.2003, in the case *Pantea vs. Romania,* published in the Official Gazette of Romania no. 1150/6.12.2004; ECtHR, Decision adopted on 26.04.2007, in the case *Popescu (1) vs. Romania,* according to HUDOC; ECtHR, Decision adopted on 26.04.2007, in the case *Popescu (2) vs. Romania,* published in the Official Gazette of Romania no. 830/5.12.2007.

[30] ECtHR, Decision adopted on 21.09.2006 in the case *Maszni vs. Romania,* published in the Official Gazette of Romania no. 585/24.08.2007.

Thus, the military judges undergo the same professional training as their civil counterparts do and benefit of constitutional guarantees which are identical to those of the civil judges - they are appointed by the President of the State at the proposal of the Superior Council of Magistracy, are irremovable and enjoy professional stability. On the other hand, other characteristics of the military judges' statute can cast doubt upon the judges' independence and impartiality. Articles 29 and 30 of the Law no. 54/1993[32] provide that military judges are career officers, are paid by the National Ministry of Defence, are subject to military discipline and their promotion is regulated by the internal military[31] norms.

Under these conditions, the European Court of Human Rights established that the right to a fair trial is aggrieved if the military tribunal - which judged a criminal case involving an offender accused of committing common crimes - did not observe the independence exigency. Thus, it was held that the offender's doubt as to the independence and impartiality of the military tribunals can be considered as objectively grounded.

The lawmaker's right to a fair trial obliges the state to ensure the fair application of the judicial procedures, while ensuring the equality of the parties before an independent and impartial system of justice which is set up in accordance with the law. This obligation is permanent because, otherwise, the right to a fair trial is aggrieved by the national jurisdictions.

Conclusions

In Romania, in criminal trials, the court of law is defined as the most important processual subject and it is included in the specialized literature in the category of the official processual subjects. The lawmaker's right to a fair trial determines the state to ensure the fair enforcement of the judicial proceedings, as well as the equality of the parties involved in the trial in accordance with the legal provisions. This regulation has a permanent character and, otherwise, the right to a fair trial is aggrieved by the national jurisdictions.

The present Romanian legal framework meets the requirements imposed by the organization and functioning of an independent system of justice. A number of guarantees that support these essential requirements for the judiciary and the fairness of the judicial procedure are also regulated. Subsequent to the ECtHR decisions, important modifications have been brought to legislation in matters of criminal procedure. Thus, e.g., we mention the limitation of the military judicial bodies competence only as to the offences committed by the military personnel (declining military tribunals any competence to judge the offences committed by civilians, no matter what these may be) or exclusively placing the remanding in custody measure with the judge, thus reducing the prosecutor's competence.

[31] We notice that, although Law no. 54/1993 was abrogated, the regulations were taken from Law no. 303/2004 on the statute of judges and prosecutors. Thus, according to Article 30[1] "A person who meets the requirement provided by the law for becoming a magistrate can be appointed in the position of a military judge or prosecutor after this person became an officer within the National Ministry for Defence". According to Article 73 § (4) § (5) and (6) "(4) Military judges and prosecutors are active military officers who have all the rights and duties that this position implies. (5) The remuneration and the other rights that military judges and prosecutor have are ensured by the National Ministry for Defence, in conformity with the legislative provisions regarding salaries and the other rights that are specific to the judiciary personnel and in conformity with the regulations regarding the payment rights that are specific to the quality of a military, and to the quality of a civil employee for this Ministry. (6) Military ranks and promotion of military judges and prosecutors shall be made in accordance with the norms that are applied for the full-time employees within the National Ministry for Defence."

References

- Berger Vincent, *Jurisprudența Curții Europene a Drepturilor Omului*, the 4th Romanian Edition, the Romanian Institute for Human Rights, Bucharest, 2003
- Bîrsan Corneliu, *Convenția europeană a drepturilor omului*, All Beck Publishing House, Bucharest, 2005
- Dongoroz Vintilă, Kahane Siegfried, Antoniu George, Bulai Costică, Iliescu Nicoleta, Stănoiu Rodica, *Explicații teoretice ale Codului penal român. Partea generală, vol. II,* 2nd Edition, Academi Româna Publishing House and All Beck Publishing House, Bucharest, 2003
- Leş Ioan, *Organizarea sistemului judiciar românesc. Noile reglementări,* All Beck Publishing House, Bucharest, 2004
- Leş Ioan, *Instituții judiciare contemporane*, C.H. Beck Publishing House, Bucharest, 2007
- Mole Nuala, Harby Catharina, *Le droit à un procès équitable,* Conseil de l'Europe, Strasbourg, 2007
- Mowbray Alastair, *Military Judges and The Right to a Fair Trial*, in Human Rights Law Review, vol. 6, nr. 1/2006, pp. 176-183
- Neagu Ion, *Tratat de procedură penală. Partea generală*, Universul Juridic Publishing House, Bucharest, 2010
- Petersmann Ernst-Ulrich, *Do Judges Meet their Constitutional Obligation to Settle Disputes in Conformity with Principles of justice and International Law,* in European Journal of Legal Studies, vol. I, nr. 2/2007, according to http://www.ejls.eu/index.php?id=2.
- Rămureanu Virgil, *Competența penală a organelor judiciare*, The Scientific and Encyclopaedic Publishing House, Bucharest, 1980
- Udroiu Mihai, Predescu Ovidiu, *Protecția europeană a drepturilor omului şi procesul penal român. Tratat*, C.H. Beck Publishing House, Bucharest, 2008
- Volonciu Nicolae, *Drept procesual penal*, Didactic and Pedagogical Publishing House, Bucharest, 1972
- ECtHR, Decision adopted on 30.11.1981 in the case *H. vs. Belgium*
- ECtHR, Decision adopted on 1.10.1982 in the case *Piersack vs. Belgium*
- ECtHR, Decision adopted on 28.06.1984 in the case *Campbell şi Fell vs. the UK*
- ECtHR, Decision adopted on 23.10.1985 in the case *Benthem vs. the Netherlands*
- ECtHR, Decision adopted on 2.03.1987 in the case *Weeks vs. the UK*
- ECtHR, Decision adopted on 29.04.1988 in the case *Belilos vs. Switzeraldn*
- ECtHR, Decision adopted on 22.06.1989 in the case *Langborger vs. Sweden*
- ECtHR, Decision adopted on 28.06.1990 in the case *Obermeier vs. Austria*
- ECtHR, Decision adopted on 22.11.1995 in the case *Bryan vs. the UK*
- ECtHR, Decision adopted on 22.05.1998 in the case *Vasilescu vs. Romania*
- ECtHR, Decision adopted on 9.06.1998 in the case *Incal vs. Turkey*
- ECtHR, Decision adopted on 28.10.1998 in the case *Ciraklar vs. Turkey*
- ECtHR, Decision adopted on 16.07.2002 in the case *Ciobanu vs. Romania*
- ECtHR, Decision adopted on 3.06.2003, in the case *Pantea vs. Romania*
- ECtHR, Decision adopted on 16.12.2003 in the case *Greaves vs. the UK*
- ECtHR, Decision adopted on 16.12.2003 in the case *Cooper vs. the UK*
- ECtHR, Decision adopted on 3.03.2005 in the case *Brudnicka vs. Poland*
- ECtHR, Decision adopted on 2.06.2005 in the case *Zolotas vs. Greece*
- ECtHR, Decision adopted on 21.09.2006 in the case *Maszni vs. Romania*
- ECtHR, Decision adopted on 26.04.2007, in the case *Popescu vs. Romania*
- The Romanian Criminal Procedure Code

- The European Convention for the Defence of the Fundamental Human Rights and Liberties (Rome, 04.11.1950), ratified by Romania through Law no. 30/18.05.1994 (The Official Gazette of Romania no. 135/31.05.1994)
- Law no. 317/1.07.2004 on the Superior Council of Magistracy (The Official Gazette of Romania no. 827/13.09.2005)
- Law no. 303/28.06.2004 on the Statute of Judges and Prosecutors (The Official Gazette of Romania no. 826/ 13.09.2005)
- Law no. 247/19.07.2005 on the Reform of Property and Justice, as well as on other adjacent measures (The Official Gazette of Romania no. 653/22.07.2005).
- Law no. 356/2006 on the Modification and Completion of the Criminal Procedure Code, as well as on the Modification of Other Laws (The Official Gazette of Romania no. 677/7.08.2006)

ADMITTING GUILT IN COURT CASE IN ACCORDANCE WITH NEW LEGISLATIVE CHANGES

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Abstract

Entry into force of the law no.202/2010 regarding some measures to speed up the trial processes already raises some problems of interpretation especially concerning cases that are pending. Such a situation was inevitable since the transitional provisions could not cover all situations arising in practice, and the law mentioned above create some completely new institutions in our criminal law. But I believe that for the new institution of admitting guilt in court case, would be required to adopt transitional rules necessary to eliminate the controverses that arise and will arise in practice. As any new institution, admitting guilt in court case will require a certain period of time untill crystallize an unitary practice field, even more because the text contains some vague expressions. Unfortunately, the courts have no benefit yet of a fast and efficient mechanism for unifying the jurisprudence, and this fact will probably affect also the solutions that will be taken by the courts in this matter.

Keywords : *guilt, offence, court,unfair, controverses.*

Introduction

Under the statement of reasons in the Law no. 202/2010, regarding some measures for speeding up the cases settlement it has been illustrated that: *"the introduction in the Code of Criminal Procedure of a new institution, such as the institution of trial in case of pleading guilty, satisfies the need of efficacy of the judgment, contributing to the annulment of some time consuming procedures and often useless for establishing the legal truth, subsuming to the qualitative requirements of the act of justice"*.

However, the entry into force of the Law no. 202/2010, stirred up numerous discussions amid the practitioners and it has already generated a series of interpretation problems in the judicial practice, especially regarding the application of this law to the pending cases, under process of settlement, as long as the above-mentioned law has introduced some completely new institutions in our criminal law, and the provisional measures could not cover all the possible situations occurred into practice.

Under the marginal title *"The judgement in case of pleading guilty"*, the new art. 320^1 of the Criminal procedure code provides that *"until the initiation of the court investigation, the accused can declare either personally of by means of an authentic document that he / she acknowledges to have been committed the incriminated actions recorded in the court notification instrument and asks for the judgement to be settled based on the evidence submitted to the file in the stage of criminal investigation"* (art. 320^1 paragraph 1 Code of criminal proc.). In the case of applying this procedure *"the court shall decide on the conviction of the accused, who benefits of the remission by one third of the limits of the sentence provided by the law, in the case of sentence*

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to imprisonment, and a remission by one fourth of the limits of the sentence provided by the law, in the case of punishment by administrative fine" (art. 320[1] paragraph 7 C. criminal proc.).

Paper content

Regarding the application of the new art. 320[1] of the Code of crim. proc., regulating the trial procedure in case of pleading guilty, as far as concerning the cases pending at the effective date of this text of law, these provisions are susceptible of being interpreted differently in the judicial practice, as there are possible several solutions, depending on the procedural stage of the case, on the accused position as to that moment, on the criminal plurality registered in the case and on the legal frame of the action.

Thus, one of the problems that have occurred was the one of the moment up to which the accused can plead guilty and what consequence causes the fact that the request of being judged based on the evidence gathered during the criminal prosecution is submitted after the initiation of the court investigation.

In the cases where the court investigation has not been initiated yet, and before the procedural moment up to which pleading guilty can become incidental (the initiation of the court investigation), the accused can use, beyond any discussion, of the provisions of the art. 320[1] Code of criminal procedure, operating the rule of immediate application of the norms of criminal procedure law (*tempus regit actum*).

In the cases where the court investigation has begun or such procedural stage has not been reached, and the accused did not admit his guilt, it is not yet a matter of pleading guilty.

However, a thorough analysis of the legal provisions called forth presupposes both the hypothesis where, in the cases pending with the courts of law, where the court investigation has begun, the accused admitted to have committed the deed ever since the criminal prosecution stage, stating this position also in front of the court, as well as the case when, the accused has not pleaded guilty during the criminal prosecution stage, but, after the initiation of the court investigation, he understands to reconsider the procedural position in the sense of admitting his / her guilt, thus as, although, as procedural stage, there has been exceeded the moment of initiating the court investigation, the accused requires to be applied the new procedure.

According to the opinion of theoreticians of law as well as to the practice of the courts, there is a first trend that considers that the accused is not automatically granted the right to benefit of the provisions of the art. 320[1] Code of criminal procedure, from the very moment of the enforcement of this text, regardless of the considered hypothesis, resulting from the above-illustrated facts.

In supporting this opinion and the solutions passed by the courts in this sense, there is, firstly, the argument, according to which, one must consider the fact that the criminal trial has exceeded the procedural moment up to which the accused could plead guilty and could admit committing the crimes and when he could ask for the judgement to be done based on the evidence submitted to the file in the criminal prosecution stage (initiation of the court investigation).

The deadline established by the legislator that is until the initiation of the court investigation, is equal to the expiration of a time-limit. This presupposes that any statement formulated after the initiation of the court investigation must be dismissed as belated.

This is because the criminal trial must carry out operatively, without interruptions and reinstatements to the prior stages, and a reinstatement to a previous stage or procedural phase is likely solely in the cases in which the law expressly stipulates such action (i.e. in the case of cassation for re-judgement or in the case of reopening the criminal investigation).

However, the accused whose decision has been quashed or cancelled in one of the remedies at law, and the case has been sent to be re-judged by the court of first instance, he/she

can make use or not make use of this procedure depending on the limits, in which the decision is cancelled and of the last valid procedural instrument, from which point on the criminal trial must be recessed.

Another argument of those supporting the above-opinion is that, the rule of immediate enforcement of the procedural criminal law cannot be ignored and cannot have a retroactive character unless expressly provided as such by its text. In the doctrine there has been even ascertained that the retroactivity of the new procedural criminal law cannot be accepted under any circumstances, as it is not allowed by the art. 15 paragraph 2 of the Constitution, providing the possibility of retroactivity only for the criminal law but nor for the procedural criminal law.

It is appreciated that, in the case of a succession of procedure laws the discrimination cannot be called forth, as the procedure law applies immediately to all the persons in the same procedural stage, without any discrimination. However, the accused whose court investigation has proceeded face a different situation than those not yet in that procedural stage, and the possibility to ask for the judgement solely based on the evidence submitted during the criminal prosecution granted only to the later ones, does not represent a discriminatory act. Thus, it would mean that the new procedure law would apply to all the persons facing the same situation, including those that have been definitively convicted, which is deemed to be absurd.

Besides, if there would be adopted the contrary solution it would mean that the judgement procedure for the case of pleading guilty would be applicable, including in the case of the files under the appeal or recourse stage, such a point of view being less likely to be generally accepted.

In analysing the incidence of the art. 320^1 paragraph 7 Code of crim. pr. in the case of the files already under investigation with the court at the date of entering into force of such Code, one cannot simply ignore the fact that this norm is not one effective on its own, without entailing any condition, but a norm whose incidence is conditioned by the performance of a certain procedural action of the accused, that is the acknowledgement of the facts by the accused and his/her request, *made prior to the initiation of the court investigation*, that the judgement shall be done based on the evidence submitted during the criminal prosecution stage.

However, it is considered that, in the cases where the court investigation started before the effective date of this new art. 320^1 Code of crim. pr. this condition is not complied with and it can no longer be complied with. If the courts would only apply the art. 320^1 paragraph 7 Code of crim. pr., without considering the fact that the conditions under the paragraph 1/6 of the same article are not complied with, the result would be that the provisions of the new law and the old law would combine, thus giving birth to a new law (*lex tertia*), which is not admissible.

Thus, the surpassing of the procedural moment up to which the perpetration expression of will can intervene, entails the inapplicability of that cause providing the lack of sentence or the remission, and any likely changes in the accused plead, occurred subsequent to that moment, are ineffective, therefore, if the court investigation proceeded and if any evidence have been served to the court, the judgement cannot no longer be grounded on the evidence submitted during the criminal prosecution stage.

There is however a new approach of some courts who have admitted that both the accused acknowledging their actions since the criminal prosecution stage can benefit of the provisions of the art. 320^1 Code of crim. proc., maintain this position in front of the court, even if, by reference to the effective date of the new legal provisions, the starting date of the court investigation had passed, as well as the accused who, although have not pleaded guilty during the criminal prosecution stage, have changed their procedural position understanding to acknowledge their action and asking for the judgement to be carried out according to the new regulated procedure.

Practically speaking, as we talk about a law containing also provisions of substantial criminal law – as it provides a ground for remission by one third of the limits of the sentence

provided by the law, in the case of sentence to imprisonment, and a remission by one fourth of the limits of the sentence provided by the law, in the case of punishment by administrative fine – it can apply retroactively, as this is a more favourable law.

Regarding the criteria for differentiating between the norms of substantial criminal law and the ones of criminal procedure, in the doctrine, we have a unanimous opinion according to which the placement of such norms in the Criminal Code or Criminal Procedure Code does not represent a criterion for differentiating such norms, hence, the fact that the relevant text appears in the Criminal procedure code does not represent an impediment for its assessment as a norm of substantial criminal law, susceptible of being, thus, retroactively applied, if it is more favourable.

Even if the constitutional provisions contained in the art. 15 paragraph 2 stipulate that the „*law orders only for the future, except for the more favourable criminal law (...)"*, we consider that the reasoning of the legislator upon the drafting of such norm was to provide the possibility to retroactively apply any criminal law or procedural criminal law, containing more favourable provisions.

An extensive interpretation of the constitutional law provisions is required, in the sense that, even if the text does not expressly stipulate that the criminal procedural law can also retro-activate, we must accept that, if we talk about the remission of the sentence limits, any law, whether criminal or procedural criminal law, is subject to retroactivity.

The legislator did not refer to the constitutional law provisions of the art.15 paragraph2 and to the criminal procedural law, as the remission of the sentence limits, fall under the matter of criminal law, the provisions of the art. 320^1 Code of crim. proc. being the first procedural provisions containing norms of criminal substantial law.

We deemed as compulsory the interpretation of the art. 320^1 paragraph 7 Code of crim. proc., as it is a norm concerning the quantum of the sentence applicable to certain offences or crimes, to be further framed beyond any doubt in the category of the criminal substantial law, and not in the category of the criminal procedural norms category.

Besides, the finality of norms edicting by the legislator is represented by the granting of a right, being excluded the fact that the above-mentioned legal provision regulates any formalities, the actual result to which the application of this legal provision leads to targeting the criminal liability that can be decreased.

Thus, as far as a norm, by its actual application on the case referred to judgement, regardless of the law section it belongs to, introduces a change in the incrimination conditions, in the conditions of charging the criminal liability or in the sanctions, shall fall under the incidence of the more favourable law (mitior lex).

We also consider that, in the case of some accused that caused criminal offenses at the same date, it would be deemed as discriminating if the judgments passed by the courts to be different, in the sense of considering as incidental or not the provisions of the art.320^1 Code of crim. proc., depending on the expedience of a criminal investigation authority in more effectively run through the procedural stages and phases of research and /or execution of the criminal prosecution.

Even more discriminating would be considered the different judgments in a trial in process of settlement, if the accused had committed a criminal offense for which he/she is judged by the court, while another accused that has committed a criminal offence long before the previously-referred to accused, either a similar offence, or a different offence, but due to a more complex criminal participation, or due to the fact that the crime has been committed in a series of criminal offences, circumstances which, due to the case complexity, resulted in a longer criminal investigation.

We consider that, in the given situation, such a treatment would be a discriminating one, as long as the causes generating it are as objective as it gets, being obviously not imputable to the

accused. Thus, we get to the situation in which the accused that committed a single criminal offence, related to which the evidence service did not require a long period of time, hence the file has been referred for settlement by the competent court, will not benefit of the new simplified procedure, while other accused that have committed the criminal offence long before the other accused, will benefit of the simplified procedure of pleading guilty.

For this purpose, we called forth the Decision no. 86/27.02.2003 of the Constitutional Court, establishing that the provisions of the art. 8 of the Law no. 543/2002 regarding the pardoning for certain sanctions and the removal of some measures and sanctions that are unconstitutional, because they limit the application of the law for sanctions established by means of final court decisions, unchallenged by the date of entry into force of the law, excluding the sanctions applied subsequently for actions committed before such date. In grounding the decision the Constitutional Court showed that the situations of certain categories of persons should basically differ for justifying the difference in the legal treatment and such difference should be based on an objective and rational criterion.

Another issue of interpretation and application is the one regarding the disjunction and incompatibility, and it concerns the case where in the same case there are two or more accused with different pleadings: one or several acknowledging to have committed the criminal offence described in the indictment and requesting the case settlement based on the evidence submitted to the file during the criminal prosecution and another one or ones not recognising to have committed the criminal offence or not requesting the application of the art. 320^1 paragraphs 1-6 Code of crim. proc.

From the text analysis, it results that the legislator did not expressly provide the coerciti-veness to disjoint the case in such a situation, as provided under paragraph 5 of the art. 320^1 of the Code of crim. proc. for the case where evidence are required for the settlement of the civil action.

Although we do not deal with an imperative provision that would establish the coercitiveness of the case disjunction, in the case where any of the criminal participation forms is held and the procedural position of the participants to the offence is different, the court can decide the disjunction, only when possible. In such case, the court shall proceed according to the rules of simplified procedure for those that comply with the conditions, ordering by its decision the case disjunction for the other accused parties.

The accused sentenced on the grounds of *"pleading guilty"* can be heard as witnesses in the disjoint case, in relation to the other accused parties.

The judge passing the sentence for convicting the accused, according to the simplified procedure, can find himself/herself incompatible to judge the case of the other participant to committing the criminal offence.

Based on this interpretation of the text of law, included in a study published by the Superior Council of Magistracy, some courts facing such a situation declared themselves incompatible to judge the accused towards whom they ordered the case disjunction.

Considering the rule established by the art. 32 Code of crim. pr., text providing that, the case disjunction would not represent the best solution, in case of indivisibility or joint cases, the first instance judges all the cases, if the court settles all the criminal offences and all the accused.

Even if the art. 38 Code of crim. pr. allows the disjunction in the cases of incompatibility provided under art. 33 let. a) and in all the joint cases, one should not forget the basic rule, that is, in such situations the cases it operates and prevails the case joining, and the disjunction is merely the exception.

The only case that might be taken into account is the one regulated by the art. 47 paragraph 2 of the same code, which provides the fact that the judge who has pre-empted on the judgement that might be reached in the case can no longer participate to the case settlement.

According to the legal provision quoted above, the judge that, prior to the case settlement, pre-empts on the merits of the case is incompatible for judging the case. It is of no importance if the pre-emption occurred before the appointment or during the trial, if it has happened during first instance or in during the redress procedures, if it happened in an official environment or in an occasional case.

By using the word “settlement”, the legislator referred to the situation in which the judge determined on the existence of the criminal action and on the guilt of the accused, and not to other situations such as the change of juridical framing of the offence, the extension of the criminal judgement on other material actions, on other deeds or on other persons. In fact, in both the doctrine and the practice, the opinion according to which the judge that has previously settled the criminal law part of the trial is not incompatible for settling also the disjoint civil part is the majority opinion.

By relating to the provisions of the art. 33 let. a) and art. 34 Code of crim. pr., if we take into account the situation in which there was a criminal participation when the criminal offence was committed, all the persons have been sent to judgment, and, prior to the commencement of the court investigation three of the accused have requested to be judged based on the simplified procedure, while the other accused have not pleaded guilty, if the case is disjoint, the court must order the conviction of the three persons, applying the provisions of the art.320[1] and the disjunction related to the other two accused, that will be judged by a different panel of judges.

If, in this case, there exists a prejudice, the means of settling the civil action shall be an extremely difficult one, in the context in which the three accused, that have chosen to benefit of the new procedure implied by pleading guilty, do not challenge the prejudice, precisely because the modality established in the indictment is a convenient one for them, considering the rule of solidarity operating between the debtors.

In such a case, will the court jointly convict solely the three accused that have opted for calling forth the new legal procedure in their favour, further the solidarity being established on the occasion of convicting the other two accused, or will it disjoint, regarding the three accused, the civil matter settling it together with the criminal matter that concerns the other two accused, as well?

Moreover, we have to consider the issue of what happens in the case where, on the occasion of judging the two accused, shall there be ascertained that the entire prejudice has been caused by the three accused that have benefited of the procedure of pleading guilty, and, in relation to them, has the criminal court decision, establishing the fault or the contribution to the prejudice, remained final?

We consider that the answer to the two above-posed questions is represented by the fact that, in a case like the above-illustrated one, the disjunction is not the best solution, therefore, in such a case, when the legal conditions are complied with, for the accused choosing the simplified procedure the court shall have to limit to admitting the judgement based on the evidence serviced during the criminal prosecution stage, and the judgement for these accused shall be passed concurrently to the one of the accused judged according to the ordinary procedure.

There is, however, the case when, due to different reasons, the case disjunction could not be possible. In this hypothesis, a pertinent question would be can the court dismiss the request of an accused to apply the simplified procedure, only because the other one does not agree?

Practically, in case there is a criminal offence committed by several authors and one of the accused intends to benefit of the simplified procedure, acknowledging the committing of such offence based on the evidence serviced during the criminal prosecution and the other accused opts for the ordinary procedure of settling his case, and, thus, we have a case in which the disjunction is impossible, if the case reaches the stage of court investigation and the evidence is submitted to the

file pending with the court, can it still be supported the compliance with the premise for applying the remission of the sanctions limits, according to the art. 320^1 paragraph 7, if the case has not been settled solely based on the evidence serviced during the criminal prosecution?

In this case, considering the argument related to the indivisible nature of the norm provided under art. 320^1 Code of crim. pr. and to the impossibility of applying the paragraph 7 of the same article in case of concurrent non-application of the paragraphs 1-6, we consider that the accused pleading guilty should neither benefit of the remission of the sanction.

Nevertheless, in this case, the difference of legal treatment between the two accused is to be carried out, like before the effective date of the new art. 320^1 Code of crim. pr., by applying the sanction particularization criteria or by holding the mitigating circumstances for the accused pleading guilty of committing the actions indicated in the indictment.

However, we ask ourselves if it is equitable and non-discriminating that the accused who intended to benefit of the simplified procedure should receive a conviction the only mitigating factor applicable to his case being the mitigating circumstances for his honest attitude and for acknowledging his/her deed. It is obvious that, although this accused agrees that the judgement shall only be carried out based on the evidence serviced during the criminal prosecution, finds himself/herself in the impossibility of making use of the simplified procedure due to causes independent of his/her will, as long as the second accused (co-author to committing the criminal offence) understands to adopt a procedural position of pleading not guilty and the cause cannot disjoint.

On one hand, due to the occurrence of a cause independent of his/her will, the accused should be able to benefit of the new procedure. On the other hand, as long as the other accused does not acknowledge the guilt of committing the criminal offence, thus, the criminal trial must follow its course in front of the court, the file enters the stage of court investigation and other evidence is implicitly serviced during the criminal trial, thus that the first accused could no longer call forth the provisions of the simplified procedure. It is a situation that the judiciary practice must solve by adopting a majority solution in this sense.

It is true that the doctrine and jurisprudence have accepted the possibility of combining more favourable provisions stipulated under different laws, when such provisions concern institutions that are susceptible of being applied autonomously, such as, for example, the case of multiple criminal offences, where there shall be selected the more favourable law for each offence separately, and further there shall be selected that sanctioning treatment for multiple criminal offences, provided by successive laws, which is more favourable. Is, however, the institution of guilt acknowledgement, regulated by the art. 320^1 paragraphs 1-6 Code of crim. pr. one susceptible of being applied autonomously of the institution of the cause of sanction remission, provided under paragraph 7 of the same article? Does the norm provided under art. 320^1 Code of crim. pr. have a divisible nature, allowing a separate application of the paragraph 7 of this article, independent of the special procedure of pleading guilty, regulated under the paragraphs 1-6 of the same article? We believe that the answer to such questions can only be a negative one, as, according to all the criteria proposed by the doctrine, the norm provided under the art. 320^1 has indivisible nature, and the application of the sanction remission cause, provided under paragraph 7 of this article to be conditioned by the application of the separate procedure of acknowledging the guilt, regulated by the paragraphs 1-6 of this article.

Thus, in the foreign doctrine, there has been ascertained that *"the milder provisions of the new law are a sort of a counterparty to the more severe provisions the two series of provisions are trying to balance, therefore the two series of provisions cannot be applied independently one of another"*. However, it is obvious the legislator's intention to grant a "*compensation*" consisting in the remission of sanction only to that accused that pleaded guilty and facilitated a more efficient

settlement of the criminal trial by the request of settling the case based on the evidence serviced during the criminal prosecution.

We deduce this also from the fact that the simple acknowledgement of guilt, without the judgement carried out based on the evidence gathered during the criminal prosecution (due to various reasons, including the dismissal of the request by the court, according to art. 320^1 paragraph 8 Code of crim. pr.), does not lead to the remission of the quantum of the sanctions applicable to the accused.

Another problem in applying the provisions of the art. 320^1 Code of crim. pr. is the significance of the verb*"to hear"*.

There are opinions according to which the hearing is carried out after the court has previously informed the accused on all the consequences deriving from opting for the simplified procedure, followed by the reading of the intimation.

It has been considered that this hearing focuses on admitting the actions described in the indictment and on accepting the evidence serviced during the criminal prosecution and that is does not have the legal nature of an evidence (not being applicable the provisions of the art. 69-74 Code of crim. pr.), representing but a mandatory procedural activity required for establishing the procedural frame, being placed at the time of prior matters, before admitting the claim for judgement, according to the procedure provided under art. 320^1 Code of crim. pr.

The mandatory nature of this procedural activity is correlated with the accused right to opt for the simplified procedure. The supporters of this opinion have accepted the fact that this simplified procedure can carry out by default, in the absence of the accused, if the legal requirements are complied, in the hypothesis in which the acknowledgement has been made by means of an authentic deed.

However, this opinion, presents some drawbacks, that we shall further detail:

Placing the action of hearing the accused at the time of prior matters not correct. From the art. 44 Code of crim. pr., marginally called *"prior matters"*, it results that: *" The criminal court has the competence to try any prior matter on which the resolution of the case depends, even if, by its nature, that matter falls under the competence of another court. The prior matter is tried by the criminal court according to the rules and probative means regarding the field to which the matter belongs. The final decision of the civil court on a circumstance that represents prior matter in the criminal trial has authority of res iudicata in front of the civil court."*.

The text of the art. 44 Code of crim. pr., illustrates the fact that, there is no provision on the procedural moment when the accused can call forth this matter and that this moment can occur whenever during the criminal trial, both in the prosecution stage (see art. 45 Code of crim. pr.), as well as in the judgment stage (both before and after the court investigation initiation).

The hearing of the accused, provided under art. 320^1 Code of crim. pr., even if, apparently, has the value of a simple statement of acknowledgement, it cannot be reduced to it. It cannot be carried out by omitting the fact that the judgment stage is governed by certain rules. These rules require an active role to both the judge and prosecutor, and provide the right of the other parties to ask questions.

As a matter of fact, the hearing of the accused must be placed in the context established by the Code of criminal procedure. After analysing the order of the legal texts it results that, in a criminal trial, the order of the activities shall be the following:

- according to the art. 320 C. cr. pr., the chairman shall explain to the damaged person that he/she can have the capacity of party in a civil trial or it can participate as damaged person in the criminal trial;

- according to the art. 320^1 paragraph 3 Code of crim. pr., the chairman shall ask the accused if he/she requires for the judgement to be carried out based on the evidence serviced

during the criminal prosecution stage, evidence he/she acknowledges, or, based on the ordinary procedure and shall take note of the expressed position;

- according to the art. 320 paragraph 2 Code of crim. pr., the chairman shall ask the prosecutor and the parties if they have formulated pleas, applications or if they propose new evidence; in case of a negative answer, the court declares the court investigation initiated, and such investigation shall be carried out according to the provisions of the art. 321 Code of crim. pr.
- according to the art. 322 Code of crim. pr., the chairman shall order that the clerk to read or to make a summary of the court intimation deed.
- according to the art. 323 Code of crim. pr., the court shall proceed to hearing the accused; if there are several accused, the hearing of each of them shall take place in the presence of the others.

Practically, after hearing the accused, according to art. 323, art. 324 Code of crim. pr., the court shall be able to determine on the request of the accused to be judged based on the evidence serviced during the criminal prosecution, fully aware of the case details.

Regardless of the means of action of the court, the disjunction regarding the other accused and the continuation of the trial, the statement of the accused opting for the simplified procedure shall have the value of evidence.

After a careful reading of the provisions of the art. 320^1 Code of crim. pr., it can be noticed that under this aspect, the legislator points out two moments: the one in which the accused states that he/she opts for being judged based on the evidence serviced during the criminal prosecution, prior to commencing the court investigation and the one of hearing the accused that can only be realized as above-indicated.

Of course, it would be possible for the accused that has submitted to the file the authentic statement, but is not present, to be brought in front of the court, if the court considers his/her present necessary.

What differentiates the two procedures is the fact that in the case of simplified procedure, the evidence gathered in the criminal prosecution no longer have to be services by the court, according to oralitaty, contradictoriality and publicity conditions, as provided for the regular procedure.

As a matter of fact, we should not forget the reason of introducing such procedure that was grounded on some actual realities, the fact that the courts had to re-service the evidence during the criminal prosecution, even if the accused was admitting the actions for which he was undergoing trial.

Another interpretation issue generated by the simplified procedure of the judgement in case of acknowledging the guilt results from the ambiguous content of the paragraph7 of the art. 320^1, also mentioned by the provisions of the art. 320^1 paragraphs 1-6 Code of crim. pr., the chairman does not apply in case the criminal action targets an offence sanctioned with life imprisonment, leaving unregulated another situation much more often met in the practice, that is the one in which the law provides the sanction of life imprisonment, alternatively with the imprisonment sanction for the committed offence.

If we take into account the fact that, upon the procedural moment when the legal provisions, regarding the guilt acknowledgement, can be applied (prior to the court investigation), the court cannot assess if the judgement to be passed is the sanction of life imprisonment or the imprisonment sanction, one might consider that the provisions of the art. 320^1 Code of crim. pr. are not applicable either if the criminal action targets an offense sanctionable with life imprisonment alternatively with the imprisonment sanction.

However, if we take into account the fact that the legal provision above mentioned is of strict interpretation and application, the conclusion to be drawn is that the legislator, by the plea it has created, had in mind only the offences that are exclusively sanctioned with life imprisonment.

In an interpretation *per a contrario*, in the case of committing the criminal offences for which the law provides the sanction of life imprisonment alternatively to the imprisonment sanction, the accused can benefit of the simplified procedure, if, based on the list of evidence serviced in the case, the court shall reach the conclusion that the life imprisonment is to apply, the guiding principle being that, if the evidentiary material provides data based on which the court considers that the life imprisonment sanction should apply, even if it used the simplified procedure, the accused cannot benefit of it.

Moreover, it is difficult for the court to accurately interpret and assess the possibility of an accused to benefit of the simplified procedure in the case of committing a series of criminal offences in which we have one offence punishable only by life imprisonment and another sanctionable only by imprisonment.

In such a case, we consider that it is mandatory for the court to assess that the provisions of the art. 320^1 Code of crim. pr. are not applicable.

However, we ask ourselves what would be the solution adopted in the practice in the above-mentioned hypothesis when the accused acknowledges this/her guilt by reference to the criminal offence for which the law provides solely the imprisonment sanction, and during the trial the evidence leads to the inexistence of the accused guilt by reference to the offence sanctioned by life imprisonment, thus, in relation to such offence the court shall order the acquittal of the accused. Can the court still relate retroactively to the fact that the accused initially pleaded guilty for the offence sanctionable by imprisonment, thus as for the accused to benefit of the remission of his sanction limits, according to the simplified procedure? Because we could encounter such judicial errors that are not covered by our legal framework and for which the legislator and the judicial practice must clear such aspects.

Another aspect that needs to be brought into discussion is the one regarding the means of applying the text of the art. 320^1 paragraph 3 Code of crim. pr., which provides that at the hearing *"the court asks the accused if he/she requires the judgement to be made based on the evidence serviced during the criminal prosecution stage, evidence that he/she acknowledges and accepts, and in such case it proceeds to hearing the accused and then it grants the permission to speak to the prosecutor and to the other parties"*.

First of all, it does not clearly result what the hearing of the accused refers to, that is if it only concerns the aspect related to the judgment made based on the evidence services during the criminal prosecution stage or the hearing should also concern aspects related to the offence subjected to trial?

From the text of the paragraph 1 of the art.320^1 C. crim. pro. that provides the fact that the accused can declare also by means of an authentic deed that he/she admits to have committed the offence held in the intimation, we could deduce that the hearing of the accused concerns solely the first aspect, related to the formal statement of admitting to have committed the offence and to the request for the judgement to be made based on the evidence serviced during the criminal prosecution stage.

The same interpretation would be also required by the fact that in this case it is not about a hearing carried out during the court investigation, as the text does not make any reference to reading the intimation, or to the commencement of the court investigation, but, on the contrary, from the paragraph 1 of the art. 320^1 Code of crim. pr. we deduce the fact that the entire procedure takes place *"prior to the initiation of the court investigation"*.

Moreover, the entire reasoning of the text, of simplification and expedition of the procedure for judging the cases in which the accused acknowledges the offences described in the indictment, might lead to the same conclusion, that the hearing only refers to the formal statement of admitting to have committed the offences described in the indictment and to the express request of the

accused for the judgment to be carried out based on the evidence serviced during the criminal prosecution, which, of course, can include a detailed statement of the accused regarding the offence referred for settlement, to be considered upon judging the case.

If we take into account the *cases Colozza vs. Italy*, *Ilisescu and Chiforec vs. Romania,* we can only conclude that the above-illustrated interpretation does not contravene to the ECHR case law in the matter, as the accused has expressly waived his/her right to be heard and to ask the hearing of witnesses in front of the court, in which case the right to a fair trial is not infringed.

Secondly, the text does not clearly explain what it means to grant the permission to speak to the prosecutor and to the other parties: is the permission to speak is granted based on their statement on the case merits or only on the accused request, of settling the case based on the evidence serviced during the criminal prosecution?

Based on the fact that the paragraph 6 of the art. 320^1 Code of crim. pr. expressly provides that in case of settlement of the file by means of this procedure, there shall be applied the provisions of the art. 340-344 Code of crim. pr. (referring to, among others, to granting the permission to speak during the debates and the last hearing being granted to the accused), we may implicitly conclude that the permission to speak granted to the prosecutor and to the other parties, after hearing the accused, concerns only his/her request of case judgment by means of the special procedure of pleading guilty.

Further, after the court approved this request of the accused, the court would grant the permission to speak both during the debates on the case merits and the last intervention would be granted to the same.

Another interpretation issue raised in the discussion is the one concerning the judgement to be ordered by the court in the case of applying the provisions of the art. 320^1 paragraph 7 Code of crim. pr..

By using the categorical formula of the legislator *"the court shall determine the accused conviction"* we might deduce that another solution than the conviction is not possible, even if there are grounds for acquittal, as provided by the art.10 C.of crim. proc., and, implicitly the accused acquittal based on the art. 10 let. b^1 Code of crim. pr., when the offence does not present the social danger of a crime, would not be possible.

It is hard to believe that the legislator would have consider that the procedure of pleading guilty is incompatible to any other solution, other than the accused conviction, although the text leaves no room for interpretation.

It might be ascertained that, for the case in which it intends to pass an acquittal, the court might dismiss the accused request to be judged based on the evidence serviced during the criminal prosecution stage and to carry on with the court investigation.

In this case, if it intends to order the acquittal of the accused based on the art. 10 let. b^1 Code of crim. pr., it would be pretty difficult for the court to reason the dismissal of the accused request to apply the procedure under the art. 320^1 Code of crim. pr., without pre-empting on the judgment to be passed in the case.

Moreover, the judiciary practice is to establish what happens in case a person, due to various considerations, takes over himself / herself the liability of a crime, that he/she did not actually committed, requests for the judgement to be made based on the simplified procedure, the court orders conviction, within the remission limits, and after a while the true author of the crime is discovered?

Shall it be considered that the criminal prosecution authorities have committed a serious judiciary error that led to the considering that person as author of the criminal offence? Shall it be considered that the statement of the accused of pleading guilty represented major evidence, and thus the state authorities shall be exonerated of any liability by reference to the existing judiciary error, as long as the accused took over him/her the crime he / she hadn't committed?

Or, in case a person, that is not guilty, still pleads guilty, due to the lack of confidence in the impartiality and objectiveness of the court, the procedural conduct of pleading guilty only for eliminating the possibility to receive a higher sanction, and later on, during the court investigation, it proves to be innocent, can there be considered the accused supporting statement, according to which he / she pleaded guilty, even if not guilty, because he/she was afraid of getting a higher sanction, for assessing the existence of a judiciary error? We will find an answer to this question again from the judiciary practice, the answer being imposed by the majority opinion.

Another problem occurred in the practice is represented by the statement of guilt acknowledgement of the accused. In relation to such statement, it has been said that the accused must not acknowledge also the legal framing of the offence, such as held in the intimation, being able to ask for the legal framing of the same, according to art. 334 Code of crim. pr.

Moreover, it has been stated that, considering the capacity of guarantor for the compliance with the right to a fair trial, the court may order the exclusion of the illegally or unfairly gathered evidence, even if the accused requested to be judged based on all the evidence gathered during the criminal prosecution stage.

This opinion is questionable in the light of the aspect referring to the court opportunity to exclude, in this simplified procedure, certain evidence as illegally or unfairly gathered. Practically, a condition for the request admissibility is that the accused must not challenge such evidence, and the court must ascertained that the same was legally gathered. If the court shall ascertain the contrary, it must dismiss the request of the accused and must settle the case according to the ordinary procedure.

As resulting from the content of the art. 320^1 Code of crim. pr., the only evidence to be serviced in this procedure are those in favour of the accused proving his/her bona fide conduct prior to such offence.

The last paragraph of the article in discussion is also susceptible of leading to non-unitary interpretation by the fact that it does not enumerate, not even as an example, the causes for which the court might dismiss the accused request for applying the procedure of the judgment in case of pleading guilty.

We could deduce from the paragraph 4 of the art. 320^1 Code of crim. pr. that such a request can be dismissed in case the evidence gathered during the criminal prosecution shows that the actions of the accused are not determined or when there are not enough evidence regarding the accused, for determining a sanction.

In lack of express provisions we consider that the request shall be analyzed by reference to the provisions of the art. 320 paragraph 4 Code of crim. pr., providing that the *"trail court settles the criminal matter when, from the serviced evidence, it results that the accused actions are determined and there are sufficient data regarding his/her person for enabling the court to reach a verdict"*.

Therefore, when the accused actions are not determined and there are not sufficient evidence regarding his/her person for enabling the court to reach a verdict, the court will be able to dismiss the request. Considering that all the citizens are equal in front of the law, as provided under the art. 16 of the Constitution, it can be considered that this provision is unconstitutional as it establishes different treatments between the accused whose request is allowed and the ones whose request is dismissed, the first ones benefiting of a substantial remission while the others do not, just because their actions are not determined and there are not sufficient evidence regarding their person for enabling the court to reach a verdict.

However, considering the deficiencies occurred during the criminal prosecution cannot be imputable to the accused, there is no reasoning that would lead to the conclusion of his / her „sanctioning'' by dismissing the request for applying such procedure, as it would implicitly render his / her impossibility to benefit of the remission of the sanction limits as provided by the law.

It seems that a great deal of interpretation is left with the courts, when settling the accused request to be judged based on the evidence gathered during the criminal prosecution.

This circumstance has a double nuance, consisting in both a positive aspect, if we refer to the attempt of eliminating the possibility that, due to different reasoning, the accused will acknowledge offences he did not commit, but also in a negative aspect if we take into account that, if, after the court investigation, the court reaches the conclusion that the accused really committed the offence, as described in the indictment, it can no longer apply the sanction within the limits of the remission, according to the art. 320^1 par. 7 Code of crim. pr..

Even if the text of law does not provide such a possibility, we deemed as correct the opinion according to which the accused must benefit of the legal cause for remission according to art. 320 paragraph 7 Code of crim. pr., moreover, this happening in the situation in which, although he/she opted for the simplified procedure, the court dismissed the request and applied the common law rules regarding the judgement, and, on the occasion of deliberation on the case, after analysing the evidentiary material, has ascertained that the facts described in the indictment and acknowledged by the accused are proved beyond any doubt.

A major aspect is the corroboration between the art. 320^1 Code of crim. proc. and the provisions of the art.18 of the Law no. 508/2004 on the set up, organization and functioning within the Public Ministry of the Directorate for Investigating Organized Crime and Terrorism.

Thus, according to the art.18 of the Law no. 508/2004: "the person committing one of the provided by the law under the jurisdiction of the Directorate for Investigating Organized Crime and Terrorism, and during the criminal prosecution denounces and facilitates the identification and the holding criminally responsible other participants to the criminal offence benefit of the remission to half of the sanction provided by the law''.

Considering the fact that the art. 320^1 paragraph 7 C. crim. proc. provides the remission by one third of the sanctions provided by the law in the case of imprisonment sanction, there is one question to pose: how will the court act in case a person that committed a criminal offence provided by the Law no. 508/2004, has adopted a procedural attitude by which he/she has contributed, during the criminal prosecution, to the identification and to holding criminally responsible other perpetrators, thus, becoming incidental the provisions of the art. 18 of the special law, and before the court, prior to initiating the court investigation, he/she maintains the same honest attitude and understands to use the simplified procedure of pleading guilty?

We consider that in the above-illustrated example, the court will have to pass a decision by which to order the application of the art. 320^1 paragraph 7 C. crim. proc. in relation to the accused and to order the remission by one third of the imprisonment sanction, but relating to the sanction already reduced to half, according to the art.18 of the special law. Practically, in such a situation, the court should reduce the imprisonment sanction, to be applied to the accused, by two thirds.

Conclusions

These are only some of the issues raised by the application of the new text of the art. 320^1 Code of crim. pr., the discussions that can occur and the interpretations to be given, being definitely more than those above-mentioned. As any new institution, the judgment in the case of pleading guilty shall require a certain period of adjustment until the unitary practice in this matter shall be reached, especially that the text contains some inexact formulations, meant to create multiple interpretations. Unfortunately, the courts do not yet benefit of a quick and effective mechanism for unifying the judiciary practice, fact that has affected and shall probably continue to affect the solutions adopted in this matter.

We consider that for the new institution of judgment by pleading guilty, the adoption of some transitory norms would have been required, as being necessary for eliminating the controversies occurred and still to occur in the practice, as the possible interpretations to be given to the texts related to this institution can no longer refer to the prior Romanian case law and doctrine, and the consulting of the judgments from the comparative law is still a desideratum out of the reach of most of the interested ones.

Although apparently simple, the means of settling the issue causes numerous consequences in the practice, consequences we deem solvable solely through the promotion and admission of recourse actions for judicial review that would render impossible to pass contrary judgments in similar cases, thus ensuring unitary judgments in the judiciary practice, for eliminating the discriminating verdicts, in which the same text of law is applied differently, although the situations are identical.

References

- Ion Neagu, *Treatise on Criminal Procedure.* Special part, Vol.II, Bucharest, Publishing House, 2010.
- G. Theodoru, *Treatise on Criminal Procedural Law*, Bucharest, Hamangiu Publishing House, 2007, p. 57.
- C. Barbu, *Applying the law in space and time),* Bucharest, Scientific Publishing House, 1972, p. 182.
- F. Streteanu, *Treatise on Criminal Law. General part*, vol. I, Bucharest, C. H. Beck Publishing House, 2008, p. 284.
- F. Desportes, F. Le Gunehec, *Droit penal general*, Paris, 2004, Economic Publishing House, p. 311-312, apud. F. Streteanu, *op.cit.*, p. 285.
- M. Puech, *Droit penal general*, Paris, 1988, Litec Publishing House, p. 113-114, apud. F. Streteanu, *op.cit*., p. 285.
- M. Udroiu, *Preliminary explanations on the Law no. 202/2010 on certain measures for speeding up the criminal law trail,* The High Court of Cassation and Justice, Joint Sections, Decision no. 1/2006, published in the Official Monitor of Romania, part I, no. 291 on March 31st 2006. M. Udroiu, *op. cit.*
- Cristinel GHIGHECI, Pleading guilty, www.juridice.ro
- Sorina Siserman, Questionable aspects on the new procedure of judgment in the case of pleading guilty, www.juridice.ro.
- Constitutional Court, Decision no. 86/27.02.2003.

INSTRUMENTS TO ASSURE THE UNITY OF THE JUDICIAL PRACTICE IN ROMANIA

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Abstract

In the new Code of penal procedure and the new Code of civil procedure, it is proposed the creation of a new mechanism for the unification of the judicial practice which should contribute, along with the appeal in the interest of the law, to the creation of predictable jurisprudence and should have as effect the shortening of the process duration. It concerns: the request to settle a law issue on which the settlement of a trial depends, legal issue that was not unitarily settled in the practice of the courts; the notification of the High Court of Cassation and Justice is made ex officio or upon the request of the parties after contradictory debates and if the conditions stipulated by law are met, through a conclusion that is not subject to any appeal possibility; in order to assure the efficiency of this new mechanism, the decision of the High Court of Cassation and Justice, published in the Official Gazette, will have a binding character both for the court that formulated the application of clarification of the issue and for all the other courts.

Key- words: *non- unitary judicial practice, unification of the non- unitary judicial practice, jurisprudence, High Court of Cassation and Justice, jurisprudence predictability.*

Introduction

The present study deals with the judicial instruments meant to assure the unity of the non- unitary judicial practice existing *lege lata* in the Romanian law and it also presents some suggestions regarding the introduction of some new instruments meant to contribute to the unification of the judicial practice and to make the act of justice in Romania more predictable.

The subject approached in the lines below is important and topical for the Romanian judicial system because it deals with the efficiency of the mechanisms that assure the unity of the judicial practice stipulated in the legislation in force. At the same time, in the second part of the study, we suggest new instruments that should contribute to the reaching of the same objective – **unification of the non- unitary judicial practice.**

The legislative means and measures suggested in this study are: the creation of some specialized courts of laws and panels starting with the first jurisdictional level in Romania – courts of law; the alteration of the legislation regarding the legislative technique; the reorganization of the Legislative Board; the institutionalization of the Commission in order to assure the judicial practice within the Superior Council of Magistracy; the reinforcement of the part of the People's Attorney in the matter of the appeal in the interest of the law.

In the specialty literature, it was approached another similar subject that would examine the legal instruments through which it can be assured the unity of the jurisdictional solutions from more perspectives – legislative, judicial and social.

In our intercession, we started from the idea that the existence of the status of Rechtsstaat assumes that the judicial courts should unitarily enforce the law for all the „consumers of the act of

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justice". Besides, the Constitution of Romania stipulates at art. 124 (2): „The justice is unique, impartial and equal for all". The Constitution of Romania also establishes in art. 126 paragraph (3) that: „The High Court of Cassation and Justice assures the unitary interpretation and application of the law by the other courts of law according to its competences".

But, unfortunately, the practice of the courts of law in our country is unequal, incoherent and not- unitary, consideration valid also with regard to the resolutions of the High Court of Cassation and Justice. This opinion is shared not only by litigants or potential litigants, but also by judges.

To be realistic, we consider that the assuring of a unitary judicial practice is not an easy objective to be carried out, because in Romania, there are almost 250 courts of law and there isn't a single „pure court of cassation" with the entitlement to maintain and impose upon a unitary practice of the courts of law. This fact determines a feeling of distrust in the act of justice on the side of the public opinion.

We mention that, within the PHARE project „The jurisprudence unification of the courts of law and prosecutor's offices in Romania", a group of German experts and Romanian magistrates analyzed the main causes that were leading to the instability, incoherence and unforeseeableness of the current judicial practice[1] and based on them, it drew up a bill with the purpose of unifying the judicial practice that the Association of the Magistrates in Romania adopted and presented to the parliament groups[2].

1. Legal instruments to assure the unity of the judicial practice stipulated by the legislation in force

1.1. Appeal in the interest of the law

De lege lata, the main mechanism through which the lawgiver tries to assure the unity of the judicial practice is the **appeal in the interest of the law** regulated in the Code of civil procedure and in the Code of criminal procedure[3]. The matter of the appeal in the interest of the law was altered through Law no. 202/2010 regarding some measures for the acceleration of settling down the trials[4].

Considering the fact that the texts regarding the institution of the appeal in the interest of the law contained in the two codes of procedure are similar, we will present only the provisions in question of a single code, that is, the Code of criminal procedure.

[1] www.juridice.ro. This group set a preliminary list of conditions that stimulated the development of a stable and unitary jurisprudence, among which there are:
• creation of specialized panels at all the courts;
• establishing of the panels;
• enforcement of a unitary methodology for the settlement of the causes;
• need to exist some procedures of the High Court of Cassation and Justice for the purpose to create guiding jurisprudence, having at its disposal all the needed means in order to efficiently carry out this part;
• introduction of some procedural mechanisms to support an interpretation or unitary enforcement of the law at the level of the High Court of Cassation and Justice and of the inferior courts;
• reevaluation of the part of the legal precedent and the necessity of a stable and constant jurisprudence as a component of the lawful state

[2] For the content of this project, see www.juridice.ro.

[3] For a complex dealing with of this institution, see D. Lupaşcu, *Recursul în interesul legii în proiectele noilor coduri de procedură*, in LESIJ no. XVI, Vol. I/2009, pages 78-109. For the previous regulation of the matter of the appeal in the interest of the law in criminal matter, see I. Neagu, *Tratat de drept procesul penal. Partea specială,* Global Lex Publishing house, Bucharest, 2007, pages 375-378.

[4] Published in the Official Gazette no. 714 on October 26th, 2010.

According to art. 414^2 of the Code of criminal procedure, in order to assure the unitary interpretation and application of the law by all the courts of law, the general prosecutor of the Prosecutor's Office of the High Court of Cassation and Justice, ex officio or upon the request on the minister of justice, the management board of the High Court of Cassation and Justice, the management boards of the courts of appeal and the People's Attorney **have the duty** to ask the High Court of Cassation and Justice to pronounce itself on the matter of law that had been differently settled down by the courts of law.

Art. 414^3 of the Code of criminal procedure stipulates that the appeal in the interest of the law is admissible only if it is proved that the **matters of law** that make the object of the trial **were differently settled down** through definitive judicial resolutions that are attached upon request.

In art. 414^4 of the Code of criminal procedure, it is stipulated the procedure of ruling over the appeal in the interest of the law. The appeal in the interest of the law is ruled over by a panel made out of the president of the High Court of Cassation and Justice or, in its absence, of the vice-president of the High Court of Cassation and Justice, the section presidents within the High Court of Cassation and Justice, a number of 14 judges from the section that is competent to deal with the matter of law that was settled down differently by the courts of law and each 2 judges from the other sections. The chairman of the panel is the president or the vice- president High Court of Cassation and Justice.

In case the matter of law presents interest for two or more sections, the president or, in its absence, of the vice-president of the High Court of Cassation and Justice establishes the sections from which the 20 judges come.

After informing the High Court of Cassation and Justice, its president or, depending on the case, the vice president will take the necessary measures in order to **randomly delegate the judges** within the section that is competent to deal with the matter of law that was settled down differently by the courts of law, as well as the judges of the other sections that make the panel according to art. 414^4 paragraph (1).

At the receipt of the petition, the chairman of the panel will delegate a judge within the section that is competent to deal with the matter of law that was settled down differently by the courts of law in order to draw up a report on the appeal in the interest of the law. In case the matter of law presents interest for two or more sections, the president of the panel will delegate a judge within each of these sections in order to draw up the report. Those that make the reports are not incompatible.

For the purpose of drawing up the report, the panel chairman can request some acknowledged specialists the written opinion on differently settled down matters of law.

The report will contain different data of the matter of law and the arguments on which it is based, the relevant jurisprudence of the Constitutional Court, the High Court of Cassation and Justice, the European Court of Human Rights, the Court of Justice of the European Union and the opinion of the consulted specialists, if it is the case, as well as the doctrine in the field. At the same time, the judge or, depending on the case, judges that make the report will draw up the bill of the solution that is supposed to be given in the appeal in the interest of the law.

The meeting of the panel is convoked by its chairman at least 20 days before its carrying on. Once with the convocation, each judge will receive a copy of the report and the suggested solution.

All the judges of the panel take part at the meeting. If there are objective reasons, they can be replaced by observing the rules stipulated by art. 414^4 paragraph (3).

The appeal in the interest of the law is pleaded before the panel, depending on the case, by the general prosecutor of the Prosecutor's Office with the High Court of Cassation and Justice or by the prosecutor appointed by this, by the judge appointed by the management board of the High Court of Cassation and Justice, the court of appeal respectively.

The appeal in the interest of the law is trialed within at most 3 months since the information of the court and the adopted solution with at least two thirds of the number of panel judges. No abstentions from the vote are admitted.

According to art. 414[5] of the Code of criminal procedure, the panel pronounces itself on the petition through a decision. The decision is delivered only in the interest of the law and has no effects on the court resolutions examined and neither with regard to the situation of the parties in those trials. The decision is adduced within at most 30 days since its delivery and is published at most 15 days since its adduction in the Official Gazette of Romania, Part I. The solution given to the trialed matters of law is obligatory for the court of law since the publishing date of the decision in the Official Gazette of Romania, Part I.

Based on the legal texts presented above, we consider that the appeal in the interest of the law is, considering its legal nature, a **legal procedural instrument** or, as it was stated in the specialty literature, „a procedural means of unification of the judicial practice"[5].

On the other hand, contrary to the estimation of the Constitutional Court – that shows in a decision that „The only procedural instrument through which it is assured the unification of the judicial practice, starting from the obligatory character of solving the matters of law by the supreme court, is the appeal in the interest of the law regulated through art. 329 of the Code of civil procedure" – we consider that the appeal in the interest of the law is not and it does not have to be the only procedural instrument through which the unitary interpretation and application of the law is assured in Romania[6].

Another legal instrument that contributes to the assuring of a unitary judicial practice is the one offered by the legal mechanism of the constitutional challenge.

1.2. Constitutional challenge

According to art. 146 lit. c) of the Constitution, the Constitutional Court decides on the constitutional challenges regarding the law and the ordinances brought before the courts of law or by the trade arbitrage; the constitutional challenge can be raised also direct by the People's Attorney. According to art. 147 paragraph (4) of the fundamental law, the decisions of the Constitutional Court are published in the Official Gazette of Romania. Since the publishing date, **the decisions are generally obligatory** and have power only for the future[7].

Through certain decisions, the Constitutional Court created vivid controversies especially in the world of the jurists, as well as in other fields of the social life. One of these is decision no. 62/2007 through which the Constitutional Court found that the provisions of art. I item 56 of Law no. 278/2006 for the alteration and completion of the Penal code, as well as for the alteration and completion of other laws, the part referring to the repealing of art. 205 (insult – n.n.), 206 (calumny – n.n.) and 207 (evidence of truth– n.n.) of the Penal code, were unconstitutional[8].

In motivating the decision, it was indicated that "the removal of the penal means of protecting the dignity as supreme value in the Rechtsstaat determines the violation of the actual character of access to justice in this matter. Besides, the Court finds that, through the analyzed rehealing effect, unlike the persons whose rights – others than the right to honor and a good reputation – were violated and that can address to the courts of law to defend their rights, the

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[5] D. Lupaşcu, quoted work, page 83.

[6] Decision no. 104/2009 published in the Official Gazette no. 73 on February 6th, 2009.

[7] Regarding the intimation of the Constitutional Court, in doctrine, pertinent recommendations were made (see D.C. Dănişor, *Mic ghid de sesizare a Curţii Constituţionale*, in the Romanian Pandects no. 1/2011, page 75).

[8] For an examination of the causes regarding the lack of unity of the judicial practice, see M.A. Hotca, *Discussions regarding the causes of the non-unitary legal practice in Romania*, LESIJ nr. XVII, Vol. I/2010, page 23.

victims of the infractions of insult and calumny have no real and adequate possibility to judicially benefit from their dignity – the supreme value guaranteed by the Fundamental law”[9].

Usually in practice, the decisions of the court of contentious constitutional are rigorously observed by the courts of law. Nevertheless, there are exceptional situations when these decisions were disregarded by a number of courts of law. It concerns mainly the High Court of Cassation and Justice that ignored certain decisions of the Constitutional Court.

The last resolution through which the supreme court disregarded a decision of the Constitutional Court is Decision no. 8/2010 delivered by the United Sections of the High Court of Cassation and Justice through which it was admitted the appeal in the interest of the law declared by the general prosecutor of the Prosecutor’s Office with the High Court of Cassation and Justice and the information of the Management board of the Prosecutor’s Office with Bucharest Court of Appeal in the sense that the “incrimination norms of insult and calumny contained by art. 205 and art. 206 of the Penal code, as well as the provisions of art. 207 of the Penal code regarding the evidence of truth repealed through the provisions of art. I item 56 of Law no. 278/2006, the provisions declared unconstitutional through decision no. 62 on January 18th, 2007 of the Constitutional Court are not in force”[10].

This decision that was not published in the Official Gazette can not be analyzed from the perspective of the considerations, but exclusively from the point of view of its apparatus. But, based on the reasons contained in the memoir of appeal in the interest of the law and considering the grounds of Decision no. 62/2007, including the separate opinion and the one concurrent to this one, we can make a prediction in this sense[11]. A few considerations contained in the two separate opinions to the decision from above are relevant.

So, in the separate opinion expressed by judges I. Vida and K. Gabor, it is stipulated that “The decision to which it refers the current separate opinion was delivered within the precise a posteriori control of constitutionality. Art. I item 56 of Law no. 278/2006 has produced legal effects since the coming into force date of the law; after this date, it was no longer possible to hold responsible those that had committed the deeds stipulated by the former articles 205 and 206 of the Penal code. The decision of the Constitutional Court that determines through its effects the suspension of the effects of the legal norm declared as unconstitutional leads to the re- coming into force of the provisions of art. 205 and 206 of the Penal code on the date of its publication in the Official Gazette of Romania, Part I, which is equivalent to the re-incrimination of the deeds of insult and calumny, incrimination of which the lawgiver is exclusively competent. Under such conditions, the Constitutional Court becomes positive legislator, a right that is not given to it neither by the Constitution nor by it own organic law”.

In the concurrent opinion of judge V. Stănoiu it is shown: “A close examination of the reasons brought in favor of this point of view (according to which the Constitutional Court can not alter or complete the legal norms – n.n.) entitles serious reserves with regard to it.

Because, on the one side, through the effect of finding the unconstitutionality of the repealed provisions, the same provisions that had been repealed and not the new ones are coming into force again, it is difficult to sustain that the Court arrogates itself the capacity of positive lawgiver in this way.

As long as the coming into force again of the repealed provisions represents just a mediated effect of the decision of the Court to find the unconstitutionality of the repealed provisions and not a direct effect of this one, there are not enough grounds for the presented thesis.

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[9] Published in the Official Gazette no. 104 on February 12th, 2007.

[10] www.scj.ro.

[11] See also Î.C.C.J., criminal section, decision no. 2203/2010, with a note by E.M. Nica, in the Romanian Pandects no. 1/2011, page 173.

At last, under the conditions under which the interdiction to alter and complete set by art. 2 paragraph (3) of Law no. 47/1992 refers exclusively to the provisions subject to control, and in the present cause, the object of the control is the repealing provision, while the provisions repealed and come into force again as a result of finding the unconstitutionality of the former are subject to alteration and completion and the assumed violation of the legal text mentioned can not be retained".

Analyzing the lawfulness of the two decisions mentioned above, we consider that they both are contrary to the Constitution and the norms in the field. Decision no. 8/2010 of the United Sections of the High Court of Cassation and Justice is contrary to art. 147 paragraph (4) of the Constitution that orders that **the decisions of the Constitutional Court should be generally obligatory**.

But at its turn, the Constitutional Court through Decision no. 62/2007 disregarded its constitutional competence, the provisions of Law no. 47/1992, as well as Law no. 24/2000. According to art. 2 paragraph (3) of Law no. 47/1992, the Constitutional Court pronounces itself on the constitutionality of the acts about which it was informed **without being able to alter or complete** the provisions subject to control. Practically, the only possible legal intervention of the Constitutional Court on the legal norms subject to the constitutionality control is **to find** their **unconstitutionality**. Such a finding is similar to the repealing and according to art. 64 paragraph (3) of Law no. 24/2000, the repealing of a provision or of a norm has a definitive character. **It is not allowed to reinforce the initial norm** by repealing a previous repealing act. The exceptions are the provisions of the Government ordinances that stipulated repealing norms and were rejected by the Parliament through law.

2. Suggestions regarding the assuring of the judicial practice unity

2.1. Widening of the domain of the courts and specialized panels

The widening of the domain of the specialized courts and panels is imperative because, as it is shown in the presentation of reasons of the suggestions made within the project "The jurisprudence unification of the courts of law and prosecutor's offices in Romania", the specialization represents a simple and efficient method for the promotion of a non- contradictory and quality judicial practice. The extension of the domain of the specialized courts to the entire system of courts of law would make the files referring to the specialized domain to be settled down by a limited number of judges. So, the contradictory judicial practice between the various panels of the same court would be, if not excluded, at least rarely encountered[12].

On the other side, the specialization will increase both the judge's capacity to solve the causes in a professional manner and the possibility to solve them in a shorter period of time.

2.2. Alteration of the provisions of Law no. 24/2000

Many of the law matters settled down differently in the judicial practice are determined by the violation of the rules stipulated by Law no. 24/2000 regarding the norms of legislative technique. Among the norms of legislative technique violated, it is: the violation of the rule that forbids the spreading of the regulation with the same object in more norms; the disregard of the rule that binds to the integration of the new norms in the ensemble of the legislation; the overlooking of the rules referring to the clarity and precision of the used language, etc.

[12] Within this bill, the authors suggest that it should be set up specialized panels made out of three judges in the four sections of the High Court of Cassation and Justice and within the sections of the courts of appeal. It is also mentioned that the Management Collages of the tribunals and courts of law can order the setting up of specialized panels.

Such violations of the norms regarding the legislative technique can be avoided through the alteration of Law no. 24/2000 in the sense of stipulating the obligatory character of the notice of the Consulting Council with regard to the observance of the norms of legislative technique for any other initiators of norms, except for the members of the Parliament.

Another suggestion that has in view the alteration of this law refers to the setting up, in charge of the Ministry of Justice, of the obligation to identify the legal norms that generate the non- unitary judicial practice and to draw up the norms that should contain legal interpretative norms in all the cases in which it is found that certain legal norms were interpreted and applied differently by the judicial organs.

We consider that, within Law no. 24/2000, it would be useful to be inserted certain rules that have to be observed on the occasion of drawing up the norms, among which: the social interest; the correlation with internal regulations; the harmonization of the national legislation to the European legislation and the international treaties to which Romania is a party; the harmonization to the jurisprudence of the European Court of Human Rights, etc.

2.3. Alteration of the provisions of Law no. 73/1993

Considering the part of the Legislative Council, dedicated by the fundamental law, of “consulting specialty organ of the Parliament that approves the bills for the purpose of systemizing, unifying and coordinating the entire legislation”, we consider that in Law no. 73/1993 for the setting up, organization and functioning of the Legislative Council, it should be inserted provisions according to which the Legislative Council should have in its competence also the systemizing, unifying and correlation of the legislation of Romania.

Such legal provisions are not against the provisions of the Constitution because this one does not forbid this thing. We consider that, by attributing such competences to the Legislative Council, it would mean just the systemizing, unifying and coordinating of the legislation of Romania. The lacking by the law of such a competence that would regulate the organization and functioning of the Legislative Council is at least partially „explainable” also by the lack of unity of the judicial practice in Romania, because the judges dispose of an unsystematized, uncorrelated and often unclear legislation in terms of language.

2.4. Institutionalization of the work group for the uniformity of the judicial practice within the Superior Council of Magistracy

Among the measures that would contribute to the assuring of the jurisprudence stability and unity, we estimate that it is also the institutionalization of the work group for the uniformity of the judicial practice within the Superior Council of Magistracy. This work group made out of representatives of the appeal courts and members of this judicial body functioned within the Superior Council of Magistracy until 2010. Within the above- mentioned group, it was analyzed matters of law that had been differently settled down in the judicial practice and, as a result of the discussions, it was drawn up a document containing the solutions suggested by the commission.

We believe that, within the Superior Council of Magistracy, it should be stipulated by law a commission that should have as attribution the analysis of the non- unitary judicial practice, because the activity of the work group that functioned until 2010 was a useful one for the Romanian judicial system.

2.5. Reinforcement of the part of the People’s Attorney in the matter of identifying the non- unitary judicial practice

Through Law no. 202/2010, the lawgiver stipulated among the duties of the People’s Attorney also „the duty to ask the High Court of Cassation and Justice to pronounce itself on matters of law that had been differently settled down by the courts of law”.

It is obvious that through these legal stipulations, the People's Attorney obtained an efficient legal instrument through which it could contribute to the defense of the rights of the natural persons by assuring the foreseeableness of the act of justice.

In order to be able to carry out the above- mentioned function, we nevertheless consider that these stipulations have to be altered or completed. We take into consideration the extension of the cases for which the citizens can inform through petitions the People's Attorney by adding the hypothesis when the non- unitary judicial practice is invoked. Besides, the Constitution establishes (art. 58) that the People's Attorney has the part to „defend the rights and liberties of the natural persons"[13].

Conclusions

Based on those presented above, we conclude that, although there were made steps in order to assure the unity and stability of the judicial practice in Romania, neither the entire distance was covered nor the route was the right one in all the cases.

Without pretending to have the optimal solutions, in the present study we suggested certain legal instruments that, along with those already existing, we consider to be capable to diminish, within acceptable limits, the lack of unity of the judges' solutions in the similar law problems.

We believe that, along with the appeal in the interest of the law, the regulation of some courts of law and specialized panels, the alteration of Law no. 24/2000 and Law 73/1993, the setting up of a commission with competence in examining the non- unitary judicial practice, as well as the reinforcement of the part of the People's Attorney will contribute to the stability and predictability of the act of justice in Romania.

On the other side, the list of the legal instruments for this purpose remains open and we are convinced that the specialists in the field will bring up for discussion also other suggestions. But what it is important at last is that the lawgiver should have the understanding to choose the most efficient instruments for the judicial system in our country.

References

- Neagu, *Tratat de drept procesul penal. Partea specială,* Global Lex Publishing house, Bucharest, 2007;
- D.C. Dănişor, *Mic ghid de sesizare a Constitutional Court*, in the Romanian Pandects no. 1/2011;
- D. Lupaşcu, *Recursul în interesul legii în proiectele noilor coduri de procedură*, LESIJ no. XVI, Vol. I/2009;
- M.A. Hotca, *Discussions regarding the causes of the non-unitary legal practice in Romania*, LESIJ no. XVII, Vol. I/2010;
- E.M. Nica, *Notă la Î.C.C.J., secția penală, decision no. 2203/2010*, in the Romanian Pandects no. 1/2011.

[13] According to art. 15 paragraph (1) of Law no. 37/1997, the petitions to the institution of the People's Attorney have to be in writing and to contain the name and domicile of the natural person trenched upon its rights and liberties, the violated rights and liberties, as well as the administrative authority or the public clerk in question. The applicant has to prove the delay or the refusal of the public administration to settle the legal petition.

THE ENTERPRISE - THE LEGAL FORM FOR CARRYING ON AN ACTIVITY HAVING A PROFESSIONAL NATURE

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Abstract:

The new Romanian Civil Code has institutionalised a new conception regarding the regulating system for civil and commercial legal relations. Thus, new concepts emerge to fit the new conception, concepts regarding to the persons, the professionals, and the carrying on of an organised and systematised activity that qualifies such activity as having a professional nature. As one can find the new civil code has changed the conception regarding the enterprise, as it resulted from the actual commercial code. The operation of an enterprise will represent the legal form of carrying on an activity having a professional nature.

Keywords: *enterprise, organised activity, professionals, traders, new civil code*

1. Introduction.

The commercial code now in force qualifies the enterprise as a trading deed. According to the article 3 in the Commercial Code there are trading deeds any furnishing enterprises, public performance enterprises, commission enterprises, agencies and business offices, construction enterprises, factory, manufacturing and printing enterprises, publishing house, book and art objects selling enterprises, personnel or goods transport enterprises, etc.

There was specified that the listing of the trading deeds in the article 3 in the Commercial Code has a declarative nature, and not a limiting one.

As the commercial code regulates enterprise types, the doctrine was preoccupied with giving a general definition of the enterprise.

Within the classic conception of the commercial law the enterprise was defined as an economic organism led by a person called an entrepreneur, which combines the forces of nature with the capital and the labour for the purpose of producing goods and services[1].

Within the modern doctrine of the commercial law was attempted the grounding of a new definition of the enterprise. It was considered that within the traditional conception the material side is too much emphasised, the enterprise being only defined as a group of goods the entrepreneur allots to the carrying on of the commercial activity, without a reference to the human collective carrying on the activity. Within the proposed definition the primordial element has to be the subjective and social one. Therefore the enterprise has to be defined as a human group being coordinated by the organiser for the purpose of carrying on a commercial activity[2].

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[1] Please refer to G. Ripert, R. Reblot, Traite de droit commercial *(Commercial Law Tractate – in French in the Romanian version of the text)*, Tome 1, 18eme, L.G.D.J. Paris 2001, pages 227-228, I.L. Georgescu, Drept comercial roman *(Romanian Commercial Law)*, vol. 1, Ed. Socec, Bucharest, 1946, page 201 and the following.

[2] Please refer to O. Căpățână, Caracteristicile generale ale societătilor comerciale *(The General Features of Trading Companies)*, in the Dreptul magazine, no. 9-12/1990, pages 28-29.

There was noted that the definition of the enterprise that mainly emphasises the subjective and social element is not of nature to clarify the notion of enterprise.

Starting from the finding that a general definition of the enterprise cannot be given based on one criterion only, within the doctrine was proposed a definition that considers the classic, economic meaning of the notion of enterprise, as well as certain elements that are specific for trading deeds. Within such conception the enterprise appears as an economic and social organism; it represents an autonomous organisation of an activity by the entrepreneur, by means of the production factors (the forces of nature, the capital, and the labour), at their own risk, for the purpose of producing goods, executing works, and rendering services, in order to obtain a profit.

As a conclusion, within the conception of the Romanian commercial code, the notion of enterprise designates an activity being organised by an individual or an entity in order to produce goods and services, and not a law subject. The capacity of law subject lies with the entrepreneur, the one who organises at their own risk the activity. The same may be an individual, in the case of the individual enterprise, or a trading company, in the case of the corporate enterprise.

2. Under the influence of the doctrine opinions definitions of the enterprise were also given in certain normative documents.

Thus the article 2 in the Law no. 346/2004[3] defines the enterprise as any form of organising an economic activity that is autonomous as concerns its patrimony, and is authorised under the laws in force to perform trading acts and deeds for the purpose of obtaining a profit under competition conditions.

Then, according to the article 2 letter f in the Emergency Ordinance of the Govern no. 44/2008, the economic enterprise is the economic activity being carried on in an organised, permanent, and steady manner, in combining financial resources, attracted labour, raw matters, logistic and computer means, at the risk of the entrepreneur, and under the conditions being provided for by the law[4].

3. The new Romanian Civil Code, which was enacted by means of the Law no. 287/2009[5], has institutionalised a new conception regarding the regulating system for civil and commercial legal relations. The civil code has established the principle of the unity of regulation for the patrimonial and non-patrimonial legal relations.

According to the article 3 in the Civil Code, the provisions in the civil code are also applicable to the relations between professionals, as well as to the relations between the same and any other civil law subjects.

Within the conception of the civil code a professional is the one who is operating an enterprise, and by operating an enterprise is understood the systematic exercising by one or several persons of an organised activity consisting of producing, managing, or alienating goods, or rendering services, irrespective of the fact that the same has or not for purpose to obtain a profit.

As one can find, within the conception of the new civil code the carrying on of an organised and systematised activity qualifies such activity as having a professional nature, and the person who is carrying it on has the capacity of a professional. From those above results that the civil

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[3] The Law no. 346/2004 regarding the stimulating of the establishing and developing of small and medium-sized enterprises (M.Of. *(Monitorul Oficial al Romaniei – The Official Journal of Romania)* part I no. 681/29.07.2004).

[4] The O.U.G. *(Emergency Ordinance of the Govern)* no. 44/2008 regarding the carrying on of economic activities by authorised individuals, individual enterprises, and family enterprises (M.Of. *(Monitorul Oficial al Romaniei – The Official Journal of Romania)* no. 328/25.04.2008).

[5] Published with the M.Of. *(Monitorul Oficial al Romaniei – The Official Journal of Romania)* no. 511 of the 24.07.2009.

code has fundamentally changed the conception regarding the enterprise. While under the conditions of the commercial code the enterprise represents a category of the objective trading deeds, the civil code has generalised the notion of enterprise. According to the civil code, the operation of an enterprise represents the legal form of carrying on an activity having a professional nature.

4. Based on the article 3 in the Civil Code the enterprise is a systematically organised, autonomous activity being carried on by a person (the entrepreneur) at their own risk, which consists of producing goods, executing works, and rendering services, irrespective of the fact that the same has or not for purpose to obtain a profit.

The definition of the enterprise has a general nature; it regards any activity being carried on that has a professional nature, notwithstanding the object and the purpose of such activity. From such definition arise the features of the enterprise.

The notion of enterprise designates an activity being systematically organised, which is carried on permanently, and according to own rules.

The organising of the activity has an autonomous nature; the one who organises the activity is independent as to making the decisions.

The activity is carried on by one or several persons, at their own risk. The persons who are carrying on the activity have the capacity of professionals. The object of the organised activity is to produce goods, execute works, or render services. The purpose of carrying on the activity may be to obtain a profit, or to achieve a non-profit purpose.

5. In characterising the enterprise the essential criterion is the purpose of the person or the persons who are organising the activity.

The carrying on of an organised activity, which has a professional nature, for the purpose of obtaining a profit, is inherent to the economic (commercial) activity. This means that an enterprise the purpose of which is to obtain a profit is an economic, commercial enterprise, and reversely, an enterprise having a non-profit purpose is a civil (non-commercial) enterprise.

6. A definition of the economic enterprise was given, as we stated above, by the article 2 letter f in the Emergency Ordinance of the Govern no. 44/2008. We feel however that a definition of the economic enterprise should also retain the elements of the general definition of the enterprise. The economic (commercial) enterprise is an economic activity being carried on in an organised, permanent, and systematic manner, which is carried on by one or several persons (traders) at their own risk, and consists of producing and circulating goods, executing works, and rendering services, for the purpose of obtaining a profit.

From the definition arise the features of the economic (commercial) enterprise.

The activity of the enterprise is an economic activity. According to the article 2 letter a in the Emergency Ordinance of the Govern no. 44/2008 the economic activity is the organised industrial and commercial activity being carried on in order to obtain goods or services the value of which can be expressed in money, and which are intended for sale or exchange within the organised markets, or towards determined or determinable beneficiaries, for the purpose of obtaining a profit.

The activity of the economic enterprise is carried on in an organised, permanent, and systematic manner, by one or several persons, at their own risk. Such persons may be individuals or legal entities holding the capacity of a trader. Individuals may carry on economic activities under the following forms: individually and independently, as authorised individuals, as an

entrepreneur holding an individual enterprise, as a member of a family enterprise (the article 4 in the Emergency Ordinance of the Govern no. 44/2008).

The object of the economic activity consists of producing and circulating goods, executing works, and rendering services.

The purpose of the economic activity is to obtain a profit.

The carrying on of an economic (commercial) activity imposes the conclusion of legal documents, and the performance of legal deeds, and of economic operations.

As they regard an economic (commercial) enterprise, such legal documents, legal deeds, and economic operations may be conventionally called commercial legal acts.

The commercial legal acts are the legal documents, the legal deeds, and the economic operations by means of which a trader carries on economic activities regarding the producing and circulating of goods, the execution of works, and the rendering of services, within an economic (commercial) enterprise.

From the definition arise the features of the commercial legal acts.

The commercial legal acts are the legal acts being imposed by the operation of an economic (commercial) enterprise.

Such legal acts are performed by professionals being called traders.

The commercial legal acts have for object the producing and circulating of goods, the execution of works, and the rendering of services.

The commercial legal acts have for purpose the obtaining of a profit.

Under the conditions of the new civil code the legal treatment of the commercial legal acts is the same as the one of the civil legal acts.

Currently the regulation in the new civil code only includes few provisions derogating from the principle of the unity of regulation for the civil legal relations and the commercial relations.

Thus, as regards the representation, the article 1297 in the Civil Code provides for that: “(1) The agreement having been concluded by the representative within the limits of their granted powers, when the contracting third party was not aware, and ought not be aware of the fact that the representative was acting in such capacity, shall only bind the representative and the third party unless otherwise provided for by the law.

(2) However, should the representative, when contracting with the third party within the limits of their granted powers on behalf of an enterprise, claim that they are the holder of the same, the third party having subsequently found the identity of the true holder may also exercise against the latter the rights they have against the representative.”

Then, as regards the solidarity, the article 1446 in the Civil Code provides for that: “The solidarity is presumed between the debtors of a liability having been contracted in exercising the activity of an enterprise unless otherwise provided for by the law.”

Finally, as regards the late performance of the obligations the article 1523 paragraph 2 letter d in the Civil Code provides for that: “The debtor is notified at law in the case where an obligation to pay an amount of money, which was undertaken in exercising the activity of an enterprise, was not fulfilled.”

7. The civil (non-commercial) enterprise is an activity being systematically organised, which is carried on by one or several persons, at their own risk, and has for object legal acts and deeds having a civil nature, without having for purpose to obtain a profit.

The activities representing the object of the civil (non-commercial) enterprise are the activities being carried on within the liberal professions (lawyers’, doctors’ activities, etc.).

The persons carrying on the activity have the capacity of professionals, and are carrying on such activity under the structural law that regulates the legal treatment of the relevant profession.

Such persons are making available for the concerned persons their knowledge and competence, in consideration of which they receive fees, and not a profit.

The legal issues the operation of a civil (non-commercial) enterprise involves are civil legal acts, and are regulated under the special law.

8. Conclusions. Under the conditions of the new civil code, the enterprise is no longer a trading deed, but it represents the legal form for carrying on an economic or civil activity having a professional nature.

References

- G. Ripert, R. Reblot, Traite de droit commercial *(Commercial Law Tractate – in French in the Romanian version of the text)*, Tome 1, 18eme, L.G.D.J. Paris 2001;
- I.L. Georgescu, Drept comercial roman *(Romanian Commercial Law)*, vol. 1, Ed. Socec, Bucharest, 1946;
- O. Capatana, Caracteristicile generale ale societatilor comerciale *(The General Features of Trading Companies)*, in the Dreptul magazine, no. 9-12/1990;
- Law no. 346/2004 regarding the stimulating of the establishing and developing of small and medium-sized enterprises (M.Of. *(Monitorul Oficial al Romaniei – The Official Journal of Romania)* part I no. 681/29.07.2004).
- O.U.G. *(Emergency Ordinance of the Govern)* no. 44/2008 regarding the carrying on of economic activities by authorised individuals, individual enterprises, and family enterprises (M.Of. *(Monitorul Oficial al Romaniei – The Official Journal of Romania)* no. 328/25.04.2008).
- Law no. 287/2009, Published with the M.Of. *(Monitorul Oficial al Romaniei – The Official Journal of Romania)* no. 511 of the 24.07.2009.

THE DETERMINATION AND THE IMPACT OF THE PREFIGURED MODIFY OF ROMANIAN LABOR CODE ON THE LABOR INDIVIDUAL AND COLLECTIVE RELATIONSHIPS

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Abstract

The Romanian Labour Code – Act no 53/2003 – has been modified several times during its application. The most important modifications were aiming at the following aspects: the termination of the labour contract (especially the individual and collective dismissal and the rightful termination of the contract), the individual labour contract for a limited duration, the work time and the rest time. These modifications were punctual and determined by the necessity of assuring a balance between the position of the employees and the one of the employers. A lot of critics have been formulated by the representatives of the employers after the Labour Code got in force. They consider that the actual regulation is too restrictive for them. It is still extremely favourable for the employees, who are protected by the Code even in situations which are not necessary to assure this protection (professional evaluation, individual dismissal, disciplinary procedure and liability). These were the reasons which determined a constant pressure from the employer's trade unions in relation with the Government in order to modify those parts of the Code which are too favourable to the employees. The draft of the modification act includes the following major aspects: the written form of the individual labour contract; the non-competition clause; the unilateral modification of the individual labour contract by the employer; the individual dismissal; the work time; the collective bargaining and the collective contracts; the material liability of the employee; the labour jurisdiction.

Keywords: *Labour Code, labour relationship; individual labour contract; dismissal; disciplinary liability; material liability; non-competition clause.*

1. Introduction

One of the most important field of regulation in Romanian law system is the labour legislation. According to art. 1 paragraph 3 of Romanian Constitution, "*Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed*".

The social character of the Romanian state had determined the special protection of the labour – in generally – and of the workers, especially. The art. 41 from the Fundamental Act – suggestively entitled "Labour and social protection of labour" – settle:

"(1) The right to work shall not be restricted. Everyone has a free choice of his/her profession, trade or occupation, as well as work place.

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(2) All employees have the right to measures of social protection. These concern employees' safety and health, working conditions for women and young people, the setting up of a minimum gross salary per economy, weekends, paid rest leave, work performed under difficult and special conditions, as well as other specific conditions, as stipulated by the law.

(3) The normal duration of a working day is of maximum eight hours, on the average.

(4) On equal work with men, women shall get equal wages.

(5) The right to collective labour bargaining and the binding force of collective agreements shall be guaranteed.".

Based on these principles, the Labour Code – Act no. 53/2003[1] – was built and represent the regulatory body of the labour legislation. Since the first period of application, it was obvious that the regulation is not equilibrate. The rights and the social protection of the employees were (and mostly, are) much more represent in the Law then the rights and legal recognition of the employers' interests.

It was the reason why the Labour Code was successively modified[2]. The Romanian Legislative organisms – both Parliament and Government – had tried to determine a necessary equilibrium between the rights and interests of the labour relations parts: employees and employers.

The global financial crisis and its reflection in Romanian economy and social life has shown that the economic productivity and the labour force flexibility are far to law compared to other countries (form European Union and beyond the European Union).

On this background, the social partners – trade unions, employers' representatives and the representatives of the Government – decided to identify the possible modification of the labour legislation, especially of the Labour Code, in order to achieve a higher performance and flexibility of the labour. Of course, the opinions are not convergent, because the trade unions wants to preserve the majority of the actual legal solutions, which assure the "social status" of the employees.

The results of the consultations between the social partners determined few drafts of the Labour Code modifications, but the Government had recently announced that intends to promote a legislative initiative in the Parliament, based on its political responsibility.

We had compared the different forms of the drafts and they include the following major aspects: the written form of the individual labour contract; the non-competition clause; the unilateral modification of the individual labour contract by the employer; the individual dismissal; the work time; the collective bargaining and the collective contracts; the material liability of the employee; the labour jurisdiction.

2. A critical examination of the proposed major modification of the Labour Code

a) The written form of the individual labour contract

According to art. 16 of Labour Code, in the actual form:

"*(1) An individual labour contract shall be concluded based on the parties' consent, in writing, in Romanian. The employer has the obligation to conclude the individual labour contract*

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[1] Published in the Official Gazette of Romania, part I, no. 72 of 5th February 2003.

[2] By the: Law No. 480/2003; Law No. 541/2003; Government Emergency Ordinance No. 65/2005; Law No. 241/2005; Law No. 371/2005; Government Emergency Ordinance No. 55/2006; Law No. 94/2007; Government Emergency Ordinance No. 82/2007; Law No. 237/2007; Law No. 202/2008; Government Emergency Ordinance No. 148/2008; Government Emergency Ordinance No. 28/2009; Government Emergency Ordinance No. 37/2009.

in written form. Any employer who is a legal entity, any natural entity authorised to be carry out an independent activity, as well as the family association shall be under the obligation to conclude the individual labour contract, in written form, prior to beginning any labour relationship.

(2) If the individual labour contract has not been concluded in written form, the presumption is that it has been concluded for an unlimited duration, and the parties may make the proof of contract provisions and the work performed by means of any other piece of evidence.

(3) The work performed based on an individual labour contract shall give the employee length of service"[3].

The Government intents to abrogate the second paragraph of the art. 16, correlated to the intention of the legislative to determine the criminal liability of the person – individual or company – who will use labour force without signing a written labour contract. In present, if an employer doesn't conclude a written individual labour contract, only material and/or administrative liability are engaged.

b) The non-competition clause

The regulation of the non-competition clause in the Labour Code are the following:

"*ART. 21*

(1) Upon the conclusion of the individual labour contract or throughout its execution, the parties may negotiate and include in the contract a non-competition clause under which the employee shall be under the obligation, after contract termination, not to perform, for his/her own interest or that of a third party, an activity which is competing with the one performed for his/her employer, in exchange for a monthly non-competition emolument which the employer undertakes to pay for the entire non-competition time period.

(2) The non-competition clause shall only take effect if the individual labour contract clearly stipulates the activities the employee is prohibited from performing from the date of contract termination, the amount of the monthly non-competition emolument, the time period for which the non-competition clause causes its effect, the third parties on behalf of whom the performance of the activity is being prohibited, as well as the geographic area where the employee might be in actual competition with his/her former employer.

(3) The monthly non-competition emolument due to the employee shall not represent wages, shall be negotiated and shall be at least 50% of the average gross wages in the last 6 months prior to the date of termination of the individual labour contract was terminated or, if the duration of the individual labour contract was less than 6 months long, of the average gross monthly wages due to him/her for the contract period.

(4) The non-competition emolument shall represent an expense made by the employer, shall be deductible upon the calculation of the taxable profit, and the tax shall be charged from the beneficiary natural person, under the law.

ART. 22

(1) The non-competition clause may cause effects for a period not exceeding 2 years as from termination date of the individual labour contract.

(2) The provisions of paragraph (1) shall not be applicable when the termination of the individual labour contract has taken place rightfully, except for the cases provided in Article 56 d), f), g), h) and j), or when it has been based on the employer's initiative for reasons which not pertaining to the employee' person.

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[3] Ion Traian Ştefănescu, *Tratat teoretic şi practic de dreptul muncii* (Bucharest, Universul Juridic, 2010), p. 252-258; Alexandru Ţiclea, *Tratat de dreptul muncii* (Bucharest, Universul Juridic, 2009), p. 412-414

ART. 23

(1) The non-competition clause may not have as effect the employee being absolutely prohibited from exercising his/her profession or specialization.

(2) Based on a notification by the employee or the territorial labour inspectorate, the competent court of law may diminish the effects of the non-competition clause.

ART. 24

In the event of the employee having violated, in ill will, the non-competition clause, he/she may be obliged to return the emolument and, as applicable, pay damages corresponding to the prejudice caused by him/her to the employer”[4].

The principals modifications of the non-competition clause regulation are referring to the possibility of the employer:

- to increase the period of the former employee’s interdiction to work for another employer or to work on an individual and independent form in an activity related to the activity of the former employer; the actual period of two years (art. 22 paragraph 1);

- to negotiate the amount which the former employee will receive in change of the respect of the non-competition obligation; in the actual form of the Code, the employer has no possibility to bargain an amount under the minimum value mentioned by the art. 21 paragraph 3 – which is at least 50% of the average gross wages in the last six months prior the date of termination of the individual labour contract was terminated or, if the duration of the individual labour contract was less than six months long, of the average gross monthly wages due to the employee for the contractual period;

- to unilaterally denounce the non-competition clause, during the period of its application, in order to stop the payment of the former employee; in the actual regulation, if the former employee notify the former employer (the debtor of the payment of the non-competition emolument) its position of entire respect of the non-competition obligations, the former employee has to pay the non-competition emolument all the period negotiated with the employee (maximum two years), even the employer has no or limited interest in respect by the former employee of the non-competition obligation. It is possible to have such positions because the non-competition clause is negotiated at the conclusion of the individual labour contract and produce its specific effects only after the termination of the contract. Between the two mentioned moments it is possible that the initial interest of the employer to assure that the employee will respect the non-competition obligation could vanish.

c) The trial period

One of the most sensitive modification of the Labour Code implies the modification of the norms having object the trial period. In the actual settlement, the norms are the following:

“*ART. 31*

1) In order to check the abilities of the employee, on the conclusion of the individual labour contract, a trial period not exceeding 30 calendar days may be established for executive positions, and not exceeding 90 calendar days for management positions.

(2) The check of professional abilities when employing disabled persons shall be based only on a trial period of not exceeding 30 calendar days.

3) As far as unskilled workers are concerned, the trial period shall be exceptional and shall not exceed 5 workdays.

4) Graduates of higher-education institutions shall be employed, at the beginning of the employment in their profession, based on a trial period not exceeding 6 months.

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[4] Ion Traian Ştefănescu, *op. cit.*, p. 312; Alexandru Ţiclea, *op. cit.*, p. 405-409

4^1) Throughout the trial period or at the end of it, the individual labour contract may only be terminated, based on a written notice, following the initiative of either party.

5) During the trial period, the employee shall enjoy all the rights and have all the obligations stipulated in the labour legislation, the applicable collective labour contract, the internal regulations, as well as the individual labour contract.

ART. 32

1) During the progression of an individual labour contract, there may only be one trial period.

2) As an exception, an employee may be subject to a new trial period if he/she starts up in a new position or profession with the same employer, or is to perform his/her activity in a work place under difficult, harmful, or dangerous conditions.

(3) The failure to inform the employee, before the conclusion or amendment of the individual labour contract, about the trial period, within the term set under Article 17 (4), causes the employer to lose the right of checking the employee's abilities by such means.

4) The trial period shall represent length of service.

ART. 33

It is prohibited to successively employ more than three persons for trial periods for the same position".

The modification aim at the following results:

- the Government intends to increase the trial period for all employees' positions categories (executive positions, management positions) from 30 calendar days up to 90 calendar days for the executive positions and from 90 calendar days up to 180 calendar days for the management positions; the interest of the Government is here related to the interest of the employers representatives, because throughout the all trial period or at the end of it, the individual labour contract may only by unilaterally and unconditioned terminated by the employee, based on only a written notice (without the respect of all formal and material conditions asked by the law related to the dismissal of the employee) – art. 31 paragraph 4^1;

- the Government wants to abrogate the stipulation of art. 33 – which obliges the employers not to hire more than three persons for trial periods for the same position; if the legal provision will be abrogated, the employers will have the legal permission to conclude more than three individual labour contracts for the same position, determining the termination of each one based on the written notice addressed to the employee at the end of the each trial period; in this way, it is possible to have an undetermined number of employees hired successively on the same position with the permission of the employer to fire them without the respect of the dismissal's conditions.

d) The individual dismissal

In the actual regulation of the individual dismissal – an unilaterally way of termination of the individual labour contract – the employer could determine the end of the labour relation only if is in one of the hypotheses which are settle by art. 61 and art. 65 from the Labour Code:

"*ART. 61*

The employer may order the dismissal for reasons pertaining to an employee's person under the following circumstances:

a) if that employee has perpetrated a serious departure or repeated departures from the work discipline regulations or those set by the individual labour contract, the applicable collective labour contract, or the internal regulations, as a disciplinary sanction;

b) if the employee has been placed under police custody for a period exceeding 60 days, under the terms of the Criminal procedure code;

c) if, following a decision of the competent medical examination authorities, physical and/or mental incapacity of that employee has been found, which prevents the latter from accomplishing the duties related to his/her current work place;

d) if the employee should not be professionally fit for his/her current position;

ART. 65

(1) The dismissal for reasons not pertaining to the employee's person shall represent the termination of the individual labour contract, caused by the suppression of that employee's position, for one or several reasons not related to the employee".

The Government representatives, including the Prime-Minister, affirmed that the restrictive way of the dismissal regulations is an factor which contributes to a low degree of efficiency of the employers activity, both in the public and private sectors of activity. This is the reason why the future solutions are in order to increase the flexibility of the labour relations and the accent in this matter to be put not on the social protection of the employees, but on the professionalism and efficiency of their activity.

The employer is suppose to have the legal permission to evaluate the activity of the employees and to determine the termination of the labour relation for the ones who do not fully respond to its economical interests.

The trade unions representatives affirmed that a such solution will determine an so called "salary slavery", because the employees will depends of the simple will of the employers: when an employee shall not be necessary anymore for the employer, the last one will denounce the contract without the possibility for the employee to defence.

e) The individual labour contract for a limited duration

The principle stipulated by the Labour Code in the matter of the individual labour contract's duration is that this contract should be concluded by its parts on an unlimited duration (art. 12 paragraph 1). The exception is the limited duration of the contract. Art. 80 regulates:

"*(1) As an exception to the rule stipulated under Article 12 (1), the employers may be permitted to employ, for the purpose and under the terms of the present code, personnel based on individual labour contracts for a limited duration.*

(2) An individual labour contract for a limited duration may only be concluded in a written form, expressly stating the duration it is being concluded for.

(3) An individual labour contract for a limited duration may be extended even after the expiry of the original delay, based on the parties' written consent, but only within the delay stipulated under Article 82 and no more than two times consecutively.

(4) No more than 3 successive individual labour contracts for a limited period may be concluded between the same parties, and only within the delay stipulated under Article 82.

(5) Individual labour contracts for a limited period concluded within 3 months from the termination of a prior labour contract for a limited period shall be deemed as successive contracts".

The situations which allow the employers to propose to the future employee a limited duration of the individual labour contract are settled by the art. 81. They are the following:

- replacement of an employee in the event his/her labour contract is suspended, except when that employee participates in a strike;
- a temporary increase in the employer's activity;
- progression of some seasonal activities;
- if it is concluded based on some lawful provisions issued with a view to temporarily favouring certain categories of unemployed persons;

- hiring a person who, within 5 years from the hiring date, meets the terms of retirement for age limit;
- occupying an eligible position within the trade, employers' or non-government organizations, for the duration of the term of office;
- the hiring the retired persons who, under the law, may cumulate the pension and the wages;
- in other instances expressly stipulated by special laws or for the progression of works, projects, programs, under the terms set forth by the national and/or branch collective labour contract.

According to art. 82 paragraph 1, an individual labour contract for a limited duration may not be concluded for a period exceeding 24 months. If an individual labour contract for a limited duration is concluded with a view to replacing an employee whose individual labour contract has been suspended, the contract duration shall expire when the reasons having caused the suspension of the individual labour contract of the full employee have ceased to exist (paragraph 2 of the art. 82).

The Government intends to prolong the actual limit of 24 month up to 36 month, which represents an increase with 33% of the duration.

f) The duration of the work time

Art. 111 in its actual form regulate the maximum duration of the work time:

"*(1) The maximum lawful length of the work time shall not exceed 48 hours/week, including extra hours.*

(2) As an exception, the length of the work time, including the overtime work, may be extended over 48 hours/week, provided the average number of work hours, as calculated for a reference period of 3 calendar months, does not exceed 48 hours per week.

(2^1) For certain sectors of activity, units, or professions listed in the national sole collective labour contract, under applicable collective labour contract at the level of branch of activity, reference periods that exceed 3 months may be negotiated, without, however, exceeding 12 months.

(2^2) When establishing the reference periods stipulated under paragraphs (2) and (2^1), the length of one's annual rest leave and the instances when the individual labour contract is being suspended shall not be taken into account.

(3) The provisions of paragraphs (1), (2) and (2^1) shall not apply to young people who have not turned 18 years of age".

The Government doesn't intend to increase the maximum duration of the weekly work time – 48 hours – but wants to modify the second paragraph of art. 111, in order to prolong the reference period from the actual solution (three month) up to four month.

g) The collective bargaining and the collective labour contracts

The actual principle regulation of the labour bargaining and collective labour contracts is find on the art. 236-247 of the Labour Code.

"*ART. 236*

(1) The collective labour contract shall be the agreement concluded in a written form between the employer or the employers' organization, on the one hand, and the employees, represented by their trade unions or in any other manner stipulated by the law, on the other hand, in which clauses are set up concerning the work conditions, the wages, as well as other rights and liabilities deriving from the labour relationships.

(2) Collective negotiation shall be mandatory, except when the employer has less than 21 employees.

(3) When negotiating the clauses and concluding the collective labour contracts, the parties shall be equal and free.

(4) The collective labour contracts, concluded in compliance with the provisions of the law, shall constitute the law of the parties.

ART. 237

The parties, their representation, and the procedure for negotiating and concluding the collective labour contracts, shall be established under the law.

ART. 238

(1) The collective labour contracts shall not contain clauses which set up rights at a lower level than the one set up in the collective labour contracts concluded at a higher level.

(2) The individual labour contracts shall not contain clauses setting up rights at a lower level than the one set up in the collective labour contracts.

(3) When concluding a collective labour contract, the provisions of the law concerning the employees' rights shall constitute a minimum standard.

ART. 239

The provisions of the collective labour contract shall cause effects for all employees, irrespective of their date of employment or affiliation to a trade union.

ART. 240

(1) The collective labour contracts may be concluded at the level of the employers, branches of activity, or at a national level.

(2) The collective labour contracts may also be concluded at the level of groups of employers, hereinafter called groups of employers.

ART. 241

(1) The clauses of the collective labour contracts shall cause effects as follows:

a) for all employees of an employer, in the case of the collective labour contracts concluded at such level;

b) for all employees hired by employers that belong to the group of employers for which the collective labour contract has been concluded at such level;

c) for all employees hired by all the employers in the branch of activity for which the collective labour contract has been concluded at such level;

d) for all employees hired by all the employers in the country, in the case of the collective labour contract at national level.

(2) At each of the levels stipulated under Article 240, a single collective labour contract shall be concluded”.

The modification prefigured by the Government are in order to:

- increase the number of employees of the employers who are obliged to bargain from 21 up to 50;
- renounce at the mandatory provisions of the collective labour contract at national level.

In the actual form, the Labour Code determines a mandatory solution even for the employers who were not represented at the negotiation of the collective labour contract at national level. They have to respect all the content of the collective labour contract, without having the possibility to determine this content. The employers claimed that it is a excessive solution, and proposed to be abrogated. The Government representatives affirmed that the collective labour contract concluded at the branch level will become the rule in this matter. Each branch of activity will have its specific labour relations regulations.

h) The labour jurisdiction

An important modification of the rules of labour jurisdiction was already operated by the Act no. 202/2010, which modified the composition of the labour specialized panels: in the composition enters only one judge, not two, how was settled before the entered in force of the Act no. 202/2010.

An other modification which is prefigured is referring to the provisions of art. 287 from the Labour Code:

"*The employer shall be responsible for providing evidence in labour conflicts, being obliged to submit evidence in his defence by the first day of trial*".

The Government intends to renounce at this solution, in order to determine the application of common solution in a civil trial (art. 1169 Civil Code – the claimant shall be responsible for providing the evidences).

Conclusions

The modification of the Labour Code is a difficult and risky task for every part which is implicated in this process. One thing is certain: the modification is necessary in order to establish a functional regulatory settlement in the field of labour relations.

In this framework, the most important institutions which need to be modify are: the written form of the individual labour contract; the non-competition clause; the unilateral modification of the individual labour contract by the employer; the individual dismissal; the work time; the collective bargaining and the collective contracts; the material liability of the employee; the labour jurisdiction.

In the future, depending on the final form of these modifications, the specialists will be able to affirm their utility or, *a contraire*, the fact that one or more modification were useless or even had determined difficulties in application.

References

- Ion Traian Ștefănescu, *Tratat teoretic şi practic de dreptul muncii* (Bucharest, Universul Juridic, 2010).
- Alexandru Țiclea, *Tratat de dreptul muncii* (Bucharest, Universul Juridic, 2009).
- Law no. 53/2003 – The Labour Code
- Law No. 480/2003
- Law No. 541/2003
- Government Emergency Ordinance No. 65/2005
- Law No. 241/2005
- Law No. 371/2005
- Government Emergency Ordinance No. 55/2006
- Law No. 94/2007
- Government Emergency Ordinance No. 82/2007
- Law No. 237/2007
- Law No. 202/2008
- Government Emergency Ordinance No. 148/2008
- Government Emergency Ordinance No. 28/2009
- Government Emergency Ordinance No. 37/2009

CONSIDERATIONS REGARDING THE DEFINITION AND CLASSIFICATION OF COMMERCIAL INTERMEDIATION

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Abstract

The commercial intermediation is a complex juridical operation which includes a different number of juridical relationships that takes place between contractual partners either on a national or international level. These partners bare different naming due to their different set of rights and obligations set forth by the law or by the parties, and it is from this that the classification of the intermediation can be set forth. The commercial intermediation represents the activity that one person executes either in the name and on behalf of another person, or using its own name but on behalf of another person, or, finally, using its own name but on behalf of acting towards a common goal with the person who mandated her (the principal), in relation with who it is either a proxy or an independent intermediary, only negotiating or both negotiating and binding the principal. The purpose of the paper is to strictly define and set in order the various variations of the juridical operation that is the commercial intermediation, presented both in the light of the actual legal framework and also by reference to the New Civil Code. Also, the purpose is to highlight and systematize the contractual relationships from which the parties involved in a commercial intermediary operation may choose and the rights and obligations specific to each contract.

Keywords: *commercial intermediation, contract of mandate, contract of commission, agency contract, brokerage contract, franchise contract, exclusive distribution contract*

1. Introduction. The notion of commercial intermediation.

a) Intermediation – complex commercial operation

Commercial intermediation is a complex operation, which includes several legal relations concluded between its contractual partners, having various names and various capacities, carried out either inland or internationally.

Participants to legal relations arising out of intermediation contracts bear various names, depending on the actual contractual relation to which they participate, the capacities in which they act may range from that of mandator and mandatary (in the case of the contract of mandate), to that of principal and commission agent (in the case of the contract of commission), of consignor and consignee (in the case of the consignment contract), principal (client) and sender or shipper (in the case of the shipment contract), principal and agent (in the case of the agency contract), client and broker (in the case of the brokerage contract) etc.

Independently from the legal nature of each intermediation contract, a common feature of all forms of intermediation may be discovered. This discovered feature, common to all forms of intermediation, consists of the object of the intermediation, namely, in that the intermediary, by means of the rendered activity under a specific commercial intermediation contract, acts as an

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agent for particular commercial affairs between particular partners or on behalf of another person (client), in exchange for payment. This particularity gives the contracts, based on legal relations of commercial intermediation, an onerous feature[1].

Generically, intermediation contracts are contracts for services, the intermediation activity carried out under such contracts favour, especially commercially speaking, the exchange of goods and in general economic development.

b) Origin of commercial intermediation

The origin of commercial intermediation is to be found in the Middle Ages, when it was used every day for carrying out commerce practised at distance. In the 10th and 12th centuries in Italy and in Northern Europe drafts similar to those of the nowadays contract of commission appeared. Commerce at distance carried out on a daily basis by frequent exchanges occurring in European medieval fairs, represented the premise for the first forms of intermediation.

The fast-paced development of commercial transactions, occurring throughout Renaissance, lead to the necessity of adapting commercial transactions, in view of traders cooperating and improving the actual means of exchanging goods.

It was during this period that the commercial mandate was born[2]. However, along with it, as an expression of the expansion of the principle of free commerce, especially international commerce[3], other types of intermediation were encountered more and more often, similar to the nowadays commission and agency contracts.

Indeed, the ever higher complexity of the concluded operations and the obstacles, given the large geographical areas in which such commercial relations arose, along with the language and culture barriers and the significant differences in terms of laws, lead throughout time to the necessity of discovering some advantageous methods for traders to enter and expand in markets from other states, in order to conclude international contracts under easy terms and to maintain durable economic connections[4]. One method which was frequently resorted to as a result of international commerce developing was the execution of intermediation contracts namely contracts of commission.

Once with the development of international commerce, a tradesman entering a foreign market in which he could sell his goods had to be done, via persons they knew on the local market, who had earned their trust and were prestigious, thus procuring the popularization and personal guarantee of their products[5]. The persons in question, who became the intermediaries under the conventions they executed with foreign tradesmen, carried out the required precedent operations and effectively executed commercial contracts in their own name or on behalf of clients; the effects of such contracts reflected upon foreign tradesmen.

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[1] See R. Munteanu, *Intermediation contracts in Romanian foreign commerce* (*Contracte de intermediere în comerțul exterior al României*), Printing House of the Academy of the Romanian Socialist Republic, 1984, p. 138.

[2] See F.A. Moțiu, Commercial intermediation contracts without representation (*Contractele comerciale de intermediere fără reprezentare*), Lumina Lex Printing House, Bucharest, 2005, p. 24-25.

[3] For a more detailed analysis of the principle of free commerce, see Dragoş A. Sitaru, International Commerce Law. Treaty. General Part (*Dreptul comerțului internațional. Tratat. Partea generală*), Universul Juridic Printing House, Bucharest, 2008, p. 20-24.

[4] V. Anghelescu, Al. Deteșanu, E. Hutira, International Commercial Contracts (*Contracte comerciale internaționale*), Printing House of the Academy of the Romanian Socialist Republic, Bucharest, 1980, p. 106-113.

[5] See R. Petrescu, General theory of commercial obligations. General Part (*Teoria generală a obligațiilor comerciale. Partea generală*), Romfel Printing House, Bucharest, 1994, p. 185.

c) Sense and definition of the notion of intermediation

The notion of intermediation[6] had an historical evolution, in the traditional sense of the notion, up to the modern concept of our days.

In the traditional sense, the notion of intermediation is based on the idea of representation, in the sense of technical and juridical procedure whereby a person, named representative (in Romanian *reprezentant*), executes a legal deed in the name and on behalf of another person, called the principal (in Romanian called *reprezentat*), and the effects of the executed legal deed will directly and immediately produce over the principal[7].

It follows that the institution of intermediation is based, in Romanian law, on the contract of mandate; however it may not be restricted to this type of contract.

In commercial law, the notion of intermediation, as that of representation, underlying the former, has a wider range, referring to the situation in which the mandatary acts on behalf of the mandator (in Romanian *mandant*), either in his own name, or in the principals name.

Therefore, according to the principles of the Romanist law system, to which Romanian law belongs, there is a difference between activities in one's own name and on behalf of mandator, in the form of the contract of mandate with representation, or in ones own name by a mandatary however on behalf of the mandator, under the form of a contract of mandate without representation (commission, consignment etc.).

From this respect, a distinction may be noted between the vision of the Romanist law and the Anglo-Saxon one. As far as the Anglo-Saxon system[8] believes the distinction between the mandate with representation and that without representation does not exist, both types of intermediation take the form of the „*agency*"[9] institution. Consequently, intermediaries, no matter if they act as mandataries or consignees the Romanist law system, are both included by the wide term "*agents*"[10]. Agency is characterized in the Anglo-Saxon law system by the multiple possibilities of adapting to the requirements and the nature of the business object of the intermediation, and also by pragmatism and flexibility[11].

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[6] For a general presentation of intermediation in international commerce, see O. Căpăţînă, B. Ştefănescu, Treaty on international commerce law, vol. II, (*Tratat de drept al comerţului internaţional, vol. II*) Printing House of the Academy of the Romanian Socialist Republic, Bucharest, 1987, p. 138-140; B. Ştefănescu, I. Rucăreanu, International Commerce Law, (*Dreptul comerţului internaţional*) Didactic and Pedagogical Printing House, Bucharest, 1983, p. 142-144; T.R. Popescu, International Commerce Law, (*Dreptul comerţului internaţional*) Didactic and Pedagogical Printing House, Bucharest, 1976, p. 326-330; Sofia Ţămbălaru, *Some aspects regarding intermediation in international commerce law*, in Commercial Law Magazine No. 6/1999, p. 75-82 (Unele aspecte privind intermedierea în dreptul comerţului internaţional, în Revista de drept commercial, Nr. 6/1999, p. 75-82) .

[7] In this sense, see Gh. Beleiu, *Romanian civil law. Introduction in civil law. Subjects of civil law, (Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil)* ninth Edition, reviewed and supplemented by M. Nicolae, P. Truşcă, Universul Juridic Printing House, Bucharest, 2007, p. 210; G. Boroi, *Civil Law. General Part. Persons*, (*Drept civil. Partea generală. Persoanele*) third Edition, reviewed and supplemented, Hamangiu Printing House, Bucharest, 2008, p. 291-294.

[8] F.A. Moţiu, *Commercial intermediation contracts without representation*, (*Contractele comerciale de intermediere fără reprezentare*) p. 17-23; Dragoş A. Sitaru, Ş.A. Stănescu, Intermediation contracts in international commerce *(I)*, in Commercial law Magazine No. 11/2005, p. 26-43 (Contractele de intermediere în comerţul internaţional (I), în Revista de drept comercial nr. 11/2005, p. 26-43) .

[9] Clive M. Schmitthoff, *Schmitthoff's Export Trade, The Law & Practice of International trade*, ninth edition, London, Stevens & Sons, 1990 p. 278-316; Ewan Mckendrick, *Contract Law*, sixth edition, Palgrave Macmillan Law Masters, 2005, p. 163-164; R. Munteanu, *op. cit*., p. 25-30.

[10] For a presentation of the characteristic features of the agency contract, see D. Florescu, L.N. Pîrvu, *International commerce contracts*, (*Contractele de comerţ internaţional*) second edition reviewed ans supplemented, Universul Juridic Printing House, Bucharest, 2009, p. 205-213.

[11] F.A. Moţiu, *Agency contract*, (*Contractul de agency*) in the Annals of Timişoara West University, compilation Case Law, No. 1-2/2001, p. 73-83.

In the modern sense of the notion of intermediation, it may not however be limited to traditional contracts, contracts of mandate and commission, and it has so developed that it currently comprises a series of contracts – such as shipment, agency, brokerage, franchise, exclusive distribution, etc. -, in which the institution of representation has either suffered transformations arising from practical reasons, or it is missing.

In the case of contracts in which the institution of mandate (with or without representation) is not met, the intermediary establishes contracts third parties in his own name and on his own behalf, and not on behalf of the principal. Nevertheless the contract is still an intermediation one, due to the fact that certain effects arising from the legal deeds executed by the intermediary with third parties are reflected upon the principal. This is justified by the common interest both the representative and the principal have in executing the intermediation contract, which particular interest is served by the intermediary, through contracting third parties[12].

As regards what has been shown above, we believe that nowadays for the institution of intermediation the idea of mandate or representation is less significant, than in particular the intermediary carrying out an activity in/and for the benefit of another person[13].

It follows that **intermediation may be defined** as being an activity which a person (the intermediary) performs on behalf of another person (the principal), either in the name of the principal (in a legal relation of a mandate with representation), or in his own name (in a legal relation of a mandate without representation), or in his own name and on his own behalf however for achieving a common interest with the principal, activity in which the intermediary is the prepositive of the mediated parties or is independent therefrom, as the case may be, and which solely consists of negotiating or of negotiating and concluding legal deeds with third parties.

Thus, intermediation is the activity carried out by another person other than the actual beneficiary of the economic interest (the principal), on behalf of the latter, either in his own name, or in the name of the beneficiary of the interest in question, or in their own name and on their own behalf however in the context of a professional collaboration with the principal.

Specific to the intermediation contracts is the fact that, based on the powers granted to the intermediary by the principal, the intermediary acts in the sense of perfecting civil or commercial operations whose effects exclusively reflect upon the principal.

2. Classification of legal relations of commercial intermediation

Depending on the criterion of the powers granted to the intermediary, we find four types of commercial intermediation contracts [14], to which we refer hereinafter.

2.1. Intermediation contracts in which the intermediary acts in relation to third parties as the holder of a mandate of representation

The intermediation contracts to which we refer to presuppose the fact that the intermediary, when concluding legal deeds with third parties, acts in the name and on behalf of the person wherefrom the powers follow. Therefore, the intermediary discloses (exhibits) to third parties his capacity as representative (*i.e.* the fact that he is acting *nomine alieno*), third parties are thus

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[12] Dragoş A. Sitaru, C.P. Buglea, S.A. Stănescu, *International commerce law. Treaty, Special Part,* (*Dreptul comerţului internaţional. Tratat. Partea specială*) Universul Juridic Printing House, Bucharest, 2008, p. 305-306.

[13] Dragoş A. Sitaru, Ş.A. Stănescu, *Intermediation contracts in international commerce (I)*, (*Contractele de intermediere în comerţul internaţional (I)*) *op.cit,* p. 21.

[14] For a similar opinion, but with some highlights, see Dragoş A. Sitaru, C.P. Buglea, S.A. Stănescu, *op. cit*., p. 306-308.

informed as regards the fact that the effects arising from the concluded legal deed will reflect not upon the person that handled the execution of the deed, but in the account of the beneficiary of the economic interest, the issuer of the proxy.

The contract of mandate with representation is the highlight of this category of intermediation contracts. The Civil Code in force regulates the mandate under Articles 1532-1559. The new Civil Code[15] dedicates Articles 2013 – 2038 to the mandate of representation.

The commercial mandate is regulated by the provisions of Articles 374-391 of the Commercial Code[16].

The general principles of the contract of mandate from the civil law[17] are applied to the commercial contract of mandate, its juridical outline is supplemented by the characteristic features of the commercial mandate, arising from the nature of this operation, that of mediating commercial affairs[18].

According to Article 374 of the Commercial Code, "The commercial mandate deals with handling commercial affairs on behalf and on the account of the mandator. The commercial mandate is not supposed to be free of charge".

This legal provision allows us to note the essential features of the commercial mandate institution, which we will briefly reveal hereinafter.

Therefore, the commercial mandate is that particular contract under which a person called the mandatary undertakes to conclude particular legal deeds in the name and on behalf of another person who gave the proxy, called the mandator, which legal deeds are facts of commerce for the mandator [19].

The entering into and execution of the contract of mandate, by the mandatary handling commercial affairs with third parties, in the name and on behalf of the mandator, lead to specific effects, consisting of creating direct legal relations between the mandator and the co-contracted third party. The essential condition for the effects of the legal deeds perfected by the mandatary with the third party producing, directly in the mandator is that the mandatary acted within the limits and under the powers received in his capacity as representative, since the mandate may not be employed and held for the execution of other obligations other than in which the will of participating to the legal deeds generating rights and obligations, via the mandatary, was validly expressed.

The capacity of the mandatary of acting in the name and on behalf of the mandator causes the existence, in principle, of a subordination relation, in the sense that the mandatary is a prepositive of the mandator.

The said provisions of Article 374 of the Commercial Code, according to which the commercial mandate is not presupposed to be a free of charge contract, the concept of the commercial law maker is inferred according to which the commercial mandate is in its nature an contract in exchange for a consideration, in the sense that usually the mandatary is paid for his activity of concluding legal deeds in the name and on behalf of the mandator. The same idea is conveyed by Article 2010 of the N.Civ.C., which states the following "the mandate given for acts

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[15] We will hereinafter also use the abbreviation N.Civ.C.

[16] As regards the notion and the characteristic features of the mandate contract in domestic commercial law, see St. Cărpenaru, Treaty on Romanian commercial law, (*Tratat de drept comercial român*) Universul Juridic Printing House, Bucharest, 2009, p. 539-548, and for an analysis of the mandate contract in international commerce law, see R. Munteanu, *op. cit.*, p. 34-47.

[17] See C. Popa Nistoreanu, *Representation and mandate in private law*, All Beck Printing House, Bucharest, 2004; Cl. Roşu, *Mandate contract in domestic private law*, (*Reprezentarea şi mandatul în dreptul privat*) C.H. Beck, Bucharest, 2008.

[18] R. Munteanu, *op. cit.*, p. 34-38.

[19] St. Cărpenaru, *op. cit.*, p. 540.

of exercising a professional activity is presumed to be in exchange of a consideration", this provision is common for the mandate with and without representation.

Under the commercial contract of mandate, the mandatary benefits from powers higher than the mandatary in a civil contract of mandate. The reason behind this is that in the commercial mandate, the mandatary may fulfil all the operations required by trading.

2.2. Intermediation contracts in which the intermediary acts in relation to third parties as mandatary without representation

Contracts of mandate without representation are mainly characterized by the fact that the mandatary (the intermediary) concludes legal deeds in his own name, however on behalf of the represented person (the principal).

The New Romanian Civil code defines this type of mandate under Article 2039. According to its text, the mandate without representation is the contract under which a party, called the mandatary, concludes legal deeds in his own name (*nomine proprio*) however on behalf of the other party, called mandator, and in relation to third parties undertakes the obligations arising from these deeds, even if the third parties were aware of the mandate.

In the eyes of the new code, the mandate without representation is *genus proximus* for three types of contracts, namely the commission, consignment and shipment contracts, whose main features we will present hereinafter. However such contracts do not exhaust the list of contracts based on this legal institution. Other types of mandate without representation, which are actually forms of commission, maybe encountered in various sectors of commerce, especially international one, such as terminal benefits contracts, applicable in matters of international shipment of goods[20].

a) Contract of commission

The contract of commission is typical for intermediation contracts based on a mandate of representation[21].

Pursuant to Article 405 of the Commercial Code "The commission deals with the commission agent handling commercial affairs on behalf of the principal".

The New Code defines the contract of commission as being the mandate having as object the purchase and sale of goods or services being rendered on behalf of the principal and in the name of the commission agent, acting professionally, in exchange for a payment called commission (Article 2043).

Commercial doctrine defines the contract of commission as being the will by which one of the parties, called commission agent, undertakes based on a proxy issued by the other party, to conclude certain commercial actions, in its own name, however on behalf of the principal, in exchange for a payment, called commission[22].

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[20] See, for terminal benefits contract, especially, O. Căpățînă, *Transports law. Contract of expedition for goods, (Dreptul transporturilor. Contractul de expediție a mărfurilor*) Lumina Lex Printing House, Bucharest, 1997, p. 138 - 160; A.T. Stoica, *Contractual liability of the operator in terminal benefits contract*, in the Commercial law Magazine No. 4/2000, p. 134-143 (*Răspunderea contractuală a operatorului în contractul de prestații terminale, în Revista de drept comercial nr. 4/2000, p. 134-143*) ; Gh. Piperea, *Transports law*, (*Dreptul transporturilor*) second edition, All Beck Printing House, Bucharest, 2006, p. 87 - 91.

[21] For a more detailed analysis of the contract of commission in Romanian commercial law, see St. Cărpenaru, *op. cit.*, p. 559-568, and as regards the features of the contract of commission in international commerce law, see R. Munteanu, *op. cit.*, p. 48-70.

[22] See, St. Cărpenaru, *op. cit.*, p. 560.

It follows from what has been mentioned above that this agreement is the technical and legal procedure by which the legal deeds concluded between certain parties produce effects in favour of another person. Therefore, the contract is an original mechanism of intermediation, created to allow a tradesman to conclude commercial operations, benefiting from the services of another tradesman.

The contract of commission is one of the most frequent applications of intermediation contracts, in domestic commerce and also especially in international commerce,[23] this type of contract fulfilling some clear necessities.

The contract of commission appeared as a solution to the limitations presupposed by the commercial mandate, whose use requires some specific conditions, such as that of informing third parties with which they establish contracts on the person of the mandator and the limits of their powers granted under the proxy.

The frequency with which commission is applied in commerce is of course due to the advantages it brings to the contractual parties. Thus, the contract of commission deals with commercial operations occurring over large geographical areas and is based on a legal mechanism favourable to both parties. On the one hand the principal is relieved from having to supervise and control the stages of the operations whose execution and carrying out are delegated to the commission agent, and his entire attention and resources are turned to the main activity it carries out, at the same time benefiting from the experience and prestige of the commission agent it has on the relevant market in which it is active[24]. On the other hand, the commission agent in its turn gets benefits from intermediation operations, properly developing its commercial reputation, nevertheless holding on to its independence from the principal who contracted it. It is not only the parties who benefit from this type of contract, but also the third parties with which commercial operations on behalf of the principal are concluded. The third parties in question have the advantage to directly deal with the commission agent, who is undertaking in its capacity as co-contractor and from which they can easily recover debts, unlike the situation in which the legal relations had been established directly with the principal, whom they do not know or is in another state other than the one where the business is perfected.

Given the features specific to the legal regime of the contract of commission, and also the fact that it is a variety of the commercial mandate, a number of similarities and differences may be observed which we will hereinafter present in terms of their essential elements.

The main similarity is the fact that the legal deeds are concluded with third parties by the mandatary “on behalf” of another person, who has given the proxy (the mandator). This similarity is clearly shown by Article 2009 of the N.Civ.C., that defines the mandate as mentioned, in general (with or without representation).

Also, the two commercial agreements are similar in terms of their object, namely “handling commercial affairs”. Pursuant to Article 405(2) of the Commercial Code “between the principal and the commission agent there are the same rights and obligations as between the mandator and mandatary” along with the differences established under the Code.

The fact that the commercial mandate is a paid one, as shown above, and the commission is always paid - Article 2043 of the New Civil Code includes this feature in the definition – also brings closer these two forms of contracts of intermediation. The abovementioned Article 2010 of the N.Civ.C. in a common provision for both types of mandate, establishes the same idea.

The main difference between a commission and a commercial mandate resides in the fact that the individual empowered as commission agent acts in its own name, however on behalf of the

[23] D. Florescu, L.N. Pîrvu, *op.cit.*, p. 204.

[24] See M.L. Belu-Magdo, *Special contracts*, (*Contracte comerciale*) Tribuna Economică Printing House, Bucharest, 1996, p. 116-117.

principal, whereas the mandatary has a right of representation and handles commercial affairs in the name and on behalf of its mandator. It is from here that the defining trait of the commission follows - that of being qualified as a mandate without representation.

Therefore, the commission agent concluding *nomine proprio* legal deeds personally undertakes towards them, and thus direct legal relations arise between third parties and the commission agent, and their effects will however reflect upon the principal. The principal, on whose behalf the commission agent acts, may remain unknown to third parties, who acquire and undertake obligations solely in their relation with the commission agent. This trait specific to the contract of commission is expressly regulated by the provisions of Article 406(1) of the Commercial Code, according to which "the commission agent is directly bound by the person with which it established a contract, as if the affair were its own". Consequently, „the principal may hold no action against the persons contracted by the commission agent and such persons may hold no action against the principal" (Article 406(2) of the Commercial Code), since they established no contractual relations.

As a difference between the mandate and the commission one may also note particular facts, consisting of the actual transparency of one party related to the opacity of the other party. The mandate presupposes representation, arising from the presentation of the mandatary in front of third parties as a simple spokesman of the mandating-tradesman, whereas the commission is characterized by trading commercial affairs in the commission agent's own name, however on behalf of the principal, irrespective whether the principal is acknowledged or not to third parties.

Unlike the mandatary, who is usually a prepositive of the mandator, the principal acts "professionally" (Article 2042 of the N.Civ.c.), that means that the latter is organized under the form of an enterprise.

b) Consignment contract

A form of intermediation contracts based on the mandate without representation is also the consignment agreement[25], a variety of the contract of commission.

The consignment contract is lawfully established by Law No. 178/1934 for the regulation of the consignment contract. The New Civil Code, under Article 2054, limits to providing that this agreement is a variety of the contract of commission having as object the sale of some immovable goods which the consignor entrusted to the consignee for this purpose.

The consignment agreement may be defined as the consent, by which a party, called consignor, entrusts the other party, called consignee, certain goods in view of being sold in its own name, but on behalf of the consignor, at a price established by the parties, in exchange for a payment. The consignee is bound to deliver the obtained price or, as the case may be, return the unsold good.

The similarity with the contract of commission resides in the fact that the object of the consignment contract is represented by handling a commercial affair, in its own name, but on behalf of the consignor. The particularity of this type of contract and, at the same time, the distinction in relation to the commission, is the actual object of the operations perfected by the consignee, namely, the execution of sale-purchase contracts for movable goods belonging to the consignor.

[25] For a more detailed analysis of the consignment agreement in Romanian commercial law, see St. Cărpenaru, *op. cit.*, p. 569 - 576. Also see, V. Anghelescu, Al. Deteşanu, E. Hutira, *op. cit.*, p. 113.

c) Shipment contract

In the matter of transport activities, the contract of commission is materialized in the shipment contract. In terms of legal nature, the shipment of goods is an intermediation operation which, according to some standardized conventional norms, it oftentimes also bears the name „contract of commission for transport”[26].

The New Code defines the shipment contract as a variety of the contract of commission by which the sender undertakes to execute, in its own name and on behalf of the principal, a transport contract and to fulfil the related operations (Article 2064).

According to doctrine, the shipment contract is the willing consent between the client / principal (supplier or seller of goods) and shipper (sender), whereby the latter undertakes, in exchange for a payment to execute in its name, however on behalf of the principal, the required agreements with third parties for the shipment of the cargo, and also to fulfil the preliminary acts and things (cargo handling, loading the cargo in the transport means) and the cooperation necessary in view of performing the delivery[27].

The shipment contract is commercial in nature for the shipper (carrier), fulfilling a professional activity of intermediation, enterprise-specific.

The similarity of the shipment contract with the contract of commission consists of the representative concluding commercial operations in its own name, however on behalf of the client, the particularity arising from the specific sector where the shipment contract applies – transport activities – and from the specialized object of the commercial contracts perfected by the shipper – the transport contract of the goods and the services related to the shipment.

2.3. Intermediation contracts in which the intermediary acts as an independent professional tradesman, for business negotiation with third parties or for the negotiation and the conclusion of business with third parties

The category of intermediation contracts we refer to is firstly characterised by certain elements pertaining to the legal regime of the intermediary, as follows:

- the intermediary acts on a sustained and professional basis, and is organised under the form of an enterprise, and is not acting as an occasional intermediary, as it usually happens in the case of a commercial mandate;
- the intermediary runs his activity as an independent intermediary, specialised in that particular area, without being subordinated to the principal (client).
- the intermediary acts on the basis of a common interest with the principal, which means that a complex co-operation relation will be formed between them, by means of a contract.

Secondly, these contracts are particularized by the extent of the proxy granted by the principal (client) to the intermediary. Thus, the intermediary might be empowered, either to only negotiate commercial deals with third parties (which is the rule in practice), or to negotiate and conclude such deals in the name and on behalf of the principal.

Within the category of contracts we refer to; the following contracts are especially included: the agency contract, intermediation contracts (occasional) and the brokerage contract.

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[26] See for an analysis of this contract, especially, O. Căpățînă, *Transport law. Shipment contracts for goods*, (*Dreptul transporturilor. Contractul de expediție a mărfurilor*) Lumina Lex Printing House, Bucharest, 1997, p. 13 - 137; Gh. Piperea, *op.cit.*, p. 65 - 87.

[27] See Gh. Piperea, *op. cit.*, p. 67-69.

a) Agency contract

The agency contract is a contract of Anglo-Saxon origin, where the complex juridical institution of “agency”, practically refers to all the range of agreements by which a person (the agent) acts on behalf of another person (the principal), as previously shown. Therefore, in the Anglo-Saxon conception, the agent may be empowered either to only to negotiate commercial deals with third parties or to negotiate and conclude such deals in the name and on behalf of the principal.

In Romanian law[28], the agency contract is generally defined, in the specialised literature, as that agreements concluded between two independent tradesmen, by which one person (the agent) undertakes to promote the business of the other person (the principal or the client) within a certain area, through business negotiation and/or the conclusion of business contracts by the agent, on behalf of the principal, in all cases, in exchange for a commission, without there being any subordination relation between the agent and the principal[29].

The institution of the commercial agent is regulated in the Romanian Law No. 509/2002 on permanent commercial agents.

In the New Civil code, the notion of "civil contract" means that agreement by which the principal unfailingly empowers the agent either to negotiate or to negotiate and to conclude contracts, in the name and on behalf of the principal, in exchange for remuneration in one or more determined regions. The New Code adds the provision that the agent is an independent intermediary who acts on a professional basis, and he cannot be the prepositive of the principal at the same time. (Article 2072)

Therefore, according to the Romanian Law, the parties in the agency contract are independent tradesmen, and the agent is not economically dependent or dependent for executive decisions, on the principal. At the same time the agent acts as a professional, meaning it is organised as an enterprise. The agent, as an enterprise, has as main activity business intermediation, and the client (the principal) resorts to his experience as a result of a good professional reputation. The commercial agent is entrusted with dealing with the business of a client on a determined clientele (usually a geographic area), and the legal relations that arise from the agency contract are long lasting.

From the point of view of the scope of the proxy, meaning the extent of the mandate the agent receives from the client (the principal), the agency contract is, of two kinds, as follows:

Firstly, the agent may be granted a proxy solely for the purpose of negotiating the client’s affairs, when he is granted by the client a mandate without representation. Under this mandate, the agent negotiates the conditions of future contracts, with third parties, contracts which will be concluded directly between the client and the third parties. Therefore, in this case, the proxy is limited to the procurement of orders/offers from third parties, thus to finding contractual partners for the client. This situation is presumed, in case the contract does not grant explicit powers of representation to the agent.

Secondly, the proxy (explicit) granted to the agent may be for the purpose of negotiating and concluding affairs in the name and on behalf of the client. In this case, the mandate granted to the agent in a mandate with representation.

For a better understanding of the juridical outline of the agency contract, a short comparative overview is mandatory, between the agency contract and the contract of commission and the commercial mandate with representation.

[28] See, for a detailed analysis of the agency contract, especially, St. Cărpenaru, *op. cit.*, p. 548-559; V. Anghelescu, Al. Deteșanu, E. Hutira, *op. cit.*, p. 109-110; 113-114; Dragoş A. Sitaru, Ş.A. Stănescu, *Intermediation Contracts in international commerce (I)*, (*Contractele de intermediere în comerţul internaţional (I)*) *op.cit.*, p. 19-43.

[29] Dragoş A. Sitaru, C.P. Buglea, S.A. Stănescu, *op. cit*., p. 312-313; D. Florescu, L.N. Pîrvu, *op. cit.,* p. 205-213.

Therefore, there is a difference between the agency contract and the contract of commission, which primarily consists in the fact that the commission agent is empowered by the contract of commission, to conclude in his name, but on behalf of the principal, one or several specific legal deeds; the contract ceases to be in force after the obligation of the intermediary is fulfilled. As regards the agency contract, it is concluded for a determined or non-determined period of time throughout which the agent is bound to conclude commercial contracts on behalf of the client, with a pre-established scope, within the envisaged territory (generally with an exclusivity clause). Therefore, the commission agent usually concludes one or more determined legal deeds, whereas the agent concludes an undetermined number of legal deeds for his client.

Unlike the commercial mandate with representation, the intermediation activity in the case of the agency contract is long lasting and professional in nature, not occasional. Moreover, unlike this commercial mandate where the intermediation activity predominantly unfolds in the principal's interest, the agency contract is characterised by the fact that the intermediation activity is based on the mutual interest of the agent and of the principal to conclude and execute the intermediation activity. Thus, the interest of the principal to capitalize his products and render the services which make the object of its commercial activity is doubled by the agent's interest to negotiate or to negotiate and conclude in the name of and on behalf of the principal as many commercial contracts, thus justifying the right of the agent to be paid[30].

For the situation when the agent is strictly empowered to obtain offers and negotiate contracts, and not with the power to conclude legal deeds, there is an even more clear distinction between the agency contract on one hand, and the contract of commission and the mandate without representation, on the other hand. This distinction resides in the existence of a different scope, such as the conclusion of legal deeds by the commission agent or the mandatary with representation, respectively the execution of pre-contractual commercial operations (of negotiation) by the agent.

To conclude, given the above mentioned particularities, the agency contract represents a special form of intermediation contracts, and not a particular case of mandate or contract of commission.

b) Intermediary contract (occasional)

The New Romanian Civil Code provides for the intermediary contract under Article 2096 - 2102. As per Article 2096, the intermediary contract is defined as the contract by which the intermediary undertakes, in relation to the client, to put him in contact with a third party, for the purpose of concluding a contract. The intermediary is not the prepositive of the intermediated parties and is independent in relation to them in the execution of his obligations.

For the use of the participants to the international commerce, the International Chamber of Commerce in Paris drafted a model for the occasional intermediary contract, entitled ICC Occasional Intermediary Contract –ICC Publication No. 619-2000.[31] The scope of the contract essentially consists of, for the intermediary (agent) obtaining information for the principal about potential clients or about a particular business and, as the case may be, of the assistance offered for the negotiation of a contract, and for the principal, of the payment he is bound to pay to the intermediary for his services rendered. Unless otherwise provided in the contract, the intermediary is not empowered to contract third parties in his capacity as mandatary (with or without representation) of the principal.

[30] St. Cărpenaru, *op. cit.,* p. 550.
[31] See also, for analysis, Dragoş A. Sitaru, C.P. Buglea, S.A. Stănescu, *op. cit*., p. 324 - 328.

Therefore, in principle, the intermediary in this type of contract is empowered by the principal (client) only for pre-contractual operations, acting as a mandatary without representation.

c) Brokerage contract

The brokerage contract[32] is defined in the specialised literature as a contract by which one person, named a broker, undertakes to find for the person from whom he received the task to contract, named client, a contractual partner for carrying out a commercial deal (a co-contractor) in exchange for a payment named brokerage.[33].

The brokerage contract, hardly distinguishes from the intermediary contract (occasional), both resembles and presents important differences from the contracts of mandate with representation, mandate without representation (commission) and agency contract.

The most important difference between the brokerage contract and the contracts of mandate with representation is the fact that in the case of the brokerage contract the mandate is granted without representation. The broker, unlike this mandatary, professionally performs the activity of intermediation, which constitutes the scope of the contract, without participating to the conclusion of the contract. The broker limits himself to making the connection between the persons who want to contract, facilitating and mediating the conclusion of commercial transactions. While the scope of the contract of mandate is the conclusion of legal deeds by the mandatary, in the name and on behalf of the mandator, the broker simply searches for a co-contractor for the client.

The brokerage contract resembles the contract of commission[34] especially because both of them have as scope independently performed intermediation activities. The commission agent distinguishes from the broker through the fact that he concludes in his name the legal deeds he was empowered to perform. The broker limits himself to making the connection between the persons who resorted to his services, without intervening in the conclusion of the contract. Thus, the broker, even if he receives a special mandate, does not act in his own name, but in the name of the mandatary, on the basis of a mandate without representation. Also, the broker does not have any privileges for the guarantee of debts against the client, unlike the commission agent, whose debts are secured under a special privilege, provided by the law.

The brokerage contract is essentially close in form to that of the agency contract in which the agent is entrusted only to negotiate deals with third parties, meaning the situation where the principal grants the agent a mandate without representation.

2.4. Intermediation contracts in which the intermediary acts in his own name and on his own behalf, in the relations with third parties, but having a mutual legal and economical interest with the principal

As it was justly noted in the specialised literature[35], in the modern sense, the intermediation is no longer restricted to the contracts of mandate and to the contract of commission, which presume a direct or indirect representation, but knows a series of other contractual forms in which the institution of representation, even an indirect one, is no longer found. In the case of these contracts, the intermediary enters into contractual relations with third parties in his name and on

[32] F.A. Moțiu, *Commercial Contracts of intermediation without representation*, (*Contractele comerciale de intermediere fără reprezentare*) *op.cit.,* p. 218-264.

[33] L. Săuleanu, A. Calotă, *The brokerage contract,* in Commercial Law Magazine No. 7-8/1999 (*Contractul de curtaj, în Revista de drept comercial nr. 7-8/1999*), Lumina Lex Printing House, Bucharest, 1999, p. 210.

[34] Gh. Stancu, *Intermediaries in commerce. The Contract of commission and the brokerage contract*, published in Law, no. 10/2007, (*Contractul de comision şi contractul de curtaj, publicat în Dreptul nr. 10/2007*) p. 129-145.

[35] See, Dragoş A. Sitaru, C.P. Buglea, S.A. Stănescu, *op. cit*., p. 306.

his behalf, and not as a mandatary with or a without representation (commission agent). Nevertheless, the activity performed by the intermediary is also in the interest of the co-contractor party to the intermediary contract, for whom it ensures a more efficient sale of merchandise or rendered services. Consequently, at the moment, the intermediation criterion is based less on the idea of mandate (with or without representation), and more on the intermediary performing an activity and in the interest of another person.

Therefore, the contracts to which we refer come under the institution of intermediation because the principal and the intermediary both act for the realisation of a mutual economical and legal interest, similar to that which characterises the agency contract. As a result of this, relations of professional co-operation between the intermediary and the principal are established, and this puts the intermediary in a mixed position, one of independence, but also in a position of economical interdependence on the principal. These contracts are essentially different from the agency contract, when the agent acts in the name and on behalf of the principal (client), as seen above.

We now give a short description of the main categories of contracts, which in our opinion, fall under this category of intermediation.

a) Franchise contract (franchising)

The franchise contract, known in the international commerce under the Anglo-Saxon name of franchising,[36] means the contract by which a person, named franchiser, allows the exploitation of a trademark or a production brand or of rendered services by an independent person, manufacturer or one who provides services, named franchisee, and of the know-how, the use of his trademark and sometimes the related supply, which the beneficiary should exploit according to the convention, in exchange for a remuneration[37].

In the specialised literature, the franchise contract was defined as representing the system of commercialisation based on a continual collaboration between natural persons or legal persons, financially independent, by which a person, named franchiser, grants another person, named beneficiary, the right to exploit or to develop a business, a product, a technology or a service[38].

In the domestic law, the franchise contract is regulated by the provisions of Government Ordinance No. 52/1997 on the legal regime of the franchise.

In international commerce, tradesmen most often use, as a model for the franchise contract, the codification of usage drafted by the International Chamber of Commerce in Paris, namely ICC

[36] For a general analysis of this contract see especially St. Cărpenaru, *op. cit.*, p. 605 - 616; I. Bălan, *Franchising contractual techniques*, in Commercial Law Magazine no. 3/2000, p. 23 (*Tehnici contractuale ale francizei, în Revista de drept comercial nr. 3/2000, p. 23*) ; M.C. Costin, *Franchising contract*, în Commercial Law Magazine no. 11/1998, p. 132 (*Contractul de franchising, în Revista de drept comercial nr. 11/1998, p. 132*) ; Gh. Gheorghiu, G.N. Turcu, *Franchising operations*, (*Operaţiunile de franciză*) Lumina Lex Printing House, Bucharest, 2002; Dan Alexandru Sitaru, *The Franchise Contract In Domestic and Comparative Law (Contractul de franciză în dreptul intern şi comparat)*, Lumina Lex Printing House, Bucharest, 2007; M. Mocanu, *Franchising contract*, (*Contractul de franciză*) C.H. Beck Printing house, Bucharest, 2008; Dragoş A. Sitaru, Ș.A. Stănescu, *Intermediation Contracts in internaţional commerce (II)*, in Commercial Law magazine no. 12/2005, p. 49-61 (*Contractele de intermediere în comerţul internaţional (II), în Revista de drept comercial nr. 12/2005, p. 49-61*). For a presentation of characteristic features of the agency contract, please see also D. Florescu, L.N. Pîrvu, *op.cit*, p. 213-214.

[37] Dan - Alexandru Sitaru, *The Franchise Contract In Domestic and Comparative Law (Contractul de franciză în dreptul intern şi comparat)*, Lumina Lex Printing House, Bucharest, 2007, p. 33.

[38] St. Cărpenaru, *op. cit.*, p. 607.

Model International Franchising Contract – ICC Publication No. 557-2000. This document provides a summary of commercial practice related to this domain[39].

b) Exclusive distribution contract

The exclusive distribution contract[40] is the commercial contract, concluded for a long term, under of which a party, named supplier, undertakes to deliver to the other party, named distributor, under terms of exclusivity, certain quantities of merchandise, according to the received requirements, which the latter will resell to his clients, using the supplier's trademark, on a market already determined in the contract, in exchange for a remuneration, which consists of the difference between the purchase price and the re-sell price.

Given the lack of special regulations in the Romanian domestic law, the contract to which we refer is included, for usage in international commerce, in the model contract drafted by the International Chamber of Commerce in Paris, entitled ICC Model Distributorship Contract (Sole Importer-Distributor) – ICC Publication No. 646-2002[41] - which has the advantage of representing a summary the commercial practice, representing a codification of usages related to this domain.

The exclusive distribution contract may not be reduced to a contract of mandate (with representation) or to an agency contract, because the deeds to re-sell performed by the distributor are not made in the name and on behalf of the supplier. At the same time, the exclusive distribution contract is not a form of the contract of commission, although the distributor acts, just as the commission agent, in his own name, in relation with third parties. Nonetheless, the distributor, unlike the commission agent, acts in his name and on his behalf.

The exclusive distribution contract is significantly close though to the agency contract, because it presumes that a permanent professional co-operation relation is established between parties, as a consequence of the fact that both parties act for the purpose of achieving a common interest, which is the commercialisation of merchandise and the provision of services which make the scope of the contract.

Conclusions

The concept of commercial intermediation has not been seen as a whole but usually it has been analyzed by the doctrine and confirmed by the courts practice in specific, referring only to the contracts that include the representation of another party. There is no doubt that the commercial intermediation is a complex operation, one that includes several legal relations concluded between its contractual partners, having various names and various capacities, carried out either under the domestic commercial law or under the provisions of the international commercial laws, and the history of the development of the concept shows also the same.

Probably the most important new improvement that this paper brings is that it separates the traditional concept in the sense that the commercial intermediation is based only on the idea of representation. But the notion of intermediation is not only expressed in the contract of mandate, the entire legal nature of the other contracts that have a link to the notions, which we thoroughly

[39] See for the the analysis of this model Contract of ICC, Dragoş A. Sitaru, C.P. Buglea, S.A. Stănescu, *op. cit.*, p. 328 - 341.

[40] R. Munteanu, *op. cit,.* p. 71-96; Dragoş A. Sitaru, Ş.A. Stănescu, *Intermediation Contracts in internaţional commerce (III)*, in Commercial Law magazine no. 1/2006, p. 32-45 (*Contractele de intermediere în comerţul internaţional (III), în Revista de drept comercial nr. 1/2006, p. 32-45*) .

[41] Dragoş A. Sitaru, C.P. Buglea, S.A. Stănescu, *op. cit.*, p. 341 - 353.

presented in the paper, shows that the perspective should be much wider. From this the definition of the commercial intermediation had been extracted.

It must be noted also, that the implications of the New Civil Code are mostly as regards the classification of the concept. This is because after the New Civil Code has institutionalized a new conception regarding the regulating system for civil and commercial legal relations. By doing so it redefined the characteristics of mostly every contract that refers to the commercial intermediation. Also, it settles more clearly the criterion of the powers granted to the intermediary, by which we find the four types of commercial intermediation contracts, to which we referred in the paper.

References

Books, treaties

- B. Ştefănescu, I. Rucăreanu, International Commerce Law, (*Dreptul comerţului internaţional*), Didactic and Pedagogical Printing House, Bucharest, 1983.
- C. Popa Nistoreanu, *Representation and mandate in private law*, All Beck Printing House, Bucharest, 2004.
- Cl. Roşu, *Mandate contract in domestic private law*, (*Reprezentarea şi mandatul în dreptul privat*) C.H. Beck, Bucharest, 2008.
- Clive M. Schmitthoff, *Schmitthoff's Export Trade, The Law & Practice of International trade*, ninth edition, London, Stevens & Sons, 1990 p. 278-316;
- D. Florescu, L.N. Pîrvu, *International commerce contracts*, (*Contractele de comerţ internaţional*) second edition reviewed ans supplemented, Universul Juridic Printing House, Bucharest, 2009.
- Dan - Alexandru Sitaru, *The Franchise Contract In Domestic and Comparative Law (Contractul de franciză în dreptul intern şi comparat)*, Lumina Lex Printing House, Bucharest, 2007.
- Dragoş A. Sitaru, International Commerce Law. Treaty. General Part (*Dreptul comerţului internaţional. Tratat. Partea generală*), Universul Juridic Printing House, Bucharest, 2008.
- Dragoş A. Sitaru, C.P. Buglea, S.A. Stănescu, *International commerce law. Treaty, Special Part*, (*Dreptul comerţului internaţional. Tratat. Partea specială*) Universul Juridic Printing House, Bucharest, 2008.
- Ewan Mckendrick, *Contract Law*, sixth edition, Palgrave Macmillan Law Masters, 2005.
- F.A. Moţiu, Commercial intermediation contracts without representation (*Contractele comerciale de intermediere fără reprezentare*), Lumina Lex Printing House, Bucharest, 2005.
- G. Boroi, *Civil Law. General Part. Persons*, (*Drept civil. Partea generală. Persoanele*) third Edition, reviewed and supplemented, Hamangiu Printing House, Bucharest, 2008.
- Gh. Beleiu, *Romanian civil law. Introduction in civil law. Subjects of civil law, (Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil)* ninth Edition, reviewed and supplemented by M. Nicolae, P. Truşcă, Universul Juridic Printing House, Bucharest, 2007.
- Gh. Gheorghiu, G.N. Turcu, *Franchising operations*, (*Operaţiunile de franciză*) Lumina Lex Printing House, Bucharest, 2002.
- Gh. Piperea, *Transports law*, (*Dreptul transporturilor*) second edition, All Beck Printing House, Bucharest, 2006.
- I. Bălan, *Franchising contractual techniques*, in Commercial Law Magazine no. 3/2000, p. 23 (*Tehnici contractuale ale francizei, în Revista de drept comercial nr. 3/2000, p. 23*).
- M. Mocanu, *Franchising contract*, (*Contractul de franciză*) C.H. Beck Printing house, Bucharest, 2008;
- M.L. Belu-Magdo, *Special contracts*, (*Contracte comerciale*) Tribuna Economică Printing House, Bucharest, 1996.

- O. Căpăţînă, B. Ştefănescu, Treaty on international commerce law, vol. II, (*Tratat de drept al comerţului internaţional, vol. II*) Printing House of the Academy of the Romanian Socialist Republic, Bucharest, 1987.
- O. Căpăţînă, *Transport law. Shipment contracts for goods*, (*Dreptul transporturilor. Contractul de expediţie a mărfurilor*) Lumina Lex Printing House, Bucharest, 1997.
- O. Căpăţînă, *Transports law. Contract of expedition for goods*, *(Dreptul transporturilor. Contractul de expediţie a mărfurilor*) Lumina Lex Printing House, Bucharest, 1997;
- R. Munteanu, *Intermediation contracts in Romanian foreign commerce* (*Contracte de intermediere în comerţul exterior al României*), Printing House of the Academy of the Romanian Socialist Republic, 1984.
- R. Petrescu, General theory of commercial obligations. General Part (*Teoria generală a obligaţiilor comerciale. Partea generală*), Romfel Printing House, Bucharest, 1994.
- St. Cărpenaru, Treaty on Romanian commercial law, (*Tratat de drept comercial român*) Universul Juridic Printing House, Bucharest, 2009.
- T.R. Popescu, International Commerce Law, (*Dreptul comerţului internaţional*) Didactic and Pedagogical Printing House, Bucharest, 1976.
- V. Anghelescu, Al. Deteşanu, E. Hutira, International Commercial Contracts (*Contracte comerciale internaţionale*), Printing House of the Academy of the Romanian Socialist Republic, Bucharest, 1980.

Articles, reviews, laws

- A.T. Stoica, *Contractual liability of the operator in terminal benefits contract*, in the Commercial law Magazine No. 4/2000, p. 134-143 (*Răspunderea contractuală a operatorului în contractul de prestaţii terminale, în Revista de drept comercial nr. 4/2000, p. 134-143*).
- Dragoş A. Sitaru, Ş.A. Stănescu, Intermediation contracts in international commerce *(I)*, in
- Commercial law Magazine No. 11/2005, p. 26-43 (*Contractele de intermediere în comerţul*
- *internaţional (I), în Revista de drept comercial nr. 11/2005, p. 26-43*).
- Dragoş A. Sitaru, Ş.A. Stănescu, *Intermediation Contracts in internaţional commerce (II)*, in Commercial Law magazine no. 12/2005, p. 49-61 (*Contractele de intermediere în comerţul internaţional (II), în Revista de drept comercial nr. 12/2005, p. 49-61*).
- Dragoş A. Sitaru, Ş.A. Stănescu, *Intermediation Contracts in internaţional commerce (III)*, in Commercial Law magazine no. 1/2006, p. 32-45 (*Contractele de intermediere în comerţul*
- *internaţional (III), în Revista de drept comercial nr. 1/2006, p. 32-45*).
- F.A. Moţiu, *Agency contract*, (*Contractul de agency*) in the Annals of Timişoara West University, compilation Case Law, No. 1-2/2001, p. 73-83.
- Gh. Stancu, *Intermediaries in commerce. The Contract of commission and the brokerage contract*, published in Law, no. 10/2007, (*Contractul de comision şi contractul de curtaj, publicat în Dreptul nr. 10/2007*).
- L. Săuleanu, A. Calotă, *The brokerage contract,* in Commercial Law Magazine No. 7-8/1999 (*Contractul de curtaj, în Revista de drept comercial nr. 7-8/1999*), Lumina Lex Printing House, Bucharest, 1999.
- M.C. Costin, *Franchising contract*, în Commercial Law Magazine no. 11/1998, p. 132 (*Contractul de franchising, în Revista de drept comercial nr. 11/1998, p. 132*).
- Sofia Ţămbălaru, *Some aspects regarding intermediation in international commerce law*, in
- Commercial Law Magazine No. 6/1999, p. 75-82 (*Unele aspecte privind intermedierea în dreptul*
- *comerţului internaţional, în Revista de drept commercial, Nr. 6/1999, p. 75-82*).
- New Romanian Civil Code – Law no. 287 from 17/07/2009, published in Official Gazette no. 511 from 24/07/2009.

PRINCIPLE OF PROPORTIONALITY, CRITERION OF LEGITIMACY IN THE PUBLIC LAW

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Abstract

A problem of essence of the state is the one to delimit the discretionary power, respectively the power abuse in the activity of the state's institutions. The legal behavior of the state's institutions consists in their right to appreciate them and the power excess generates the violation of a subjective right or of the right that is of legitimate interest to the citizen. The application and nonobservance of the principle of lawfulness in the activities of the state is a complex problem because the exercise of the state's functions assumes the discretionary powers with which the states authorities are invested, or otherwise said the 'right of appreciation" of the authorities regarding the moment of adopting the contents of the measures proposed. The discretionary power cannot be opposed to the principle of lawfulness, as a dimension of the state de jure. In this study we propose to analyze the concept of discretionary power, respectively the power excess, having as a guidance the legislation, jurisprudence and doctrine in the matter. At the same time we would like to identify the most important criterions that will allow the user, regardless that he is or not an administrator, a public clerk or a judge, to delimit the legal behavior of the state's institutions from the power excess. Within this context, we appreciate that the principle of proportionality represents such a criterion. The proportionality is a legal principle of the law, but at the same time it is a principle of the constitutional law and of other law branches. It expresses clearly the idea of balance, reasonability but also of adjusting the measures ordered by the state's authorities to the situation in fact, respectively to the purpose for which they have been conceived. In our study we choose theoretical and jurisprudence arguments according to which the principle of proportionality can procedurally be determined and used to delimit the discretionary power and power abuse.

Keywords: *discretionary power, power excess, subjective right, principle of lawfulness, principle of proportionality constitutional law*

I. Introduction

The lawfulness, as a feature that needs to characterize the juridical acts of the public authorities, has as a central element the concept of "law". Andre Hauriou defined the law as a written general rule established by the public powers, after the deliberation and involving the direct or indirect acceptance of the governors[1]. In a wide meaning, the concept of law includes all juridical acts that contain the law norms. The law in a restricted acceptance is the juridical act of the Parliament elaborated in compliance with the constitution, according to some pre-established proceedings, that regulates the most general and most important social rules. A special place in the administered legislative system is owned by the constitution defined by the fundamental law that is placed on top of the hierarchy of the legislative system which contains juridical norms with a

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[1] André Hauriou, *Droit constitutionel et institution politiques*, (Paris, Ed. Montchrestien, 1972), p.137.

superior juridical force regulating the fundamental and essential social relationships, mostly those regarding the installing and exercising of the state power.

The lawfulness status in the public authorities' activity is founded on the concept of supremacy of the constitution and supremacy of the law.

The supremacy of the constitution is a quality of the fundamental law which in essence expresses its supreme juridical force in the law system. An important consequence of the supremacy of the fundamental law is the compliance of the entire law with the constitutional norms[2]. The concept of juridical supremacy of the law is defined like "its characteristic that is seeking its expression in the fact that the norms it establishes should not correspond to neither of the norms, except for the constitutional ones, and the other juridical acts issued by the state bodies, are subordinated to it, from the point of view of their juridical efficacy"[3].

Therefore, the supremacy of the law, in the above given acceptance is subsequent to the principle of supremacy of constitution. Important is the fact that the lawfulness, as a feature of the juridical acts of the state authorities involves the observance of the principle of supremacy of constitution and supremacy of the law. The observance of the two principles is a fundamental obligation of constitutional nature consecrated by the provisions of item 1 paragraph 5 of the Constitution. The non observance of this obligation results, as the case might be, into sanctions of non-constitutionality or unlawfulness of the juridical acts.

The lawfulness of the juridical acts of the public authorities involves the following requirements: the juridical acts should be issued with the observance of the competence stipulated by the law; the juridical act should respect the superior law norms as a juridical force.

The "legitimacy" is a complex category with multiple significances that forms the search topic for the general theory of the law, philosophy of law, sociology and other branches of instruction. The significances of this concept are multiple. To remind a few: the legitimacy of the power, the legitimacy of the political regime; the legitimacy of a governing, the legitimacy of the political system, etc.

The legitimacy concept can be applied also in the case of the juridical acts issued by the public authorities being linked to the "appreciation margin" recognized to them in the exercising of the duties.

The applying and observance of the principle of lawfulness in the activity of state's authorities is a complex problem because the exercise of the state's powers implies also the discretionary power with which the state's bodies are invested, or otherwise said the right of appreciation of the authorities regarding the adopting moment and the contents of the disposed measures. What it is important to underline is the fact that the discretionary power cannot be opposed to the principle of lawfulness, as a dimension of the rightful state.

In our opinion, the lawfulness represents a particular aspect of the legitimacy of the juridical acts of the public authorities. Thus, a legitimate juridical act is a legal juridical act, issued outside the appreciation margin recognized by the public authorities, that does not generate unjustified discriminations, privileges or restraints of the subjective rights and is adequate to the situation in fact, which is determined by the purpose of the law. The legitimacy makes distinction between the discretionary power recognized by the state's authorities, and on the other side, the power excess.

Not all the juridical acts that fulfill the conditions of lawfulness are also legitimate. A juridical act that respects the formal conditions of lawfulness, but which generates discriminations

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[2] For development see Marius Andreescu, Florina Mitrofan, *Constitutional Law. General Theory*, (Pitesti, Printing House of the University of Piteşti), p.61-68

[3] Tudor Drăganu, *Constitutional Law and Political Institutions. Elementary Treaty*, (Bucharest, Lumina Lex Publishing House, 1999, vol.II,) p.362

or privileges or unjustified restrained to the exercising of the subjective rights or is not adequate to the situation in fact or to the purpose aimed by the law, is an un-legitimate juridical act. The legitimacy, as a feature of the juridical acts of the public administration authorities should be understood and applied in relation to the principle of supremacy of Constitution.

II. THE DISCRETIONARY POWER OF THE POWER EXCESS IN THE ACTIVITY OF STATE INSTITUTIONS

Antonie Iorgovan asserted that a problem of essence of the rightful state is that of answering to the question: "where ends the discretionary power and where begins the law abuse, where ends the legal behavior of the administration, materialized by its right of appreciation and where begins the subjective law or the legitimate interest of the citizen? "[4]

Approaching the same problem, Leon Duguit in 1900 makes an interesting distinction between the "normal powers and the exceptional powers" conferred to the administration by the constitution and the laws, and on the other side the situations in which the state's authorities act outside the normative framework. The last situations are split into three categories by the author: 1) the power excess (when the state authorities exceed the limits of the legal mandates; 2) the embezzlement of the power (when the state's authority fulfils an act that enters its competence aiming a different scope, other than the one the law stipulated), 3) the power abuse (when the state's authorities act outside their competence, but through acts that don't have a juridical character)[5].

In the administrative doctrine, that studies mainly the problematic of the discretionary power, it was underlined that the opportunity of the administrative acts cannot be opposed to their lawfulness, and the conditions of lawfulness can be split in general lawfulness conditions and respectively in lawfulness specific conditions on opportunity criterions[6]. As a consequence, the lawfulness is the corollary of the conditions of validity, and the opportunity is a requirement (a dimension) of the lawfulness.[7] Nevertheless, the right of appreciation is not recognized by the authorities of the state in the exercising of all duties they have. One must remember the difference between the *linked competence* of the state's authorities that exists when the law imposes them a certain strict decisional behavior, and on the other side the *discretionary competence*, situation in which the state authorities can choose between more decisions, within law limits and its competences. To remember the definition proposed in the literature in specialty to the discretionary power: "it is the margin of liberty that is let to the free appreciation of the authorities, so that in view of fulfilling the purpose indicated by the law maker, to use any means of action within its limits of competence."[8]

Yet the problematic of the discretionary power is studied mainly in the administrative law, the right for the appreciation in the exercise of some duties represents a reality met in the activity of all state's authorities.[9] The Parliament, as a supreme representative organ and with a unique law

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[4] Antonie Iorgovan. *Forward to:* Dana Apostol Tofan, *Discretionary power and the power excess of the public authorities*, (Bucharest, All Beck Publishing House, 1999).
[5] Leon Duguit, *Manuel de Droit Constitutionnel*, (Paris, 1907), p.445-446.
[6] Antonie Iorgovan, *Treaty of administrative law, .Nemira Publishing House, Bucharest 1996,volI,p.301*
[7] Ibidem, p.292.
[8] Dana Apostol Tofan, *quoted works*. p. 22.
[9] In the doctrine, Jellinek and Fleiner sustained the thesis according to which the discretionary power is not specific only to the administrative function, but also it appears in the activity of the other functions of the state, under the form of a liberty of appreciation upon the content, on the opportunity and the extent of the juridical act. (see Dana Apostol Tofan, *quoted works*. p. 26)

making authority, disposes of the largest limits in order to show its discretionary power, which is identified by the characterization of the legislative act. The discretionary power exists in the activity of the law courts. The judge is obliged to decide only when it is noticed for, within this notification limit. Beyond these it is manifested the sovereign *right of appreciating* the facts, the right to interpret the law, the right to fix a minimum punishment or a maximum one, to grant or not extenuating circumstances, to establish the quantum of the compensations etc. The exercising of such competences means nothing else but the discretionary power.

Exceeding the limits of the discretionary power signifies the violation of the principle of lawfulness and of legitimacy or, of what in legislation, doctrine or jurisprudence is named to be the "excess of power".

The power excess in the activity of state's organs is equivalent with the law abuse because it signifies the exercising of the legal competences without the existence of a reasonable motivation or without the existence of an adequate relation between the disposed measures, the situation in fact and the legitimate purpose aimed at.

The law of the Romanian administrative prosecution[10] uses the concept of "power excess of the administrative authorities" which is defined to be the "exercising of the right of appreciation belonging to the public administration, by the violation of the fundamental rights and liberties of the citizens stipulated by the Constitution or by the law" (item 2, paragraph 1, letter m). For the first time the Romanian law maker uses and defines the concept of power excess and at the same time acknowledges the competence of the administrative prosecution instances to sanction the exceeding of the discretionary power limits throughout the administrative acts.

The exceptional situations represent a particular case in which the Romanian authorities, and mainly the administrative ones, can exercise the discretionary power, obviously existing the danger of the power excess.

Certainly, the power excess is not a phenomenon that manifests itself only in the practice of the executive organs it can be seen in the Parliament activity or in the activity of the law courts.

We appreciate that the discretionary power acknowledged by the state's authorities is exceeded, and the measures disposed represent a power excess, anytime it is ascertained the existence of the following situations:

1. The measures disposed do not aim to a legitimate purpose;
2. The decisions of the public authorities are not adequate to the situation in fact or to the legitimate purpose aimed, in the meaning that everything that is needed in order to reach the aimed purpose, is exceeded;
3. There is no rational justification of the measures disposed, included the situations in which it is established a juridical treatment that is different for identical situations, or a juridical treatment identical for different situations;
4. By the measures disposed the state's authorities limit the exercise of some fundamental rights and liberties, without the existence of a rational justification that would represent, mainly, the existence of an adequate relationship between those measures, the situation in fact and the legitimate purpose aimed at.

III. THE PRINCIPLE OF PROPORTIONALITY, CRITERION DELIMITING THE DISCRETIONARY POWER FROM POWER EXCESS

The essential problem remains that for the identification of criterions through which are to be established the limits of the discretionary power of state's authorities and to differentiate them

[10] Law no.554/2004, published in the Official Gazette no.1154/2004.

from the power excess, that should be sanctioned. Of course there is the problem of using some criterions in the practice of the law courts or in the constitutional prosecution.

In connection to these aspects, in the literature in specialty it is expressed the opinion according to which the “purpose of the law will be then the legal limit of the right to appreciate (the opportunity). Therefore the discretionary power does not mean a liberty outside the law but one allowed by the law.” [11]

Of course, “the purpose of the law” represents a condition of lawfulness or, as the case may be, of constitutionality of the juridical acts of the state bodies and that’s why it can be considered as a criterion to delimit the discretionary power from the power excess.

Such as results from the jurisprudence of some national and international law courts, in relation to our search topic, the purpose of the law cannot be the only criterion to delimit the discretionary power (synonymous with the margin of appreciation, term used by C.E.D.O.), because a juridical act of the state can represent a power excess not only in the situation in which the measures adopted do not aim to a legitimate purpose, but also in the hypothesis in which the measures disposed are not adequate to the purpose of the law and are not necessary in relation to the situation in fact and with the legitimate purpose aimed at.

The suitability of the measures disposed by the state authorities to the aimed legitimate purposes represents a particular aspect of the principle of proportionality. Significant is the opinion expressed by Antonie Iorgovan which considers that the limits of the discretionary power are established by the: “written positive rules, the general law principles subscribed, the principle of equality, the principle of non retroactivity of the administrative acts, the right to defense and the principle of contradictoriality , *the principle of proportionality” (s.n.).*[12]

Therefore, the principle of proportionality is an essential criterion that allows the delimiting of the discretionary power from the power excess in the activity of state’s authorities.

This principle is consecrated explicitly and implicitly in the international[13] juridical instruments or by the majority of the constitutions of the democratic[14] countries. Romania’s Constitution regulates explicitly this principle in item 53, but there are other constitutional dispositions that imply it.

In the constitutional law, the principle of proportionality finds its use mainly in the field of protection of human fundamental rights and liberties. It is considered as an efficient criterion of appreciation of legitimacy of the interventions of the state authorities in a situation limiting the exercise of some rights.

Much more, even if the principle of proportionality is not consecrated expressly in the constitution of a state, the doctrine and jurisprudence considers it as being a part of the notion of a rightful state[15].

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[11] Rozalia Ana Lazăr, *The Lawfulness of the administrative act. Romanian law and the compared law, quoted works* p. 165.

[12] Antonie Iorgovan, *quoted works* vol. I, p.296.

[13] To remind on this topic item.29, paragraphs.2 and 3 of the Universal Declaration of Human Rights items 4 and 5 of the International Pact regarding the economical, social and cultural rights, item 5, paragraph 1, item 12 paragraph 3, item 18, item 19 paragraph 3 and item 12 paragraph 2 of the International pact regarding the protection of the national minorities; item G Part V of the European Social Chart – revised; items 8, 9, 10, 11 and 18 of the European Convention for the defense of human rights and the fundamental liberties or item B13 of the Treaty regarding the European Economical Community.

[14] For example, item 20, point.4; item 31 and item 55 of Spain Constitution; items 11,13.14,18,19 and 20 of the German Constitution or the provisions of items.13,14,15,44 and 53 of Italy Constitution.

[15] For the development see Petru Miculescu, *The Lawful State,(* Lumina Lex Publishing House, Bucharest, 1998) pg.87-88 and Dana Apostol Tofan *quoted works.*, p.49.

This principle is applied in many branches of the law. Thus, in the administrative law it is a limit of the discretionary[16] power of the public authorities and represents a criterion in the exercising the jurisdictional control of the discretionary administrative acts. Applications of the principle of proportionality exist in the criminal law[17] or in the civil law[18].

The principle of proportionality is found also in the community law, in the meaning that the lawfulness of the community rules is subject to the condition that the means used to be adequate to the aimed objective and not to exceed what it is necessary to reach this objective.

The jurisprudence has an important role in the analysis of the principle of proportionality, applied in concrete cases. Thus, in the jurisprudence of the European Court of the Human Rights, the proportionality is conceived as a just, equitable ratio, between the situation in fact, the restraining means of the exercise of some rights and the aimed legitimate purpose, or as an equitable ratio between the individual interest and the public interest. The proportionality is a criterion that determines the legitimacy of state interference of the contracting states in the exercising of the rights protected by the Convention.

In the same meaning, the Constitutional Court of Romania, by several decisions established that the proportionality is a constitutional principle[19]. Our constitutional instance asserted the necessity to establish some objective criterions, by the law, for the principle of proportionality: "it is necessary that the legislative institutes objective criterions that should reflect the exigencies of the principle of proportionality" [20].

Therefore, the principle of proportionality is imposed more and more as a universal principle consecrated by the majority of the contemporary law systems, to be found explicitly or implicitly in constitutional norms and acknowledged by the national and international jurisdictions[21].

In the literature in specialty were identified three jurisdictional levels of the administrative acts: "a) the minimum control of the procedure rules (form); b) normal control of the juridical appreciation of the facts; c) the maximal control, when the judge asserts upon the necessity and proportionality of the administrative measures"**.**[22]

The maximal control, to which the quoted author refers to, represents the correlation between the legality and the opportunity, otherwise said, between the exigencies of the principle of lawfulness and the right of appreciation of the public authorities, the proportionality couldn't be considered as a super legality criterion, but as a principle of law, whose main finality is to represent the delimiting between the discretionary power and the power excess in the activity of the public authorities.

There are situations in which the Constitutional Court used a "proportionality reasoning" as an instrument for the interpretation of the correlation between the legal contested dispositions and on the other side the constitutional dispositions, and in situations in which the proportionality, as a

[16] On this meaning see Dana Apostol Tofan, *quoted works* pg.46-50; Iulian Teodoroiu, Simona Maya Teodoroiu, *Lawfulness of opportunities and the constitutional principle of proportionality* in: Law no. 7/1996, p.39-42.
[17] The provisions of item 72 of the Criminal Code refer to the proportionality as a general criterion of judicial individualization of the punishments or the provisions of item 44, paragraph 3 of the Criminal Code considers the proportionality as a condition of legitimate defense.
[18] The provisions of items 951 and 1157 of the Civil Code, allow the cancellation of a contract for the obvious disproportion of the service conscriptions (lesion).
[19] The Decision no 139/1994, published in the Official Gazette no 353/1994, decision no.157/1998, published in the Official Gazette no 3 /1999; the decision no. 161/1988 published in the Official Gazette no 3 / 1999.
[20] The decision no. 71/1996, published in the Official Gazette no.13/1996
[21] For development see Marius Andreescu, *Principle of proportionality in the constitutional law*, (Publishing House C.H. Beck, Bucharest, 2007)
[22] Antonie Iorgovan, *quoted works.* vol.I, p. 296.

principle, is not explicitly expressed by the constitutional texts. Self evident in this meaning are two aspects: invoking in the Constitutional Court's jurisprudence of C.E.D.O. jurisprudence, which, in the matter of restraining the exercise of some rights, analyzes also the proportionality conditions, and the second aspect, the use of such a principle in situations in which it is raised the question of respecting the principle of equality.

Declaring as non constitutional a normative disposition on the ground of non observance of the principle of proportionality, applied in this matter, signifies in essence the sanctioning of the power excess, manifested in the activity of the Parliament or of the Government. Also excess of power, sanctioned by the Constitutional Court, using the criterion of proportionality, are the situations in which the principle of equality and non discrimination are violated, if by the law or by the Government ordinance it is applied a differentiated treatment to equal cases, without the existence of a reasonable justification or if exists a disproportion between the aimed purpose and the means used.

IV. Conclusions

There are two most important finalities of the constitutional principle of proportionality: the control and the limiting of the discretionary power of the public authorities and respectively the granting of the fundamental rights and liberties in situations in which their exercising could be conditioned or restricted.

The proportionality is a constitutional principle, but in several cases there is no explicit normative consecration, the principle being deducted by different methods of interpretation from the normative texts. This situation creates some difficulties in the application of the principle of proportionality.

In relation to these considerations we propose that in the perspective of a reviewing of Romania's Constitution, that at item 1 having as a side denomination "Romanian state" to be added a new paragraph that will stipulate that :"*the exercising of the state power must be proportional and non discriminatory"*.

In such a manner many of requirements have been answered:

a) The proportionality is consecrated expressly as a general constitutional principle and not only with a restrained application in case of restraining of the exercise of fundamental rights and liberties, such as it may be considered presently, when having into consideration the provisions of item 53 in the Constitution:

b) This new constitutional provision corresponds to some similar regulations contained in the "Treaty instituted by the European Community" or in the draft for the Treaty for the establishment of a Constitution for Europe, which is very important in the perspective of Romania's adhering to European Union.

c) This new regulation would represent a genuine constitutional obligation for all state authorities to exercise their duties in such a way that the measures adopted, to subscribe within the limits of the discretionary power limits acknowledged by the law and not to represent a power excess;

d) To create the possibility for the Constitutional Court to sanction, by the means of control of constitutionality of the laws and ordinances, the power excess in the activity of the Parliament and the Government, using as criterion the principle of proportionality;

e) To make a better correlation between the principle of proportionality and the principle of equality.

References

- André Hauriou, *Droit constitutionel et institution politiques*, (Paris, Ed. Montchrestien, 1972)
- Ion Deleanu, *Constitutional law and political institutions*, (Bucharest, Europa Nova Publishing House, 1996)
- Marius Andreescu, Florina Mitrofan, *Constitutional law. General theory,* (Pitesti, Publishing House of the University of Pitesti)
- Tudor Drăganu, *Constitutional law and political institutions. Elementary treaty*, (Bucharest, Lumina Lex Publishing House, 1999)
- Dana Apostol Tofan, *Discretionary power and the power excess of the public authorities*, (Bucharest, All Beck Publishing House, 1999)
- Marius Andreescu, *Principle of proportionality in the constitutional law*, (Bucharest, C.H. Beck Publishing House, 2007)
- Petru Miculescu, *The Lawful State,(* Lumina Lex Publishing House, Bucharest, *1998)* p.87-88

REVOCATION OF ADMINISTRATIVE ACTS - THEORETICAL AND PRACTICAL CONSIDERATIONS

Elena Emilia ŞTEFAN*

Abstract

Revocation is a method of terminating the legal effects of an administrative act. Just like the general theory of law admits that any subject of law, author of a manifestation of will, is able to withdraw it, in the administrative law there is also possibility for the authority that issued the administrative act to abrogate its own act under certain circumstances. Thus, this study aims at making a presentation of the legal regime of the revocation of administrative acts, starting from aspects such as terminology, legal grounds, reasons, term, and ending with the analysis of the applicable legislation on revocation, particularly of the law on administrative disputes, and much more. Hence, revocability appears to be the fundamental principle of the legal regime of administrative acts, in close connection with the principle of stability of legal relationships.

Keywords: *administrative act, revocation, principle of stability of legal relationships, Constitutional Court, principle of legality*

Introduction

This study purposes to present the institution of revocation of administrative acts in the Romanian legal system, both as a theoretical and practical approach.

Before the actual analysis of the proposed subject, the first part of this study will provide an overview of the legislative framework that justifies the existence of this method of terminating the effects of an administrative act in the Romanian administrative law.

We begin treating this subject by quoting a fragment from the Constitution of Romania that sanctions, in its article 1 par. (5), the principle according to which "in Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory".

The principle of legality is sanctioned in any legal system, therefore the Romanian legislation is also generous from this point of view, thus establishing, according to the fragment quoted above from the fundamental law of the country, a general obligation imposed to all subjects of law, public authorities or not, to observe the law while conducting their activities.

The general principles of law, as the professor Nicolae Popa[1] used to say, are the substantiated regulations that channel the creation of law and its application.

The principle of legality[2], which is a constant of the modern system of administrative law, is currently the fundamental principle of organization and operation of the public administration in any democratic rule of law.

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[1] Nicolae Popa, *General Theory of Law*, 3rd edition, (Bucharest, C.H. Beck Publishing House, 2008), p.95.

[2] J. Scwarze, *Droit administratif européen*, (Editions Bruylant et Office des publications des Communautés européennes, vol.1), p.111, quoted by Dana Apostol Tofan in *European Administrative Institutions)*, (Bucharest, C.H. Beck Publishing House, 2006), p.34.

It is important to emphasize that, in the western political acceptation[3], the mandatory observance of the law refers equally to the individual and to the public authorities, including the State. In other words, all the authorities of the State must observe the law, just like any citizen.

The content[4] of legality includes three essential requirements, which correspond to three fundamental coordinates, namely: legality is the limit of the administrative action, legality is the foundation of the administrative action, and legality is the administration's obligation of acting so as to effectively observe the law.

From this[5] last requirement derive certain obligations devolving upon the administration, such as: the administration's obligation of advertising legality, of informing everybody about the rules of law, by means of publication or by any modern form of communication; in the event the administration itself impinged on legality, it must immediately put an end to the illegal situation that it created, either by abrogating the administrative act or by revoking it... etc.

An important complement of subjecting the administration[6] to the law was born, in time, from the development of certain principles of law, such as equality of citizens before the law, legal certainty, and protection of individual rights by independent courts of law.

The principle of legal certainty refers not only to the lawmaking operation that must observe certain strict rules[7], but it also refers to the "possibility offered to any citizen of evolving in a certain legal environment, protected from the vagueness and sudden changes that effect the legal standards"[8].

Section 1. General considerations; terminology used in case of a revocation of administrative acts

André de Laubadère defined the administration as being the "assembly of authorities, agencies and bodies having the duty, under the impulse of political power, of ensuring multiple interventions of the modern state"[9].

Since the process of issuing administrative acts may also contain errors, there must be a possibility of correcting them, which was indeed succeeded by introducing the principle of revocability of administrative acts in the activity of the public administration bodies.

Seeing that[10] the administrative authorities act under time pressure, the solution of social needs must be prompt.

Whereas the administrative act is the main legal form of action of the public administration, it goes without saying that the rules of the legal regime can only be established based on the rules underlying the organizational structure of the public administration. This way, we come to understand revocability of administrative acts as a rule (a principle) of the functional structure of the public administration.

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[3] Cristian Ionescu, *Comparative Constitutional Law*, (Bucharest, C.H. Beck Publishing House, 2008), p.36.
[4] Dana Apostol Tofan *op. cit*, p.36
[5] C.C. Manda, *Comparative Administrative Law. The Administrative Control in the European Judicial Context*, (Bucharest, Ed. Lumina Lex, 2005), p.54 et seq.
[6] Dana Apostol Tofan, *op. cit*, p.36.
[7] Law no. 24/2000 establishing the legislative technique rules for drafting pieces of legislation, published in the Official Gazette no. 139/2000, as subsequently amended by Law no. 60/2010, republished in the Official Gazette no. 260 / 21 April 2010.
[8] M. Heers, *La securité juridique en droit administratif français: vers une consécration du principe de confiance légitime?* (RFDA 1995), p.963, quoted by Ion Brad in *Revocation of Administrative Acts,* (Bucharest, Universul Juridic Publishing House, 2009), p. 123 et seq.
[9] André de Laubadere, *Traité de droit administratif*, 6ème édition, vol. I (Paris, L.G.D.J., 1973), p.11
[10] Ion Corbeanu, *Administrative Law)*, 2nd Edition revised and supplemented, (Bucharest, Lumina Lex Publishing House, 2010), p.107.

The administrative acts cause legal effects until they are rescinded, which is usually ordered by the issuing authority or by the higher authority in the hierarchy or by a court of law. As the public administration[11] is organized according to the principle of hierarchy, it also features the possibility of revoking administrative acts in order not to prejudice the system itself.

In terms of cessation of the legal effects of the administrative act, some authors[12] treat revocation jointly with rescission. Thus, it is said that: "in the legislation of our country, administrative acts are, as a general rule, *revocable, which means that they can be rescinded or revoked"*.

Professor Antonie Iorgovan[13] believes that revocation is a particular case of nullity.

The author Dana Apostol Tofan[14] is also of the opinion that revocation is a particular case of nullity but also a rule, a fundamental principle of the legal regime of administrative acts.

On the contrary, other authors[15] definitely reject the assertion that revocation is a kind of rescission, believing that the two methods are different kinds of the abrogation of administrative acts, being seen as two independent methods.

In cases when the revocation was ordered by the issuing body, the term of *retraction* has been used, which is unanimously adopted by almost all the theoreticians of law.

Section 2. Legal grounds; reasons of revocation, time limit

Subsection 2.1. Legal grounds of revocation of administrative acts and time limit

This principle of revocability of administrative acts derives from the Constitution and from the Law nr. 554/2004 on administrative disputes[16]. Although the Constitution of Romania does not make express provisions in this respect, this principle results from several articles read together, i.e. 52, 21, 126, etc.

This survey does not aim to deal also with the categories of irrevocable administrative acts, as their number varies depending on the author who analyses them.

According to article 7 of the Law on administrative disputes, before approaching the competent administrative litigations court, the person who considers that its right or legitimate interest has been violated by an individual administrative act must ask the issuing public authority or the superior authority in the hierarchy, if applicable, within 30 days as of receiving the document, *to revoke it, in full or in particle*

Also, even the right of the public authority who issued the document to challenge it before the administrative litigations court in view of acknowledging its nullity, has been sanctioned in situations when *the document can no longer be revoked because it has entered the civil circuit and has caused legal effects*, according to article 1 par. (6) of the same law. The action must be brought within one year as of the issue date of the document.

It is worth mentioning that the one-year time limit for the legal action observes the principle of certainty of legal relationships that derives from the provisions of article 6 of the

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[11] Ion Corbeanu, *op.cit.* p.107.

[12] Dumitru Brezoianu. Mariana Oprican, *The Public Administration in Romania*, (Bucharest, C.H. Beck Publishing House, 2008), p. 90 et seq.

[13] Antonie Iorgovan, *Treatise of Administrative Law)*, vol. I, (Bucharest, Biblioteca Juridică Nemira, 1996) p. 332-333.

[14] Dana Apostol Tofan, *Administrative Law*, vol. II, (Bucharest, All Beck Publishing House, 2004), p.58.

[15] Ion Brad, *Revocation of Administrative Acts,* (Bucharest, Universul Juridic Publishing House, 2009), p.63.

[16] Law no. 554/2004 on administrative disputes, published in the Official Gazette no. 1154/2004 (with its last amendment by Law no. 202/2010 on certain measures for accelerating the solution of trials).

European Convention on Human Rights (Convention), ratified by Romania by Law no. 30 / 18 May 1994. This principle requires, among others, the observance of the finality of an act that has not been challenged in court within the time limit of a common law action in the field or, failing such time limit, within a reasonable time – before being construed as "final".

The possibility to challenge, without having to observe a time limit, a unilateral administrative act referring to an individual endangers the legal order, meaning that the legal relationships and the social ones ordered by the former ones may be changed at any time, thus affecting the social order itself. However, any social relationship and any legal relationship must dispose of a sufficient time limit in order to be, if necessary, sanctioned in justice, a time limit beyond which no changes are allowed, by checking the legality or other aspects characterizing that legal relationship.

It is also worth mentioning that the same considerations are valid also for the possibility of revoking the administrative act by its issuer, therefore this measure cannot be taken at any time, but within a time limit that observes the principle of certainty of legal relationships, a principle already detailed above.

Subsection 2.2. Reasons of revocation of the administrative act

If in the introductory part of this survey we mentioned "legality", another term is worth mentioning as well, namely "opportunity"[17], both terms being closely connected to the principle of revocability of administrative acts.

The opportunity[18] of the administrative act derives from the capacity of the issuing body of choosing, among several possible and equal solutions, the one that best suits the public interests that must be satisfied.

Thus, it indicates the quality of the administrative act of satisfying both the strict rigors of the law and an especially determined need, at a given time and place. Whereas legality evokes the fact that the act complies exactly with the law, opportunity is the conformity of the administrative act mainly with the spirit of the law, without identifying the two notions.

Hence, revocation intervenes for all reasons of illegality, but particularly for reasons regarding opportunity[19].

In terms of the moment they intervene after the issue of the administrative act, regardless of whether they are due to its illegality or to its inopportunity, the reasons of revocation can be anterior, simultaneous or subsequent to the issue of the administrative act, as follows:

1) anterior reasons, causing the legal effects of revocation to be *ex tunc*, for the past, as if the act had never existed;
2) simultaneous reasons, causing legal effects of the same nature (*ex tunc*);
3) reasons subsequent to the issue of the act, causing legal effects in the future (*ex nunc*), having as consequence the termination of the legal effects caused by that act upon its revocation.

Section 3. Examples of revocation, regulated in the Romanian legislation

In the following, we are going to make some references to the legislation with regard to revocation and we shall start by nominating those in the Constitution of Romania; however, there are many other examples besides the ones we shall mention here:

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[17] In the doctrine, the term "opportunity" has also been analysed in connection with the excess of power.
[18] Verginia Vedinaş, *Administrative Law*, 4th Edition revised and updated (Universul Juridic Publishing House, 2009), p.91.
[19] Antonie Iorgovan, *op.cit*, p.334.

➢ Article 64 par. 2 regarding the internal organization of the Parliament: "Each Chamber shall elect its Standing Bureau. The President of the Chamber of Deputies and the President of the Senate shall be elected for the Chambers' term of office. The other members of the Standing Bureaus shall be elected at the opening of each session. The members of the Standing Bureaus *may be dismissed* before the expiry of the term of office."

➢ Article 85 par. 2 regarding the appointment of the Government: "(2) In the event of government reshuffle or vacancy of office, the President shall *dismiss* and appoint, on the proposal of the Prime Minister, some members of the Government."

➢ Article 107 par. 2 and 3 regarding the Prime Minister:

"(2) The President of Romania *cannot dismiss* the Prime Minister.

(3) If the Prime Minister finds himself in one of the situations stipulated under Article 106, *except for him being dismissed*, or if it is impossible for him to exercise his powers, the President of Romania shall designate another member of the Government as Acting Prime Minister, in order to carry out the powers of the Prime Minister, until a new Government is formed. The interim, during the Prime Minister's impossibility to exercise the powers of the said office, shall cease if the Prime Minister resumes his activity within the Government."

➢ Article 110 par. 2 regarding the end of the term of office of members of the Government: "(2) The Government shall be dismissed on the date the Parliament withdraws the confidence granted to it, or if the Prime Minister finds himself in one of the situations stipulated under article 106, *except for him being dismissed*, or in case of his impossibility to exercise his powers for more than 45 days. "

Other examples:

- *revocation* and abolishment of the patent of invention[20],
- *revocation* of the administration right[21]
- *dismissal* of the Ombudsman[22], as a result of violating the Constitution and the laws
- *revocation* of the right of abode[23]
- *revocation of the authorization for tax warehouse*[24]
- *revocation* of the right to hold weapons[25] etc.

By the examples given above, we tried to highlight that the term of "revocability" is expressly used in the Romanian legislation.

Section 4. Revocation of administrative acts reflected in the ECHR case law

As regards the projection of the principle of legality in the European legislation, we would like to mention that, at the European level, there is a right to good administration[26] in the operation of the public authorities.

[20] (For details, refer to the procedure of revoking and abolishing the patent of invention in Cristian ŞTRENG, *Revocarea şi anularea brevetului de invenţie (Revocation and Abolishment of the Patent of Invention)*, (Bucharest, Revista Română de Proprietate industrială nr. 1/2008) p. 07-17, with elements of Romanian legislation and much more).
http://www.osim.ro/publicatii/rrpi/nr1_08/Revocarea%20si%20anularea%20BI.pdf.

[21] Law no. 213/1998 on public property and its legal regime, published in the Official Gazette no. 448/24 November 1998, updated.

[22] Law no. 35/1997 on the organization and operation of the institution of the Ombudsman, published in the Official Gazette no. 844/2004, updated.

[23] Government Emergency Ordinance (OUG) no. 194/2002 on the regime of aliens in Romania, published in the Official Gazette no. 955/2002.

[24] Law no. 571/2003 of the Internal Revenue Code, published in the Official Gazette no. 927/2003, updated

[25] Law no. 295/2004 on the regime of weapons and ammunition, published in the Official Gazette no. 583/2004, updated.

[26] For full details, refer to Elena Ştefan, *The European Ombudsman in the Light of the European Constitution),* RDP no.1/2006, (CH Beck Publishing House, Bucharest, 2006), p.106.

The right to good administration is set forth in the Charter of Fundamental Rights of the European Union[27], promulgated at the Summit of Nice of December 2000, as well as in the European Code of Good Administrative Behaviour[28], approved by the Parliament on 6 September 2001, and currently it serves as a guide and source of information[29] for the personnel of all the institutions and bodies of the Community.

Therefore, in the light of the recent evolutions within the Community, one can distinguish a special interest for the protection of rights, legitimate interests, and civic liberties, the leverages for their factual accomplishment having been created. We would also like to mention the procedure of the prior complaint which, besides the principle of legality and of stability of legal relationships, is an efficient means of fighting bad administration and was created in order to offer the interested parties the possibility of solving their complaint within a shorter period of time and more effectively, as the notified administrative body is able to revert to the act it has issued and to issue another one, accepted by the claimant.[30]

The author Ovidiu Podaru[31] analyses several decisions of the Strasbourg Court, connected to the principle of certainty of legal relationships, cases in which the solution of the Court was against Romania, and so does another author[32], as follows:

- case Păduraru[33] versus Romania
- case Brumărescu[34] versus Romania
- case Viaşu versus Romania, of 09 December 2008
- case Beian[35] versus Romania

After an analysis of these decisions is follows that legal certainty involves the same dimensions: clarity of the right and stability of the right. These decisions do not explicitly refer to the issues regarding the revocation of administrative acts.

The Constitutional Court of Romania has acknowledged the European trend of punishing the violation of this principle and, to that effect, we would like to mention two decisions:

1.) In its Decision no. 404 of 10 April 2008, it asserted that: "the principle of stability of legal relationships, although it is not expressly sanctioned by the Constitution of Romania, is inferred both from the provisions of article 1 par. (3), according to which Romania is a State of law, a democratic and social State, and from the preamble to the Convention on Human Rights, as interpreted by the European Court of Human Rights in its case law. "

2.) In its Decision no. 1352 of 10 December 2008, the Court decided that: "The European Court of Human Rights, by its decision given in the case of Brumărescu versus Romania, 1999,

[27] Charter of Fundamental Rights, published in the Official Journal 2007 C 303.
See http://eur-lex.europa.eu/ro/treaties/dat/32007X1214/htm/C2007303RO.01000101.htm.

[28] Le Code européen de bonne conduite administrative, Office des publications officielles des Communautés européennes, L- 2985 Luxembourg 2002, ISBN 92-95010-42-6.

[29] For full details, refer to http://www.ombudsman.europa.eu/activities/home.faces.

[30] Iulia Rîciu, *Procedure of Administrative Disputes*, (Bucharest, Hamangiu Publishing House, 2009), p. 219.

[31] Ovidiu Podaru, *Administrative Law*, vol. 1, *The Administrative Act. (I) Guidelines for a Different Theory*, (Bucharest, Hamangiu Publishing House, 2010), p.300 et seq.

[32] Ion Brad, *op.cit.* p.160 et seq.

[33] Published in the Official Gazette, Part I, no. 514 of 14 June 2006.

[34] On this subject: Iuliana Rîciu, *Theoretical Examination of Judicial Practice regarding the Actions Brought before the Administrative Litigations Court by the Public Authority that issued the Illegal Administrative Act*, Bucharest, RDP no. 1/2008, p.131.

[35] Published in the Official Gazette, Part I, no. 616/21 August 2008.

ruled that: The right to a fair hearing by a court, guaranteed by article 6, 1st paragraph of the Convention, must be interpreted in the light of the preamble to the Convention, which asserts the supremacy of law as an item of the joint patrimony of the contracting states. One of the fundamental elements of the supremacy of law is the principle of certainty of legal relationships, which claims, among others, that the final solution given to any dispute must not be subject to a new judgment."

Conclusions

In this study, we have tried to highlight the fact that the activity of the public administration is based on an entire range of principles, that the revocability of administrative acts was born from the need of limiting the damages for the administration and from the need of not prejudicing the system itself.

Towards the end of the study, our analysis referred to the ECHR case law in the field, bringing to attention certain aspects connected to the principles of operation of the public administration and insisting on the fact that a sustainable administration relies on laws.

Unlike[36] other legal systems, the Romanian system contains an imbalance in this respect: the very short timeframe in which the administrative authorities may revoke their illegal acts clearly favours the principle of legal security as opposed to the principle of legality.

In conclusion[37], at the European level there is a concern for the revocation of administrative acts, considering the dynamics of the administrative phenomenon and the importance that the administrative appeal may have as a procedural means of prejudicial solution of administrative conflicts.

References

- Nicolae Popa, *General Theory of Law*, 3rd edition, (Bucharest, C.H. Beck Publishing House, 2008), p.95;
- Ion Brad, *Revocation of Administrative Acts*, (Bucharest, Universul Juridic Publishing House, 2009), 245 p.;
- Ion Corbeanu, *Administrative Law*, 2nd Edition revised and supplemented, (Bucharest, Lumina Lex Publishing House, 2010), 349.p;
- Ovidiu Podaru, *Administrative Law*, vol. 1, *Guidelines for a Different Theory)*, (Bucharest, Hamangiu Publishing House, 2010), 408 p;
- Antonie Iorgovan, *Treatise of Administrative Law*, vol. I, (Bucharest, Biblioteca Juridică Nemira, 1996) p.332 et seq.,
- Rene Chapus, *Droit administratif general,* t.1, 15th Edition (Paris, Éditions Montchrestien, 2001), p. 1155 ;
- Antonie Iorgovan,*Tratat de drept administrative (Treatise of Administrative Law)*, vol. I, (Bucharest, Biblioteca Juridică Nemira, 1996) p.332 et seq.,
- Verginia Vedinaş, *Administrative Law*, 4th Edition, revised and updated, (Bucharest, Universul Juridic Publishing House, 2009), p.91;

[36] Ion Brad, *op. cit*. p.221.
[37] Iuliana Rîciu, *op.cit.* p.218.

- Sorin Popescu, Cătălin Ciora, Victoria Ţăndăreanu, *Practical Aspects of Legislative Technique and Recording*, (Official Gazette Publishing House, 2008), p. 7;
- C.C. Manda, *Comparative Administrative Law. Administrative Control in the Legal Framework*, (Bucharest, Lumina Lex Publishing House, 2005), p.54 et seq.,
- Dana Apostol Tofan, *Administrative Law,* vol. II, (Bucharest, All Beck Publishing House, 2004), p.58;
- Jean Rivero et Jean Waline, *Droit Administratif*, 17 –a ed.(Paris, Editions Dalloz, 1998) p.111 et seq.;
- Alexandru Cristian ŞTRENG*, Revocarea şi anularea brevetului de invenţie (Revocation and Abolishment of the Patent of Invention)*, (Bucharest, RomanianJournal of Industrial Property no 1/ 2008) p.07-17;
- M Heers, *La securité juridique en droit administratif français: vers une consécration du principe de confiance légitime?* (RFDA 1995), p.963;
- Iulia Rîciu, *Procedure of Administrative Disputes*, (Bucharest, Hamangiu Publishing House, 2009) p. 218 et seq.;
- Iuliana Rîciu, *Theoretical Examination of Judicial Practice regarding the Actions Brought before the Administrative Litigations Court by the Public Authority that issued the Illegal Administrative Act,* (Bucharest, RDP no. 1/2008), p.131;
- Dumitru Brezoianu, Mariana Oprican, *The Public Administration in Romania*, (Bucharest, C.H. Beck Publishing House, 2008), p. 90 et seq.;
- Elena Ştefan, Ştefan, *Ombudsmanul European în lumina Constituţiei Europene (The European Ombudsman in the Light of the European Constitution,* (Bucharest, Public Law Review no.1/2006, CH Beck Publishing House, 2006), p.106;
- Charter of Fundamental Rights, published in the Official Journal 2007 C 303;
- Le Code européen de bonne conduite administrative, Office des publications officielles des Communautés européennes, L- 2985 Luxembourg 2002, ISBN 92-95010-42-6;
- http://eur-lex.europa.eu/ro/treaties/dat/32007X1214/htm/C2007303RO.01000101.htm;
- Law no. 35/1997 on the organization and operation of the institution of the Ombudsman, published in the Official Gazette no. 844/2004, updated;
- Law no. 554/2004 on administrative disputes, published in the Official Gazette no. 1154/2004, (with its last amendment by Law no. 202/2010 on certain measures for accelerating the solution of trials),
- Law no. 213/1998 on public property and its legal regime, published in the Official Gazette no. 448/24 November 1998, updated;
- Law no. 295/2004 on the regime of weapons and ammunition, published in the Official Gazette no. 583/2004, updated;
- Government Emergency Ordinance (OUG) no. 194/2002 on the regime of aliens in Romania, published in the Official Gazette no. 955/2002;
- Law no. 571/2003 of the Internal Revenue Code, published in the Official Gazette no. 927/2003, updated;
- http://www.osim.ro/publicatii/rrpi/nr1_08/Revocarea%20si%20anularea%20BI.pdf;
- http://www.ombudsman.europa.eu/activities/home.faces.

THE REQUIREMENTS FOR PROTECTION OF THE COMMUNITY DESIGN

Alina Mihaela CONEA[*]

Abstract

This paper aims at showing the key issues underlying the requirements for protection of the community design. According to the Council Regulation (EC) No 6/2002, a design must satisfy two main conditions to be protected by a Community design: novelty and individual character. A further consideration is the requirement of visibility, but only when it comes to register component parts of a complex product. Three main types of subject matters are excluded from protection: first, a Community design cannot relate to characteristics of the appearance of a product that are exclusively dictated by its technical function; second, the situation referred to as "must fit" and "must match" cases and, third, a design applied to or incorporated in a component part of a complex product if the component part does not remain visible during the normal use of the complex product. Also, Community designs contrary to public policy or to accepted principles of morality are excluded from protection. One special interest of the paper is the recent jurisprudence of the community design courts in this field. A core element of the protection system is the role of the community court's jurisdiction in matters of community design. These are courts of Member States that have been designated by them as community courts, which have exclusive jurisdiction to decide on cases of breaches of rights of community designs. The evolving and contradictory decisions of the national instances implies that with respect to the evolution of a homogeneous case law on unified Community industrial property, the European Court of Justice has had and still has to fulfil its exclusive mission of informing national courts as to the direction, in which European Union law is to develop.

Keywords: *community design, individual character, informed user, solely dictated by technical function, European Court of Justice*

Introduction

The Community Design Regulation (CDR)[1] states, in articles 4 to 9, that a design shall be protected by a Community design to the extent that it is *new* and has *individual character*. A further consideration is the requirement of *visibility*, but only when it comes to register component parts of a complex product. In addition, Community designs contrary to *public policy* or to accepted principles of *morality* are excluded from protection. The requirements for protection of community design mentioned above are circumstantiated using notions that entail further consideration and analysis. The present paper highlights, in the context of community design, these concepts and attempts to clarify them

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[1] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, *OJ L 3, 5.1.2002, p. 1–24*

The significance of the studied matter is relevant in outlining the protection conferred for the community design. The requirements for protection regarding novelty and individual character, actually, constitute absolute grounds for invalidity[2].

The paper illustrate that there are conflicting views over the clarification of this legal norms in the jurisprudence of the national instances, designated as European design courts and in the decisions of the Board of Appeal of the Office. Therefore, depending on the understanding of the notions mention above the validity of design will be established.

To clarify the concepts of novelty and individual character, it will be carry out an examination of the legal norms governing the issue, art 4-9 of the Regulation 6/2002. The attempt is to compare and study these terms in light of the programmatic documents of the European Commission, the opinions of scholars, the recent decision of the Office for Harmonization in the Internal Market and the few existing judgements of the European General Court. One special attention is grant to the jurisprudence of the European design courts.

The issue of harmonization and unification of the legislation on design law, at the European Union, is a constant concern of the doctrine. Since the planning stage, proposals for a directive on the harmonization of national legislation on the design and the creation of the Community Design Regulation enjoyed an in depth comparative analysis, in an attempt to anticipate the possible interpretations of legal text (Mario Franzosi, 1996), (David Musker, 2002). It is recognized that design protection crosses all aspects of intellectual property rights (Uma Suthersanen, 2000; 2010)[3] and advantages and drawbacks of community design is consider (Massa and Strowel, 2003). The coverage of the legal norms governing the community design is present in the Romanian doctrine (Viorel Roș, 2003)[4], (Constantin Duvac and Ciprian Paul Romițan, 2009)[5], (Alice Mihaela Postăvaru and Gheorghe Bucșă)[6]. Access to the decisions of competent national law courts is not simple. Some court decisions are published in annual collections, receiving annotations. (Henning Hartwig, 2007, 2008, 2009).

Novelty

Under article 5(1) of the Regulation”a design shall be considered to be new if *no identical design* has been made available to the public”. Novelty is identified with the absence of identical designs publicly disclosed prior a reference date. Designs are considered identical if their features differ only in *immaterial details*[7]. In other words, according to Massa and Strowel, novelty consists in an objective non-identity exceeding immaterial details.

In the case of the protection of community design, the Commission did not intend to adopt the system of "novelty" within the meaning of patent law protection, although the drafting norm displays similarities, but to create a specific concept[8].

[2] Massa, Charles-Henry, and Alain Strowel. “Community Design: Cinderella revamped.” *EIPR* (2003): 68-78.

[3] Suthersanen, Uma. Design law in Europe: an analysis of the protection of artistic, industrial, and functional designs under copyright, design, unfair competition, and utility model laws in Europe, including a review of the E.C. Design Regulation, the E.C. Design Directive, and international design protection. London: Sweet & Maxwell, 2000 (2nd ed., September 2010)

[4] Roş, Viorel. Dreptul proprietății intelectuale. Dreptul de autor şi drepturile conexe, Editura ALL Beck, 2005

[5] Duvac, Constantin, and Ciprian Paul Romițan. *Protecția juridico-penală a desenelor şi modelelor*. Bucureşti: Universul Juridic, 2009

[6] Postăvaru, Alice Mihaela, and Gheorghe Bucşă. *Designul comunitar. Ghid*. Bucureşti: Ed. OSIM, 2007

[7] Art. 5(2) of the Regulation

[8] Commission of the European Communities. Green Paper on the Legal Protection of Industrial Design: Working Document of the Services of the Commission, Brussels, 1991. parag. 5.5.1.3.

In this context, the Green Paper[9] indicates a two-step test presented below. In the first stage of the test, the design must not to have been anticipated by a design which appears as identical or substantially similar *to the circle of specialists* in the field and in the second stage, must be distinguished from other designs commonly known *in the eyes of an ordinary consumer*. The result of this first stage of the test would, therefore, be that designs which are not known by experts operating within the Community would be eligible for protection either because they are completely different from anything known by them at the specific point in time, or because they present, according to the assessment by an expert eye, sufficient differences from known designs to constitute creative independent development.

The second stage involves the evaluation of the test indicated by the "relevant public". While the Commission acknowledges that the differences can be less perceptible to an ordinary consumer, it points out the design rationale protection, which must be perceived as something different at the market level, where it plays its role in competition between products, and not at the more sophisticated level of the world of the experts.

As regards the interpretation of the expression *immaterial details*, the Board of Appeal of the Office considered, that as the only difference is ”a slight variation in the shade of the colour pattern in the contested design, this amounts to no more than a hardly noticeable difference in a detail”[10]

A recent decision of the OHIM Board of Appeal of 2 November 2010, in Case R 1086/2009-3, *Erich Kastenholz*, concern a contested RCD registered for ‘watch-dials’(represented below in grey scale). The invalidity applicant claimed that the RCD was not new since an identical design of a clock-face with the technique of overlapping coloured foils had been shown and published by an artist in exhibitions and catalogues between 2000-2005.

The board held that in the case of the RCD ”the intensity of the colours does not change gradually with the change of time” and that, ”by contrast, the clock-face of the earlier design is able to produce a wide spectrum of colours”

> *The differentiating features mentioned have a significant impact on the overall impression produced by the two designs and lead to a different perception by the informed user. The contested RCD, therefore, possesses individual character.*
>
> *The two designs are not identical. It is clear that novelty and individual character, although presented as separate requirements in Articles 4 to 6 CDR, overlap to some extent. Obviously, if two designs produce a different overall impression on the informed user, they cannot be identical for the purposes of Article 5 CDR.*[11]

[9] Commission of the European Communities. Green Paper on the Legal Protection of Industrial Design: Working Document of the Services of the Commission, Brussels, 1991. parag. 5.5.5.4

[10] OHIM, Decision of the Third Board of Appeal of 28 July 2009 In case R 921/2008-3 Věra Šindelářováv. Blažek Glass s.r.o (Nail files), parag. 25

[11] OHIM, DECISION of the Third Board of Appeal of 2 November 2010, In Case R 1086/2009-3, Erich Kastenholz v. qwatchme a/s (Watch-dials), parag. 25-27

It is considered that for establish novelty, the specific elements that confers the design its particular character should be taken into account, and not the general ones. A design should be considered new if its specific matter are different from the status quo of *"the existing design corpus"* (prior art).

The reference date for novelty is stated in article 7(a) of the Regulation no. 6/2002. A design shall be deemed to have been made available to the public if it has been published before the date on which the design for which protection is claimed *has first been made available to the public*[12] (in the case of an unregistered Community design) or before *the date of filing of the application for registration* of the design for which protection is claimed, or, if priority is claimed, *the date of priority*[13]. Publication can be achieved as a result of registration, or exhibited, used in trade or otherwise disclosed[14].

However, a design is not considered publicly disclosed where these events could not have become known in the normal course of business to the *circles specialized*[15] in *the sector concerned*, operating within the Community[16]. Sherman and Bently point out that this is a "safeguard clause" aimed at preventing a design form being unregistrable on the basis of prior obscure disclosures. The precise impact of this clause is difficult to predict, not at least because its wording presents a number of ambiguities[17].

As regards the interpretation of this provision of the regulation, can be reported the decision of the British courts in the case *Green Lane Products v PMS International*[18]. The case concerned infringement of a Community Design, registered for products indicated as "flatirons and washing, cleaning and drying equipment" by Green Lane Products and the trial was on a preliminary point: namely, which disclosures constituted prior art. The question here was, which was the "sector concerned": the sector of the prior art (i.e. massage balls) or the sector of the design (i.e. laundry balls). The judge held that the design would be infringed whatever the product, so that the registration did not merely cover "flat irons and washing, cleaning and drying equipment", but any product whatsoever. The judge concluded that the "sector concerned" was the sector of the prior art.

The Hamburg District Court held, in the case *Gebäckpresse I*[19] that

[12] Articles 5(1)(a) and 6(1)(a) of the Regulation
[13] Articles 5(1)(b) and 6(1)(b) of the Regulation
[14] OAPI, Decizia Camerei a treia de recurs din 26 martie 2010 in Cauza R 9/2008-3 *Crocs V. Holey Soles Holdings Ltd Inc*
[15] Commission of the European Communities. *Green Paper on the Legal Protection of Industrial Design: Working Document of the Services of the Commission.* Brussels:, 1991. parag. 5.5.5.2 " the specialists, designers. merchants, and manufacturers operating in the sector concerned"
[16] *Green Paper,* parag. 5.5.5.2 "The circle of relevant persons Is limited to those operating within the Community, but their knowledge is not subject to any territorial limitation"
[17] Bently, Lionel, and Brad Sherman. *Intellectual property law*. Oxford ; New York: Oxford University Press, 2004, pag. 629
[18] Green Lane Products Ltd. v PMS International Group Plc, Court of Appeal (UK), [2008] ECDR 15
[19] Landgericht Hamburg – Gebäckpresse I, Urteil vom 20. Mai 2005 – 308 O 182/04

> *”an unregistered Community design acquires protection by being made available to the public for the first time within the territorial borders of the Community. A design registration of the same object published by the holder in a foreign country (China) prior to the disclosure of the unregistered Community design is not detrimental to novelty”*[20].

Also is not considered to have been made available to the public a design that was disclosed only to a third party in explicit or implicit conditions of confidentiality. A disclosure shall not be taken into consideration for the purpose of applying Articles 5 and 6 and if a design for which protection is claimed under a registered Community design has been made available to the public by the designer, his successor in title, or a third person as a result of information provided or action taken by the designer or his successor in title; and *during the 12-month period preceding the date of filing of the application or, if a priority is claimed, the date of priority*.

In the case *Gebäckpresse I*[21], Hamburg District Court decided that:

> *”The presentation of the design in the context of contractual negotiations is subject to confidentiality even without explicit agreement on this point, and therefore does not constitute a fact detrimental to novelty”.*

In the Case R 608/2009-3, *Reinhold Gerstenmeyer* AB, the Board of Appeal of the Office[22] stated that”since it has been established that the prior design, which is identical to the RCD, was disclosed in 2004 well before the 12-month period preceding the date of priority claimed of 7 December 2006”,”it is of no relevance who the designer of the prior design was”.

The rationale for the existence of this warranty clause is contained in the Preamble, which specified that the author should have the opportunity ”to test the products embodying the design in the market place before deciding whether the protection resulting from a registered Community design is desirable”[23].

The same applies if the design has been made public following *abusive conduct*[24] against the author or his successor in title. The characteristic of an *abusive* conduct is underlined by the OHIM Board of Appeal in the decision of 8th March 2010, in Case R 1775/2008-3, *European Citizen's Band Federation* where it concludes that

> *The objection about the ineffectiveness of disclosure of the RCD under Article 7, paragraph 3, is unfounded. Disclosure is not the consequence of any abuse and does not, therefore, in this case described in paragraph 3 of Article 7 CDR*[25].

Individual character

Article 6(1) provides that ”a design shall be considered to have *individual character* if the *overall impression* it produces *on the informed user* differs from the overall impression produced on such a user *by any des*ign which has been made available to the public”. It is specified that in

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[20] Hartwig, Henning. *Designschutz in Europa*. Köln ; München [u.a.]: Heymann, 2007, pag.243

[21] Landgericht Hamburg – Gebäckpresse I, Urteil vom 20. Mai 2005 – 308 O 182/04

[22] OHIM, DECISION of the Third Board of Appeal of 11 December 2009, In Case R 608/2009-3, Reinhold Gerstenmeyer AB v. B-NU Limited

[23] Point (20), preamble of the Regulation :”It is also necessary to allow the designer or his successor in title to test the products embodying the design in the market place before deciding whether the protection resulting from a registered Community design is desirable. To this end it is necessary to provide that disclosures of the design by the designer or his successor in title, or abusive disclosures during a period of 12 months prior to the date of the filing of the application for a registered Community design should not be prejudicial in assessing the novelty or the individual character of the design in question.

[24] Franzosi, Mario. *European design protection : commentary to directive and regulation proposals*. The Hague ; Boston: Kluwer Law International, 1996, pag.81

[25] OHIM, DECISIONE della Terza Commissione di ricorso del 8 marzo 2010 Nel procedimento R 1775/2008-3, EUROPEAN CITIZEN'S BAND FEDERATION (ECBF) contro European Citizen's Band Federation, parag. 58

assessing individual character, *the degree of freedom of the designer* in developing the design shall be taken into consideration[26].

As explained in the preamble ”the assessment as to whether a design has individual character should be based on whether the overall impression produced on an informed user viewing the design *clearly* differs from that produced on him by the existing design corpus, taking into consideration the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it belongs and the degree of freedom of the designer in developing the design”.

Individual character is thus a difference in the overall impression on the informed user. Individual character seems to be more demanding than novelty as it refuses protection to overall *déjà vu*. In practice, individual character is likely to absorb novelty[27].

The approach used to implement the trademark test of distinctiveness appears more appropriate than the patent approach, in view of the stated intention to protect the marketing functions of designs. In each case, the test is based on the reaction of the consumers to the design relative to the prior art, whereas the patent test of inventive step is based on a peer review approach by designers rather than consumers[28].

The Office admitted[29] the existence of some criticism, expressed when the Community Design Regulation came into force, because it does not require a Community design to “clearly differ”[30] from the prior art in order to have individual character as a pre-requisite for protection. In fact, all it specifies is that the Community design produces a different overall impression on an informed user than any prior design.

In the case R 860/2007-3, *Wuxi Kipor vs. Honda Motor*, the Boards had to compare the subject matter of the contested Community design RCD 171178-0004 concerning inverter generators with a prior design Despite the many differences between the two opposing designs, the Boards found that “the differences are not sufficient to affect the overall impression that the two designs produce on the informed user”, because “*the informed user* is more likely to be impressed by *the overall aspect* of the generator rather than *the various details* that characterise mechanical devices in general.” The Board held that, “according to the case-law of this Board, *the informed user is identified on the basis of the class of products* within which, according to the application for registration, the design itself is intended to be incorporated. (...) The informed user against whom individual character of the contested RCD should be measured is therefore whoever *habitually purchases* such an item and puts it to *its intended use* and has become *informed on the subject by browsing* through catalogues of such generators, visiting the relevant stores, downloading information from the internet”. The Board underlines that the two designs concern products having a high technical content and, consequently,”are products for which technical characteristics and safety considerations – ease of use, protection against hazards – are of such importance that the informed user’s overall impression of the aspect of the product is more likely to be *influenced by the general appearance* (arrangement of component parts, size, overall shape of components) *than by relatively immaterial details*”[31]

[26] Article 6(2) of the Regulation

[27] Massa, Charles-Henry, and Alain Strowel. “Community Design: Cinderella revamped.” *EIPR* (2003): 68-78.

[28] Musker, David. *Community Design Law: Principles and Practice*. London: Sweet & Maxwell, 2002, pag. 29

[29] Decision of the Third Board of Appeal of 17 April 2008, Case R 860/2007-3, *Wuxi Kipor Power Co., Ltd. vs. Honda Motor Co., Ltd.*

[30] The Office mentions that “during the drafting process of the CDR the term “clearly” has been deleted in the definition of individual character. The fact that it was forgotten to delete the term in the preamble of the Regulation has led to some confusion”

[31] Decision of the Third Board of Appeal of 17 April 2008, Case R 860/2007-3, *Wuxi Kipor Power Co., Ltd. vs. Honda Motor Co., Ltd,* emphasis added

In its recent decision, from 16 December 2010, in Case T-513/09 *José Manuel Baena Grupo, SA v. OHIM*[32], the European General Court considered a dispute against the validity of a registered Community design (RCD 426895-0002, on the left) brought on the basis of an earlier Community trade mark (CTM 1312651).

Whilst the Board of Appeal (and before it the cancellation division of OHIM) considered the registered design to be sufficiently close to the Community trade mark so as to decline individual character to the design, the General Court held that it did produce a different overall impression on the informed users and, therefore, that it did have the necessary individual character. As regards *the identity of the informed user,* the General Court considered it to be teenagers who were presumed to be the consumers of the T-shirts, stickers and other items for which the design was registered. The Court also emphasis the *different facial expressions* depicted in the two competing character designs and consider that

> *In this case, it should be noted that the overall impression created by the two conflicting figures on the informed user is determined largely by the facial expression of each thereof.*[33]

It is, however, controversial the fact that the different facial impression is sufficient for considering the contested design as having individual character.

Bently and Sherman believe, however, that the elaborated definition of ”individual character” does not demand a ”personality” of its own of the design, and merely focuses on the difference of impression[34].

This view was confirmed in case the national design courts. The Court of Appeal of Berlin, in the case *Sal de Ibiza*[35], said that

> *”contrary to section 1(2) German design act- former version-, there is no minimum ”particular individuality” required for the Community design. In particular, it does not necessarily have to demonstrate any aesthetic content. Therefore, a high degree of originality is not required. Primarily, distinctiveness is determining, not creativeness”.*

As regards interpretation of the concept of "informed user", the Court held recently in *Shenzhen Taiden* [36]decision, issued on 22 June 2010 that

> *”With regard to the interpretation of the concept of informed user, the status of ‘user’ implies that the person concerned uses the product in which the design is*

[32] Case T-513/09, Judgment of the General Court of 16 December 2010 - Baena Grupo v OHIM - Neuman and Galdeano del Sel (Seated figure)

[33] Case T-513/09, 16 December 2010, Baena Grupo, parag. 21

[34] Bently, Lionel, and Brad Sherman. *Intellectual property law*. Oxford; New York: Oxford University Press, 2004, pag. 635

[35] Kammergericht *Berlin – Sal de Ibiza*, *Beschluss vom 19. November 2004 – 5 W 170/04*

[36] Case T-153/08, Judgment of the General Court of 22 June 2010 — *Shenzhen Taiden v OHIM — Bosch Security Systems* (Communications Equipment), *OJ C 209, 31.7.2010, p. 34–34*

incorporated, in accordance with the purpose for which that product is intended. The qualifier 'informed' suggests in addition that, without being a designer or a technical expert, the user knows the various designs which exist in the sector concerned, possesses a certain degree of knowledge with regard to the features which those designs normally include, and, as a result of his interest in the products concerned, shows a relatively high degree of attention when he uses them."[37]

Competent national courts have had occasion to rule, before the above decision of the Court, on the interpretation of the term *"informed user"*.

In the first case concerning the registered Community design that has come before the Court of Appeal in England and Wales, *Procter & Gamble Company v Reckitt Benckiser (UK) Ltd*[38], Lord Justice Jacob, by decision of 10 October 2007, stated that "the informed user is not the same as the "average consumer"[39] of trade mark law"[40], so "is alert to design issues and is better informed than the average consumer in trade mark law"[41]. "The "informed user" will have more extensive knowledge than an "average consumer in possession of average information, awareness and understanding" in particular he will be open to design issues and will be fairly familiar with them".

In *Bailey & Anor v Haynes & Ors* the enquiry on the informed user focuses on "those having a practical interest in the use to which the *product* incorporating the design is to be put"[42].

In its decision of 21 December 2007, the High Court of Ireland, in the case *Karen Millen Ltd.* v *Dunnes Stores & Anor*[43],follows the decision *Procter & Gamble Company v.Reckitt Benckiser (UK) Ltd* (2007) and considers that the informed user is "an "end user" of the products to which the design relates", "is aware of similar designs which form part of the relevant design corpus", "he will be alert to design issues and better informed that the average consumer in trade mark law", "he must be considered to be familiar with the functional or technical requirements of the design or, perhaps more precisely, the product for which the design is intended", and "he is not considered to have extensive technical knowledge appropriate to a manufacturer of the product".

An additional factor in assessing the individual character is, under Article 6 (2) of Regulation no. 6/2002, *the degree of freedom of the designer* in developing the design. This provision must be considered in the context of the Preamble, which along with the degree of freedom of the designer in developing the design., evaluation takes into " consideration the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it belongs"[44]

[37] Case T-153/08, Judgment of the General Court of 22 June 2010 — *Shenzhen Taiden v OHIM — Bosch Security Systems* (Communications Equipment), *OJ C 209, 31.7.2010, p. 34–34, parag. 46-47*

[38] Procter & Gamble Company v Reckitt Benckiser (UK) Ltd [2007] EWCA Civ 936, comentat de Carboni, Anna. "Design validity and infringement: feel the difference." *European Intellectual Property Review* 30.3 (2008): 111-117

[39] For the purposes of that global appreciation, the average consumer of the category of products concerned is deemed to be reasonably well-informed and reasonably observant and circumspect (see, to that effect, Case C-210/96 *Gut Springenheide and Tusky* [1998] ECR I-4657, paragraph 31). However, account should be taken of the fact that the average consumer only rarely has the chance to make a direct comparison between the different marks but must place his trust in the imperfect picture of them that he has kept in his mind. It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question.

[40] Procter & Gamble Company v Reckitt Benckiser (UK) Ltd [2007] EWCA Civ 936, parag. 24

[41] Ibidem, parag. 28

[42] Bailey & Anor v Haynes & Ors [2006] EWPCC 5 (02 October 2006), Patents County Court (England and Wales), parag. 55

[43] Karen Millen Ltd. v Dunnes Stores & Anor. [2007] IEHC 449 (21 December 2007)

[44] Punctul (14), Preambul, Regulamentul (CE) nr. 6/2002

The test of the "degree of freedom of the designer 'indicates that where the possibility of differences is small, the smallest difference from the previous drawing will be sufficient to give an individual character[45].

Court stated in its Judgement of 18 March 2010 in Case *Grupo Promer Mon Graphic* that in this respect,

”it must be noted that the designer’s degree of freedom in developing his design is established, inter alia, by the constraints of the features imposed by the technical function of the product or an element thereof, or by statutory requirements applicable to the product. Those constraints result in a standardisation of certain features, which will thus be common to the designs applied to the product concerned”[46].

Massa and Strowell notes that the requirement of individual character could be interpreted as ”unconfessed original novelty” and that, in theory, there is no oxymoron in associating novelty and originality as both standards may perfectly well supplement each other. In law the conjunction”or” separating novelty and originality in article 25.1 of the TRIPs constitutes an insuperable obstacle to associate them[47].

Visibility of the constitutive elements

Article 4(2) of the regulation provides that ”a design applied to or incorporated in a product which constitutes a *component part of a complex product* shall only be considered to be new and to have individual character: if the component part, once it has been incorporated into the complex product, remains *visible* during *normal use* of the latter; and to the extent that those visible features of the component part fulfil in themselves the requirements as to novelty and individual character”[48].

As regards the visible character, OHIM Board of Appeal has ruled that

”The Board concludes none the less that the requirements of Article 4(2)(a) CDR are satisfied. That provision does not require a component part to be clearly visible in its entirety at every moment of use. It is sufficient if the whole of the component can be seen some of the time in such a way that all its essential features can be apprehended.”[49]

"Normal use" shall mean use by the end user, excluding maintenance, servicing or repair.

Musker underlies that the notion of *normal use* could imply that even an attractive component, perhaps visible at point of purchase, can be denied protection if invisible in ”normal use”. The issue is apparently not whether the article is bought for its appearance, but whether it is used for its appearances[50].

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[45] Musker, David, op.cit, pag. 33

[46] Judgment of the General Court (Fifth Chamber) of 18 March 2010, Grupo Promer Mon Graphic, SA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-9/07, European Court reports 2010 Page 00000

[47] Pentru o discuție asupra art. 25 TRIPs, a se vedea: Reichman, Jerome H. (1995) *Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement.* International Lawyer, 29 . pp. 345-388, http://eprints.law.duke.edu/687/

[48] Point (12) Preamble of the regulation” Protection should not be extended to those component parts which are not visible during normal use of a product, nor to those features of such part which are not visible when the part is mounted, or which would not, in themselves, fulfil the requirements as to novelty and individual character. Therefore, those features of design which are excluded from protection for these reasons should not be taken into consideration for the purpose of assessing whether other features of the design fulfil the requirements for protection”.

[49] OHIM, DECISION of the Third Board of Appeal of 22 October 2009 in Case R 690/2007-3 Lindner Recyclingtech GmbH v. Franssons Verkstäder AB, parag. 21

[50] Musker, David. *Community Design Law: Principles and Practice*. London: Sweet & Maxwell, 2002, pag.24

Issues covered in this article are particularly used parts"for the purpose of the repair of that complex product so as to restore its original appearance"[51], the spare parts.

The debates that took (and still) occur in connection with the opportunity to protect spare parts forced the adoption of a temporary solution for the Community design protection. As stated in the preamble" (...) under these circumstances, it is appropriate *not to confer any protection* as a Community design for a design which is applied to or incorporated in a product which constitutes a component part of a complex product upon whose appearance the design is dependent and which is used for the purpose of the repair of a complex product so as to restore its original appearance, until the Council has decided its policy on this issue on the basis of a Commission proposal"[52].

Regulation no. 6/2002 has, therefore, a transitional provision that "are not granted protection as a Community design to a design that is one part of a complex product, until a later date when is foreseen an amendment to the Regulation, on a Commission proposal. According to Regulation no. 6/2002[53], the proposal from the Commission shall be submitted together with, and take into consideration, any changes which the Commission shall propose on the same subject pursuant to Article 18 of Directive 98/71/EC. In 2004, the Commission submitted a controversial[54] proposal[55] to amend Art. 14 of the Directive that excluded spare parts from design protection afforded by national legislation. To the extent that this proposal will be adopted, it will have a direct impact on the Regulation on Community design.

Products that cannot be protected

Public policy or morality

Article 9 of the regulation provides that" a Community design shall not subsist in a design which is contrary to public policy or to accepted principles of morality." This is similar to the corresponding provision of the Directive[56]. However, it raises different issues because the Directive does not impose a European level of morality, leaving this to the discretion of each state. Phillips believes that a design may be completely unacceptable in a Member State, although it could be considered a masterpiece in another state[57].

As stressed by Musker, the importance of identifying this problem appears in the context in which, apart from the definition of design, it is the only basis for evaluating formal application for a registered Community design[58]. It is equally a ground for invalidity. It is possible that the protection should be refused if the design is contrary to public order and morality, in no more than in one Member State[59]. Examples brought are a swastika decorating a product or drawing of anti-personnel mines[60].

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[51] Article 110 (1) of the Regulation

[52] Point (13) Preamble of the Regulation

[53] Article 110(2) of the Regulation

[54] Straus, Joseph: Design Protection for Spare Parts Gone in Europe? Proposed Changes of the EC Directive: Commission's Mandate and its Doubtful Execution. in: EIPR, 2005, p. 391 - 404.

[55] Proposal for a Directive of the European Parliament and of the Council amending Directive 98/71/EC on the legal protection of designs, COM/2004/0582 final

[56] Art. 8, Directiva 98/71/CE

[57] Phillips în Franzosi, Mario. European design protection: commentary to directive and regulation proposals. The Hague ; Boston: Kluwer Law International, 1996, pag.52

[58] Musk**er**, David, op.cit, pag. 104

[59] Massa, Charles-Henry şi Strowel, Alain, *Community Design: Cinderella revamped*, 2003, EIPR, pag. 68-78, pag.72

[60] Commission of the European Communities. *Green Paper on the Legal Protection of Industrial Design: Working Document of the Services of the Commission.* Brussels:, 1991. parag. 8.9.2.

Duvac and Romițan expressed the opinion that in case the community design should have a unitary character at European level, it is necessary that the notions of public order or morality to be cleared at EU level[61].

Technical features

Article 8(1) of the Regulation provides that"a Community design shall not subsist in features of appearance of a product which are *solely dictated by its technical function*". To assess the area of exclusion, clarification is needed on the terms "*technical*" and " *solely dictated*"". The following questions arise: how broad is"technical function" intended to be and how strict is the"solely dictated" link intended to be[62].

This provision excludes from protection certain technical aspects. According to the declared legislative intent[63], the purpose of regulation is to protect both functional and aesthetic designs. Apparently, this provision is contrary to this purpose. Paragraph (10) of the Preamble explains that the exclusion from protection is intended *not to hampered technological innovation* and that *this does not entail that a design must have an aesthetic quality*[64].

As observes Bently and Sherman, the term "technical" is not clarified in the context of the Regulation on Community design, although it believes it has become a key concept of European patents law[65]. Although the functionality is a concept known in national law, each state has (had) different standards[66]

The interpretation of Article 8(1) CDR (and of the corresponding provision in Article 7(1) of Council Directive 98/71/EC on the legal protection of designs) is highly controversial. One view holds that a technical necessity exception, such as that contained in Article 8(1) CDR applies only if the technical function cannot be achieved by any other configuration; if the designer has a choice between two or more configurations, the appearance of the product is not solely dictated by its technical function. That theory – known as the multiplicity-of-forms theory – is defended by some German authors[67] and was formerly followed by the French courts.

According to another view ("causal approach"), a design will be imposed by the function depending on whether it was created purely with functional intentions (even if the function could be satisfied through other forms).

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[61] Romițan, Ciprian Paul, and Constantin Duvac. *Protectia juridico-penala a desenelor si modelelor*. Bucures ti: Universul Juridic, 2009; for an in depth view of morality and public order in the protection of community design, pag 90-101.

[62] Massa, Charles-Henry şi Strowel, Alain, *Community Design: Cinderella revamped*, 2003, EIPR, pag. 68-78, pag. 72

[63] Commission of the European Communities. Green Paper on the Legal Protection of Industrial Design: Working Document of the Services of the Commission. Brussels:, 1991. Parag 5.4.4.2

[64] Paragraph (10) Preamble of the regulation" Technological innovation should not be hampered by granting design protection to features dictated solely by a technical function. It is understood that this does not entail that a design must have an aesthetic quality. Likewise, the interoperability of products of different makes should not be hindered by extending protection to the design of mechanical fittings. Consequently, those features of a design which are excluded from protection for those reasons should not be taken into consideration for the purpose of assessing whether other features of the design fulfil the requirements for protection."

[65] Bently, Lionel, şi Brad Sherman. *Intellectual property law* . Oxford ; New York: Oxford University Press, 2004, pag. 618

[66] Phillips în Franzosi, Mario. *European design protection : commentary to directive and regulation proposals* . The Hague ; Boston: Kluwer Law International, 1996, pag. 86

[67] Ruhl, Oliver, and Martin Schlötelburg. "Gemeinschaftsgeschmacksmuster: Kommentar." Carl Heymanns Verlag, Köln-Berlin-München 2007, pag. 169, cited in OHIM, DECISION of the Third Board of Appeal of 22 October 2009 in Case R 690/2007-3 Lindner Recyclingtech GmbH v. Franssons Verkstäder AB, parag. 28

Regarding the decisions of national courts, in *Landor & Hawa against Azure Designs*[68], English Court of Appeal confirmed in the decision of 2006, that the design that serve a functional purpose may be protected under European Union legislation on industrial designs. Exclusions from protection on the grounds "dictated solely by technical function" and "method or principle of construction" must be interpreted restrictively so as not to unduly restrict the availability of protection to non-aesthetic designs. Under ancient law of Great Britain, established by interpretation of the decision *Amp against Utilux*[69] [1972], the exclusion was understood in an extensive way: "dictated solely by function" meaning "attributed to or caused by function ".

The Court held, in *Landor & Hawa against Azure Designs* that decisions on the Directive on the Community trade mark cannot be safely relied on in a case involving the community design, invoking Advocate General Colmer, in *Philips v Remington*[70]:

> *the level of functionality must be greater in order to be able to assess the ground for refusal in the context of designs; the feature concerned must not only be necessary but essential in order to achieve a particular technical result: form follows function.*

Recently, the Supreme Court of England and Wales decision, from 29 July 2010*, Dyson Ltd v Vax Ltd*[71], returns to the interpretation given by the decision *Amp against Utilux*, in terms of understanding the concept of "solely dictated by technical function", distancing over the multiplicity of forms theory. The court judgment was based on the decision of the Office of Harmonization in the Internal Market on 22 October 2009, in the case *Lindner Recyclingtech*[72].

In this case, the Board of Appeal of the Office chose not to follow the Advocate General of the Court of Justice in *Philips v Remington* case or the decision of the UK Court of Appeal in the *Landor & Hawa against Azure* and the adoption of the multiplicity of forms theory supported by a large part of the doctrine, adopting instead *the designer's intention theory*. Thus, in the case *Lindner Recyclingtech against Franssons Verkstäder*, Office Board of Appeal stated that the drafting of Art. 8 (a) of Regulation 6/2002,

> *"do not, on their natural meaning, imply that the feature in question must be the only means by which the product's technical function can be achieved. On the contrary, they imply that the need to achieve the product's technical function was the only relevant factor when the feature in question was selected."*[73]

According to article 8 of Regulation no. 6/2002, are the excluded from protection designs of interconnections. The argument presented is that interoperability should not be disturbed by products of different makes [74].

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[68] Landor & Hawa International Ltd v Azure Designs Ltd [2006] EWCA Civ 1285; [2006]

[69] Amp Inc v.Utilux Pty Ltd [1972] R.P.C. 103 (HL)

[70] Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 23 January 2001, Koninklijke Philips Electronics NV v Remington Consumer Products Ltd. Case C-299/99 , *European Court reports 2002 Page I-05475* *"The wording used in the Designs Directive for expressing that ground for refusal does not entirely coincide with that used in the Trade Marks Directive. That discrepancy is not capricious. Whereas the former refuses to recognise external features which are solely dictated by its technical function, the latter excludes from its protection signs which consist exclusively of the shape of goods which is necessary to obtain a technical result. In other words, the level of functionality must be greater in order to be able to assess the ground for refusal in the context of designs; the feature concerned must not only be necessary but essential in order to achieve a particular technical result: form follows function. This means that a functional design may, none the less, be eligible for protection if it can be shown that the same technical function could be achieved by another different form".*

[71] Dyson Ltd v Vax Ltd [2010] EWHC 1923 (Pat) (29 July 2010)

[72] OHIM, DECISION of the Third Board of Appeal of 22 October 2009 in Case R 690/2007-3 Lindner Recyclingtech GmbH v. Franssons Verkstäder AB

[73] OHIM, DECISION of the Third Board of Appeal of 22 October 2009 in Case R 690/2007-3 Lindner Recyclingtech GmbH v. Franssons Verkstäder AB, parag 32

[74] Paragraph (10) Preamble of the Regulation , (...) Likewise, the interoperability of products of different makes should not be hindered by extending protection to the design of mechanical fittings. Consequently, those features of

Consequently,”a Community design shall not subsist in features of appearance of a product which must necessarily be reproduced in their exact form and dimensions in order to permit the product in which the design is incorporated or to which it is applied to be mechanically connected to or placed in, around or against another product so that either product may perform its function”[75]. Article 8 of Regulation no. 6/2002 requires exclusion seemingly[76] committed to free market competition by encouraging interoperability of products of different makes[77]. It is considered that the main problem, however, is the automotive industry and automotive spare parts issue.

In article 8(3) of Regulation no. 6/2002 is foreseen an exception to exclusion of protection of interconnections products for modular products. Thus,”a Community design (...) shall subsist in a design serving the purpose of allowing the multiple assembly or connection of mutually interchangeable products within a modular system”. The argument presented in the preamble is that”the mechanical fittings of modular products may nevertheless constitute an important element of the innovative characteristics of modular products and present a major marketing asset, and therefore should be eligible for protection”.

This provision is similar to the "must-fit" exclusion of British law.[78] It is considered that the term refers to modular product type of LEGO[79] or Duplo. This provision is considered from a part of the doctrine as an exception to principles of free competition[80].

Conclusions

The key concepts identified as structuring requirements for protection of the community design are: novelty, immaterial details, the existing design corpus (prior art), the sector concerned, the circles specialized, individual character, overall impression, the informed user, the degree of freedom of the designer, a component part of a complex product, to remain visible during normal use, technical features, solely dictated by technical function.

The paper illustrates for each of the terms above that there still are ambiguities and tensions in their understanding from the point of view of the Board of Appeal of OHIM and, more relevant, in the judgement of the competent national courts. As such, the unitary character of the community design is uncertain. This issue is even more significant as the reference is to the absolute grounds for invalidity. Moreover, the rules established by the Regulation 6/2002 seem to establish an exception to the general rule that national courts do not have jurisdiction to ascertain the invalidity of acts of an EU institution. A national court is competent to annul a design conferred by the Office for Harmonization in the Internal Market. Given that these decisions have a European wide effect, the demand for unitary interpretation is compulsory.

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a design which are excluded from protection for those reasons should not be taken into consideration for the purpose of assessing whether other features of the design fulfil the requirements for protection.

[75] Article 8(2) of the Regulation

[76] Phillips în Franzosi, Mario. *European design protection: commentary to directive and regulation proposals* . The Hague; Boston: Kluwer Law International, 1996, pag. 88

[77] Case 53/87, Consorzio italiano della componentistica di ricambio per autoveicoli and Maxicar v Régie nationale des usines Renault, Judgment of the Court of 5 October 1988, European Court reports 1988 Page 06039

[78] *British Leyland Motor Corporation Ltd. v Armstrong Patents Ltd. [1984] FSR 591.*

[79] Case T-270/06 , Lego Juris A/S v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM,)Judgment of the Court of First Instance (Eighth Chamber) of 12 November 2008, European Court reports 2008 Page II-03117

[80] Phillips în Franzosi, Mario, op. cit., pag. 88

Rererences

Specialized literature

- Bently, Lionel, and Brad Sherman. *Intellectual property law*. Oxford ; New York: Oxford University Press, 2004.
- Carboni, Anna. "Design validity and infringement: feel the difference." *European Intellectual Property Review* 30.3 (2008): 111-117
- Franzosi, Mario. *European design protection : commentary to directive and regulation proposals*. The Hague ; Boston: Kluwer Law International, 1996.
- Hartwig, Henning. *Designschutz in Europa*. Köln ; München [u.a.]: Heymann, 2007.
- Massa, Charles-Henry, and Alain Strowel. "Community Design: Cinderella revamped." *EIPR* (2003): 68-78.
- Musker, David. *Community Design Law: Principles and Practice*. London: Sweet & Maxwell, 2002.
- Reichman, Jerome H. (1995) *Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement.* International Lawyer, 29, pp. 345-388, http://eprints.law.duke.edu/687/
- Roș, Viorel. Dreptul proprietății intelectuale. Dreptul de autor şi drepturile conexe, Editura ALL Beck, 2005
- Ruhl, Oliver, and Martin Schlötelburg. "Gemeinschaftsgeschmacksmuster: Kommentar." Heymann, 2007.
- Straus, Joseph : Design Protection for Spare Parts Gone in Europe? Proposed Changes of the EC Directive: Commission's Mandate and its Doubtful Execution. in: EIPR, 2005, p. 391 – 404

Legal text

- Commission of the European Communities. Green Paper on the Legal Protection of Industrial Design: Working Document of the Services of the Commission. Brussels:, 1991
- Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, *OJ L 3, 5.1.2002, p. 1–24*
- Proposal for a Directive of the European Parliament and of the Council amending Directive 98/71/EC on the legal protection of designs, COM/2004/0582 final

Court of Justice of the European Union

- Case 53/87, Consorzio italiano della componentistica di ricambio per autoveicoli and Maxicar v Régie nationale des usines Renault, Judgment of the Court of 5 October 1988, European Court reports 1988 Page 06039
- Case T-153/08, Judgment of the General Court of 22 June 2010 — *Shenzhen Taiden v OHIM — Bosch Security Systems* (Communications Equipment), *OJ C 209, 31.7.2010, p. 34–34*
- Case T-9/07, Judgment of the General Court (Fifth Chamber) of 18 March 2010, Grupo Promer Mon Graphic, SA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), European Court reports 2010 Page 00000
- Case T-513/09, Judgment of the General Court of 16 December 2010 - Baena Grupo v OHIM - Neuman and Galdeano del Sel (Seated figure)
- Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 23 January 2001, Koninklijke Philips Electronics NV v Remington Consumer Products Ltd. Case C-299/99 , *European Court reports 2002 Page I-05475*

National courts decisions

- Amp Inc v.Utilux Pty Ltd [1972] R.P.C. 103 (HL)

- Bailey & Anor v Haynes & Ors [2006] EWPCC 5 (02 October 2006), Patents County Court (England and Wales), parag. 55
- Dyson Ltd v Vax Ltd [2010] EWHC 1923 (Pat) (29 July 2010)
- Green Lane Products Ltd. v PMS International Group Plc, Court of Appeal (UK), [2008] ECDR 15
- Kammergericht *Berlin – Sal de Ibiza*, *Beschluss vom 19. November 2004 – 5 W 170/04*
- Karen Millen Ltd. v Dunnes Stores & Anor. [2007] IEHC 449 (21 December 2007)
- Landgericht Hamburg – Gebäckpresse I, Urteil vom 20. Mai 2005 – 308 O 182/04
- Landor & Hawa International Ltd v Azure Designs Ltd [2006] EWCA Civ 1285; [2006]
- Procter & Gamble Company v Reckitt Benckiser (UK) Ltd [2007] EWCA Civ 936

OHIM Boards of Appeal

- OHIM, Decisione della Terza Commissione di ricorso del 8 marzo 2010 Nel procedimento R 1775/2008-3, EUROPEAN CITIZEN'S BAND FEDERATION (ECBF) contro European Citizen's Band Federation
- OHIM, Decision of the Third Board of Appeal of 17 April 2008, Case R 860/2007-3, *Wuxi Kipor Power Co., Ltd. vs. Honda Motor Co., Ltd.*
- OHIM, Decision of the Third Board of Appeal of 22 October 2009 in Case R 690/2007-3 Lindner Recyclingtech GmbH v. Franssons Verkstäder AB
- OHIM, Decision of the Third Board of Appeal of 11 December 2009, In Case R 608/2009-3, Reinhold Gerstenmeyer AB v. B-NU Limited
- OHIM, Decision of the Third Board of Appeal of 26 March 2010 in Cauza R 9/2008-3 *Crocs V. Holey Soles Holdings Ltd Inc*
- OHIM, Decision of the Third Board of Appeal of 28 July 2009 In case R 921/2008-3 Věra Šindelářováv. Blažek Glass s.r.o (Nail files)
- OHIM, Decision of the Third Board of Appeal of 2 November 2010, In Case R 1086/2009-3, Erich Kastenholz v. qwatchme a/s (Watch-dials)

THE HARMONIZATION OF THE EUROPEAN LAWS ON INSOLVENCY

Luminița TULEAŞCĂ[*]

Abstract

The harmonization of the European legislations on insolvency, in reference to the problems related to the substantive law of insolvency, represents a new stage, required by the European legislative process. The outline and analysis of the current problems of European, cross-border insolvency, of its causes and effects at the European Union level and, in particular, of the solutions proposed for the elimination of such problems, represents the concern of this paper. The INSOL EUROPE Report - Academic Forum "The harmonization of the laws on the insolvency at the European Union level" represents a first and important scientific step in this matter, and, therefore, this European document represents the starting point for analysing the utility and the means of harmonizing the European laws on insolvency, as a solution to the present difficulties generated by the cross-border insolvency at the EU level, from the view of the Romanian law and based on the Romanian experts opinions.

Keywords: *cross-border insolvency, European laws harmonization, INSOL Europe Report.*

I. Introduction

1. As always, the reality represents the harshest test of the laws and, from this perspective, the laws on cross-border insolvency could not be an exception.

The outline and analysis of the current problems regarding the European, cross-border insolvency, of the causes and effects of the same at the EU level, but, in particular, of the solutions proposed for their elimination, represents the main concern of this paper.

For the right approach of this topic, very actual in the specialized literature, is important to present the current legislative context with a view to the relevant European laws, to the main problems related to the cross-border insolvency and of the main cause of it: major regulatory disparities in the insolvency matter, at the level of the EU member states.

The comparative law approach is an essential aspect of the insolvency: the admissibility conditions for opening the insolvency procedure on which there are various regulations, as above-mentioned, is a mandatory step supporting the need to harmonize the European laws in the insolvency matter.

Of similar importance is also the outline of the practical aspects, of the cross-border insolvency cases, of those involving Romanian legal entities and Romanian citizens, as well as those settled by the competent courts of our country.

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And last, but not least, as the harmonization of the European insolvency laws have been proven and accepted, it is useful to present and analyze the means for achieving such an objective, from the perspective of the document that will comprise all the uniform norms in the matter of insolvency and of the legal nature of the European legal instrument on insolvency.

The paper grounds on the Romanian and foreign specialized literature for grounding its analyses, although it worth mentioning the fact that the number of the specialized studies on the harmonization of the substantive laws on insolvency at the European level is quite limited.

II. The current legislative framework – European and national regulation on cross-border insolvency

2. The extension of the trade companies' activities beyond the borders of a state has entailed, naturally, the reality of the cross-border insolvency.

The cross-border insolvency rises complex and multiple problems, the difficulties being entailed by the legislative disparities, the substantive laws and procedural laws, by the conflict of jurisdiction and state-related laws, where the debtor's insolvency must be initiated, the conditions for opening the insolvency proceedings, the law called forth for applying the insolvency, the international effects of insolvency, a.s.o.

All these difficulties corroborated with the impact of these procedures on the proper function of the internal markets have required the drafting of legislative instruments representing uniform relevant instruments.

At the European level, the first and the most important step has been taken by means of the Regulation (CE) no. 1346/May 29th 2000 regarding the insolvency proceedings, effective as of May 31st, 2002 (hereinafter referred to as the Regulation)[1], harmonizing the most important aspects of the international insolvency: conflicts of jurisdiction and conflicts of laws, attempting to harmonize the laws on companies in distress and the expedient settlement of the conflicts of laws and jurisdiction in bankruptcy matter[2].

In fact, the Regulation represents the first international conflict-solving objective instrument in the insolvency matter having direct applicability in a large number of states: all the member states of the European Union and of the European economic area, except for the Denmark.

In our country, as a result of the transposition in the internal laws of the directly applicable European laws, the cross-border insolvency is regulated by the Law no.637/2002 on the regulation of the international private law relations in the insolvency law[3].

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[1] Regulation (CE) no.1346 of 29 May 2000 on insolvency procedures, published in the OJEC L 160/1 on 30.06.2000, p.143-160; available in Romanian at:<< http://www.just.ro/Portals/0/CooperareJudiciara/LegislatieComunitara/1346%20insolventa.pdf>> (last visited on December 10th 2010);

[2] L.Idot, C.Saint-Alary-Houin, Procedures collectives-Droit communautaire en gestion, J.-Cl.Europe, Fsc.871 quoted in Michel Jeantin, Paul Le Cannu, Droit du Commerce International, 2e edition, Dalloz, Paris, 2000., no. 555, p.360**;** Daniela Claudia Muntean, *<<European Insolvency Regulation– Central Theme of the Conference "Current developments in the bankruptcy laws" that has taken place in Dubrovnik-Croatia, during 16-18 November 2005>>,* in R.D.C. no. 3/2006, p.174; I.Turcu, *"Creation of the European bankruptcy law (II)",* R.D.C. no. 4/2001, p.13 and following.; Bob Wessels, *"Improving the operation of the EU Insolvency regulation",* Revista Romana de Drept al Afacerilor (Romanian Business Law Magazine), Supplement, I/2007, p.22;

[3] Law no.637 on 07.12.2002 on the regulation of the international private law relations in the insolvency field, published in the Official Monitor, Part I no. 931 in 19.12.2002;

Both regulations, European and national, have represented, upon the adoption date, major starting points in providing a coherent method for opening, implementing and closing the insolvency proceedings at the European level.

The strong, essential points of the current regulations are not enough for covering all the cross-border insolvency aspects; however they will be the starting point of the action to be taken for harmonizing the European laws on insolvency.

Thus, the Regulation applies to the collective procedures based on the debtor's insolvency involving its complete or partial divestment and the appointment of a bankruptcy judge without any mention on the significance of the insolvency status[4], aspect exclusively regulated by the member states laws.

Moreover, the Regulation does not contain any provisions on the debtor's capacity, individual or legal entity, trader or non-trader subjected to the insolvency procedure but, by way of express provision, does not apply to the insurance companies, to the credit institutions and to the investment companies, to special regime legal entities regulated by special laws.

The main objective of this regulation is avoiding the debtor's temptation of transferring its assets or legal proceedings from a member state to another in order to benefit of a more favourable treatment *("forum shopping")* and, for reaching such objective the following common rules are established regarding the court competence and decision making that directly apply to this procedure, including provisions on the recognition of these decisions, the applicable law and the obligatory law and the obligatory coordination of the procedures that have been opened in several member states.

Upon the Regulation adoption, there was considered that a sole procedure would not be indicated for the entire community, thus, the combined the theory of the bankruptcy specificity with the territoriality of the same.

A main procedure of bankruptcy is admissible under the condition that it can be initiated in the member state on whose territory the main interests of the debtor are centred, the and a secondary procedure of bankruptcy can be initiated in any member state on whose territory the debtor has an undertaking, the effects of such a procedure limiting to the member state where the undertaking is carrying out its assets in that state.

As above-indicated, the Regulation is limited to establishing the international jurisdiction, appointing those member states whose jurisdiction allows the initiation of the bankruptcy procedure, the territorial jurisdiction within that member state being further established to be the national law of that state.

The competent jurisdictions must be able to take the provisional and conservation measures on the very moment of opening the procedure.

The competent court for opening the main procedure of insolvency is that member state on whose territory the main interests of the debtor are centred. In case of a company or legal entities, the centre of the main interests is presumed to be, until proven differently, the place where the main headquarters are located. The Romanian law no. 637/2002 completes this legal assumption establishing that, the centre of the debtor's main interests is, until proven differently, as the case may be: the main office of the legal entity, the professional domicile of the individual entity carrying out an economic activity or an independent profession, the residential address of an individual entity that does not carry out an economic activity or an independent profession.

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[4]Jerome Carriat, The Council Regulation 1346/2000 on Insolvency Proceedings, http://ec.europa.eu/enterprise/entrepreneurship/support_measures/failure_bankruptcy/conference/carriat_slides.pdf (ultima vizualizare la 10 decembrie 20100;

It is extremely important the fact that, the Regulation establishes the difference between the centre of the main interests of a debtor and its registered office, possibility that has been developed based on the jurisprudence by the European Union Court of Justice (Court decision on 9th of March 1999, C-212/97, Centros[5] and the Court decision on 30th of September 2003, C-167/01 Inspire Art, Rec. 2003 p. I-10155[6]), closely related to the possibility of transferring a company headquarters to another member state different from the original incorporation state, based on the right of establishment (Court decision on 16th of December 2008, C-210/06, Cartesio, Rec. 2008 p. I-09641[7]).

Obviously, the law of the member state opening the procedure –law applicable to this procedure – determines also the effects of such procedure.

As a rule, prior to opening a main procedure, no secondary procedure can be initiated in another member state on whose territory the debtor has a working unit, unless, the debtor either has local lenders, or lenders with a debt occurred from the exploitation of that working unit, or the main procedure cannot be initiated due to the conditions set by the law of the member state, competent for opening the main procedure.

Nevertheless, when a main procedure is opened, all the territorial procedures become secondary.

Besides protecting the local interests, the opening of a secondary procedure can be justified also by the overly complex patrimony of the debtor or by the significant difference between the incidental legal systems, which might create complex difficulties by extending the effects of the main procedure over the territory of other states.

For the proper administration of the insolvency procedure, the bankruptcy judge of the main procedure can request the opening of secondary procedures and, in this case, between the bankruptcy judges involved in all the initiated procedures, strict activity coordination actions must be established.

For a proper equality of treatment of the insolvent debtor's lenders the establishment and compliance with the principle according to which any lender having the headquarters or the

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[5] European Court, Case C-212/97, Judgment of the Court of 9 March 1999; Centros Ltd v Erhvervs- og Selskabsstyrelsen; Reference for a preliminary ruling: Højesteret - Denmark; Freedom of establishment - Establishment of a branch by a company not carying on any actual business - Circumvention of national law - Refusal to register; available at: <<http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61997J0212&lg=en>>;

[6] European Court, Case C-167/01, Judgment of the Court of 30 September 2003, Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd., Reference for a preliminary ruling: Kantongerecht te Amsterdam - Netherlands; Articles 43 EC, 46 EC and 48 EC - Company formed in one Member State and carrying on its activities in another Member State - Application of the company law of the Member State of establishment intended to protect the interests of others; European Court reports 2003 Page I-10155; available at: << http://eur-lex.europa.eu/Notice.do?val=277831:cs&lang=ro&list=277831:cs,277660:cs,277685:cs,&pos=1&page=1&nbl=3&pgs=10&hwords=>> (last visited on December 10th 2010);

[7] European Court, Case C-210/06, Judgment of the Court (Grand Chamber) of 16 December 2008; CARTESIO Oktató és Szolgáltató bt.; Reference for a preliminary ruling: Szegedi Ítélőtábla - Hungary; Transfer of a company seat to a Member State other than the Member State of incorporation - Application for amendment of the entry regarding the company seat in the commercial register - Refusal - Appeal against a decision of a court entrusted with keeping the commercial register - Article 234 EC - Reference for a preliminary ruling - Admissibility - Definition of 'court or tribunal' - Definition of 'a court or tribunal against whose decisions there is no judicial remedy under national law' - Appeal against a decision making a reference for a preliminary ruling - Jurisdiction of appellate courts to order revocation of such a decision - Freedom of establishment - Articles 43 EC and 48 EC; available at: << http://eur-lex.europa.eu/Notice.do?val=484894:cs&lang=cs&list=484894:cs,470901:cs,&pos=1&page=1&nbl=2&pgs=10&hwords=&checktexte=checkbox&visu=>> (last visited on December 10th 2010);

residence in a member state is entitled to declare its debt in any of the insolvency procedures initiated against the debtor and the need to coordinate the allotments from the debtor's patrimony are mandatory actions.

In this sense, any lender will be able to withhold what it /he has been given, but shall no longer be able to receive any amount of money until the lenders of the same rank shall have received an equal share of indemnity.

Moreover, as soon as a bankruptcy procedure is open, the bankruptcy judge has the obligation to individually inform each known lender with the registered office or residence in a member state, as well as to publish the essential content of the procedure initiation in both the Official Journal of the EU, as well as in the Official Monitors of all the member states, however, such publication not representing a condition of the immediate recognition of the bankruptcy procedure.

And last, but not least, the law applicable to the insolvency main procedure and to its effects is the law of the member state on the territory of which has been initiated the main procedure of bankruptcy and the applicable law to the secondary proceedings is the law of the member states on the territory of which the secondary procedures have been initiated.

In this context, the law of the origin state where the bankruptcy procedure has been initiated determines the conditions for opening, developing and closing the insolvency procedure.

A major principle of this European regulation is the one of immediate recognition - without further formalities – of all the decisions made by the tribunal of the competent member state for the main procedure, in the other member states.

The cross-border insolvency regulation pattern offered by the European Regulation is the one of a mixed system where the territoriality of the bankruptcy occupies a highly important role and the procedure universality reflects, in a legal manner, through the coordination of the secondary procedures by the main one, through the close cooperation between the bankruptcy judges involved in all the procedures, through the equal treatment of the lenders and through the recognition of the effects of bankruptcy procedures in all the other member states.

III. The need to harmonize the European insolvency laws

3. The harmonization of the European law at the EU level must be discussed and analyzed from the perspective of the problems generated by the cross-border insolvency and of the main cause of the same: significant disparities between the existing insolvency laws, at the level of the member states.

On the other hand, the comparative law analysis of an essential aspect of the insolvency: the admissibility conditions for opening the insolvency procedure, represents a necessary action for outlining the disparities between the existing insolvency laws at the level of the member states and for supporting the need to harmonize the European laws in the insolvency matter.

Equally important is also the illustration of the practical aspects, of the cross-border insolvency cases with an accent on those involving Romanian legal entities and Romanian citizens, as well as on those settled by the competent Romanian courts.

A) The causes for the main practical problems of cross-border insolvency at the EU level

4. As always, the reality represents the harshest test for the legislation, and, from this point of view, the cross-border insolvency could not be an exception to the rule.

INSOL Europe[8] has undertaken an essential role in the difficult process of identifying the existing problems and those that can occur directly or indirectly in relation to the cross-border insolvency procedure, and last, but not least in relation with the insolvency laws harmonization propositions at the EU level.

For this purpose, upon the request of the Commission for Legal Affairs of the European Parliament, a group of experts had accomplished the Report called "Harmonization of the insolvency laws at the EU level "[9] (hereinafter referred to as, INSOL Europe Report), which identified and outlined the "disparities between the national insolvency laws, which can create obstacles, competitive advantages, and/or disadvantages, and difficulties for companies having cross-border activities or ownership within the EU. In particular, it provides a list of problems which might occur in the absence of common rules on insolvency, such as problems related to insolvency of corporate groups, liability of shareholders being nationals of different Member states, reference to national laws for the insolvency of “Community” companies and strategic cross-border movements for insolvency purposes. In addition, the note identified a number of areas of insolvency law where harmonization at EU level is worthwhile and achievable. Lastly, it evaluates to what extent harmonization of insolvency law could facilitate further harmonization of company law in the EU. "[10].

The use of the country reports from Poland, France, Great Britain, Germany, Spain, Italy and Sweden, as well as of the materials in The Netherlands and Belgium, allowed the authors of the INSOL Europe Report to perform a complete analysis of European insolvency and to reach the purpose of assessing whether the harmonization of the insolvency laws at the European Union level is necessary or it is worthwhile to be performed, as well as to establish whether the drafting and implementation of common norms in the insolvency matter can facilitate the harmonization of the company laws in European Union.

This double concern is justified by the intrinsic relation between the two matters, being known the fact that the companies, whether national or community companies, represent the main actors of the economic activity and, implicitly, of the insolvency procedures.

From the INSOL Europe Report perspective, the main cause of the practical problems generated by the cross-border insolvency is represented by the major disparities in insolvency laws, under the aspect of substantive laws, existing at the level of the EU member states.

Acknowledging the two aspects of the companies mobility principle: the possibility of changing the actual business centre of a company and its registered office from one Member State to another, the existence of different admissibility conditions for opening the insolvency procedures and for entailing the liability of the directors, shadow directors, shareholders, stockholder, lenders, and other associated parties of the debtor, can determine the amendment of the insolvency regime applicable to the company, in the attempt of obtaining a more favourable legal situation (forum shopping).

On the other hand, the existence of different classifications of the lenders decreases the predictability of the results that can be obtained by the same, the lack of coordination instruments

[8] INSOL Europe, The professional association for European restructuring and insolvency specialists; http://www.insol-europe.org/;

[9] European Parliament Report: Harmonisation of Insolvency Law at EU Level, member contributors : Giorgio Cherubini (Italy), Neil Cooper (UK), Daniel Fritz (Germany), Emmanuelle Inacio (France), Guy Lofalk (Sweden), Miriam Mailly (France), David Marks QC (UK), Anna Maria Pukszto (Poland), Barbara F H Rumora Scheltema (The Netherlands), Robert Van Galen (The Netherlands), Miguel Virgos (Spain), Bob Wessels (The Netherlands), Nora Wouters (Belgium), (INSOL EUROPE), disponibil la: <<http://www.insol-europe.org/eu-research/harmonisation-of-insolvency-law-at-eu-level/>> in limba engleza si la: <<http://www.juridice.ro/122375/armonizarea-legislatiei-privind-insolventa-la-nivelul-uniunii-europene-bucuresti-26-noiembrie-2010.html>> in limba romana;

[10] Raportul Insol Europe -op.cit. rezumat;

for the insolvency procedures related to companies, different legal entities, from the same corporate group, inexistence of some database at the EU level, including the court decisions and the relevant court orders sentenced in the cross-border insolvency cases prevents the efficient administration of the insolvency procedures.

For summing up, by analysing and reflecting on the practical problems of cross-border insolvency, the INSOL Europe Reports considers that the following aspects related to the insolvency laws must be harmonized at the EU level:

i. Eligibility and criteria for opening the insolvency procedure;

ii. General stay on the lenders powers to assert and enforce their rights after the commencement of the insolvency and reorganization proceedings;

iii. The rules related to the management of the insolvency proceedings;

iv. The ranking of lenders.

v. The rules regarding the process of filing and verification of the lenders claims.

vi. The responsibility for the proposal, verification, adoption, modification and contents of the reorganization plans.

vii. The scope of the assets undergoing the insolvency procedure.

viii. The rules on cancelling the transactions concluded prior to opening the insolvency procedure (avoidance actions).

ix. The termination of the contracts and the rules as to the mandatory continuation of contracts execution.

x. The liability of the directors, shadow directors, shareholder, lenders, and other parties associated to the debtor.

xi. Provisions regarding the post-commencement finance.

xii. The qualifications and eligibility of the practitioners for the appointment as insolvency representatives, different rules of licensing, regulation, supervision, and professional ethics and conduct.

xiii. Coordination of the insolvency procedures in relation to companies belonging to a group of companies.

xiv. The need for a European database of the court orders and judgments.

xv. The scope of the EC Regulation no. 1346/2000.

All these harmonization directions of the insolvency laws represent, in fact, divergent aspects of the MSs laws and, concurrently, causes for the practical problems of cross-border insolvency that must be eliminated by uniform legal instruments in the matter of insolvency.

B) Eligibility and insolvency procedure initiation criteria at the EU Member states level - problematic aspect of cross-border insolvency

5. The most correct outline of the existing disparities between the EU member states laws, illustrated by means of comparative analysis of one of the main aspects of the insolvency, respectively, of the admissibility conditions for opening the insolvency procedure, such as they are established by the laws of the major European states and by the laws of our country.

This problematic must be also analysed with priority in the INSOL Europe Report, under a different form: "The eligibility and the criteria for opening the insolvency proceedings", including here both aspects related to the financial situation of the debtor by reference to the use of two different criteria: "the liquidity test (the ability to pay the debts upon their maturity date) or the balance sheet test (the assets surplus in relation to the liabilities)"[11] as well as aspects related to the capacity of certain entities and persons to call forth the bankruptcy law.

[11] INSOL Europe Report, op.cit., point I (i);

5.1. From the point of view of the objective substantive condition, of the financial status of the debtor, the legislative differences are significant.

In France, "cessation of payments" (cessation des paiements) is the main cause[12] for applying the procedure for legal redress and dissolution[13] .

The meaning of the notion: debtor under cessation of payments represents the inability of the debtor to cover the liabilities from the due or available assets ("s'il est dans l'impossibilite de faire face a son passif exigible avec son actif disponible" – art.88 of the Law no. 2005-845 in July 26th, 2005) according to the definition under art. L. 631-1 of the C.com.fr., definition used also in the Ordinance no. 2008-1345 / December 18th 2008[14], not being required for the commercial company to find itself in a desperate or irremediably compromised situation[15].

The legal definition of cessation of payments – subject to criticisms either for the ambiguity of the used notions[16] or for its rigidity[17]- occurs after the jurisprudence succeeded in determining an exact content to this notion, the great advantage of this regulation is considered to be the clear demarcation of the notion of cessation of payments of the insolvency notion[18], the cessation of payments being separate from the insolvency notion[19].

By the amendment of the French laws of insolvency achieved by the Law no. 2005-845 on July 26th 2005 – there have been eliminated the situations in which the debtor's cessation of payments did not represent a condition for opening the collective procedure.

Thus, by January the 1st 2006, the collective procedure for legal redress and dissolution could have been done without the compliance of the condition for the cessation of payments, under the following three situations:

i. against the one that did not comply with a financial obligation undertaken on the occasion of an amiable settlement concluded with its lenders;

ii. against the trader carrying out a business operated under lease ("location gerante"[20]) during a legal redress procedure and does not comply with the obligations acquired by the conditions established through the assignment plan authorized by the judge there shall be opened a legal redress procedure without the cessation of payments to be ascertained;

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[12] G.Ripert/R.Roblot, Philippe Delebecque, Michel Germain, Traite de Droit Commercial, Tome 1, 17e edition, L.G.D.J., Paris, 2000, no. 2872, p.855;

[13] Regulated in France under the Law on January 25th 1985;

[14] The Ordinance no. 2008-1345 / December 18th 2008 on the reform of law for the companies in difficulty and the Decree no. 2009-160/ February 12th 2009 for applying the reform ordinance; In this sense, see: Pierre-Michel Le Corre, La reforme du droit des entreprises en dificulte – Comentaire de l'Ordonnance du 18 decembre 2008 et du decret du 12 fevrier 2009, Dalloz, Paris, 2009, p.209; Jean-Pierre Le Gall, Caroline Ruellan, Droit Commercial, Notion Generales, Dalloz, Paris, 2008, p.167;

[15] Yves Guyon, Droit des Affaires, Tome 2 - Entreprises en difficultes, Redressement Judiciaire-Faillite, 7e Edition, Economica, Paris, 1999, nr.1121, p.141; G.Ripert/R.Roblot, Philippe Delebecque, Michel Germain, op.cit., nr.2873; Cass.com., 14 fevrier 1978, Bull.cass., 4, nr.66;22 fevrier 1994, RJDA, 1994, 662 s.a.; Code des procedures collectives- Commente, 5e edition, Dalloz, 2007, p.16;

[16] Veronique Martineau-Bourgniaud, Cessation of payments. Fundamental notion in Revue trimestrielle de droit commercial et de droit economique, April /June 2002, no. 2, Ed.Dalloz, Paris – in fact the topic is the content of the cessation of payments components: the available assets and liabilities not provided under the law;

[17] Yves Guyon, op.cit., no. 1117, p.135;

[18] Michel Jeantin, Paul Le Cannu, Droit commercial. Instruments de paiement et de credit. Entreprises en difficulte, 5e Edition, Dalloz, Paris, 1999, nr.594, p.383;

[19] Code des entreprises en difficulte, Commente sous la direction de Corinne Saint-Alary Houin, premiere edition, LexisNexis, Litec, Paris, 2007, p.250 and the quoted decisions;

[20] Location-gerance / business operated under lease of the goodwill is considered a lease of an incorporeal movable property, details: Jerome Huet, Traite de Droit Civil sous la direction de Jacques Ghestin, Les principaux contracts speciaux, 2 e edition, L.G.D.J., Paris, 2001, n.21116, p.689;

iii. when the debtor fails to execute its financial obligations undertaken by the continuation plan, the tribunal orders the plan's resolution and opens a new economic redress procedure without the cessation of payments to be required[21].

The elimination of these causes for opening the reorganization and legal winding-up procedure has been requested by the specialized literature which considers that, these exceptional situations should be abated, the payments termination becoming the only cause necessary for the opening of the collective procedure, as the legal redress of the debtor is a remedy, not a sanction[22].

In Germany, the German Insolvency Code (Insolvenzodnung (InsO) adopted in October 1994 and effective as of January 1st 1999, defines the insolvency notion, but introduces a new concept for the continental law system of "imminent payment inability" as cause for opening the insolvency procedure.

Thus, it is established that the opening of the insolvency procedure is subordinated to the existence of the cause for opening (art 16 InsO), the insolvency represents the general cause for procedure opening (art.17 para.1 InsO) the debtor being in insolvency if it fails paying the debts, the insolvency being presumed when the debtor ceases the payments (art.17 para.2 InsO). In fact, it is about the debtor's incapacity to cope with the debts due lacking the necessary liquidities.

As a general rule, a commercial company shall be considered unable to pay its duties if it fails to pay 80% - 90% of its debts in 2- 3 weeks after becoming due.

As for the imminent payment inability, as a special cause for procedure opening, the German law leaves with the debtor to assess its imminent inability to pay (subjective criterion), being able to request the opening of the procedure when the debtor believes it cannot pay its existing debts upon maturity date (art.18 InsO).

The German law also establishes another special cause for opening the procedure, applicable exclusively to the legal entities: the excess of debts / over-indebtedness (surendettement) existing when the patrimonial assets of the debtor fail to cover the existing debts.

Therefore, in Germany there are causes for opening the insolvency procedure:

i. payment inability;

ii. imminent payment inability;

iii. excessive debt[23].

In Italy, the article5 of the Royal Decree no.267 of 16th of March 1942[24] defines the insolvency as a state manifested as the failure to comply with the obligations or other external actions, demonstrating that the debtor is not able to pay regularly its obligations, state that can initiate the bankruptcy procedure opening.

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[21] G.Ripert/R.Roblot, Philippe Delebeque, Michel Germain, op.cit., p.855;

[22] Yves Guyon, op.cit., nr.1123 – 3), p.144

[23] The notion "*surendettement*"- *excessive debt* (*indebted)* is original and we also fiind it in the French law. It is not the same as cessation of payments or insolvency. It can exist an *active indebtedness* regarding the persons with excessive debts as they applied for loans based on their possibility reimburse it and passive indebtedness in the case of the persons without sufficient resources for covering acoperirea cheltuielilor indispensabile (curente)- Yves Guyon, op.cit., nr.1108, p.124-125; G.Paisant, *"La reforme de la procedure de tratement du surendettement par la loi du 29 juillet 1998 relative a la lutte contre les exclusion",* Revue trimestrielle de droit commercial et economique, 1998, 743; The need to regulate this cause for insolvency procedure application in our country in Gheorghe Piperea, *"Despre ncesitatea extinderii procedurii insolventei la simpli particulari pentru supraindatorare",*published in Probleme actuale ale dreptului bancar, Ed.Wolters Kluwer, 2008;

[24] The Royal Decree no. 267 / 16th of March 1942 - published in the G.U. no. 81 / 6th of April 1942, Supplemento Ordinario – has been successively amended through the Law Decree no.35 /14th of March 2005 transformed in the Law no. 80/May 14th, 2005, by the Law Decree no. 5/January 9th 2006 and by the Legislative Decree no.169 / September 12th 2007;

In the light of these legal provisions, the insolvency state is identified with the inability to comply with the due obligations upon the maturity date, by using the normal means, the situation of the debtor's patrimony being irrelevant even if the assets are bigger than the liabilities[25].

By this definition of insolvency the "external actions" showing the state of insolvency are indicated; however, the insolvency can manifest also by internal actions, known by the entrepreneur alone, being in the presence of a "asymptomatic"[26] insolvency that will form the grounds for opening the procedure by the debtor.

Spain, by the Law no.22/2003 – the so called concurrence law - adopted in July 2003 and entered into force on September 1st 2004, replaces the old law regarding the bankruptcy procedure and also establishes the notion of imminent insolvency, as cause for opening the collective procedure upon the debtor's request.

Until the adoption of the Law no. 22/2003, the Spanish law made the distinction between the bankruptcy (quibera) and payment suspension (suspension de pagos) however, presently, the state of insolvency alone is defined (concurso).

Thus, according to the Spanish law vision the debtor is insolvent when he/it cannot pay regularly its due and payable debts [27] (art.2 para.2 Law 22/9th of July 2003 Concursal).

The debtor's insolvency is presumed to be in favour of the lenders when:

i. the attempt to recover an asset based on an enforcement title has failed;

ii. the current payments have been suspended, and there is a seizure affecting the debtor's assets;

iii. in case of fraudulent bankruptcy or accelerated liquidation of the debtor's assets;

iv. there is a generalized failure to comply with the certain debts, such as: taxes, social insurances, or salaries.

In Romania, the Law no.85/2006 on the insolvency procedure[28], preserves both the condition for opening the collective procedure: the insolvency, defined as: *"that state of the debtor's patrimony characterized by the insufficiency of funds available for the payment of the certain, liquid, due and payable debts" (art.3 pct.1 of the Law no. 85/2006). The minimum quantum of the debt is RON 45,000, and for employees, of 6 national average gross wages /per employee.*

The novelty of the current regulation is defining the legal state of imminent insolvency and the cause for opening the collective procedure.

The insolvency is imminent when *it is proved that the debtor shall not be able to pay upon due date the due and payable debts he undertook, from the available funds available on the maturity date* (art.3 pct.1, let. b of the Law no. 85/2006).

5.2. At the level of the Member States there are major disparities also as far as concerning the second substance - subjective and admissibility-related – condition of applying the insolvency procedure, which is related to the debtor's capacity or, as indicated in the INSOL Europe Report:

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[25] Barbara Ianniello, Il nuovo diritti fallimentare, Guida alla riforma delle procedure concorsuali, Giuffre, Milano, 2006, p.11;

[26] Francesco Meloncelli, La Conoscenza dello Stato D'Insolvenza nella Revocatoria Fallimentare, Giuffre, Milano, 2002, p.107-11;

[27] Alberto Palomar Olmeda, La Normativa de insolvencia en Espana, http://ec.europa.eu/enterprise/entrepreneurship/support_measures/failure_bankruptcy/conference/palomar_slides.pdf

[28] Law no. 85/05.04.2006, on the insolvency procedure, published in the Off. M., Part I no. 359/21.04.2006, as further amended and completed;

"of the capacity of certain entities or persons to call forth the laws on bankruptcy, which have serious effects on the final remedy, presumed to be the formal insolvency procedure "[29].

The European laws have the tendency to enlarge the scope of the insolvency procedure, trend illustrated under the pct. 9 of the preamble of the European Regulation no. 1346/2000 on the insolvency procedures by which it is indicated that, this regulation should apply to the insolvency procedures regardless whether the debtor is an individual or a legal person, a trader or a private person.

In France, the reformation started by the Law adopted on July 13th 1967, based on which the collective procedure applies also to the private law legal entities performing an economic activity, continuing successively, with the inclusion of the handicrafts – by the Law of January 25th 1985 -, regarding the farmer – under the Law of 30th of December 1988- and, of the individual persons exercising an independent professional activity, a liberal profession – by the Law of 26th of July 2005-.

Obviously, the economic activity – whose area has been expanded – carried out by the non-traders represents the support for applying it to the collective procedure.

According to the German Code of Insolvency (Insolvenzordnung –InsO) adopted on the 5th of October 1994[30], the insolvency procedure can be opened in relation to the patrimony of all the individual and legal entity, - the association without legal capacity being considered for this purpose as a legal person – as well as to the patrimony of a company with no legal capacity (the unlimited company, limited partnership, partnership, civil company, shipping company, European economic interest group) without no other additional subjective condition.

In Italy, the entrepreneurs performing a commercial activity, except for the public companies and small enterprisers, (art. 1 of the Decree Law no.5 / January 9th 2006[31]), as well as the farmers[32] (that do not carry out commercial activity under art. 2195 art.1 of the It. com. c.) and the law offices (art.16 para.3 of the Decree Law no. 96/February 2nd 2001) are subject to the provisions regarding the write-off and the bankruptcy.

Small enterprisers are not those performing a commercial activity, individually or collectively, that, even if alternatively: a) have carried out capital investments in value exceeding Euro 300,000; b) have registered, by any means, a gross calculated profit, as the average of the last 3 years from the activity start-up, if such period is lower than 3 years, in annual overall exceeding Euro 200,000;

The Spanish law in July 9th 2003 regarding the concurrence reform establishes that, the concurrence procedure applies to all the debtors, individual or legal entities.

In Poland, the Law of 28th of February 2003 on bankruptcy and economic redress applies solely to the entrepreneurs debtors. In the sense of the Polish law, the entrepreneurs / undertakers are: all the individual persons, legal persons, all the entities with no legal capacity to whom a special law confer legal capacity, performing an economic or professional activity[33].

In Romania, according to the Law no. 85/2006, the debtors in the insolvency procedure are the individual or legal entities of private law, included in the categories of debtors - traders and non-traders-, subjected to the general or simplified procedure of insolvency.

In other words, the Romanian law opts for the indication of the categories of persons subjected to the insolvency procedure in a less classic way, from the perspective of the two types

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[29] Ibidem, pct.I (iii):

[30] For the German Insolvency Code in English: http://www.iuscomp.org/gla/statutes/InsO.pdf;

[31] Decree Law no.5 / Janury 9th 2006 published in Gazzetta Ufficiale no.12 / January 16th 2006;

[32] Gian Mario Perugini, Il Patrimonio nel Fallimento, In base alle nuove Leggi di Riforma, Giuffre, 2006, p.5-6;

[33] Polish law of 28.02.2003 on bankruptcy and redress written in French language and translated by Daniela Borcan and Monika Bogucka, in www.juriscope.org;

or means of achievement of the insolvency procedure: the general procedure and the simplified procedure indicating these categories of persons within each procedure.

In Romania, there are subjected to the insolvency procedure: the commercial companies, the unlimited companies, the cooperative companies, cooperative organizations, farming companies, economic interest groups, any other legal private entity, performing economic activities, traders - individual entities, trader – individual entity holder or member of an individual or of a family undertaking.

6. This comparative law analysis illustrates the fact that the, "the liquidity test seems to be the most commonly used test in the EU Member States and is in line with the United Nation Commission on International Trade Law (UNCITRAL) Legislative Guide on Insolvency Law.[34] However, differences exist in defining how much indebtedness must be due for an insolvency or reorganization proceeding to be opened and in reconciling other entry criteria applied by Member States.

As Member States apply different tests, in some cases companies will not be able to open main proceedings, but they may open territorial proceedings, in other cases they may open main proceedings and may, by virtue of Article 27 of the Regulation no. 1346/2000, open subsequent territorial proceedings in Member States where they do not meet the domestic insolvency test."[35]

And last but not least, by the regulation differences existing at the level of the member states regarding the possibility of certain individual or legal persons to be declared insolvent, it reduces the possibility of using the insolvency procedure as formal procedure of remedying the financial situation of the actors acting on the domestic market.

C) Practical aspects of the cross-border insolvency practice

7. We showed in the beginning of this paper that the mobility of the commercial companies and of the individuals performing economic or professional activities (materialized in the possibility to move the registered office from one member state to another) and the possibility to have a centre of main interests differed from the registered office are aspects generating or that shall generate the main problems when opening, developing and closing the insolvency procedures.

Closely related to these aspects there is also the principle established under the Regulation, according to which the laws of the state hosting the debtor's centre of the main interests, are those determining the conditions for opening, developing and closing the insolvency procedure.

Thus, although the law governing the legal articles of association of a commercial company is the law of the country on the territory of which the registered office has been established, the governing insolvency law applicable to this entity can be a different law than the one applicable to the articles of association of the company.

These forms of free establishment of the registered office determine a possibility occurred from the change of main interests centre of a company, as well as the option of moving the registered office, and, thus, of amending the insolvency regime applicable in relation to the relevant society.

The courts in our country had relatively few cases of cross-border insolvency pending with them for settlement, and settled by applying the Regulation.

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[34] The full text of the Legislative Guide on insolvency law of UNCITRAL is available at: <<www.uncitral.org>>;

[35] INSOL Europe Report, op.cit., pct.I (i);

In this sense, in the case of the debtor MKJV Ld. Newpark – Bucharest Branch, limited liability company with the registered office in Newpark, Irland, Bucharest Tribunal 7th Commercial section[36], ordered the opening of the insolvency procedure with the exclusion of the Regulation incidence on the procedure. The decision has been cancelled by the second appeal court, the Court of Appeal Bucharest, which established the Regulation application in the case and decided that no relevant proofs have been submitted based on which to result that the debtor has the centre of the main interests in Romania for allowing the opening of a main insolvency procedure[37].

In a different cause, the Bucharest Tribunal approved the opening of a secondary insolvency procedure regarding the Romanian-based branch of a commercial company with the registered office in Istanbul (Turkey)[38], court decision cancelled by the superior court. However, subsequently, a new insolvency procedure against the same has been requested by another lender, however, this time, the court decision allowing the opening of the procedure has been sustained and remained enforceable, the debtor agreeing on the procedure opening[39].

In Spain, on May 30th 2008, the Court of first instance in Logrono, has passed a court decision on the voluntary bankruptcy of two individual entities, Romanian citizens, establishing itself as competent for declaring the bankruptcy, such jurisdiction being based on the centre of main interests of the two debtors, the place where the debtors usually perform their activity, although, the registered office of the two was in Santo Domingo de la Calzada.

By the court decision passed on 22nd of April 2009, the Tribunal of Macerata, Italy, declare the bankruptcy of S.C.I.T.S.R.L., commercial company with the current registered office in Bucharest, Romania the court expressly establishing its jurisdiction, based on the previous existence of the registered office in Civitanova Marche, Italy.

The same Tribunal of Macerata, Italy, passed the court decision no. 46/5th of November 2008 declaring the bankruptcy of S.C.R.S.R.L., with the registered office in Salonta, Romania however, this court decision has been cancelled due to procedural reasons on 19th of May 2009 by the Court of Appeal in Ancona.

On January 14th 2009, the High Court of Justice in London, England – Department of the Lord Chancellor, the Company Court, issued an order for opening the main insolvency procedure against S.C. N.N.R. S.R.L., company having its registered office in Bucharest, Romania. The Court decided that the main centre of interests of N.N.R., in the sense provided by the Regulation is in England.

In another cross-border insolvency case involving a Romanian company, the Tribunal for Civil Cases in Graz has decided in 9th of June 2008 the opening of the insolvency procedure for the patrimony of the AR SRL company, with the registered office in Bucharest, Romania and with the centre of main interests of the company in Graz (Austria).

On October the 20th, 2009, the Commercial Court in Paris has been applied a very special settlement modality to a bankruptcy case. Thus, based on the insolvency statements submitted for the opening of insolvency procedure, concurrently by: the parent company – with the registered office in Paris – and its subsidiaries: LE SL – company with the registered office in Barcelona (Spain), Oy SRL – company with the registered office in Bentivoglio (Italy) and Ox SRL with the registered office in Sibiu, Romania have decided to open the insolvency procedure on all the above-mentioned company.

[36] Bucharest Tribunal, 7th Commercial section, com. judgment no.5020/26.10.2009, not published;
[37] Court of Appeal Bucharest, 6th Commercial section, com. court decision no.1082/14.09.2010, not published;
[38] Bucharest Tribunal, 7th Commercial section, com. judgment no.3674/25.06.2009, not published;
[39] Bucharest Tribunal, 7th Commercial section, com. judgment no.5814/19.11.2009, not published;

For passing this court decision, the Commercial Court in Paris has held that, from the illustrated facts, it results a set of clues according to which the centre of the main interests (according to art.3 let.1 of the (EC) Regulation no.1346/2000 of the Council) of the group of companies was in France. Considering that the insolvency of the parent company had triggered, consequently, the insolvency of all its subsidiaries, it is hereby demonstrated the total absence of financial autonomy of these companies. It is deemed that, the lenders of these subsidiaries considered that the solvability of their debtors and/or the return of their contribution depend largely on the financial situation of the parent company. And, eventually, considering the financial and operational interdependency existing among the group's companies, drafting a correct reorganization plan for the group entails automatically the opening of one insolvency procedure for all the four companies, in France – the state where the centre of the main interests of these companies is located.

These are few situations directly involving Romanian legal entities and Romanian citizens in cross-border insolvency proceedings, and that indicates the fact that the problems of the disparities between the insolvency laws existing at the level of the EU is of interest for our country too.

In this context, the aspects related to the means of reconciliation of the disparities of insolvency laws with the permanent economic integration and, thus, with the continuously increasing cross-border movements and activity of the EU-based companies are of major importance.

IV. Means of harmonizing the European insolvency laws

8. The harmonization of the European laws on insolvency must be carried out based on an European academic project drafted by an international academic network, project that would propose the most adequate means for harmonizing the European laws on insolvency, by means of an instrument responding to the problems regarding the diverging laws, and without introducing extra administrative tasks, shaped in a politically agreed form thus as to be accomplishable.

The INSOL Europe report, whose conclusions we agree upon, the commission of experts on insolvency law composed of renowned professors, researchers and practitioners of law, established that: "There is a limited number of areas where the harmonization may be desirable and achievable. These area are, principally, the following: a possible common test of insolvency as a requirement of a formal insolvency process; the formal aspects of lodging and dealing with the claims in a formal insolvency; certain aspects of the manner in which the reorganization plans are adopted and their contents; the rules regarding so-called detrimental acts and the interrelationship between contractual rights of termination and insolvency; and finally director's responsibilities. However, even these areas are affected by non-insolvency laws considerations. Therefore, any further consideration of reform in an insolvency law context will have to take into account other important areas that are or may be the subject of European law amendment and reform such as general company law"[40].

The completion of the Regulation with uniform substantive law might be considered however, we think that, in this stage of problems in harmonizing the insolvency laws, a regulation for establishing a European insolvency law might entail delicate problems regarding subsidiarity and proportionality of these harmonization means.

The replacement of the plurality of domestic laws with a single mandatory set of rules, under the form of the regulation or directive, might not be a proportional measure for eliminating

[40] INSOL Europe Report, op.cit., Report Summary;

the internal market barriers "where the disparities between the national insolvency laws and restructuring create obstacles, competitive advantages and /or disadvantages and difficulties for companies having cross-border activities or ownership within the EU"[41].

We believe that an instrument that has no mandatory nature might improve the coherence of the European Union law in insolvency matter.

The use of a regulation creating an optional instrument of European insolvency law, conceived as "the second regime" in each member state or as the "28th regime" at the EU level, as it has been proposed in other matters intended to be harmonized at the European level, is not an option in the matter of insolvency considering the special statute of the regulations on insolvency. We consider the fact that, in most of the member states, the aspects related to the rules of insolvency substantive law enter the category of the imperative rules.

An instrument of European insolvency law could be attached to a recommendation of the Commission addressed to the member states, by which they should be encouraged to incorporate the legal instrument in their national law. Such a recommendation would allow the member states to gradually incorporate the instrument in their national laws, based on their own decisions, as a means that does not affect the law-making autonomy of the member states and would adequately answer the requirements of the subsidiarity principle.

In addition to this important aspect in supporting this option, the European Court of Justice would be competent to interpret the provisions of the recommendation that would form the object of the preliminary reference procedure to the ECJ, insuring thus a uniform application by the national courts.

The recommendation would encourage the member states to replace the domestic laws in the matter of insolvency with the instrument in discussion. In a similar method, that proved to be a success, have acted the United States of America where, the " Uniform Commercial Code[42], drafted by a group of experts and approved by the neuter, quasi-public organization [43], has been adopted by all the 50 states, except for one."[44]

Conclusions

No doubt, the practical problems, current and future, of the cross-border insolvency, determined by the significant disparities between the national laws in the insolvency matter, presented and analyzed in this paper, require the uniformization of the rules of substantive insolvency law at the EU level.

The harmonization of the insolvency laws at the EU level represent a necessary objective considering the advantages achieved by its drafting.

The lack of any differences of treatment in the insolvency matter, at the EU level, shall eliminate the lenders and third parties uncertainty and, in particular, the attempts to create or achieve a more favourable regime (forum shopping), shall generate a uniform court practice and last, but not least, a better functioning of the internal market.

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[41] See INSOL Europe Report, op.cit., introduction;

[42] Uniform Commercial Code is available on:<< http://www.law.cornell.edu/ucc/ucc.table.html.>>;

[43] Uniform Commercial Code is frequently revised and approved by the Commission for uniform law, which has the purpose of drafting and promoting the adoption of uniform state laws, if the uniformity is practical and desirable, as well as by The American Law Institute, drafting influential academic papers for clarifying, modernizing and improving the laws;

[44] The Green Paper of the Commission on policy options for progress towards a European Contract Law for consumers and businesses, European Commission, Brussels, 1.7.2010, COM(2010)348 final, available at:<< http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0348:FIN:RO:PDF>>;

In this context, the harmonization of the European laws on insolvency shall be approached by drafting an European academic project by an international academic network, project proposing the most adequate measures for harmonizing the European laws on insolvency, by means of an instrument with a force responding best to the harmonization objective and a form politically agreed up thus as to be achievable.

References

- Jerome Carriat, The Council Regulation 1346/2000 on Insolvency Proceedings, available at: <<http://ec.europa.eu/enterprise/entrepreneurship/support_measures/failure_bankruptcy/conference/carriat_slides.pdf >> (last visited on December 10th 2010;
- Pierre-Michel Le Corre, La reforme du droit des entreprises en dificulte – Comentaire de l'Ordonnance du 18 decembre 2008 et du decret du 12 fevrier 2009, Dalloz, Paris, 2009, p.209;
- Jean-Pierre Le Gall, Caroline Ruellan, Droit Commercial, Notion Generales, Dalloz, Paris, 2008, p.167;
- Yves Guyon, Droit des Affaires, Tome 2 - Entreprses en difficultes, Redressement Judiciaire-Faillite, 7e Edition, Economica, Paris, 1999;
- Jerome Huet, Traite de Droit Civil sous la direction de Jacques Ghestin, Les principaux contracts speciaux, 2 e edition, L.G.D.J., Paris, 2001;
- Barbara Ianniello, Il nuovo diritti fallimentare, Guida alla riforma delle procedure concorsuali, Giuffre, Milano, 2006;
- L.Idot, C.Saint-Alary-Houin, Procedures collectives-Droit communautaire en gestion, J.-Cl.Europe, Fsc.871 citat in Michel Jeantin, Paul Le Cannu, Droit du Commerce International, 2e edition, Dalloz, Paris, 2000.**;**
- Michel Jeantin, Paul Le Cannu, Droit commercial. Instruments de paiement et de credit. Entreprises en difficulte, 5e Edition, Dalloz, Paris, 1999;
- Veronique Martineau-Bourgniaud, Incetare de plati. Notiune fundamentala in Revue trimestrielle de droit commercial et de droit economique, aprilie/iunie 2002, nr.2, Ed.Dalloz, Paris;
- Francesco Meloncelli, La Conoscenza dello Stato D'Insolvenza nella Revocatoria Fallimentare, Giuffre, Milano, 2002;
- Daniela Claudia Muntean, *<<Regulamentul European de insolventa – Tema centrala a Conferintei "Dezvoltari Actuale in legislatia falimentului" care a avut loc la Dubrovnik-Croatia, in perioada 16-18 noiembrie 2005>>,* in R.D.C. nr.3/2006;
- G.Paisant, *"La reforme de la procedure de tratement du surendettement par la loi du 29 juillet 1998 relative a la lutte contre les exclusion",* Revue trimestrielle de droit commercial et economique, 1998;
- Alberto Palomar Olmeda, La Normativa de insolvencia en Espana, disponibil la <<http://ec.europa.eu/enterprise/entrepreneurship/support_measures/failure_bankruptcy/conference/palomar_slides.pdf>>;
- Gian Mario Perugini, Il Patrimonio nel Fallimento, In base alle nuove Leggi di Riforma, Giuffre, 2006;
- Gheorghe Piperea, *"Despre necesitatea extinderii procedurii insolventei la simpli particulari pentru supraindatorare",* in Probleme actuale ale dreptului bancar, Ed.Wolters Kluwer, 2008;
- G.Ripert/R.Roblot, Philippe Delebecque, Michel Germain, Traite de Droit Commercial, Tome 1, 17e edition, L.G.D.J., Paris, 2000;
- I.Turcu, *"Creatia dreptului european al falimentului (II)",* R.D.C. nr.4/2001;

- Bob Wessels, *"Improving the operation of the EU Insolvency regulation",* Revista Romana de Drept al Afacerilor, Supliment, I/2007;
- European Court, Case C-212/97, Judgment of the Court of 9 March 1999; Centros Ltd v Erhvervs- og Selskabsstyrelsen; Reference for a preliminary ruling: Højesteret - Denmark; Freedom of establishment - Establishment of a branch by a company not carying on any actual business - Circumvention of national law - Refusal to register; disponibil la: <<http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61997J0212&lg=en>>;
- European Court, Case C-167/01, Judgment of the Court of 30 September 2003, Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd., Reference for a preliminary ruling: Kantongerecht te Amsterdam - Netherlands; Articles 43 EC, 46 EC and 48 EC - Company formed in one Member State and carrying on its activities in another Member State - Application of the company law of the Member State of establishment intended to protect the interests of others; European Court reports 2003 Page I-10155; disponibil la: << http://eur-lex.europa.eu/Notice.do?val=277831:cs&lang=ro&list=277831:cs,277660:cs,277685:cs,&pos=1&page=1&nbl=3&pgs=10&hwords=>> (ultima vizualizare la 10 decembrie 2010);
- European Court, Case C-210/06, Judgment of the Court (Grand Chamber) of 16 December 2008; CARTESIO Oktató és Szolgáltató bt.; Reference for a preliminary ruling: Szegedi Ítélőtábla - Hungary; Transfer of a company seat to a Member State other than the Member State of incorporation - Application for amendment of the entry regarding the company seat in the commercial register - Refusal - Appeal against a decision of a court entrusted with keeping the commercial register - Article 234 EC - Reference for a preliminary ruling - Admissibility - Definition of 'court or tribunal' - Definition of 'a court or tribunal against whose decisions there is no judicial remedy under national law' - Appeal against a decision making a reference for a preliminary ruling - Jurisdiction of appellate courts to order revocation of such a decision - Freedom of establishment - Articles 43 EC and 48 EC; disponibil in: << http://eur-lex.europa.eu/Notice.do?val=484894:cs&lang=cs&list=484894:cs,470901:cs,&pos=1&page=1&nbl=2&pgs=10&hwords=&checktexte=checkbox&visu=>> (ultima vizualizare la 10 decembrie 2010);
- Cass.com., 14 fevrier 1978, Bull.cass., 4, nr.66;22 fevrier 1994, RJDA, 1994, 662 s.a.; Code des procedures collectives- Commente, 5e edition, Dalloz, 2007;
- European Parliament Report: Harmonisation of Insolvency Law at EU Level, member contributors : Giorgio Cherubini (Italy), Neil Cooper (UK), Daniel Fritz (Germany), Emmanuelle Inacio (France), Guy Lofalk (Sweden), Miriam Mailly (France), David Marks QC (UK), Anna Maria Pukszto (Poland), Barbara F H Rumora Scheltema (The Netherlands), Robert Van Galen (The Netherlands), Miguel Virgos (Spain), Bob Wessels (The Netherlands), Nora Wouters (Belgium), (INSOL EUROPE), available at: <<http://www.insol-europe.org/eu-research/harmonisation-of-insolvency-law-at-eu-level/>> in English language and at<<http://www.juridice.ro/122375/armonizarea-legislatiei-privind-insolventa-la-nivelul-uniunii-europene-bucuresti-26-noiembrie-2010.html>> in Romanian language;
- (EC) Regulation no.1346/May 29th 2000 on insolvency procedures, published in OJEC L 160/1 of 30.06.2000, p.143-160; available in Romanian language at:<< http://www.just.ro/Portals/0/CooperareJudiciara/LegislatieComunitara/1346%20insolventa.pdf>> (last visited on December 10th 2010);
- Law no. 637 of 07.12.2002 on the regulation of the international private law relations in the field of insolvency, published in the Official Monitor, Part I no.931 in 19.12.2002;
- Law no. 85/05.04.2006, on the insolvency procedure, published in the Official Monitor, Part I no. 359/21.04.2006, as further amended and completed;

- Code des entreprises en difficulte, Commente sous la direction de Corinne Saint-Alary Houin, premiere edition, LexisNexis, Litec, Paris, 2007;
- Ordinance no. 2008-1345 of December 18th 2008 regarding the reform of the law on companies in difficulty and the Decree no. 2009-160 of February 12th 2009 on the application of the reform ordinance;
- Italian Royal Decree no. 267 of March 16th 1942 - published in G.U. no. 81, April 6th 1942, Supplemento Ordinario, amended by the Decree Law no. 35 of March 14th 2005 transformed in the Law no. 80/May 14th 2005, by the Decree Law no. 5/January 9th 2006 and by the Legislative Decree no. 169 in September 12th 2007;
- German Code of Insolvency in English language: http://www.iuscomp.org/gla/statutes/InsO.pdf;
- Decree law no.5 of January 9th 2006 published in Gazzetta Ufficiale no.12 in January 16th 2006 (Italy);
- Polish Law of 28.02.2003 on bankruptcy and economic redress in French language translated by Daniela Borcan and Monika Bogucka, in www.juriscope.org;
- Legislative Guide on insolvency law of UNCITRAL, available at: <<www.uncitral.org>>;
- Uniform Commercial Code of the USA, available at:<< http://www.law.cornell.edu/ucc/ucc.table.html>>
- The Green Paper of the Commission on policy options for progress towards a European Contract Law for consumers and businesses, European Commission, Brussels, 1.7.2010, COM(2010)348 final, available at:<< http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0348:FIN:RO:PDF>>;

EFFECTIVENESS OF EU LAW IN MEMBER STATES

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Abstract

When the original Rome Treaty was drafted, it was envisaged by the authors that the procedure as set out in what is now article 258 T.F.E.U. (infringement procedure) would be the primary means by which EU law is enforced - a "centralized" and "public" form of enforcement assured by the ECJ, the Commission and Member States, which was itself innovative, since most international treaties contained no such mechanism. It was a point of view shared by Member States, who could see no reason why provisions of EC Treaties should be treated any differently from those of other international treaties. Thus, on the one hand, the effect of international treaties was generally governed by the principle that they cannot by themselves create rights and obligations for individuals, but only for contracting states - therefore, states were considered the only ones entitled to claim respect of international norms in international courts (individuals and national courts were excluded); on the other hand, as the text of EC treaties made no specific reference to the effect their provisions were to have, the general rule governing international treaties should also apply to them. The European Court of Justice disagreed and engaged in a prolonged judicial activism, resulting in the creation of other legal mechanisms by which national courts and individuals (rather than ECJ, Commission and Member States) were to take the leading role in the enforcement of EU law - a "decentralized" and "private" form of enforcement, governed by three interrelated principles developed jurisprudentially by the ECJ: direct effect, indirect effect and state liability. In this context, the purpose of this paper is to provide an overview of actual means of EU law enforcement, as presented above; to this end, there will be considered the legal/judicial basis, scope, limits and practical difficulties of the "centralized" and "decentralized" form of enforcement.

Keywords: *infringement, direct effect, incidental horizontal effect, indirect effect, state liability*

1. Introduction

The paper intends to provide an overview of primary means by way of which, at present, EU law is enforced against Member States, national authorities and individuals.

The topic proposed is central for EU law, both from theoretical and practical point of view.

From a theoretical perspective, the importance of analysis results, on the one hand, from the fact that means of EU law enforcement are different from those provided in case of international law enforcement; on the other hand, nor treaties or the other EU law sources identify a general scheme of these means (of which some have been established, in fact, by the case-law of Court of Justice of the European Union) – the analysis should therefore prove useful, taking into account the lack of legal provisions and also the evolving jurisprudence of ECJ on the subject.

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From a practical perspective, although EU law measures should willingly be complied with in Member States, experience has proved that existence of coercive methods of enforcement is still necessary, and a good knowledge of those methods is undoubtedly useful.

In this context, the paper will systematically present the public and private means of EU law enforcement which are part of the complex coercive means at the disposal of all those involved in application of EU law (EU institutions, Member States, national authorities, individuals); it will also discuss their legal or judicial basis, area of application, limits and possible interferences; to this end, both ECJ case-law and doctrinal opinions will be presented.

2. General aspects

Since none of the sources of EU law provided a general scheme of means ensuring EU law enforcement, the difficult task of conceptualising most of them fell on the European Court of Justice; the concepts established by ECJ were subsequently discussed and systematized by juridical literature.

The starting point was represented by the distinction between „public" and „private" enforcement – „Law can be enforced either through a public arm of government, which is accorded power to bring infringers to court, or through actions brought by private individuals, or a mixture of the two"[1].

The „public" enforcement was stipulated by the EEC Treaty and initially considered as the only means of enforcement; nevertheless, the ECJ conceived a complex system of „private" means, at the same time pointing out that „public" and „private" ways of enforcement do not exclude each other, but must coexist in order to ensure a complete effectiveness of EU law in Member States[2].

It can be concluded from those presented above that, at the present time, there are two channels which secure compliance with EU law in Member States: on the one hand, a „centralised" and „public" system of enforcement, assured by the Commission/Member States through actions brought before ECJ, and on the other hand a „decentralised"[3] and „private" system, assured by national courts in proceedings brought by individuals; the coexistence of these two forms amounts to what the European Court of Justice[4] and juridical literature[5] have referred to as „dual vigilance".

[1] P. Craig, G. de Burca, *EU Law, Text, Cases And Materials*, Fourth Edition, Oxford University Press, 2007, p. 269 (translated to Romanian by B. Andreşan Grigoriu and T. Ştefan, Hamangiu Publishing, Bucharest, 2009, p. 335).

[2] A. Evans, *A Texbook on EU Law,* Hart Publishing, Oxford, 1998, p. 186.

[3] J. Engstrom, *The Europeanisation of Remedies and Procedures through Judge-made Law – Can a Trojan Horse Achieve Effectiveness?*, European University Institute, Doctoral dissertation, Florence, 2009, p. 1; C. Boch, *The Iroquois at the Kirchberg; or some Naive Remarks on the Status and Relevance of Direct Effect – Dual Vigilance Revisited,* in Jean Monnet Working Papers no. 6/1999, published by Jean Monnet Center for International and Regional Economic Law & Justice, NYU School of Law, p. 1.

[4] „The vigilance of individuals concerned to protect their rights amounts to an effective supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States." – ECJ decision, 05.02.1963, *NV Algemene Transport - en Expeditie Onderneming van Gend & Loos c. Netherlands Inland Revenue Administration*, C-26/62.

[5] B. Moriarty, *Direct Effect, Indirect Effect and State Liability: An Overview,* Irish Journal of European Law, vol. 14, no. 1 and 2, 2007, p. 197-160, p. 100; J. Steiner, L. Woods, C. Twigg-Flesner, *EU Law*, Ninth Edition, Oxford University Press, 2006, p. 112; C. Bosch, *op. cit.*, p. 1; A. Howard, D. J. Rhee, *Private Enforcement – A Complete System of Remedies ?*, in *A True European. Essays for Judge David Edward,* edited by Mark Hoskins and William Robinson, Hart Publishing, Oxford and Portland, Oregon, 2003, p. 307-326, p. 308; R. Munteanu, *Drept european. Evoluţie – Instituţii - Ordine juridică,* Oscar Print Publishing, Bucharest, 1996, p. 347.

3. Public enforcement of EU law

When the original Rome Treatiy was drafted, the principal channel of Community law enforcement conceived by the authors consisted in a specific procedure by which the Commission/Member States could demand sanction of failure to fulfil an obligation under the Treaty, through actions brought before the European Court of Justice.

It was a „public" and „centralised" form of enforcement of Community law, stipulated by articles 169-170 of the Treaty and assured by the ECJ, the Commission and Member States, which was itself innovative, as most international treaties contained no such mechanism of international law enforcement.

The procedure mentioned above still exists and finds its actual legal basis in the provisions of articles 258-259 T.F.E.U.[6]

There are nevertheless significant limits of this form of EU law enforcement, which will be presented further on.

The first and most important limit is represented by the fact that individuals[7] take absolutely no part in this procedure (which was, indeed, conceived not for the protection of individuals, but as a form of EU law enforcement) – therefore, legal proceedings cannot either be initiated by individuals, nor used against them (active procedural position is attributed to the Commission/Member States[8], and passive procedural position to Member States).

Secondly, in most of the cases, the Commission itself finds out non-compliance with EU law only as a consequence of individual complaints (not every breach is as blatant as to determine the Commission to take action or result in a complaint on part of a Member State) and therefore its actions depends on the vigilance of individuals; on the other hand, the Commission does not have the institutional capacity to prosecute but a rather small number of infringements; finally, the Commission has discretionary power over the decision to initiate or not legal proceedings[9].

Thirdly, the sanction itself in case the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties is rather ineffective, as long as the ECJ decision (althouhg compulsory) is not self-executing and has only declarative effect – the Court limits itself to declare non-compliance of a Member State with an EU law obligation[10].

Thus, the Court cannot impose on Member States in breach certain obligations or particular measures – it is only for the domestic authorities to establish and carry on measures of execution of the infringed EU obligation so as comply with the judgment of the Court; the most „burdensome" sanction consists, eventually, in imposing on the Member State concerned payment of a lump sum or penalty payment (the Commission indicates the amount of the lump sum or penalty payment to be paid by the Member State which it considers appropriate in the circumstances[11])[12].

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[6] Ex articles 226 and 227 EC Treaty.

[7] Both physical and moral persons - A. Fuerea, *Drept comunitar European. Partea generală,* All Beck Publishing, Bucharest, 2003, p. 34.

[8] The procedure stipulated by article 258 T.F.E.U. is used frequently by the Commission; by contrast, Member States themselves make use of provisions of article 259 T.F.E.U. quite rarely (e.g., ECJ decision, 04.10.1979, *French Republic v. United Kingdom of Great Britain and Northern Ireland*, C-141/78 and ECJ decision, 16.05.2000, *Kingdom of Belgium v. Kingdom of Spain,* C-388/95), choosing instead to inform the Commission of the infringement, which continues the procedure in conformity to article 258 T.F.E.U.

[9] O. Ţinca, *Drept Comunitar General*, Third Edition, Lumina Lex Publishing, Bucharest, 2005, p. 337; C. Boch, *op. cit.,* p. 2, points out that in practice, in most cases, Commission's decision depends on political considerations.

[10] This is the reason why „judgements declaring Member States in breach of their Community obligations were all too often ignored" – C. Boch, *op. cit.,* p. 4.

[11] According to article 260 T.F.E.U. (ex article 228 EC Treaty).

[12] G. Gornig, I. E. Rusu, *Dreptul Uniunii Europene,* Second Edition, C. H. Beck Publishing, Bucharest, 2007, p. 104, pointed out that it was only in 2000 when the ECJ first decided to impose on a Member State penalty payments

4. Private enforcement of EU law

In this context, starting from the first and well-known case Van Gend en Loos[13] up to the present, the European Court of Justice ”has engaged in a prolonged and radical programme”[14], which resulted in the judicial establishment of methods by means of which „national courts, rather than the Court of Justice, are expected to play the lead role in the enforcement of Community law against the Member States, national authorities and private parties”[15].

The Court thus legitimated a „private” mechanism of EU law enforcement which integrated individuals into UE legal order, by establishing their capacity to invoke EU law, respectivelly challenge domestic non-compliance with EU provisions before national courts[16].

English literature[17] appreciated that three principal means have been conceived and subsequently developped by the Court: direct effect, indirect effect (harmonious interpretation of domestic law in accordance to EU law) and state liability for breach of EU provisions (methods to integrate EU law into domestic law[18]).

In addition to these channels of compliance, juridical literature also made reference to the preliminary ruling procedure[19] regulated by article 267 T.F.E.U.[20] and incidental horizontal effect[21] consacrated by the Court.

Preliminary ruling procedure will not be discussed in the present paper – although it undoubtedly allows individuals to invoke EU law before domestic courts, its efficiency is still weak concerning individuals’ implication in the procedure and their protection.

On the one hand, decision to send the case before ECJ belongs exclusively to domestic courts (individuals have absolutely no competence in this respect), and on the other hand the procedure was designed in order to ensure the correct and uniform application of EU law by internal courts, and not for the purpose of individual protection.

(ECJ decision, 04.07.2000, Commission v. Greece, C-387/97) – as a consequence of having been found in breach of EU obligations by judgment of the Court from April 1992, case C-45/91, Greece had been imposed to take measures necessary for the disposal of waste and toxic and dangerous waste from the area the area of Chania without endangering human health and without harming the environment in accordance with Article 4 of Council Directive 75/442/EEC of 15 July 1975; as Greece had not implemented the measures necessary to comply with the judgment in Case C-45/91, penalty payments were ordered by the Court. “Greece has been imposed payment of penalty payments (20.000 Euros per day) ... The Court took into consideration calculations proposed by the Commission, which assured transparency, predictibility, legal certainty and proportionality of the measure”.

[13] ECJ decision, 05.02.1963, *NV Algemene Transport - en Expeditie Onderneming van Gend & Loos c. Netherlands Inland Revenue Administration*, C-26/62, quoted before.

[14] D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *European Union Law, Text and Materials*, Cambridge University Press, 2006, p. 365.

[15] Idem; B. Moriarty, *op. cit.,* p. 159.

[16] A. Howard, D. J. Rhee, *op. cit.,* p. 307, underline the exclusive judicial effort of ECJ which, in spite of the contrary opinion expressed both by G.A. Roemer and the Member States in Van Gend case, has dismissed the argument that the Treaty addresses only to Member States and thus the only means of enforcement is the one stipulated by ex articles 169 and 170 EEC Treaty, emphasising that the Treaty also creates individual rights, which can be invoked before domestic courts.

[17] P. Craig, G. de Burca, *op. cit.,* p. 269-300; D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *op. cit.,* p. 365; J. Steiner, L. Woods, C. Twigg-Flesner, *op. cit.*, p.89; S. Prechal, *Member State Liability and Direct Effect: What’s the Difference After All?*, European Business Law Review, vol. 17, no. 2, 2006, p. 299-316, p. 300.

[18] See I. Moroianu Zlătescu, R. C. Demetrescu, *Drept Instituţional European*, Olimp Publishing, Bucharest, 1999, p. 140.

[19] C. Bosch, *op. cit.*, p. 1.

[20] Ex article 177 EEC Treaty, respectively ex article 234 EC Treaty.

[21] B. Moriarty, *op. cit.,* p. 112.

Concerning incidental horizontal effect, for reasons to be presented, its efficiency is also diminished, mainly because this judicially established notion has not yet been intirely clarified by the Court.

4.1. Direct effect

No legal provision consacrated direct effect, and therefore the main role in establishing the theory belonged to the ECJ[22] – the Treaty on the Functioning of the European Union contains a single disposition regarding direct applicability[23] (and not direct effect) of EU regulations (and not all sources of EU law), respectively article 288 T.F.U.E.[24], according to which regulations are directly applicable in all Member States.

In essence, direct effect theory[25] stipulates that a EU provision (should certain conditions be satisfied) has the capacity of creating individual rights and obligations, which can be relied on before national courts[26].

It can easily be observed that, by establishing direct effect theory, the most important deficiency of the infringement procedure has been eliminated – individuals have been brought into the legal order of European Union and could rely directly on EU law[27].

On the other hand, enforcement of measures of EU law partially shifted to domestic courts[28], which from this point on could sanction Member States at national level for failure to comply by means of direct application of EU provisions[29].

Effectiveness of EU law was therefore achieved even in cases where the „public" means of enforcement had proved ineffective – e.g., Member States ignored an ECJ decision declaring them in breach of EU law, choosing instead to pay the lump sum or penalties imposed.

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[22] The theories of direct effect and supremacy of EU law (the latter was consacrated by ECJ decision, 25.06.1964, *Flaminio Costa v. E.N.E.L.*, C-6/64) have been established together (this is the reason why there are cases where the Court discusses both theories in the same judgment); in addition, direct effect and supremacy are inextricably linked, as the problem of solving a conflict between a domestic and a EU law provision and decide which one should apply to the dispute (supremacy) cannot be settled but after having already established that both cathegories of norms produce effect in the national system concerned (direct effect).

[23] Direct applicability defines a specific characteristic of EU law which means that it needs no transposition measures in order to be applied at national level (therefore, EU law can be directly applied by domestic courts or national administration to particular litigations).

[24] Ex article 249 EC Treaty.

[25] Consacrated by ECJ decision, 05.02.1963, *NV Algemene Transport - en Expeditie Onderneming van Gend & Loos c. Netherlands Inland Revenue Administration*, C-26/62, quoted before.

[26] The narrower sense of direct effect consists in the capacity of a provision of EU law to confer rights on individuals (this sense is referred to as „subjective direct effect"); there is also a broader sense of the definition of direct effect, which can be expressed as the capacity of a EU law provision (clear, precise and unconditional) to be relied on by individuals before national courts – the provision does not necessarily create individual rights, but individuals are still interested in invoking it, e.g., in order to protect themselves in a dispute with a national authority or obtain disapplication of a national provision contrary to EU law (this sense is known as „objective direct effect").

[27] By contrast to the situation of „international law, where individuals are powerless before the all mighty State, the doctrine of direct effect of EC law opened for individuals effective channels, and thus made EC law a reality states should respect"– P. Pescatore, *L'effet direct du droit communautaire,* Paricrisie Luxembourgeoise, Imprimerie Joseph Beffort, Luxembourg, 1975, p. 19.

[28] Juridical literature pointed out the importance of the role played by domestic courts in enforcement of EU measures - R. Kovar, *L'integrité de l'effet direct du droit communautaire selon la jurisprudence de la Cour de Justice de la Communauté,* Das Europa der zweiten Generation, Nomos Verlagsgesellschaft, Baden-Baden, 1981, p. 164; also, see P. Pescatore, *op. cit.*, p. 1 – the author concludes that integration of EU law into domestic systems of Member States by way of direct effect entrusts its application mainly to the national judge and national courts.

[29] Direct effect "does not have the sole purpose of individual protection, but at the same time aims to guarantee effectiveness of EC law in national juridical orders." - D. Simon, *Le système juridique communautaire*, Second Edition, Presses Universitaires de France, Paris, 1998, p. 268.

Nevertheless, direct effect theory has important limitations[30], which result both from the Court's case-law, and also from national legislations.

In this respect, it should be noticed that not every source of EU law has been acknowledged the capacity of producing direct effect (e.g., the situation of non-binding secondary measures of EU law - recommendations and opinions).

Also, there is not always the case that the EU norm concerned fulfils the judicially established direct effect criteria of clearness, precision and unconditionality (this is the situation when direct effect is conditional).

Finally, there are UE measures in case of which only vertical direct effect was accepted (the well-known situation of directives, where the Court constantly denied horizontal direct effect)[31].

In the first case (EU measures which do not have the capacity of producing direct effect), the theory of direct effect is totally ineffective and, in addition, the infringement procedure is also not available, given the fact that recommendations and opinions are non-binding (effectiveness of these EU measures is therefore difficult to be achieved, but for the situation they are willingly accepted by the Member States).

In the second situation (failure to satisfy the conditions imposed in situation of conditional direct effect), although direct effect theory still remains useless, the public way of enforcement provided by article 258 T.F.E.U. becomes available, as the EU sources concerned are binding (nevertheless, in this situation, there is practically a turn over to the initially single form of enforcement stipulated by ex article 169 EEC Treaty).

The third case (no horizontal direct effect for directives) represents one of the most important judicially established limit of the doctrine, which means that non-implemented/ inadequately implemented directives cannot be relied on in litigations between private parties (regardless that the directive in question should fully satisfy direct effect criteria).

Some authors[32] remarked also limitations imposed by Member States' legislation – litigations at national level where direct effect of EU measures is relied on must be judged by domestic courts in accordance to their own internal procedural rules, different fron one state to another, and which have obviously not been adopted for the purpose of enforcing EU law (e.g., a case solved by a Romanian court by application of the status of limitation concept[33] renders impossible the analysis of the merits, and therefore the enforcement of rights conferred by EU provisions on individual parties by way of direct effect theory).

4.2. Horizontal incidental effect

Horizontal incidental direct effect was also established judicially by the ECJ[34], with the purpose of lessening the deficiency of direct effect doctrine consisting in denial of horizontal direct effect in case of directives; in essence, it means that directives can be relied on in litigations between private parties, in order to set apart inconsistent national legislation.

This does not mean that the directive concerned creates rights or obligations for individuals, but simply that it has an „exclusionary" impact of contrary domestic law and the protection it provides for individuals; the „vacuum" thus created is filled in by another conforming national

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[30] For a critical point of view over direct effect doctrine and an exhaustive presentation of its deficiencies - I. Sebba, *The Doctrine of „Direct Effect": A Malignant Disease of Community Law,* in *Legal Issues of European Integration*, Law Review of the Europa Instituut, no. 2/1995, Amsterdam University, p. 35-58.

[31] In the particular case of directives, acknowledgement of direct effect is in fact a sanction against the Member State to which the directive is addressed – or, the sanction should apply strictly to the Member State who committed a wrong, and not also to other subjects, such as individuals.

[32] C. Boch, *op. cit.,* p. 6.

[33] In Romanian law – "excepția prescripției dreptului la acțiune".

[34] ECJ decision, 30.04.1996, *CIA Security International SA v. Signalson SA and Securitel SPRL*, C-194/94; ECJ decision, 26.09.2000, *Unilever Italia SpA v. Central Food SpA*, C-443/98.

provision, and private parties can therefore be subject of liability deriving from obligations created by the latter provision.

In other words, in such cases, the directive is invoked in litigations between individuals to preclude the application of inconsistent domestic law, and the result is that parties are exposed to a potential liability[35] under another consistent provision of national law - which would not have happened if offending national law would have been applied.

English doctrine[36] concluded that „The crucial factor in these horizontal cases is that one party suffers a legal detriment and the other party gains a legal advantage from the terms of an unimplemented directive".

The most important limit of incidental horizontal direct effect theory, remarked by juridical literature[37], is that it is often difficult in practice to clearly distinguish it from horizontal direct effect theory, as the case-law of the Court in the area of incidental horizontal direct effect is rather confuse.

Thus, the no-horizontal-direct-effect-of-directives rule (unimplemented/inadequately implemented directives cannot be relied on in litigations between private parties) is based on the argument that directives cannot impose obligations upon individuals – or, incidental horizontal direct effect has the result that, although the directive itself does not create obligations upon individuals, it allows removal of domestic legal protection and makes the individual subject to potential liability; thus, indirectly, directives produce effects in private litigations.

4.3. Indirect effect

Most deficiences presented above were stepped aside by creation of indirect effect theory[38] (a second „private" means of enforcement of EU law), according to which domestic courts[39] must interpret national legislation in conformity with EU law.

It must be underlined that indirect effect theory applies to all EU sources[40], even those non-binding, such as recommendations[41]; also, it applies to all measures of national law (including domestic case-law[42]).

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[35] Although the State itself is in breach of EU law, individuals must accept the advantages/disadvantages of exclusion of the national law.

[36] P. Craig, G. de Burca, *op. cit.,* p. 297.

[37] B. Moriarty, *op. cit.,* p. 155; P. Craig, G. De Burca, *op. cit.,* p. 296.

[38] The Court established the indirect effect theory in Von Colson case – ECJ decision, 10.04.1984, *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, C-14/83, based on provisions of ex article 5 EEC Treaty (ex article 10 EC Treaty and the actual article 4 alin. 3 T.E.U.).

[39] Indirect effect theory is to be considered not only by domestic courts, but also by all national authorities applying EU law, either legislative, administrative or judicial – G. C. R. Iglesias, J.-P. Keppenne, *L'incidence du droit communautaire sur la droit national,* Mélanges en hommage à Michel Waelbroeck, vol. I, Bruylant, Bruxelles, 1999, p. 530.

[40] In case of Treaties – ECJ decision, 05.10.1994, *Van Munster v. Rijksdienst voor Pensioenen*, C-165/91, ECJ decision, 26.09.2000, *Rijksdienst voor Pensioenen v. Robert Engelbrecht*, C-262/97; in case of regulations – ECJ decision, 07.01.2004, *Montres Rolex S.A. and others v. Customs Authorities Kittsee-Austria*, C-60/02; in case of directives – ECJ decision, 10.04.1984, *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, C-14/83; liberalisation of indirect effect theory was consacrated in the Pfeiffer case (ECJ decision, 05.10.2004, *Bernhard Pfeiffer, Wilhelm Roith, Albert Süß, Michael Winter, Klaus Nestvogel, Roswitha Zeller, Matthias Döbele v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, joined cases C-397/01 to C-403/01), where the Court stipulated that requirement of conforming interpretation is „inherent to the system created by the Treaties" and thus applies to all sources of EU law (including decisions - measures of secondary binding EU law - in case of which it could not have been identified a case explicitly taking in discussion harmonious interpretation).

[41] ECJ decision, 13.12.1989, *Salvatore Grimaldi v. Fonds des maladies professionnelles*, C-322/88.

[42] L. Flynn, *Simple catchwords and complex legal realities: recent developments concerning the juridical effects of EC legal norms,* Irish Law Times, no. 16, 2000, p. 260, exemplifies by ECJ decison, 13.07.2000, *Centrosteel Srl v. Adipol GmbH*, C-456/98, where the Court makes reference to case-law.

In addition, indirect effect theory applies regardless of fulfilment of direct effect criteria[43] by the EU provision concerned – in this respect (independence of theories of direct and indirect effect), it was pointed out[44] that „duty to construe national law in conformity with Community law ... gives an individual the possibility of obtaining satisfaction, not because he can derive rights from directly effective Community law ... , but because he can derive rights from national law once it has been interpreted in conformity with Community law."

In the same line of reasoning, indirect effect operates independently of complete direct effect –directives do not have horizontal direct effect, but national courts are still under the obligation to interpret national law according to directives even in litigations between private parties.

Nevertheless, establishment of harmonious interpretation theory succeeded only in smoothing the limit consisting in prohibition of horizontal direct effect of directives, but not creating a secure means of repairing of loss suffered by individuals as a consequence of non-implemented/inadequately implemented directives – this is because the juridical effect of such a directive concerning the rights it confers on individuals is left to the power of appreciation of domestic courts, which are sovereign in the interpretation of national law according to the said directive[45].

On the other hand, the Court itself was fully aware of the risks implied by use of indirect effect theory, and therefore specifically established two important limits of its application.

Firstly, the Court has held that „in applying national law, ... , the national court called upon to interpret ... is required to do so, *as far as possible*, in the light of the wording and the purpose of the directive"[46] – indirect effect does not require thus *contra legem* interpretation of national law (the force of the interpretative obligation is not so strong as to impose a provision of domestic law to be given a meaning that clearly contradicts its ordinary meaning)[47].

Secondly, the Court was very cautious in allowing application of indirect effect in the area of criminal law, where legal certainty is especially important for the protection of individual rights and freedoms[48] - provisions of criminal law must be interpreted and applied *stricto sensu*, and indirect effect cannot result in determining or aggravating liability in criminal law[49].

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[43] Idem, p. 260 - „the direct effect of a legal norm forming part of the Community legal order is not the only way in which such a norm can have juridical effect ... principle of loyal interpretation also gives rise to such effect even in the case of measures which do not have direct effect themselves".

[44] W. van Gerven, *From "direct effect" to "effective judicial protection",* in Schritfenreihe der Europaischen Rechtsakademie Trier, Bundesanzeiger, 1996, Band 12, Academy of European Law, Trier, p. 31.

[45] For evolution of English case-law concerning application of harmonious interpretation theory and cases where it was denied, see J. Steiner, L. Woods, C. Twigg-Flesner, *op. cit.*, p. 108 - 110.

[46] ECJ decision, 13.11.1990, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, C-106/89.

[47] ECJ decision, 16.12.1993, *Teodoro Wagner Miret v. Fondo de Garantía Salarial*, C-334/92 (where the Court suggested legal proceedings based on state liability procedure, as indirect effect procedure was inapplicable) – for a comment on this decision, see S. Drake, *Twenty years after Van Colson: the impact of "indirect effect" on the protection of the individual's Community rights,* European Law Review, vol. 30, no. 3, 2005, p. 329-348, p. 342 ("As a result, it is clear that the duty of purposive interpretation imposed on national courts is not absolute and is not designed to give national courts a legislative function so as to allow them to re-write national law"); in the same line of reasoning, see D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *op. cit.,* p. 365.

[48] ECJ decision, 26.09.1996, *Criminal proceedings against Luciano Arcaro*, C-168/95.

[49] ECJ decision, 08.10.1987, *Criminal proceedings against Kolpinghuis Nijmegen BV*, C-80/86.

4.4. State liability

As a consequence of limits presented above, there were still cases when individuals could not use direct/indirect effect theories, and therefore a third „private"[50] way of enforcement of EU law against the Member States was conceived by the Court[51], namely the theory[52] of state liability for breach of EU law.

The starting point was the situation of unimplemented/inadequately implemented directives – in horizontal litigations, rather than attempting to enforce the obligation stipulated by such directives against the opposite party by way of incidental horizontal direct effect or indirect effect[53], the individual can bring proceedings for damages against the state (a much more effective means to impose Member States correct and in due time implementation of directives).

Over the years, application of state liability theory extended beyond the original situation of non-implementation/inadequate implementation of directives[54] (the said theory had been created as a means of enhancing the ability of national courts to enforce directives, still without allowing them full direct effect), and in consequence the state could also be held liable in case of breach of EU law by way of legislative[55], administrative[56] or judicial[57] actions (which did not have to relate to directives at all).

What should firstly be noticed is that state liability theory applies regardless of the direct effect of the concerned EU provision (even in case of a directly effective EU norm, the individual is not imposed to use the direct effect theory prior to bringing proceedings based on state liability theory) - nevertheless, until having been clarified by the Court in *Brasserie du Pecheur*[58] case, this was a subject of debate.

Some domestic courts[59] and a part of juridical literature[60] opinated that state liability as a remedy for breaches of EU law should be made available only in case of infringement of directly effective EU provisions (arguing that non-directly effective norms do not have the capacity of having any juridical effect whatsoever).

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[50] P. Craig, G. de Burca, *op. cit.*, p. 300.

[51] ECJ decision, 19.11.1991, *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*, joined cases C-6/90 and C-9/90.

[52] Some authors use the expression "*principle* of state liability" - D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *op. cit.*, p. 365; T. Ştefan, B. Andreşan Grigoriu, *Drept comunitar*, C. H. Beck, Publishing, Bucharest, 2007, p. 236 or „*doctrine* of state liability " - D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *op. cit.*, p. 391 (interchangeable use of these expressions is also characteristic for direct/indirect effect).

[53] In this case, direct effect theory is inapplicable.

[54] A. Ward, *Judicial Review and the Rights of Private Parties in EU Law*, Second Edition, Oxford University Press, 2007, p. 73 (the author discusses in detail the means conceived by the Court in order to compensate prohibition of horizontal direct effect of directives).

[55] ECJ decision, 05.03.1996, *Brasserie du Pecheur and Factortame III*, joined cases C-46/93 and C-48/93.

[56] ECJ decision, 26.03.1996, *The Queen v. H. M. Treasury, ex parte British Telecommunications plc.,* C-392/93.

[57] ECJ decision, 30.09.2003, *Gerhard Köbler v. Austria,* C-224/01.

[58] ECJ decision, 05.03.1996, *Brasserie du Pecheur and Factortame III*, joined cases C-46/93 and C-48/93, quoted before.

[59] S. Prechal, *op. cit.*, p. 299, identifies the judgment of Hoge Raad (the Netherlands), 11.06.1993, AB 1994, no. 10, regarding the proceedings which concerned the so-called „Roosendaal-method" of expulsion of aliens. The author points out that, generally, proceedings setteled by domestic courts prior to the *Francovich* decision (the case concerned a non-directly effective directive) implied only application of EU directly effective provisions (for discussion, see A. Barav, *State Liability in Damages for Breach of Community law in the National Courts*, in Heukels and McDonnel (eds), *The Action for Dameges in Community Law*, Kluwer Publishing, Haga, 1997, p. 363).

[60] W. van Gerven, *op. cit.,* p. 40-41.

There was also an opposite opinion, according to which state liability should apply only for breaches of non-directly effective measures of EU law[61] – individuals can assert their rights by way of direct effect theory if they are directly effective.

The Court dismissed both opinions in the *Brasserie du Pecheur* case, holding that „The right of individuals to rely on directly effective provisions before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of Community law. That right … cannot, in every case, secure for individuals the benefit of the rights conferred on them by Community law and, in particular, avoid their sustaining damage as a result of a breach of Community law attributable to a Member State."

Secondly, state liability theory is available independently of any prior use of the infringement procedure regulated by articles 258 and 259 T.F.E.U.[62], and this aspect was also clearly stated by the Court in the same *Brasserie du Pecheur* case:

„ … to make the reparation of loss or damage conditional upon the requirement that there must have been a prior finding by the Court of an infringement of Community law attributable to the Member State concerned would be contrary to the principle of the effectiveness of Community law, since it would preclude any right to reparation so long as the presumed infringement had not been the subject of an action brought by the Commission under Article 169 of the Treaty and of a finding of an infringement by the Court. Rights arising for individuals out of Community provisions … cannot depend on the Commission's assessment of the expediency of taking action against a Member State pursuant to Article 169 of the Treaty or on the delivery by the Court of any judgment finding an infringement."

In fact, direct effect of the EU provision concerned or prior use of the infringement procedure are not at all mentioned among criteria to be satisfied for incidence of state liability theory (which are: the EU rule of law infringed is intended to confer rights on individuals, the breach is sufficiently serious, and there is a direct causal link between the breach of the obligation imposed on the Member State and the damage sustained by individuals).

This final private way of EU law enforcement also has its limit, belonging to the procedural area, namely the principle of national procedural autonomy, according to which cases involving state liability are to be judged by domestic courts by applying national relevant provisions.

Still, this principle is subject to two conditions: 1. procedural circumstances required by national law may not be less favourable in the context of EU law enforcement than they are in case of norms deriving from domestic law[63]; 2. procedural domestic circumstances must not be applied if their effect is practically to make impossible to exercise the EU rights which national courts are required to enforce[64].

5. Conclusions

There are two channels which secure at present effectiveness of EU law in Member States: on the one hand, a „centralised" and „public" form of enforcement assured by the ECJ, the Commission and Member States, based on the procedure stipulated by articles 258 and 259

[61] In this respect, S. Prechal, *op. cit.,* p. 299, makes reference to M. Nettesheim, *Gemeinschaftsrechtliche Vorgaben für das deutsche Staatshaftungsrecht*, Die Offentliche Verwaltung, 1992, p. 1002.
[62] B. Moriarty, *op. cit.,* p. 119.
[63] Condition of equivalence.
[64] Condition of effectiveness.

T.F.E.U., and on the other hand a „decentralised" and „private" form of enforcement in which national courts and individuals play the leading role, through legal proceedings based either on direct/indirect effect theories, or on the theory of state liability for failure to comply with EU law (the coexistence of these „public" and „private" means of enforcement amounts to the notion of „dual vigilance", initially legitimated by the Court and later accepted in doctrine).

All these „public" and „private" forms of enforcement are legally independent one from another, and their use in practice evolved over the years, as the ECJ attached increasingly more importance to integration of individuals in EU legal order and therefore to the significant contribution of the „private" way of enforcement of EU law[65].

The „public" means of enforcement has never been contested, nor by Member States or doctrine (contestation would anyway have been difficult, as legal basis was provided by the Treaty); on the other hand, in spite of the initial opposition of some of the Member States to the judicial creation of the „private" channels, the theories of direct effect, indirect effect and state liability are nowadays fully accepted.

Judicial acknowledgement of horizontal incidental direct effect remains though highly controversial, especially as a consequence of an insufficient delimitation from the concept of horizontal direct effect (and this is an aspect which needs to be cleared by the Court in its case-law to follow).

References

- Barav, Ami, *State Liability in Damages for Breach of Community law in the National Courts*, in Heukels and McDonnel (eds), *The Action for Dameges in Community Law*, Kluwer Publishing, Haga, 1997
- Boch, Christine, *The Iroquois at the Kirchberg; or some Naive Remarks on the Status and Relevance of Direct Effect – Dual Vigilance Revisited,* in Jean Monnet Working Papers no. 6/1999, published by Jean Monnet Center for International and Regional Economic Law & Justice, NYU School of Law
- Craig, Paul, De Burca, Grainne, *EU Law, Text, Cases And Materials*, Fourth Edition, Oxford University Press, 2007
- Chalmers, Damian, Hadjiemmanuil, Christos, Monti, Giorgio, Tomkins, Adam, *European Union Law, Text and Materials*, Cambridge University Press, 2006
- Drake, Sara, *Twenty years after Van Colson: the impact of "indirect effect" on the protection of the individual's Community rights,* European Law Review, vol. 30, no. 3, 2005
- Engstrom, Johanna, *The Europeanisation of Remedies and Procedures through Judge-made Law – Can a Trojan Horse Achieve Effectiveness?*, European University Institute, Doctoral dissertation, Florence, 2009
- Evans, Andrew, *A Texbook on EU Law,* Hart Publishing, Oxford, 1998
- Flynn, Leo, *Simple catchwords and complex legal realities: recent developments concerning the juridical effects of EC legal norms*, Irish Law Times, no. 16, 2000
- Fuerea, Augustin, *Drept comunitar European. Partea generală*, All Beck Publishing, Bucharest, 2003
- Gornig, Gilbert, Rusu, Ioana Eleonora, *Dreptul Uniunii Europene*, Second Edition, C.H. Beck Publishing, Bucharest, 2007

[65] ECJ decision, 25.07.2002, *Unión de Pequeños Agricultores v. Council,* C-50/00 P.

- Howard, Anneli, Rhee, Deok Joo, *Private Enforcement – A Complete System of Remedies?,* in *A True European. Essays for Judge David Edward,* edited by Mark Hoskins and William Robinson, Hart Publishing, Oxford and Portland, Oregon, 2003
- Iglesias, Gil Carlos Rodriguez, Keppenne, Jean-Paul, *L'incidence du droit communautaire sur le droit national,* în *Mélanges en hommage à Michel Waelbroeck*, vol. I, Bruylant, Bruxelles, 1999
- Kovar, Robert, *L'integrité de l'effet direct du droit communautaire selon la jurisprudence de la Cour de Justice de la Communauté*, Das Europa der zweiten Generation, Nomos Verlagsgesellschaft, Baden-Baden, 1981
- Moriarty, Brid, *Direct Effect, Indirect Effect and State Liability: An Overview,* Irish Journal of European Law, vol. 14, no. 1 and 2, 2007
- Moroianu Zlătescu, Irina, Demetrescu, Radu Constantin, *Drept Instituțional European*, Olimp Publishing, Bucharest, 1999
- Munteanu, Roxana, *Drept european. Evoluție – Instituții - Ordine juridică,* Oscar Print Edition, Bucharest, 1996
- Nettesheim, Martin, *Gemeinschaftsrechtliche Vorgaben für das deutsche Staatshaftungsrecht*, Die Offentliche Verwaltung, 1992
- Pescatore, Pierre, *L'effet direct du droit communautaire,* Paricrisie Luxembourgeoise, Imprimerie Joseph Beffort, Luxembourg, 1975
- Prechal, Sacha, *Member State Liability and Direct Effect: What's the Difference After All?*, European Business Law Review, vol. 17, no. 2, 2006
- Sebba, Ilan, *The Doctrine of „Direct Effect": A Malignant Disease of Community Law,* in *Legal Issues of European Integration*, Law Review of the Europa Instituut, no. 2/1995, Amsterdam University
- Simon, Denys, *Le système juridique communautaire*, Second Edition, Presses Universitaires de France, Paris, 1998
- Steiner, Josephine, Woods, Lorna, Twigg-Flesner, Christian, *EU Law*, Ninth Edition, Oxford University Press, 2006
- Ştefan, Tudorel, Andreşan Grigoriu, Beatrice, *Drept comunitar*, C. H. Beck Publishing, Bucharest, 2007
- Ținca, Ovidiu, *Drept Comunitar General*, Third Edition, Lumina Lex Publishing, Bucharest, 2005
- Van Gerven, Walter, *From "direct effect" to "effective judicial protection",* in Schritfenreihe der Europaischen Rechtsakademie Trier, Bundesanzeiger, Band 12, Academy of European Law, Trier, 1996
- Ward, Angela, *Judicial Review and the Rights of Private Parties in EU Law*, Second Edition, Oxford University Press, 2007

NEW DISPOSITIONS WITH REGARD TO FILIATION

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Abstract

The new Romanian Civil Code[1] is a milestone for the profound reform of our judiciary as regards the matter of private law relationships, on the grounds of valuating the national and international experience.[2] The novelties are represented, mainly, by the review of certain legal institutions and promotion of new principles and solutions. On this backdrop, the regulation of family relationships also received a new face.The present task is devoted to highlighting the amendments interfered in the matter of filiation, by presenting the systematization method of legal regulations and the critical analysis of its content.

Key words: *filiation, paternity presumption, donor assisted human procreation, possession of status, legal timeframe of conception*

I. Introduction

Filiation, the subject of this paper represents an important landmark to all law systems as it provides the rules that guarantee the child's rights to know his/her parents and the duties of all parents regarding the education and care for their own children.

The new Civil Code reiterates the existing rules but also provides for innovations and settles the dispositions regarding filiation against the new issues imposed by the evolution of Romanian society, doctrine and judicial practice. The protection of child's rights and the best interest of the child with regard to filiation remain a priority objective of the new regulation.

Considering both the importance and the innovation character of the regulation of filiation issues, we feel that a systemic approach of the issues is not only necessary but also useful, having in mind that there are few literary references to this subject.

We undertake to elaborate a general presentation of the new legal norms regarding filiation both in terms of theory and practice.

II. General aspects regarding filiation

1. Definition of filiation

Filiation is the descendent relationship between a child and his parents.[3]

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[1] Adopted by Law 287/2009, published in the Official Journal, Part I, no. 511 of 24 July 2009.

[2] Sources of inspiration were mainly the legislation of: France, Italy, Netherlands, Spain and Canada – Province of Quebec, and also a series of international regulations.

[3] Please see: A. Ionaşcu, M. Mureşan, M.N. Costin, V. Ursa –"*Filiation and protection of minors*", Editura „Dacia", Cluj – Napoca, 1980, page 14.

It usually consists of a biological relationship resulted from conception and birth. In some cases (assisted procreation, donor assisted procreation, unjustified application of the paternity presumption and wrongful maternal or paternal acknowledgement), filiation does not entail a biological relation.

2. Filiation reference

The new civil code regulates filiation in chapter II, Second Book, Title III (art. 408 – 450), structured in 3 sections, namely: Section 1- establishment of filiation: Section 2 –Donor assisted procreation; Section 3 – Legal status of children .

III. Establishment of filiation

1. Means for establishing filiation

1.1. General aspects

Acknowledgement of filiation consists of the procedures that attest the legal fact or act proving the descendent relationship between a child and his parents.

Establishment of filiation is rather different considered the mother's or the father's side in questions.

The new legal norms maintain the existing legal provisions regarding the acknowledgement of filiation[4].

Thus, maternal filiation is the result of giving birth to the child, which applies both to marriage filiation and to out of wedlock filiation. This means that maternal filiation implies of proof of the following elements: a) the mother gave birth to the child; b) identity between the born child and that whose filiation is in question; c) proof of marriage (only in the case of marriage filiation).

In cases strictly provided for, maternal filiation is established by acknowledgement and court decision.

As regards parental filiation, it can be results out of application of the presumptions of paternity. In these cases indivisibility arises in the sense that if maternity filiation is established, the paternal filiation is not questionable.[5]

Paternal filiation for the child born out of wedlock is established through acknowledgement and court decision[6].

In order to produce legal effects, filiation must be proven, as prescribed by law. As a rule, civil status is proven with acts produced by the civil service officers and the civil office certificates handed to the parties. Thus, proof of filiation is made through the act of birth[7] of the respective

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[4] Please see Family Code (Law no. 4/1953) republished in the Official Bulletin no. 13/ 18.04.1956, as subsequently amended and modified.

[5] The attestation of paternity for the child born inside marriage through the paternity presumption is embraced by all legal systems, as an application of the principle „*pater est quem nuptiae demonstrant*" (Ingeborg Schwenzer (editor) – *Tensions Between Legal, Biological and Social Conceptions of Parentage*, Ed. Intersentia, Antwerpen-Oxford, 2007, page 5).

[6] According to article. 3 of the European Convention of the legal status of children born out of wedlock, Strasbourg, 15th of October 1975, ratified by Romanian through the Law no. 101/1992, published in the Official Monitor, no. 243 /10.09.1992: „ Paternal filiation of all children born out of wedlock may be acknowledged or attested through voluntary acknowledgment or court decision.

[7] In the sense that the birth act represents, by excellence the ultimate proof of birth please see: C. Hamangiu, I. Rosetti – Bălănescu, Al. Băicoianu –*Romanian Civil law Treatise*, Editura „Academiei", Colecția „Restitutio", București, 1997, Vol. I, page. 285.

person and the birth certificate produced on the basis of the former. For the children born inside a marriage, the marriage must be proven through the act of marriage and the marriage certificate.

Proof of maternal filiation is made through the certificate attesting the birth, which is a medical act and is not to be confounded with the birth certificate. The certificate attesting the birth proves not only the physical act of birth but also the identity of the child[8].

During judicial proceedings before the courts, proof of filiation is made through all legal means of proof, as prescribed by law. The evidentiary force of the act of birth is consolidated through the possession of status in conformity with the former.

1.2. Possession of status

Unlike the former regulations, art. 410 para 1 of the new Civil Code defines the possession of status as " the factual situation indicating the ties of filiation between the child and the family he/she is presumed to belong to". Thus, a relative presumption of filiation is introduced here.

Following, examples are provided to give clues about filiation, such as:

" a) a person behaves towards the child as if it were his own, taking care of raising and educating him/her and the child behaves towards this person as towards his/her parents;

b) the child is recognized by the family, society and if the case may be, by the public authorities as being the child of the person presumably considered his/her parent;

c) the child has the name of the person presumably considered his/her parent."

Possession of status must fulfill the following conditions:

a) it must be continuous, meaning without presenting unjustified interruptions. From this point of view, several difficulties may arise if there are lacks in the raising and education process of the child, but the subjective attitude of the parent will be decisive;
b) it must be peaceful, without any violence;
c) it must be public, meaning that it is not exercised secretly and is made known to all interested parties;
d) it is unquestionable, meaning that it provides a clear significance of the relevant circumstances.

If the possession of status and the act of birth are concordant, as for instance both point to the same woman as mother of the child, then in principle the maternal filiation cannot be questioned neither by the child - requesting another civil status - nor by other persons - contesting the respective civil status.[9] Accordingly, we are in the presence of a presumption that the civil status resulting from the act of birth and the possession of status corresponds to reality.

In exceptional cases, situations may arise when such a presumption does not correspond to reality, as for instance when children have been substituted at birth or when a woman is registered as mother of the child and she is not the one who gave birth to the child. In these circumstances, legal action in court is admissible to establish the real maternal filiation, any legal means of evidence being admissible.

[8] Pleasse see: Sc. Şerbanescu – *Family Code, amended and modified*, Editura „Ştiinţifică", Bucureşti, 1963, pag. 157; T.R. Popescu – *Family Law, Vol. II,* Editura „Didactică şi Pedagogică", Bucureşti, 1965, pag. 27; I. P. Filipescu – *Family Law,*, Editura „Didactică şi Pedagogică", Bucureşti, 1965, pag. 146. In the sense that this act does not refer to the identity of the child, please see : P. Anca –*Maternal filiation*, în lucrarea „Kinship in the law of the Romanian Socialist Republic.", Editura „Academiei", Bucureşti, 1966, pag. 32.

[9] Please see: article 411 alin. (1) şi (2) of the new Civil Code.

1.3 Presumption regarding the legal timeframe of conception

In order to prove the maternity of the child born inside marriage and out of wedlock, the presumption regarding the legal timeframe of conception applies, as prescribed by article 412 of the new Civil Code in the same lines as the existing article 61 of the Family code, namely:

"The timeframe between the 300th day and the 180th day before the birth of the child represents the legal timeframe of conception."

However, it must be mentioned that where the uterus presents several malformations

(double cavity, for instance), the legal timeframe of conception must be determined separately for each child conceived and grown in different cavities of the uterus.[10]

We are in the presence of a legal relative presumption that can be overturn in judicial proceedings through scientific evidence. Thus it can be proven that the child was conceived in a certain period of the 121 days or even outside the legal timeframe of conception, this being one of the newly introduced issues.

2. Paternity presumption [11]

According to article 414 para 1 of the new Civil Code" the child born or conceived during marriage is fathered by the husband of the mother". This provision entails the following aspects:

a) the child was conceived during marriage;

b) the child was conceived before the marriage but was born inside the marriage;

c) the child was conceived during marriage but was born after the divorce, annulment or termination of the marriage.

The new norms do not contain the former disposition prescribed by article 53 para 2 of the Family Code regarding the child conceived during marriage and born after the divorce, annulment or other termination of marriage, in which case the paternity presumption favors the ex - husband of the mother on the condition that the birth takes place before the subsequent remarriage of the mother.

This omission does not mean a change of the view of the Romanian legislator in this respect, thus the solution remains the same – as deduced from article 414 para 1 of the new Civil Code –in the sense that if the mother remarries, the spouse of the mother from the subsequent marriage is presumed the father of the child.

The paternity presumption is applicable ope legis, any wrong or incorrect data in the act of birth of the child being irrelevant (this could point to an unknown father or other person than the mother's spouse)[12].

As regards the legal nature, we are in the presence of a mixed presumption that can be overturned exclusively through an action to contest paternity, in the conditions strictly provided for by law.

We must underline that the legal norms mentioned above institute a preference order, in the sense that the child born during marriage is preferred to the one only conceived during marriage. This envisages the solution in case paternity is contested, thus father of the child will be considered the mother's spouse in the subsequent marriage.

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[10]Please see: D. Lupaşcu –*Family Law*, ediţia a V-a, Editura „Universul juridic", Bucureşti, 2010, page 220.

[11] In the sense that the former norms [art. 53 para (1) şi (2) of the Family Code) contain 2 paternity presumptions, please see: I. Albu – *"Family Law,,* Editura „Didactică şi Pedagogică", Bucureşti, 1975, page. 112; I. Bohotici – "*Establishment and contestation of paternity"*, Editura „Cordial Lex", Cluj – Napoca, 1994, page 14 – 15. In the sense that there is only one paternity presumption, please see: I. P. Filipescu, A.I. Filipescu – *Family Law Treatise,* Editura „All Beck", Bucureşti, 2001, page 302.

[12] Please see: I.P. Filipescu, A.I. Filipescu – *op. cit.*, page 303

3. Establishment of filiation through voluntary acknowledgement [13]

3.1. Definition

Through voluntary acknowledgement a person, unilaterally declares or attests the filiation bond between him/her and the child he/she pretends to be his/her child. It represents a civil status act, in the meaning of negotiun juris and must be registered in the civil status registries.

Voluntary acknowledgment may be used to establish both maternal and paternal filiation.

3.2. Legal nature

Voluntary acknowledgement is of a mixed legal nature: on the one hand it is a manifestation of intent/will that produces legal effects – with regard to the filiation between the parent and the child – and, on the other hand, it is a means of evidence (a confession to a previous legal fact).

Its legal nature also imprints the applicable regime, meaning that it should comply both with the rules which are specific to unilateral judicial acts and those regarding confession. Notwithstanding the common law, the recognition of lineage is valid even when it is made by a person lacking legal capacity or having limited legal capacity, without legal representation or the preliminary approval of the legal guardian being necessary. The only requested condition, from this point of view, is the existence of discernment at the moment of recognition.[14]

Also, acknowledgement is irrevocable, which means that it is irreversible, even if it was made by testament. However, this doesn't prevent the author to challenge it in the case of recognition by error, due to the fact that the essence of revocation is different than the one of the challenge.

3.3. Cases of acknowledgement

The new regulation maintains the current cases in which the acknowledgement of the child is possible, as follows:

1) in the case of maternity: a) the birth was not registered in civil status registries; b) the child was enlisted in the civil status registries as being born from unknown parents;

2) in the case of paternity: the child was conceived and born outside marriage.

The law doesn't distinguish with regard to the reasons for which the birth was not registered in the civil status registries, situation in which we must consider any situation related to this case (for example: the inexistence of the registers; the omission of registration by fault of the civil status officer; loss or deterioration of the registries, etc.).

An issue under the old regulations (and which, for the same reasons, is also maintained until present) is that of admissibility of acknowledgement (especially the recognition of lineage towards the mother), occurred before the birth of the child.

Some authors[15] estimate that the acknowledgement of the child before birth is not possible, because cases of establishing the maternal filiation through recognition refer exclusively to born

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[13] With regard to the establishment of filiation through acknowledgement, please see: A. Bacaci, C. Hageanu, V. Dumitrache –*Family law*, Editura „All Beck", Bucureşti, 1999, page 151 şi urm.; R. Petrescu –*Legal action regarding the persons' civil status*, Editura „Ştiinţifică". Bucureşti, 1968, page 165 şi urm.; I.P.Filipescu, A.I. Filipescu – *op. cit*., page 284 şi urm.; A. Corhan – *op. cit*., page.301 and next.; E. Poenaru –Recognition through will of the child born out of wedlock în Revista „Justiţia Nouă" nr. 3/1956, page 463; A. Ionaşcu, M. Costin, M. Mureşan, V. Ursa – *Filiation and protection of minors*, Editura „Dacia", Cluj – Napoca, 1980, page 23

[14] In this regard, art. 417 of the new Civil Code provides that: „The unmarried minor can recognize his child by himself, if he has discernment at the time of recognition."

[15] In this regard, please see: P. Anca – *op. cit*., pag. 32 and the following.; T.R. Popescu – *op. cit*., pag. 76 – 78.

children. Moreover, if the mother would decease immediately after the birth of the child, before she would register the child as being born, or the child would be registered as being born of unknown parents or not registered at all, proof of filiation is available through any means of evidence in a court of law[16].

Other authors[17] – whose opinion we agree with – consider this acknowledgement admissible, under the suspensive condition that at birth, the child would be in one of the limited situations provided by law in which the recognition may be made. The decisive argument is that, according to art. 36, first thesis, of the new Civil Code: „The rights of the child are recognized from conception, but only if he is born alive." Among these, there is also the right to civil status, as an attribute of identification of the natural person.[18]

The doctrinal dispute with regard to the admissibility of maternal recognition of the deceased child is ended by the express provisions according to which:"After the demise of the child, he can be recognized (both by the mother and father – s.n.), only if he left natural descendants.[19]

Both minors and the adults may be thus acknowledged, the law expressly establishing such a solution.[20]

3.4. Forms of acknowledgement

Due to the juridical effects that it produces, the recognition of the child is a juridical act of special importance, reason for which the law provided it with a solemn character, meaning that it should carry one of the limited forms provided by law, as follows: a) statement at the civil status office; b) authentic document; c) testament.

The recognition is a personal act, which, however, does not exclude the possibility for it to be made in the name of the mother or, as the case may be, the father, by a representative with a special and authentic power of attorney.

The acknowledgement is inscribed through a mention on the edge of the child's birth certificate and, if the registration of birth was not acknowledged, the birth certificate is written and the recognition is inscribed on the edge.

The statement of recognition may be made at any civil status office, but the mention on the edge of the birth certificate is inscribed only by the civil status office which produced that document.

The authority which issued the authentic document by which a person recognizes a child has the obligation to transmit *ex officio* a copy of this document to the competent civil status office, in order for the corresponding mention to be inscribed in the civil status registry.

3.5. The sanction for disrespecting the legal provisions regarding the recognition of the child

The recognition of the child must be made with the respect of the conditions for form and substance provided by law, and, moreover, they must correspond to the truth[21].

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[16] E. Ion, T. Moise – *Legal and genetic bases of legal and medical expertise on lineage*, „Medicală" Publishing House, Bucharest, 1990, pag. 26.

[17] See: A. Ionașcu – *Liniage towards the mother,* in the work *„Linage and Minor's Care", op. cit.,* pag. 15 – 16; I. Filipescu – *op. cit*., pag. 268.

[18] See: art. 59 and 98 of the new Civil Code.

[19] See: art. 415 para. (3) of the new Civil Code.

[20] According to art. 413 of the new Civil Code: „The provisions of the current chapter referring to the child are applicable also to the adult whose lineage is under investigation."

[21] See: Al. Oproiu – *Cases of absolute invalidity of recognition*, Law Review „Justiția Nouă" no. 1/1961, pag. 131; T.R. Popescu – *op. cit*., pag. 159.

Breaching the conditions provided by law for the recognition of the child may impose the invalidity/nullity sanction, which may be absolute or relative.

The absolute invalidity occurs if a legal provision which defends a general interest is breached[22], and the relative invalidity sanctions the breach of a legal provision which defends a particular interest[23].

Art. 418 of the new Civil Code provides for three cases of absolute invalidity:

a) a child was recognized and his filiation, legally established, was not removed;

b) a deceased child was recognized and he did not leave any natural descendents;

c) the recognition was made in forms other than those provided by law.

Beside those situations, we estimate that the absolute nullity occurs also in the case when the recognition was not made by the parent personally or by representative with a special and authentic power of attorney. Practically, we are in the presence of a virtual invalidity, meaning that the sanction must be applied in order for the scope of the breached legal provision to be reached.[24]

With regard to the applicable legal regime, absolute invalidity/nullity of the recognition is imprescriptible and may be invoked by any interested person, by legal action or exception. Also, the court is obliged to invoke the absolute invalidity ex officio.

If the previous established filiation was removed through a court decision, the recognition is valid and we are in the presence of a validation of this unilateral legal act by covering the invalidity.

The recognition may be annulled in the case of vitiation of consent, by error, dolus or violence.[25] The express provision of this sanction removes another controversy of our legal doctrine.[26]

The case when the parent did not have discernment in the moment of recognition is added to those presented above. It also regards an express provision of the relative invalidity.[27]

The action for annulment of recognition may be exerted only by the parent whose consent was vitiated or who had not discernment at the moment of recognition.

The term of extinctive prescription is 3 years[28] and starts „(…) from the date when the violence ceased or, as the case may be, when the dolus or error was discovered”[29]. We observe that with regard to error, there is a derogation from common law[30], meaning that an objective moment for the start of the prescription is not instituted anymore, respectively „(…) not later than 18 months from the day when the legal act was signed.”

As regards the annulment for lack of discernment, we consider that the prescription term starts “from the day when the rightful person, his representative or the one called by law to approve or to authorize his acts, became aware of the invalidity cause, but not later than 18 months from the day when the legal act was signed.”[31]

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[22] See: art. 1325 corroborated with art. 1247 para. (1) of the new Civil Code.

[23] See: art. 1325 corroborated with art. 1248 para. (1) of the new Civil Code.

[24] With regard to the virtual invalidity: see art. 1253 of the new Civil Code.

[25] See: art. 419 para. (1) of the new Civil Code.

[26] See: Al. Oproiu – *Is it possible to file an action for annulment of lineage recognition on grounds of incapacity or vice of consent?*?, in The Law Review „Legalitatea populară” no. 9/1961, pag. 51 and the following; Sc. Şerbănescu – *Family Code, commented and annotated*, „Ştiinţifică” Publishing House, Bucharest, 1963, pag. 160 and the following.; Ghe. Nedelschi – *Note to the Decision no. 54/1955 of the Bucharest Tribunal*, in the Law Review „Legalitatea populară” no. 4/1955, pag. 431 and the following; P. Marica – *Controversial aspects in Family Law*, In the Romanian Law Review no. 7/1967, pag. 101 – 102; T.R. Popescu – *op. cit.*, pag. 161 and the following.

[27] See: art. 1325 corroborated cu art. 1205 of the new Civil Code.

[28] See: art. 2517 of the new Civil Code.

[29] See: art. 419 para. (2) of the new Civil Code.

[30] See: art. 2529 para. (1) lit. c) of the new Civil Code.

[31] See: art. 2529 para. (1) lit. c) of the new Civil Code.

The relative invalidity of the recognition may be confirmed.

4. Court actions regarding filiation

Both in the case of lineage towards the mother and towards the father, the law provides the possibility for filing court actions.[32]

4.1. Actions for contesting filiation

4.1.1. Action for contesting filiation established by birth certificate

In this situation, we are in the presence of a complaint against the possession of status, which aims at the removal of a lineage, alleged unreal, and its replacement with another, alleged real.

The action for contesting filiation may be exerted in the case when the lineage is established by birth certificate, which is not in accordance with the possession of status.

This action may be filed by any interested person and is imprescriptible.

In court, the proof of the alleged real filiation is made through the medical certificate of birth, through forensic expertise for establishing the lineage or, if the certificate is missing or, in the case when the expertise cannot be carried out, in principle through any type of proof, including the possession of status. With regard to the testimonial evidence, this is admissible only in the following cases: a) a child substitution took place; b) another woman, other than the one that gave birth, was registered as the child's mother; c) there are documents which make the action trustable.

4.1.2. The action for contesting child acknowledgement

Recognition of filiation, if it is not in accordance with the truth, may be contested by any interested person, including the recognized child, by means of a court action.

Contestation against recognition may be intended also by the author of recognition, even if at the date of recognition he was not in error, because the civil status data of the person must correspond to the truth, the person's status being of interest both for him/her and for the society.[33]

Such an action is imprescriptible and any means of proof admitted by law may be used as evidence.

As a rule, the burden of proof is incumbent to the claimant. Art. 420 para. (2) of the new Civil Code deviates from this rule, stating the following: „If the recognition is contested by the other parent, by the recognized child or by his descendents, proof of filiation must be made by the author of recognition or his heirs."

4.1.3. The action contesting paternal filiation inside marriage

The action for contestation of paternity within marriage aims at removing wrongful or fraudulent application of the paternity presumption.

In such a situation, the child was wrongly registered, as being from marriage and having the mother's husband as father although: 1) the child was born prior to the marriage of parents; 2) the child was born after 300 days since the cessation, or as the case may be, or dissolution or annulment of marriage; 3) the child's parents have never been married.

This action is imprescriptible and may be introduced by any interested person, including the child.

[32] With regard to the court actions for lineage issues, see, for example: A. Corhan, *op. cit.,* pag. 289 and the following.

[33] See: T.J. Hunedoara, civil decision no. 1303/1979, în the Law Review Revista Română de Drept no. 11/1979, pag. 67.

4.2. The action for establishing filiation

4.2.1. The action for establishing maternal filiation

The action for establishing the maternal filiation is an civil status reclamation in order to determine the lineage relation between the child and his mother.

This action may be introduced in the following situations:

a) when, for any reason, the proof of lineage towards the mother cannot be made through the birth certificate;

b) when the reality of those written in the birth certificate is contested.

With regard to the first situation, under the influence of the old regulation, in the legal literature[34] it was underlined that the action's admissibility is conditioned by the absolute impossibility to establish maternity, and not when a temporary obstacle exists, such as, for example, the hypothesis of reconstruction or subsequent elaboration of the civil status act. Also, the action is inadmissible if the birth declaration can be made at a later time.

With regard to the second case, it is not sufficient to contest the reality of those comprised in the birth certificate, but the legal possibility for such contestation must exist, for example in the situations when there is no concordance between the birth act and the possession of status.

We should underline that, within the same action, it is possible to contest the reality of the mentions on the birth certificate and to claim a different marital status, not requiring two separate actions.

Action for determining maternity has a personal character, the child being the bearer of it. If the child lacks the capacity to exercise his rights, the action is introduced, in his name, by the legal representative.

If the child died subsequently to the introduction of the action, his heirs can exert it, according to the law. Even more- unlike the previous regulation- the heirs of the child can introduce the action (if it was not prior introduced by the child).

In our opinion, according to the procedural provisions, the prosecutor[35] can introduce or continue such an action every time it is necessary in order to protect the legitimate rights and interests of minors, of persons under interdiction and of disappeared persons.

The alleged mother has passive locus standi and, after her death, the heirs of the alleged mother.

The right to introduce an action is inalienable. If the right was not exerted by the child, his heirs, in case the child dies, can introduce the action within on year (calculated from the date of the child's death). Within such an action, it should be proven both the fact of birth by the woman against whom the action is exerted and the identity of the born child to that the holder of the action.

In terms of probation, any means of proof admitted by law can be used.

4.2.2. The action fore establishing paternity outside marriage

The action for establishing paternity outside marriage is an action in civil complaint, which is to establish the lineage between the child out of wedlock and his father, when the latter does not recognize the child.

[34] See, for example: A. Bacaci, C. Hageanu, V. Dumitrache – *op. cit*., pag. 156; A. Corhan – *op. cit.,* pag. 300.

[35] Concerning the action introduced by the prosecutor, see, for example: V. Pătulea -Regarding the prosecutor's right to file an action in order to establish the lineage of minor children out of wedlock, in the Legal Magazine „Legalitatea populară" no. 10/1960, p. 56; E. Poenaru – The prosecutor's action to file a civil action and establishing strictly personal rights,, in the Legal Magazine „Justiția nouă" no. 2/1964, p. 60 and the following.; P.A. Szabo – Problems related to the civil action of the prosecutor, in the Legal Magazine „Justiția nouă" no. 7/1956, p. 127 and the following.

Unlike the prior regulations - when the child and his mother were holders of the action - the new provisions state that the action belongs to the child and can be introduced, in his name, by the mother, even if she is underage, or by the legal representative of the child.

The right to introduce the action in determining paternity outside marriage is not submitted to statutory limitations during the child's life.

If the child died subsequently to the introduction of the action, his heirs can exert it, according to the law. If the child died prior to the introduction of the action, his heirs can introduce the action within one year from his death.

Also, the prosecutor can introduce the action, according to the provisions of the Civil Procedural Code.

The alleged father has the passive locus standi, and after his death this quality passes to his heirs, even if they have renounced the estate, because the action has a personal character.[36]

In case of *plurium concubentium* it is possible to summon all men with whom the mother had intercourse during the timeframe of conception.

In order to establish paternity for a child born outside marriage, the following elements need to be proved: 1) the birth of the child; 2) the intimate liaisons between the alleged father and the mother during the legal timeframe of conception[37]; 3) the fact that the child resulted from such relations.

These elements can be proved by any evidence admitted by law, including by hearings of relatives, except for the descendents.

If the defendant recognizes the child as his own, such a voluntary acknowledgement stands for recognition of paternity in authentic form.

Art. 426 of the new Civil Code provides for a relative presumption of paternity in the hypothesis that the alleged father lived together with the mother during the legal time of conception. In such a case, evidence is no longer necessary for proving intercourse and its result, but the alleged father is called upon to prove - in order to remove such presumption - that he cannot have conceived the child.

The cohabitation of the mother with the alleged father involves living in same household or the existence of stable, continuous contact.[38]

It is worth mentioning that only cohabitation leads to such presumption, and not other situations, like, for example, financially supporting the child.

The new Civil Code provides for a special regulation on the compensation the mother is entitled to ask from the alleged father, concerning the expenses made during pregnancy, birth and puerperium/post partum confinement. Thus, she may ask and obtain from the alleged father the following: a) half of the expenses at birth and puerperium; b) half of the expenses made with her living expenses during pregnancy and puerperium.

Such legal action can be introduced within 3 years from the birth of the child.

The compensation can only be requested if the action for determining paternity was introduced, even if the latter is still pending.

If the action for determining paternity will be irrevocably dismissed and if the compensation were granted during this period of time, we consider that there is no reason for keeping them, the defendant can regress against the child's mother for unjust enrichment.

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[36] See: T.R. Popescu, op. cit., p. 77.

[37] See: Supreme Court of Justice – Civil Section, decision no. 2264/1992, in the paper „Law problems from the decisions of the Supreme Court of Justice 1990 – 1992", „Orizonturi" Publishing House, Bucharest, 1993, p. 184 – 186.

[38] See: Supreme Court of Justice – Civil Section, decision no. 779/1990, in the paper Law problems from the decisions of the Supreme Court of Justice 1990 – 1992", op. cit., p. 180 – 181.

Compensation may be claimed even if the child was born dead or died before issuing the decision establishing paternity.

For any other prejudice caused by the alleged father, the mother of the child and her heirs have the right to compensation according to common law provisions.

4.3. Action in denial of paternity

Action in denial of paternity is an action that aims to remove the paternity established by applying the presumption of paternity.[39]

According to art. 414 (2) of the new Civil Code, „The paternity can be contested, if it is not possible for the mother's husband to be the father of the child." The cases that fall under this general rule may differ, for example: a) the physical impossibility to procreate; b) the material impossibility of cohabitation; c) the moral impossibility of cohabitation, etc.

The new provisions extend the sphere of persons entitled to formulate the action, giving this possibility also to the alleged biological father, as well as to the heirs of the mother's husband, the heirs of the mother, the heirs of the alleged biological father and the heirs of the child.

Considering the holder of the action, we distinguish the following situations:

1) When the action is introduced by the mother's husband, the child is the defendant; if the child is a minor under the age of 14, he will be represented by the mother or by the legal representative; after reaching this age, he will sit alone in court, assisted by the mother or the guardian.

If the child is deceased, the mother's husband introduces the action against the child's mother and, if the case, against any other heirs of the child.

The mother's husband can introduce this action within 3 years, calculated either form the date that he learned he is the alleged father of the child[40], or from a subsequent date, when he learned that the presumption of paternity does not correspond to reality. If the husband died before the expiry of the deadline and did not introduce the action, his heirs can introduce it within one year from his death.

For the husband put under interdiction, the action can be introduced by a guardian, or, failing that, by a court appointed trustee.

It is worth mentioning that the deadline for introducing the action in denial of paternity is not calculated against the husband put under interdiction, the husband being able to introduce the action within 3 years calculated from the ceasing of the interdiction, if such action was not introduced by a guardian or trustee.

2) When the action is introduced by the mother, the mother's husband is the defendant, and if he is deceased, his heirs;

The mother can introduce the action within 3 years, calculated from the birth of the child.

For the mother put under interdiction, the action can be introduced by the guardian or, failing that, by a court appointed trustee.

The deadline for introducing the action is not calculated against the mother put under interdiction, she will be able to introduce the action within 3 years calculated from the ceasing of the interdiction, if such action was not introduced by a guardian or trustee. Also, if the mother died

[39] For other definitions, see, for example: C. Hamangiu, I. Rosetti-Bălănescu, A. Băicoianu –Civil Law Treatise, Vol. I (republishing), „All" Publishing House, Bucharest, 1996, pg. 479; A. Corhan – op. cit., p. 309.

[40] For a de lege ferenda proposal in this respect and critics to the previous solution, according to which the deadline is calculated from the date that the father learned about the birth of the child, see: F.A. Baias, M. Avram, C. Nicolescu – Changes brought to the Family Code trough Law no.288/2007, in the Legal Magazine „Dreptul" no. 3/2008, p. 35.

before the completion of the 3 years deadline, without introducing the action, it can be introduced by her heirs, within one year from her death.

3) When the action is introduced by the alleged biological father, the passive locus standi is incumbent to the child and the mother's husband, and if they are deceased, the action is introduced against their heirs;

Unlike the previous 2 holders of the action, the right to introduce the action does not prescribe during the lifetime of the alleged biological father. If he deceased without introducing the action, his heirs can introduce it within one year calculated from his death.

If the alleged biological father is under interdiction, the action can be introduced by the guardian or, failing that, by a court appointed trustee.

It is extremely important to note that the law imposes the condition that the alleged biological father is due to prove his paternity, in order to have his action in denial of paternity admitted.

4) When the action is introduced by the child, the mother's husband will be called upon in court, and, if he is deceased, the action is introduced against his heirs.

We consider that the provision stating that: "The action in denial of paternity is introduced by the child's legal representative, if he is a minor" can be criticized.[41]

In our opinion, the underage child having full capacity of exercise can introduce the action by himself. Also, the child of 14 years old can promote the action by himself, without needing any previous consent, taking into consideration that the right is personal and non-patrimonial.

The right to introduce the action is cannot be subject to statutory limitations prescribed during the child's life, as well as in the case of the alleged biological father.

If the child dies before the action is introduced, it can be initiated by his heirs, within one year from his death.

4.4. The action for contesting paternal filiation inside marriage

Misapplication of the presumption of paternity to the child registered civil status, as being born in wedlock, although he was born before marriage or was conceived after a period more that three hundred days after the dissolution of marriage or whose parents were never married may be the subject of an action challenging the paternal filiation of the respective spouse.

Such an action is not expressly provided for by law, but it is a creation of the doctrine[42] and received jurisprudential applications.

According to art. 434 of the new Civil Code, the action for contesting the paternal filiation inside marriage is regulated in the same line as the actions concerning the civil status of the person. Thus, the active locus standi belongs to any interested party, and the right to action is not subject to prescription.

By admitting such an action, the presumption of paternity wrongly or fraudulent applied is removed and the child becomes, retrospectively, child out of wedlock, which will have implications on the name, parental care, residence, the obligation to ensure support, etc.[43]

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[41] See: art. 433 (1) of the new Civil Code.

[42] Known under different designations, as: „contesting the paternity of the child wrongly registered from wedlock" „action in contesting paternity", „contesting the paternity of the child apparently from wedlock", „contesting the filiations from wedlock", „contesting the paternity of the child from wedlock"(Emese Florian –Family Law, ed. 3, C.H.Beck Publishing House, Bucharest 2010, p. 325), „contesting the filiations against the father in the marriage" (Alexandru Bacaci, Viorica-Claudia Dumitrache, Codruța Hageanu – Family Law, ed. 4, All Beck Publishing House, Bucharest, 2005, p. 198), „contesting the paternity from marriage" (Dan Lupașcu – Family Law 5th Edition, amended and revised, op. cit., p. 200).

[43] Alexandru Bacaci, Viorica-Claudia Dumitrache, Codruța Hageanu – op. cit., p. 198; Emese Florian – op. cit., p. 325; Dan Lupașcu – op. cit., p. 201.

IV. Medically donor assisted procreation

Firstly regulated in Romanian law, the medically donor assisted procreation represents a solution for the straight couples or single women who want a child and cannot bear a child naturally.

The new Civil Code regulates[44] in detail the juridical situation of children conceived through such a method. The regulation is meant to ensure the conditions necessary for the interested persons to choose such a procreation method, the confidentiality of the act, as well as the parental relations concerning a child conceived in such a manner[45].

Third donor procreation is not expressly defined by the new regulatory framework. However, judging from the legal provisions governing its effects, one can deduce that it is a human reproduction method, using specific medical techniques and genetic material that may belong not only to those who will act as parents to the child so conceived, but also to other donors.[46]

According to article 441 of the new Civil Code, persons who may resort to this procreation method may be a couple consisting of a man and a woman or a woman alone, who shall act as parents of the child so conceived. This is quite a permissive approach, also offering to single women the opportunity to have babies[47].

Using medically donor assisted procreation will generate problems as concerns the filiation/lineage of the children born this way. The regime of this situation was clearly regulated by the legislator.

According to article 441, paragraph (1) of the new Civil Code, no filiation connection shall be recognized between the third donor and the child thus conceived. Parents will always be those

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[44] The medically donor assisted reproduction is regulated in art. 441 – 447 of the new Civil Code. These provisions will be completed by special law concerning the legal regime, ensuring the confidentiality of information, as well as the way of transmitting such information.

[45] Such method of procreation is also regulated in other law systems. Thus, in France, 2 laws adopted on the 29th of July 1994 regulated this institution, one concerning the „human body", and the other one concerning the utilization of its „products" and the medically assisted procreation (see, Alain Bénabent – Droit civil de la famille, 9-ème édition, Ed. Litec, Paris, 2000, p. 360). Same provisions are found in the law of other countries, like: Austria, Netherlands, Spain, Japan, Switzerland, etc. For details: Ingeborg Schwenzer (editor) – Tensions Between Legal, Biological and Social Conceptions of Parentage, Intersentia, Antwerpen-Oxford Publishing House, 2007, pg. 9.

[46] The French Public Health Code defines the medical assistance for procreation within article 152-1 of the Law no. 94-654 of 29 June 1994, also maintained after the amendment occurred through the Ordinance no. 2000-548 of 15 June 2000, as "clinical and biological practice allowing the *in vitro* conception, embryo transfer and artificial insemination, and any technique having an equivalent effect and allowing procreation outside of a natural process" ("*Code civil*" 103e edition, ed. Dalloz, Paris, 2004, page 348). For more details, please see: Veronica Dobozi (I), Gabriela Lupşan, Irina Apetrei (II) - Lineage within the medically assisted reproduction, "Law" Review no. 9 / 2001, page 41 et seq.

[47] The possibility to resort to such a procreation method is regulated differently by various law system; thus, while in United Kingdom, Austria or Spain it is not conditioned by the marital status of the person (in this sense: Lupşan Gabriela, Irina Apetrei (II) - *op. cit.*, p. 50), France recognizes as beneficiaries of such means of procreation solely the man and woman forming a couple or able to provide evidence of a common life of at least two years, who are alive and have a suitable age to procreate and who agree beforehand to embryo transfer or insemination. (*Code de la santé publique*, L. 2141-2, in „*Code civil"*, Dalloz, Paris, 2004, p. 348). There are also much more permissive legal systems, such as, for example, that in Quebec. According to the law here, heterosexual and homosexual couples, as well as single women have access to medically assisted procreation (Marie Pratte - *La tension entre la filiation légale, biologique et sociale dans le droit québécois de la filiation*, în Ingeborg Schwenzer (editor) - op. cit., p. 101. A similar situation can be found within the Greek law, where the medical assistance for procreation addresses heterosexual married couples or not, as well as single women (A.C.Papachristos – *Le droit hellénique de la filiation: parenté biologique et parenté socio-sentimentale*, in Ingeborg Schwenzer (editor) – *op. cit*., p. 211).

who have resorted to this method of reproduction. For this reason they must give their consent before a public notary, who will explain beforehand the consequences of this act on the future child's filiation, in terms of strictest confidence. Until the time of conception, this consent will remain void in case of death, an application for divorce, the separation of fact or of its revocation by those who have expressed it.

In this context, the maternal filiation will result from the act of birth[48], according to the principle *mater semper certa est (the mother is always certain).*

The paternal filiation is determined differently, depending on the marital status of the woman who gives birth to the child. Thus, in the case of a married woman, the father's child will be the mother's husband, by applying the presumption of paternity, under article 408, paragraph (1) of the new Civil Code. In the case of an unmarried couple, the paternal filiation shall be determined through recognition or, if the man who consented to medically assisted reproduction using a third donor refuses to recognize the child's parentage, by court order. His responsibility towards the mother and child is expressly provided by law[49] and we believe that this translates into the possibility of applying to this situation[50] the provisions of article 428 of the new Civil Code.

The specific feature of the filiation resulting from the use of this procreation method is that it can not be challenged by anyone, not even by the child born through this method, for reasons relating to medically assisted reproduction. The action to contest/ deny paternity may be filed only if the mother's husband did not consent to medically assisted reproduction with third donor, under the law. We believe that such an action can also be filed by the mother's husband who has revoked his consent before the time of conception, or if, during this period, one of the following circumstances occurs: an application for divorce or separation in fact (cases when, according to the law, the effects of the prior consent are removed).

The opportunity provided by article 443, paragraph (3) of the new Civil Code – regarding the actual application of the provisions regulating the denial of paternity if the child was not conceived in this way – tries to sanction the case where a mother's extra-conjugal relation, which the child might result from, would be disguised by the use of medically donor assisted procreation. We agree with other authors[51], that this legal provision is likely to jeopardize the immutability principle of the child's civil status. This is due to the fact that in an action of denial of paternity filed in the conditions set by common law, where the mother's husband, the mother, the child, the alleged biological father or the heirs of each of the above may have *locus standi*, it can easily be proven by scientific evidence that it is impossible for the mother's husband to be the father to the child, but it is not possible to prove whether or not the child's birth is due to medically assisted reproduction. And the negative consequences of the admission of such an action will reflect upon the child, whose filiation in relation to his/her father will remain not established.

The child conceived through medical intervention with a third donor will benefit from the parental care from the father his/her lineage was established to, under the same conditions as his natural child.

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[48] According to article 408, paragraph (1). It is worth mentioning that the Romanian legislator has not provided the possibility of using the so-called "carrying mother" or "surrogate mothers", who keep the pregnancy and give birth to a child for another couple, child that will then be taken by his/her biological parents. Such a possibility exists in the laws of many states. For details, please see: Veronica Dobozi (I), Gabriela Lupşan, Irina Apetrei (II) - op. cit., p. 45, Emese Florian - op. cit., p. 356; Ingeborg Schwenzer (Editor) - op.cit, p. 10.

[49] Please see: article 444 of the new Civil Code.

[50] In this sense, please see also Emese Florian – *op. cit.,* p. 358.

[51] Emese Florian – *op. cit.,* p. 357

V. The child's legal condition

As concerns the legal condition of the child, the new regulations will reconfirm the equality in rights of children, irrespective of the fact that they are born in wedlock or outside it. This is actually a principle that was enshrined by the Romanian legislation since the Family Code was adopted. Thus, the law provides that the child born outside the wedlock whose lineage was established according to law has the same rights as the child born in wedlock against each parent and his/her relatives.

The difference lays only in determining the child's name, but the legislator has provided modalities converging to achieve the same solution for this case too. Thus, both the child born inside marriage and out of wedlock will have the name of one of his/her parents or the parents' names combined.[52]

VI. Conclusions

The new regulations regarding filiation bring a comprehensive and detailed approach of aspects concerning the meaning of the concept, establishing filiation to the mother and the father, the procedural means that interested persons may resort to in order to solve some practical problems in establishing lineage, as well as the cases in which lineage does not derive from the natural act of procreation. The analysis of these regulations requires a high complexity, especially given the fact that, by their nature, they comprise a number of sensitive issues, which may give rise to difficulties in their practical application.

That is why we believe that a thorough analysis, when relating to how similar rules in other legal systems are enforced, as well as the problems existing in the previous Romanian jurisprudence will prove to be of real support in the implementation of the new Romanian Civil Code.

References:

- I. Albu – *Family Law,* „Didactică şi Pedagogică" Publishing House, Bucharest, 1975;
- P. Anca – *Lineage to the mother*, in the paper „Rudenia în dreptul R.S.R.", „Academiei" Publishing House, Bucharest, 1966;
- A. Bacaci, C. Hageanu, V. Dumitrache – *Family Law*, „All Beck" Publishing House, Bucharest, 1999;
- F.A. Baias, M. Avram, C. Nicolescu – *Changes brought to the Family Code trough Law no. 288/2007*, In the Review „Dreptul" no. 3/2008;
- Alain Bénabent – *Droit civil de la famille*, 9-ème édition, Ed. Litec, Paris, 2000;
- I. Bohotici – *Establishing, denying and challenging paternity*, „Cordial Lex" Publishing House, Cluj – Napoca, 1994;
- A. Corhan – *Family Law. Theory and practice*, „Lumina Lex" Publishing House, Bucharest, 2001;
- Veronica Dobozi (I), Gabriela Lupşan, Irina Apetrei (II) – *Lineage within the medically assisted reproduction*, in the Law Review „Dreptul" no. 9/2001;

[52] Please see: article 449-450 New Civil Code

- Emese Florian – *Family Law*, ed. 3, C.H.Beck Publishing House, Bucharest, 2010;
- I. P. Filipescu – *Family Law,* „Didactică şi Pedagogică” Publishing House, Bucharest, 1965;
- I. P. Filipescu, A.I. Filipescu – *Treaty on Family Law,* „All Beck” Publishing House, Bucharest, 2001;
- C. Hamangiu, I. Rosetti – Bălănescu, Al. Băicoianu – *Treaty on Romanian Civil Law*, „Academiei” Publishing House, „Restitutio” Collection, Bucharest, 1997, Vol. I;
- C. Hamangiu, I. Rosetti – Bălănescu, A. Băicoianu – *Treaty on Civil Law*, Vol. I (republished), „All” Publishing House, Bucharest, 1996;
- E. Ion, T. Moise – *Legal and genetic bases of legal and medical expertise on lineage*, „Medicală” Publishing House, Bucharest, 1990;
- A. Ionaşcu, M. Mureşan, M.N. Costin, V. Ursa – *Lineage and Minor's Care*, „Dacia” Publishing House, Cluj – Napoca, 1980, page 14;
- A. Ionaşcu, M. Costin, M. Mureşan, V. Ursa – *Lineage and Minor's Care*, „Dacia” Publishing House, Cluj – Napoca, 1980;
- D. Lupaşcu – *Family Law*, 5th Edition, „Universul juridic” Publishing House, Bucharest, 2010;
- P. Marica – *Controversial aspects in Family Law*, In the Romanian Law Review no. 7/1967;
- Ghe. Nedelschi – *Note to the Decision no. 54/1955 of the Bucharest Tribunal*, in the Law Review „Legalitatea populară” no. 4/1955;
- Al. Oproiu – *Cases of absolute invalidity of recognition*, the Law Review „Justiția Nouă” no. 1/1961;
- Al. Oproiu – *Is it possible to file an action for annulment of lineage recognition on grounds of incapacity or vice of consent?* in the Law Review „Legalitatea populară” no. 9/1961;
- V. Pătulea – *Regarding the prosecutor's right to file an action in order to establish the lineage of minor children outside wedlock*, in the Law Review „Legalitatea populară” no. 10/1960;
- R. Petrescu – *Actions on Civil Status of Persons*, „Ştiințifică” Publishing House. Bucharest 1968;
- E. Poenaru – *Recognition through will of the child born aut of wedlock,* in the Law Review „Justiția Nouă” no. 3/1956;
- E. Poenaru – *The prosecutor's action to file a civil action and establishing strictly personal rights*, in the Law Review „Justiția nouă” no. 2/1964;
- T.R. Popescu – *Family Law, Volume II,* „Didactică şi Pedagogică” Publishing House, Bucharest, 1965;
- Ingeborg Schwenzer (editor) – *Tensions Between Legal, Biological and Social Conceptions of Parentage*, Ed. Intersentia, Antwerpen-Oxford, 2007;
- P.A. Szabo – *Problems related to the civil action of the prosecutor*, in the Law Review „Justiția nouă” no. 7/1956;
- Sc. Şerbanescu – *Family Code, commented and annotated*, „Ştiințifică” Publishing House, Bucharest, 1963;
- Sc. Şerbănescu – *Family Code, commented and annotated*, „Ştiințifică” Publishing House, Bucharest, 1963;
- The New Civil Code, adopted by the Law no. 287/2009, published in the Official Journal, Part I, no. 511 of 24 July 2009;
- Family Code (Law no. 4/1953), republished in the Official Bulletin no. 13 of 18 April 1956, with subsequent modifications and completions;

- The European Convention on the legal status of children born out of wedlock, concluded in Strasbourg at 15 October 1975; Romania adhered to this Convention trough Law no. 101/1992, published in the Official Journal, Part I, no. 243 of 30 September 1992;
- Supreme Court of Justice– Civil Section, Decision no. 2264/1992, in the paper „*Law problems from the decisions of the Supreme Court of Justice 1990 – 1992*", „Orizonturi" Publishing House, Bucharest 1993;
- Supreme Court of Justice– Civil Section, Decision no. 779/1990, in the paper „*Law problems from the decisions of the Supreme Court of Justice 1990 – 1992*";
- Hunedoara Tribunal, Civil Decision no. 1303/1979, in the Romanian Law Review no. 11/1979.

MANAGING CHANGE: THE PRIVATE UNIVERSITY SECTOR IN CYPRUS, OPERATIONS WITHIN THE EUROPEAN CONTEXT. A CASE STUDY

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Abstract

Our case study attempts to show the manner by which change has been introduced and dealt within the Business School of a private Cypriot University, the European University Cyprus. Then it tries to demonstrate if the success of the change process has its roots in the history of the organization and its representative strategies as per the theoretical framework of the literature review. Out of the main study results it emerges that it is the trust placed on the organization by the management, the staff and the student body that can bring high standards of education to the change process along with the acceptance for process and embedded innovation. At the other end, there are still strong drawbacks that hider change management to its full positive results. These reside mostly the inequalities, the social contract issues and keeping promises.

Keywords: *Change Management, Business Administration, Higher Education, Case Study*

Introduction

Organizations worldwide are confronting with more turbulent, more demanding times and shareholders, less time to act and more astute "customers", hence many are restructuring their business to meet at least these challenges. The only question mark is on how much time and change dependent are such requirements and which is the sustainable effect foreseen on the education industry as a whole.

Sustainable growth in private business has always relayed on the restructuring of the business strategies utilized and on the recovery of the investment and consumption markets. As this latest crisis was an over-consumption- overspending- overleveraging related one, the way to tackle such sustainable growth requires focused socio-economic and financial skills, but in essence, the long term indirect engine is the continuous adaptation to change in all sectors of the economy and now more then ever, in the education system reformation.

In this perspective, the private Universities sector in Cyprus is now operating within a very competitive and highly regulated European environment. The existing private Universities have acted under a much simpler college type organizational structure and have had to face the inevitable changes brought about by a new economic environment. The fact that since 2004 Cyprus has become a member of the European Union has changed the general setup of the problem, since nowadays more then 53% of students study in the EU. (Cyrpus in the EU Scale, 2008.)

Within this general context, private Universities had to develop and adapt to the new demanding regulations that govern the operations of a university teaching and research type

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institution and continue to be self reliant and economically viable. At the same time, change was inevitable, while circumstances continue to produce new challenges.

In the our case study of the oldest private Universities in Cyprus, the European University Cyprus (EUC) the human resources seem to have beene re-developed, sound personnel policies adopted, proper manpower planning implemented and assessment and a conscious policy revised to improve work and management at all levels. These have been important factors that have contributed to its success story. However, the effects of change are still affecting everyone in their daily activities. Therefore proper change management skills are imperative, if all mismanaged it could have disastrous effects. Also, since change becomes pertaining, mangers in this industry need to strive to find new ways to understand it and act in an optimum way.

Our case study attempts to show the manner by which change has been introduced and dealt with and then to demonstrate that the success of the change process has its roots in the history of the organization and its manpower. It is the trust placed on the organization by the management, the staff and the student body that can bring high standards of education to the change process.

The paper is drawn under a case study and event study methodology combined with exploratory research since the moment of the accreditation of EUC in 2008 till 2011. We plan through this study to capture and integrate people's perceptions, behaviour, cognition or knowledge and creative ideas in the way they have faced change in their environment and then propose a pattern for dealing with concrete change management problems and actions to prevent potential activity disruptions.

Altogether, our study also tries to collect and present information related to the way EUC has dealt so far with current change management issues, especially value changes at its strategic level. Additionally, the study wants to raise the need to know how to handle appropriate ways of correct and wrong application of change management in the industry.

Last but not least, the study aims at redesigning a conceptual framework encompassing strategic and practical aspects emerged from the data analysis that can help managers of other European Private Universities deal in a better and sustainable way with such phenomena.

1. Literature review and the research theoretical framework- responding to the power of change

Be it a large or small organization of any particular industry, the first thing one must understand about dealing with change is that it is a continuous process rather then a status quo. Change implementation difficulty relates mostly its communicating vessels effect. Blaise Pascal proved in the seventeenth century that the pressure exerted on a molecule of a liquid is transmitted in full and with the same intensity in all directions. Meaning, if you change something in one area, it affects other areas triggering thus changes in those areas too. This is to say that change is a continuous process, mostly cyclical (Lawrence *et al.*, 2006), that needs adjustment at any of its phases and various types of leadership control, strategies and behaviour.

Also, no matter the organization, change may be applied at different levels, which have different power to force change themselves. These levels are considered in our research to include the most important 4P's:

1. The people at work, first, as they are the main trigger for change due to their changing nature, second due to their active role in implementing. Changing people offers the least amount of change leverage, due to its actual "impossible task" character to be achieved in a certain timeframe. Bureaucratic systems are designed to work in the way they do, not

considering who does the job. One needs to change the culture of those people, but this is a long, slow process that seldom pulls change back through the system.

2. The *processes of work* determines how work is performed. Changing work processes is important, but it won't force change anywhere else-in fact, it is hard to change work processes without changing the organizational structure and administrative systems of an institution.

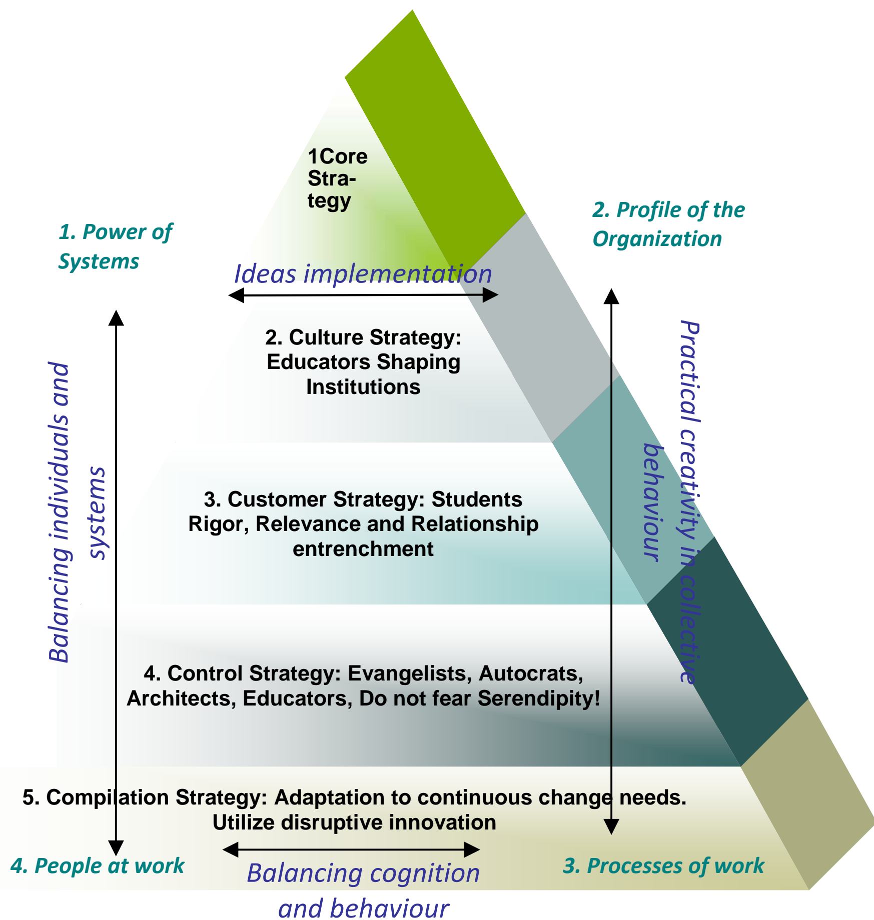
3. The *power of system* within which the organization functions, including the support system or the administrative one. If you change the education system, you can force change in every institution within it. Systems control their organizations through their administrative systems-budgeting, personnel, procurement, accounting, auditing and the like. Hence changing these administrative systems also creates remarkable leverage.

4. The *profile of the organization* level. Learning organizations have been described in reverential terms like employees' paradises, good management practices, socialistic models and workplace democracies etc These organizations provide working environments where the employees and management together reflect on all decisions, resolve all differences, if any, through mutual dialogue, and open communication systems resulting in high levels of *trust*, *co-operation and commitmen*t on the part of the employees which enables generation of learning. (Akella, 2008). Universities are close to be this type of organization that is however still constrained by the system's rules and incentives, as well as its administrative systems. One can change much within an organization, mostly if one can put up some flexibility from the administrative systems. But, clearly one has little influence to force change in all Schools within the University, due to the diverse panoply of needs.

Either public or private education institutions, due to their publicly originated system in certain countries, have some basic building blocks of organizational structure. This structure must relocate itself from a bureaucratic to a more entrepreneurial model. Such a model would include five basic strategies that have power over change implementation. We have named them as the "five C's.":

1. The Core Strategy. Creating clarity of purpose for University reform.
2. The Culture Strategy. Changing employees' habits, modus operandi, hearts and minds.
3. The Customer Strategy. Making Universities accountable to their customers.
4. The Control Strategy. Pushing control down from the top and out from the center. Do not fear serendipity though.
5. The Compilation Strategy. Creating a set of actions for performance measurement and responsibilities.

Fig. 1. The Research Theoretical Framework (Source: Authors' research)



Our theoretical framework creates under a 5Cs format of strategies, a pyramidal non-vertical relationship concept that is supported by the interactions among the 4Ps presented above. In our framework, the bonder between the 5Cs and the 4Ps resides in:

- Ideas implementation, (when it comes to implementing the system's requirements into the profile of the organization)

- Practical creativity in collective behaviour is necessary both ways when designing the University profile to match the underlying processes of work, as well as restructuring these processes in order to redefine a new organizational image.

- Balancing cognition and behaviour at both individual and group level is know-how and skills related double way of accommodating people in the new processes of work, as well as tailoring such processes for the people's needs.

- Balancing individuals and systems (when trying to fit systems in for people and when accommodating people's need into the system).

To be strategic in restructuring such institutions one must get leverage as high in the system as possible and one must change as many of the fundamental construction blocks (the 5C's) as possible.

By creating a clear purpose and decentralizing power are major changes, for example-but without compilation for performance they are barely sufficient. If the five 5C's represent the central levers for restructuring, then how do they work?

1.1 The Core Strategy

The core strategy focuses on steering, not rowing-making policy and setting direction rather than producing services. It involves three basic approaches.

The first is removing what does not add to the purpose of the University-by abandoning it. This move offers to the decision makers the clarity of purpose they need to manage effectively.

A second approach is uncoupling steering from rowing and compliance from service functions. Separating these roles into distinct organizational units with separate missions can enhance the quality and effectiveness of both steering and rowing. The British and New Zealanders, which are relatively far from the Cypriot education system, have done this systematically, at both the national and local levels. It has helped these two countries achieve enormous improvements in the efficiency and effectiveness of their educational systems.

A third core approach is to clarify the aim by creating new steering mechanisms. This is a specific move in the American educational system. In Cyprus, steering functions tend to be concentrated in the hands of a few people rather than in elective bodies. But elected bodies like the Academic Senate, the Board of Directors, have great difficulty thinking and acting strategically.

There are, however, ways to get around this. When adopting long-term outcome goals of the University, then these are translated into medium- and short-term outcome goals, which then translates into output targets for other Schools and departments. EUC has created a highly visible body representative of stakeholder groups in the community, under the new EUC brand name. It has set long-term goals, which may act as benchmarks, and it measures progress and reports to the all stakeholders including to the community.

While all educators must play key roles in changing mentalities, the burden is even greater for those in leadership positions. Leaders must respond to change appropriately and show others the way. They must take University staff on challenging journeys that the staff often would not take on their own by creating room for creativity and innovation and releasing any other constraints in their activities.

By nature, researching and teaching is a creative work and a liberal individualistic one. Those who try imposing systems in this industry will not perform well at all. Besides, people like to feel comfortable and do not want to disturb authorities for the sake of being themselves protected. In such case, no development is possible.

1.2. The Culture Strategy

teaching staff from the field from various organizations that used to be exposed to high pace of change, it proves more effective and less time consuming rather then doing it otherwise.

In most public or highly stratified organizations, accountability flows up the chain of command. This strategy is the weakest of the five C's in terms of implementation and transparency. However, it is a key component of the pyramid that must be fine tuned when implementing change. The other C's will coerce changes in the culture-but they will not always create exactly the culture reformers want. At some point in the change process, all successful implementers discover that they must deliberately work to change their employees' habits, modus operandi, hearts, and minds.

One approach that creates the most leverage is to change what people do. If one creates new experiences and new behaviour, new thinking will come in. Available tools include interactive strategic planning, job and role rotation, internships and externships, cross-walking and cross-talking (e.g., interdepartmental or inter-schools task forces), and contests.

Dealing with people's emotions has leverage because emotions are far more powerful than ideas. You can do this by celebrating successes in outcomes, processes and initiatives and honoring failures; creating new symbols; setting up new rituals; team building; and investing in your employees and their physical and virtual work space.

The final approach to working the culture lever is what we call “charming minds”.

Some leaders develop new mental models by involving their staff in the creation of mission statements, in the vision processes, and in articulating their beliefs, values, and assumptions. Others use systems models to create familiar understanding of the way things work and how changes will be successful.

Frequent barriers with these strategic levers are related to:

- elected authorities/managers who play politics when leadership is needed;
- resources that are stuck in narrow line items;
- staff rules that eliminate the flexibility employees need to produce changes;
- unions that see their role not as asserting employee's welfare and principles, but as maximizing their connections;
- the intricate array of stakeholders in the existing system.

For sure, there are ways around these various barriers to better serve stakeholders’ needs, but they are not easy, they need to be "worked-out."

1.3 The Customer Strategy

The first best way to change private higher education institutions is to make it accountable to its customers. In terms of customers we have considered students, academic and administrative staff.

When we talk about “customer needs” and stakeholders in education, we come across a lack of consensus for the student as customer concept (see Eagle and Brennan, 2007 vs. Svensson and Wook, 2007). Trying to advance our theoretical framework, we utilize concepts from relational theories, acknowledging that higher education is largely a private good and this essentially “makes the student the customer in the higher education process” (Eagle and Brennan, 2007, p.48).

Related to the internal customers, the academic staff, several countries in the EU including Sweden, Australia and the UK have gone as far as considering compulsory teacher training for lecturers. Some countries, (eg Norway), are currently implementing such a policy. We are not suggesting a similar policy but the acknowledgement that, if you 'train higher education teachers to teach, they will do a better job than untrained ones' (Trowler and Bamber, 2005: 80). Also if you train key leaders in change management and use The most prevailing way to achieve goals that are important to the customer is by creating customer choice. If customers can choose the service providers they prefer-the flow of money follows their choices-then the institution that serves them must be accountable for satisfying their needs.

The second approach is quality assurance. One can set "customer" service standards and require Universities to meet them or offer their customers some form of redress.

However, in order to use the customer strategy, one has to listen to the both internal and external customers, using surveys, focus groups, interviews, rating systems, complaint tracking systems, etc. Although necessary, this is not sufficient to enforce change. The University management may find out what the customer wants, but it may not be willing to go through the pain of the changes required to carry it through for the sake of "push" rather than "pull" and avoiding serendipity (Hagel *et al*., 2010).

In terms of the change application for Universities at their most "visible customer" level (i.e. the student) the Rigor/Relevance Framework further presented in Fig. 2.below (Jones, 2008) may prove an interesting view point knowledge-related. It uses four quadrants that represent levels of learning.

On the Knowledge axis, the framework defines low rigor as Quadrants A and B and high rigor as Quadrants C and D. On the Knowledge axis, Quadrant A represents a basic understanding of knowledge per se. Quadrant A is named "Acquisition" because students gather and store parts of knowledge and information.

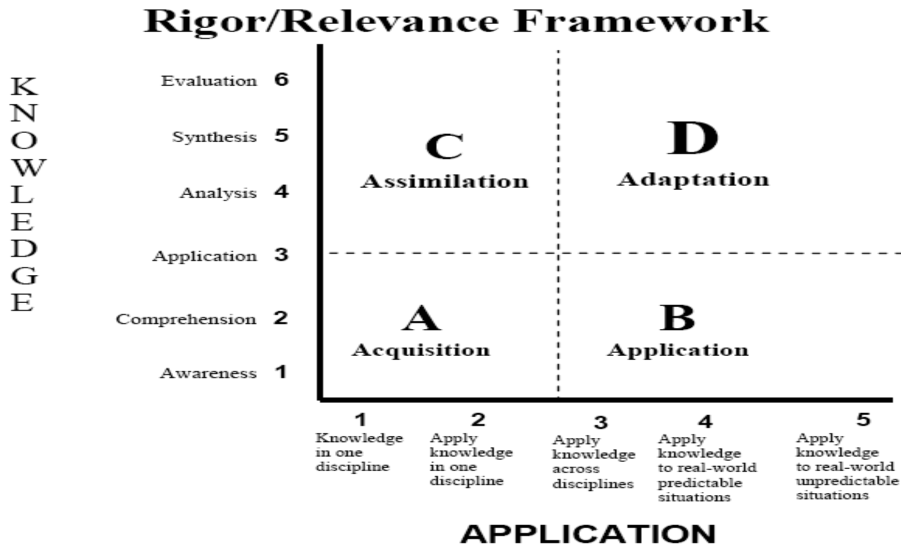
Quadrant C, "Assimilation," represents more difficult thinking, yet still knowledge for its own sake. In Quadrant C, students extend and refine their acquired knowledge to be able to use it automatically and routinely to analyze and solve problems and to create unique solutions.

Quadrants B and D represent actions or high degrees of application. In Quadrant B, "Application," students use asked to solve problems, find solutions, and finalize work.

In Quadrant D, "Adaptation," students have the competence to think in complex ways as they apply knowledge and skills they have acquired to new and unpredictable situations. Students create solutions and take actions that further develop their skills and knowledge.

Knowing that students need a rigorous and relevant curriculum taught in a climate of positive relationships is an important step in school reform (Jones, 2008, pp 7), while the same way of thinking can be applied to other "customers "of the University.

Fig. 2. Rigor/ Relevance framework Source (Jones, 2008, pp 5)



However, Jones (2008) matrix misses a control unit and measure and constant rethinking of the necessary double loops and feedback types necessary in learning and managing the process of learning and change, issues that we further discuss.

1.4 The Control Strategy

The control strategy pushes considerable decision-making power down through the hierarchy and at times out to the community. It transfers the form of control from detailed rules and hierarchical instructions to shared missions and systems that generate accountability for performance. But what is performance for Universities: knowledge towards students, developing life-long learning skills, creating employability, generating academic knowledge, developing a great name worldwide, increasing shareholder's value no matter what?

We have suggested three approaches in tackling this strategy:

- Organizational empowerment moves control down to organizations by loosening the grip of the central administrative structures, such as budget, personnel and procurement systems that are run under equalitarian terms.

- Organizations then use employee empowerment to push decision-making authority down to those with front-line knowledge. Finally, some re-inventers use a third approach, called community empowerment.

- They shift control from the University towards the community, empowering community members and other organizations to solve their own problems and take responsibility of their actions.

In terms of control tools, Private University managers and academia are open relatively reluctant in using the Internet, in the sense of not letting it change exclusive knowledge management practices.

Implementation of Internet had been adjusted to acceptance of intranet and fostering communication among personnel for academic, managerial and supporting roles. It wants to exploit the advantages of online communication without letting such communication challenge its expertise model. But one cannot have it both ways. One cannot participate in a medium fundamentally developed around the concept of ingenuousness if one insists on a closed model of know-how and knowledge control, such as the above mentioned frame: the intranet.

In terms of managerial control over the teachers Unions and vice versa, one cannot act towards major changes unless it offers that "little something" gradually. Teachers' Union negotiations with the management should not be "over the bush", but transparent and with advancements based on concrete propositions and adjusted upon European benchmarks and accomplishments. In this respect, control pressure from the Union should be made from a third party/ consultant involved both in the negotiations process as well in drafting terms and conditions. The Union is always a tool for auditing and maintaining University regulations and system of work down to people.

1.5 The Compilation Strategy

Creating a compilation of strategies and using consequences for performance is probably the most powerful lever in the reformation tool kit.

There are three approaches to working this lever:

- When appropriate, the greatest impact of this strategy can be achieved by using enterprise management: putting the University in a competitive market, making it dependent on its "customers" for its revenue, and letting it sink or swim based on how well it serves its customers. There is nothing like competition to force rapid change. This approach is only appropriate for services that should be paid for directly by their customers, but not for the academic and research work, where competition should come in terms of services and stimuli offered to "internal customers".

- A second approach is called controlled competition. If you cannot put the University in a market you can often create competition through competitive contracting, by using "market testing" approach. As a paradox though, when a British University introduced a certain innovative programme, another American University won the funds in their own country on the same idea. The same thing can happen internally in Cyprus, when private universities compete in coping each others programmes instead of being innovative, searching for blended learning techniques, become innovative and focused on developing student's creativity (MihaiYiannaki and Savvides, 2010) and diversity both in curricula development and in course delivery. Eventually, utilize disruptive innovation, a term of art coined by Clayton Christensen (2010), that can be introduced as a process whereby simple application of creativity related programs and change management for the bottom of a market can then relentlessly moves 'up market', eventually displacing established competitors.

- The third approach is performance management. If you cannot use competition, you can measure results and create incentives or rewards for those who accomplish them. You can use tools such as performance awards, performance pay, performance-based budgets, and gain-sharing to create incentives for high performance at both students and staff members' levels.

2. Research methodology

The qualitative approach has been chosen by the research team as it provides an inventory of in-depth data with higher information content that cannot always be anticipated at the outset of the research process.

The significance, in particular, of qualitative methodology is also in the fact that it enables a contextual and social placement of gathered information, includes the process, causal and related nature of phenomena, and does not study and acquire, respectively, the data separately from other accompanying phenomena. Similarly, it allows for the acquisition of the so called "concealed" contents, which can easily escape the classical positivistic approach. Finally quantitative research often restricts experiences that are so crucial to 'attitudes/opinions' which is the focus of this research.

As the moderator can challenge and probe for the most truthful responses, supporters claim, qualitative research can yield a more in-depth analysis than that produced by formal quantitative methods.' (Mariampolski, 1984).

These interviews contain standardized instruments that emerge from the literature review and the research theoretical framework grouped primarily on the categories of 5C;s and 4Ps.

Also the purpose of the interviews was to discuss the importance of enhancing change adaptation, change behaviour, response to change and acceptance of change within the University/ Business School. Upon the obtained results, the paper has identified the main barriers and constraints related to change introduction in the Business School as well as has improved the research framework.

The main data collection instrument, the semi-structured interview was initiated with 4 of the members of the University and Business School authorities, managers and chair persons. Analysis has been conducted in the spirit of the Miles and Huberman's (1994) approach, manually and mechanically. The manual part has included traditional analytical methods such as introducing marginal remarks and memos within the transcripts and then producing a one-page summary with key points for each semi structured-interview. At this stage, analysis was conducted in search of relationships and patterns.

Coding, for both instruments, was a combination of pre-coding and open coding. The pre-assigned codes were derived from the literature and the study's objectives. Open coding was carried out during analysis, both at the manual and mechanical level.

Following the culmination of the above procedures, the research team was able to describe the current situation and isolate the knowledge, training, coaching and attitude deficiencies which needed to be addressed and included within change management recommendations part. However the results of the project provide an excellent opportunity for the future expansion of the topic idea at European and International level.

2.1 Research Results Interpretation

Table 1. The Pathologies of Changes and EUC management response:

Organisational Imbalance	Change Pathology	Management responses
Over-reliance on individuals: • too many evangelistic and autocrats • few architects and educators	Creativity without learning	-No creative culture implemented, nor efforts in this way undergone till the settlement of change.

Over-reliance on systems: • too many architects and educators • few evangelistic and autocrats	Institutionalisation without creativity	-Overreliance on MIS, without understanding its role in the general strategy, fear of regulators, but positive feedback from them.
Over-reliance on thinking: • too many evangelistic and educators • few autocrats and architects	Ideas without im-plementation	-No initiative follow up, despite medium to high level of novelty acceptance, advertising is seen in a heterogeneous way.
Over-reliance on doing: • too many architects and autocrats • few evangelists and educators	Change without strategy	-Strong focus on customer strategy without innovation, but based on diversification, which may lead to control, quality and time management issues.

Source: (Lawrence *et al*., 2006, pp.65, and research results)

Table 2. The Research Framework synthetic results

Strategy Analysis	Research Results
1. The Core Strategy. Creating clarity of purpose for University reform.	Clarity recognized at managerial level in both form and content, but the strategy of change is very diversely seen.
1. The Culture Strategy. Changing employees' habits, modus operandi, hearts and minds.	Culture is not identifiable yet at managerial level. Initial stage of shaping organizational culture due to lack of specialized continuous training and human resources allocation. All is based on trust and on existing people's capabilities.
2. The Customer Strategy. Making Universities accoun-table to their customers.	Very diverse opinions on customer strategy, approach and education, as well as regarding supporting issues and processes.
3. The Control Strategy. Pushing control down from the top and out from the center. Do not fear serendi-pity though.	Very tall organization, with limited power of action at bottom level, lacking serendipity support and liberty of action regarding investments in people, systems and processes.
4. The Compilation Strategy. Creating a set of actions for performance measurement and responsibilities.	Balanced compilation strategy, yet with missing parts affecting the overall change results, especially linked to management of resource allocation and lack of HRM transparent policies.

Source: Respondent's results based on author's semi structured interview as in Appendix 2.

3. Emerging recommendations for how to change in business schools

The following eight components have been identify the more specific actions that schools must take to achieve rigor, relevance, and relationships. These eight are not sequential, but all must be addressed if schools are to prepare students adequately for their future. The aspects of the living system model should be reflected through each of these components.

1. Be guided by a Common Vision and Goals through the Rigor, Relevance, and Relationships framework. Everyone must be committed to shared goals to measure success, and personnel must have the same viewpoint as to what it the main goal of the University.
2. Be ready to avoid the pathologies of change in the University, by knowing well its imbalance, where is the vision and mission and the next following steps.
3. Give power to Leadership Teams to Take Action and Innovate. Leadership does not reside in a single position, but reflects the aptitudes and attitudes of all personnel, as role models, who take action and improve through effective learning communities.
4. Notify decisions through MIS and budgetary liberty. The entire University reform is a continuous process guided by a well-developed data structure based on several measures of student learning. There is a need for quality data to make fast decisions about curriculum, instruction materials and methods as well as assessment. But , there is a need for separation of budgetary issues for better providing incentives to staff development, trust, commitment and bonding.
5. Adopt effective Instructional Practices for lifelong learning. More than excellent marks, successful instructional practices include having a broad range of strategies and tools to meet the needs of diverse learners in all disciplines and grade levels.
6. Make Clear Student Learning Expectations, letting though in innovation and creativity. When clarity takes place in explaining students what they are expected to learn, they meet with success in improving student realization, but also if creative incentives and modus operandi are enforced.
7. Address Managerial Structures and Processes. Managerial structure should be determined by instructional needs. Only after a comprehensive review of instructional practices should schools begin to address managerial issues such as school schedules, use of time, unique learning opportunities, school calendars etc.
8. Monitor Progress/Improve Support Systems. Highly successful programs recognize the need to monitor student progress on a regular basis. Successful higher education institutions use formative assessments in an organized, deliberate, and ongoing way to monitor student advancement. More, they use this data immediately to adjust instructional methods and adapt to meet student needs.
9. Redefine and reinvent process on an ongoing basis and assure quality without copying models, but basing them on ethical standards and organizational culture. High-performing schools realize that success is a continuing and ever-changing course of action. This step in the process, in fact, should refresh the process and cause University/ Business School leaders to consider new challenges and search potential solutions and successful practices internationally, find benchmarks and assure quality.

3.1 Deliverables from managing change in our research and case study

The following three form the core still pending deliverables of our managing change framework at Universities/ Business School level:

(1). Aim for rigor, relevance, and relationships, inspiring trust,

(2) Begin with the end in mind, and look at the open non-vertical pyramidal cluster of strategies, allowing open innovation and creativity in process, content and form.

(3) Consider Universities an organism that links the above strategies with the 4Ps through its 4 bonders.

Conclusions

This research has produced a theoretical framework backed by a case study where change management was interpreted in terms of semi-structured interviews and event methodology results for the European University Cyprus for the period of 2008-2011. We can conclude that this framework proves to be valid in the conditions and that a series of 10 principles result as conclusions to our research study.

These principles give improved detail to the practices that one needs to focus on when implementing certain changes at in higher education institutions:

1. Decide with data, not intuitions. True data-driven achievement involves much more than simply reacting to “low-test” scores. The choice of what and how much to change must be based on data that shows what the world beyond the Business School expects graduates to know and be able to do, but also what is ethical to know and do.

2. Enlist passionate people who glimpse opportunities. Leadership is one of the keys to success. That leadership is started and designed by a main leader, but is not restricted to a single individual. Successful Universities thrive with models of team and shared leadership.

3. Develop staff through professional and personal learning, training in managing change, and conflict. A staff team that functions as a professional learning community comes together for learning within a supportive community. At the same time conflict, which in times of change is inherent, should not be a threat to cooperation, nor needed to be resolved rapidly and permanently (Huczynski and Buchanan, 2001), but rather in a correct and just manner.

4. Inspire innovative instruction and engagement. Just as standards and tests do not constitute a curriculum, high-performing Business Schools recognize that curriculum is not instruction. The idea is to play the game on the uniqueness of each student and become a student centered organization. Prioritize the curriculum, as less is more. Teachers need to engage in a clear way to help differentiate among curriculum topics that are essential for all students and those that are only nice to know.

5. Make good use with the community to form true partnerships based on keeping the promise and thus enhancing trust. Community and business partners bring many benefits to a University and especially to Business Schools in terms of learning, teaching, sharing, financial support and not least employability.

6. Hold teams accountable for learning results. Good leaders not only set powerful visions and high expectations, but also follow up to make sure staff implement approved practices.

7. Know your “customers”, know your strengths. Business Schools need to find ways to customize instruction by fully understanding the culture, prior experiences, learning styles, backgrounds, and interests of its all “customers”. At the same time they have to offer various success paths without distorting the most performing ones who are already implemented and have proven unbeaten. Rather than holding instructional approaches constant and putting up with different results in student accomplishment, multiple pathways create different alternatives for students to acquire the same learning.

8. Measure learning by know-how. Many Business Schools need to reexamine grading policies both at the school and classroom levels to ensure that student achievement measurement results in students being graded on proficiency rather than seat time.

9. Compel to high expectations. Business Schools that establish high expectations for all students and provide the support necessary to achieve these expectations have high rates of academic success. High expectations have to be a way of life and drive daily behaviors and actions.

10. Foster positive relationships to close the loop rigor/ relevance/ relationship. Strong relationships based on trust and commitments are decisive in students carrying out thorough work. Students are more likely to make a personal vow to engage in rigorous learning when they know teachers, parents, and other students actually care about how well they do.

References

- Akela, D, Learning Organizations. *Global Business Review* 8, No. 1, . (2007):13-28.
- Cyprus in the EU Scale *Statistical Service of Cyprus*, November (2008), http://www.mof.gov.cy/mof/cystat/statistics.nsf/All/FDFB10D5496A1686C225723700362C99/$file/CYPRUS_IN_THE_EU_SCALE_2008.pdf?OpenElement (accessed January 29th, 2010)
- Christensen, Clayton. Diruptive Innovation http://www.claytonchristensen.com/disruptive_innovation.html (2011)
- Garcia A., Sternberg P. *Sociodrama: Who is in your Shoes?(* Praeger Publishers 2000),
- Hagel J., Brown J.S., Davidson L., *The Power of Pull: How Small Moves, Smartly Made, Can Set Big Things in Motion.*Publisher: ReadHowYouWant, July 2010.
- Huczynski, A., Buchanan, D. Organizational Behavior: An introductory Text. Financial Times (Prentice Hall.2001)
- Johnson Mark W., Christensen Clayton M., Kagermann Henning. Reinventing Your Business Model. *Harvard Business Review*, Dec 01, 2008.
- Johnson, R. & Johnson, D. An Overview of Cooperative Learning. In R. Villa & A. Nevin (Eds.) Creativity and Collaborative Learning: A Practical Guide to Empowering Students and Teachers. Baltimore, MD: Paul H. Brooks Publishing, 1994.
- Jones, R.D. The Process of Change —Why Change, What to Do, and How to Do It, from Chapter 3 of *Leading Change in High Schools*, International Center for Leadership in Education(2008), http://www.leadered.com/pdf/Process%20of%20change%20white%20paper.pdf (accessed on January 10, 2010)

- Knowles, M. *The Adult Learner: A Neglected Species* (3rd ed.). (Houston: Gulf 1984).,
- Lawrence, T.B., Dyck, B., Maitlis, S. and Mauws, M. The Underlying Structure of Continuous Change, *The MIT Sloan Management Review*, Vol 47.No. 4. Summer 2006. http://www1.sauder.ubc.ca/Faculty/People/Faculty_Members/Maitlis_Sally/~/media/Files/Faculty%20Research/Publications/Maitlis-Paper-StructureContinuous.ashx (accessed 8 January 2010)
- Mariampolski, H. The resurgence of qualitative research. *Public Relations Journal*, 40(7), (1984):21-23.
- Mihai-Yiannaki, S and Savvides,S. Creativity in business schools-post financial crisis implications. *3rd EMRBI Conference*, Nicosia 4-5 November 2010. Forthcoming in the International Journal of Organizational Analysis, Emerald.
- Miles, M. B. & Huberman, A. M.. *Qualitative data analysis* (2nd ed.). Thousand Oaks, CA: (Sage 1994).
- Morgan, G. *Images of Organizations*. (Sage Publications. 1997), Inc. Osborn A. *L'imagination constructive: „Principes et processus de la pensée et du Brainstorming“*, Paris, (Dunod 1971),1 – 357;

APPENDIX 1. RESEARCH SEMI STRUCTURED INTERVIEW BASE

The Interview questions are valid for the period 2008 to 2010.

The questions “how much” have been scaled from 1 to 5. (Where: 1. is very little, 2. little, 3. some, 4. significant and 5. very much.)

1. What is your opinion about change at University level in general?
2. How much has the education environment changed for the past two years?
3. Which are the areas of change needed in the University? (Name at least 3 areas).
4. Where do you see your University coping best with change?
5. What are the most difficult tasks in this respect?
6. What are the three things you would change first now?
7. Have you benefit of training in change management?
8. How can the University improve service to its stakeholders?

A. Students; B. academic staff; C. administrative staff; D. the community

9. How much does money help you in managing change?
10. What financial aids you consider in implementing change?
11. Would a specific strategy that is known to everyone help you in implementing changes? Which is this one?
12. How much uncertainty you think is acceptable when implementing change, if any from a scale of 1 to 5?
13. How much planning do you use when implementing change in general and how much you use for this case?
14. Do you involve your team in implementing change?

   a. Yes, why? To what level/ which areas? And how many of all your team members? Do you allocate extra members for this?
   b. No, why?

15. How much of change do you consider in your core strategy?
16. How much change you allow in controlling the business?
17. How much have you changed in your department/ area?
18. How much budgeting do you do when implementing change?
19. What are three budget items you consider necessary but had not really thought about prior to this year's change and where would you cut this budget for this year?
20. How much you want to change the believes of your personnel? If so how much you think you have changed their believes?
21. How much you want to change the believes of your students? If so how much you think you have changed their believes?
22. How much creativity from your staff do you allow when implementing change?
23. Do you consider change at advertising level and publicity of your University and by which means?
24. Do you consider change in the pricing, what prices would you use for students fees (promotional, skimming, etc)?
25. Do you consider change in the type of customer niche and which would be this one?
26. Do you consider change in the offerings of products? And to what degree of diversification?
27. Do you consider change in the relationship with your partners (business ones) and other organization? How do you think this would this affect your future business?(How do you keep them happy?
28. How much importance you give for free interchange of ideas?
29. How much leadership you think is required in times of change for your University?
30. How much novelty do you think is acceptable for your University?
31. Do you think is good to follow the market or follow your own strategy?
32. Have you reconsidered changing the goals set up two years ago?
33. What are you most important performance indicator for your Institution?
34. The human resources have had to be re-developed, sound personnel policies adopted, proper manpower planning implemented and assessment and a conscious policy adopted to improve management at all levels. How did you achieve this in your area?
35. Regarding research / (your department) area what was the biggest change you (want to be) implemented?
36. Are you satisfied with the achieved change strategies implemented at your University?

APPENDIX 2. RESEARCH SEMI STRUCTURED INTERVIEW RESPONSES

Question	No. 1	No. 2	No. 3	No. 4
1	change is inevitable, represents a continuos process, we have to learn from it, available to all academics and the society	very important, especially in the light of changes in the EU in higher education of the Bologna process framework.	under the factor of change as a positive promotor regarding the transformation from college to university status ther was a need for rapid change.	it is a fulfillment of the strategy of the Ministry of Education of Cyprus, one of the axis of the strategy of Cyprus for education and health for the next 5 years
2	very significant in the private university area, less in public ones, in order to comform to legislation, internal procedures	in the private higher education yes a lot, nut much in education in general	It has changed subsequently for more than 2 years. It has been expressed in process and procedures to be a university relevant and pertinent to the University status.	The university environment has changed a lot. Level 4 to accommodate students at each stage of the strategy.
3	teaching, research, administration, strategic development, change of burocratic procedures	quality assurance, development and implementaion of international qualitfications frameworks with 3 cycles, lifelong learning	overal university culture, autonomy, the research factor	culture of the people and instructors, systems and procedures, infrastrucutre (MIS)
4	teaching, because research is at its early stage and so is administration	quality assurance and ECTS	in research and cooperation with other universities or established academic networks	procedures we start coping with problems at MIS, infrastructure
5	assessment, find out new changes in the teaching methods, quality is very difficult to assess, aws you assess only students' evaluationa, faculty assessment is dificult and is done subjectively by students, peer review being done only during the first year and not later on.	got everyone involved	the adaptaion of university culture in both administration and academic personnel	culture is very difficult to change due to resistence to change and systems
6	Schedule, too many things to do at the same time for the requirements of others, the system that we have, reducing the teaching load, changing mentalities, which is a long term process	more development of quality assurance, lifelong-learning, social inclusion, social responsibility in the community, capturing older graduate in catching up with their studying	comply with the University Charter, as the operations of schools and departmetns, mentalities	It is very difficult to change things, try to change the attitude of instructors to see themselves as faculty members for 24 hours in this job, to do continuous research oriented institution and in teaching in class
7	Only during my studies it was part of my subjects	Continuously, due to the evolvement in various areas in the Higher Education.	yes, when this trainig is not instrumental oriented services	very difficult to convince and get accepted
8	a). reorganising the advising service, hire professional people just for that,b). by not overloading them, c). should reorganise their MIS, d). increasing contacts with them	a.further enhancement of students Centre approach, b. more opportunities for development, c. more opportunities for development, d. give also programmes that serve university employees, private and public, municipalities.	a. by establishing a constant and perpetual feedback process and procedures. B. establish proven respect of academic outcomes, c. by providing regularly training and management and university oriented culture issues, d. Be again in constant and perpetual communication with community, an open locus for disscussion and activities, collaborative type of activities and synergies in new projects that are of paramount importance for the community	a. see students as clients, adapt all services to be student oriented, to care, continuous monitoring and academic feedback of students, b. developing academic staff, give them opportunities to undertake research and more time for doing that.c. trining and developing career paths, proper proceudres, d. create research centres to solve problems of communities, respond to community needs through expertise and faculty members
9	4	4	5	2
10	they are rare for private universities, just funds from private enterprises	grants from outside society, state budget, in research ang infrastructure	by allocating special budget for managing change oriented culture	money in terms of training and required research, not so important, but needed in bringing MIS, infrastructure supports
11	Change has to be small and continuous, because it can upset people, it should be planed and agreed, no change without asking them and complete buy in.	the SMART objectives we developes every year	interactive communication based on reciprocity	should be comunicated to everybody. But people have resistence to change and it is set by law anyway and the University Charter
12	3	3	3	3
13	5,5	5,5	5,5	4,4
14	a. Yes, allover, programmes, courses, ECTS,. It depends on the time, only all or anly coorinators, administrative staff also. Yes in some cases.	a.Yes, all areas, No allocation of extra staff.	a. research. It depends on the project. The whole university	a. 4,5, all, yes people from outside the school
15	4	3	4	3
16	2	4	4	2
17	4	3	4	2
18	4	3	3	nothing
19	exceptional items, conferencesm research , publications. I cut publications off	add more development advantages and introducing new motivation.	very centralised, it cannot work this way	nothing
20	4, 2	3,3	4,4	5,2
21	4, 2	3,3	4,4	2,2
22	3	4	5	5
23	essentially it has to increase, improve, consider more possibilities, mainly media and organisation events, conferences organised by the university and abroad.	toward academic nature	yes, this is done through needs and oriented culture advertising	I do not believe in advertising here, only in word of mouth and given results of students and to community
24	In new courses, promotional price for new courses makes sense	they are ok	no idea.	no, just promotional pricing for new programmes.
25	It is not feasable, the target market is given	give them more attention to some countires that were not before in	no idea.	yes, professional experience, executives
26	3/ new programs, adult learning seminars and professional studies	it is Ok. It is not fully controlled. Thre are significant changes in the programmes made.	accommodate balance	yes, high diversification
27	relationships are evolving, intensify networking, studying their needs, satisfy their needs for graduate training and senior staff trainig.	satisfy their needs as well	I consider the community perceptions towards out university is higher, and we got to serve it, this affects positively and forms of our synergism.	they are the final customers eventually, respond to their needs and to the community's needs
28	5	4	5	5
29	5	4	5	5
30	4	3	4	3
31	follow ther strategies that follows market strategy	follow the market	what is to follow the market. No. we serve community needs not the market	follow the market is the boss
32	yes	no, but further enhance them	yes, definitely in order to adjust processes and regulations	yes
33	students retention, no of new students	service to the students in their activity and the overal image of the University	service to the community, students ans state of art research	number of students, research of faculty members
34	to praise the employees achievements, no material items though	involvement of the people and encouraging initiatives	not applicable	2, did not achieve , just a little
35	1. encourage colleagues to carry out research and meeting . 2. provide the time to do that.	get more faculty members involved in the research and teaching. Attracting more grants and financial support for the university	A new research policy that will affect the whole operation of the university and codification of all research performances.	involve faculty members more
36	moderately, not fully, it has to be recognised the need for investment, yet the university is not yet ready to invest in research, teaching and MIS	yes, so far so good. Significant level 4.	to an extended part yes	not really, level 2

ON ORTHODOX/HETERODOX AND AUTISTIC/POST AUTISTIC ECONOMICS – A VIEW FROM THE ROMANIAN ACADEMIC LANDSCAPE

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Abstract
The way economics is perceived nowadays seems to be going back to the old label of `dismal science`, because it has not achieved to offer consistent and valid solutions to real problems in critical moments. In a constructive defense of our profession, we need to acknowledge the existence of some oversimplified hypothesis that do not conform to the actual human behavior, and thus to turn to different branches of the discipline (from behavioral to feminist, green economics and econo-physics, just to give some examples) that try to reintegrate economic thinking in the real landscape, through different approaches. The post autistic economics represents a powerful example within this attempt of offering economics a new spirit and new insights of how it should be taught and applied. The aim of this paper is to discuss on the multiple perspectives, orthodox and heterodox, autistic and post-autistic, and on the manner they appear to be understood, accepted and implemented in the Romanian economic higher education. We question the neoclassical paradigm in search for new insights that could lead to a possible internal reform of the field, opening it more to the opinions of the surrounding social sciences.

Keywords: *orthodox and heterodox economics, post autistic economics, Romanian economic higher education*

JEL codes: A11, A12, B50

Introduction

Labeling mainstream economics as autistic it was definitely a bold move of the French students who coined the term in 2001. „Abnormal subjectivity, acceptance of fantasy rather than reality"(PAE Newsletter), this was their more precise view on the economic science, regarding the status of teaching and relevance for practical applications and public policies.

Discovering the existence of this kind of radical perspective, as freshly young economists, is was not least of a challenge and it has lead us to extensive readings of the recent approaches on the issue and critical thinking of our own, in terms of what to believe and what paradigm to embrace.

We consider that having a broad understanding over the new theories that populate economics nowadays is essential especially for economics students and young researcher, because as Colander says „individuals are not born as economists; they are molded through formal and informal training. This training shapes the way they approach problems, process information and carry out research, which in turn influences the policies they favor and the role they play in society." (Colander 2005:175).

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Under these auspices, the aim of this paper is to offer some theoretical markers about the many directions in which economics is split nowadays, with a specific focus on the latest trends, namely post autistic economics. To this framework, we have added some personal, subjective considerations on the particular situation from the Romanian economic academia.

The importance of such a topic is highlighted by the effervescence of the many relevant studies in these area (Thaler, 2000; Kirchgässner, 2005; Rubinstein, 2006), discussing the nature of economics, compared to other sciences, and the harmony (or disharmony) between its declared scopes and the practical results.

Even if the paper does not have the ambition to be a comprehensive material in terms of modern economic doctrines, we have found necessary to start our inquiry with a chapter discussing the two distinctive schools of orthodox and, more extensively, heterodox economics, but also clarifying terms like mainstream economics or neoclassical economics. The literature review is continued through the presentation of the arguments raised by the post autistic economics, and then naturally followed by a chapter containing a conceptual analysis on how these currents were integrated in the Romanian economic academic environment, but also reflected in some public measures. We end our short demarche with a concluding section, pointing out our future research plans.

Orthodoxy and Heterodoxy in Economics

„Economics is the only field in which two people can receive a Nobel Prize for saying exactly the opposite thing". This only one of the many jokes you will find about the differences in opinion of the economists. For somebody coming from outside the field, the first impression can be that we are dealing with a very flexible and open science, thus the great number of opinions and the possibility to have such divergent views. At a closer look, the reality shows us somewhat the contrary: even if there are many interdisciplinary tendencies of questioning the problems, economics as a traditional science has some internal rules and mechanisms of high rigidity

For an accurate image, we will proceed to properly define the terms of neoclassical, mainstream, orthodox and heterodox economics, using as a starting point the excellent review of Dequech (2007).

Even if it may look simple, drawing some boundaries for neoclassical economics is quite difficult, because the concept, or the use of the label, has consistently changed over time. An important observation to be made here is that the general acceptance of what neoclassical economics means is different from the one of Adam Smith, David Ricardo, Hayek or even Keynes.

In the opinion of Dequech (2007), the three main characteristics of neoclassical economics are the emphasis on rationality, along with utility maximization as the most import criterion, the emphasis on equilibrium and the neglect of strong kinds of uncertainty. In different words, but in the same spirit, Arnsperger and Varoufakis (2005) also discuss three axioms of neoclassicism – „neoclassical meta-axioms" (p.7): methodological individualism, methodological instrumentalism and methodological equilibration. They claim that these axioms are hidden to the public eye and thus it can be explained the capacity to obtain funding and institutional prominence of the neoclassical adepts. The institutional reference leads us to our next concept, which is mainstream economics: „what is taught in the most prestigious universities and colleges, gets published in the most prestigious journals, receives funds from the most important research foundations, and wins the most prestigious awards." (Dequech 2007:281). The definition is quite precise but what needs to be added for our purpose is the intricate dynamic of what it is or not included in the mainstream. Nowadays, even if the general impression is that mainstream economics is still dominated by neoclassical approaches, it is absolutely clear that in fact mainstream is represented by a complex mixture of ideas, including heterodox ones. Just to give an example, behavioral economics has

started to gain more and more power, the ultimate proof being the Nobel prize (2002) gained by Daniel Kahneman, a psychologist, for his work (in collaboration with Amos Tversky) on prospect theory. He shared the prize with Vernon Smith, a pioneer in another emergent field – experimental economics, a branch that generates distinctly non-neoclassical results.

Returning to the main intentions of this chapter, orthodoxy is next in line to be clarified. Following an analogue definition of mainstream economics, orthodox economics is represented by the dominant school of thought. In Estey words, „orthodox economics is the analysis of economic behavior under existing institutions" (Estey 1936:791). Surprisingly, or not, recent references to orthodoxy in economics are confuse, many authors using instead, as equivalents, both neoclassical and mainstream economics. We think this is due partly to the general connotations of the term, an orthodox being a person who lives strictly by the teaching of its religion. Therefore, an orthodox economist would be an economist who analyzes and researches strictly according to the traditional dogmas, and, we imply, who rejects the new approaches. Naturally, this is a perspective to be criticized in any science and Hodgson, for example, is one of the authors that see in the non-recognition of the necessity of a large number of theoretical frameworks of understanding human behavior, a profound flaw in the methodology of the economic science (Hodgson, 1992). And this is how we have reached the last stop of this doctrinaire short journey, revealing also the nature of heterodox economics.

According to Lawson (2005), „heterodoxy serves (...) as an umbrella term to cover the coming together of, sometimes long-standing, separate heterodox projects or traditions"(Lawson, 2005:2). On a more precise basis, heterodox economics rejects the very incisive form of methodological reductionism that only accepts formal mathematical methods. The main difficulty when mapping this field consists in its heterogeneity. We are agreeing with the position that treats heterodox economics as a collection of theories (Garnett, 2005). The attention gave to methodology and to the history of economic thought point out to them as being the hallmarks of a heterodox approach. In the same time, for example, behavioral economics is principally embracing the principle that human actors are social and less than perfectly rational, driven by habits, routines, culture and tradition. Another case is for Keynesian and institutional analysis which particularly fond to the idea that while theories of the individual are useful, so are theories of aggregate or collective outcomes. Further, neither the individual nor the aggregate can be understood in isolation from the other.

Autistic and Post-Autistic Economics (PAE)

This section will follow a retrograde method of presentation, starting with the PAE movement and in relation to it, with what is understood through the attribute autistic in this case.

For a proper understanding of the issue, we need a short historical background. The intellectual revolution we are talking about was started by a group of French students, in June 2000, and it was raised against the „narrow, mathematical, nonpluralistic economic lectures they were forced, to sit through" (Lee, 2004). They demanded science than scientism, pluralism than neoclassical monotheism, empirical realism than deductive abstracts and they requested from their teachers to save economics from its irresponsible state. Also, they have claimed the need to adopt richer models of human agency and institutional change which seriously consider such factors as culture and history as significant active ingredients in any explanatory framework.

Naturally, they have attracted a lot of attention, equally supporters and critics. The metaphor of autism has especially disturbed many people, raising a natural wave of protests against the use of such a serious medical term – „a developmental disorder that is characterized by impaired development in communication, social interaction, and behavior" (Medical dictionary). Robert Solow and Olivier Blanchard, famous economists and professors at MIT, were the

neoclassical voices who replied to the attack of the discipline. However, they have only marked the beginning of controversies and the debates have multiplied, and also transformed into more public and open discussions on the current state in economics, involving more and more participants and gaining more awareness.

Fulbrook (2005) argues that pluralism remains the most important element advanced by the PAE movement, and it is also the element that makes possible the existence of a body of heterogenic sub disciplines: „Out of all the approaches to economic questions that exist, generally only one is presented to us. This approach is supposed to explain everything by means of a purely axiomatic process, as if this were THE economic truth. We do not accept this dogmatism. We want a pluralism of approaches adapted to the complexity of the objects and to the uncertainty surrounding most of the big questions in economics (unemployment, inequalities, the place of financial markets, the advantages and disadvantages of free-trade, globalization, economic development, etc.)".

From a global perspective, „the underlying critique is not new, nor unique to economic science" (Mohn, 2008:1992) and the heterodox beliefs presented in the previous section are solid proofs in this sense. The accusation of autism in economics is grounded on the reformulation of past heterodox arguments that are strikingly similar to the traits of the disease. Firstly, the missing interdisciplinary approaches are interpreted as a sign of non-sociability in terms of awareness. Stiligtz (2000) adds here the socially insensitive applications and policy. Secondly, the missing realism in many assumptions is understood as a poor communication (Thaler, 2000) with all the other stakeholders and the society. Not last, the simplified methodology is nothing else than a non-recognition of the complexity of human behavior. Thus, even if we believe that autistic is a hard label to digest, and quite inappropriate due to its primary use, we do admit the general tendencies towards it, reflected in the artificial creation of stylized facts for describe a phenomenon, for tracking it mathematically and for finding an (unique) equilibrium to the problem.

Doctrinaire Approaches within the Contemporary Romanian Economic Higher Education

To speak honestly on the contemporary state of economics in university it is necessary to asses some facts from the past, thus from the period before the 1989 revolution. One common popular memory of the old system, regarding education, was the clear focus on memorization and almost an interdiction of critical thinking outside the communist system norms (Druica, Cornescu & Ianole, 2009). Even if in reality the assertion is only partial true, the public perception has defeated the contextual and historical realities, taking it and promoting it until today, transforming it to the rank of, we dare to say, a psychological conditioning. What we mean by this is the fact that many reforms were lead in the name of this terrible threat, but almost none has solved it. At the contrary, they have just indulged this idea more deeply in the popular subconscious.

At the higher education level, in the first 10 years after the revolution, the number of universities was more than double and afterwards it has slightly diminished. In economic terms, at the beginning of the transition period we could witness an explosion on the supply side materialized through the apparition of the private universities. The market mechanism started to function and after reaching its peak it found its equilibrium at a lower number of higher education institutions.

In this context, economics was one of the sciences that started to know a widespread popularity. As statistics proves it (table 1), there were radical changes in the development of

different fields of study, moving the emphasis from science and engineering towards social sciences, especially economics, commerce and business, and law.

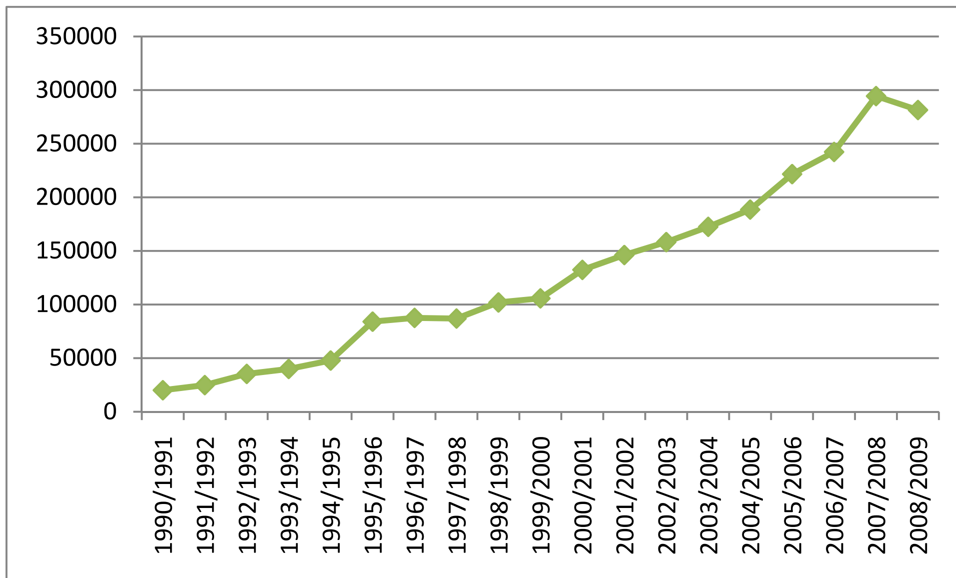
Table 1.

Group of specializations / Year	Technical sciences*	Medicine and pharmacy	Economics	Law Science	General sciences**	Artistic
1990/1991	120541	20128	20003	3975	26270	1893
1991/1992	123736	21796	24801	7543	34367	2983
1992/1993	118097	23656	35279	10865	44298	3474
1993/1994	111145	25738	39867	14854	54297	4186
1994/1995	100837	26316	47712	15424	59947	4926
1995/1996	94289	32237	83996	43143	76729	5747
1996/1997	95792	32714	87472	48268	83430	6812
1997/1998	98864	31862	86861	53445	82370	7188
1998/1999	112720	32130	101896	57294	96071	7609
1999/2000	125357	32227	105727	63055	118371	7884
2000/2001	138324	32999	132332	68870	152132	8495
2001/2002	149521	32823	146110	69124	175684	8959
2002/2003	152547	32495	158185	63456	180603	9011
2003/2004	158014	33072	172409	60613	187141	9536
2004/2005	161850	35039	188505	59621	195190	10130
2005/2006	164736	36422	221619	63586	218860	11241
2006/2007	170921	40028	242330	82696	238711	10820
2007/2008	178258	41398	294417	116538	265624	11118
2008/2009	188660	47758	281421	127399	235923	9937

Source: Statistical Yearbook, 2009
(*Technical sciences include: Industry, Mining, Petroleum-Geology, Electric power and electrotechnics, Metallurgy and engineering, Chemical technology, Wood and building materials industry, Light industry, Food industry, Engineering, Transport and telecommunications, Architecture and construction, Agriculture, Veterinary medicine, Forestry)
****General sciences include: Philology, History-Philosophy, Geography, Biology, Chemistry, Mathematics-Physics, Pedagogy, Physical Education, Political and Administrative Sciences)**

Figure 1 illustrates separately the evolution of the number of enrolled students in Economics between 1990 and 2009.

Figure 1.



Source: personal analysis of data

This un-natural growth, along with the rigid old representation on teaching and learning outcomes, has creating a new label to be applied on the economic studies and economic students, only at a national level: an easy option, a superficial faculty and a future commercial profession. Even if these are only exterior attributes, some of their features have transferred to the interior one, making Romanian economics a peculiar mix of doctrines.

On the one hand you will say it is mostly orthodox, reined by the neoclassical hypothesis. In this sense you cannot neglect the old influences of the political economy taught during the communist regime, which still reflects some inabilities to question the problems raised by the contemporary society. On the other hand, it seems to be a low interest to adhere to one specific current or to have a coherent perspective. Tiberiu Brailean is a remarkable Romanian author who subscribes to the fact the economics has become a Babel tower because of the high degree of fragmentation and specializations. Everybody is speaking a different language which is almost impossible to understand by an economist working in different area (Brailean, 2001).

With reference to the PAE claims, we will briefly discuss how we think they are perceived in our Academia.

We will start with the students, because they were the promoters of the PAE movement. Even if there any many complaints regarding the problem of excessive theory without practice (especially with the popularization of the Bologna Process) – point 1 on the PAE original petition list – Romanian economic students are lacking a coherent body of representatives to put the problem in more scientific terms, including here research and critical economical analysis skills, and not only operational competences. One possible and reasonable explanation is due to the

dynamic of the labor market, dominated by multinational organizations that need graduates with very specific sets of skills. The lack of think thanks, representative research centers and institutes or other important bodies of decision is orienting students only in some very pragmatic and business related directions, and they are not to blame for this. Therefore, either the true reason behind it, students are not offered alternative approaches developed by Post-Keynesians, institutionalists, Austrians, evolutionists or behavioral economists. The even saddest part is that the problem seems to be the same elsewhere: 95 per cent of the economics taught in higher education institutions is mainstream (Mearman, 2007).

And of course, the other side of the equation is represented by the professors. Our empirical observations suggest that we face also a lack of interest for the new branches of economics, some of it due to the lack of research infrastructure. It is almost impossible to be involved in neuroeconomics if you do not have the financial resources to equip ate a laboratory with the necessary brain scan technologies. The same with experimental economics, where you need specific conditions to run an experiment. The first reaction to this is that everybody is looking for funds and grants but we actually face a vicious circle: how to firstly be interested in these emergent fields without have no local representation of what they mean.

Conclusions and further research

„The issue of interpreting economic theory is…the most serious problem now facing economic theorists…Economic theory lacks a consensus as to its purpose and interpretation. Again and again, we find ourselves asking the question 'where does it lead? (Rubinstein, 1995:12)

Even if it may have a philosophical tent, we consider the question above to be of crucial importance and positioned at the core of the training program for students, for professors, and why not, for practitioners also. A more comprehensive and flexible understanding on economics is definitely a long and delicate process, but if we are engaged in some way with this science, it is actually an intrinsic duty to call for a greater awareness on the issue. The research initiatives in this area carry the same „stigma" of diversity, a stigma in the sense that it is almost impossible to offer a spot solution. The validity of the articulated assumptions is only arbitrated by time, maintaining still a shadow of contextual subjectivity.

With respect to the case of Romanian economics, they are many limitations, especially on a psychological level, in accepting to even explore many of the ideas discussed through the article, and still some unresolved complexes of the past paradigm. Nevertheless, we plan to elaborate on our observations and to continue the present theoretical overview through a future empirical investigation.

References

- Arnsperger, C. and Y. Varoufakis (2005). What is neoclassical economics?, available at http://www.econ.uoa.gr/ua/files/941678562..pdf
- Brailean, T. (2001). Noua economie. Sfârşitul certitudinilor, Publishing House European Institute, Iaşi, Romania
- Colander, D. (2005). The Making of an Economist Redux, *Journal of Economic Perspectives*, Volume 19, No. 1, pp. 175-198
- Dequech, D. (2007). Neoclassical, mainstream, orthodox and heterodox economics, *Journal of Post Keynesian Economics*, Vol. 30, No.2, pp. 279-302

- Druica, E., Cornescu, V., Ianole, R. (2009). Challenges on the Economics of Romanian Higher Education, Paper presented at the International Conference on Engineering, Environment, Economics, Safety and Health 2009 (CONVEEESH'09), Manado, Indonesia
- Eisemon, T. et al. (1999). Higher Education Reform in Romania, *Higher Education*, Vol. 30, No. 2, pp. 135-152
- Estey, P. (1936). Orthodox economic theory: A Defense?, *The Journal of Political Economy,* Vol. 44, No. 6, pp. 791-802
- Fullbrook, E. (2005). Teaching Economics: PAE and Pluralism, The European Association for Evolutionary Political Economy's Newsletter, available at
- http://www.paecon.net/PAEarticles/Fullbrook2.htm
- Garnett, R. (2005). Whither Heterodoxy?, *Post-Autistic Economics Review*, 34.
- Hodgson, G et al. (1992). A plea for a rigorous and pluralistic economics, *American Economic Review,* Vol. 82
- Kirchgässner, G. (2005). (Why) are economists different? *European Journal of Political Economy*, 21(3), 543–562.
- Lawson, T. (2005). The Nature of Heterodox Economics, *Cambridge Journal of Economics*, pp.1-23, doi:10.1093/cje/bei093
- Lee, F.S, (2004). Book Review: The Crisis in Economics: The Post-Autistic Economics Movement: The First 600 Days (by Edward Fullbrook), *Journal of Economic Issues*, Vol. 38, No. 3, pp. 880-882
- Mearman, A. (2007). Teaching Heterodox Economic Concepts, Published by The Economics Network, availabe at http://www.economicsnetwork.ac.uk/handbook/printable/heterodox.pdf
- Mohn, K. (2010). Autism in Economics? A Second Opinion, *Forum for Social Economics*, Vol 39, pp: 191-208
- Rankin, K. (2002). Autistic economics?, *Journal of Australian Political Economy*, Vol. 50, pp.10–13.
- Rubinstein, A. (1995). John Nash: the master of economic modeling, *Scandinavian Journal of Economics*, vol. 97, no. 1, pp. 9–13
- Rubinstein, A. (2006). A sceptic's comment on the study of economics, *Economic Journal*, 116, C1–C9.
- Thaler, R. H. (2000). From homo economicus to homo sapiens. Journal *of Economic Perspectives*, 14(1), 133–141.
- Post-Autistic Economics Newsletter, http://www.paecon.net/
- Heterodox Economics Association, http://www.hetecon.com
- National Institute of Statistics, http://www.insse.ro

FINANCIAL ASPECTS OF DECENTRALISATION

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Abstract

The objective of the decentralization process is better targeting of the financial resources, which translates into a lower tax price to financial cover the decentralized public services. In the current period, also in the European Union and in relations with other developed countries, there is an increasing mobility of people and economic activities. Wealthy individuals and firms are inclined to place their wealth or relocate their activities to lower taxation centers, while lower income people tend to move into communities benefiting more generous social transfers.

Keywords: *descentralisation, public finance, local authority, services, functions*

Introduction. The event functions in the process of decentralization of public finances

In modern theories of public finance, they are considered a basic factor for macroeconomic development. Thus, according to Musgrave's theory, the public sector performs three essential functions for the good of the state:

- affected function of resources
- redistribution function
- macroeconomic stabilization function of the activity.

At the national level, macroeconomic stability and growth targets imply the need for sustained fiscal consolidation, and discipline in public spending, at all levels of government, which is public or private, central or local.

The three functions of public finances is manifested differently in terms of administrative and financial decentralization.

There are a great variety of administrative and financial systems adopted both in the European Union and in the most developed contries in the world. Thus, although many countries present three levels of administration – France (regions, departements and municipalities), Germany (federal, landers, local), Italy (regions, provinces, communes), Spain (autonomous communities, provinces, municipalities), Sweden (federal, län, kommuner), United Kingdom (different for each hystorical region: England, Northern Ireland, Scotland and Wales) etc., there are several countries, like Romania, where administrative organisation comprise only two levels.

This paper discusses the relationship between central and local administrative level, both regarding their responsabilities and public financial - revenues and expenditures – correlation, taking account by the type of decentalisation the country heve adoppted.

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1. The public finance functions

The affected function

The affected function represents State intervention as producers of goods and services, it ensures satisfying public needs and the necessary adjustments in the allocation of resources that forms on the market. This action must be performed by the economic authority because no private operator would not accept to fulfill it, because of the too hight economic and financial risk arising from development and exploitation of certain products and services at those prices and tariffs acceptable to all social categories.But in this case, the question arises - the very difficult problem – of The State efficiency as an economic agent producer of goods and services

The redistribution function

By their very nature, liberalism and market economy creates inequality in society. When this inequality is excessive, the state must intervene to reduce, by performing duties of redistribution. To this end, the State acts in two ways:

- collects, in the form of taxes, a newly created part of the national income;
- redistributes what has been taken through the economic and social transfer:
- overall objective of economic transfers.-. materialized in the most part., into the subsidies made to certain economic sectors and capital gains for the achievement of investments regarded as national priority - is to support the financial situation of the agents whom they are intended, either public or private;
- social transfers are carried out as a national solidarity action. Through such transfers is realised the vertical income redistribution, respectively from those with higher incomes to those with lower incomes, etc.

Stabilization function of the economic activity.

The state sets as an essential target the economic climate stabilization, that is the keeping of global demand at the desired level. This relatively new function of the State requires appropriate means, which are mainly monetary, budgetary and industrial policies.

- in a period characterized by an unfavorable conjuncture, State injects revenues in the economic cycle through the budget or a flexible monetary policy[1], to support the demand and the relaunch of the economy;
- in a period characterized by favorable juncture, The state controls the wealth creation.-. for example by limiting the level of domestic credit.-. to hamper the expansion of global demand. The economy, which often tends to move away from its equilibrium state, is restored - or regulated - in this state through direct and / or indirect State intervention.

Resource allocation function

The decentralization process is aimed at improving financial resource allocation, which translates into a fiscal price as low as posible for the financial coverage of decentralized public services.

In this respect, decentralization is considered proper (devolution), one that gives the largest autonomy to the local communities,which best enable the corelations of public services linking local preferences / needs of citizens and, also, with businesses that are located within those communities.

[1] Fiscal and monetary policy interact each other in vary ways and they affect both macroeconomic performace and the living conditions. Change in fiscal policy has a direct impact on demand. Thus, if the tax level is modified, are affected companies profits and disposable revenues of individuals. Using these fiscal instruments, central authorities inflence the labor market and the investitional process, both privat and public. On the other hand, monetary policy credibility is a very important factor for fiscal stability. In every stance of an economic cycle, fiscal and monetary policies have to be correlated. That means, in an expansionary period, when the fiscal policy is relax and contribute to the economic growth, the monetary policy has to maintain a stability of prices.

In addition, decentralization is accompanied by democratic participation in decision-making, which is done only through the operation of a stable and effective institutional framework. In addition, involving the citizen in a political decision, decentralization allows it to control the cost of local public services, which leads to improving allocative efficiency, and efficacy of public funds.

But, there are cases, where a too deep decentralization is not beneficial, for example:

- when the production of collective goods and services is obtained with incremental returns to scale[2], to have lowered average costs as it is possible, is recommended, as this to be done on an administrative level that is most convenient, generally at a supra-municipal (regional, county, etc.).

- If a public good is consumed by several communities (so-called *spill-over effect*), when the supra-national level does not assume its performance, the solution is cooperation / association of local stakeholders, in a legal or contractual contract. For example, in this regard are the provisions introduced by Law no.273/2006, local public finance law[3], regarding the local specific

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[2] Economy of scale, which records the returns to scale, is a microeconomic process characterized by increasing production and decreasing the cost of long-term average.

Economies of scale can be technical or financial.

Economies of scale are determined by technical factors and economic factors:

Technical factors refer mainly to:

- better specialization within the company, which becomes possible through an increase in its size;
- the increased division of labor, increase production capacity requirements;
- unable to divide the plant and other major endowments, the volume of production is higher;

Economic factors include, among others:

- facilities offered by a larger firm in terms of supply, storage, etc.;
- bonuses to big orders, guarantees quality products purchased, rate of delivery as required;
- conditions of funding - through trade credit or bank loan - best

Economies of scale can be internal (company) or external (outside it). The internal occurring particularly with increasing size of business, when fixed costs per unit of output and marginal costs are significantly reduced.

External economies of scale refers to the possibility of undertaking corporate to have access to a market whose inputs are well organized and accessible to a road infrastructure, telecommunications, power engineering, etc. well-developed and affordable cost.

(Nita Dobrota, Coordinator - Dictionary of Economics, Economic Publishing House, Bucharest, 1999)

[3] The Law no.273/2006, local public finance law, provided (Art. 35): Collaboration, cooperation, association, twining, accession (a) The deliberative authorities may agree to conduct cooperation or association of local public works and services. The cooperation or association agreements are made on the basis of association, which provide funding sources representing the contribution of each local government authorities involved. The association agreements concluded by the principal budgetary officer, under mandates approved by each local council or association involved in collaboration. (2) The deliberative authorities may decide on the capital or assets participation on behalf or in the interests of local communities they represent, at the companies setting up or establishment of local public services, or county, as appropriate, in terms of legal provisions. The deliberative authorities may decide to purchase, on behalf or in the interests of local communities they represent , the shares in the companies in whose establishment was attended by the capital contribution in kind and may increase or decrease their capital , under the law . (3) Deliberative authorities may decide on the capital or assets participation, in the name for the interests of local communities they represent, at the the establishment of development community associations, within the limits of the law and for carrying out joint projects for development of regional and local interest or joint provision of public services. (4) The community development associations are financed by contributions from local budgets of administrative-territorial units, from other sources on a project basis, loans and public-private partnerships, in terms of legal provisions. (5) The government develops development national programs to stimulate the association of administrative-territorial and to increase their administrative capacity, funded from the annual budget, through the Ministry of Administration and Interior budget. (6) The financial obligations arising from cooperation, twinning or accession agreements of the administrative-territorial membership in national associations organized at the national or international organizations with legal personality, determined by the deliberative, under the law, is covered from local budgets thereof.

principles, and the European Union policies aiming to foster local cooperation regardless of their geographical location within the Union.

Redistribution function

In the current period, in the European Union, but also in relations with other developed countries, there is registered an increasing mobility of people and economic activities due to the operating pillors of the Union. Wealthy individuals and firms are inclined to place their wealth or relocate their activities to the centers with lower taxation, while lower income people tend to move the community to benefit from more generous social transfers.

In these circumstances it is recommended a centralization of redistribution policy, which refers both to public services and public funds relating to:

- as regards public services, those redistribution in kind or form of cash benefits, its shall be done in accordance with standards and rules applicable throughout the country. Also, the general trend - and negotiations accordingly - is to extend these rules throughout the entire European Union. Classical examples in this regard are education and basic health services;

- public funds financing these services will be affected, therefore, centralized. However, the redistribution will be performed with good results if it would be used procedures aimed at efficiency and effectiveness, that lead, for most public social services, to implement some form of decentralization as devolution and delegation.

If the redistribution function, which lean towards centralization, there are many contrary examples, especially in developing countries. Rural population in these countries face major drawbacks and risks (famine, pestilence, wars, etc..) and many individuals are moving towards the periphery of cities to find a job and / or protection, social services that they could benefit beeng considered by them in second background.

Stabilization function

Taking account by the macroeconomic stabilization, the traditional view is considering that it should be assumed by central government authorities. In favor of centralization are several reasons, among which the most important being:

- tax revenues of the territorial-administrative units must be as stable as possible, which means that the tax bases of local taxes should be as inelastic as its could. This requirement implies, however, that such taxes can not be used as instruments of macro-stabilization policy;

- economy of a local community is an open economy, with multiple economic and social relations with other communities, which means that fiscal-budgetary policy implemented by a local community will produce effects in a more different geographic area than that of the organization concerned.

Conversely, local public authorities of a territorial-administrative unit may adopt a tactic

An equally important problem is the management of local public deficit and, consequently, the local government borrowing, which may be very different, depending not only on the financial abilities of local authorities concerned, but also the degree of market development financial institutions in which they have access.

2. The system of government versus the typology of decentralization

The public sector modernization implies, on the one hand, adopting a system of decentralization appropriate socio-economic conditions and, on the other hand, it equally important, linking this system with a set of principles and procedures for fiscal and budgetary system that would can support decentralized governance.

In the economic analysis undertaken for the implementation of a decentralization process, it is standing out, in terms of public finances, two aspects:

- when decentralization is downward, fiscal decentralization need, i.e. passing the responsibility of collection of certain taxes and duties which are sub-budget financial sources.

Conversely, if decentralization upward, to develop a constitutional procedure by which tax revenues are transferred from a local to a regional or central office. For example, in Switzerland, to transfer the powers of a tax or a fiscal fee charge at the cantonal level of confederation, it is cantonal voting population or a special provision inserted in the state constitution.

- if the public revenues collected by local authorities are not sufficient to cover the full financial costs of decentralized public services - and this is the general case - should be developed and adopted by law mechanisms to ensure the funds necessary to balance local budgets, and these mechanisms should be applied throughout the country - for fairness - and that would be clearly stipulated in national legislation.

In countries with federal structure, downward financial relationships - vertically from the central authority by sub-national authorities - are more limited, first in order to preserve their autonomy and then for those ones to assume tax consequences of budgetary expenditure policy of their own budgets.

In fact, the main objective of applying balancing mechanisms in public finances of decentralized systems vary depending on the system of government, as follows:

- in the states with unitary tendency, the core objective of balancing is to give local authorities the opportunity to benefit from comparable social services, without being obliged to bear a greater fiscal press;

- in countries with federal features, by balancing mechanisms is aiming to reduce the disparities between sub-national communities to an acceptable level.

3. Benefits of decentralization:

Clearly, decentralization proves its usefulness, regardless of the administrative organization of the state. There are many benefits associated with of devolution and local public services delivered: a better utilization of ressources and, consequantly, an greater operational efficiency compared with a centralized system, and the increased allocational efficacity[4], meaning that devolution increases the fit between people's wants and what they get.

It may be mentioned at least two important ways in which decentralization produces beneficial effects for the population:

- the possibility of community control and to exercise the power to participate in decisions about managing public activities. In this way, it is limited the discretionary behavior of local public authorities and economic agents, individuals or legal entities that are resident in those municipalities area can compare their elected officials performance with results from other local elected officials and impose measures to improve local public services.

In addition, the population entitled in a democratic state, to change residence that is to relocate - housing and / or business - in one place more convenient in terms of taxation. In this way, it is preferred a locality beneficing of a lower fiscal pressure exerted by local taxes and fees or where the local public services are better and more numerous, or both.

[4] Efficacy is the capacity to produce an effect. It is these conditions that distinguish efficacy from the related concept of effectiveness, which relates to change under real-life conditions. -- Wikipedia: "efficacy" http://wiki.answers.com/Q/Difference_between_efficacy_and_effectiveness#ixzz1Eb757oX1

Actualy, however, mobility is quite limited, in many personal reasons for individuals and in order of management for businesses - they must have in its new location, the necessary resources: human, material and financial.

Also, the exercise of public pressure, in terms of tax, over the local authorities may have adverse effects for the entire population. Thus, for dealing with tax competition, local governments would be tempted to reduce the pressing produced by local taxes.

- either by lowering rates, either through tax relief - or to engage in increased public expenditure to finance local public services. If, however, the trim[5] is not sufficiently elastic, i.e. the general tax base is not expanding sufficiently, due to the increase of economic growth and living standards, mainly, the total amount of local government revenues from local taxes and fees will diminish considerably, which will drastically reduce their maneuver margin for the financial management of local public services.

- local public authorities can implement best practices experimented by other local authorities, with the approval of their citizens, without considering the opinion of the higher public authorities - than if those ones participate to the extent of local resources in the implementation of those measures.

This advantage depends on the type of decentralization applied to that activity. If decentralization is done by delegation, the performed model is passed even by the upper hierarchy authority, which reduces the risk ..

When decentralization is a deconcentration, i.e. the agency responsible for local public service is part of the organizational structure of a territorial public authority, the leaders of this sub-national public institution are tempted to show that the benefit is greater than the cost of the experiment, the information received by the central public authority beeng thus distorted.

In conclusion, the behavior of public decision makers at the local level depends largely on the type of decentralization adopted by national law and for each category of local public service, also on the specific socio-economic, cultural, historical, etc. of localities. When the population, not only in the area analyzed, but all nations, is poor, the satisfaction of vital needs prevail, which means that public services requirement is nearly homogeneous.

As society evolves, the localities are diversified in terms of citizens' preferences, decentralization beeng necessary to meet these preferences.

Conclusion

Public financial revenues come from different sources: from taxes and fiscal fees collected at central level and various sub-national levels, from non-fiscal revenues, from the pricing of public services, loans etc..

Public expenditure financing public services are covered from various sources, which in a modern democratic state, are not centralized under a single public authorities. Therefore, the allocation of responsibilities in the management of public money, also public revenue collection should be done taking into account the specific requirements of the local population. If this goal is not met, central public autthority exercising a discretionary power in budgetary planning, economic and social development capacity will be affected by not only in certain localities, but also by the contagion effect at national level.

A breakdown of the budget and fiscal powers clear and transparent, conducted in accordance with the principle of responsibility (*accountability*) produce the most efficient and

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[5] Trim are all measures are taken by tax authorities in connection with each subject taxable, to taxable object identification and determination of tax due (Economic and Financial Dictionary, http:www.contabilizat.ro)

effective results for producing and distributing public services, removing the possibility of public authorities to take advantage of so-called X-inefficiency[6].

The division of competences is based on administrative-territorial organization of the country and, in the administrative-territorial units are created public institutions to which will be given the tasks of producing and distributing local public services.

Sharing administrativ districts do not always take into account the economic specificity of a public service, so in order to benefit from economies of scale[7], the local authority concerned will have to be associated, under the law, with other local communities[8].

An alternative is the decentralization of public service up to higher administrative level - for example, county, city or common face - so that of the respective service can benefit the population that lives in a wider geographic area, but the management and finance to be the responsibility of an admnistrativ higher level.

References

- Dafflon B., Madies T., Décentralisation: quelques principes issus de la théorie du fédéralisme financier , Agence Française de Développement, Département de la Recherche, Paris, AFD 2008, p.36-51
- Martinez-Vazquez J., Boex J., The design of equalization grants: theory and applications, World Bank Institute, Georgia State University, p.13-25
- Tanzi, Vito (1996), Fiscal Federalism and Decentralization: A Review of Some Efficiency and Macroeconomic Aspects, Annual Bank Conference on Development Economics 1995, The World Bank, Washington D.C., 295-316.
- A Users'Guide to Measuring Local Governance, United Nations Development Programme, UNDP Oslo Governance Centre, Borgatta 2B, N-0650 Oslo, Norway, p. 6-9
- www.undp.org/oslocentre, oslo.governance.centre@undp.org

[6] X-inefficiency occurs when an economic agent that produces goods and / or services is subject to little or no control. Being the only good costomer execution of production and not having to answer to any higher institution - what is called information asymmetry - the operator does not pay attention to the requirements of the efficiency of production, and this inefficiency is named X, because no one knows who takes advantage from this situation, because the production process involved more economic operators. (Wikipedia, the free encyclopedia)

[7] Economy of scale - reducing the unit cost of a public service with the increase in its production volume and, consequently, the number of beneficiaries (Article 2, lit.o, no.195/2006 Law, Law of decentralization, OG. 453/2006).

[8] Art.13 of Law No.195/2006, Law of decentralization, states: "In order to exercise powers in terms of efficiency, administrative-territorial units may be organized in intercommunity development associations, under the provisions of the Law no. 215/2001, as amended and supplemented.

COMPARATIVE ANALYSIS OF VAT EVOLUTION IN THE EUROPEAN ECONOMIC SYSTEM

Mihaela Andreea STROE[*]

Abstract

In this paper we study a comparative analysis of VAT in different states of the world. I made some observation on this theme because I believe that VAT is very important in carrying out transactions and the increase or decrease of this tax has a major impact upon national economies and also on the quality of life in developing countries. The papers has to pourpose to make a comparison between the American and European system of taxation with its advantages and disadvantages and, in the end to render an economic model and its statistics components. VAT is a value added tax which appeared about 50 years, initially with two purposes: one to replace certain indirect taxes, and another to reduce the budget deficit according to the faith of that time. The first country that has adopted this model was France, calling it today as value-added tax.

Keywords: *rate, tax, VAT, budget deficit*

Introduction

One of the important factors that led to this measure was established to avoid tax cascading phenomenon, namely the taxation of the same product. Today often easier and more correct, tax only the value-added product. This is why we consider taxes a necessary phenomenon . Along parallel between the U.S. and Europe which has been taken as reference models in order to discuss and debate their favorable and less favorable points, and most of them in my opinion is representative of the French model, implementation of the tax where it had a beneficial role in the economy. As an example, we use the European model which is used in the VAT and the American model. In the first chapter I talked about the effects of introducing VAT in the euro zone and pros to this measures. On the other hand we will use the U.S. model as an example for countries that have introduced this tax measure. It will be discussed the pros and cons of implementing these measures in both Europe and the USA and see why are the reasons for which VAT was implemented or not. In the next chapter I will analyze some concrete examples of Europe countries that have value added taxation system and will analyze the benefits that were subsequently introduced this measure in developing economies.

Today most European Union states have increased the rate of VAT and the effects of this measure for each economy participant will be a subject of debate. The largest VAT increase since 2010 had 5 percent, the case of Romania will be discussed and also the effects of this increase. This increase was primarily due to the population, and secondly due to the economy.

However, in addition to countries that have increased the VAT rate to reduce the budget deficit exists also the countries that have not implemented this measure, like France. Separately will discuss about tax reform and the reason which have not adopted the VAT increase in 2010 thus making a parallel with the current situation in Romania. I consider necessary the parallel

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between American and the taxation of European countries in order to see the effects on the population especially at the time when this method had been introduced but also to determine the need for that change in the economic environment. To see what effect had the change when decided to reduce its rate of VAT, and especially if it had the desired effect. Furthermore, I have chosen our country as a reference model to determine what effect had increased VAT revenues in 2010 and especially the share of VAT and its direct relationship with revenue. In this model we determine whether the increase in VAT in our country had a negative effect of higher government spending and see what steps were taken to overcome the crisis in Romania and especially their effectiveness.

At the end of the work are presented conclusions and also some methods for improving the Romanian tax now, and we will see if Romania has achieved its purpose by increasing the VAT by 5 percent, especially if taken fiscal measures will be able to recover Romania.

COMPARISONS OF TAX POLICY IN THE EUROPEAN AND ECONOMIC SYSTEM

In this comparative approach of VAT in Europe versus the United States, we will determine why the U.S. did not want to adopt this tax, value added and the advantages and disadvantages of its implementation. In a paper drafted in 2001 and suggestively named "tax systems in the world," Lawrence W. Kenny American professor says: "There is surprisingly little empirical work to explain why the countries choose different tax policies." Although between tax systems currently existing in the world there are some similarities, however, we must observe that each country has its own individuality generated by specific elements (traditions, history, religion) and in finding a common ground should be determined on the basis of which can indicate similarities and differences between two or more countries. VAT is designed to charge efficient and comprehensive personal consumption in a economic reform .TVA site was most prevalent in the second half of the 20th century and into the 21st century, and proved to be a major source for government information .TVA's revenue is used both in developed and developing countries, both at local, national and supra-national level (European Union). It is effectively an indirect tax, originally adopted in France at the initiative of M. Laure in 1954.In the following years the value added tax was adopted on 1 January 1970 to all Common Market countries tax replacing the movement of goods cascade that leads to taxation.

VAT is in fact a tax on consumption in general, calculated and applied at every stage of goods and services flow from primary production to final consumption stage. Unlike European powers, the United States of America had many attempts to implement VAT in recent years but without success. This is due to the fact that VAT is regarded as having three weak points, namely: the first, is considered to be so-called "money machine" in the hands of government, secondly it is considered that the VAT is regressive, and at last it is believed that consumption taxes are used to broaden the State tax. In 2006, Keen and Lockwood points out the existence of two types of "money machine", a poor form and poor strong. This form is characterized by the assumption that countries with VAT budget revenues higher than those without VAT, or at least the same, which could lead to a better mobilization of savings inside a better financing of certain sectors. In strongest form it is suggested that an increase in budgetary revenues results in an increase in government spending is not beneficial within an economy. Such studies showed last year the opposite, namely the American belief that the VAT is not so-called "money machine" in the hands of pro government. An another argument for applying VAT in the U.S. is that it would reduce the deficit of the budget. This contradicted by Alverson (1986) showing that the average budget deficit is higher in countries that have adopted the VAT as a form of taxation and increased more rapidly with the implementation of VAT, except in countries that have adopted this method . Ali Agha and

Jonathan Haughton (1996) stating that VAT is the perfect money making machine.Take, for example when Switzerland with the introduction of this tax, budget revenues have not increased, remained the same as in the period before the introduction of VAT, but in developing countries such as New Zealand budgetary revenues have increased substantially.

VAT proponents conclude that compared with other forms of taxation, VAT is not discouraging savings and create certain ways of fair competition in international trade. It is said that the burden of VAT may be in the worst case proportional and regressive if not the denominator for purposes of measuring the tax burden was a lifetime income rather than annual income as contradicting American economists. [1]We notice that the socialist states tend to use more than other regimes, tax sources Corporation, sales and excise taxes, so that business can be more easily monitored.There is a strong ideological interest in taxing business and a necessity lower in individual taxation to achieve social goals. Making parallels between the fiscal pressure of the EU member countries and appreciation of the level of tax burden in the European Union in general is also facing many difficulties, due to the fact that tax levels are not the same from one country to another . Disagreement is due to a variety of general and specific factors for each country.

Most important are the following:

- differences in reference periods and methods;
- social security contributions, which are quite large in some countries (including Germany), tax levels are sometimes included, sometimes not, an example of this is given by employers' social security contributions for government employees;
- required government contributions are not included in fiscal reports;
- taxes on inheritance and gift taxes are sometimes considered, sometimes it is estimated that taxes should not be included in the category. For EU countries, VAT and customs duties sometimes appear as a net value sum. In the researched work, they also show that the level of taxation is determined and influenced by many factors, and that between taxation and its base and the level of GDP there is no strict correlation.

In a brief listing of factors influence the tax burden is represented by the volume of public expenditure, which depends on various economic, social and political,to reduce the effect of regressive some countries; especially in Eastern Europe, have provided substantial reduction of VAT on consumer goods and also primary health services, and this is underlined by Angelo Faria (2001). When the consumption tax rate increases on higher income levels it means that this rate is progressive, when this ratio is proportional when we deal with a proportional tax, we say that this rate decrease is a regressive tax

Unable to pay this fee are those who feel the tax burden harder. But this regressive is reduced by certain exemptions from VAT for commodities and population. The necessary medical services to France and New Zealand tried to reduce this effect by collecting the tax on social security and its spending for poor grades. Another pro argument is that VAT is not significantly different from other fees and does not encourage such an increase in taxation or to raise government spending.

On the other hand, opponents argue that a VAT increase in taxation will bring government spending, and this form of tax raises the overall tax burden too easy.

Another appeal of VAT is that it is vulnerable to fraud significant, this is to say that fraud losses in these countries was about 10% net income of such damage VAT collected. We can

[1] Angelo Faria (2001) - "Tax Policy IMF Fiscal Affaires Department Handbook" (P275).

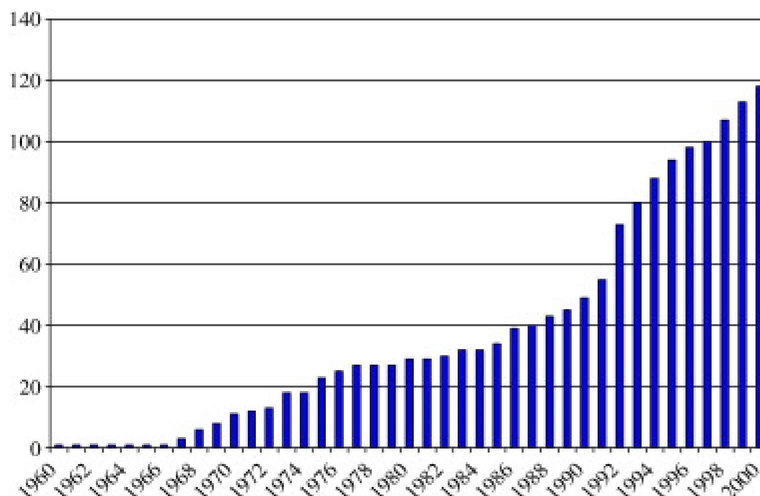
remember Germany (1.5% of revenues from VAT) and the UK (about 1.5 to 2.5% of revenues from VAT).

Cnossen says that tax is probably the best ever invented in terms of increasing budget revenues, but also in terms of fraud is much easier a tax fraud and RST (Retail Sales Tax) . But still, VAT fraud is significantly less than other types of consumption taxes, property taxes because it refers to different stages in production and not to the final property tax as it is used in the American system. (Retail Sales Tax)[2]. This form of taxation, perhaps better than the VAT it is much less expensive to implement because it represents just the final property tax and is much faster to implement in the tax system of a country, but has one big disadvantage: it is much easier to rig. This type of fraud is based on a fairly simple mechanism, at least in appearance: the country of origin trader VAT invoices (as performed an intra-Community, which fall into the category exempt operations with right of deduction), and the operator economic destination country applying the reverse charge for this operation (because making an intra-Community acquisition calculating and accounting for VAT on intra-Community acquisitions, so that VAT is collected, as well as the tax deductible, but without actually pay it) .Piggot and Whalley (in 2001) illustrates that expanding the tax base of VAT in developing economies can reduce the population welfare sector informal. This deeper critique was developed by Joseph Stiglitz at the Congress IIPF 2003. Many countries in Eastern Europe have adopted lower VAT rates tax hoping to reduce the evasion that would be created with the adoption of a higher rate.

Many European countries have adopted this form of taxation as opposed to letting the United States as income levels increase further or being introduced as a substitute for existing taxes. Comparing the income tax used by countries that have adopted VAT in European countries we can say that income tax is more flexible as a tool to achieve a progressive tax.[3] However, unlike the European model, Americans have no VAT in the tray instead they have a similar sale of VAT ranging from 5% to 12% being imposed in many stages of production (RST-Retail Sales Tax). But still why VAT is better than a sales tax that excludes taxes like VAT cascade? In case of VAT, the taxation is taking place in various stages of production, so is much more difficult to nearly impossible to find certain Legal wickets.

Countries that have adopted VAT charge have chosen this path because this structure does not meet budgetary requirements. Also this method has raised a number of problems and over the years this have been intensely debated. Thus depending on the levers of government each country has its own system of taxation,so that in some states this form of consumption tax works, but in other countries like the U.S. is considered ineffective. Comparing tax rates in the world is difficult and somewhat subjective, tax laws are complex and in most countries the tax burden falling on different groups in each country. However, a strong point of this charge is that avoid cascading charge (charge applies several times on the same income) by taxing the value added at each stage of production. This practically be the main reason that most countries in Europe adopted VAT. In the chart below we see the number of countries that have implemented this form of taxation over the years:

[2] Bird, Richard M. & Cnossen, Sijbren. 1998 - "The Personal Income Tax: Phoenix from the ashes?".
[3] John Piggott & John Whalley, 2001. - "VAT Base Broadening, Self Supply, and the Informal Sector".



Value Added Tax (flat tax collected divided as it is called) is calculated in Romania on increasing the value added by each undertaking participating in the cycle of making a product or performance of works that fall in the incidence of this tax circuit eliminating inequalities between phases economic products, applying the attributes on its share of all economic activities. Value added is the difference between the proceeds from the sale of goods or services and effectual payments for goods or services relating to the same stage of economic cycle. By setting the value added to avoid repeated entries external consumption (consumption from third parties) of productive enterprises. VAT tax is a single, neutral, and payment to be made in a single part. The character of this form of taxation wether you cycle through raw material to finished product realization (in this way can pass by two or more companies), is the same level as the rate of taxation, the tax is not dependent on the extent of the economic cycle, it is applyied at every stage of manufacturing value added. Operating system of value added is based on a fundamental principle that the fee charged for goods delivered and partner services rendered minus the fee for goods or services purchased or manufactured in their own units for the realization of taxable operations The object is the value of taxable goods, works and services at billing prices an also a taxable lump sum from the sale.

The mechanism by which one determine the VAT due to state budget continues to show it succinctly. The VAT account is recorded output VAT collected on sales or work product. The account is registered VAT paid input,VAT on buying by traders of material, to receive papers which were made or the payment of benefits. Reducing the output VAT results input VAT which the operator has to pay state tax (VAT to pay). If this difference is negative,output VAT is less than the input VAT, meaning that the trader has to recover this amount from the state. It is easily seen that the trader is not affected by VAT, and it pays only one who actually bear the ultimate consumer.

In fact, the producer who purchased raw materials, manufactures suppliers, although with the delivery of their share of VAT paid do not suffer a monetary loss because the asset sale will collect that amount, state and will return that value but the final consumer is not credited by the state, so that it will fully support the value added tax related. From product tax, value added is considered a consumption tax, borne by the final consumer and the state budget. Therefore an

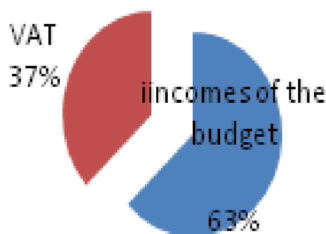
increase in the tax rate primarily affects the final consumer for the same commodity bought in a previous period will have to pay more in the current period.

Regarding foreign trade, VAT is not paid for exports and imports. VAT levied on imports is to offset losses which occur due to taxes export. If goods were delivered to the internal state, revenues would increase.

Also, the VAT on imports representes an equalization of opportunities for companies, because if there is no VAT for importing foreign goods the competitiveness of prices would be more appyling that the national one

Countries where the product is consumed implemented VAT and not where it performs. Consequently, everything is exported, is completely absolved of paying this tax, but what is imported is taxed accordingly. VAT has a greater elasticity to economic processes in the sense that, if the business is developing , the VAT payment will be higher. If sales stagnate and VAT amount will be lower consequently in state revenues. The VAT as well as all indirect taxes "copy" the economy going. VAT is a tax, high tax efficiency, but that any indirect tax is unfair. This translates in that VAT is regressive in relation to revenue growth and do not lend themselves to a minimum non-taxable. The VAT affects more pronounced low-income people and those who affect a large proportion of their income for consumer spending. In our country the VAT was introduced for the following reasons: reasons of compatibility with the tax systems of European countries to increase resources for the state and the necessity of replacing the outdated formula has been taxed on the movement of goods. Our country's accession to EU economic structures imposed a series of changes in the national tax legislation to harmonize it with European regulations domain.In global crisis, the government of Romania was forced to increase the VAT rate from 19% to 24% to shrink the deficit this way budgetary. It is true that those who felt that this change was more low-income population small, the final consumer in the position are those that support this growth.Among European countries, Romania had the highest rate increase along with it and arousing discontent of the population who have experienced a rise in consumer prices. This increase had the intended effect, registering a substantial increase from the state budget. With this increase in overall share of VAT revenues increased indicating an increase in revenues as the chart below illustrates:

The structure of VAT in the total incomes of the budget



Source of data: National Institute of Statistics, INS

To play multiple linear regression model we used data on the United Kingdom, between 1990 and 2007 about the total indirect taxes, excise duties, VAT and consumer price index, thus

implementing the data extracted in Eviews. The base year chosen is 2000. Values are taken from the table below re expressed in millions of pounds.

Year	Total indirect taxes	Excise duties	VAT	Price index
1990	61.096	19.871	34.136	76.8
1991	66.466	21.660	37.523	82.6
1992	70.361	22.501	41.031	86.1
1993	72.591	24.267	41.762	88.3
1994	78.338	26.457	44.690	90
1995	85.507	28.167	47.539	92.4
1996	91.537	30.174	51.692	94.7
1997	96.637	31.866	54.475	96.4
1998	102.478	34.487	57.003	97.9
1999	109.161	36.471	61.415	99.2
2000	112.874	37.271	64.302	100
2001	115.007	36.597	67.051	101.2
2002	120.246	37.284	71.154	102.5
2003	127.731	38.081	77.308	103.9
2004	133.748,5	39.458,45	81.735,42	105.3
2005	135.366,6	39.289,65	83.537,46	107.5
2006	142.036,1	46.196,13	79.359,44	110
2007	155.309,3	50.612,33	87.678,99	112.5

Sursă: www.eurostat.com

The linear multiple model is:

$$\mathrm{Im}\,p_ind_tot_t = \alpha + \beta_1 * accize_t + \beta_2 * TVA_t + \beta_3 * IPC_t + e_t;\qquad t=1,2,\ldots,T,$$

unde T=18.

In Eviews, the model is: Imp_Ind_Tot=C(1) + C(2)*Accize + C(3)*TVA + C(4)*IPC

Imp_Ind_Tot = 8528,4194 + 1.49457*Accize + 1.01587*TVA - 157.62403*IPC

Variable	Coefficient	Std. Error	t-Statistic	Prob.
C	8528.419	5692.535	1.498176	0.1563
ACCIZE	1.494572	0.087339	17.11226	0.0000
TVA	1.015874	0.037614	27.00770	0.0000
IPC	-157.6240	92.74270	-1.699584	0.1113

R-squared	0.999543	Mean dependent var	104249.5
Adjusted R-squared	0.999445	S.D. dependent var	28264.28
S.E. of regression	665.7775	Akaike info criterion	16.03292
Sum squared resid	6205635.	Schwarz criterion	16.23078
Log likelihood	-140.2963	F-statistic	10208.15
Durbin-Watson stat	1.623409	Prob(F-statistic)	0.000000

Tabel 1 The results for testing the parameters model in Eviews

For testing the parameters model,it is used the t test

Test student

The hypotheses are:

- The nule hypotheses, $H_0: \alpha = 0$ or $\beta_t = 0$, t = 1,2,3
- The alternative hypotheses, $H_1: \alpha \neq 0$ or $\beta_t \neq 0$, t = 1,2,3

Thus, the coefficient of excises is $\hat{\beta}_1$= 1.4945, the stndard error $SE(\hat{\beta}_1)$ = 0.087339, and the statistics $\hat{t}_1$= 17.11226, calculated thus: $\hat{t}_1 = \frac{\hat{\beta}_1}{SE(\hat{\beta})_1} = \frac{Coefficient}{Std.Error}$; the value p (*p value*) = 0.0000, which shows hat the volum of excises in the total indirect taxes is an important factor.

The VAT coefficient is $\hat{\beta}_2 = 1.015874$, the standard error $SE(\hat{\beta}\ ) = 0.037614$, and statistics $\hat{t}_2$= 27.0077. The value of this probability is 0.0000, so VAT is another significant component of total indirect taxes estimated regression model.

The coefficient of the price index is $\hat{\beta}_3 = -157.624$, standard error $SE(\hat{\beta}_3) = 92.7427$, thus the statistics $\hat{t}_3 = -1.699584$. But the probability for this indicator is 0.1113, which exceeds the threshold of 0.05. But student test (t test) has an associated p-value of 0.1113 that is close, so we can say, by assuming a 11.13% risk of error that we are doing by rejecting the null hypothesis is still small, so we can to reject, and thus influence the CPI's total indirect taxes.

The intercept is $\hat{\alpha}$ =8528.419, the standard error $SE(\hat{\alpha})$=5692.535, the statistics $\hat{t}_{\alpha}$ = 1.498176, and the p value is 0.1563. Although he exceeds the probability of 0.05 applying the t

test we can say that we take a risk that the value of 15.63% to be 0 and thus reject the null hypothesis, accepting the fact that free time is significant for multiple regression model chosen.

Report of determination (R^2) indicates what percentage is explained by the significant influence. It is calculated as: $R^2 = \frac{SPAR}{SPAT} = 1 - \frac{\sum e_t^2}{SPAT}$. It is used in assessing model quality. It can take only values falling in the interval [0,1]. The values are closer to 1, the model is better. The value that we take here is 0.999543, and thus we can say that the regression model is good. Approximately 99.95% of total indirect taxes are explained by multiple linear regression model chosen.

S.E. regression is the following indicator of our table, calculated as follows:

$SEof\ Regression = \sqrt{\frac{\sum r_i^2}{n-4}}$, where r represents the errors; $\sum r_i^2$ = Sum Square Resid.

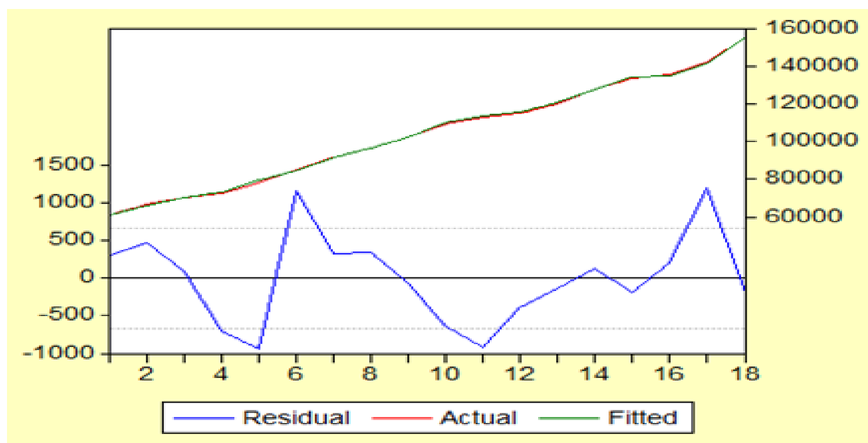
Then SE of Regression$=\sqrt{\frac{6205635}{14}} = 665.7774$.

$$\mathrm{Im}p_ind_to\hat{t}_t = \hat{\alpha} + \hat{\beta}_1 * accize + \hat{\beta}_2 * TVA + \hat{\beta}_3 * IPC$$

$$\mathrm{Im}p_ind_to\hat{t}_t = 8528.419 + 1.494572 * accize_t + 1.015874 * TVA_t - 157.624 * IPC_t.$$

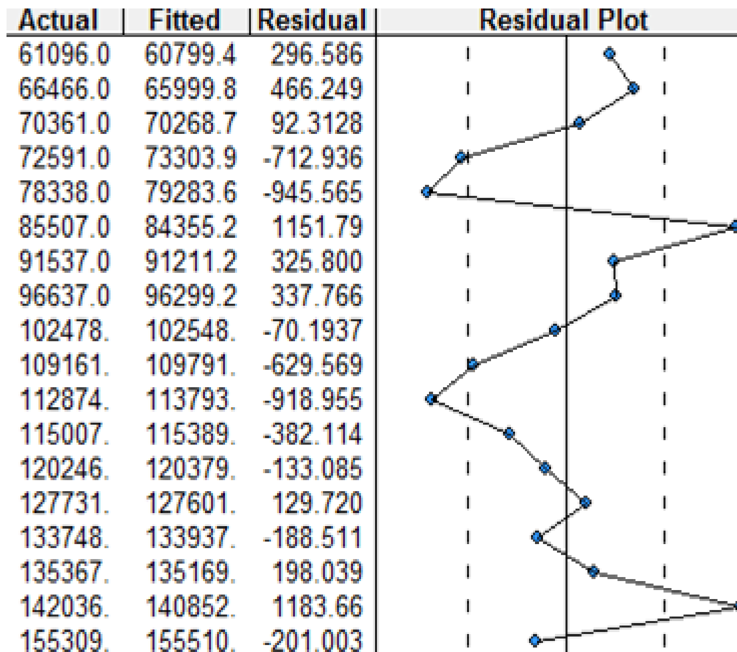
The previous table contains the value of the residuals for each among from the 18 calculated:

$$r_t = \mathrm{Im}p_ind_tot_t - \mathrm{Im}p_ind_to\hat{t}_t.$$



Tabel 3: The values for residuals, actual and fitted indirect taxes

Charts explaining residue values were also extracted from Eviews as follows: the below graph were residues is calculated as total indirect taxes chart taken from table in nominal source, represented by the red line (Actual) and total indirect taxes taken chart adjusted value, represented by the green line (Fitted). The blue line, is represented precisely by the difference of the residuals of the other two values above



Actual	Fitted	Residual	Residual Plot
61096.0	60799.4	296.586	
66466.0	65999.8	466.249	
70361.0	70268.7	92.3128	
72591.0	73303.9	-712.936	
78338.0	79283.6	-945.565	
85507.0	84355.2	1151.79	
91537.0	91211.2	325.800	
96637.0	96299.2	337.766	
102478.	102548.	-70.1937	
109161.	109791.	-629.569	
112874.	113793.	-918.955	
115007.	115389.	-382.114	
120246.	120379.	-133.085	
127731.	127601.	129.720	
133748.	133937.	-188.511	
135367.	135169.	198.039	
142036.	140852.	1183.66	
155309.	155510.	-201.003	

Tabel 4:The values for residuals, actual and fitted indirect taxes

It can be noted that the nominal values are almost equal, so the lines overlap almost second chart thus resulting in low values of their residues.

F test is used to test the validity of the model as a whole.

It is calculated as the ratio between the variation explained by regression and regression unexplained variation each of which is in turn divided by their degrees of freedom. The calculation formula looks like this:

$$F = \frac{\sum(\hat{y}_i - \bar{y})^2 / k}{\sum(y_i - \hat{y}_i)^2 / (T-k-1)},$$ with k = number of variables for the model, here 3 and

T = number of observations 18.

Analyzing the data in our model we see that F = 10208.15 and a probability of 0.00000. Therefore, we accept that overall multiple linear regression model is better studied.

The multicoliniarity test: The test of Klein
For the multiple linear model chosen:

$$\mathrm{Im}\, p_ind_tot_t = \alpha + \beta_1 * accize_t + \beta_2 * TVA_t + \beta_3 * IPC_t + e_t;$$

The hypotheses are:

$H_0 : \exists\ r^2_{x_i, x_j} > R^2$ is the multicoliniarity phenomenon;

$H_1 : r^2_{x_i, x_j} < R^2$ it is not the multicoliniarity phenomenon;

From EVIEWS the obtained results:

Correlation Matrix			
	TVA	IPC	IMP_IND
TVA	1.000000	0.967591	0.991579
IPC	0.967591	1.000000	0.980201
IMD_IND	0.991579	0.980201	1.000000

Tabel 5: The correlation matrix

Value is 0.9995 and find that is greater than the pearson coefficients so multicoliniarity phenomenon is not present in the multiple regression model.

To check homoscedasticity

Homoscedasticity refers to the hypothesis that the regression model that states that errors must have the same variance model: for any t = 1,..., T. Homoscedasticity presence or not we can identify both graphically and by statistical tests. Graph residuals can not say for sure that neither the existence nor the homoscedasticity heteroskedasticity. The best known test is White's test to test the following hypotheses:

The nule hypothese $H_0 : \sigma_i^2 = \sigma^2$ for all i =1,...,T

The alternative hypothese $H_1 : \sigma_i^2 \neq \sigma^2$ for at least one i.

White Heteroskedasticity Test:

F-statistic	0.653726	Probability	0.730593
Obs*R-squared	7.628003	Probability	0.572025

Test Equation:
Dependent Variable: RESID^2
Method: Least Squares
Date: 01/23/10 Time: 12:25
Sample: 1 18
Included observations: 18

Variable	Coefficient	Std. Error	t-Statistic	Prob.
C	-1.23E+08	1.56E+08	-0.785164	0.4550
ACCIZE	-4400.584	5096.226	-0.863499	0.4130
ACCIZE^2	-0.086030	0.070530	-1.219766	0.2573
ACCIZE*TVA	0.019991	0.043870	0.455694	0.6607
ACCIZE*IPC	93.46943	86.50170	1.080550	0.3114
TVA	-1082.017	2819.240	-0.383798	0.7111
TVA^2	-0.003665	0.014057	-0.260728	0.8009
TVA*IPC	7.316386	40.42917	0.180968	0.8609
IPC	4585351.	5405744.	0.848237	0.4210
IPC^2	-41077.56	46417.93	-0.884950	0.4020

R-squared	0.423778	Mean dependent var	344757.5
Adjusted R-squared	-0.224472	S.D. dependent var	461276.3
S.E. of regression	510429.2	Akaike info criterion	29.42407
Sum squared resid	2.08E+12	Schwarz criterion	29.91872
Log likelihood	-254.8167	F-statistic	0.653726
Durbin-Watson stat	1.888994	Prob(F-statistic)	0.730593

Tabel 6: The White test applied for our model for test homoscedasticity

For the initial model has been build:

$$e_t^{\ 2} = \alpha_0 + \alpha_1 * accize + \alpha_2 * TVA + \alpha_3 * IPC + \alpha_4 * accize^2 + \alpha_5 * TVA^2 + \alpha_6 * IPC^2 + \alpha_7 * accize * TVA + \alpha_8 * accize * IPC + \alpha_9 * TVA * IPC + v_i$$

New errors v_i are normally distributed and the independent of e_i .

In these circumstances I have the null hypothesis: the alternative: not all α parameters are zero. If we accept the null hypothesis when the hypothesis homoscedasticity accept, and if there are different parameters of 0 accept heteroscedasticity. Output table for this new model obtained by regression apply t test of significance for each coefficient separately. The probability is 0.455 for the free time that exceeds the threshold of 0.05 and 0.8 is smaller than that are in the area of uncertainty. In this interval are coefficients of variables with two exceptions, the coefficient of VAT and the coefficient of CPI. For later, we can accept the null hypothesis. Also for F-test probability is quite high and again located in the area of uncertainty, p = 0.73059. Considering the value of p we could say that we reject the null hypothesis (presence of heteroskedasticity) with an error of 73%, therefore we can accept the null hypothesis (presence homoscedasticity) with an error of 27% (100% -73%).

The autocorrelation analysis of the first rank:

The Durbin – Watson test: $\text{cov}(e_t, e_{t-1}) = 0$

For the analysed equation:

$\mathrm{Im}\, p_ind_tot_t = \alpha + \beta_1 * accize_t + \beta_2 * TVA_t + \beta_3 * IPC_t + e_t$;first-order autocorrelation of errors is expressed by the relation: $e_t = \rho e_{t-1} + v_t$, for t=2,...,T where v_t ~N(0, σ_t^2). DW statistical test used pair of hypotheses: H_0: $\rho = 0$ (the nule hypotheses); $H_1: \rho \neq 0$ (the alternative hypotheses). DW statistics are tabulated, its values depend on the specified significance level, the number of observations in the sample and the number of variables influence the regression model. This, for a specified significance level, has two critical values is obtained from the DW tables.

Reject the null hypothesis regions are defined as:

If $DW \in (d_2, 4-d_2)$, it does not autocorrelation,if $DW \in (0, d_1)$ the positive autocorrelation of the residuals;if $DW \in (4-d_1, 4)$ the negative autocorrelation of the residuals;if the DW is between the two intervals (d_1, d_2) or $(4-d_2, 4-d_1)$ the test is not conclusive.In the model analyzed, DW statistics = 1.6234. For a significance level of 5%, a total of 18 observations and four variables influence the statistics are tabulated values: 0.93 and 1.69. The value obtained in the model belongs to the range so we can not rule on the autocorrelation of disturbances.

After analyzing the data entered in the multiple regression model, for best results on homoscedasticity, autocorrelation of errors, or model of normality may enter more observations to capture the relations between them

Conclusions

The model which explained the relationship between the indirect taxes, VAT, CPI and excises is a valid model and the majority of parameters are significant. The relationship is linear and strong between the four variables. It was studied the hypotheses for testing our model.

I think that it is a strong relationship between that four variables because the taxes represent an important factor for the quality of people's life. If people are pressured by the taxes, they cannot concentrate for increase their educational level and they are only oriented how to obtained money.

The model can be improved by analyzing a long series of data and can be extended for many countries and the obtained results can be compared and can be established which country has the better taxation system. VAT is in fact a tax on consumption, calculated and applied at every stage of goods and services flow from primary production to final consumption stage.

Many European countries have adopted this form of taxation as opposed to United States as income levels increased further or were introduced as a substitute for existing taxes. Comparing the income tax used by countries that have adopted VAT in European countries it can be said that income tax is more flexible as a tool to achieve a progressive tax. Comparing tax rates in the world is difficult and somewhat subjective, tax laws are complex and in most countries the tax burden falling on different groups in each country.

Value Added Tax is calculated in Romania on increasing the value added by each undertaking participating in the cycle of making a product or performance of works that fall in the incidence of this tax circuit eliminating inequalities between phases economic products, applying the attributes on its share of all economic activities.

Fiscal pressure generated by the size of taxes paid by taxpayers is high in Romania and distribute.In Romania VAT became the target of argued opinions due to the tax burden on the population and especially small and medium businesses, besides direct taxes population supports a series of indirect taxes which currently holds the principal place within fiscal resources.

A high taxation, a „sick" economy can only have negative consequences because of the disrupt demand for goods and services and less likely investments. Among various tax savings in order to attract resources used by the State budget, those which are pressured are significant tax: personal income tax, consumption taxes and social contributions. I believe that indirect taxes are very burdensome for taxpayers and the dimensions of income and wages are lower compared to the fees and charges incurred by individuals.

For a more judicious distribution of income the tax system is necessary for policymakers to consider how it is constructed, the criteria underly the differentiation of taxes and how they participate in the formation of budgetary resources.

I appreciate that in the current period, the configuration of our country's tax revenue will over-tippe the balance in favor of indirect taxes along with the increase in VAT to 24%, resulting in increased tax burden on labor, with extremely negative effects on investment and savings.

References

- Alan A.Tait (1995)–"Value Added Tax :Administrative and policy issues"
- Alan Schenk,Oliver Oldman -"Value Added Tax:a comparative approach"
- Angelo Faria (2001)-" Tax Policy Handbook IMF Fiscal Affaires Departament"
- Bird, Richard M. & Cnossen, Sijbren(1998)- „The Personal income tax : Phoenix from the ashes?"
- John R. McGowan, B. Anthony Billings -"An Analysis of the European Community VAT: Implications for U.S. Tax Policy"
- John Piggott & John Whalley(2001) -"VAT Base Broadening, Self Supply, and the Informal Sector,"
- Laurence S. Seidman –"The USA tax : a progressive consumption tax"
- Lawrence W. Kenny(2001)-„Fiscal system across the world"
- Richard Miller Bird,Pierre-Pascal Gendron-"The VAT in developing and transitional countries".

ASSUMPTIONS ABOUT THE ROLE OF ECONOMIC GROWTH IN THE DEVELOPMENT OF CONSUMER BEHAVIOR IN ROMANIAN ECONOMY

Cristina Teodora BĂLĂCEANU[*]
Cosmin STOICA[**]

Abstract

This paper aims to identify valences of Romanian consumer profiles and the main influencing factors of income, especially income of labor. Also, we try to establish causal links between economic growth, income and investment on the one hand, and consumption support, on the other hand.

Keywords: *consumption, disposable income, economic growth, labor productivity*

Introduction

The increase of the income level depends on the economic growth. This indicator blocks the cumulative manifestation of goods competitiveness on the market, endowment with natural resources, exploration of the productive potential, labour force incentives, the balance degree of import and export, unions' force of negotiation, weight of social policy versus other structural policies, access to the sources of finances already existent on the monetary- financial market, the degree of market liberalization.

The most important aspect of consumer's theory may be linked to the impulses of economic policies sent through the channels of prices and exchange rate because the consumer's motivation and his behaviour changes once with the modification of price behaviour, the consumer being a active player on the market of goods and services. At the same time, the changes in social policies that appeared in time, stress the trend to purchase goods or, on the contrary, the consumer being one of the budgetary transfer beneficiaries which leads to a surplus of monetary mass that covers the demand of economic goods.

Therefore, a desirable consumer is the one with an increasing purchase power in the context of economy competitiveness. The impulses of economic and social policy influence consumer's behaviour to adjust the demand of goods, consumer's psychology and the motivation of his purchase being strongly influenced by the market itself.

The structural change in wholly demand and the decline of the standards of living for most of the Romanian population are problems of great political and social sensitivity Romania's transition to a market economy induced deep and contradictory changes to the standard of living. On the one hand, a diversification of the sources of income took place. In 1990 a law which permits accumulation has been in place, supplementary income has been generated from occasional activities, and substantial opportunities to gain income have arisen from business. On the other, the dramatic fall in production, as well as the rapid changes in income levels, structure and distribution, has led to an explosion of poverty in entire Romania economy.

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The market economy pinpoints the role of consumer as a promoter of goods demand as well as its main outlet. Under these circumstances, it is necessary to have an analysis on the consumer's behaviour in accordance with the conditions of the market mainly adjusted by monetary constraints, and, secondly, by the conditions of absorption, in order to set up a strategy for stimulating consumption considering the acceleration of economy growth meant to supply financially the economy.

Paper content

The consumer's behaviour is tightly connected to the available income on the one hand, and the systemic relation between the needs, the utility of the economic goods, education and, on the other hand, the consumer's psychological profile and the consumption tradition.

The classic analysis would construct the function of demand for a certain good, firstly considering the relation price- quantity. (Gilbert Abraham-Frois, 1992). Keynes suggests, after several hesitations, a certain relation between the global consumption and income; the characteristics of the consumption function and the justification of the hypothesis are formulated as it follows: the fundamental psychological law on which we definitely can count, a priori, due to the knowledge we have about human nature and, at the same time, a posterior, due to the detailed information acquired through experience, is that most of time people tend to increase their level of consumption once with their income, but not proportional with it. (Keynes, 1936).

In a certain economy, decisions for and against consumption are taken by different economic agents who take the decision of investing; even if the agents that save and invest are the same, their reasons are different. Generally, the decision for consumption is correlated subsidiary to the behaviour of budgetary policy: family's temptation to consumption does not depend on the distributed income Y, but on the available income Y_d, which is the income that remains after taxes payment. So, we have[1]:

$$Y_d=Y-T$$

and

$$C=C_0+cY_d=C_0+c(Y-T)$$

$$Y= C_0+c(Y-T)+I_0+G$$

$$Y=\frac{C_0-cT+I_0+G}{1-c}$$

In this case, there are highlighted different types of budgetary policies that public power may promote through budget. Thus, under the conditions of an expansionist budgetary policy, the appetence for consumption may influence the capacity of economy production at the aggregated level. Thus, an increase of the public expenditures determines a more proportional increase of the level of income provided that the extension of the public expenditures should not generate an increase at the fiscal level.

[1] T-the level of taxes and
C_0- autonomous consumption
G- government expenditure
I- the level of investments

$\frac{dY}{dT} = -\frac{c}{1-c} \Rightarrow dY = -\frac{cdT}{1-c}$ where size $-\frac{c}{1-c}$ stands for fiscal multiplication.

The variation of the level of production opposes to the weight level: a state weight increase generates a decrease of income and yield Y.

The allocation of income for consumption varies, as we have showed, depending on the behaviour of fiscal policy, as well as the monetary one. At least for the economies strongly oriented to import, the dynamics of the interest rate influences the decision of consumption, especially the consumption of the future goods: the acquisition of household goods or the consumption by credit card create the consumer's dependency in terms of monetary market. At the same time, the variability of the exchange rate is another pressure on the available income under the conditions in which the domestic production decreases the weight of import goods in the family budgets.

If it is natural to have a interdependent relation between the level of household goods consumption and the interest rate, the great part of the these economic goods being acquired by credit, the consumption of current goods in Romania depends both on the relation potential income- goods demand when using credit as payment tool for current consumption. This fact is not irrational in terms of economy, but in case of an economy with high capacity of production and as a result, of limited added value, produces a confusing effect which implies a stressing dependency on crediting function without a proportional coverage in terms of creative yield of a production meant to allow a real appreciation of income.

Under the normality conditions of economy, the equation production-consumption would generate income meant to assure a certain level of wellness if a significant percentage of production would be domestic which would lead to an increase of the available income of active labour force, on the one hand, and the increase of the employment rate, on the other hand. Under these circumstances, there are premises to increase budgetary incomes that should be oriented to public investments.

The economic motivation of encouraging incomes and their transformation in consumption, respectively the formation and the support of the aggregated demand are of great interest. An economy that is not oriented on economic resources correlated to the labour ones highlighting the act of production, and, in subsidiary to that of consumption, would generate an increase of external demand, with negative repercussions on the debt level , a labour force motivation and capacity of relating production factors to the production act. The problem is not the increase of the external demand, but the incapacity of internal conjectural factors (political, economic and social) to orient economy towards a rational use of production factors and the retain of those categories of economic activities that comply with the requirements of the market and the needs of the solvable consumers both on the domestic and external market.

The function of aggregate expenditure are[2]:

Y=C+I+G+(X-IM)

Analyzing the import content of consumption, enabling the C's and IM's to depend on Y:

Y=cY+I+G+(X-mY)

Then put out the import content of independent expenditures, separating it in each case:

[2] X- the level of exports
IM- the level of imports

$Y=cY+(I-I_m)+(G-G_m)+[(X-X_m)-mY]$

where I_m, G_m şi X_m are imports of investment expenditure, government expenditure and exports.

$Y=cY+I+G+[X-(Z+mY)]$

where Z is an autonomous component imports, $Z=I_m+G_m+X_m$

The income for consumption is generated by the remuneration of the labour production market. The labour force management and its payroll is done considering the function of optimal dimensioning of the market as well as the dynamics of labour productivity. Considering this, the labour force market of Romania is remunerated at a low level than other markets of the E.U.

We think that labour remuneration is fundamentally linked to productivity and efficiency that, in their turn, depend on a series of psycho- social factors, such as education, health, culture, mentality, creativity, attitude towards a certain group, organization, community, society and family.

Romania has recorded the lowest labour income which denotes that labour productivity is very low (as a result of the lack of incentive and the low quality of the technical equipment), and the completion in terms of economic goods is also low. In this case, there are required special measures regarding production yield, increase of economic goods competition, adjusting capital and labour force to produce certain economic goods of higher quality. All these measures require important investment flows and economic resources consumption regulations in order to decrease production costs and adjustment of production to demand.

There is a sort of paradox in this economic strategy: a low labour cost does not generate high incomes as the decrease of the costs is not an effect of the productivity yield, but of the lack of correlation between production and market demands. s

The low cost of labour force stands for an essential element when attracting investments provided that the level of fiscal policy should not minimize investor's profit. In Romania, the advantage of the reduced cost of labour force was not sufficient for investors. The excessive fiscal policy in Romania diminishes the competitive advantage of labour force cost; however, investors classified the labour low as lenient as thanks to the minimum wage may create the possibility of fraud in case of some non- taxable incomes. Thus, the state budget balances between two hypotheses: on the one hand, from the payment of profit income, and, on the other hand, from the encouragement of the underground economy.

The ex-socialist economies have a very low level of income as a result of low production which is due to the inadaptability of the capital to the production structure, especially, to the demands of the market. In this case, the cost of restructure and upgrading technology of enterprise amplify the cost of production for economic goods, which confers a disadvantage of the product comparatively to the price of the best cutting edge product on the market; the demand of consumption in the ex-communist countries is higher- as a result of the interdictions of the communist years which supports import, to the detriment of adjustment of national production to the new conditions of internal demand, without mentioning the external demand; to the differences and deficiencies of the educational system of the urbane and rural environment that encourage low labour incomes.

Low productivity in Romania is an effect of using improperly the capital and the capacities of production, respectively, the irrational use of the production factors, as a result of an insufficient investment flow to the insufficient requirements of growth and development.

In Romania, the lack of correlation between payment and labour productivity stands for an institutional deficiency that affects substantially the degree of society development on long term. There are more factors that generated this economic paradox:

- ✓ Weight of available labour force on jobs as a result of insufficient development of market economy – economy in Romania has not reached that level that allows resources meet the requirements of internal and external market. This fact leads to the impossibility of reaching that level of production that satisfy the requirements of the market on the one hand, and generate incomes that meet these needs, on the other hand.
- ✓ Lack of strategy in allocating public resources- in Romania, the correlation between the economic resources already existent and their possibility of creating financial resources, obviously in relation with other factors of production, such as labour and capital, is ignored. That explains why agriculture, the highly advantaged branch of economy, even the most advantaged one, is not properly valued in order to increase the level of production and to cover as much as possible the demand, due to the lack of an investment strategy, the maintenance of a low degree of development in infrastructure or the indifference towards the labour force training in rural environment. Low interest in exploring the domestic economic potential which is the main cause of low competitiveness in economy, in terms of external market..
- ✓ Weak or insufficient professional training of the labour force in order to decrease the costs of labour as a factor contributing to productivity growth; on the other hand, to increase labour productivity, the degree of labour technology is also taken into consideration.
- ✓ Low domestic products penetration on external markets. The opposite effect of external products on the domestic market deepens the economic deficit. Another effect is the decrease of the selling price for the economic goods, which generates low labour remuneration.

Conclusions

The low labour income cannot support the development of that certain society, the population not having the financial resources necessary for human capital, the main factor of production; the processes of accumulation and preservation of human resources are deficient. And, however, the low costs of the labour force are a competitive economic advantage which attracts foreign investments generating economic growth and development. It seems that the low level of income discourages labour force, respectively contributing to the decrease of productivity, so it affects negatively the economic growth. It is unlikely to progress under the circumstances of a low remuneration that does not cover all the basic needs of the people of our times. Perhaps one of the biggest misconceptions about recent growth in Romanian economy is that consumption and investment was the principal driver behind it. Embodied as the notion of a so-called wealth effect, the misconception is so deeply entrenched that its internal contradictions are overlooked and alternative views are simply ignored. As it is, this misguided thinking is used in diverse settings to (mis)interpret economic conditions. For it is only investments that find their way into productive activities, especially in manufacturing, that can bring sustained boosts to an economy. Consumer spending is not a key indicator, as many have portrayed it. Without an increase in real earnings brought about by rising real income from increased productivity, an economic boom on the back of consumption will be an illusion.

In most instances, consumption is the result rather than the cause of growth. An exception occurs when promiscuous central-bank policy causes excessive expansion of credit. But this can only create an artificial and temporary sense of increased prosperity that eventually is brought to an end either by a bruising round of inflation or an overexpansion that leads to a collapse in profitability.

References

- Cristina Balaceanu, *Sequential approach of the Romanian economy before and after accession*, Universitara Publishing House, Bucharest, 2010
- Gilbert Abraham Frois, *Economics*, Humanitas Publishing House, Bucharest, 1998
- M. Keynes, *General Theory of Employment, Interest and Money*, Stiintifica Publishing House, Bucharest, 1970
- Richard Lipsey, K. Alec Chrystal, *Positive economics*, Economica Publishing House, Bucureşti, 1999

ROMANIA'S MACROECONOMIC ACHIEVEMENTSFOR JOINING THE UNIQUE EUROPEAN CURENCY

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Abstract

The Romanian government has announced plans to join the eurozone by 2015. Currently, the leu is not yet part of ERM II but plans to join in 2010-2012. The economic advantages of the monetary union grow with expansion of the Euro zone. There is also a high level of skepticism; the main fear about the Euro is the inflation –that is considerable promoted by the Euro currency's exchange rate in comparison with 2002; another restraint is due to member states inability to establish their own interest rates. The IMF arose the option of joining the Euro zone criteria relaxing. A one-sided Euro's joining was suggested by International Monetary Fund on March-April 2009, in a confidential report mentioned by The Financial Times as the emergent states in Central and Eastern Europe to be able to pass to the unique currency, but not being represented in the Central European Bank Board. By its side, CEB considers that emergent states of the European Union must not pass to the unique currency unilaterally, because such a fact could under-mine the trust in Euro currency worldwide. This option would hardly deepen the macroeconomic controversies inside the Euro zone and would contradict the previous conditions already imposed. An acceptable solution could be the fastening of emergent countries joining the Exchange Rate Mechanism 2, after they are aware of risks arisen by such a step. The European Commission endorses in the Convergence Report on 2010 that Romania doesn't meet any criteria needed by passing to the unique European currency, respectively: prices stability; budget position of the government; stability of exchange rate; interest convergence on long run and there are also law impediments. Our paper discusses arguments for a faster passing to the Euro currency versus arguments for a late joining the Euro currency in Romania.

Keywords: *Euro currency, the economic depression, stability of exchange rate, monetary policy, the financial depression.*

Introduction

Theoretical foundation of optimum currency area (OCA) was pioneered by Mundell (1961) and further developed by McKinnon (1963), Kenen (1969), Tavlas (1993), Bayoumi and Eichengreen (1996) and others. Frankel and Rose (1996), found a strong positive relationship between business cycles correlation and trade integration as the participation to a currency union increases the integration of collateral trade which lead to greater business cycles synchronization; Beside the nominal convergence criteria, the states who want to join a monetary union have to take into consideration also the real convergence criteria: business cycle synchronization, demand and

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supply shocks correlation, market flexibility, etc; Among OCA's properties business cycle synchronization features prominently; Synchronization of Business Cycles: Artis and Zhang (1997,1999), Artis (2003), Darvas and Szapary (2004),Massmann and Mitchell (2003), Fidrmuc and Korhonen (2006);Demand and supply shocks correlation: Blanchard and Quah (1989) and further Bayoumi and Eichengreen (1992), Frenkel and Nickel (2002), etc; The theory of optimum currency areas tries to identify more exactly thereport between the benefits and costs and the opportune moment of entrance in a monetary union. The pioneer of this theory is Robert Mundell (1961):"The Theory of Optimum Currency Areas", American Economic Review 51 (September 1961), pp. 717 – 725, a classic paper. What seemed to be a utopia in 1961 became a reality in 1999. „The European states may agree on a simple act […], they may establish a currency authority or a central bank. This is a possible solution, and may be even the ideal solution. From a political point of view, it is very complicated, almost utopian." R. Mundell (1973).The optimality of a currency area is defined within the terms of certain properties (criteria), among which the economic integration of the member states, the mobility of the factors of production, the similarity of the production structure. According to a definition, it is optimum for a country to adopt the currency of the monetary union if the benefits associated to this decision exceed the costs. There is an extremely wide literature with respect to the optimum currency areas, but all articles and books in the field are focused on the manner in which a country may assure the internal stability with the policies remained available after the loss of the monetary autonomy and the rate of exchange policy. This literature refers to the possibilities of insuring a macroeconomic balance (internal and external balance) after an asymmetric shock, namely a shock which affects a country of the union, but not the others. The internal balance refers to bringing the unemployment rate to the level of the natural rate and to the insurance of economic increase. The external balance refers to assuring the balance of payments, seen as balance equilibrium This paper has the merit of elaborating a synthesis of the evolution of the concept of unique currency, as well as the assessment of the performances of the countries which adhered to the Economic and Monetary Union from the point of view of the mechanisms of operation of their economies. It also deals with the steps necessary for a careful preparation of adopting the unique currency by Romania, the efforts and the progresses made by our country in the process of macro stabilization, the main directory lines of the monetary policy in the last years and last but not least a careful assessment of the impact and implications of adopting Euro in Romania

Paper content

1. Economic advantajes of the euro zone 's extension

The Euro currency is public assets, bringing many advantages to envolved countries. This removes the exchange rate risk for the member countries, by diminishing the interest rate, and allows to those countries to benefit by the advantage of prices stability, the basic purpose of ECB. Also, it creates the conditions for an integrated market, a liquid and compact one, among the participating countries. Once the expansion of Euro zone is done, more EU member states will enjoy these advantages. Much more, some of the advantages of the monetary union, as removing the incertainity of exchange rate, are higher. A currency exchange will not be needed, nor the payment of added taxes for that transactions in the countries inside the Euro zone. Although, to achieve the maximum potential of these advantages, a country must be prepared for passing to Euro currency. The stage will be evaluated on the Maastricht convergence criteria basis.Member States of Euro currency zone gain from being parts of a wider currency block. It is more difficult, for example, for those that speculate to make a quick profit from currency exchange and by this

way to remove a great part of pressure affecting the value. A trip in Euro currency zone countries is easier for the EU citizens, with no currency exchange expenses. Also, it's an easier task to compare the prices of goods and services, contributing to a better home market work and suporting a healthy competition, with benefits for consumers.The economic and prices stability as a whole brought by Euro currency is benefic for entire economic environment, from individuals to large companies.

2. The skepticism about the euro currency zone

The main fear about the Euro is the prices inflation –that is considerable promoted by the Euro currency's exchange rate in comparison with 2002. An average citizen could be able to face the conversion from previous currency into Euro. But only those that are systematically registering the prices have a clare vision upon changes of prices for a large quantity of goods. In this context there is another phenomenon: as the use of previous currency was longer, as the sensation that prices grew is stronger. The reason is that the actual prices in Euro are compared with former prices. Often it is neglected the fact that the previous currency would generate higher prices because of inflation. The most frequent restraint is due to member states inability to establish their own interest rates. The member states incapacity to modify interest rates means that they can't decrease the interest rates unilaterally to encourage the investments or to grow them to stimulate savings. A unique European currency means a European unique monetary policy and that needs answers to several questions.

3. Opinions concerning a faster pass to euro currency in the context of economic depression

3.1. One-sided pass to Euro currency

A one-sided Euro's joining was suggested by International Monetary Fund on March-April 2009, in a confidential report mentioned by The Financial Times as the emergent states in Central and Eastern Europe to be able to pass to the unique currency, but not being represented in the Central European Bank Board. According to the report, such a fact would solve the problems of off-shore debts of those countries and would take-off the incertitude on markets in the region. The European Commission rejected the information suggesting that the report is overfulfilled and said that European Union took several decisions to help the Eastern Europe countries to pass the financial depression. The Central European Bank considers that emergent states of the European Union must not pass to the unique currency unilaterally, because such a fact could under-mine the trust in Euro currency worldwide. This option would hardly deepen the macroeconomic controversies inside the Euro zone and would contradict the previous conditions already imposed. An acceptable solution could be the fastening of emergent countries joining the ERM 2, after they are aware of risks arisen by such a step. Entering in ERM 2 means to take the responsibility to keep a stabile exchanging course for a determined period, but this implies risks. For the countries that are targeting the exchange rate (the Baltic states and Bulgaria) the perfect solution is to pass to the Euro zone as soon as possible, but they don't fulfil the conditions for that. For those four countries at least, a one-sided pass to Euro currency could be a solution. Those countries would not be accepted as full-members of the Euro zone, would not take part to political decisions of the Euro zone, could not rise funds from Central European Bank and would not affect the statistics of the Euro zone, but they would remove the exchange rate risk and would be members of a liquid Euro market. Their main next purpose would become to be promoted from the position of semi-member to that of full-member inside the Euro zone. In a way, a one-sided pass to Euro currency could discredit the joining rules; in the end, these countries will pass to Euro currency

taking upon themselves all the risks and pay for them from their own reserves. Some analysts consider that by this way the costs would fall for all the European Union countries. The other four applicant countries for the Euro zone (Czech Republic, Poland, Romania, Hungary) are the greatest economies in the region, and their size makes the sudden change of national currency a more risky, more complex and less realistic process. Their floating exchange rate regim makes the change vulnerable to speculations. Although some advantages would be for Romania (removal of exchange rate risk), as long as there are not fulfilled all the criteria for convergence, more riks appear, generated by the inadecvate macroeconomic statement for this approach.

3.2. Change of criteria for passing to the Euro zone

On the background of the new economic depression it was arisen the problem of *relaxing criteria* for passing to the Euro currency. Western countries' leaders gave different answers during discussions refering to this subject. Although leaders as Angela Merkel (Germany's Cancelor, a country considered the most uncompromising about respecting the passing rules to the Euro currency) considered that the decision concerning *pre-joining period* could be re-examined, the criteria of passing to the Euro zone were not modified. Most leaders reject the idea of more flexible criteria that are limiting the level of budget deficit, public debt and inflation. Behalf of the Czech Presidency of the European Union, MirekTopolanek declared that there is a wide consensus among the 27 members of the Union upon the fact that would be an "error the play rules to be changed at this moment". Several leaders of the EU countries said they agree an acceleration of passing for the East European countries, but they don't discuss about relaxing criteria, nor exceptions to the rules. Fulfiling criteria also means to ensure the sustenability of nominal convergence indices. Lithuania had been refused to join the Euro zone on 1st January 2007, because it didn't fulfiled the criterium about prices stability in the referred year and the inflation rate surpassed the accepted level. Although the inflation rate is a moving target, known *post factum*, it was considered that a sustenable inflation low rate is not enough, implying many risks.

4. Eu member states and passing to euro

The less member states non-members of the Euro zone can join the Euro zone faster than greater countries. Estonia, Lithuania and Slovenia joined to ERM 2 on June 2004 (less than two month since the moment of their adjoining to EU), and in May 2005, Cyprus, Malta and Latvia made the same thing. The Baltic states are preparing to pass to the Euro zone as soon as the economic conditions will permit them to. At the begining these countries planed to be ready for passing to Euro in 2007-2008. All of them are fighting to fulfil the inflation criteria seriously and also the need of re-considering the national targets being realistic. The non- EU micro-states as Vatican, San Marino and Monaco, passed to Euro as a part of the union with states they are involved to, EU members. Andorra, Montenegro and Kosovo passed to Euro zone one-sidedly. On contrary, although Slovakia entered the ERM 2 in 2005, it seems to be accepted not very soon, while bigger states as Bulgaria, Czech Republic, Hungary, Poland and Romania still didn't that. Czech Republic and Hungary planed to pass to the Euro zone in 2010, and both of them have now a delay and didn't proposed a new date. Poland has no official date-target yet for passing to Euro currency. Bulgaria proposed its dead-line for 2010 but certainly will be a longer time to wait, as long as Romania seems to pass to the Euro zone about 2014.The public opinion of some new entered countries into the EU is changing. Many citizens feel that the benefits of a member statement could be seen very few. They are very suspicious about finding themselves into a way to get a stable position about the limiting economic policy that seem be represented by the Economic Monetary Union. They can see the most of economies inside the Euro zone fighting for economic growth, as long as their own economies had been growing faster some years ago. If the main

performance for the new accepted states is to reach the same economic performances as older states into the Union, as fast as this is possible; so it arises the question: why such a rush to impose more difficult economic policies, that make these tasks more and more difficult. The new member states could see that the older ones dislike to suport them to develop, being afraid of their potential competition in the future. Much more, some new member states feel that economic criteria required are more strictly imposed than the already adopted Economic Stability and Growth Reformed Pact that is working now.

5. Romania' way towards the euro zone

5.1. Analyse belonging the Convergence Report – May 2010

Romania doesn't fulfil any criteria for passing to unique European currency, it is said by the European Commission in its Convergence Report on 2010, respectively: prices stability; budget position of the Government; stability of exchange rate.Convergence of interest on long run, but also faces law obstacles. Behind the *economic problems*, as a too high inflation or rather high variations of national currency during the last two years, due to the economic global depression, *Romania also has legislative problems.*The Commission considers that the law referring to the statement of National Bank of Romania is not aligned to European standards yet, neither concerning the independence of institution, nor about the interdiction to grant loans to financial institutions, excepting "the rescue aid". Strictly referring to economic criteria, the Commission emphasizes that Romania had a too high rate of inflation since 2007, the year of joining EU, to present day, for passing to the Euro zone. Actually the procedure for excessive deficit is started by the Commission against Romania, the dead-line for reducing the deficit below 3% of GDP being 2012. The deficit was 5.4% for 2008 and rose to 8.3% for 2009. For this year the deficit is estimated to 8% of GDP. Another problem is the public debt that will rise from 30.5% this year to 35.8% of GDP for the next year. Although the Joining Treatise stipulates that the maximum level of the public debt could be 60% of GDP, the economists consider that Romania can't afford such a big debt, its economy being rather weak. Romania doesn't seem for a moment being interested in joining the Euroland in 2015 as it was predicted, a more reasonable horizon being 2018. Actually it is not known if the costs of passing to the unique currency could be higher than the future benefits. We need an anchor like passing to Euro currency, but it is better to look realistically. For an economy with such sized GDP, the Euro currency "umbrella" could offer protection.

Table nr.1
Arguments for a fast passing vs. Arguments for a late passing to Euro currency in Romania

Arguments for a fast passing to Euro currency	*Arguments for a late passing to Euro currency*
Faster benefits due the exchange rate disappearance, implying a sustenable economic growth stimulation.	Delaying in structural reforms implementation would have negative effects on long run if the passing to Euro currency is made too soon.
Actually we have a high exchange rate risk due to the high level of indebting in foreign currency (the exchange rate could be sooner a propagator of shocks than an instrument for adjustment).	High inflation pressures – low potential for prices convergence.
The delay could lower the motivation for making structural reforms.	A low correlation of Romanian economic cycle with that of the Euro zone; the synchronization

	of the business cycle is a pre-condition to diminish the asymetric shocks risks.
The actual essemby of policies would continue to be stimulated.	The low sustenability of the public finance – a high pressure on expenses and a very low level of budget rises.
The trade affairs with the Euro zone would make possible a faster passing technically.	A different structure of economy.
	The low level of the real convergence (GDP per capita).
	Difficulties on the labour market.
	A longer independence for monetary policy and exchange rate.
	It would facilitate the progress of real and nominal convergence.

5.2. Possiblescren-plays for Romania's passing to Euro currency

5.2.1. A delay on long run for passing to Euro currency

(1) Advantages

A longer period to fulfil the structural adjustments still not made

A better progress of real and nominal convergence

The synchronization of the business cycle in Romania with that in the Euro zone countries (pre-condition to diminish the asymetric shocks risks).

A longer independence for monetary policy and exchange rate

(2) Disadvantages

Higher transacting costs together exchange rate risks, that could inhibit investments and economic growth

The possibility to delay some structural reforms and to relax the macroeconomic policies (mainly in fiscal and salary fields) if a long run is decided for passing to the Euro currency

The unclear message given to international capital markets, the delaying could be atributed to some structural or economic policy weakness, hard to be seen by investors

5.2.2. An accelerated passing to Euro currency on a short run

(1) Advantages

Faster benefits due the exchange rate disappearance, implying a sustenable economic growth stimulation

Lowering motivations for relaxing the rhytm of structural reforms

Stimulating the consistency of macroeconomic policies assambly

(2) Disadvantages

The loss of monetary and exchange rate independence would move the pressure of structural adjustments to the economic activity and labour market, in the actual condition of a limited flexibility of Romanian economy

The lack of synchronization between Romanian business cycle and the Euro zone countries would increase the risk of asymetric shocks, very difficult to be controlled without independent monetary and exchange rate policy

The difficulty to find a representative central parity for a stable exchange rate Leu/Euro, that could delay on long run the belonging to ERM2

A higher probability to act the Balassa-Samuelson effect in the first part of the economic adjustment process after the moment of joining EU, it having cosequences upon targeting inflation and/or the national currency growing up

A limited period to finish the target inflation effectiveness as a monetary policy

A passing to Euro currency would remove the exchange rate risk, and lower the costs for firms in commercial activities, that meaning a higher stability for Romanian economy. But the exchange rate decided at the moment of passing is very important; a low rate for Leu means an increasing in prices. On the other hand, the salaries couldn't grow easily, and the National Bank of Romania couldn't decide the interest rates and the inflation would be hardly controlled. But, the purpose of passing to Euro currency remains an available improvement for the future coherent policies.

Conclusions

The papers offers a short in time to the idea of monetary unionwhich allows us a more objective appreciation of the political dimensions of themonetary unions, approaching with accuracy the history and the bases ofcreation of the European Monetary System (SME) and especially the political andeconomic context of the time. There are presented the basic elements of SME, the stages and effects of UEM incorporation.Thepaper presents the European integration regarded synthetically, which is reduced to the incorporation and use by the members of the monetaryunion of the unique currency, which replaces the national currencies. "The currency is a macroeconomic phenomenon, and by this a political phenomenon", the monetary integration is therefore, in its essence, an integration from thepolitical perspective. The currency, regarded as institution, has a social-politicalnature and relies on the "trust of the agents in the system which proposed and warrants it". From a functional perspective, the currency fulfils the role of unique tool of transactions, of reserve, of valueand cash or of value standard. The institution of unique currency – EURO – is a synthetic expression of European monetary integration and the visible sign of the European Monetary Union. EURO imposes the formation of the consciousness that all members of this union belong to a sole monetary space and compels the citizens of the member states of the Union to acknowledge it as material form of the right of obtaining by it a part of the goods and services offered for sale on the territory of the Union. Robert Muldell, the author of the theory of „optimum currency areas", stated that Euro would be a factor of understanding, prosperity and peace. Is presented the evolution and the impact of adopting Euro. The creation and acceptance of the unique currency, was without any doubt an act of trust in Europe, and at the same time a challenge in the context of global economy. All changes generated by the passing to unique currency wereincurred for the increase of the capacity of competing in a globalization economy, the passing to Euro being favoured by the economic stability whichallowed the subsequent development of he member states, without the risk of inflation.is presented the impact of creating the unique currency Euro TheEuro currency was a protection wall before the financial crisis, registering an increased interest of the countries of the European Union (UE) which were not convinced of the importance of a unique method, as Denmark and Sweden, as well as of Iceland, which is not even a part of the communitarian block. "During this period of crisis, Euro protects the companies in front of volatilisation of the rate of exchange, which affected them strongly during the previous periods of recession", stated the president of the European Committee, Jose Manuel Barroso But Euro has other advantages as well. Being the second global currency, after dollar, the European unique currency - in which are denominated 27% of the global currency reserves – is considered as important as the dollar and yen on global plan and allows the avoidance of some monetary crises. However, the Euro area shall be affected by the adverse representation oninternational plan, not having individual representatives within the internatio-

nalorganisations, such as the International Monetary Fund or the Group of Seven (G7). A special attention is paid to the manner in which Romania was situated in the process of preparation of adhering to the European Union, by stating the advantages and costs of this demarche. The quality of EU member has a major impact on our country with respect to the economic, political and social dimensions. The economic implications shall be preponderant, but radical mutations shall also be registered in the political, security, social and cultural fields. From the political perspective, the mechanisms of taking decisions shall have to be reconfigured, in the sense of a transfer of competences to the communitarian institutions. At the same time, Romania shall benefit of the possibility of participating, within the Union, to the collective complex decisional processes, having thus the possibility to promote and protect, better, its own interests. The development of the economy shall not be performed homogenously between the economic sectors, since there shall always be relative losers and winners. The introduction of unique currency raises problems of strategy and tactic for the economy of Romania. It is accepted the idea that Romania is interested and preoccupied of the future of Euro in the international system of payments and, as a reserve currency, of the evolution of Euro- American dollar rate of exchange, of the connections which may be established between leu and Euro. Euro involves a series of modifications both in the global economy and in the Romanian economy. “All the people agrees that the occurrence of the sole currency shall involve transformations of historical importance, but also that our possibilities of anticipating the nature of these transformations are extremely limited”.(Romano Prodi, “A vision on Europe”, 2001). The paper confirms some previous results in the literature, concerning the quantitative and qualitative properties of the business cycles which vary across detrending techniques by extracting different types of information from the initial data (Canova, 1998). Most of the CEECs showed a certain tendency to move toward higher synchronization level, especially during 2004-2008, however Romania, Hungary and Bulgaria still register the most reduced business cycle correlations among CEECs. This study support strong correlations between the GDP cyclical component of the Baltic States and Euro zone after 2004, explained by the collapse of trade with Russia and reorientation toward Western countries. The study support also the endogeneity hypothesis of the optimum currency area criteria which tells that a common market intensifies the bilateral trade with impact on higher business cycle synchronization degree. However, we observe the clear impact of the financial crisis on the last analyzed subperiod, where all the correlation coefficients increased significantly as most of the countries faced strong GDP contractions. Demand shocks for most of the countries included in the study, are negatively correlated with few exceptions (France and Poland), while supply shocks are positive and strong for France and Poland, while for Germany and Italy is negative and seems relatively week. In Romania’s case, demand disturbances are negatively correlated with the Euro zone and are quite significant for the analyzed period; supply disturbances are important and positive due to the different policies and exchange rate regimes in time. The major result of our paper is that, Romania as well as others CEECs countries still need time to progress and to real converge toward Euro zone, in order to reduce the costs of loosing the monetary and the exchange rate policy independence.

References

- Artis, M. J. and W. Zhang (1997), “International Business Cycles and the ERM”, *International Journal of Finance and Economics*, vol. 2 no.1, 1-16;
- Artis, M. J. (2003), “Analysis of European and UK business cycles and shocks”, *EMU study HM treasury*;

- Bayoumi, T. and B. Eichengreen (1992), "Shocking aspects of European Monetary unification", *NBER Working Paper Series*, no. 3949;
- Baxter, M. and R.G. King (1995), "Measuring Business Cycles: Approximate Band-pass Filters for Economic Time Series", *NBER Working Paper Series*, no. 5022;
- Baxter, M. and M. Kouparitsas (2004), "Determinants of Business Cycle Comovement: A robust Analysis", *NBER Working Paper Series*, no. 10725;
- Blanchard, O. J. and D. Quah (1989), "The Dynamic Effects of Aggregate Demand and Supply Disturbances", *The American Economic Review*, vol.79 no.4, 655-673;
- Canova, F. (1998), "Detrending and business cycle facts", *Journal of Monetary Economics*, vol.11 no.3, 475-512;
- Cooley, T.F. and M. Dwyer (1998), "Business cycle analysis without much theory: A look at structural VARs", *Journal of Econometrics*, 83, 57-88;
- Christiano, L.J. and T.J. Fitzgerald (1999), "The Band Pass Filter", *NBER Working Paper Series*, no. 7257;
- Darvas, Z. and G. Szapary (2004), "Business Cycle Synchronization in the enlarged EU", *Magyar Nemzeti Bank*;
- Égert B,(2007)-*Real Convergence, Price Level Convergence and Inflation Differentials in Europe, Working Papers 138, OesterreichischeNationalbank, Viena*
- Erste Bank (2009)*Special report – Growth after the crisis*
- Fidrmuc, J. and I. Korhonen (2006), "Meta-analysis of the business cycle correlation between the euro area and the CEECs", *BOFIT Discussion Paper, Bank of Finland;*
- Frankel, J.A. and A.K. Rose (1996), "The endogeneity of the Optimum Currency Area Criteria", *NBER Working Paper Series*, no.5700;
- Frenkel, M. and C. Nickel (2002), "How symmetric are the shocks and the shocks adjustment dynamics between the Euro Area and Central Eastern European Countries?", *International Monetary Fund Working Paper* no. 02/222;
- Harding, D. and A. Pagan (2002), "Dissecting the cycle: a methodological investigation", *Journal of Monetary Economics*, no. 49, 365-381;
- Hodrick, R.J. and E.C. Prescott (1997), "Postwar US business cycles: An empirical investigation", *Journal of Money, Credit and Banking*, vol. 29 no.1, 1-16;
- Inklaar, R. and J. Haan (2000), "Is there really an European Business Cycle?", *CESIFO Working Paper* no. 268;
- Inklaar, R., J. Haan and R. Jong-a-Pin (2005), "Will Business Cycles in the Euro Area Converge? A critical survey of empirical research", *Journal of Economic Survey,* vol. 22, no.2, 234-273;
- Krugman, P.R. (1991), "Geography and Trade", *MIT Press: Cambridge*;
- Massmann, M. and J. Mitchell (2003), "Reconsidering the evidence: Are Eurozone business cycles converging?", *Journal of Business Cycle Measurement and Analysis*, vol.1, 275-307;
- Mundell, R.A. (1961), "A theory of Optimum Currency Areas", *The American Economic Review,* vol. 51, no.4, 657-665;
- Tavlas, G.S. (1993), "The new theory of optimum currency areas", *The World Economy*, 663-685;
- Zarnowitz, V. and A. Ozyildirim (2002), "Time series decomposition and measurement of cycles trends and growth cycles", *NBER*2009 *Working Paper Series,* no. 8736;
- The World Bank EU10 (2009) *Regular Economic Report*The EU's response to support the real economy during the economic crises*: An overview of the Member States' recovery measures,* European Economy, Occasional Paper no 51,

FROM EXTERNAL DEBT TO ECONOMIC GROWTH … AND BACK

Oana Simona (CARAMAN) HUDEA[*]

Abstract

This paper is meant to trace the relationship existing between external debt and economic growth for 109 countries spread all over the world. We have resorted for this study to cross-sectional data, the economic modelling being simultaneously made for a three-year period. After having constructed four models and after having estimated them by econometric techniques, we have selected the most appropriate of them, which is in fact the version to be build upon within future personal studies. The results indicated as optimum the model including GDP in logarithm as endogenous variable and total external debt in logarithm and development level dummy as exogenous variables. The analysis revealed a positive relationship between external debt and economic growth, indicating that the threshold above which the indebting influence on the economic performance should become negative has not been reached yet. The coefficients obtained within the estimations performed, construed as elasticities, show that, while GDP is inelastic in relation with debt, the latter has a supra-unitary elasticity, therefore its modification being ampler than the GDP one.

Keywords: *economic growth, external debt, impact factors, estimates, economic modelling*

1. Introduction

This study, based on an analysis made on 109 countries, for a three year period, that is 2006, 2007 and 2008, with annual data, is meant to reveal several important issues on the economic growth phenomenon and to analyse some of its main influencing factors.

According to the economic theory, economic growth represents the increase of the real GDP from a period to another one and reflects the living standard and well being of a society. This is the reason why it is highly important to identify the key elements with major impact on economic growth and to determine the type of relationships established with each and every single such item, so as to provide accurate arguments for a ground development of a nation. The said factors cover a large range, comprising, among others, without limitation, investments, unemployment rate, budgetary deficit, exports, imports, governmental expenses, external debt or population increase. Given their significant number, we have decided to take them separately and to further render our analysis increasingly complex in subsequent studies.

Therefore, we have started, by resorting to only one item, save for GDP, meaning external debt, taken consecutively as exogenous and endogenous variable. Subsequently, we have separately added two dummies, one relating to the geographical layout and the other one to the level of development of the analysed countries. After having taken into account various facets of

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the issue, as seen hereinafter, the following equations have been subject to econometric estimations:

$$\log_{gdp} = \alpha + \beta * \log_{dat} + \varepsilon$$
$$\log_{dat} = \alpha + \beta * \log_{gdp} + \varepsilon$$
$$\log_{gdp} = \gamma + \delta * \log_{dat} + \theta * d_1 + \varepsilon$$
$$\log_{gdp} = \gamma + \delta * \log_{dat} + \theta * d_2 + \varepsilon$$

The relationship between the economic growth and the external debt of a country is, basically, negative, considering the opportunity cost relating to the money exit out of the country due to the debt service, this rendering non-achieved potential investments. Yet, there is an inflexion point in this relationship graphic, an optimum level up to which the external debt has a positive influence on economic growth by the increase of the investments funds acquired as result of the external credit contracting. In this case, it is important to see whether the investment yield is sufficient to cover the long-run debt service rate, so that the leverage should not reverse once the reimbursements begins. In order to achieve a positive impact of the external debt on growth, an efficient and comprehensive debt strategy is absolutely necessary.

In view of rendering this paper as clear as possible, we have decided to structure it into six sections, as follows: Introduction in section 1 (the current section), a brief Literature Review which appears in section 2, followed by the description of Data in section 3, the presentation of the Methodology and Empirical Results in section 4, Conclusions in section 5 and, finally, Suggestions for Further Research in section 6.

2. Literature review

The external debt – economic growth relationship has been lately focused on by many economists interested in discovering the type of correlation existing between such variables. Savvides (1992) resorted to a TSLDV method, applied on cross-sectional time series for 43 less developed countries, over a six year-period (1980-1986), in order to render the negative connection between these two variables. In his opinion, the obligation of a country to pay its foreign debt seriously affects its economic performance, as a large part of its output increase should be directed towards its debt service and creditors, the debt overhang acting as a marginal tax rate on that country and lowering its investment returns, while negatively impacting on its domestic capital formation.

A negative influence of foreign debt on growth is also rendered by Elbadawi et al.(1996) whose analysis is based on cross-section regressions for 99 developing countries spanning SSA, Latin America, Asia and Middle East. They underline the indirect effect of external debt on a country's economic performance, via the impact of the former on the public sector expenditures. While the financial standing becomes increasingly precarious, governments assist to the diminishing of their resources and, subsuquently, to the cutoff of their public expenditures, thus leading to a desrease in GDP.

Clements et al. (2003) made appeal to both fixed effects and system GMM, based on data for 55 low-income countries classified as eligible for the IMF's Poverty Reduction and Growth Facilitiy, for the period 1970–1999. Their study is directed towards the analysis of the channels via which external debt affects growth in those countries. The authors indicate that a significant decrease of the external debt of heavily indebted poor countries would directly increase per capita

income growth with about 1% per year and indirectly contribute to economic growth by their effects on public investments.

Patillo et al. (2002, 2004) examined the relationship between the total external debt and the GDP growth rate for 61 developing countries, for the period 1969-1998. They found out a backward bending growth curve with a debt-growth positive relationship at low levels of national debt and negative relationship at high levels. This shows us that the effects of debt-overhang are likely to occur only after a certain threshold has been reached.

Schclarek (2004) used panel data for 59 developing countries and 24 industrial countries, with data averaged over each of the seven 5-year periods between 1970 and 2002 (1970-74; 1975-80; etc.), applying the GMM dynamic panel econometric method. The study revealed a negative and significant relationship between total external debt and economic growth for developing countries. After having divided the total external debt into public and private external debt, a negative relationship has resulted between public external debt and growth, and no significant relationship as for private external debt.

Hameed et al. (2008) studied the long-run and short-run relationships between external debt and economic growth for Pakistan, by resorting to annual data for the period 1970-2003. They identified that the debt service ratio tends to adversely affect GDP and therefore the economic growth rate in the long-run, which, in turn, diminishes the country's capacity to service its debt. Also, the estimated error correction term indicated a significant long-run causal relationship among the said variables. As a whole, the results evidenced both a short-run and long-run causal relationship running from debt service to GDP.

An impressive analysis is made by Reinhart and Rogoff (2010) who selected 44 countries over around 200 years, collecting about 3,700 yearly observations. They found out that the relationship between government debt and real GDP growth is weak for debt-GDP ratios below a threshold of 90% of GDP, while, above 90%, median growth rates fall by 1%, and average growth falls considerably more. As regards the emerging markets, there are lower thresholds for public and private external debt: when external debt reaches 60% of GDP, annual growth decreases by about 2%; for higher levels, growth rates are roughly cut in half.

3. Data

In order to study the above mentioned phenomenon, we have selected the data described below:

- The economic performance (log_{gdp}) - expressed by GDP at PPP in USD, annual series taken over from UNO database.
- The indebting (log_{dat}) - represented by the credits contracted by the authorities and economic agents from the banks reporting to IRB, corrected by the implicit index for passing to PPP standard, for comparability. These data have been annualised (given that the external debt series is quarterly) and they have been taken from UNO and IMF databases.
- For the third model, a dummy variable (d1) has been defined, as follows:
  d1 = 2, if the country is located in Europe
  d1 = 1, if the country is located in North America or Asia

d1 = 0, if the country is located on another continent

- For the forth model, a dummy variable (d2) has been defined, as follows:
  d2=0, if the country is less developed
  d2=2, if the country is developed.

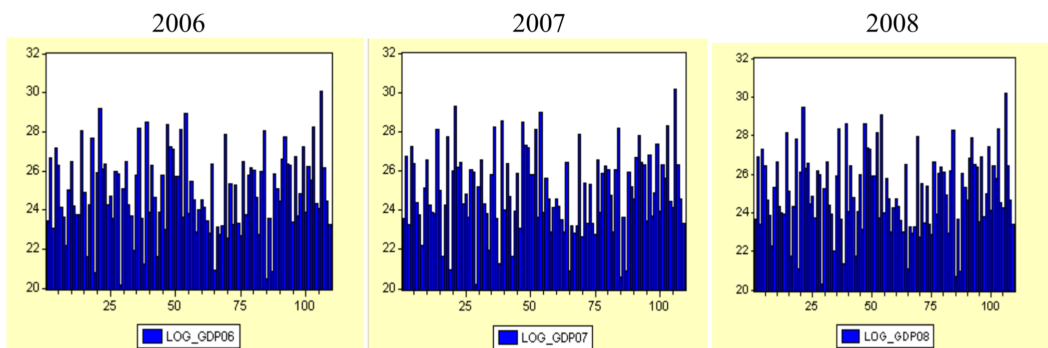
Such classification has been made according to the data collected from the World Bank official site.

The data correspond to the years 2006, 2007 and 2008 and refer to the economic standing of 109 countries. Within the estimations performed, the series have been used in logarithm, so as to attenuate the size-related differences between the values of the variables for the selected countries.

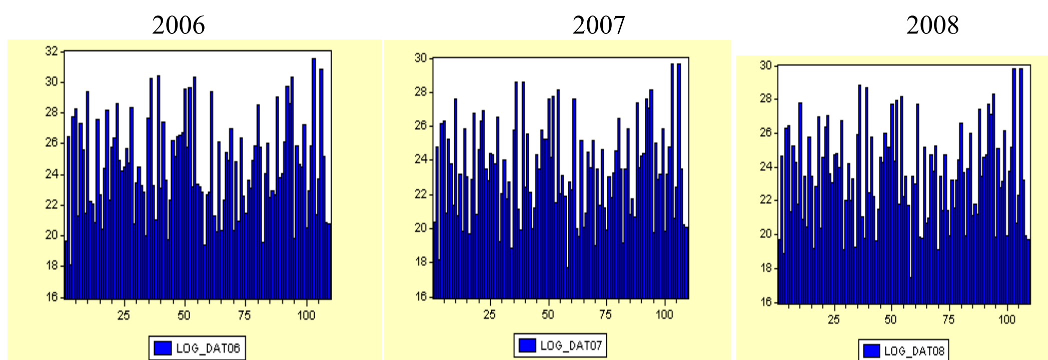
4. Methodology and Empirical Results

4.1. Data Descriptive Analysis

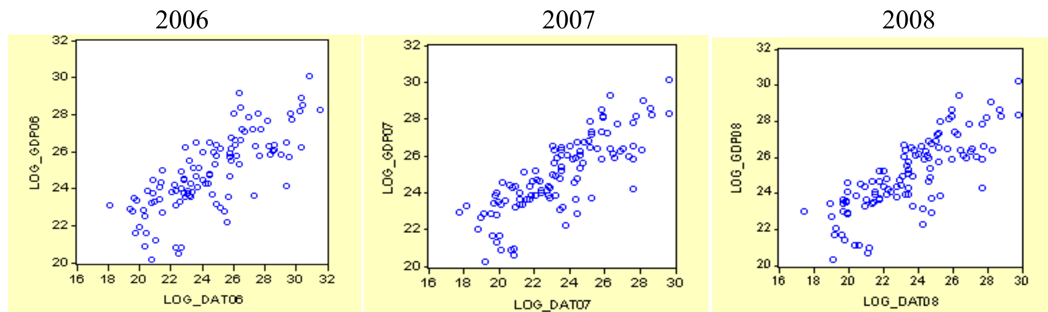
The graphic representation of the gross domestic product and of the external debt reveals the major differences between the analysed countries, even if these have been partly compensated by the logarithmic transformation performed. As for GDP, the differences indicate the distance separating the well developed countries from the poor ones.



Such significant differences are also obvious in the case of the external debt series and look like remaining quite unchanged for the whole analysed period. We specify that this series is adjusted with the implicit index for passing to PPP standard and it comprises both external public debt and external private debt.



The dot plot graphic indicates a quite significant dispersing of values, but it also reveals a certain trend, a positive, stochastic relationship between the two data series to be tested by OLS method.



The descriptive analysis of the two variables is separately rendered, for each of them, in Table 1.1 below:

Table 1.1 Statistic data

DEBT	2006	2007	2008	GDP	2006	2007	2008
Mean	24.55952	23.40943	23.54578	**Mean**	24.88958	24.96721	25.05848
Median	24.43337	23.46045	23.45824	**Median**	24.66615	24.75479	24.87544
Max	31.55636	29.63298	29.79000	**Max**	30.09061	30.14872	30.21124
Min	18.07819	17.72692	17.49275	**Min**	20.16988	20.23551	20.30623
Std.dev	3.097767	2.753593	2.773542	**Std.dev**	2.051020	2.051408	2.046549
Skewness	0.223488	0.172115	0.131958	**Skewness**	0.046065	0.034324	0.030269
Kurtosis	2.264114	2.289877	2.287765	**Kurtosis**	2.675430	2.680631	2.678163
Jarque-Bera	3.366811	2.828412	2.620225	**Jarque-Bera**	0.516995	0.484637	0.487066
Probability	0.185740	0.243119	0.269790	**Probability**	0.772211	0.784806	0.783854

By analysing the results obtained for the external debt, we can see that the mean increases over the three-year period, but the values remain sensitively equal. Also, the difference between the series minimum and maximum strengthens the previous statements as for the rather divergent levels between the debts of the countries considered in this study.

An interesting issue is that, in 2006, the standard deviation suddenly decreases from about 2.7 to 1.7, thus indicating a tendency of the sizes of observations to come closer to one another. The values of the skewness and kurtosis indicators have values close to the ones specific to the normal distribution.

Considering that the probability of Jarque-Bera test exceeds 5%, the null hypothesis cannot be rejected, therefore the external debt following a normal distribution. As skewness is more than

zero, a slightly right deviation distribution is revealed, but its value decreases each year, thus dissipating such deviation.

As for GDP, the same increase of the mean and a significant distance between the series minimum and maximum is noticed. The standard deviation is lesser than in the previous case and it maintains all over the analysed period.

A compared to the external debt, GDP presents a positive value skewness much closer to zero, indicating an imperceptible deviation to right of the distribution graphic. The Jarque-Bera test confirms in this case too the normal distribution of the analysed series and the kurtosis values directs each year towards the normal value of 3.

4.2. Parameter Estimation

As mentioned in Introduction, we have started our study by analysing the relationship between GDP and external debt, taken successively as endogenous and exogenous variables. We have subsequently added two separate dummies, thus constructing four models to be estimated. The estimation results are rendered in brief in the tables below.

Table 1.2

$\log_{gdp} = \alpha + \beta * \log_{dat} + \varepsilon$ $\log_{dat} = \alpha + \beta * \log_{gdp} + \varepsilon$

Modelul 1	2006	2007	2008	Modelul 2	2006	2007	2008
Coeficient β	**0.504418***	**0.601439***	**0.588830***	**Coeficient β**	**1.150663***	**1.083645***	**1.081471***
Coeficient α	**12.50132***	**10.88788***	**11.19402***	**Coeficient α**	**-4.080010****	**-3.646159***	**-3.554232****
R-squared	0.580415	0.651746	0.636802	**R-squared**	0.580415	0.651746	0.636802
Adj R-squared	0.576494	0.648491	0.633408	**Adj R-squared**	0.576494	0.648491	0.633408
F-statistic	148.0141	200.2467	187.6053	**F-statistic**	148.0141	200.2467	187.6053
Prob F-statistic	0.0000	0.000000	0.000000	Prob F-statistic	0.0000	0.000000	0.000000
Akaike	3.433542	3.247588	3.284860	**Akaike**	4.258231	3.836349	3.892800
Schwartz	3.482925	3.296971	3.334243	**Schwartz**	4.307613	3.885732	3.942183
Durbin-Watson	2.024481	2.035982	1.987568	**Durbin-Watson**	1.985802	2.069626	1.992531

According to Table 1.2., in models 1 and 2, the independent variables are econometrically significant, the t-test having a computed value exceeding the critical one for a significance threshold of 5% for 109-2 observations. As for model 2, the intercept is significant for a significance threshold of maximum 10% in 2006 and 2008.

F statistics renders also high values, evidencing the correct specification of the said models and an adequate selection of the considered factors.

The determination ratio R^2 shows that the variance of the dependent variable is explained in a proportion of 63% by the selected explanatory variable. By comparing the two models, the

adjusted R^2 is identical, as expected, but the Akaike and Schwartz tests have a lower value for the first model, indicating it as qualitatively superior.

As regards the error autocorrelation, the DW test values are located within the interval (d_2, 4-d_2), evidencing no autocorrelation for the two analysed models.

The obtained coefficients have quite similar values across the tree-year period. Considering that the used variables are in logarithm, they shall be construed as elasticities. Therefore, we could state, by interpreting the estimation results for Model 1 that GDP is inelastic in relation with the external debt, more exactly, if the external debt increases by 1%, GDP increases by only 0.58% in 2006, for instance. Model 2 indicates the elasticity of the external debt in relation with GDP, the coefficient exceeding the 1 value for the entire analysed period. The relationship would reverse once the β coefficient reaches the maximum value (t statistics value), the leverage becoming negative.

Table 1.3

$log_{gdp} = \gamma + \delta * log_{dat} + \theta * d_1 + \varepsilon log_{dat} = \gamma + \delta * log_{gdp} + \theta * d_2 + \varepsilon$

Modelul 3	2006	2007	2008	Modelul 4	2006	2007	2008
Coeficient δ	**0.500752***	**0.621105***	**0.619299***	**Coeficient δ**	**0.581558***	**0.692501***	**0.700211***
Coeficient θ	**0.045621**	**-0.168338**	**-0.239868**	**Coeficient θ**	**-0.404404***	**-0.437195***	**-0.515113***
Coeficient γ	**12.54991***	**10.58040***	**10.69447***	**Coeficient γ**	**11.05943**	**9.245491***	**9.148010***
R-squared	0.580756	0.656104	0.645411	**R-squared**	0.605520	0.681993	0.677046
Adj R-squared	0.572846	0.649616	0.638720	**Adj R-squared**	0.598077	0.675993	0.670953
F-statistic	73.41808	101.1165	96.46866	**F-statistic**	81.35402	113.6630	111.1103
Prob F-statistic	0.0000	0.000000	0.000000	Prob F-statistic	0.0000	0.000000	0.000000
Akaike	3.451078	3.253342	3.279222	**Akaike**	3.390194	3.175077	3.185770
Schwartz	3.525152	3.327416	3.353295	**Schwartz**	3.464268	3.249150	3.259844
Durbin-Watson	2.018820	2.046178	2.003555	**Durbin-Watson**	2.026908	2.099867	2.075932

Concerning models 3 and 4 from Table 1.3., we have tried to identify the influence of the geographical layout of the analysed countries on their economic performance (for model 3) and the influence of their development level on their future economic growth (for model 4).

The dummy variable proved to be insignificant in model 3, for a significance threshold of maximum 10%; therefore we could draw the conclusion that the geographical layout does not clearly determine the economic growth of the countries in the analysed period.

In model 4, the dummy variable is significant for a significance level of at most 5% for the entire period. The sign of this coefficient is negative and sub-unitary, signalling a reverse relationship between GDP and the level of development of the countries.

By comparing this model to model 1, the first one looks like more adequate, this affirmation being strengthened by the value of the adjusted R^2 and by the Akaike and Schwartz tests.

F-test validates the model and DW test shows the absence of error autocorrelation, therefore our previous statement being reinforced. The debt coefficient remains close to the values registered for model 1, meaning positive and sub-unitary, suggesting a highly similar relationship between the two variables.

5. Conclusions

The positive relationship between external debt and GDP revealed by this study may have one of the following two explanations:

- Considering the major differences between the values of the analysed series, the negative leverage effect obtained for some of them has been compensated the positive effect of the other ones, so that, as a whole, a positive relationship emerged for the two variables of interest;
- At the world level, in average, the threshold above which the indebting influence on the economic performance should become negative has not been reached yet.

By comparing our results to those obtained by the authors of the articles considered as basic bibliographic sources, we could state that this study has revealed the same trend as that reached by Patillo et al. (2002, 2004), with the mention that the latter found a debt coefficient much closer to the inflexion value above which the leverage on GDP becomes negative.

The d1 dummy variable, dividing the countries depending on their geographical layout, proved to be insignificant, the same result being also obtained by Alfaro (2003) in his study on the influence of investments on economic growth.

Our analysis indicated that the d2 dummy variable has a strong influence on the economic growth, it being in compliance with the economic theory, according to which, as a country develops, its economic growth lowers, because the economic increase function is concave, therefore evidencing decreasing returns. On the other hand, a country in progress will develop more rapidly, as it has not reached yet the flattening level of the economic growth curve, according to Solow-Swan model.

The coefficients obtained within the estimations may be interpreted as elasticities and indicate that, while GDP is inelastic in relation with debt, the latter has a supra-unitary elasticity, so that the conclusion may be drawn that its modification is ampler than the GDP one.

Such result could be explained by stating that, if an increase of the debt determined a quicker increase of GDP, then many countries would indebt themselves until the maximum limit so as to obtain economic growth, and the debt service would be always covered by it.

The debt elasticity in relation with GDP is supra-unitary and it is confirmed for the developing and emerging countries, with significant economic growths, but highly indebted in order to reach a superior development standard, especially considering that their governments are involved in expensive development projects.

6. Suggestions for further research

In order to continue the economic growth analysis, we propose to render the model more complex, by adding, as explanatory variables, series relating to foreign direct investments, exports and imports. Such estimation results will be rendered in a future study. Also, a panel data approach could offer a larger perspective on this issue. As concerns methodology, a fixed versus random effects generalised method of moment would be an interesting alternative to the already used econometric estimation techniques.

References

- Alfaro, L., Chanda, A., Kalemli-Ozcan, S. and Sayek, S. (2003), *FDI Spillovers, Financial Markets and Economic Development*, IMF Working Papers 03/186, International Monetary Fund
- Clements, B., Bhattacharya, R. and Nguyen, T. Q. (2003), *External Debt, Public Investment, and Growth in Low-Income Countries*, IMF Working Paper WP/03/249
- Elbadawi, A. I., Ndulu, J.B., and Ndung'u, N. (1996), *Debt overhang and economic growth in Sub-Saharan Africa*, A paper presented to the IMF/World Bank conference on External Financing for Low Income Countries
- Hameed, A., Ashraf, H. and Chaudhary, M.A.(2008), *External Debt and its Impact on Economic and Business Growth in Pakistan*, International Research Journal of Finance and Economics*,*20: 132-140
- Levine, R., Loayza, N., and Beck, T. (2000), *Financial intermediation and growth: Causality and causes*, Journal of Monetary Economics, 46:31–77.
- Mankiw, N. G., Romer, D., and Weil, D. N. (1992), *A contribution to the empirics of economic growth*, The Quarterly Journal of Economics, 107(2):407–437.
- Patillo C., Poirson H., Ricci L., (2002), *External Debt and Growth*, IMF Working Papers 02/69, April
- Patillo C., Poirson H., Ricci L., (2004), *What are the channels through which external debt affects growth?*, IMF Working Papers 04/15
- Reinhart, C. and Rogoff, K. (2009), *This Time is Different: Eight Centuries of Financial Folly*. Princeton, NJ: Princeton Press
- Reinhart, C. and Rogoff, K. (2010), *Growth in a Time of Debt*, American Economic Review, American Economic Association, vol. 100(2): 573-78
- Savvides, A. (1992), *Investment Slowdown in Developing Countries During the 1980s: Debt Overhang Or Foreign Capital Inflows*, Kyklos, Cilt 45, Sayı 3: 363-378.
- Schclarek, A., (2004), *Debt and Economic Growth in Developing and Industrial Countries*, Working Papers 2005:34, Lund University, Department of Economics

THE INFLUENCE OF LENDING ACTIVITY OVER CONSUMER'S BEHAVIOR

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Abstract

Lending activity involves an embedding of general principles which require the analysis of risks incorporated in banking operations, both from a consumer and bank perspective. Correlated with economic environment shifts, the consumer's definition concentrates a series of individual and group necessities with a decisive role in a possible lending decision. As socio-economic issue, the consumer is oriented at lending when his income in order to buy goods or services is not satisfactory. This paper aims at presenting the consumer hypostasis resulted from lending activities, identifying its purposes and risks.

Keywords: *Lending, environment shifts, lending risks, consumer's behavior, individual necessities*

Introduction

According to Michael Solomon, Gary Bamossy, Soren Askegaard, Hogg, K. Margaret, "a consumer is generally thought of as a person who identifies a need or desire, makes a purchase and then disposes of the product during the consumption process"[1].

Richard E. Beck and Susan M. Siegel highlight that "Consumer lending includes all types of credit extended to consumers, either individually or jointly, primarily for buying goods and services for their personal use"[2].

Sustaining Professor Arjun Chaudhuri, Fairfield University, Connecticut, "Consumer behavior is the study of how and why people consume products and services. All behavior can broadly be attributed to three classic influences – the particular characteristics of the individual, the environment that surrounds the individual (culture, subculture, family, friends) and the inherited genetics that constitute the biological makeup of the individual (personality, attitudes, needs)".[3]

Loan consumer rights, along with other addendums, are stipulated in GEO no. 50/2010 regarding loan contracts for consumers, published in Official Monitor, Part I no.389 per June 11th 2010.

The notion of "creditor" includes all legal entities, branches of credit institution and non-banking financial institutions that operate in Romania and grant or undertake to grant loans in its commercial of professional activity.

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[1] Solomon, M. R., Bamossy,G., Askegaard, S. , Hogg, M.K, Consumer behaviour- european perspective, Pearson Education, 2010, p. 7.
[2] Beck, E.R. Jr., Siegel, M. S., Consumer Lending, American Bankers Association, 2001, p. 3.
[3] Chaudhuri, Arjun, Emotion and reason in consumer behavior, Elsvier Inc., 2006.

The consumer, represented by the individual who is acting in purposes structured outside his professional or commercial activities, enters in the lending area activity trough the loan agreement.

In terms of Richard E. Beck and Susan M. Siegel, “a consumer is a natural person who is primarily or secondarily liable on a credit contract- in other words, the individual ultimately responsible for repaying the loan and a consumer credit is borrowed funds used for personal, family, household, or agriculture – not for commercial or business purposes.”[4]

According to the law in force, the credit agreement refers to that agreement in which a creditor, in front of whom the credit consumers are protected, grant, undertake or stipulates the possibility of granting to a credit consumer, as a deferred payment, a loan or another similar financial facility, except the agreement for continuous service or good supply of similar kind, when the consumer pays for this services or goods in rates, throughout their supply period.

Conceptual framework

Coming to aid the consumers, we mention that a credit agreement can be modified according to the new law in force in two ways, namely by addendums and trough the direct effect of the law over the contract.

The first way – trough addendums, the creditor is obliged to evidence the proof that all diligences have been made in way to inform the consumer over signing this kind of addendum. If the creditor is trying to introduce a clause by which he tries to evade the legal provisions, it is considered void, whether the consumer signed it or not.

The second way – trough the direct effect of law over the contract, situation that carries the name “tacit acceptance” is when the consumer does not sign any addendums, no matter the reason or cause.

According to law, it is forbidden the creditor to unilaterally change the agreement, this law restates the “requirement of full contract” that is to include all the charges and costs and the info in respect of which the consumer has no choice, without making references to general business conditions, to general pricing and taxes lists or any other reference.

All these interdictions, addendums and determinations in the credit agreement framework represent the action of the law maker in order to protect the consumer in front of abusive behavior that can appear in banking practice.

The law in force impose and require from banks the following conditions: full and correct informing from the pre-agreement stage forward over the whole contractual agreement, compliance to honest advertising for their offer of credit product, the complete agreement rule, with no references to general business regulations, the pricing and tax list and any other fees or any other references, the interdiction to increase the fees, prices or any other costs over the full ongoing credit agreement, the inclusion of variable interest calculation in the credit agreements and prohibits the unilateral settlement of the interest over the ongoing contract, procedures for amending the credit contract addendums and the impossibility of tacit acceptance of new conditions by the consumer if they do not meet the legal provisions, meaning to provide a document attesting the closing credit-debt settlement.

The quadrant reflected in GEO no. 50/2010 is exposing, in its appendixes both the theoretical info necessary in the loaning relationship and the precise mathematical formulas for

[4] Beck, E.R. Jr., Siegel, M. S., Consumer Lending, American Bankers Association, 2001, p. 3.

annul effective interest calculation and the fact, that for the approved loan there cannot be charged with other than certain fees: file analysis fee or account management fee (this fees cannot be simultaneously collected), compensation in case of prepayment, the insurance costs, penalties for payment delay, unique fee for services at consumer's demand.

In the legal matters it is stipulated that the information, for any customer, must be, clearly and concise over a representative example, visible and easy to read, in the same visual field and with the same character font size.

This elements are: the interest rate of the loan (fixe and/ or variable) together with the info regarding any other fees and costs included in the total cost of credit, the total credit amount, the effective annual interest rate, the duration of the loan, in case of a form of deferred payment for a specific good or service, the purchase price and the amount of any payment in advance and by the case, the total amount payable by the consumer and the total amount of rates.

The creditor, and if necessary, the intermediary shall provide to the consumer, based on the terms and loan conditions offered by the creditor, and where appropriate the expressed preferences and provided elements of the customer, information that is necessary to provide the consumer the meanings for a comparison on offers in order to take an informed decision on whether to conclude a loan agreement.

The information should be provided well in advance, but not less than 15 days (this period can be reduces by written agreement of the consumer) before the consumer is to sign a credit agreement or to accept an offer: on paper copy or other sustainable support.

The information provided refers to: the type of credit, the identity and registered office address and the working point of the creditor, the total loan and conditions governing the drawdown, the duration of the loan, if a credit is given in the form of deferred payment for a specific good or service, the interest rate of the credit; conditions governing the application of the borrowing rate, the interest rate calculation formula, and deadlines, conditions and procedures for interest rate change and, if different rates apply in different circumstances, above all the applicable rates, the effective annual interest rate and total amount payable by the consumer, illustrated by a representative example which is mentioning all the assumptions used to calculate that rate, if the consumer informed the creditor of one or more components for the preferred credit, and the duration of the loan and the total loan amount, the lender must consider these components, the management fees of one or more accounts recording both payments transactions, and drawdown, unless the opening of an account is optional, along with charges for using a mean of payment for both payment and drawdown, any other costs resulting from the credit agreement together with credit conditions, can be changed; existence of taxes, fees and costs which the consumer must pay in connection with the completion, publication and / or the registration of the credit agreement and any attached documents, including notary fees.

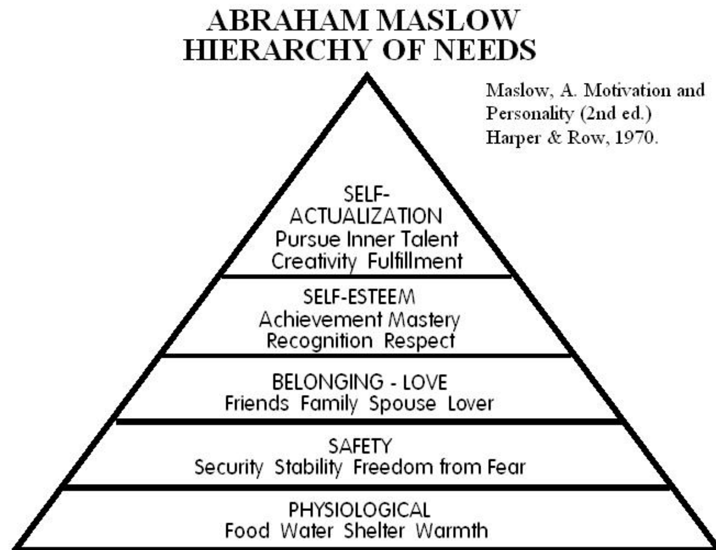
The obligation, when the case, to conclude a agreement for a credit enhancement service is mandatory in order to obtain the loan itself or in order to obtain it in accordance with terms and conditions.

The interest rate, applicable in case of late payments and measures for its adjustment and any other costs incurred by the violation of the agreement, a warning regarding the consequences of missing payments, requested guarantees, the existence or absence of withdraw right, the right of early payment and, if its applicable, the info regarding the creditor's right to compensate and the way it is going to be settled according to terms, the consumer's right to be immediately and costs free informed over the result of database search on trustworthiness, the consumer's right to request and receive a free copy of the draft credit agreement.

Social and economic approach

From a consumer's point of view, lending activity refers at the action taken to contract a loan in order to satisfy their needs or desires (loans for personal needs, loans for buying a home etc).

In order to highlight an overview for consumer behavior, we shall begin with Maslow's pyramid, which establishes the hierarchy of needs.



Professor Geoffrey P. Lantos describes Abraham Maslow`s classification of motives as a hierarchical ladder and an influential system for explaining human and consumer motivation.

Therefore, safety (security) needs involve **physiological and psychological needs** concerned with the need to establish stability and consistency of life, **social needs** (love and belonging, affection, affiliation, oriented toward loving and being loved by others, affiliation social recognition, being accepted by people, and satisfied through relationships, social groups, friends, acquaintances, advisors, **esteem needs** represented by self-worth, self-confidence, and self- respect**, self-actualization needs** related to fulfilling personal potential and devotion.[5]

The factors that influence the consumer's behavior in economic activities startup, according to Phillip Kotler's classification are the following: socio-cultural factors, psychological factors, personal factors, economical factors and demographical factors.

If we extend this factor's influence in consumer's decision assuming for a getting a loan agreement, a individualized vision of it is created.

The socio-cultural factors can be represented by family, educational level, culture, social status, reference groups, social classes.

[5] Lantos, P. G., Consumer behaviour in action: real-life applications for marketing managers, Library of Congress Cataloging-in-Publication Data.

Under economic-social aspect, the education grants a primordial role in the decision of getting a loan agreement. As a foundation of this decision, the consumer must analyze, with a high level of responsibility, every detail that comes from the consumer-bank relationship. A consumer must realize if he can afford the gradual coverage or prepayment of the loaned amount, if his own behavior or his way of life folds with the terms and requirements of bank's agreement.

Contracting a loan involves a series of steps, a stable trajectory that make the demarcation from a consumer that can assume the risks involved and another one, that will not reach the stage of primary intention, which will reach another option that will cover their needs.

The physiological factors include: motivation, beliefs, attitude, perception, learning.

The correlation between the involved risks of contracting a loan and the benefits of a good financial and banking management involves a homogenization of beliefs with perceptions, the motivation and behavior elements developed ongoing, in concordance with the saying of the American president James Abraham Garfield (1831-1881): "a right motivation is stronger than the force".

The personal factors refer to: age, incomes, way of life, sex, occupation, personality.

Earnings, as a household level, influence the loaning activity trough the coverage of default rate, of commissions and interest provided and also, the reach of its initial purpose.

The age, along with the incomes gained, are representing a condition at contracting a loan, achieving a interdependency strictly base on gaining some results that are going to place the consumer and the credit institution also, in the comfort zone granted by the trustworthiness and seriousness on both sides.

The economic factors include the specifics of the micro environment and macro environment. The great picture of the economy can evidence a crisis situation or a situation that involves the growth of the economy.

The great picture of the economy shapes the population's decision to contract a loan, trough the economical-financial evolution prism. When the growth of the economy, at the whole state level is high, the consumer is willing to contract a credit loan, while the risks are very low or even covered.

In the opposite situation of economic growth, meaning the situation of crisis, the population's decision regarding the contract of loan is subjected to a developed reasoning, with uncertain results considering the general fluctuating activity caused by globally and country changes.

Demographic factors are putting their mark over the crediting activity, evidencing the following notions: birth rate, natural growth – in terms of credit institution, they can be seen as part of a process that develops the idea of potential subject apparition: clients, loan bearers; mortality – carries out the implicit risk assumed by banks, the type of their habitat - rural or urban – the origin of households can fit the consumer both in the optimum and unanimously accepted pattern of accepted client and in the not meeting the conditions for a loan agreement. The type of habitat gains accentuated relevance when it is cumulated with the other environmental factors.

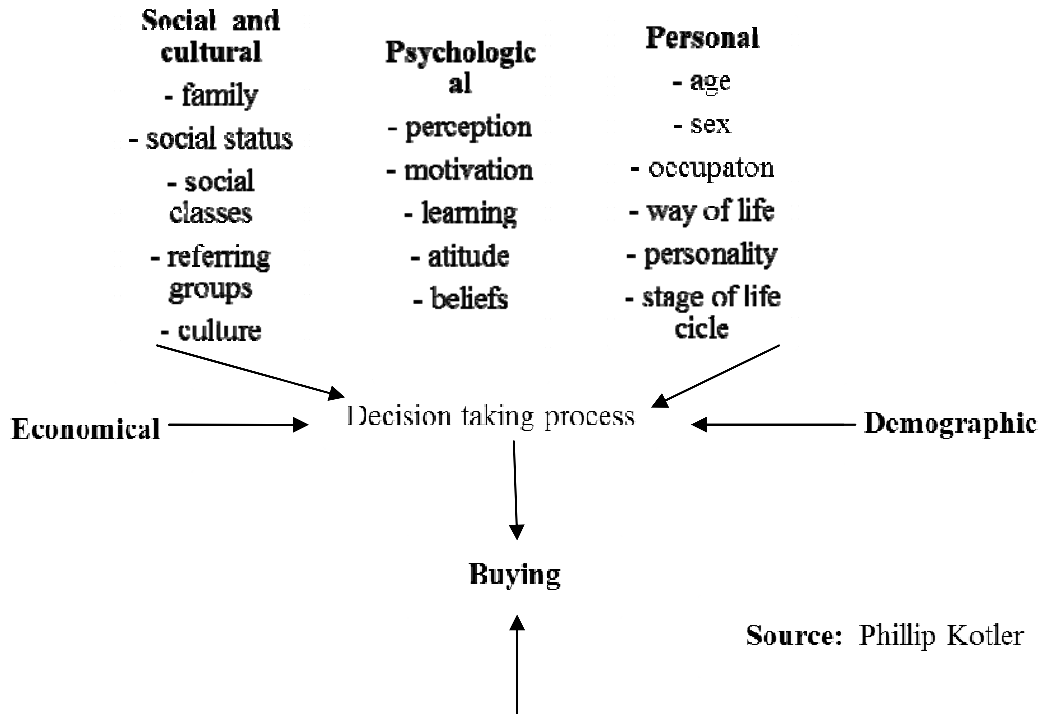


Figure no. 1. Factors that influence consumer behavior[6]

According to leading micro-economists Angus Deaton and John Muellbauer, "consumer behavior is frequently presented in term of preferences, on the one hand, and possibilities on the other. The emphasis in the discussions commonly placed on preferences, on the axioms of choice, on utility functions and their properties. The specification of which choices are actually available is given a secondary place and, frequently, only very simple possibilities are being considered.[7]

Conclusions

The influence of lending activity is directly proportional to the degree of the risk involved. Higher the level of risk assumed by the consumer and uncovered by financial basis, the higher the fluctuating behavior, instable, behavior that relies in the uncontrollable nature of the economical discontinuities and in the population's incapacity to maintain its solvency resulting from household income level.

Because of unforeseen situation of pseudo-forecasts unpleasant situations for both the bank and the consumer appear. Initially, the bank charges penalties and commissions depending on the contracted loan, so, scripting, the bank benefits of incomes that gradually increase as a result of accounts maintenance and other banking operations. Factual, the bank suffers because the

[6] Kotler, P., Armstrong G., Saunders, J., Wong, V., Principiile marketingului, Editura Teora, Bucuresti, 1999.
[7] Deaton, A., Muellbauer, J., Economics and consumer behavior, Cambridge University Press, reprinted in 1999, p. 3.

liquidities are not cashed-in, when the person that contracted the loan is in the incapacity of payment and does not own any valuable goods from which the bank, as creditor, could cover the entire loaning structure per individual.

"Consumer behavior reflects the totality of consumer`s decisions with respect to acquisition (including leasing, trading, sharing), consumption, and disposition of goods, services, activities, experiences, people, and ideas".[8]

"Consumer behavior is a complex, dynamic, multidimensional process, and all marketing decisions are based on assumptions about consumer behavior. Consumer behavior can be defined as the decision-making process and physical activity involved in acquiring, evaluating, using and disposing of goods and services."[9]

In a world in which crediting decision is founded on material reasoning, the consumer, as in a credit requester position is assuming the active participant condition in the economical environment. The development of the crediting decision is a crucial moment which influences both the quality of life and the individualized character of the professional frame, the motive why the consumer must assure that the decision that he will take is a optimum one and it can be supported by its own activity.

By this paper, we tried to expose the influences over the consumer, both trough an economic approach and by the description of initiative generating factors which, on a evolutionary scale, mark the birth of determined crediting decisions.

References

- Solomon, M. R., Bamossy,G., Askegaard, S. , Hogg, M.K, *Consumer behavior- European perspective*, Pearson Education, 2010
- Beck, E.R. Jr., Siegel, M. S., *Consumer Lending*, American Bankers Association, 2001
- Lantos, P. G., *Consumer behavior in action: real-life applications for marketing managers*, Library of Congress Cataloging-in-Publication Data
- Kotler, P., Armstrong G., Saunders, J., Wong, V., *Principiile marketingului*, EdituraTeora, Bucuresti, 1999
- Deaton, A., Muellbauer, J., *Economics and consumer behavior*, Cambridge University Press, reprinted in 1999
- Gânj, C., *Drepturile consumatorilor de credite*, Credite si Asigurari, cabinet de avocat, 2010.
- Deming, W.E., *Out of the crisis*, First MIT Pres edition, 2000
- Olteanu, A., Sudacevschi, M., *Marketing financiar-bancar*, Editura Cartea studenteasca, Bucuresti, 2007
- Stanciu, S., *Bazele generale ale marketingului*, Universitatea din Bucuresti, 2002
- Datculescu, P., *Cercetarea de marketing- cum patrunzi in mintea consumatorului, cum masor si cum analizezi informatia*, EdituraBrandbuilders, Bucuresti, 2006
- Ralph J. Rohner,Frederick H. Miller,Robert A. Cook, Alvin C. Harrell,Elizabeth Huber, *Truth in lending*, American Bar Association. Section of Business Law, 2000
- Wayne D. Hoyer,Deborah J. Macinnis, *Consumer Behavior*, Cengage Learning, Library of Congress, 2008
- Khan, M., *Consumer Behavior*, 2007
- Chaudhuri, Arjun, *Emotion and reason in consumer behavior,* Elsvier Inc., 2006

[8] Wayne D. Hoyer,Deborah J. Macinnis, Consumer Behavior, Cengage Learning, Library of Congres, 2008, p.3.
[9] Khan, M., Consumer Behavior, 2007.

- GEO no. 50/2010 regarding loan contracts for consumers, published in Official Monitor, Part I no.389 per June 11th 2010.

- Institutul national de statistica, www.insse.ro
- www.oecd.org
- Netoiu, L. M.., articol *Etapele activitatii de creditare*, Universitatea din Craiova, Facultatea de StiinteEconomice
- Bratucu, G., Bratucu, O.T., articol *Analiza sistemului de factori care influenteaza comportamentul consumatorului*, UniversitateaTransilvania din Brasov

IMPERFECT INFORMATION AND ENTREPRENEURS' CHOICE ON PROVISION OF HOUSE FITTINGS

Rita Yi Man LI*

Abstract

Entrepreneurs have always been regarded as talented individuals who can bear the risk of running a business. They can reap a huge profit in return for their hard work. In mainland China, most housing entrepreneurs do not provide housing with fittings. There are no floor or wall fittings, kitchen appliances or bathroom fittings. Home buyers only receive bare units when developers finish their job. What is the motive behind this choice? This paper analyses the motive based on imperfect information and entrepreneurs' risk-averse behaviour.

Keywords: *imperfect information, entrepreneur, house fittings*

"[I]nformation is random and miscellaneous. We are flooded by messages from the instant everywhere in excruciating profusion... The latest information on anything and everything is collected, diffused, received, stored, and retrieved before anyone can discover whether the facts have meaning" (Boorstin, 1979)

1. Introduction

An entrepreneur combines the resources of land, capital and labour to produce a good. He is the major driving force behind production of goods. As there is no guarantee of making a profit and imperfect information exists in our business world, the entrepreneur assumes the role of risk bearer. At the same time, like other business persons, he cannot accept a job that has too high a risk of loss (Brue et al., 2009).

Running a real estate business is risky; it requires heavy capital investment in land, professional training and recruitment. Nevertheless, this huge expenditure does not guarantee a great return, and it is possible to suffer a substantial loss if the entrepreneur makes a wrong decision. Provision of home fittings is one of the risks that the housing entrepreneur faces. Some home buyers may dislike the fittings and thus decide not to purchase the home. In Hong Kong, land supply is scarce, but demand is huge (7 million people live in a small city with a hilly landscape). Land price occupies a relatively large proportion of the costs of dwelling production. Provision of a wash basin, towel ring, water closet, and other fittings only uses a small proportion of the total costs of construction. Entrepreneurs thus focus on land purchases more than provision of fittings. The risk of installing fittings that do not suit the taste of customers is not very high. Furthermore, many developers have run their business for many years and have accumulated sufficient knowledge on buyers' taste. Provision of fittings to customers is common. Yet, in mainland China, especially in areas of low land costs, costs of fittings have become relatively high. The risk of supplying fittings that prospective owners dislike is higher. Many entrepreneurs

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do not wish to take the risk of providing fittings. This paper aims at reviewing the asymmetric information and risks that housing entrepreneurs face in mainland China and analysing entrepreneurs' decision in response to this risk.

2. Assumptions, functions and factors affecting the supply of entrepreneurs

Austrian economists postulate that no individual is homogeneous. Individuals act according to their experiences and knowledge. Hence, each of us foresees and predicts the future in different ways (Yu, 2009). It is also assumed that people are endowed with different levels of innate talent; the more talented group become entrepreneurs and hire the less talented in equilibrium (Dias and McDermott, 2006). The when and where questions in entrepreneurs' business ventures are mainly determined by the social context, organisational norms, culture, history and power considerations (Vandenbosch and Huff, 1997). Entrepreneurs in our society combine means of production, and their acts are crucial to economic development (Shanea et al., 2003).

Entrepreneurs also deal with the "who" question. They create and organise new companies and hire workers with human capital. They also encourage workers to invest in their own education so that they can move into the modern production sector. Had entrepreneurs not existed, these educated workers might have had to take jobs that make inadequate use of their skills. They may not have been able to earn a high salary. The literature also reviews the importance of entrepreneurs in individuals' learning (Shanea et al., 2003).

Entrepreneurs also play a major role in assuming a large part of firms' risk (Carland et al., 1984). Theorists of entrepreneurship view entrepreneurs as individuals who bear residual uncertainty in running a business. Entrepreneurs must accept uncertainty in career security, family relations and psychic and financial well-being (Shanea et al., 2003). Starting from the moment an entrepreneur realises that their ideas possess market potential, they face the challenge of venture finance. Though some firms' business and financial strategies are laid out and agreed between the entrepreneur and interim investors, others depend on the entrepreneur only in seeking financial and strategic advice. This may increase entrepreneurs' momentum to raise any additional funds beyond their personal means, possibly from angel investors (Williams et al., 2006).

Concerning the supply of entrepreneurs in our market, some concur that the supply constitutes a key bottleneck to development and is inelastic in nature. Others hold the view that productive entrepreneurs can be summoned relatively quickly if the rules and institutions they determine are conducive to such activity because supply is always latent in the population (Dias and McDermott, 2006).

Similar to any other type of entrepreneur, housing entrepreneurs combine the factors of production, and they have to make decisions on what, how and for whom to produce. They also have to accept the financial risks, e.g., the global financial crisis led to a drop in sales of newly built residential units.

3. Information, imperfect information and asymmetric information

Traditional thinking concurs that uncertainty creates the need for information processing. By way of proper problem formulation, information helps executives to create and select the appropriate course of action. Information also helps to stimulate creativity, monitor performance,

determine environmental trends, generate scenarios and control activities. Furthermore, information is the major source of fuel in planning and strategising. After all, executives simply cannot function without information (Vandenbosch and Huff, 1997). Although "information" is an important subject in many disciplines, it does not give rise to any economic interest by itself (Arrow, 1996). In a world of positive transaction costs, imperfect information exists, and information has to be transmitted from one who knows it well to a receiver. Nevertheless, information sometimes backs up among information holders who have no use for it and fail to transmit it to individuals who wish to receive it (Friedman and Friedman, 1990). Therefore, it is suggested that asymmetric information exists between sellers and purchasers (i.e., some sellers hold private information) (Narayanan et al., 2000, Lin et al., 2009). Information asymmetry indicates that market participants possess unequal sets of information (Lu et al., 2010). Information is inseparable from the concept of agency (MacFarlane, 2003), even though there are many ways to reduce information asymmetry (Narayanan et al., 2000). The associated unobserved variables under asymmetric information may affect the cost and benefit (Arrow, 1996), e.g., investors can reap more profit by acquiring rates of return information (Arrow, 1987); however, it may also cause home investors to suffer losses.

Business activity	Asymmetric information example
Bank	A borrower knows more than bankers about his or her chance of default (Wolfstetter, 1999).
Firm investment	Although some investors may have private information about a firm's fundamental value, conflicting interests of informed and uninformed traders not only increase a firm's value uncertainty but also make investors take a conservative view on the firm's future value (Lu et al., 2010).
Higher education	The department head knows less about a perspective teaching staff's ability and attitude than the professors themselves (Wolfstetter, 1999).
Agriculture	The tenant who rents a piece of land knows the soil quality better than the landlords do; he is in the best position to estimate the rent that he should pay (Braverman and Stiglitz, 1986).
Stock	The managerial staff in a company knows more information about the company than other stockholders (Narayanan et al., 2000).
Housing	Residential unit purchasers do not hold the same information as builders do (Chau et al., 2007).

Table 1 Examples of asymmetric information

4. Risk-averse human behaviour

Risk has been identified as the potential for negative consequences of an activity, a combination of exposure and hazard as well as the possibility of damage, loss or injury. Recent literature focuses on the two-edged nature of risk, such as challenge and threat, and the probability that something will happen that will affect the original objectives of an act. Risk can be managed by easing and control, quantification and identification, catastrophe planning and financing (Li, 2010). The risk attitude of an individual affects his behaviour and plays an important role in his decision making (Richard, 1975, Xiao and Yang, 2008). For example, a retailer under demand

uncertainty changes its pricing, purchasing, and service investment behaviour (Xiao and Yang, 2008).

Are people risk seeking or risk averse? Many papers concur that humans are risk averse. This premise lays important ground for many business activities (Arrow, 1971, Grossman and Stiglitz, 1980), such as hedge funds, derivative sales, and agency contracts. Individuals who choose not to act on an actuarially fair activity are classified as risk averse (Arrow, 1971). Though risk attitudes can also be explained by utility curvature, risk aversion holds if and only if the utility function has a concave shape, implying the basic assumption of diminishing marginal utility. Nevertheless, some previous research falsifies expected utility systematically as a descriptive theory of individual decision making, and extensive experiments have shown that risk aversion is more than the psychophysics of money. Furthermore, “this descriptive inadequacy has become the major inspiration for alternative theories development on individual decision making under risk” (Halek and Eisenhauer, 2001). Risk-averse home purchasers, therefore, prefer the option of “tried and true” (Koebel et al., 2003).

To minimise perceived risk, consumers rely on various risk-reduction methods, e.g., reliance on brand names, sharing risk with others and selecting a less risky choice.

Method to lower risk	Example
Brand name	Searching for better choices from formal and informal sources, using brand image/reputation or price as a quality guide, or shopping only in stores with a high-quality image .
Risk sharing with others	Partnership, risk sharing contract, contracting and subcontracting.
Selecting the less risky choice	Becoming an employee instead of an entrepreneur, purchasing insurance, choosing compromising brands. Marketers have also successfully made use of tools such as money-back guarantees, warranties, and free trials to influence consumers’ risk perception.

Table 2 Methods of lowering risk (Li, 2010)

The degree to which people are risk averse, however, is not constant. Research has shown that people who are facing income uncertainty or constrained liquidity are relatively more risk averse (Richard, 1975). On the contrary, Halek and Eisenhauer (2001) postulate that rich people are more risk averse. Other researcher finds that men are less risk averse than women are (Schubert, 2006). Similarly, many auction theorists view the principal as considerably more risk averse than its trading partners. For instance, a privatisation agency might be more risk averse than the bidders in a transitional economy (Eso and Futo, 1999). Some companies hold more cash solely because their risk aversion on the part of management is above average in the aftermath of bankruptcies in previous years (Xiao and Yang, 2008).

Whalley (2010, forthcoming) models the investment choices of a risk-averse entrepreneur in an R&D project. Risk aversion is more likely to be an important factor in investors’ decision making in smaller, privately owned firms than in large public corporations. The model is particularly relevant to, for e.g., research-based start-up firms.

5. Loss-averse human behaviour

Apart from the notion of risk aversion, others have used loss aversion within Prospect Theory to describe decision-making behaviour. Loss aversion has gained recognition in economics as an important explanation for many phenomena that remain paradoxes under traditional choice theory, such as the endowment effect and the equity premium puzzle (Tovar, 2009). Loss aversion is distinguished from risk aversion by the presence of a reference point that determines whether a payoff is perceived as a loss or a gain and by an abrupt change in the slope of the utility function at the reference point (Wang et al., 2009). Loss aversion differs from risk aversion in that, first, it implies a kink in the utility function and hence generates a pronounced asymmetry even for arbitrarily small losses and gains. Second, empirical results also support the theoretical prediction that the marginal value of both losses and gains drops with their size; however, risk aversion does not usually display a diminishing sensitivity on losses. Finally, as Tovar (2009) suggested, "a traditional concave utility cannot generate this result under loss aversion; since the level of income is similar in both sectors, both would get the same protection…provide evidence that value or utility is determined by changes in wealth… the disutility that one experiences in losing a sum of money is greater than the pleasure associated with gaining the same amount. This is called loss aversion and it leads to a utility function that is steeper for losses than for gains…"

6. Housing entrepreneurs' decisions on provision of fittings

In many places, including Hong Kong, housing entrepreneurs provide elaborate wall treatments, window frames, cupboards, floor tiles and electrical fittings. In some cases, developers also provide heated floors and wine storage. There is, however, a completely different norm in mainland China. For instance, the majority of developers in Beijing and Nanjing sell roughcast flats to home purchasers. There are no towel rings, kitchenwares, cupboards or basic bathroom fittings (Li, 2009). Table 3 shows the percentage of bare flats in China from 1997 to 2008. Among all first hand residential units sold in Beijing districts, more than 70% of them were bare units. Table 4 displays a similar phenomenon. Among all the residential developments available for occupation in 2004-2007 in Nanjing, 90% of them were bare units. This finding simply implies that entrepreneurs in Beijing and Nanjing do not spend a penny on house fittings.

District	Bare flats	Total	Percentage of bare flats	District	Bare flats	Total	Percentage of bare flats
Da Xing	140	165	85	Xuan Wu	88	114	77
Feng Toi	260	305	85	Hai Dian	379	470	81
Shi Jing Shan	48	54	89	Mi Yun	43	52	83
Xi Cheng	62	82	76	Chong Wen	62	74	84
Huai Rou	37	44	84	Tong Zhou	194	219	89
Chong Ping	160	182	88	Chao Yong	618	853	72

Yan Qing	17	24	71	Dong Cheng	59	79	75
Fang Shan	83	90	92	Shun Yi	102	126	81
Others	92	110	84				

Table 3 Percentage of bare flats in Beijing from 1997 to 2008 (Li, 2009)

District	Total of residential developments available for occupation in 2004-2007	Percentage of bare flats
Xia Guan	24	91.6666667
Da Han	4	50
Lu He	12	91.6666667
Xuan Wu	35	91.4285714
Bai Xia	32	92.3076923
Jiang Zhu	133	98.4962406
Yu Hua	34	100
Jian	71	92.9577465
Pu Kou	60	96.6666667
Qian Huai	42	100
Gao Chun	3	100
Qi Xia	50	100
Li Shui	11	90.9090909
Gu Lou	65	93.8461538

Table 4 Percentage of bare residential units in Nanjing (Li, 2008)

What is the major reason behind this finding? China is a newly emerging real estate market. There were no private companies prior to 1978 due to the planned economy. Many entrepreneurs are thus newcomers in the industry. They are not experienced sellers with plenty of information for predicting buyers' tastes in house fittings. In sharp contrast, repeated sales activities in other places, such as Hong Kong, Boston, and Australia enable local housing entrepreneurs in these locations to learn from their mistakes. No matter what, housing entrepreneurs are risk and loss averse. They all aim to maximise their profits and minimise the risk. To minimise risk, these entrepreneurs choose not to provide any fittings. Furthermore, traditional entrepreneurs relied upon

many sources of external financing: debt, venture capital, private equity and public stock offerings. Investors who commit funds to business start-ups expect to receive back their invested sum of money along with a handsome return. Entrepreneurs must ask themselves if their goals are congruent with those of possible investors (Williams et al., 2006). If housing entrepreneurs make an incorrect decision, such as putting undesirable fittings into their residential units, it will affect the other investors as well. Shareholders who invest in these companies will develop negative opinions about these entrepreneurs. Potential joint ventures may also become futile if the housing entrepreneurs have a history of incorrect decisions.

7. Conclusion

All entrepreneurs share one characteristic: they bear risk and earn some profit in return. Housing entrepreneurs are risk averse as well. They attempt to find ways to reduce their risk. Housing entrepreneurs in mainland China who provide bare units provide a vivid example of risk aversion.

References

- Arrow, K. J. 1971. Essays in the theory of risk-bearing, Essays in the theory of risk-bearing, North-Holland Publication Company.
- Arrow, K. J. 1987. The Demand for Information and the Distribution of Income. Probability in the Engineering and Informational Sciences, 1, 3-13.
- Arrow, K. J. 1996. Technical Information and Industrial Structure. Industrial and Corporate Change, 5, 645-652
- Braverman, A. & Stiglitz, J. E. 1986. Cost-Sharing Arrangements under Sharecropping: Moral Hazard, Incentive Flexibility, and Risk. American Journal of Agricultural Economics, 68, 642-652
- Brue, S. L., McConnell, C., R. & Flynn, S. M. 2009. Essentials of Economics, New York, McGraw Hill
- Carland, J. W., Hoy, F., Boulton, W. R. & Carland, J. A. C. 1984. Differentiating Entrepreneurs from Small Business Owners: A Conceptualization. The Academy of Management Review, 9, 354-359
- Chau, K. W., Wong, S. K. & Yiu, C. Y. 2007. Housing Quality in the Forward Contracts Market. The Journal of Real Estate Finance and Economics, 34, 313-325.
- Dias, J. & McDermott, J. 2006. Institutions, Education, and Development: The Role of Entrepreneurs. Journal of Development Economics 80, 299–328.
- Eso, P. & Futo, G. 1999. Auction Design with a Risk Averse Seller. Economics Letters 65, 71-74.
- Friedman, M. & Friedman, R. 1990. Free to Choose, U.S.A., Horcourt, INC.
- Grossman, S. J. & Stiglitz, J. E. 1980. On the Impossibility of Informationally Efficient Markets, The American Economic Review, 70, 393-408
- Halek, M. & Eisenhauer, J. 2001. Demography of Risk Aversion. The Journal of Risk and Insurance, 68, 1-24
- Koebel, C. T., Papadakis, M., Hudson, E. & Cavell, M. 2003. The Diffusion of Innovation in the Residential Building Industry [Online]. Available: http://www.vchr.vt.edu/pdfreports/Diffu sion%20Report.pdf [Accessed 6 November 2009]

- Li, R. Y. M. 2009. Legal Regulations, People's Perceptions on Law and Scope of Services Provided by Firms: a Study on Dwelling Developers in Beijing and Hong Kong. The Business Review, Cambridge, 12, 221-226
- Li, R. Y. M. 2010. Factors Influencing Developers' Decision to Sell Housing Units With Fittings - Empirical Evidence from China, The University of Hong Kong, Unpublished Ph.D. Thesis
- Lin, Y. H. H., Wu, C. & Dufrene, U. B. 2009. The 2000 Presidential Election and the Information Cost of Sensitive Versus Non-sensitive S&P 500 Stocks. Journal of Financial Markets, 12, 54-86
- Lu, C. W., Chen, T. K. & Liao, H. H. 2010. Information Uncertainty, Information Asymmetry and Corporate Bond Yield Spreads. Journal of Banking & Finance 34, 2265–2279
- MacFarlane, A. G. J. 2003. Information, Knowledge and the Future of Machines. Philosophical Transactions: Mathematical, Physical and Engineering Sciences, 361, 1581-1616
- Narayanan, V. K., Pinches, G. E., Kelm, K. M. & Lander, D. M. 2000. The Influence of Voluntarily Disclosed Qualitative Information. Strategic Management Journal, 21, 707-722
- Richard, S. F. 1975. Multivariate risk aversion, utility independence and separable utility functions. Management Science, 22, 12-21
- Schubert, R. 2006. Analysing and Managing Risks - on the Importance of Gender Difference in Risks Attitudes Managerial Finance, 32, 706-715
- Shanea, S., Locke, E. A. & Collins, C. J. 2003. Entrepreneurial Motivation. Huamn Resource Management Review 13, 257-279
- Tovar, P. 2009. The Effects of Loss Aversion on Trade Policy: Theory and Evidence. Journal of International Economics 78, 154-167
- Vandenbosch, B. & Huff, S. L. 1997. Searching and Scanning: How Executives Obtain Information from Executive Information. MIS Quarterly, 21, 81-107
- Wang, C. X., Webster, S. & Suresh, N. C. 2009. Would a Risk-averse Newsvendor Order Less at a Higher Selling Price? . European Journal of Operational Research 196, 544–553
- Whalley, A. E. 2010, forthcoming. Optimal R&D Investment for a Risk-averse Entrepreneur. Journal of Economic Dynamics & Control
- Williams, D. R., Duncan, W. J. & Ginter, P. M. 2006. Structuring Deals and Governance after the IPO: Entrepreneurs and Venture Capitalists in High Tech Start-ups. Business Horizons, 49, 303—311
- Wolfstetter, E. 1999. Topics in Microeconomics, U.S.A., Cambridge University Press
- Xiao, T. & Yang, D. 2008. Price and Service Competition of Supply Chains with Risk-averse Retailers under Demand Uncertainty. International Journal of Production Economics 114, 187–200
- Yu, F. L. T. 2009. Taiwan's Entrepreneurs and International Coordination: Evolution of Global Production Network in Electronics and IT Industries. Global Economic Review, 38, 49-62.

INTERNATIONAL SECURITY RELATIONS AND POST-IMPERIAL ORDERS

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Abstract

This paper intends to investigate the relations between former imperial powers and new sovereign states succeeding an empire in the field of international security, particularly when involving the use of force. Despite their stated attachment to the normative principles of what we usually call "Westphalian order", former imperial powers continue to interfere in the domestic affairs of these new states, especially those unable to exercise their sovereignty efficiently and legitimately. One could say that, by military interventions, these powers deny the sovereignty of weak states in the regions once under their control; but the preparation of these missions makes the actions not to be interpreted as expressions of an imperialist attitude. I consider there are two major ideal-types that could better explain such interventions. In a power-oriented post-imperial order, the intervention of a former empire is the result of the projection of its national interests and identities. In a norm-oriented post-imperial order, the sense of moral responsibility of the former imperial power is the main reason for its interference. The intervention's legitimacy and suitability require domestic and international support. This paper, grounded on a constructivist approach, intends to contribute to the understanding of international security issues in terms of a world shaped by actors' interests and identities and the dynamics of their relations. The identified ideal-types of post-imperial orders consider both material and cultural factors. The analytical elements that may link extremely different situations are the socially variable interpretations of past and present.

Keywords: *empire; hegemony; intervention; power-oriented post-imperial order (POPIO); norm-oriented post-imperial order (NOPIO).*

The term "empire" seems to have gained in recent IR literature an incredible spreading, its usage covering various interpretations of the contemporary social world, as for the expansion of the global capitalism, or the projection of American military and political power, or the leveling of political expectations worldwide, and so on. In spite of their different meanings, all the forms the term "empire" is used suggest the image of unity and of an (un)conscious march toward this unity, or the "imperialism". In this paper I use the term "empire" in a more narrow (and old-fashioned) way, as a territorial political entity.

Despite this precaution, to define an empire is not a simple task. In the last half of millennium, we have witnessed the progressive establishment of what it is generally called the "Westphalian" order, where the political space is divided into separate territorial sovereign states, interacting in an anarchical environment. At least since the end of the two World Wars, the dominant idea of the legitimate organizing principle of a sovereign state is the expression of the will of a political community shaped into a nation defined by the "self-determination" principle. It is precisely the claim of every nation to benefit from sovereignty that makes the system to be

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anarchic, in the absence of any authority capable to impose the order into the system, by power and legitimacy.

This conception is somehow misleading, because it is obvious that this legalistic point of view does not have an authentic correspondent in the political reality, for the contact between the nation-states. In fact, the supposed anarchy of the international realm should be considered in practice only in part, the states observing several ways of dealing with the anarchy. Many factors, material and ideational as well, contribute to the formation of a much more complex international realm, in particular due to the way the political entities understand and exercise the sovereignty, inside the borders and during their interactions with others. In a famous article, Alexander Wendt points out that the anarchy has multiple meanings, which appear from the interactions among states.[1] By supporting a constructivist perspective toward International Relations, I take into account the importance of the interactions among actors in defining their interests and identities, in a mutually constitutive relation between structure (anarchy) and actors. I thus consider that the meanings of "security" and "sovereignty" are socially constructed, dynamic, and interconnected.[2]

It is not my intention to investigate all the social meanings of the sovereignty and security that occur during interactions among political entities, from the shared sovereignty of EU member states to the establishment of some sort or hierarchy. In this paper I shall focus on the interventions made by the former imperial powers, mainly with military means, in the territories that used to be under their control.

The starting points for investigating such a theme are three empirical observations. Firstly, the weak states facing an external intervention that I envisage are mainly those that used to be part of an empire, now part of what is generally known as the Third World. Secondly, the former imperial power tends to be the main subject (if not the only one) of the intervention, so that it can be granted a special interest in conducting the operation. The question that I raise is why precisely the former empire is taking the initiative in dealing with the situation and the answer I suggest is that happens because of the special links that bond the two actors. I group such links in a "post-imperial order". Thirdly, I consider that these interventions can be divided into two major categories: those designated mainly to protect interests of the former imperial patron and those that have as the prime objective to protect the lives and properties of the people living in the countries affected by the failure of the state.

Based on these three observations, I suggest in this paper that the post-imperial orders imply that the former imperial powers are in particular interested in interfering in those weak states that used to be under their control. The relations among states succeeding an empire would thus have distinguishing features from other kinds of international links. In my opinion, these special relations between the former centre and subordinated units of an empire, the post-imperial identities and interests, could offer some good answers for the study of contemporary international security issues.

In order to investigate the post-imperial orders, the first necessary step would be a definition of the empire and to distinguish it from other forms of political dominance over alien territories. Once we identified the empire, it is possible to discuss the post-imperial order. The third section of the paper is dedicated to identification and definition of two ideal-types of post-imperial order that I call *power-oriented post-imperial order* (POPIO) and, respectively, *norm-oriented post-imperial order* (NOPIO). As I suggest in the final part of the paper, these two

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[1] Alexander Wendt, "Anarchy is what States Make of It: The Social Construction of Power Politics", *International Organization*, 46 (1992): 391-425.

[2] I tried to demonstrate this idea in Radu-Sebastian Ungureanu, *Securitate, suveranitate şi instituţii internaţionale. Crizele din Europa de Sud-Est în anii '90* [*Security, Sovereignty, and International Institutions: The South-East European Crisis of the '90s*] (Iaşi: Polirom, 2010).

ideal-types may be used when discussing various post-imperial approaches toward international security.

As from the theoretical and methodological approach, as already said, the paper should be considered in the light of a moderate form of constructivism. By this, I consider the importance of material and ideational factors as well, a double determination relationship between agents and structure, that the identities and interests of the actor should be considered in a relation of co-determination, and so on. Also, due to the permanent social interactions, I take into consideration a dynamic perspective on the institutions and meanings.

Empire and hegemony

Usually, a military intervention (as the acts of inter-state war as well) can be interpreted as a denial of the sovereignty of the object of intervention. What I have in mind are the interventions made on the territory of weak states, unable to enforce the sovereignty they enjoy in an effective and legitimate way, but only in a formal or legalistic manner. In these particular cases, the intervention is not seen as the expression of an imperialist attitude, as long as it is not designed to lead to the construction of an empire.

In such cases, we should reconsider the meaning of anarchy as a characteristic of international relations. In the field of the security institutions, in the military dimension of the term, David Lake considers that there are some sorts of arrangements where the anarchy is replaced by some forms of hierarchy between two sovereign states. He identifies in this respect several increasingly hierarchic security institutions, such as the spheres of influence, protectorates, informal empires, and empires[3].

Even if I consider that Lake is right in identifying some forms of hierarchy in these cases, I think that the empire should be distinguished from other forms, even informal, of hierarchic organizations. In my view, the main concurrent of the term "empire" in this matter is that of "hegemon". Both of these two concepts imply a form of dominance of a political centre over some foreign subjects and territories, but in a different manner. As a specific difference from "hegemony", an empire would be defined by the legitimate monopoly of one centre of power to generate and interpret the rules of the system in a given space (considered in territorial and/ or cultural terms). On the contrary, in the hegemony case the simple recognition of the sovereignty of the other part implies that this actor is entitled in formulating and enforcing some specific rules on his own territory. In other words, in the case of an empire, the dominance of the centre is inner-directed, while regarding the hegemony the dominance of the centre is an outer-directed one.[4]

The previous claim can be sustained if we consider two major features of an empire, that being its vocation of universality and unity (anti-entropy) over the particularities of national order (most empires), of the component states (as the German Empire – the Second *Reich*, where the

[3] David A. Lake. "Beyond Anarchy. The Importance of Security Institutions", *International Security*, 26 (2001): 132-133.

[4] According to Michael Doyle's well-known definition, an empire consists of the "effective control whether formal or informal, of a subordinated society by an imperial society" - Michael Doyle, *Empires* (Ithaca, NY: Cornell University Press), 1986,30. A different position is to consider several forms of exercising influence over subordinated societies beside the empire – dominions, suzerainty, and hegemony. A discussion on this topic can be found in Barry Buzan, Richard Little, *International Systems in World History. Remaking the Study of International Relations* (Oxford: Oxford University Press, 2000), 176-182. In my view, as I shall show, the sovereignty, norm monopoly, decision autonomy, responsibility and common project are main issues in differentiating an empire from other types of dominance, which I generally group in the hegemony family.

previous existing political units, as the Kingdom of Bavaria, preserved some elements of statehood), religious, linguistic, etc, order, and a consciousness of the self-assumed mission. This second dimension – ideology – also legitimizes imperial expansion. On the other hand, following the views of well-known scholars of different orientations, as George Modelski[5], Robert Gilpin[6], or Robert Cox [7], we could state that the hegemony is generally considered as the capacity of a political centre to produce the most performing rules and to impose them in the international system in its own profit in a competitive manner. As Peter Taylor puts it, a hegemonic state is a counter-imperial project[8].

These two positions – of an imperial or a hegemonic state – can be fulfilled by the same political centre, but not necessary. By taking a look at the roles played by Britain during, roughly, the 19th century, we would find out that it was a participant at the European balance of power (a great power among others), the political centre of its empire, but the world's hegemon, as long as she imposed international rules such as the gold standard, the anti-slavery and anti-piracy policies, the free trade, etc, norms to be observed not only by the small states, but also by her competitors in the imperial project. One could also say that even the imperialist project was also a norm, to be followed by every great power of the time with the ambition of being treated as such. The Italian or German claims of a right in building a colonial empire in the pre-War World I era are eloquent in this direction.

The difference between empire and hegemony appears even clearer if we take a closer look to the specific orders they create. For the hegemonic power, the order is considered to address some sovereign units, so that at least formally one could say that it faces an anarchic order. On the other hand, in the case of an empire a metropolitan power imposes an imperial order over alien societies/ territories in two major ways. The first is the material and legal superiority in violent means, even if in many cases a monopoly in this matter is lacking. Secondly, an empire is a common normative system, both formal and informal, even if some local particularities are allowed.[9]

The normative monopoly seems to be the most important defining feature of an empire, the claim of the legitimate violent means being only its necessary consequence. In this respect, the influential *Empire* of Michael Hardt and Antonio Negri is very suggestive: "The concept of Empire is presented as a global concert under the direction of a single conductor, a unitary power that maintains the social peace and produces its ethical truths. And in order to achieve these ends, the single power is given the necessary force to conduct, when necessary, "just wars" at the borders against the barbarians and internally against the rebellious."[10] The "natural" expansionism of the empire is in intrinsic normative logic, so that it "exhausts historical time, suspends history, and summons the past and future within its own ethical order. In other words, Empire presents its

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[5] George Modelski, "The Long Cycle of Global Politics and the Nation-State", *Comparative Studies in Society and History*, 20 (1978): 214-235.

[6] Robert Gilpin, "The Theory of Hegemonic War", *Journal of Interdisciplinary History*, 18 (1988): 591-613.

[7] Robert W. Cox, "Social Forces, States and World Order: Beyond International Relations Theory". In *Neorealism and Its Critics,* ed. Robert O Keohane (New York: Columbia University Press, 1986).

[8] Peter Taylor. In Christopher Chase-Dunn *et al.*, "Hegemony and Social Change – The Forum", *Mershon International Studies Review*, 38 (1994): 363-364.

[9] It is a matter of investigation if the issue of collecting and redistributing the resources should be considered as a central feature of an empire. If the answer is no, then it does not fit the definition of the state, in its modern acceptation. The Holy Empire did not do it, but none doubted in its time about being an empire. The best understanding of the fact is offered by the constructivist approach, any given concept having several meanings that appear during the social interactions, and knowing chronological dynamics.

[10] Michael Hardt, Antonio Negri, *Empire* (Cambridge, MA; London: Harvard University Press, 2000), 10.

order as permanent, eternal, and necessary.”[11] For the Euro-centric world, the very model of the unity is the Roman Empire. The memory of its magnificence, civilization and glory mobilized every European imperial project since Antiquity, and each of them tried very hard to present itself as the legitimate Roman heir.

Compared with the imperial order, the hegemonic normative space is significantly less defined, mainly because of the anarchic order it describes, and so are the manifestations of its power. “Compared to empire, hegemony is commonly seen as a shallower and less intrusive mode of control.”[12] Usually lacking a formal responsibility for the domestic politics of the states where it exercises its dominance, the hegemonic power has more freedom in selecting the nature and range of the intervention. But in order to preserve the legitimacy of its predominance (as a “counter-imperial project”), it also has to self-restraint in exercising its power. As Hurrell explains it, “stable hegemony rests on a delicate balance between coercion and consensus, a balance between the exercise of the direct and indirect power by the hegemon on the one hand and the provision of a degree of autonomy of action and a degree of respect for the interests of weaker states on the other.”[13]

By returning now to David Lake’s classification of the hierarchic structures of the international realm, I believe that the first three forms (spheres of influence, protectorates, informal empires) could be considered as belonging to the family of hegemonic dominance. They are ordered according to the range of the involvement of the centre, being expressions of some sort of a soft, a medium and a hard hegemony in material, military terms. I tried to show that the empire is a different kind of dominance, and in what it follows I suggest that the post-imperial order can be seen as some sort of hegemony, but not necessary, only in those cases where the former metropolitan power imposes its own rules to the succeeding states.

In spite of the fact that there are authors convinced that a world-state is inevitable[14] or that empire is an immanent threat toward the freedom of the world’s citizens[15], empirically one could observe that the fate the empires are facing seems to be their unravel (at least of the political units considered in this paper). It is now the moment to take a closer look to the relations built among the states that follow an empire or, in other words, to identify and investigate a post-imperial order, if possible.

Empire and post-imperial order

As I have shown, it is the intention of this paper to investigate and conceptualize the features and typology of the post-imperial orders. In this respect, I think that a brief comparative look to the British and, respectively, the Russian Empires could prove to be very fruitful. I am using the plural form when speaking about the Russian empire because I consider it in its both forms, Tsarist and Soviet. By doing so, I shall try to mark either the elements of continuity and specificity of both these two empires governed from Moscow.

There are at least two reasons for choosing them: firstly, they were the very embodiment of two different forms of imperialism, so that I formulate as a first hypotheses that the post-imperial orders that they generate would be quite different; secondly, they were the most powerful players

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[11] Hardt, Negri, *Empire*, 11.
[12]Andrew Hurrell, *On Global Order. Power, Values, and the Constituency of International Society* (Oxford; New York: Oxford University Press, 2007), 262.
[13] Hurrell, *On Global Order,* 270.
[14] Alexander Wendt, "Why a World State is Inevitable”, *European Journal of International Relations*, 9 (2003): 491-542
[15] Hardt, Negri, *Empire*.

in the imperialist game, and each of them managed, at the climax of their territorial expansion, to control roughly one fifth of the earth, so that the post-imperial orders that they eventually generated represented the widest spread.

The differences between a commercial, sea-born empire, on one hand, and a militaristic land-based on the other are quite known in IR theory. A classical geopolitical approach is visible in Dominic Lieven's commentary:

> The contrast between British commercial and Russian military–dynastic empire overlaps with another distinction: the one between maritime and land empire. Since from the sixteenth century to the creation of the railway (and actually in many cases beyond) long-distance trade was far cheaper and quicker by water one reason for the overlap is clear. In the view of many scholars the contrast between maritime and land empire also entails the distinction between a far-flung collection of colonies in the former case, and a polity which is in embryo at least a unified state, and maybe even a potential nation-state. Added together, these contrasts are often summarized as the distinction between liberal, diffuse maritime power on the one hand, and autocratic, centralizing land empire on the other.[16]

Although Lieven's perspective is compelling, there are perhaps of making only two comments to add. First, the logics behind empire-building are quite different: in the British case, it was, for the most part of its history, an individualistic enterprise, where the state came lately into the scene. More or less, it was built on a bottom-up dynamic. For the Russian case, it was mainly a state-guided effort, driven by territorial defense and expansion, so that it can be considered a top-down project.

The diffuse nature of the British Empire outlined by Lieven implies a much larger freedom for the colonies and territories[17] than for the Russian example. Even ideological, the British Empire envisaged in its late period its natural collapse as the moment when the indigenous people would be able of self-governing. The distinction between colonies and dominions is not only a matter of race, but also one of governmental aptitudes.[18] In the Russian example, the autocracy offered a much harsher political environment, so that the relations between the centre and the subjects can be considered strictly hierarchic.[19]

The second comment concerns the position of the centre inside the empire. Queen Victoria was Empress of India in her capacity of ruler of the United Kingdom, which had a distinct identity inside the empire, preceding, co-existing and succeeding it. His correspondent in Russia was "Emperor and Autocrat of All the Russias". Russia itself (Great Russia, distinct from White Russia – Belarus, and Little Russia – Ukraine) had not a distinct personality. Curiously, in Russian Empire's heir, the Soviet Union, the situation somehow perpetuated, at least at the level of ideological tools.[20] Russia *was* the empire, not (only) its core.

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[16] Dominic Lieven, "Empire on Europe's Periphery". In *Imperial Rule*, eds. Alexei Miller, Alfred J. Rieber (Budapest; New York: Central European University Press, 2004), 138.

[17] The histories of relations between London and the "white colonies", but also with the local rulers in India, are eloquent in this respect.

[18] See, for instance, the discussion of the inter-war period regarding India's capacity for gaining the dominion status.

[19] For a much detailed discussion over the social conditions in the British and, respectively, the Russian empires, see Lieven, "Empire on Europe's Periphery", 141-147.

[20] For instance, all the Soviet republics had their own Communist Party, except for Russia, where the Soviet Union's Communist Party (the "general" one) was acting. At individual level, it is also to note that many political leaders of the Soviet Union were born outside Russia. It is enough to mention in this respect the names of I. V. Stalin, a Georgian, and Nikita Khrushchev, a Ukrainian. Examples as such are indicators for considering that in the Soviet Union the Russian national political identity was to be subsumed to the imperial, Soviet, one.

In these circumstances, Lieven's consideration of the Tsarist Empire as a "potential nation-state" should be considered with caution. This potential nation-state would have needed a nation, but a nation that contained the Russians in a larger political community. The Russians entered in nations' era not only without political instruments of building a "community of will", but, one can speculate, also without a socially relevant idea of imaging a history and a future separated from those of other such political entities.[21]

The Bolshevik Revolution, besides having as an immediate effect the dismantlement of the Tsarist Empire, brought a Marxist ideological dilemma in the issue of imperialism. On the one hand, there should be considered the self-determination right of the proletariat from the ancient exploiter, meaning the right to secession of the proletarians living on alien territories. On the other hand, the nation-state is, from a Marxist point of view, the expression of the interests of the exploiting upper-classes, and so the only legitimate country for the all the proletarians would be the Soviet Union. Eventually, the imperialist project won, and almost all the territories once part of the Tsarist Empire returned by violent means under Moscow's control.

The ideological factor had two important consequences for the imperial identity. Internally, it offered a much more powerful unifying tool in the hands of the political elite of the centre than the autocracy gave. Externally, while the Tsarist Empire was an accepted member of the international society, the Soviet Union, because of its revolutionary character, gained this status only in the eve of the World War II. During the Cold War, the ideology was for the Soviet Union both a form of power, and an impediment in shaping social relations at international level.

The Soviet imperialist ideology was at least twice revised regarding its exclusive sphere of influence, the "external" or "informal" Soviet empire.[22] The first was represented by the moment when Moscow imposed friendly regimes in the satellite countries, in the period following the end of War World II. The second important moment came in the late 1960's, with the Brezhnev Doctrine. I should highlight the fact that the manifestations of projects in the political life should be considered as forms of hegemony. The imperialism is the ideology that made such policies possible, not the practices - a possible political unifying project that never came into fact, simply because the countries in question preserved their sovereignty. The perspective in its ideological dimension was formally ended with the announcement of the Sinatra Doctrine in 1989.

In brief, it can be said that there were some important differences between the British and Russian empires: maritime *versus* land, colonial *versus* territorial, liberal *versus* autocratic/ communist, state-core *versus* empire-core, etc. The brief comparative discussion above is not meant to exhaust the topic, but to offer a better understanding on two different kinds of relations that can emerge between the metropolis and its former alien subordinated units after the collapse of the empire. I intend to use this comparison in order to build two ideal-types of the post-imperial orders.

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[21] The above sentence should not be red as there was no Russian nationalism during the 19th century, but that it can not be compared with its contemporary counterparts in the terms of social relevance and political impact. For a good insight over the issue see, for instance, Alexei Miller, "The Empire and the Nation in the Imagination of Russian Nationalism". In *Imperial Rule*, eds. Alexei Miller, Alfred J. Rieber (Budapest; New York: Central European University Press, 2004)

[22] More considerations on this issue could be found, for instance, in Alexander Wendt, Daniel Friedheim, "Hierarchy under Anarchy: Informal Empire and the East German State". In *State Sovereignty as Social Construct,* eds. Thomas J. Biersteker, Cynthia Weber (Cambridge: Cambridge University Press, 1996)..

The ideal-types of the post-imperial orders

Part of the Weberian intellectual tradition of the Social Sciences, the constructivist approach underlines the importance of the comprehensive perspectives. Intellectual constructs as the ideal- types are meant to clarify the analytic effort of the researcher, even if the situations met in the real social, lacking the purity of the concept, can only approximate one pattern or another.

The main purpose of this paper is to offer a perspective on the involvement of the former imperial powers in their former colonies/ territories for a better understanding of some dramatic contemporary international security issues. I consider that some good answers can be found in the common past that provides special identities and interests.

In my view, these present special relations originating in the imperial past can be grouped in two main forms. In the first one, the attitudes, behaviors and policies of the former imperial power can be seen as designed to fulfill only its interests. The present sovereign states that used to be under its control are considered to be its "natural" backyard – if not in the empire, at least in its sphere of influence. Any external interference, particularly those regarding the hard security, are seen by the decision-makers of the former empire as menacing its influence, and consequently as unfriendly and veritable threats toward the international stability. In the relations established with the new independent states the former metropolis tends to act like a suzerain, and to replace the empire with a form of hegemony, mainly in its military dimension. The imperial dream is somehow still present in the most parts of the political class and inside the society as a whole, who tends to consider that period as the nation's "golden age". I name such a relations-complex (involving decision-makers, societies, states and other social actors) a *power-oriented post-imperial order* (POPIO).

In the second case, the former imperial power is somehow "ashamed" by its imperial past, in particular by the excesses, the most intrusive forms of its dominance of the life of its subordinated societies. If nothing can be made in order to remedy the errors of the past, a sentiment of responsibility toward the future of the former colonies becomes widespread in the society. The loss of the empire being accepted, the former imperial power also faces the failure of the claimed legitimate monopoly over the normative space. The imperial values should be replaced only by an even larger set (as the Human Rights doctrine), more universal, less controversial. In such a post-imperial order, the external interference is accepted as long as the interventionist proves itself to be a valid interpreter of the norms. In this *norm-oriented post-imperial order* (NOPIO), the Civilized Other is accepted, desired, invited to observe, interpret and act.

In my view, one major difference between the two ideal-types of post-imperial orders can be seen as similar to those between multilateralism and bilateralism, but at the normative and, more important, the interpretative level. Thus, I extend John Ruggie's meanings of these terms from those interests and identities embodied in formal agreements[23] to encompass all kind of shared understandings and practices, many of them being visible only in the management of occurring crisis or other moments.

Some additional comments should be made. First, we could say that in a POPIO an empire's heir is considering itself a "genuine" nation state. The identities of such an actor are those shaped by the structural conditions of a state having to act in an anarchical environment. The new actor is supposed to have the usual interests of a nation-state in a Hobbesian world, where power and self-help are the governing principles of the relationships among sovereign entities. In a NOPIO, the universal project is preserved, but reconsidered – the failure of the normative

[23] John Gerard Ruggie, "Multilateralism: The Anatomy of an Institution", *International Organization*, 46 (1992): 561-598.

monopoly does not meant that it has to be replaced by an egoistic set of values, but by a larger one, less ideological. The new identity being achieved, the possibility to make mistakes, the acceptance of the social change – all these would shape new interests toward the former colonies and territories.

I should also highlight the fact that these ideal-types refer to post-imperial orders, not actors. It is theoretical possible that the same former imperial power would build/ desire to build a POPIO in certain cases and a NOPIO in others. Such an observation could be considered illogic, or even hypocrisy, for certain theories, but the fact is consistent to the constructivist approach, where every actor knows a particular set of identities and interests, stable but not perennial. Generally speaking, certain stability in pursuing a specific post-imperial order is to be expected from each former imperial power (if we are not in front of a schizophrenic actor), but the exceptions would be not unavoidable. There are two situations, at least, to be noticed when such thing is possible: the evolution of the norms themselves and their socially recognized valid interpretation, on the one hand, and the situations when the actor would risk to act in a manner close to cognitive dissonance, so that it has to choose between becoming the "prisoner" of the norm, or to re-prioritize its identities and interests.

It is also possible to consider the two ideal-types as stages of the same process. Till now, there are too few examples in this field. As I shall discuss later, there are some indicators that one post-imperial order could replace the other. A constructivist perspective of this factor would take into consideration both material and ideational factors, continuous and slow changes of the interests and identities of the agent, and the dynamics of social structures. It should also be said that such process does not necessarily involve something inevitable or irreversible- the social-oriented approach rejects such a perspective. But if such a tendency exists, it should be discovered.

I consider that in the contemporary world the two forms of post-imperial orders coexist and produce social effects. In the next section of this paper I intend to comment some of their most visible manifestations and interactions in international security issues.

International security through post-imperial orders

It is a matter of empirical observations that in the last century the great powers progressively abandoned the imperialist projects and policies, in the conception considered here. Several explanations could be offered here, from the nature of military power (for instance, the significance of the nuclear factor) or the relative decrease of the importance of the territory till to the spreading of nation-state ideology, but it is not my intention to identify and investigate all of them. I want to point out some changes in the political ideas governing the world. Martha Finnemore suggests that, in contemporary politics, "most states do not *want* more territory nor do they see force as an effective or legitimate means of obtaining it. More territory is no longer a marker of state success or state greatness".[24]

Finnemore's statement can be best understood in the context of her book. Attached to the constructivist approach, she underlines that the norms governing the international politics are in a permanent and continuous change. The argument is completed by saying that the above changes continuously produce new institutions of the world order, that exercise a structural pressure over all social actors. In my opinion, in a constructivist perspective the institutions and agents should be considered in dynamic co-determination relationship.

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[24] Martha Finnemore, *The Purpose of Intervention. Changing Beliefs about the Use of Force* (Ithaca, NY; London: Cornell University Press, 2003), 140; emphasis in original.

The fact that the great powers abandoned the imperialist policies does not mean that there are all considered in the same fashion. The interventions vary greatly in the terms of international support and legitimacy, and asking "why such a thing would happen?" is appropriate.

In domestic politics, the legitimacy of government is conferred by the objects of governing acts. By applying these observations to the international field, the legitimacy of an external intervention would be conferred by the two kinds of subjects involved: those who suffer it and the citizens of the interventionist state, to whom the decision-makers are responsible to. The anarchic nature of the international system – lacking a monopoly in issuing, interpreting and enforcing rules - makes such a judgment insufficient, so that the interventionist looks for some support of interpreting the rules even outside, from other nation states and from a inter-/ transnational public opinion.

POPIO

A POPIO could be considered today as the "wrong" way of understanding the international politics, due to the exclusivist claim of a single power to manage all the important matters in a self-designated sphere of influence. For instance, in Western opinion at least, Russia's treatment of the former Soviet space as her own backyard is usually considered both a threat to the address of international security and obsolete in its norms and practices.[25] Of course, one could say that this interpretation is only a form of the hegemonic power of the West in imposing its judgments on international level[26]. The correctness of this statement or finding a better explanation is not relevant to the aim of the present paper, since the fact that this position produces social effects is more important.

In my view, Russia's attempts to establish a POPIO are somehow predictable, because of the identity transformations she has suffered in the last twenty years. The end of the Cold War and the collapse of the Soviet Union were accompanied by the renouncement to the ideology, the imperial unifying factor. At that moment, Russia faced the imperative of building a state and even a supporting nation as soon as possible. As for her political identity in international relations, Andrei Tsykankov discovered in 1997 at least four different and colliding projects, each of them having its supporters in the political and academic circles: the international institutionalism, the defensive and offensive realism, and the revolutionary expansionism[27].

Almost a decade later, Andrei Tsykankov considers that it is a mistake to look at Russia as to an imperialist power, but to treat her as a state looking after its own national interests, the Kremlin's policies being "post-imperial and largely defensive. They seek to pursue opportunities for economic growth and stability and to address remaining security threats"[28]. Russia is using more and more the instruments of soft power, in Tsygankov's view, designed to project influence, not power, in the former Soviet Union. For Tsygankov, "strengthening Russia's ties in the former Soviet region does not require revising existing territorial boundaries, depriving neighbors of their political sovereignty, or taking on the burden of an imperial responsibility, successful application

[25] A huge bibliography is dedicated to this subject in recent years. For a short and suggestive description, see Andrei P. Tsygankov , "Projecting Confidence, Not Fear: Russia's Post-Imperial Assertiveness", *Orbis*, 50 (2006), 677-679. An extended investigation over Russia's foreign policy can be found in Roger E. Kanet (ed.). *Russia – Re-Emerging Great Power* (Basingstoke; New York: Palgrave Macmillan, 2007).

[26] On Western normative influence in International Relations see, for instance, Anthony Pagden"Human Rights, Natural Rights, and Europe's Imperial Legacy", *Political Theory*, 31 (2003): 171-199.

[27] Andrei P. Tsyganko v, "From International Institutionalism to Revolutionary Expansionism", *Mershon International Studies Review*, 41 (1997): 247-268.

[28] Tsigankov, "Projecting Confidence, Not Fear", 684.

of soft power weakens the appeal of Russia's traditional imperialists and strengthens security in the region"[29].

Translating Tsygankov's 2006 analysis in his own 1997 terms suggests that in the last decade the liberal and revolutionary approaches became less influential in Russia, and that now her behavior could be best understood in the terms of some sort of realism. I think that Tsygankov is right in his argument and I shall try to put it in a theoretical manner, which would consider today Russia a unitary nation-state actor pursuing its interests in the anarchic environment in a selfish manner. The analysis is supported by events and processes at both internal and external level. Internally, the two Chechen Wars, for instance, were designed to ensure the rule of the central government over the entire territory of the state – violently affirming the statehood. Externally, the opposition made toward the "colored revolutions" (in Tsygankov's terms) and their political outcomes, to NATO's expansion or the Georgian intervention are all meant to formulate a sphere of exclusive hegemony, not a new empire, or a POPIO in the terms suggested by this paper. Nevertheless, this kind of management the sphere of influence is rejected by Russia's interaction partners as brutal forms of (re)imposing the hegemony. The Georgian crisis in the summer of 2008 is eloquent in this respect. This case also offers a good example for a previous statement I have made that that in a POPIO the hegemon do not accept Others' intervention. It is also to be said that the Others do not consider Russia's norm interpretation as valid (the parallel between the statehood of Kosovo on the one hand and South Ossetia and Abkhazia on the other being rejected).

The above discussion directs me to the next subsequent question, related to the different interpretations of the interventions in weak states. If the military management of international security in a POPIO looks today like a morally condemnable enterprise, one should ask how other interventions can appear as much more desirable. In other words, what makes an intervention made in a NOPIO to be seen as more legitimate than that in a POPIO?

I think that in order to answer this question it is necessary to look closer at the establishment conditions of a NOPIO, and the Western experience in this respect would offer a good insight. For instance, at the end of World War II, the British political elite contemplated both the inevitable march toward independence of some of the most important colonies and territories of the Empire (namely India) and the ambition of being one of the major powers of the world, comparable with the United States and the Soviet Union. The solution was to replace the imperial order with a hegemonic one, so that the British decision-makers made appeal to an older instrument, the Commonwealth, formerly opened only to the Dominions, the "white" part of the empire.

> The modern Commonwealth was not the natural successor to the old prewar Commonwealth that had been held together by ties of kith and kin, common ideals, and partnership. This updated version was a Whitehall device to protect old spheres of interest from competing influences, including from the USA, to offer the new members some off-the-shelf international status and prestige, certain benefits in economic, trade and military assistance, and to prevent the spread of communism.[30]

Obviously, the United Kingdom faced the harsh pressures of the Cold War and had to renounce at the claims of being comparable with the two giants of the bipolar era. European empires were doomed in the nuclear age, crashed in the superpowers' collision. The threat of the

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[29] Tsigankov, "Projecting Confidence, Not Fear", 686.

[30] Krishnan Srinivasan,"Nobody's Commonwealth? The Commonwealth in Britain's Post-imperial Adjustment", *Commonwealth & Comparative Politics*, 44 (2006), 259.

communist expansion forced the European powers to search for the American security umbrella. As for the American strategy, even if the European colonies could prove important assets in the containment policy (the replacement of the French presence in Indochina after Dien-Bien-Phu, in 1954, by the American one), the post-colonial political identity of the United States was much too strong to sustain such a position for long period of times. The Suez Crisis in 1956 could be considered as the turning point of the United States' policy toward European empires, by deciding not to support them any more. The decolonisation was the major political process that accompanied the Cold War for political reason too, because

"[…] the Americans were coming round to the view that decolonisation was the best way to counter the spread of communist influence, and American pressure thenceforward became a factor in the independence timetable[31]

In brief, one could say that, under the structural combined pressures of both the Cold War conditions and the spread of nationalist ideas, the great European powers had to reformulate their empires, the British experience being accompanied by the similar experience of France, for instance (the Fourth Republic's *Union française* and *Communuaté française* of the Fifth Republic). Till now, it seems clear that the British and French Commonwealths could be interpreted as designed to embody the political exclusive sphere of influence of the former imperial powers or, in the terms of the present paper, as POPIOs. The question is how it comes that the POPIOs were transformed in a NOPIO?

NOPIO

I think that the fundamental reason of the explanation should be searched in the unique experience of the West in post-World War II era. Even if we consider Western Europe during the Cold War under a common and foreign hegemony, the main instrument of the American military presence in Europe – NATO – was an anarchic one, with decisions taken on consensus, unlike the similar Soviet instrument, the Treaty of Warsaw[32]. At the end of the Cold War period, the West noted that it formed a security community, whose member consider themselves linked together by mutual trust, based on common identities, values, meanings, norms and practices[33]. As for the European part of this security community, right at the end of the Cold War they institutionalized their relations even more, by forming the European Union.

The common identities, values, meanings, practices of the Western security community are, in my view, the very basis of the NOPIO in discussion. The European Union itself contributes to the building of this form of post-imperial order. Firstly, the shared sovereignty of the members is, I believe, conceivable only if a unity project based on common identities and interest, norms and meanings, is taken into consideration.[34] Secondly, this unity project is not exclusive for the Other.

[31] Srinivasan,"Nobody's Commonwealth?", p. 262.

[32] Lake, "Beyond Anarchy".

[33] Emanuel Adler, Michael Barnett, "A Framework for the Study of Security Communities". In *Security Communities,* eds. Emanuel Adler, Michael Barnett (Cambridge: Cambridge University Press, 1998), 30-37.

[34] It should be noted that most discussion of a potential future "empire" (post-sovereign institutionalized form of political unity) are considering UN as the most used contemporary example (for instance, Hardt, Negri*, Empire,* 3-8). The sovereignty issue makes, I think, the EU a much more appropriate example. If so, one should also reconsider the imperial model in interpreting the EU. In spite of the common parallel between the EU and the Roman Empire, which is offering the very idea of European unity, I suppose that a more fruitful comparison would be with the Holy Empire. What do I have in mind is the permanent negotiation process among the political units, the relevance of the central power in discussing the empire, and so on. It is also one more element that entitles the comparison, the normative dimension. For the first part of its history at least, in the Holy Empire it was only one hierarchic

The aim of some of the most challenging component of the European project (the foreign and security policies, which directly address the meaning of the sovereign state) is to shape an European position in the international realm without denying the partnership with the United States, but making efforts to ensure that the transatlantic partnership is working, based, in spite of difficulties, on shared principles, meanings and responsibilities[35]. Special cautions are taken in this respect in particular by those EU members that are also NATO members[36]. I should note that the former imperial powers show the most visible interest in establishing an European international presence. I consider that this fact is due to their post-imperial identity, so that these historic responsibilities and interests define the NOPIO.

In my opinion, NOPIO should not be linked to a special international institution, as the EU. The EU independent external force projection has been very limited, in spite of the efforts made, and it should be noticed that the involvement is, till now at least, conceived in co-operation with other organizations such as NATO or UN.[37] This does not mean that the former imperial powers would fail to express their concern about the weak states that used to be under their control. For instance, Italia took initiative in solving the difficult situation of Albania in 1991 and later a UN mission in 1997, and so was France with regard to Lebanon in 2006. The instrument is less important than the objective. Moreover, the organisations established to embody the former selfish POPIO's have been transformed and become part of the NOPIO. It is enough to mention the present Commonwealth of Nations that can be compared only superficially with its ancestor (the *British* one) from the post – World War II period, but not in terms of the values, goals, and practices involved. The examples can continue in this respect, as the similar Francophone organisation, etc.

Domestic political interests should not be neglected when formulating the interventions, as the ones considered above. It is clear that the public opinion and immigrants from the former empire have their role in the crisis management. The public sensibility with regard to this subject and the presence of immigrants are precisely the signs of post-imperial order. What does it make a NOPIO is that the crisis management policies are grounded on responsibility and not on power interests. Multilateralism is also a key element of a NOPIO. Even if the regular allies and friends decide not to contribute to the operations (as the United States refused to interfere in Albania), they are consulted and offer the political support.

The last question I would like to address is the relationship between institutionalization and gaining the status of recognized norm generator and interpreter. In other words, if a post-imperial state like today Russia should became an institutionalized member of the West in order to consider her hegemony closer to a NOPIO than to a POPIO.

In my view, theoretically it is possible such a future evolution. A NOPIO is based on shared values, meanings and practices. In order to consider Russia's interventions legitimate in her former empire, they should be based on the norms and reasons as those of the West, that the Russian

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institution that functioned, a heritage from the Roman imperial unity: the Romano-Catholic Church, the main source for rules and also their main interpreter. In the present-day European Union, all the political processes are to be shaped by the common normative space, having its core outside the negotiated interests, but the common accepted basis – Human Rights doctrine, etc.

[35] Hartmut Mayer "The 'Mutual', 'Shared' and 'Dual' Responsibility of the West: The EU and the US in a Sustainable Transatlantic Alliance". In *A Responsible Europe? Ethical Foundations of EU External Affairs*, eds. Harmut Mayer, Henri Vogt (Basingstoke; New York: Palgrave Macmillan, 2006).

[36] Jolyon Howorth, *Security and Defence Policy in the European Union* (Basingstoke; New York: Palgrave Macmillan, 2007).

[37] Hanna Ojanen, "The EU's Responsibility for Global Security and Defence" In *A Responsible Europe? Ethical Foundations of EU External Affairs*, eds. Harmut Mayer, Henri Vogt (Basingstoke; New York: Palgrave Macmillan, 2006).

political system could be seen as a democratic one and that the decision-making processes are not indifferent to the positions of domestic public, the subject of the intervention and of the international partners as well. In brief, a post-imperial nation-state, as social actor, should become contemporary in the political ideas and alike in her interests and identities with others in order to be no longer considered the Other. By retracing the already suggested parallel with the security community theory, the institutionalized membership to the West is not required *per* se in order to consider Russia's predominance in her former empire as closer to a NOPIO than to a POPIO, but her observance of the socially recognized legitimate reasons and ways of exercising the influence.

On the other hand, it should be said that very different evolutions could be made possible by the dynamics and mutual influence of material and ideational factors. The very status of great power or the rejection on identity basis of the Western interpretations, domestic or external events, processes, phenomena, agents' actions, etc, could drive to policies of various natures – as, for instance, to preserve the POPIO, to transform it, even to give it up, and so on. In spite of a two-century old dream, the future of the social realm is still beyond the prediction capacities of its observers and interprets.

Conclusions

In this paper I tried to show in a constructivist approach that it is possible to consider some military interventions made by the great powers in weak states in the light of their imperial past. In this respect, I differentiated the empire from other forms of political dominance, and the most important element seemed to be the sentiment of unity and common project. When the empires collapsed, each of them generated a post-imperial order, that is to say special links between the metropolis and the sovereign states once under its control as well as special interests and identities.

The next step in the investigation of the post-imperial interventions was to take a closer look to the possible meanings of post-imperial orders. I defined in this respect two ideal forms. The first one, i. e. the *power-oriented post-imperial order*, is defined by the interests of the former political centre of the empire. It considers that the former empire is to be transformed in a sphere of influence of its own, where its special interests should be protected from any external influence, in particular in high politics. On the contrary, a *norm-oriented post-imperial order* is based on a special responsibility of the former imperial power. The interactions are based on the over-sovereign norms governing the social interactions. The external influences are not only allowed, but even desired, as long as the other interventionists are considered valid interpreter of these rules.

In my opinion, these two ideal-types of the post-imperial order could be useful analytical instruments in discussing contemporary international security issues. There are intended to allow the avoidance of misinterpretations of the political projects and ideas behind great powers' interventions in weak states. In empirical situations, these terms can suggest some possible future evolution of the international security problems. Theoretically, some entrenched meanings of important concepts of International Relations are to be reconsidered, such as sovereignty or anarchy. In a constructivist perspective, neither the world, nor the actors' interpretations stop. The continuous social interactions generate new understandings that are to be conceptualized and analyzed, and this is the reason of the above paper.

References:

- Adler, Emanuel, Michael Barnett. “A Framework for the Study of Security Communities”. In *Security Communities,* eds. Emanuel Adler, Michael Barnett, Cambridge: Cambridge University Press, 1998.
- Buzan, Barry, Richard Little. *International Systems in World History. Remaking the Study of International Relations*, Oxford: Oxford University Press, 2000.
- Cox, Robert W. “Social Forces, States and World Order: Beyond International Relations Theory”. In *Neorealism and Its Critics,* ed. Robert O Keohane, New York: Columbia University Press, 1986.
- Doyle, Michael. *Empires*, Ithaca, NY: Cornell University Press, 1986.
- Finnemore, Martha. *The Purpose of Intervention. Changing Beliefs about the Use of Force* Ithaca, NY; London: Cornell University Press, 2003.
- Gilpin, Robert. “The Theory of Hegemonic War”, *Journal of Interdisciplinary History*, 18 (1988): 591-613.
- Hardt, Michael, Antonio Negri. *Empire*, Cambridge, MA; London: Harvard University Press, 2000.
- Howorth, Jolyon. *Security and Defence Policy in the European Union*, Basingstoke; New York: Palgrave Macmillan, 2007.
- Hurrell, Andrew. *On Global Order. Power, Values, and the Constituency of International Society*, Oxford; New York: Oxford University Press, 2007.
- Kanet, Roger E. (ed.). *Russia – Re-Emerging Great Power*, Basingstoke; New York: Palgrave Macmillan, 2007.
- Lake, David A. “Beyond Anarchy. The Importance of Security Institutions”, *International Security*, 26 (2001): 129-160.
- Lieven, Dominic. “Empire on Europe’s Periphery”. In *Imperial Rule*, eds. Alexei Miller, Alfred J. Rieber, Budapest; New York: Central European University Press, 2004.
- Mayer, Hartmut. “The ‘Mutual’, ‘Shared’ and ‘Dual’ Responsibility of the West: The EU and the US in a Sustainable Transatlantic Alliance”. In *A Responsible Europe? Ethical Foundations of EU External Affairs*, eds. Harmut Mayer, Henri Vogt, Basingstoke; New York: Palgrave Macmillan, 2006.
- Miller, Alexei. “The Empire and the Nation in the Imagination of Russian Nationalism”. In *Imperial Rule*, eds. Alexei Miller, Alfred J. Rieber, Budapest; New York: Central European University Press, 2004.
- Modelski, George. “The Long Cycle of Global Politics and the Nation-State”, *Comparative Studies in Society and History*, 20 (1978): 214-235.
- Ojanen, Hanna. “The EU’s Responsibility for Global Security and Defence” In *A Responsible Europe? Ethical Foundations of EU External Affairs*, eds. Harmut Mayer, Henri Vogt, Basingstoke; New York: Palgrave Macmillan, 2006.
- Pagden, Anthony. “Human Rights, Natural Rights, and Europe’s Imperial Legacy”, *Political Theory*, 31 (2003): 171-199.
- Ruggie, John Gerard. “Multilateralism: The Anatomy of an Institution”, *International Organization*, 46 (1992): 561-598.
- Srinivasan, Krishnan. “Nobody’s Commonwealth? The Commonwealth in Britain’s Post-imperial Adjustment”, *Commonwealth & Comparative Politics*, 44 (2006): 257-269.
- Taylor, Peter. In Christopher Chase-Dunn *et al.*, “Hegemony and Social Change – The Forum”, *Mershon International Studies Review*, 38 (1994): 361-376.

- Tsygankov, Andrei P. "From International Institutionalism to Revolutionary Expansionism", *Mershon International Studies Review*, 41 (1997): 247-268.
- Tsygankov, Andrei P. "Projecting Confidence, Not Fear: Russia's Post-Imperial Assertiveness", *Orbis*, 50 (2006): 677-690.
- Ungureanu, Radu-Sebastian. *Securitate, suveranitate şi instituţii internaţionale. Crizele din Europa de Sud-Est în anii '90* [S*ecurity, Sovereignty, and International Institutions: The South-East European Crisis of the '90s*], Iaşi: Polirom, 2010.
- Wendt, Alexander. "Anarchy is what States Make of It: The Social Construction of Power Politics", *International Organization*, 46 (1992): 391-425.
- Wendt, Alexander, Daniel Friedheim. "Hierarchy under Anarchy: Informal Empire and the East German State". In *State Sovereignty as Social Construct,* eds. Thomas J. Biersteker, Cynthia Weber, Cambridge: Cambridge University Press, 1996.
- Wendt, Alexander. "Why a World State is Inevitable", *European Journal of International Relations*, 9 (2003): 491-542.

THE ROLE OF THE UNIVERSITY IN THE KNOWLEDGE SOCIETY: ETHICAL PERSPECTIVES ON ACADEMIC RESEARCH IN THE AGE OF CORPORATE SCIENCE

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Abstract

Knowledge society lies on the ruins of national culture that thought people to function in a single universal form of science. This type of society is tightly related to a post-national multicultural world that nourishes the erosion of classical (Kantian and Humboldian) cultural and scientific foundations of the university. We are now witnessing it's transformation into a "multiversity" dominated by the competitive international academic market for students and scholars and "commodified" knowledge. The fiscal crisis of publicly financed universities forced them to constantly pursue other forms of income, the industry being the most obvious solution. In the place of universities of reason and culture the drastic decrease of public funding generated the commercialization of the universities. This is because there is an "asymmetric convergence": while universities are adopting corporate values and principles the industry itself is not influenced by the academic values and norms. The pursuit of knowledge for mere intellectual curiosity and also the conception of the knowledge as a public good have been abandoned in favor of applied research serving corporate interests. The resulting academic capitalism is far from being the best solution to budget cuts and this study is trying to highlight some of advantages but also the most important shortcomings of this present trend in our universities.

Keywords: *knowledge society, commodified knowledge, academic capitalism, corporate interests, research limitations*

Introduction

During the last decade one of the most heated debates regarding academic freedom took place in USA. It was caused by an extremely controversial agreement signed between two important institutions: a famous land-grand university and the biggest pharmaceutical and biotechnological corporation. The fierce debate remained known as the Berkeley-Novartis Controversy. I chose this very interesting chapter in the industry-university relation as a starting point of my research as a result of a peculiar situation regarding the way this controversy was reflected in the mainstream press. When theorists made an inquiry on the most debated themes in mainstream journals, the general ethics issues came in the fourth place after corporate control, general research and economic concerns themes. It is not my intention to reshape the current interpretations of this particular event but to prove that this controversy is also important on a different level. I consider that the Berkeley-Novartis Agreement epitomizes a very controversial relation between corporations and universities and I think this should be the starting point for further analyzing the ethical challenges the university has to address in the present knowledge

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society. The long debated Berkeley-Novartis Controversy is only a result of a much deeper crisis threating the academic world. The long praised academic Ivory Tower is currently under attack from many directions. It is my intention to bring forward some of its enemies by highlighting some of the dramatic transformations taking place in university of the knowledge society.

In the first section of my paper I shall present some of the key moments in the transformation of the university. The university has been for centuries the sole producer of knowledge and this is only of the many reasons it was built as an intellectual Ivory Tower now under siege. Nowadays there are numerous knowledge producers and knowledge users and the knowledge society is also a society of huge corporation deeply connected to the neoliberal political agenda. This is why I think it is very important to put the university into a historical and political context in order to see whether the university lies in ruins, as Readings[1] would say or whether it can serve a more important role in the global context by linking the knowledge to its users as Delanty[2] would argue.

The second section of my paper I shall analyze some of the most important theories regarding the penetration of the managerial ethos in the academic space. The growing importance of the corporations as major sources of income for universities generated different theories trying to describe the complex relation between industry and university.

Finally in the third section of my paper I shall take a closer look to the Berkeley-Novartis Controversy in order to pinpoint the important ethical implications of the so-called academic capitalism dominating the university in the knowledge society. Although it is a recent development in Romanian academic world, academic capitalism is been largely promoted in the past decade through policies and practices designed to build a closer relationship with the economy in the context of deregulation and fierce competitiveness. This is why I think that before embracing this type of perspective a closer analysis of its most important implications is in order.

1. The historical evolution of the university

In an extremely well documented work Gerard Delanty brings forward some of the most important moments in the transformation of the university. I shall follow in this section some of the directions he is analyzing. During medieval times the university was closely related to the idea of a universal truth offered by the Christian theology. It was an austere place resembling the literary myth of Castalia where an order of intellectuals lived for the discovery of the ultimate Truth. Since this was such an abstract quest anyone could participate in it and the result was the scholars all over the world gathered in the university offering it a cosmopolitan character. The medieval institutions were even more cosmopolitan than those functioning today. The Bologna's ten thousand students came from all over Europe. But this was not the only aspect giving them a privileged position in the medieval academic world. We may ask ourselves what was so interesting about our Christian University. During medieval times important universities flourished outside the Christian world. Twenty-five thousand students learned in the Muslim university of Timbuktu, for example. It was the incredible dynamics of the European university that help it develop in a way that Hindu, Muslim or Chinese universities where not able to since they were imprisoned by a very strict curricula. The continuous specialization in the curricula of Christian universities helped them make such important progress. During those times Latin was the official language of the university. The lack of technological means of communication made this process very difficult. Knowledge was the privilege of a very few scholars able to learn the languages of Antiquity in

[1] Bill Readings, *The University in Ruins*, Harvard University Press, 1996

[2] Gerard Delanty, *Challenging Knowledge. The University in the Knowledge Society*, Open University Press, 2001.

order to have access to its manuscripts. The relation with the public was quasi inexistent due to the cultural, economic and political characteristics of medieval society. Thus, knowledge was the delight of some privileged individuals able to learn the dead languages of Antiquity. This privileged stance of medieval scholars was praised or criticized by different philosophers analyzing knowledge and its evolution. The literary myth of Castalia can be contrasted to the cynical perspective offered by *Il Nome della Rosa*. Auguste Compte is underling the fact that it was this peculiar social situation that made knowledge metaphysical (separated form society). In other words, knowledge was not metaphysical by itself: the social context made it so. This is a recurrent theme in the philosophy of science and this is not the place to analyze it any further. The rise of modern university is closely related to the struggle of institutionalizing knowledge. The university was trying to escape de dominance of the Church and find refuge under the wing of the absolutist state. Due to its cosmopolitan nature the university managed to escape the absolute political control and this is why theorists venture to say that it was the unique milieu where "culture was never fully dominated by power". [3] The relative autonomy of the university was also a result of a particular social and political context: while the authority of the Church was declining the modern state was not fully established. In between those two powerful institutions, the university was able to gain some academic freedom. The university was often developed as an autonomous association of scholars able to grant important privileges to its members. This is why the common understanding of the university was that of a "republic of letters" or a "republic of science" where knowledge was considered an end in itself. Using the capitalist terms, Delanty is describing this situation as one where "knowledge became a site to be inhabited by a knowledge producing and consuming elite. Unlike today, those who produced knowledge were also the chief consumers of knowledge."

The Enlightenment was the period where the historical alliance of the university with the state was largely established and accepted. The academic institutions were central to the consolidation of the national state. The very essence of the Enlightenment was the belief that knowledge has an emancipatory power. The modern state was build up on the firm ground offered by the rationalistic and technocratic values of the Enlightenment. The belief in the emancipatory power of knowledge made it possible for the masses to have access to formal education. It was the time where the school became financed by the state and where everyone was granted access to some form of education. Unfortunately this came with the cost of destroying the old medieval universities. Not surprisingly, this side effect was most visible at the hart of the Enlightenment movement, that is, in France. This was the country with the most collateral damages as a result of Napoleon's project of creating *les grandes ecoles* responsible for doing most part of the research, the teaching activity being main task of the universities.

Another key moment in the development of the university was the rise of positivism. It was for the first time in the history of the university where the culture of experts was opposed to the culture of intellectuals. More precisely with the rise of positivism came the exile of the intellectuals populating the salons and not the university that was conquered by experts and scientists. Despite the conflict between scientist and intellectuals they all shared the monastic belief that knowledge is autonomous and that they are the producers and owners of knowledge. This situation was not common to all the European states. In Germany, the Enlightenment had a slightly different understanding. The French version of the Enlightenment considered knowledge able to help cultivate the people and to substantially contribute to the progress of the society. In Germany the emphasis was on the culture as the main element responsible for the

[3] Gerard Delanty, *Challenging Knowledge. The University in the Knowledge Society*, Open University Press, 2001.

self-construction. German university also benefit from the presence of one of the most important philosophers of all time, Immanuel Kant. In 1978 he published the famous plea to the Prussian king *The Conflict of Faculties*. Those were glorious days for philosophers, who, benefiting from the presence of such a powerful personality found themselves in a privileged position, that of servants of reason and truth. It was perhaps a unique moment when the apparent lack of immediate utility of philosophy was transformed in such a huge advantage. Not only philosophy was to be tolerated although it did not serve am immediate political or social goal, but it had to be accepted as the most important of the faculties exactly for its fully commitment to superior values such as reason and truth. The philosophers were not the only ones to take advantage of this perspective. It was the starting point for the justification of the pursuit of knowledge as an end in itself.

The case of England was slightly different since Oxbridge was designed to educate clercs and gentlemen rather than experts and intellectuals. The conservative attitude of England's most famous universities reflected in an anti-industrial values. This is why they adapted later to modernity and its values.

The most influential intellectual whose work and ideas contributed decisively to the creation of the first modern university was Wilhelm von Humbolt. He was one of the most important supporters of the academic freedom. Instead on being a place where civil servants trained, the university has to be the institution having the important spiritual role of cultivating the entire nation. Humbolt defended the university against the bourgeois utilitarian conception of knowledge so largely accepted in present times. He considered that the university should take the huge responsibility of offering spiritual guidance, therefore taking the place of the Church. Those were the glory days for those cherishing the utopian perspective of the university as a "Republic of Letters". This perspective had the peculiar side effect of allowing theology to come back into the university as an important field of knowledge. The true enemy of the "Republic of Letter" was not the Church, but the utilitarians. The University College London was founded by important utilitarians such as Jeremy Bentham and they denied the right of theology to consider itself a cognitive science. The struggle to maintain the university as the institution fully committed to the idea of searching knowledge as an end in itself was not an easy task. There were important intellectual figures to maintain the idea that knowledge has to be useful for the society. Herbert Spencer for example was very prompt to adopt a perspective favoring science and socially useful knowledge and not humanities.

This type of civic responsibility was partly cherished by American pragmatists such as Peirce, James and Dewey but their commitment was mostly directed towards the community. Thus American academic institutions found themselves closer to their cities and their region than to the state or the empire. They mostly provided useful knowledge for those in need of vocational training. Their commitment locally directed is perhaps the main reason for their surviving in the initial form in the Globalization era. Since they were never closely related to the nation state and they never assumed the responsibility of spiritually guiding the nation and pursue knowledge as an end in itself they were able to survive de decline of the national state.

Many cultural wars occurring in modern times influenced the faith of the university. The numerous attempts to reconcile all knowledge with the Christian doctrine, for example, represents yet another battle shaping the form of today's academic world. We can still sense the echoes of those heated debates. The Natural Theology is far from its glory days, but there are still Protestant Colleges in the USA where teaching the evolution theory is forbidden by their founding members.

The history of the university represents a fascinating subject interesting by itself. I only used it to place the debate about the academic capitalism in a historical context. The medieval and modern legacy left us with an unsolved conflict between the cultural-liberal perspective and the modern perspective on the role of higher education. The first one stresses the role of humanities

and of pursuing knowledge as an end in itself while the former is committed to the scientific progress and the usefulness of knowledge.

The debate between liberal and modern perspectives on the university did not forbid the state to be for a very long period of time the sole financial provider of academic institutions. Even after the world wars the state was greatly supporting universities and was the main source of income for research programs. Although there were a lot of criticisms related to the fact that most research programs were related to the army and the Cold War the universities received great financial support from their government. This was, along with the technological progress, one of the key factors leading to the unprecedented development of the university. This development meant the appearance of a large number of new academic institutions and the transformation of the university form an elitist site to a mass form of education. As we all know higher quantity almost always means lower quality and this is the main reason this recent development of the university is not always accepted as the best direction to follow.

The seven decade of the last century bought along with important students protests major changes in the way universities are financed. The 1968 revolt was the moment where it became clear that the university was no longer an ally of the national state. Although it received most of its funds from the government the university was no longer offering spiritual guidance to the nation. On the contrary, it became a site of intellectual revolt were the very foundation of the modern state were questioned. The financial problems of the eighties reflected in an important decrease in federal funds. Consequently the old and the newly created universities found themselves functioning on their own in a very competitive environment. The end of the Cold War was the second important factor determining the state to retreat its financial support. The development of huge corporations able to invest important amounts of money into research and the university's search for funds were the elements contributing to the emergence of academic capitalism. One of the first books written on the subject offers the following definition: "institutional and professorial market or market-like efforts to secure external moneys" [4] This is one of the two most important enemies of the academic Ivory Tower. The other one is cultural relativism. The capitalist approach to knowledge transforms it into useful information that can be transformed in intellectual property. This perspective that leads to the instrumentation of knowledge finds a very powerful ally in the postmodernist cultural relativism. In other words, the cultural relativist assumption is that there is no such thing as the ultimate truth. Everything is culturally determined and there are many competing truths equally legitimate. The feminist movement and the minority struggles contributed to the erosion of the idea of a unifying culture supporting the national state. In the absence of an ultimate truth to be pursued for its own sake the knowledge as an end in itself cannot exist anymore. This way only the useful knowledge should be taken into consideration. This assumption has many implications: the final victory of the modern perspective of the university with its emphasis on science but also the victory of applied research over fundamental research. Some of those implications are analyzed by numerous theorists and I shall present the most important perspective in the following section of my paper.

2. Theories of universities in knowledge society

Since knowledge should not be pursued as a mere intellectual curiosity but serve a superior goal, that is the social progress no advantages could be granted to researchers and professors. They have to be socially responsible. This is translated into the accountability of their work. Nobody

[4] Sheila Slaughter, Gary Rhoades, *Academic Capitalism and the New Economy: Markets, State and Higher Education*, John Hopkins University Press, 2004.

seems to be willing to offer money for a research project that has no immediate and measurable results. This is why universities have to justify every penny they receive and this is paving the way for the development of the so-called "audit society". The managerial ethos is penetrating academic space and values such as efficiency, profit and low production costs are undermining the academic ideal of a "Republic of Letters" or a "Republic of Science" governed solely by the rules of Reason. Several theories have been developed in order to explain this situation. They include private versus public interest science (Krimsky, 2003), academic capitalism (Slaughter, Leslie, 1997), the triple helix (Etzkowitz, Leydersdorff, 1997), public private isomorphism, (Hackett, 1990), asymmetrical convergence (Kleinman, Vallas, 2001).

The public –private interest theory is underling a very important aspect regarding the research conducted in universities. Nowadays science requires a huge amount of technological tools. Nobody can conduct an important research project without being granted access to the sophisticated laboratories and the state of the art technological tools. Since the state is no longer the sole provider of those research instruments universities turn to private investors. The raising problem is that those private investors will not be interested in making the results of the scientific research available to the public. This can have extremely dangerous consequences if we think at the microbiology research. In a very pessimistic perspective we shall all be eating deadly "franken-foods" since the results of the research made in this field would not be available for the public. The big corporations are only interested in transforming the knowledge into intellectual property by patenting the scientific discoveries and selling those patents. The capitalist approach is focusing only to one aspect of accountability, that is explaining why and how money is being spent. In the audit society the universities are accountable, but only for the money they use, not for the public they should inform. They are fiscally but not socially accountable and this way it is not at all clear whether their research is in fact socially useful or not.

The academic capitalism theory was developed by Sheila Slaughter and Gary Rhoades. They define academic capitalism as the pursuit of profit using the well-known market means. Thus universities compete not only for the *best* students but for *enough* students allowing them to secure their profit from tuitions. Also universities are competing for research grants allowing them to gain profit from the results of scientific discoveries.

During modern times the university found itself in the middle of two other important powers: the Church and the national state. The triple helix theory is emphasizing the fact that nowadays universities are found themselves again at the intersection of two important powers: the government and the industry. The federal funds often came with political strings attached: most part of the research conducted after World War II was related to military objectives. The corporate funds have their own strings attached: there is no possibility for the university to do research questioning the corporate interests on its own money. The research agenda is no longer freely established.

The isomorphism theory and asymmetrical convergence theory are both underling the fact that universities and industry institutions are becoming more alike since the penetration of managerial ethos in the academe. The asymmetrical convergence theory is trying to show that there is an asymmetrical relation between industry and university since the university is more likely to be influenced by the industry by accepting is norms, values and procedures. Efficiency, low production costs, managerial hierarchy, audits are only a few of the industry's values adopted by contemporary universities.

What I shall try to do in this paper is not a comparative analysis of those theories. My intention is draw a list of the most important moral issues generated by those current developments in contemporary university.

3. Berkeley-Novartis Controversy

This very interesting episode in the history of contemporary university marks the beginning of the serious debate on the social accountability of the university. To the present day, universities were only to account for spending government or corporate money. They had to produce commodified knowledge to the profit of the state or the corporation. This was about to change when one of America's biggest land-grand university – Berkeley – signed a research agreement with the largest pharmaceutical company Novartis. The University of California was a "land-grant university". That is, the 1862 Morrill Act established that every state would preserve at least 40 acre of land for a university that would teach and disseminate information to the laboring masses. The land grant university served two traditions that theorists call the progressive and the populist traditions[5]. The progressive trend was represented by wealthy bankers and land owners who tried to improve the production mode. The populist trend was represented by left or right wing politicians or intellectuals trying to defend "the little guy" form major corporation interests. Those two traditions functioned together until the infamous agreement was signed. The university of California was largely perceived as representing mostly the populist tradition trying to develop research projects that would take into consideration the influence of major changes in agriculture would affect the farmers, for example.

The chronology of events that took place at Berkeley show us how a team of researchers at the Plant and Microbial Biology Department tried to find alternative research funds. First they tried to make the private corporation give them money with no strings attached: the university would have complete freedom in choosing the research agenda, the results of scientific research were to be made public, the faculty shall be rewarded according to the criteria established by the university. Of course, none of the corporation was interested in signing such a contract. Several years later the demands regarding academic freedom and autonomy were dropped and the board of professors settled for only four criteria to be met by any corporation willing to invest in research. Those criteria included the alliance with only one industrial partner, use traditional competitive means in order to encourage bidding among the willing corporations. The fact that a whole department was involved in a contract with the higher bidder was often called, especially by those opposing this type of agreement, "the auctioning of the deparment". Thus in 1997 a committee of four was established. The same year Plant and Microbial Biology Department contacted nine companies insisting that a large number of faculty members could be interested in an alliance with a single industrial partner. From the six companies responding to the offer the committee selected Novartis in 1998. A first draft of the agreement was ready the same year. On August 1998 the Academic Senate was contacted about this contract. Several months later a non-profit organization, Students for Responsible Research presented the Academic Senate a petition with 400 signatures asking for the delay of the signing of the agreement. On November 1998 the agreement was signed despite the student's efforts to delay it. During the following years there attempts have been made to externally evaluate the agreement. In November 2003 the contract expired.

The most controversial aspect surrounding dis agreement was the interesting tenure case of Ignacio Castaneda. In 1997 Castaneda was an untenured member of PMB. He was also a critic of the agreement. In 2001 he published along with David Quist, a graduate student, an article that received more attention than most scientific articles often do. He was stressing the fact that in

[5] Dawn Coppin, Jason Konefal, Bradley T. Shaw, Toby Ten Eyck, Laurence Busch, *Universities in the Age of Corporate Science*, Temple University Press, 2007.

Mexico the maize landraces contained transgenic DNA constructs and that those were unstable. A heated debate started in the academic community. The controversy was fueled by the findings of the newspaper *The Guardian* that provided evidence for the debate on Castaneda's article being initiated by some fictious scientist traced back to a public relation firm owned by the biotechnological corporation Monsanto. The same year the intensely debated article was published began the evaluation of granting tenure to Castaneda. The first committee voted overwhelmingly for granting tenure (32 to 1). The dean forwarded this case to an ad-hoc external committee for further review. At this point a very unusual decision was made by the chair of the ad-hoc committee asked that the members of this board had nothing to do with the Berkeley Novartis agreement. The ad-hoc committee recommended tenure. The case was sent back to the committee for further review. The chief of that committee resigned. Than Castaneda's case was sent to the Academic Senate Committee were Jasper Rine was a member on the Advisory Board of B-N agreement. This Committee denied tenure to Castaneda in 2003 who began a legal action against the university. In 2005, after headed debates and important support of faculty members (more than three hundred faculty members signed a petition) Castaneda was finally granted tenure).

4. The ethical issues generated by the entrepreneurial perspective of universities

After setting the historical context and presenting one of the most controversial corporation-university agreement we are able to detect the most important ethical issues deriving from the penetration of the managerial ethos into the academe.

a. The first ethical problems relates to academic freedom. A cherished valued for several centuries, academic freedom means that university professors and researchers should be free to decide what are the most interesting research themes and establish the curricula according to their wishes. This is maybe only an ideal that was never fully realized. Every historical period had its examples of occasions where this imperative was not applied. I is my intention to show who overrides today this ethical principle. The academic capitalism has its own flaws in terms of accepting academic freedoms. Embracing efficiency as its main value the entrepreneurial university is not interesting in critical thinking or on debates since it has to take decisions fast. The Academic Senate is a time and money consuming in terms of decision making. Thus, the hierarchy present in corporations tends to replace the democratic method of making decisions in the entrepreneurial university. Since the profit is the only legitimate goal those in charge of university's destiny resemble more to the managers than to the professors.

b. Closely related to the first problem is the way work is being evaluated in the university. Since it is very difficult to deal with "tenured radical" the whole process of granting tenure is designed to be very complex. More than fifty percent of faculty members hired in major universities are not tenured. This is partly because the tenured radical has a great power: he is well trained, possessing important knowledge, having important critical thinking skills and strong beliefs. In other words he is the nightmare of any manager seeking efficiency: that is the rapid implementation of his decisions by the obedient subordinates. This is probably why tenured was abandoned in some countries such as England. The faculty members have to be efficient. Thus, the industry of producing articles was born. Everybody is engaged in a desperate quest for more and more published articles. This creates an inflation of articles.

c. The third ethical challenge regards the way research is conducted in contemporary university. The Berkeley-Novartis controversy showed us how difficult someone opposing corporate control was granted tenure. It is also important from other points of view. First of all setting the research agenda should be entirely the task of the university. But how can some scientist develop a research project opposing the corporation funding the department objectives? Today's research implies access to extremely sophisticated technological instruments and it is by no means the work of the solitary scientist. The Berkeley Novartis agreement was a dangerous and unprecedented step since a whole department found itself at the mercy of a unique huge industrial partner with hundreds millions of dollars at its disposal. Given those circumstances, how can anyone develop research projects affecting the financial interests of the corporation?

d. The forth ethical dilemma is also related to scientific research. From another perspective, the commodified knowledge is the result of transforming the scientific discoveries into intellectual property afterwards sold by the industrial investor. But what if the scientific discoveries were to affect the public? Is the university only accountable for the way it spends corporate money or is it also accountable for the way its research affects the public? The common assumption of the "absolute relativism" is that there is no ultimate truth but only partial truths and that there is no such thing as fundamental research. The relativism and instrumentalism are combining giving birth to the situation where those partial truths are transformed into the intellectual property. The objective of making knowledge useful to society can no longer be met since, in the era of academic capitalism, the university is only accountable for the money it spends. There is simply no way of determining whether the scientific research is useful or not since for the sole reason that it is not available for the public. The problem is even more complex when it comes to universities still receiving government funds. If the university is using also government money and is then transforming the scientific findings into the intellectual property of the corporation the academic institution find itself in the position where it is using government funds to transform public knowledge into intellectual property.

e. The third moral challenge regards the "conflict of faculties". One of the main reasons the university loses its importance is the transformation of the national society into the knowledge society. The technological progress and the globalization process based of the generalization of financial capitalism made it possible for knowledge to be incorporated in every aspect of our society. Since the decline of the national state the university is no longer the unique provider of knowledge. But this is not the only major transformation: there are also numerous knowledge consumers. In this context the battle between the liberal and the modern perspective on university is finally decided. "The Republic of Letters" is finally defeated by "the Republic of Science". In the knowledge society is easier to survive if you are a scientist. Even if you have to make important compromises you can still have a successful career as a scientist. This is not the case of those working in the humanities. Philosophy or history are both tolerated in the academic institution seeking profit at all costs.

Conclusion

Knowledge has no value in itself in the knowledge society. There are theorists trying to prove that there is still room for the university role in this type of society. Gerard Delanty stresses that the major contribution con contemporary university is to diminish the growing gap between knowledge producers and knowledge users. I think that this is too optimistic. What we are experiencing in terms of defining the university status is a mixture of postmodern cultural relativism, utilitarianism and positivism. Given these circumstances we, as intellectuals working in humanities, are risking to be facing the same abominable imperative of a not so long ago abolished social order. That is: intellectuals are not productive. The scientific findings of a philosopher or a classical language professor cannot be transformed into the intellectual property on any corporation. It has no potential consumers since the interest in those fields is constantly dropping. The knowledge we are offering cannot be sold to anyone so why bother to produce it?

References:

- Delanty, Gerard, *Challenging Knowledge. The University in the Knowledge Society*, Open University Press, 2001.
- Coppin, Dawn & *alii*, *Universities in the Age of Corporate Science*, Temple University Press, 2007.
- Readings, Bill, *The University in Ruins*, Harvard University Press, 1996
- Roninson, George and Moulton Janice, *Ethical Problems in Higher Education*, iUniverse Inc., 2005
- Wilson, H.,T., *No Ivory Tower. The University under Siege*, Voyageur Publishing, 1999.

MODELING AND SIMULATION OF QUEUE WAITING THROUGH THE CONCEPT OF PETRI NETS

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Abstract

Petri Nets-PN are a graphical formalism which is gaining popularity in recent years as a tool in Matlab for the representation of complex logical interactions among physical components or activities in a system. This notes are devoted to introduce the formalism of Petri nets with particular emphasis on the application of the methodology in the area of the performance and reliability modelling and analysis of systems. A technique is presented whereby queueing network models and generalized stochastic Petri nets are combined in such a way as to exploit the best features of both modeling techniques. The resulting hierarchical modeling approach is useful in the solution of complex models of system behavior.

Keywords: *Petri nets, modeling and simulation, toolbox PNTool 2.3, queue.*

Petri nets

Petri Nets offer profound mathematical background originating namely from linear algebra and graph theory. Various Petri Net tools offer convenient graphical environment and sometimes they provide complex simulation and analysis of various high level Petri Net classes.

Petri Net (PN) is mathematical and graphical modeling tool well suited for describing and analyzing discrete events systems (DES). PNs allow to model and visualize systems, which contain concurrence, resource sharing or synchronization. These possibilities allow them to be used for various applications in areas including computer systems, communication protocols, flexible manufacturing systems and software verification.

Within the mentioned context, the initiative of developing instruments for simulation, analysis and design of PNs under MATLAB brought remarkable benefits for training and research because Control Engineering people are familiar with the exploitation of *Graphical User Interfaces* (GUIs)[1] based on this popular software. Although a recent list of the programs developed for PNs includes many resources (Mortensen, 2003) running under different operating systems, our initiative was successful due to the large preference shown for MATLAB.

It is worth separately mentioning that the overall design and implementation philosophy that sustains the ***PN Toolbox***, as well as the integration with MATLAB, allow further

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[1] The GUI gives the possibility to draw PNs in a natural fashion and allows a straightforward access to various commands starting adequate procedures for exploiting the PN models.

developments in the modern direction of studying hybrid dynamics involving both DES and ODE models.

After ending a simulation experiment, several *Performance Indices* are available to globally characterize the simulated dynamics. Some of the indices recorded for the transitions of the net refer to: the total number of firings during the simulation

(*Service Sum*), the mean frequency of firings (*Service Rate*), the mean time between two successive firings (*Service Distance*), the fraction of time when server is busy (*Utilization*). For the places of the net, the recorded indices refer to: the total number of arrived (*Arrival Sum*) and departed (*Throughput Sum*) tokens, the mean time between two successive instants when tokens arrive in (*Arrival Distance*) and depart from (*Throughput Distance*) the place, the mean time a token spends in a place (*Waiting Time*), the average number of tokens weighted by time (*Queue Length*).

Only for timed or (generalized) stochastic PNs, the time evolution for both current and global values of a *Performance Index* may be displayed dynamically while in the *Step* and *Run Slow* simulation modes by means of the *Scope* command. Another facility available only for timed or (generalized) stochastic PNs is *Design*, which can be used for the synthesis of the models. One or two *Design Parameters* varying within intervals defined by the user can be included in the model. For each test-point belonging to this (these) interval(s) a simulation experiment is performed in the *Run Fast* mode. The dependence of a *Design Index* on the *Design Parameter*(*s*) can be visualized as a graphical plot (2-D or 3-D, respectively).

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Queueing theory

Queueing theory is the mathematical study of waiting lines, or queues. The theory enables mathematical analysis of several related processes, including arriving at the (back of the) queue, waiting in the queue (essentially a storage process), and being served at the front of the queue. The theory permits the derivation and calculation of several performance measures including the average waiting time in the queue or the system, the expected number waiting or receiving service, and the probability of encountering the system in certain states, such as empty, full, having an available server or having to wait a certain time to be served. Queueing models are generally constructed to represent the steady state of a queueing system, that is, the typical, long run or average state of the system. As a consequence, these are stochastic models that represent the probability that a queueing system will be found in a particular configuration or state.

2.1 M/M/1

The basic queueing model is shown in figure1. It can be used to model, e.g., machines or operators processing orders or communication equipment processing information.

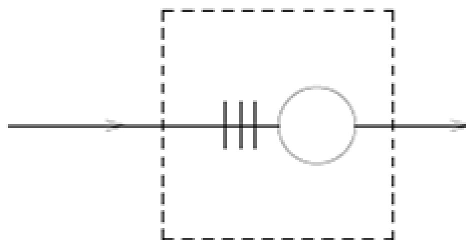

figure 1: Basic queueing model

Among others, a queueing model is characterized by:
- The arrival process of customers.
- The behaviour of customers.
- The service times.
- The service discipline.
- The service capacity.
- The waiting room.

We analyze the model with exponential interarrival with mean $1/\lambda$, exponential service times with mean $1/\mu$ and have a single server. Customers are served in order of arrival. Service rate is $\rho = \frac{\lambda}{\mu} < 1$.

The required characteristics are of great importance can be obtained theoretically for arbitrary values for λ and μ.

The following table shows basic formulas for calculating the important characteristics of the queues.

Performance Measures	$M/M/1$	$M/M/c$	$M/M/1/K$
Traffic Intensity ρ	$\frac{\lambda}{\mu}$	$\frac{\lambda}{c \times \mu}$	$\frac{\lambda}{\mu}$
Utilisation U (per server)	ρ	ρ	$\rho(1 - \frac{(1-\rho)\rho^K}{1-\rho^{K+1}})$
Prob. system is idle π_0	$1-\rho$	$\left(1 + \frac{(c\rho)^c}{c!(1-\rho)} + \sum_{n=1}^{c-1} \frac{(c\rho)^n}{n!}\right)^{-1}$	$\frac{1-\rho}{1-\rho^{K+1}}$
Prob. buffer non-empty B	ρ^2	$\frac{(c\rho)^c}{c!(1-\rho)}\pi_0$	
Mean no. in system N	$\frac{\rho}{1-\rho}$	$c\rho + \rho B/(1-\rho)$	$\frac{\rho}{1-\rho} - \frac{(K+1)\rho^{K+1}}{1-\rho^{K+1}}$
Mean no. in buffer N_b	$\frac{\rho^2}{1-\rho}$	$\rho B/(1-\rho)$	$\frac{\rho}{1-\rho} - \rho\frac{1+K\rho^K}{1-\rho^{K+1}}$
Mean response time R	$\frac{1}{\mu(1-\rho)}$	$\frac{1}{\mu}\left(1 + \frac{B}{c(1-\rho)}\right)$	$\frac{N}{\lambda(1 - \frac{(1-\rho)\rho^K}{1-\rho^{K+1}})}$

table 1 Basic formulas

The following examples are examined theoretical and simulation values of the queue M/M/1 and M/M/3. Made a comparison of theoretical and simulaciskite values and received a percentage of error.

We consider several cases for M/M/1 queue with Petri nets. Modeling is done and shown in the following figure.

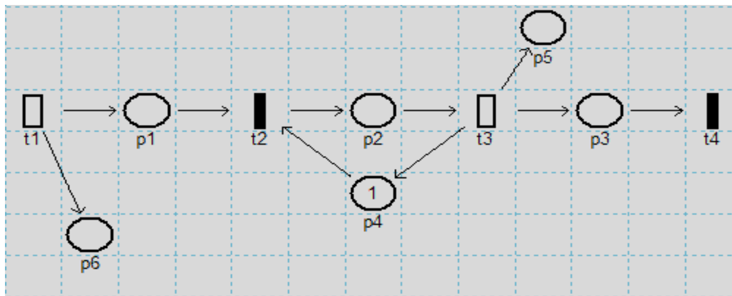

figure 2 Petri nets model on M/M/1

M/M/1	λ	μ	ρ	po	p1	p2	p3	E(X)	E(S)	E(W)
theoretical	0,100	0,400	0,250	0,750	0,188	0,047	0,012	0,333	3,333	0,833
simulation	0,101	0,375	0,269	0,731	0,197	0,053	0,014	0,368	3,645	0,980
percentage of error	0,820	6,213	7,498							

table 2

M/M/1	λ	μ	ρ	po	p1	p2	p3	E(X)	E(S)	E(W)
theoretical	0,100	0,220	0,455	0,545	0,248	0,113	0,051	0,833	8,333	3,788
simulation	0,100	0,219	0,456	0,544	0,248	0,113	0,052	0,837	8,400	3,828
percentage of error	0,312	0,573	0,262							

table 3

M/M/1	λ	μ	ρ	po	p1	p2	p3	E(X)	E(S)	E(W)
theoretical	0,100	0,120	0,833	0,167	0,139	0,116	0,096	5,000	50,000	41,667
simulation	0,100	0,119	0,837	0,163	0,137	0,114	0,096	5,127	51,366	42,983
percentage of error	0,178	0,592	0,416							

table 4

We can be concluded that the percentage of error is less than 10%. Therefore I believe that the simulation values obtained are accurate.

We consider several cases for M/M/3 queue.

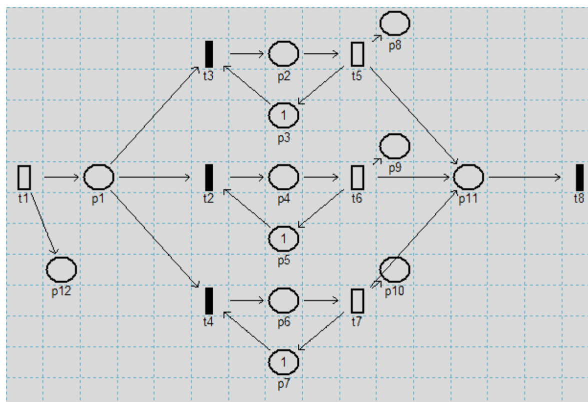

figure 3

M/M/3	λ	μ	ρ	po	p1	p2	p3	E(U)	E(X)	E(S)	E(W)
theoretical	0,100	0,667	0,050	0,868	0,130	0,010	0,000	0,150	0,150	1,500	0,000
simulation	0,100	0,675	0,049	0,870	0,129	0,010	0,000	0,148	0,148	1,481	0,000
percentage of error	0,003	1,250	1,231								

table 4

M/M/3	λ	μ	ρ	po	p1	p2	p3	E(U)	E(X)	E(S)	E(W)
theoretical	1,000	0,351	0,950	0,004	0,012	0,017	0,016	0,328	0,328	3,178	3,178
simulation	1,020	0,327	1,041	0,003	0,009	0,013	0,014	0,342	0,335	3,397	3,465
percentage of error	1,990	6,928	9,581								

`

table 5

M/M/3	λ	μ	ρ	Po	p1	p2	p3	E(U)	E(X)	E(S)	E(W)
theoretical	1,000	0,337	0,990	0,001	0,002	0,003	0,003	0,332	0,332	3,302	3,302
simulation	0,990	0,330	1,000	0,000	0,000	0,000	0,000	0,333	0,337	3,367	3,3338
percentage of error	0,987	1,990	1,023								

table 6

We can be concluded that the percentage of error is less than 10%. Therefore I believe that the simulation values obtained are accurate. The simple queue of waiting has formulas that can be obtained theoretical values, but for complex queue there are no such formulas. Because the simulation values have a small percentage of error for simple queue are true, then will believe that is correct simulation values wide following a complex queue.

Example: Show Petri net model of queue 3*M/M/1

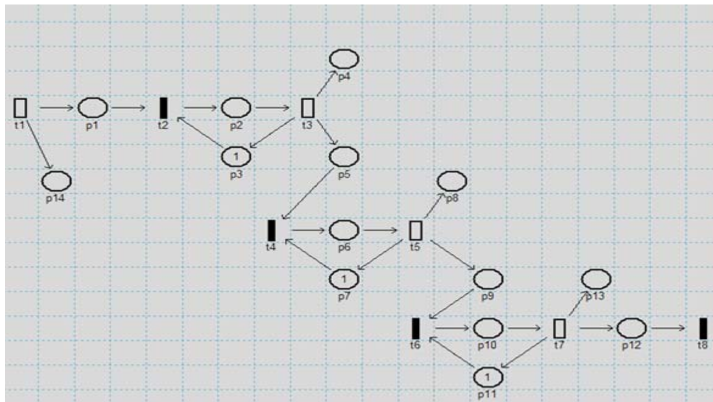

figure 4 **Basic model on 3*M/M/1**

Characteristic simulation values are shown in the following tables. Value of arrival rate λ and service rate μ taken randomly.

Events:10000

Time:6496.6981

Place Name	Arrival Sum	Arrival Rate	Arrival Dist.	Throughput Sum	Throughput Rate	Throughput Dist.	Waiting Time	Queue Length
p1	1254	0.19302	5.1808	1252	0.19271	5.1891	18.7507	3.6135
p2	1252	0.19271	5.1891	1251	0.19256	5.1932	4.1994	0.80862
p3	1251	0.19256	5.1932	1252	0.19271	5.1891	0.99306	0.19138
p4	1251	0.19256	5.1932	0	0	Inf	Inf	626.9505
p5	1251	0.19256	5.1932	1249	0.19225	5.2015	28.9124	5.5584
p6	1249	0.19225	5.2015	1249	0.19225	5.2015	4.4764	0.8606
p7	1249	0.19225	5.2015	1249	0.19225	5.2015	0.72511	0.1394
p8	1249	0.19225	5.2015	0	0	Inf	Inf	620.5315
p9	1249	0.19225	5.2015	1249	0.19225	5.2015	3.9695	0.76313
p10	1249	0.19225	5.2015	1248	0.1921	5.2057	2.9545	0.56755
p11	1248	0.1921	5.2057	1249	0.19225	5.2015	2.2494	0.43245
p12	1248	0.1921	5.2057	1248	0.1921	5.2057	0	0
p13	1248	0.1921	5.2057	0	0	Inf	Inf	619.2008
p14	1254	0.19302	5.1808	0	0	Inf	Inf	631.3727

table 7

Events:10000

Time:6496.6981

Transition Name	Service Sum	Service Rate	Service Dist.	Service Time	Utilization
t1	1254	0.19302	5.1808	1.3842	0.26718
t2	1252	0.19271	5.1891	0	0
t3	1251	0.19256	5.1932	1.31	0.25226
t4	1249	0.19225	5.2015	0	0
t5	1249	0.19225	5.2015	1.3723	0.26382
t6	1249	0.19225	5.2015	0	0
t7	1248	0.1921	5.2057	1.1283	0.21674
t8	1248	0.1921	5.2057	0	0

table 8

References

- G.A. Agha, F. De Cindio, and G. Rozenberg, editors. Concurrent Object-Oriented Programming and Petri Nets, Advances in Petri Nets 2001, volume 2001. Lecture Notes in Computer Science, Springer-Verlag, 2001.
- M. Abramowitz, I.A. Stegun, Handbook of mathematical functions, Dover, 1965..
- M. Ajmone-Marsan, editor. Proceedings of the 14th International Conference on Application and Theory of Petri Nets, Chicago (USA), volume 691. Lecture Notes in Computer Science, Springer-Verlag, June 1993.
- S. Balsamo and V. de Nitto-Persone. A survey of product-form queueing networks with blocking and their equivalences. Annals of Operation Research, 1994..
- S.L. Brumelle. A generalization of L /W to moments of queue length and waiting times. Operations Research, 1972.
- B. Baumgarten. Petri-Netze. Grundlagen und Anwendungen. BI Wissenschaftsverlag, Mannheim, 1990.
- J. Desel, editor. Proceedings of the 19th International Conference on Application and Theory of Petri Nets, Lisboa (Portugal). Lecture Notes in Computer Science, Springer-Verlag, June 1998.
- J. Desel and J. Esparza. Free Choice Petri Nets. Cambridge University Press, 1995.

THE EVALUATION OF THE INTERNET USAGE HABITS OF PUBLIC EMPLOYEES IN KASTAMONU

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Abstract

Changes in the last 10 years in information technology have increased the use of computers and internet. The changes brought about fundamental changes the way we do business and behave in social life from communication and reaching information to daily habits. Effective use of the information technology, which has become the main condition of being competitive at work, has required all employees in public and private sectors to improve themselves in the computer and internet usage. In addition, the public sector also encourages the use of internet via e-government applications. Thus, the computers and internet play a big part in the work of public sector and its employees as well.

The usage of computers and the internet in working places not only have changed the way we do business also have changed some ethical rules and issues. They brought some complicated problems for people, organizations and states. Online fraud, carelessness, negligence, viruses, system crashing, broadcasting personal information are among the most well-known ethical problems related to computers and internet and caused by employees. In addition to these, personal use of computers and internet by employees for their private usage during working hours create another problem.

The objective of the study is to reveal the internet usage habits and behaviors of public employees at work, using a field research that was carried out in Kastamonu that is a city of north of Turkey. It is especially of interest how and for what purposes the chat programs, which encourage the use of internet, are used. The results are analyzed from the point of view of public ethics. The data is collected from the state servants in Kastamonu and is analyzed on SPSS statistic program.

Keywords: *Ethic, Internet, Instant Mesa, public ethic, information technology*

I. Introduction

Today, to reach and have information technologies is easier than before because of technological advances. Everybody in every class and age in society is using computer and internet. When the Turkish Statistical Institute's databases are investigated, we see remarkable results. According to the Turkish Statistical Institute's databases, the rate of computer usage of people between 16-74 ages is 38% and the rate of the internet usage is 35% in 2008 (tuik.gov.tr,2008). These increasing rates show the same levels with the rates of the usage of

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computer and the internet in businesses. Especially, the developments in services sector have been positively affecting the usage of computer and the internet or vice versa.

Computers, the internet and e-mail are modern communication techniques used in businesses to communicate and to deliver information rapidly to the workers and customers. By using these new technologies, current works will be finished so quickly and correctly that productivity will be better than before. As a matter of fact that many firms and companies are now using computers and the internet as a standard and necessity. In this sense, the opportunities the internet provides are increasing day by day are affecting individuals' daily life. The internet as a communication interface has become widespread and people started to reduce face to face communication and increase the usage of digital media. This process is seen not only between two people or group also between workers who work in the same workplace.

Also, with the increasing role of the usage of the computer and internet, doing jobs both in workplace and at home and the spreading of home-offices and teleworkings have made workplace-free working much easier. But this development has caused some discussions in terms of ethics in the work life. Our job environments generally offer the cheap, fast and easy internet. So, we can carry on any task which we started at home,at our workplace, or we can we can continue any task we started at workplace, at our home. For that reason, our private jobs and works related to business, will possibly be intermixed and be done both at workplace and home. For instance, while a teacher can be prepared for courses and enter students' marks from the internet at home, s/he can use the internet for his or her private investigations through internet at school. (Hartman, 2001:8). Because of online medium's difficulties, both private and public sectors' workers are going to be subjected some restrictions because controlling this process is not easy. Therefore, the way to deal with this process in an ethical point of view and the way for it to organize differs from one sector to another and from a profession to another. In this study, we generally examined the data of public servants.

II. Paper Content

1.The Ethics of Public Management and the Usage of the Internet

Ethics is defined as philosophy and science of morals and also considered as a discipline that tries to determine what is right and what is wrong (Arslan, 2001:7). In addition to that, ethics is completely related to the rules that explain or advice people what to do or what not to do. In this sense, the ethics of public management firstly means that public workers' behaviors should be in accordance with laws, the codes of ethics and rules and secondly it means that they should act by taking the individual and moral assets as reference (Özdemir, 2008:182).

Especially, the item 12 of the code 657 (The Civil Service Act) explains and organizes the individual responsibility of the state workers. Also, the item 125 arranges disciplinary punishments for the state workers and behaviors and actions which require disciplinary punishments. Namely, the items mentioned in the code 657 are related to the ethics.

Emergence of the ICT and the Internet, not only offered a lot of opportunities for the people and states, but also created some problems. Especially, the usage of the internet and ICT with the private aims is an important one. According to the investigations, done in different countries, 90% of the workers also use the internet in the workplace for private aims and its cost for companies is about 50 billion Euros. The private usage of the internet can be restricted since it takes work time

of the workers and causes some problems such as virus and software and hardware in computers (Okur, 2005:48).

Also, one of the most important aims is the communication by using e-mail and other methods on the internet. Gallup is an investigation company, has done a survey related to e-mail usage and it shows that a worker spends his or her time between 49 minutes and 4 hours for e-mail transactions and the most of these e-mails are about private life or humour (Keser, 2005:65).

When we look at the state workers in the state workplaces, there is no any direct restriction about the subject mentioned above. On the other hand, in the item 125 of the code 657 it is explained that "using the official car, tools and such things which belong to the state for private aim requires disapproval punishment". Therefore, the usage of the computers and the internet which belong to the state instuitions can be commented in the same manner.

However, putting the issue in order technically requires some regulations in the related codes and instructions which explain the rules of working in the state institutions. Insomuch as that, some public institution use their special packet software belongs to the state. It is not applicable or legal to use some extra software which belongs to the workers. In the same manner, the private internet usage is possible by workers in the public institutions. This may be restricted by using some methods such as filtration and blocking so that state workers can enter only some sites which are allowed by the institution.

Moreover, the workers can be traced as online by using logs which save what the user does or clicks or computers can be checked after work hours. But, tracing the usage of the net or checking the computers mean the intrusion of the privacy of private life which is not a good behavior and can't be acceptable in terms of ethics and laws. Also, while trying to determine the faults or wrong transactions on online medium, it is possible to be an offender.

As a result, that kind of restrictions or prohibitions may not be put for every public worker or may not be necessary for all workers. Some of the workers make analysis as decision makers and they have high education level, qualifications and position. For that reason, it is not practicable to restrict or forbid the internet and computer for qualified workers since the productivity and motivation will go down. Consequently, some measures should be considered regarding the functions of the department, the qualifications of the workers and the type of the occupations.

There are a lot of reasons which increase and encourage the usage of the internet and computers for the workers of public institutions privately. One of the reasons is virtual chat which provides communication with other people around the world and on the internet. According to the Turkish Statistics Institution's investigation, 70% of internet freaks use it for instant messaging programs such as windows live messenger and skype (tuik.gov.tr, 2008:1). They may use the internet not only for the benefit of their works but also for individual aims. That is why, it needs to be investigated whether they use for work or for individual aims. After the determination of the usage aims, some restrictions can be done without prevention of the workers' independency and work necessities. For example, virtual chat which is one of the means of communication is much cheaper, faster and than the other means so that it increases the productivity and the efficiency. For that reason, every public institution should investigate in that way to regulate the internet usage by workers in the public institutions. But the regulation should be in terms of the departments, functions and qualifications otherwise it may harm the productivity and efficiency in the public institutions.

2. Research

2.1.1. General Framework of The Research

The Aim of The Research

To determine the tendency of the usage of the internet and instant messaging softwares by the government employees in Kastamonu and to associate this topic with the ethic of the public in this context is the aim of this work.

2.1.2. Content and The Limit of The Research

The related research has been done upon nearly 1000 people chosen among 10.120 public servants who work in Kastamonu city through the method of exemplification. Among these surveys, 300 of them which are received and approved for evaluation are included for the work. The research has been implemented on the workers who are in the boundaries of Kastamonu city. The reason is that, we want to form a judgement revealing the ethical behaviour related to this topic in this city. Also it is possible that, it can have similarities with the other cities as a lot of public servants in this city have come from different cities. On the other hand, the effect of the place they live shouldn't be disregarded.

2.1.3. The Method of The Research

Qualitative method has been used for the research. An survey for of the 19 questions has been executed on the test subjects. Multiple questions have taken place in the survey form. The first six questions include personal information, seven questions of the remaining 13 includes the usage of computer and internet; six of them are related to the usage of instant messaging softwares

2.2 Analysis of the Research

2.2.1. Demographic Results

Table1: The Gender of Respondents

Sex	Valid Percent
Male	74,7
Female	25,3
Total	100,0

¾ of the respondents of the research are males and ¼ of them are females.

Table 2: The Age Range of Respondents

Age	Valid Percent
20-30	8,7
31-40	44,0
41-50	39,7
51 and over	7,7
Total	100,0

Considering the age range, %84 of the respondents are middle ages.

Table 3: The Graduation of Respondents

Graduation	Valid Percent
Primary School	2,0
Secondary School	3,3
High School	39,0
College	50,3
Undergraduate	5,3
Total	100,0

When considering their educational state, they are to a great extent high school and college graduates. The percentage of university graduates are lower than expected.

Table 4: The Marital Status of Respondents

Marital Status	Valid Percent
Married	86,0
Single	14,0
Total	100,0

The respondents of the survey are majorly married. This is parallel to the age range.

Table 5: The Tenure of Office of Respondents

Tenure of Office	Valid Percent
1-5	12,7
6-10	15,0
11-15	13,7
16-20	19,7
21-25	20,7
More than 25	18,3
Total	100,0

Tenure of office of the respondents are similar to each other. But nearly %50 of them have 16 years of service.

Table 6: The Titles of Respondents

Title	Valid Percent
Civil servant	66,7
Chief	10,0
Asistant manager	1,3
Manager	3,0
Worker	19,0
Total	100,0

2/3 of the respondents are civil servants. Also almost %20 of them are workers. Consequently %85 of the respondents have lower titles.

2.2.2. The Results Related to The Usage of Computer at Workplace.

Table 7: The Usage of Computer at Workplace

Do you use computer at your workplace?	Valid Percent
Yes	94,3
No	5,7
Total	100,0

A great ratio as %94 of the employees use computer at workplace as expected.

Table 8: The Usage Status of Computers

The status of the computer been used	Valid Percent
Institution computer given for personnel use	81,4
Institution computer given for joint use	15,8
Personnel computer used at work	2,7
Total	100,0

Nearly %82 of the workers use computer given for personal use. This lets most of the employees feel comfortable when using internet and instant messaging software.

Table 9: The Usage of Computer at Home

Do you use computer at your home?	Valid Percent
Yes	74,3
No	25,7
Total	100,0

%74 of the respondents use computer at home too. This result shows that the respondents are interested in using computers.

Table 10: The Status of Internet Connection at Workplace

Is there an internet connection at your workplace?	Valid Percent
Yes	98,0
No	2,0
Total	100,0

%98 of the respondents have internet connection at their workplace. This shows that usage of internet is widespread and can cause some ethical problems.

Table 11: The Status of Internet Restriction at Workplace

Is there any restriction on the internet used at your workplace?	Valid Percent
Yes	34,0
No	66,0
Total	100,0

It is interesting that nearly 1/3 of the internet connection at workplaces have got restrictions. Public institutions are also gradually being sensitive about these regulations.

Table 12: The Places That Are Connected to Internet

Where do you usually connect the internet from?	Valid Percent
Home	33,1
Workplace	65,2
Internet Cafe	0,7
Other	1,0
Total	100,0

A major part like %65 of the respondents connects the internet usually from home. This makes it necessary to arrange some regulations related to the usage of internet.

Table 13: The Length of Connection of Internet at Workplace

How often use the internet at your workplace?	Valid Percent
0-2 hours	51,6
3-4 hours	32,5
5-6 hours	2,4
More than 6 hours	13,5
Total	100,0

The length of the usage of internet at workplace is usually less than 4 hours for %84 of the respondents. This makes the half of the working hours taking the 8 hours of working into account.

Table 14: The Purpose of Internet Usage

What is the main purpose of your internet usage?	Valid Percent
For work and professional use	76,8
To gather information about personal interests	7,2
For e-learning	1,7
Only for communication	2,7
To read the news	11,6
Total	100,0

The purpose of the internet usage is usually for work and professional use. So, this result shows that internet is used in accordance with its aim.

2.2.3. Results Related To The Usage Of Instant Messaging Software

Table 15: The Ownership of Instant Messaging Account

Do you have instant messaging account?	Valid Percent
Yes	78,9
No	21,1
Total	100,0

%79 of the respondents have instant messaging accounts.(msn,yahoo etc) This show that employees use internet for social reasons when needed.

Table 16: The Frequency of Instant Messaging Usage

How often do you instant messaging?	Valid Percent
Every time I use my computer	11,7
Everyday but not often	23,0
Sometimes	16,7
Only when I need to	48,5
Total	100,0

%48 of the ones who have instant messaging accounts mentioned that they used instant messaging software when needed. However the ones who use it frequently have a ratio of %35 which cannot be undervalued.

Table 17: The Purposes of Instant Messaging

What is the main purpose of chatting?	Valid Percent
For personnel problems	27,2
For my profession and business	61,9
For meeting new people	2,1
Other	8,8
Total	100,0

As instant messaging is carried out for professional and business reasons, it may not be necessary to restrict it. However this ratio is not satisfactory. Its being used for different purposes may make it necessary to restrict it.

Table 18: The Instant Messaging Environment

With whom do you usually chat with?	Valid Percent
With my family members	24,3
With my colleagues	55,2
With my relatives	3,8
With my friends	15,9
With a person who I met in the internet	,8
Total	100,0

%55 of the respondents mentioned that, to a great extent, they this software in order to talk to their colleagues. The result is parallel to the result that they use instant messaging software for professional and business purposes.

Table 19: The Time for Instant Messaging at Workplace

When do you chat at your workplace?	Valid Percent
When I am working	21,3
After finishing my work	51,0
Only in breaks	7,9
I never chat at work	19,7
Total	100,0

Nearly %79 of the employees either don’t instant message or they instant message after finishing their work. Consequently, as this won’t impede the job, it can be seen positive.

Table 20: The Status of Instant Messaging Restriction at Workplace

Are there any restrictions about chat at your workplace?	Valid Percent
Yes	24,3
No	75,7
Total	100,0

%24 of the respondents mentioned that there are restrictions related to the usage of internet and instant messaging software. This result is a lower ratio compared to the restriction of internet usage. Perhaps, because instant messaging programs are used for communication, they are not restricted.

2.2.4. Results of Cross-Tabulation and Mann Whitney U Tests

2.2.4.1. The Relationship Between Personal Features and The Purpose of The Usage of The Instant Messaging Software

Table 21: Gender and Purpose of Internet and Instant Messaging Usage

	For work and professional use		For personal interests		For e-learning		Only for communication		To read the news	
Gender	Internet	Inst. Mes.	Internet	Inst. Mes.	Internet	Inst. Mes.	Internet	Inst. Mes.	Internet	Inst. Mes.
Male	74,4%	61,5%	8,2%	27,4%	2,3%		2,3%	8,4%	12,8%	
Female	83,8%	63,3%	4,1%	26,7%	,0%		4,1%	10,0%	8,1%	

It's seen that women use internet for work and profession a bit more than the men, taking the gender into account for the purpose of the internet usage. On the other hand, men use internet for researching about personal interests, education, education and reading the news more than the women do. As for the instant messaging software, they are used less for professional reasons compared to the internet usage, however, it brings up an interesting result that both groups use instant messaging software to get information about their personal interests.

When we subject the related factors to Mann Whitney U test, the value of Asymp.Sig (2 tailed) for internet usage is 0,112 and for instant messaging it is 0,994. This, as a result shows that, taking the gender factor into account, there is no significant difference between internet and instant messaging software usage.

Table 22: Age and Purpose of Internet and Instant Messaging Usage

	For work and professional use		For personal interests		For e-learning		Only for communication		To read the news	
Age	Internet	Inst. Mes.	Internet	Inst. Mes.	Internet	Inst. Mes.	Internet	Inst. Mes.	Internet	Inst. Mes.
20-30	61,5%	54,2%	15,4%	33,3%	,0%		7,7%	8,3%	15,4%	
31-40	80,2%	65,5%	7,6%	25,0%	,8%		,8%	7,8%	10,7%	
41-50	76,3%	61,8%	5,9%	28,1%	2,5%		4,2%	7,9%	11,0%	
More than 50	77,8%	40,0%	,0%	30,0%	5,6%		,0%	30,0%	16,7%	

Taking the age and the instant messaging usage into account, generally all the age groups use it for work and profession. However, the interesting result is that, the employees who don't use internet for personal interests may prefer instant messaging software. Also, it is again interesting that none of the respondents of 20-30 age range use internet for educational purposes. Despite that fact, that ratio is high among the ones over 50.

Table 23: Graduate Level and The Purpose of Internet and Instant Messaging Usage

	For work and professional use		For personal interests		For e-learning		Only for communication		To read the news	
Graduate	**Internet**	**Inst. Mes.**	**Internet**	**Inst. Mes.**	**Internet**	**Inst. Mes.**	**Internet**	**Inst. Mes.**	**Internet**	**Inst. Mes.**
Primary School	83,3%	75,0%	,0%	,0%	,0%		,0%	25,0%	16,7%	
Secondary School	71,4%	,0%	14,3%	57,1%	,0%		14,3%	28,6%	,0%	
High School	75,2%	69,1%	8,8%	23,5%	3,5%		3,5%	4,9%	8,8%	
College	76,2%	59,5%	6,6%	28,2%	,7%		2,0%	10,7%	14,6%	
Undergraduate	93,8%	68,8%	,0%	31,3%	,0%		,0%	,0%	6,3%	

When we look at the relationship between the usage of internet and instant messaging software in parallel with the graduate level, we see that undergraduates use them for work and profession much more than the others do. Also we see that instant messaging software is used by the secondary school graduates remarkably for personal interests. Consequently the usage of differs according to the graduate level and this, from the institutional angle makes it necessary arrange some regulations.

2.2.4.2. Institutional Features and Results Related to the Usage of Internet and Instant Messaging Software

- Considering both the usage of instant messaging account and the people who are messaged, we see that %74 of talks realized for exchange of vocational knowledge, to a great extent. This result shows that instant messaging software is used mainly for work and exchange of vocational knowledge with colleagues.

- When considering the title, purpose of internet and instant messaging software usage and their usage length doesn’t differ significantly.

- Considering the tenure of office, as long as the tenure of office increase, the frequency of internet usage varies. In other words, it is possible to act more comfortably.

- Considering the restrictions related to both the usage of computers and the internet together, it is mentioned by the %86 of the respondents that there is unrestricted connection and there is no restriction related to instant messaging. So, the regulations in the institutions are parallel to each other.

- %30 percent of the ones who connect internet mostly at home, use internet mostly for more than 6 hours at workplace. This result should be dwelt on from an ethical point of view.

III. Conclusions

The result of the research study is that it is inevitable to use computer and internet nowadays. In so much as that, almost all of the test subjects use internet at work place and more

than %80 of the respondents have instant messaging account. These results, therefore, as we mentioned before, cause some ethical problems.

In this context, ethic is the science that tries to determine what is right and what is wrong and so, at first sight, it seems that it is wrong to use internet for personal reasons at workplaces. However we can see some positive effects when we deeply think about it. It has been determined that the usage of internet for personal interests makes the employees concentrate on their job, otherwise they lose their enthusiasm for their jobs. Consequently, it is beneficial for employers to show flexibility for their employers. (Okur, 2005;71). A similar idea must be valid for the government employees too, because the internet environment gives different opportunities to the individuals. Reading the news, having information about a topic, could make the public service be realized better.

However, taking the research results into account we see that government employees use internet instant messaging software for work rather than personal interests. So, if restrictions take place, they won't be used for these purposes either and it will cause productivity fall. Also when they physiologically feel that their right is taken away this will affect their productivity in a negative way.

At the same time, if the instant messaging software is nonstop online and they correspond, it leads to great advantages. However even the usage of it for their personal interests might be effective to decrease the work stress of the employees. Because sharing the problems relaxing effect for people.

The results also show that the majority of the workers (%51) chat after finishing their work. In this context, the right thing that should be done is checking whether the employees have done their assigned duties or not. Also, this can make the employees who want to have more free time for them to work faster and more effectively. So it can be taken as a way of rewarding.

Also, as long as it doesn't affect the performance, there is no restriction or prohibition in most of the public corporations which also support our idea. Insomuch as that, if there were any negative effects, there would absolutely some restrictions.

At the same time, in accordance with the age, gender, tenure of office and title, the internet and instant messaging software usage may have some differences. Especially regarding the age group, it is possible that the younger ones use it more frequently. Also according to the tenure of office and title, differences may appear as the superiors may take their ease. In terms of gender, men sense a stronger bias to chat over internet. In one research, the ratio of the women who chat over internet is %50 and the %70 of men chat over internet. (Tarcan 2005;59)

However, we didn't come across significant differences in terms of these factors, so the ones who work in public sector showed different results from the general impression. This can be the result of public pressure.

On the other hand, these results shouldn't make us feel too comfortable about this issue. Insomuch as that, there may be costs and damages causing by the usage of internet and instant messaging software for personal interests.

Consequently, it is not possible to speak clearly about and pass judgement on the usage of internet and instant messaging software in public service environment or their personal usage. The thing that should be done is determining a policy in accordance with the features of the institution, professions, works and employees. Objective evaluation should be done about the reasons it should be allowed, the employees for whom it should be prohibited. For example, no restrictions could be made for the academicians, whereas it could be applicable for the administrative personnels.

References

- Arslan Mahmut, *İş ve Meslek Ahlakı*, (Ankara:Siyasal, 2001), 7-8.
- Hartman, L.P., "Technology and Ethics:Privacy in The Workplace", *Business and Society Review*, Vol.:106, No:1, (2009):1-27.
- TUIK(Turkish Statistic Instituation),
- http://www.tuik.gov.tr /PreHaberBultenleri.do?id=2055 (27.08.2008)
- TUIK(Turkish Statistic Instituation),
- http://www.tuik.gov.tr/PreIstatistikTablo.do?istab_id=42 (04.03.2009)
- Keser, Aşkın, "Elektronik Postanın Örgütlerde Kullanımı ve Çalışanların Elektronik Posta Kullanımlarına Yönelik Bir Araştırma", *İş-güç,* Cilt:7, Sayı:1,(2005):59-80.
- Okur, Zeki, "İşyerinde İşçinin Bilgisayar ve İnterneti Özel Amaçlı Kullanımının İş İlişkilerine Etkisi", *Kamu-İş*, Cilt:8, Sayı:2.,(2005):47-75.
- Özdemir, M.,"Kamu Yönetiminde Etik", *Z.K.Ü.Sosyal Bilimler Dergisi*, Cilt:4, Sayı:7, (2008):179-195.
- Tarcan, Ahmet, *İnternet ve Toplum*, (Ankara:Anı, 2005), 59-70.

FEMINISM AND COSMOPOLITANISM: SOME INEVITABLE CONNECTIONS

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Abstract

In this paper I will approach the issue of feminism and cosmopolitanism in order to give arguments in sustaining the fact that, today, feminism and cosmopolitanism are inevitable connected. In constructing my discourse I will begin by laying out the main ideas of cosmopolitanism, followed by a presentation of the construction of the feminist movement over time, inter-relating these two discourses at the end of the analysis. Connected with political ethics, political theory and political philosophy, the theoretical framework selected for this paper is based on the cosmopolitan theory developed by scholars like Martha Nussbaum, Fiona Robinson and Kwame Anthony Appaih who, underlining universality, define cosmopolitism as a universal concern with every human life and its well-being, but who are also giving value to the differences (seen as cultural or/ and of identity) insofar as they are not harmful to people.

Keywords: *Feminism, cosmopolitanism, differences, identity, ethics.*

Introduction

What are the connections, if they are, between feminism and cosmopolitanism – this is the main questions at which I try to give an answer in this paper. In order to achive my goal I divided the paper in three parts. In the first one I present the way cosmopolitan discourse developed over time, but in the same time I try to give some practical answers to some critics that put the cosmopolite theory in difficulty, critics related to the problem of identity and diversity. The main scholar the are guiding my arguments in this part are Martha Nussbaum, Fiona Robinson and Anthony Appiah. In the second part of the paper will be focused on the presentation of the successive stages that feminism went through in order to become the present movement, stressing along this presentation, the common elements between the feminist and the cosmopolitan construction. At the end of this paper I will underline how the *cosmopolitan discourse* which revolves around a few principles regarded as being fundamental is highly convergent with that promoted by the feminist movements. In order to do so I will answer to the questions: *How did the feminist movement evlove in time? What were the central and defining concepts of the three waves?* by using the main core of cosmopolitan principles - humanity, universality of the human rights, acknowledging, understanding and valorizing differences – and the metaphor of concentric ciercles developed by Martha Nussbaum.

The discourse of cosmopolitanism is revolves around some basic principles, among which: *humanity* which is a distinctive feature to all humans, the *universality of human rights* resulting from their very belonging to humanity, the awareness and understanding of the *differences*,

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principles by the means of which it aims at designing a truly inclusive and universal „human community", namely encompassing all human individuals.

The philosophical origins of cosmopolitism reside with the stoics, who claimed that the moral foundation of the human being consists in its very quality as member of the humanity, perceived as being essentially rational[1]. Diogenes the Cynic was the first one to refuse his membership with the local community by defining himself as a „citizen of the world". Besides the stoics, another important contribution to the development of the cosmopolitist moral was Descartes', who assumed the task of reconstructing the entire philosophy on the basis of a mathematical model, applicable with the entire science, model that could mediate the transition from doubt to certainty. Therefore, by means of the „doubt method" he attempted to systematically deconstruct the contemporary accepted beliefs in order to gain access to the *essence*, namely to that which can no longer be subject to deconstruction, i.e. reason – „I think therefore I am". Strongly influenced by the Cartesian philosophy, by the logic that there had to be a certain *a priori*, an undoubtable essence, the philosophy of Immanuel Kant is one of the sources on the grounds of which a model of universal ethic was later on developed, claiming as fundament the aforementioned "essence", namely the very quality as a 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."[2] This universal ethic is guided by a fundamental principle claiming that any human being must be humanly treated, that is in keeping with an undeniable dignity hypostasized in a global attachment to a culture of non-violence and respect for life, to a just economical order, to tolerance, to a life led by truth and, last but not least, to the principle of equal rights[3].

Alejandro Colas defines cosmopolitanism through the following three principles:

1. all individuals are members of a single moral community by virtue of their humanity;
2. therefore, they have reciprocal moral obligations that transcend the particular boundaries of ethnicity, nationality or of any other particular definition of identity;
3. these obligations require political involvement with respect to their enforcement[4].

Easily discernible is the fact that the first two principles refer to the moral dimension of cosmopolitanism, while the third to its political one. These dimensions aroused strong debate with respect to the validity of this concept, more specifically to the possibility of transforming a moral vision into a political one. One of these critiques claim that a universalistic moral vision, once it has been transformed into a political vision, involves the great risk of imperialism and ethnocentrism, namely that of claiming that all, or at least part of "our" values are or should be shared by the "others", the problem getting even more complicated once we try to find out what these values are.

These disputes bring to the forefront the problem of respecting diversity, looked upon as a solution both to these objections, as to the issue of the importance of the moral dimension promoted by cosmopolitanism with respect to identity construction. Therefore, as a way of avoiding the imperialistic or ethnocentric traps, the core of cosmopolitanism is fundamentally embedded with the *principle of respecting diversity*, concept which, I find, requires a few observations. The concept of diversity which I find to be related to cosmopolitanism implies the

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[1] F. Dallmayr, Cosmopolitanism. Moral and Political*, Sage Publication, Political Theory 2003*; 31; 421, 23;

[2] A. Flew, *Dicționar de filosofie și logică,* (Bucharest: Humanitas, 1979), 193;

[3] F. Dallmayr, Cosmopolitanism. Moral and Political, *Sage Publication, Political Theory 2003*, 6;

[4] A. Colas, Putting Cosmopolitanism into Practie: The Case of Socialist Internationalism, *Millenium: Journal of International Studies 23,* no. 3, (1994), 513 – 534;

type of diversity that assumes not so much intrinsic valorization –diversity as a value in itself- as extrinsic valorization – that is valorization as a means of generating the kind of social emulation by the means of which the citizens of the world can gain access to diversity as being empowering and not constraining[5]. At the same time, when I refer to diversity as a value in itself and to the instrumentality of diversity within a cosmopolitan construction, I do not necessarily mean to imply that lack of diversity would be negatively valued, but rather I attempt to avoid the use of diversity as a generative doctrine for certain forms of hierarchization unavoidably leading to various forms of moral exclusion, fact that would necessarily impinge on the cosmopolitan essence by the hierarchical categorization of the human beings. The same argument is also supported by the Frankfurt School, by the Habermasian tradition in particular, according to which universal inclusion presupposes a continuous dialogue between all the parties affected by a decision, dialogue which is grounded on the moral acknowledgement of the subjects resulting in their right to participate in the decision making[6].

Differences and their acknowledgement are essential aspects of the discussion on constructing human identity. Although the cornerstone of cosmopolitanism is represented by the membership with the humanity, our quality as human beings remains only part of the complex identitary puzzle, the mere *yarn of the fabric*. At the same time, identities can be not only dynamical, but also multiple depending on the contexts to which the individuals adhere, but these identities do not impinge on the cosmopolitan one, quite the opposite, they complete it without diluting it. Martha Nussbaum, one of the modern theorists of cosmopolitanism, stresses the fact that there is no conflict among the multiple identities, that is between the national, the ethnic, the religious and the cosmopolitan one, turning to the metaphor of the concentric circles in order to illustrate this idea of identity, in which context, the bigger circle obviously represents the membership with the universal human community[7]. This metaphor of the concentric circles is also assumed by Kwame Anthony Appaih when discussing cosmopolitan patriotism, presenting communities as small spheres within which individuals can perceive and at the same time bring into force their moral duties[8].

These individuals become cosmopolitan by acknowledging, understanding, respecting and mediating the identity spheres of their interacting parties, thereby becoming "rooted cosmo-politans"[9]. "When identities are manifold, passions are divided and leave open the possibility of having particular loyalties and a universal moral concern at the same time"[10].

As such, setting about with the acknowledgement of diversity we are, more or less unavoidably led to another essential concept for the cosmopolitan construction, namely that of identity, amply discussed by philosophers such as Nussbaum or O'Neill[11] who claim that precisely the kinds of identity, which are shaped within diversity, generate a complex set of interactions

[5] Diversity is valuable in the sense of becoming instrumental to the attainment of certain legitimate purposes within a cosmopolitan construction.

[6] Fioana Robinson, Cosmopolitan Ethics and Feminism in Global Politics, *All Academic research*, accessed on 12.02.2011 , http://www.allacademic.com//meta/p_mla_apa_research_citation/0/7/4/3/8/pages74386/p74386-1.php

[7] Nussbaum M., Patriotism and Cosmopoiltanism*, Boston Review, A Politycal and Literaly Forum,* accesed in 12.02.2011 at http://bostonreview.net/BR19.5/nussbaum.html;

[8] Kwame Anthony Appiah, *The Ethics of Identity,* (London: Princeton University Press, 2005) chapter 6, Rooted Cosmopolitanism;

[9] *ibid.,* 232

[10] Fioana Robinson, *Cosmopolitan Ethics and Feminism in Global Politics*, All Academic research, pp. 7, text accessed in 12.02.201, http://www.allacademic.com//meta/p_mla_apa_research_citation/0/7/4/3/8/pages 74386/p74386-1.php

[11] D. O'Neill, Justice, Gender and International Boundaries, *British Journal of Political Science*, Vol. 20, No. 4 (Oct., 1990), 11;

which sometimes can be conflictual in nature, but which are especially useful for creating a cosmopolitan perspective. There might be added the cosmopolitan interpretation of the well known Hegelian dialectic, in the sense that conflictual interactions among nations, ethnic groups, religions etc. are conducive to that type of *conflict* which could reveal in the end that something that unites us all, namely our capacity as human beings. This struggle for acknowledgement can therefore generate mutual understanding and respect by getting to know *the other*[12]. A notable aspect is the fact that the shaping of the cosmopolitan citizen cannot be realized by the elimination of the process of knowing/understanding the other, therefore, dialectically speaking the synthesis necessarily presupposes both thesis and antithesis.

If someone wanted to sketch the generic portrait of a cosmopolitan citizen, the following features should be account for:

- continuous swinging between the local and the global spheres, with a definitive influence on the shaping of the global citizenship;
- respect for and acknowledgement of cultural diversity whenever possible, therefore the enactment of an interested dilletantism;
- general intent and opening to cultural diversity, leaving open the possibility of rejecting certain principles this diversity implies;
- high mobility rate, as empowering factor ;
- perceiving the notion of “home” in an extremely diverse manner;
- critical attitude with respect to fixed boundaries.[13]

In short, cosmopolitanism requires a continuous swinging of the individuals along a central axis determined by their membership to humanity, by their capacity as human beings. Therefore, on one end of the axis there is humanity, the citizens of the world, *sifted* through many diversity and contextual filters, thereby generating, first groups of individuals[14] (nations, ethnic and religious groups), then communities and, on the other end, the individual, whose identity is defined, according to Martha Nussbaum, by the small circle, namely that of the family. The essential link between the latter aspect and the cosmopolitan citizen is the humanity membership, but the individual, along its identity construction process, can just as well get to the other end of the axis, as he can stop along the way, at any intermediary point.

II

After this presentation of cosmopolitanism, I want to return to the main subject of this paper, namely cosmopolitan feminism. In what follows I aim at showing why today, as I was claiming in the beginning, feminism can only be seen as a cosmopolitan movement. In constructing the argument I will appeal to the *conceptual mechanism* involved with the construction of the cosmopolitan citizen which I have previously described.

I set about my argument, with a nutshell definition of feminism, followed by a presentation of the successive stages that feminism went through in order to become the present movement, stressing along this presentation, the common elements between the feminist and the cosmopolitan construction. As such, in short, feminism represents the movement for the women’s rights. As such, the substance of the feminist movements and theories can be traced back to the following minimal assumptions: a) women are the subjects of systematical oppression; b) gender relationship

[12] F. Dallmayr, Cosmopolitanism. Moral and Political, *Sage Publication, Political Theor*y 2003, 2;
[13] K. Gunesch, Education for cosmopolitanism? Cosmopolitanism as a personal cultural identity model for and within international education, *Journal of Research in International Education* 2004; 3; 251, 16;
[14] Individuals who are aware of the common interests.

are neither natural nor immutable; c) they are unjust with respect to women and therefore political action is called upon for their amendment.[15] Feminism is also defined as the belief that men and women are the equal heirs of the world and while most societies favor men as a group, the emergence of social movements promoting the idea of equality among men and women becomes unavoidable and legitimate[16]. However it would be false to assume that these are the definitions by which the first feminists operated, as would be equally false to imagine that these definitions, just as any others in fact, would have the capacity to convey the fierce unrests which generated them, or to exhaustively cover the concepts employed by feminism. These definitions are intended to raise interest for the realities behind the defined concept through a, so called, minimal effort shortcut.

Therefore, what lies behind the concept of feminism? Most authors, in explaining the emergence of feminism, take as landmark the Enlightenment discourse, the concept outspreading in Europe during the second half of the 19th century. The feminist movement initially manifested through the publication of a few isolated works[17] in which the opinion according to which women are an inferior social category, a "minority", was objected. But these works were the product of thousands of years of male dominance, during which women were denied the *privilege* of humanity[18] and treated accordingly. Toma d'Aquino, one of the most important Christian philosophers, claimed that women are "defective men", the source for this interpretation being The Old Testament, more specifically women's birth out of Adam's rib[19]. Several other sources of oppression are to be found in other religions as well. For example, the sacred Hindu text, The Law of Manu, classifies the Indian society according to castes and gender ("the woman is guarded by her father during childhood, by her man during her youth, she must never be allowed to act according to her will"[20]), while Imam Nawawi claimed that the seduction of men is in the nature of women and that is why the prophet did not appreciate their company[21].

The degree of oppression varies across societies[22], but generally speaking, women were disadvantaged for being borne as such, disadvantages that generated, along millennia, various reactions. Initially those were isolated reactions, most of the times consisting in religious revolts. For example, Mohammed's third wife, A'ishah created her own religious norms; in India, a group of women supported the *bhakti* movement objecting to one of the forms of the Hindu religion, demanding spiritual equality with men; in Europe, at the end of the 13th century, Guillemine of Bohemia created a women's church by which means she contested the catholic norms[23]. However, the origins of modern feminism can be traced back to the Renaissance and the Enlightenment, Marry Wollstonecraft's *A Vindication of the Rights of Woman* being one of the grounding works

[15] M. Miroiu, O. Dragomir, *Lexicon feminist,* (Iasi: Polirom 2002), 121;

[16] B. Winslow, Feminist Movements: Gender and Sexual Equality, in T. A. Meade, M. E. Wiesner-Hanks (ed), *A Companion to Gender History,* (London: Blackwell Publishing Ltd, 2004), 186;

[17] Just as isolated was Diogene's position when claiming he was rather a citizen of the world than of the local community;

[18] They were denied membership to humanity;

[19] Another source for women's oppression also to be found with The Old Testament is the doctrine of the original sin, but I will not follow this path, as it doesn't strictly concern the subject of this paper.

[20] I. Mihălcescu (trad.), *Lega lui Manu*, (Craiova: Chrater B.), 229;

[21] B. Winslow, Feminist Movements: Gender and Sexual Equality, in T. A. Meade, M. E. Wiesner-Hanks (ed), *A Companion to Gender History,* (London: Blackwell Publishing Ltd, 2004), 188;

[22] For example, in societies that venerated goddesses such as Astarte, the Summerian goddess Innana, the Greek Gaia; in Egypt, during the Old Kingdom, women were allowed to manifest within the public sphere, girls had equal inheritance rights with those of boys; in the Aztec civilization women had parallel but equivalent parental rights with those of men etc..

[23] B. Winslow, Feminist Movements: Gender and Sexual Equality, in T. A. Meade, M. E. Wiesner-Hanks (ed), *A Companion to Gender History,* (London: Blackwell Publishing Ltd, 2004) 192;

of feminism[24]. In the same period, the feminist movement in the USA was grounded, event marked by the Seneca Falls Convention in 1848, the main demand of which involved the complete abolition of all gender based discrimination forms.

Generally speaking, most of the initial feminist demands revolved around what we call today First-wave feminism – that of *equality*. As previously mentioned, the First-wave feminism started with the identification and deprecation by a group of women of the injustices they were subject to. The debate originated with a certain type of society, the Western one – Great Britain and USA, with a certain intellectual context – the Enlightenment – sticking to this circumstance for a significant period of time. At the same time, the demands strictly involved equal rights[25] and their attainment is still regarded by some theorists as sufficient correction of the injustices. At the same time, the First-wave feminism predilectly answered the needs of certain categories of women: *white, European, middle class*. The main point of this stage in the evolution of feminism was the attainment of rights for a specific category of women and was less responsive to issues concerning race, worker women and peasant women matters. Notwithstanding the fact that some of the voting right militants were also abolitionists, among which Elizabeth Candy Stanton, the former movement had a separate agenda from the latter[26]. The women's rights movements in Asia and Middle East have assumed some of the Western principles, while at the same time opposing imperialism and strongly supporting nationalist, socialist and anti-colonialist movements.

Therefore, if we were to make an analysis of the origins of the feminist movement according to Martha Nussbaum's cosmopolitan model, we should place it somewhere close to the middle of the representation, where it is preponderantly characterized by a strong loyalty to a certain group of women belonging to a certain geographical region, ethnic group, social class or even religion.

Even if after a long period of feminist militantism, the demands of the First Wave became a reality for most women, its results were not quite those envisioned, in the sense that equal rights proved to be a necessary but not sufficient aspect of the elimination of gender inequalities, part because it became a rather formal equality and part because the application of such rights, that were originally conceived for a masculine model, on other groups (consisting of both men and women), characterized by very different needs could not have led to the desired results. Therefore the feminist discourse started to include a completely different concept as to the difference and diversity issue, concepts which were related to certain needs to which the new theoretical constructions should provide an answer, thereby widening the militants' view of the nature of rights and women's emancipation.

The starting point of the Second-Wave Feminism – that of difference and liberation – was marked by Simon de Beauvoir's *The Second Sex* (1949), in which the author attempts to find an explanation for the inefficiency of equal rights with respect to women's emancipation and reaching the conclusion that in order to benefit from such rights, women must become men. Simone de Beauvoir paves the way for the new manners of approaching the issue of women on the grounds of the concept of difference. In 1963 another capital work for the Second-Wave Feminism is published, i.e. Betty Friedan's *The Feminine Mystique*, stressing the aspect of women's identitary

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[24] Among those who gave political coherence to the first wave feminist demands were John Stuart Mill, with his work *Subjection of Women (1869)* and his wife Harriett Taylor with her *Enfranchisement of women (* anonymously published*)*.

[25] Women's access to higher education, the secondary and high school education reform, the access of women to some professions from which they had been previously excluded (especially those related to medicine and law), the acknowledgement of the property right for married women, legislation improvement with respect to divorce and child custody, as well as, the gradual extension of the right to vote (M. Miroiu, 2004, 22);

[26] M. Miroiu, *Drumul către autonomie*, (Iasi: Polirom, 2004), 21;

construction, that up to that point had allways been considered as being closely and naturally linked to the private sphere and to family life. She objects to the mainstream thought of that time, in the view of which women can only perfect themselves by raising and caring for their children and, generaly speaking, through activities strictly belonging to the private sphere. Thereby, the problem of equality through and in diversity, problem that includes, alongside equal rights issues, that of the gender speciffic differences, leading to the acknowledgement of the common interests based on common experiences.

During the same period and following the acknowledgement of the common interests, the concept of trans-racial women's solidarity gains strong support[27]. As such, while, for example, the original feminist movement was ignorant as to the problems faced by coloured women, under the assumption of the preeminence of the racial criterium and, therefore, that coloured women would become fierce critics of white women and, followingly, reject feminism, dialectically Afro-american women contributed to the revival of the feminist movement during the 60's and the 70's, movements such as Black Woman's Liberation Commitee of Student Non Violent Coordinating Commitee, The Third World Women's Alliance, The Harlem-bases Black Women Enraged and The Oakland Black Women Organizig for Action belonging to this period. Moreover, during this period the radical movement promoting an internationalist view and supporting the anti-colonialist and liberation movements from South Africa, Palestine, Mexico and Cuba emerged. The radical feminism in that period demanded a deconstruction of the gender based order, which was considered to be male-centered and a reconstruction convergent with the particular experiences of women, thereby militating for the construction of a distinct feminine culture.

Obviously, the Second Wave feminism is a feminism of contrasts, of swinging between the local and the global dimensions, between women and women groups, between race and gender, between national and international, between androcentric and ginocentric. By the same dialectical logic, just as with cosmopolitanism, we can notice how the struggle for the acknowledgement of women's rights (First Wave) led, first, to a better understanding of the interests of women, second to a better understanding of women's and men's interests (Second Wave). This knowledge and understanding led to the possibility of the internationalization of the women's movement by organizing conferences (World Conference on Women, Mexico City 1975), by the signing of the International Convention on the Elimination of All Forms of Discrimination against women etc..

The internationalization of the movement coincided, not at all by accident, with the starting point of the Third-wave Feminism – that of *autonomy*, beginning in the 80's, that lays special emphasis on contextualization. This wave is generically characterized by the refusal of universalistic thought, accused of imperialism and ethnocentrism, and by the stressing of the importance of the plurality of women's experiences. The agenda of the Third Wave includes the acknowledgement of "pluralism, of the hybrid orientations, of the fact that opinions differ with context. […] Feminism is an argument, an action dirrected to women that have to preponderently dirrect themselves towards capacitation […] a new political generation is born, in the context of which neither age, nor the old statal frameworks matter, but rather the relevance of the similar experiences[…]"[28]. Therefore, pluralism and diversity are the values that oppose the imperialistic universalism, that could facilitate the empowerment of the individuals, of women, in this case. Boundaries become flexible and criticizable, a permanent interaction between the local and the global spheres takes place, interaction leading to the understanding of diversity as an empowerment generating mechanism. The change in the problems' approach strategy is very

[27] M. Miroiu, *Drumul către autonomie,* (Iasi: Polirom, 2004), 24;
[28] M. Miroiu, O. Dragomir, *Lexicon feminist,* (Iasi: Polirom, 2002), 143;

important, this consisting in the formulation of punctual solutions, coherent with a maximum degree of autonomy, the general purpose remaining however the same: the elimination of the oppression of women[29].

In short, thereof we speak of the First Wave as the struggle for the acknowledgement of women as persons, as moral subjects, realized through ensuring equal rights for men and women; the Second Wave mainly reffers to the struggle against the imposition of the male model as rights landmark, to the discovery and valorization of the differences between men and women, to the internationalization of the movement, grounded on the acknowledgement of the common interests; the third wave, bringing forth a much more nuanced concept of difference, stressing the differences among women and the necessity of knowing, acknowledging and understanding womens' multiple identities.

Conclusions

At the beginning of this paper we were speaking of the fact that the *cosmopolitan discourse* revolves around a few principles which it regards as being fundamental and that, as I will hereafter attempt to prove, are highly convergent with those promoted by the feminist movements: *humanity, universality of the human rights, acknowledging, understanding and valorizing differences.*

How did the feminist movement evlove in time? What were the central and defining concepts of the three waves? First, the First Wave stressed the importance of **acknowledging women as persons, as moral and as legal subjects**, militating, first and foremost, for the acknowledgement of their humanity and, on these grounds, for the universalization of the human rights. The universality of the human rights which resulted from the membership to the human community, brought forth **women's rights as human rights**, while at the same time underlining an aspect that had been previously neglected, namely the issue of the differences. This issue, that proved to be central with the Second-wave Feminism, determined and stimulated the theoretical constructions regarding the acknowledgement and understanding of the differences **– both between men and women, as among women.** Further on, the acknowledgement, understanding and valorization of the differences, involves a specific sensibility as to the **identitary constructions** and to the **autonomy support**. As such, the Third Wave emerges, promoting principles by the means of which it seeks to shape a community which is truly inclusive, **as to both men and women**. – by taking into account, this time, the multiple differences among the individuals and **their valorization**.

As it can be seen, this entire edification of the feminist movement took place on two interconnected levels:

1.*the actual, pragmatic level*, related to the actual emmancipation of women;

2.*the theoretical construction level* involving the consolidation of the feminist theory;

The two levels evloved in a permanent interconnection, their ultimate goal remaining that of promoting, as efficiently as possible, the rights of women and creating a just society. As such, the theoretical constructions have allways had the same purpose, namely that of integrating women *as women* in a construction in which hyerarchies are not determined by gender and in which humanity, involving equal respect for the dignity of women as human beings, is the foundament of any judgement of value. Therefore, we speak of ineluctable connections between the theoretical

[29] Notwithstanding our acceptance or denial of the theory by which women have common interests resulting from their specific experiences – womanly and feminine- the feminist movement still revolves around the idea of oppression even if its deployment mechanisms became ever more subtle.

and the practical evolution of the feminist and cosmopolitan movements and perspectives. These connections consist, on the one side, in the stagial and, at the same time, non-exclusive[30] construction of both theories, on the other, in the assumption and promotion of the previously mentioned valorical core.

References:

- Andersen M., Thinking about Women: A Quarter Century's View, *Gender and Society*, Vol. 19, No. 4 (Aug., 2005);
- Appiah K. A, *Cosmopolitianism: Ethics in a Word of Strangers,* (Norton, 2006);
- Appiah K. A., *The Ethics of Identity,* (London: Princeton University Press, 2005);
- Colas A., Putting Cosmopolitanism into Practie: The Case of Socialist Internationalism, *Millenium: Journal of International Studies 23,* no. 3, (1994), 513 – 534;
- Dallmayr F., Cosmopolitanism. Moral and Political*, Sage Publication, Political Theory 2003,* 31: 421-442*;*
- Flew A., *Philosophy and Logic Dictionary (Dicționar de filosofie şi logică),* (Bucharest: Humanitas, 1979);
- Gunesch K., Education for cosmopolitanism? Cosmopolitanism as a personal cultural identity model for and within international education, *Journal of Research in International Education* 2004; 3; 251;
- Hercus C., Identity, Emotion, and Feminist Collective Action*, Gender and Society*, Vol. 13, No. 1, Special Issue: Gender and Social Movements, Part 2 (Feb., 1999);
- Meade T. A., Wiesner-Hanks M. E. (ed), *A Copmanion to Gender History,* Blackwell Companions to History, Blackwell Publishing Ltd, 2004;
- Mihălcescu (trad.), *Lega lui Manu*, ed. Chrater B, Bucureşti;
- Miroiu M., Dragomir O., *Feminist Lexicon (Lexicon feminist), (*Bucharest: Polirom, 2002);
- Miroiu M., *The Road to Autonomy* (*Drumul către autonomie*), (Bucharest: Polirom, Bucureşti 2004);
- Nagar R., Lawson V., McDowell L., Hanson S., Locating Globalization: Feminist (Re)readings of the Subjects and Spaces of Globalization*, Economic Geography*, Vol. 78, No. 3 (Jul., 2002);
- Nussbaum M. , Capabilities and Social Justice*, International Studies Review*, Vol. 4, No. 2, International Relations and the New Inequality (Summer, 2002);
- Nussbaum M., Patriotism and Cosmopoiltanism*, Boston Review, A Politycal and Literaly Forum,* accesed in 12.02.2011 at http://bostonreview.net/BR19.5/nussbaum.html;
- Nussbaum M., Public Philosophy and International Feminism, Ethics, Vol. 108, No. 4 (Jul., 1998);
- O’Neill D., Justice, Gender and International Boundaries, *British Journal of Political Science,* Vol. 20, No. 4 (Oct., 1990), pp. 439-459, Cambridge University Press;
- Ossewaarde M., Cosmopolitanism and the Society of Strangers, *Sage publications, Current Sociology* 2007; 55; 367;
- Robinson F., 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/pages 74386/p74386-1.php;
- Vallance Z., Women as Moral Beings*, International Journal of Ethics*, Vol. 12, No. 2 (Jan., 1902).

[30] Third-wave Feminism does not exclude First-wave Feminism, just as, in the case of cosmopolitanism, the familial loyalty does not exclude the loyalty to the global community.

A STUDY OF SYMBOLIC RELATIONS IN PUBLIC TRANSPORT

Andrei BĂLAN*

Abstract

This paper presents an anthropological, exploratory study of the microsocial world of public transport. Our research focuses on the symbolic relations that are being established (verbally or nonverbally) between urban transport travellers that do not know each other and the consequences these relations create. Modern urban configuration forces large numbers of individuals to share public space every day. When this space becomes restrictive, symbolic relations and interpersonal behaviors such as territoriality and personal space management become clearer. Due to overcrowding, public transport is the scene of one of the most restrictive public spaces in a city. The challenge was to observe and interpret daily, casual behaviors through a sociological and psychological scheme, following the methodological tradition established by Erving Goffman and the other symbolic interactionists. Finally, our study generates a number of hypotheses and explanatory models for common practices and behaviors in trams and metros regarded from a symbolic perspective.

Keywords: *public transport, symbolic relations, symbolic interactionism, observation, interpretative scheme*

Introduction

As Marc Auge stated, we live in an era of scale reversals[1]. Along with the other social sciences, anthropology enrolls in this logic, practicing with ever-more perseverance the attention for present and proximity. The accent increasingly falls on *daily* and *contemporary* ”*in all the aggressive and disturbing aspects of reality at its most immediate”*[2]. The scale overturn that leads to the emphasis of the *daily* is interpreted by Michel de Certeau as distancing from the hegemonic and generalizing[3] discourse that used to dominate the social sciences. Vintilă Mihăilescu regards the rediscovery of the *daily* as „*a way to bring forward and put under spotlight everything that was left behind, neglected or deemed insignificant by the grand theories*”[4].

Auge discusses the difference between what anthropology describes as *places*, as opposed to simple *spaces.* Thus, places are relational, historical and concerned with identity, while simple spaces are recognizable by the absence of social and symbolic relations. Consequently, these become *non-places*[5]. The economic and social dynamics that are specific to supermodernity create

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[1] Marc Auge, *Non-Places: Introduction to an Anthropology of Supermodernity* (London: Verso, 1995), 12

[2] Auge, *Non-Places: Introduction to an Anthropology of Supermodernity*, 31

[3] Vintilă Mihăilescu, “*Introducere”* la *Etnografii urbane*, coord. Vintilă Mihăilescu (Iaşi: Polirom, 2009), 16

[4] Vintilă Mihăilescu, “*Introducere”* la *Etnografii urbane,* 16

[5] Auge, *Non-Places: Introduction to an Anthropology of Supermodernity,* 34

non-places such as the transit spaces, which people use for functional reasons determined by the urban configuration. [6]

Practicing the same dedication to microsocial, this paper sets to investigate the nature of the relations that occur between individuals in such *non-places,* or transitory spaces that simply connect places and are described by the absence of the intentional social relations. In a synthesis about the progress in the sociology of transportation Glenn Yago underlined the absence and necessity of research on the psychology of personal relations in public transport. [7]

The subject of this paper is, therefore, the psychological and symbolic interpretation of daily personal interactions that take place in public transport. We see public transport as a space of routine and somewhat ritual interaction, which makes a fertile study material for the researcher interested in what is common and daily. Our ethnographic observation sets to create an explanatory model for the aforementioned type of interactions and bring new data in this field by generating a number of new hypotheses and explanatory models. We sought to conduct a microsocial, interpretative analysis of social interactions following the flexibly-structured research method "patented" by symbolic interactionists such as George Herbert Mead and Erving Goffman. Our main hypothesis before pursuing the study was the existence of symbolic relations and of a certain spatial structure of the means of public transport that was derived from the constant negotiation of power between individuals.

Paper content

Regarding from an evolutionary perspective, the natural type of human community is the tribe. The closest correspondents in present times are the rural communities, where "everybody knows everybody". Desmond Morris[8] demonstrates the city is a modern, artificial construct that forces individuals that do not know each other to manage and share a multitude of common or *public* places. An interesting sort of dynamics occurs: the way people handle each other`s presence when they do not know each other, they have no preset rapports, but only a common space that needs to be shared. But what happens when that space becomes narrow, restrictive? In this case the symbolic relations of power become more noticeable. These relations occur, most of the times unconsciously, between individuals forced by the urban configuration to relate to each other`s presence. They have no other reason to interact but their very presence in the same space.

Starting from Auge`s vision of *places* and *non-places*, we sought to investigate, through an ethnographic study, the human relations and symbolic dynamics generated by the public transport. Albeit these relations are not intentional, we will seek to demonstrate they are inevitable, and to investigate the rules by which the simple presence of several individuals in the same space will start a process of symbolic negotiation of their relations.

The role that Max Weber ascribed to sociology was to analyze and interpret human behavior and interaction. Symbolic interactionism, one of the dominant sociological paradigms of the 20th century, states that daily life consists of interactions based on exchange of symbols. The research method put forth by the most prominent symbolic interactionist – Erving Goffman – was largely based on observation and interpretation through dramaturgic methaphors and parallels with theatre. This research approach has created perhaps the most original, popular and relevant forms of symbolic interactionism. The research we have conducted is part of the same observative –

[6] Auge, *Non-Places: Introduction to an Anthropology of Supermodernity*, 94
[7] Glenn Yago "*The Sociology of Transportation*". Annual Review of Sociology, Vol. 9 (1983): 185
[8] Desmond Morris, *The Human Zoo* (London: Jonathan Cape, 1969), 55

interpretative tradition started by the symbolic interactionists. Another important methodological aspect linking our study with this paradigm is the generation of multiple and dynamic hypothesis.

Discussing the role of the public transport system, Yago stated: ”*Transportation centrally affects the relationship between physical space and society. (...) changes in transportation affect the organization of human activity in urban and regional space, structuring the built environment, spurring urban growth, and ordering the relationships among cities in a national urban system*”[9]. The urban transport network is a good indicator of the spatial limits of a city. Usually, when a certain transport system reaches its limit and cannot match the growth rhythm of the city anymore it is complemented by a different mean of transport that is able to cover the new city limits.

The means of transport are selected by the city dwellers through a rational process influenced by their social and spatial ranking in the urban configuration. Yago shows that, for example, the wealthier dwellers have a smaller probability of using public transport, choosing to travel by car, instead.[10] In the absence of similar studies about the Romanian urban communities, we find ourselves constrained to extrapolate the findings of usually American studies, such as Yago`s. However, Bucharest`s polynuclear configuration as well as the high variations in architecture and social structure lead us to the assumption that the travel routines of Bucharest residents are probably more manifold than those of American dwellers living in more simply-structured cities. Identifying the dominant travel corridors would presumably be more difficult as we would have to deal with three different means of public transport and a private one.

Several studies conducted in the last decades were aimed at discovering the effects if public transport on city dwellers. Bateman and Brown show that overcrowding, traffic congestion and subway breakdowns create dehumanizing environments that may erode urban dweller`s sense of identity. [11] Milgram shows transportation-related stress, overcrowding, traffic congestion and noise may contribute to *psychic overload*[12]. Stress is also responsible, by Lundberg, for much of the aggressive or inappropriate behaviors that occur in public transport. [13]

Another interesting study regarding social interactions in public transport belongs to Susie Tanenbaum[14]. Her ethnographic study was conducted for three years in the New York subway and followed several categories of subjects, from musicians and simple dwellers to salespersons and the subway staff. One of the main findings was that subway music performers facilitate social interactions by creating connections between strangers that would otherwise have no pretense to interact.

As we have already mentioned, the main methodological inspiration for our ethnographic study relies in the model that was promoted and enhanced by symbolic interactionism. This was synthesized by Herbert Blumer through the following phrases: ”*Symbolic interactionism is a down-to-earth approach to the scientific study of human group life and human conduct. It lodges its problems in the natural world, conducts studies in it and derives its interpretations from such naturalistic studies. If it wishes to study religious cult behavior it will go to actual religious cults and observe them carefully as they carry on their lives*”.[15] He also underlines society exists *in*

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[9] Glenn Yago ”*The Sociology of Transportation*”. Annual Review of Sociology, Vol. 9 (1983): 171

[10] Yago, ”*The Sociology of Transportation*”, 176

[11] J. R. Bateman and J. W. Brown, *Urban planning, transportation, and human behavioral science.* Guidelines for New Systems (Chicago: Barton-Aschman Assoc, 1968), 2

[12] Stanley Milgram, “*The experience of living in cities”*, Science 167, (1970), 1461-68

[13] O. Lundberg, “*Urban commuting: crowdedness and catecholamine excretion”*. J. Hum. Stress 2/3 (1976): 26-32

[14] Susie Tanenbaum, *Underground Harmonies: Music and Politics in the Subways of New York.* (New York: Cornell University Press, 1995)

[15] Herbert Blumer, *Symbolic Interactionism – Perspective and Method* (University of California Press, Ltd, London, England, 1969), p.67

action and this is how it should be researched. This should be the starting point of any empirical study[16]. The observational research „borrows" its exploratory character from the anthropological tradition: the researcher seeks to discover new data without „tying himself" to a rigid set of hypothesis. He tries to respect the natural world conditions and to not induce any major changes through his presence. His interest is diffuse at the beginning. Any aspect of the group`s life can fall under the researcher`s scrutiny. [17]

We, therefore, chose to conduct an exploratory research of the everyday, casual interactions in public transportation, namely trams and metros. These two means of transport were selected because they are perhaps the two most representative spaces of public transport in Bucharest. They were also relevant to our research due to their fundamental difference: one travels underground while the other travels above. Our starting point consisted in the analysis of the interactions and nonverbal behavior.

While we had almost no rigid hypothesis besides the existence of symbolic relations that may determine a certain perception of the spatial structuring, we decided to follow a few dimensions:

- The natural display of individuals; possible grouping criteria (such as age, gender, social status)
- The existence of possible variations in the homogeneity or disparity of travellers in different areas of the city
- The occurrence and functioning of prosocial and antisocial behaviors
- Possible patterns in the emergence of social interaction between strangers
- Attitudes and behavior towards individuals with a special status: baggers, security staff and ticket inspectors
- The management of impression (in Goffman`s terms) and the management of the personal space

The study was conducted over a period of six months and it resulted in a larger quantity of data, out of which we will only present the most relevant part.

The means of transport were selected with regard to the length of their route and the variations in the areas they cross. We sought trams that would offer a convenient posture for observation and note-taking, and that would cover several socially-diverse areas. We finally selected three main tram lines (55, 5, and 21) that cover a large part of the city and offer a center-outskirts transition. In selecting the metro lines we used the same criteria that would maximize the variation of the individuals, the attitudes and the behaviors we would observe, but in the end we conducted our observation along all the city`s metro lines.

The research findings

Much of the social scene of the public transport can be explained through age and status. The first notes of our observation show a traveller`s placement inside a tram is closely determined by these factors. This becomes visible when a traveller has to choose a seat inside the tram when there are many empty seats to choose from in all areas. Younger people are more likely to select the back segments of a tram, while the front segment tends to be preferred by the elderly. In the center segment of a tram you will most often find younger people, and also the *white collar class*, active people involved in intellectual activities. The *blue collar* workers (the ones involved in physical labor) would usually choose the back segment.

[16] Blumer, *Symbolic Interactionism – Perspective and Method*, 3
[17] M. Q. Patton, *Qualitative Research & Evaluation Methods*, 3rd edition (Sage Publications, 2002), 260

At the metro, while on the waiting platform, the most hurried travellers are more likely to sit next to the platform limit. The same pattern is also present inside the metro, the most hurried choosing to sit near the exits. The management of the personal distance is highly visible inside the metro. The metro travellers seem to be more permissive in this regard compared to the tram travellers. Overcrowding seems more tolerable inside a metro. Nonverbal cues of territoriality and the protection of one`s personal space are less present when compared to a tram. We hereby advance the hypothesis of an unconscious acceptance of reclusion which is driven by the closed configuration of the metro space. The perception of architectural closure weakens one`s expectations of personal space. This would explain why the same level of overcrowding will produce less conflict (verbal or nonverbal) in a metro than in a tram.

The "social landscape" inside a tram is somewhat more heterogeneous than in a metro. The easier access inside a tram (the possibility to travel without a ticket) and the absence of the guards (who patrol some of the metro trains) can explain the presence of individuals from more social categories inside a tram. We have found a category of "travellers without a destination" that use the tram as a shelter. They often travel until the end of the tram`s route where they are coerced to exit, only to take the first tram coming from the line`s end.

Observing the prosocial behaviors inside the tram we found their frequency is higher in the front and median segments of a tram. Two indicators pointing towards this conclusion are the level of cleanliness and the number of the seats offered to other people. The elderly and the physically challenged individuals will very often choose to sit in the first segment of the tram, denoting a more or less conscious knowledge of this fact. The "renegades", the socially marginal (such as the "travellers without a destination" category) or the baggers will most often choose the back segment of the tram. The metro seems to spatially repress the marginal individuals towards the front and back limits of the wagons.

The people in the back segment of the tram are more likely to use a louder voice. They also are more likely to be more expressive through the use of inflexions and imitative words. Besides the social and demographic factors we have already mentioned as influencers of one`s position in a tram, there still is not enough to explain why people in the vicinity of the driver`s cabin will usually talk lower than in other parts of the tram. Thus, we presume this fact is explained by the functional authority of the tram driver. This allows him to monopolize the aggressive behaviors. In the cabin`s area the driver will often be the loudest and most expressive individual. The travellers behind the cabin will quietly accept his informal leadership and unconsciously seek the protection that comes from the leader`s proximity. This self-preservation behavior could explain the higher frequency of the older travellers in the first segment of the tram, near the driver`s cabin. The elderly are generally less able to protect themselves of aggression, thus they are more prone to look for exterior protection. Also, the marginal individuals, the ones that feel in opposition to the social norms (such as beggars) are more likely to choose the back side of a tram because the driver`s authority is weaker in there. Because of the inhibition of aggressivity determined by the driver`s authority in the front segment, the nonverbal dominance and aggressivity cues are usually more present in the back side of a tram. The personal space is also larger in the back side. People will usually seek to distance them more from the others compared to the front side. We believe that can be seen as a more intense need of protection that translates in a need for a larger "buffer zone". Again, the need for protection is smaller in the front side of a tram because of the driver`s authority.

Aside from their perceived authority and aggressive monopoly, the driver`s involvement in the "tram`s social life" is limited. On the contrary, most of them use different tactics of isolation from the people behind, by covering the cabin`s interior window with clothes or ornamental objects. If their concern with the world behind is uncertain, there is a certain preoccupation for

taking hold of the cabin space through various forms of personalization, often religious. We assume this practice carries indicators on how the driver would like to be treated when working, and, consequently, how the travellers should behave in his tram. We hold as an argument Rapoport`s point of view expressed in a study on the effects if built environment on human behavior: ”*people react to environments in terms of the meanings the environments have for them”* and ”*the meaning of an environment is generated through personalization, through taking possession, completing it, changing it”.*[18] He underlines the social character of symbols and their role in connection to status, social order and the individual`s place in it: ”*the basic point that symbols communicate, that they are social, that they are related to status and represent the social order and the individual's place in it, are all notions that can be studied in other ways-notably through nonverbal communication*”[19].

The metro drivers do not seem to have a similar status or influence on what happens behind them, compared to the tram drivers. In their case the authority does not seem to bypass the limits of their cabin. There are two hypotheses we have in this regard: their posture is not elevated, compared to the tram driver, so they lack an important cue of domination. Also, their perceived authority derived from the driver`s role is divided by two, because the metro drivers always work in pairs. The metro requires two people to perform the same role for which the tram requires only one.

Observation of nonverbal behavior in public transport will generously show cues of territoriality and protection of personal space. There are a number of behavioral patterns that accompany the breach of one`s personal space. Most often this state of perceived inadequacy is minimized by eluding the intruder or intruders` look, like a symbolic negation of the uncomfortable position. Besides the gestures that indicate a desire to escape, individuals offer cues of nervousness and self-preservation. For example, overriding one`s personal space will usually result in a more alert rhythm of breathing.

We have identified two forms of isolation in travellers: spatial – when one chooses to stand in the most remote area of a tram or metro wagon - and social, when one avoids interaction with others by exhibiting specific indicators of reclusion, such as headphones, handling the telephone or “diving” into the lecture of newspapers or magazines. These types of isolation cues are much more present in the case of younger travellers compared to the other age groups. Another reason for the desire of isolation seem to be the “overloads”. The travellers carrying heavier objects usually enter the back segment of the tram because they estimate they would be less likely to disturb the others in that side. However, when entering an empty tram, two people carrying a large box will almost always sit in the back. If the same people would enter the tram without any overload, their placement option will most likely be different. One possible reason for this is the perceived association of overload with lower status and manual labor, which would influence the individual into thinking his most appropriate position at that moment is in the back segment of the tram (the *blue collar* segment).

The metro clock has facilitated the investigation of a specific dimension of the perception of time: the attitude towards waiting, or towards “useless time”. The waiting generates nervousness signals that climax when the clock resets, after ten minutes from the departure of the last metro. There are several approaches in handling the waiting stress. They are influenced mostly by how much each individual values his time in that moment. Thus, the travellers that value their time most tend to look more often to the metro clock and stand closer to the platform limit. The

[18] Amos Rapoport, *The Meaning of the Built Environment - A Nonverbal Communication Approach*. (Tucson: The University of Arizona Press, 1990), 21

[19] *Rapoport, The Meaning of the Built Environment - A Nonverbal Communication Approach,* 48

others are more likely to rest on the chairs while waiting for the metro. Another nonverbal pattern is linked to the relief gestures when the train`s arriving sound is heard from the tunnel. Such gestures are groans or sudden turns of the head.

Beggars and ticket inspectors represent the social types of exclusion and coercion. The travellers tend to regroup and rethink their territoriality when confronted with their presence, and seek to avoid contact through such gestures as turning the head away in a symbolic denial of their presence. In the *intruders'* category also fall the travellers that force their entrance in an overcrowded tram or metro. Confronted with the intruder`s entrance efforts, the travellers inside the tram or metro will adopt a *team behavior* (in Goffman`s terms) or solidarity by spontaneously generating a group norm that defines the acceptable crowding degree and sanctioning the intruders. Once they manage to force their way into the tram or metro, the former outsiders will adopt the same team behavior and sanction the ones that try to enter after them.

Ticket inspectors usually tend to avoid the back segments of the tram, probably sharing the same perception of a higher risk of aggression and deviance. Together with the drivers, the ticket inspectors are the only ones that share a formal role in the tram space, and the only ones that rely on a formal authority. However, if the inspector`s authority is coercive, the driver`s formal authority is more reminiscent of a *low-status gatekeeper*. Returning to Auge`s terms, we may observe the tram represents a *place* for the driver and the inspectors, and only a symbolic space for the rest of the travellers.

Conclusions

In decoding the symbolic relations established in public transport we left from a set of dimensions that were extended over the course of the research. The study generated an important number of hypotheses and explanatory models for some of the behaviors that were observed. A simple passage through Bucharest by public transport will, in most cases, offer an image of the social diversity of the city. Travelling and observing frequently and persistently the same means of transport will emphasize, in time, recurring behaviors of the same individuals and offer different cues for interpreting these.

The main findings of this study rely on the symbolism of the relations established inside means of public transport. The spatiality specific to trams is mostly induced by the driver`s perceived authority. Also, the isolation and self-preservation behaviors are some of the most relevant findings that would benefit from further research.

We sought to test our hypotheses by discussing with a number of frequent travellers, but their inputs were merely seldom relevant. Much of the behavior we observed and interpreted proved to be unconscious and instinctual, rather than rational and intentional.

The natural follow-up to this study would be extending it to even more means of transportation from different cities and eventually verifying the hypotheses through experimentation and quantitative data.

References:

- Andranovich, Riposa. *Doing Urban Research*. London: Sage, 1993.
- Auge, Marc. *Non-Places: Introduction to an Anthropology of Supermodernity*. London: Verso, 1995.
- Bateman, J. R., Brown, J. W. *Urban planning, transportation, and human behavioral science. Guidelines for New Systems*, 2. Chicago: Barton-Aschman Assoc., 1968.

- Chelcea S., Marginean I., Cauc I. *Cercetarea sociologică. Metode şi tehnici*. Deva: Destin, 1998.
- Chelcea, Septimiu, coord, *Comunicarea nonverbală în spațiul public*. Bucuresti: Tritonic, 2004.
- Chriss, James J. "*Habermas, Goffman, and Communicative Action: Implications for Professional Practice". American Sociological Review*, Vol. 60, No. 4 (1995): 545-565
- Goffman, Erving. *Viața cotidiană ca spectacol.* Bucureşti: comunicare.ro, 2003.
- Hall, Edward T. *The Hidden Dimension*. New York: Doubleday, 1966.
- Krupat, Edward. *People in Cities: The Urban Environment and its Effects*. Cambridge University Press, 1985.
- Kuklick, Henrika. "*Chicago Sociology and Urban Planning Policy: Sociological Theory as Occupational Ideology". Theory and Society* Vol. 9, No. 6 (1980): 821-845
- Laub Coser, Rose. "*Role Distance, Sociological Ambivalence, and Transitional Status Systems". The American Journal of Sociology*, Vol. 72, No. 2 (1966): 173-187
- Manning, Phil. "*Drama as Life: the Significance of Goffman`s Changing Use of the Theatrical Metaphor". Sociological Theory*, Vol. 9, No. 1 (1991): 70-86
- Mihăilescu, Vintilă, coord. *Etnografii urbane*. Iași: Polirom, 2009.
- Milgram, Stanley. "*The experience of living in cities". Science* 167 (1970): 1461-68
- Morris, Desmond. *The Human Zoo*. London: Jonathan Cape, 1969.
- Neculau, Adrian, coord. *Manual de psihologie socială*. Iaşi: Polirom, 2003.
- Ostrow, James M. (1996). "*Spontaneous Involvement and Social Life". Sociological Perspectives*, Vol. 39, No. 3, (1996): 341-351
- Park, Robert E. *Human communities: the city and human ecology*, New York: Free Press, 1952.
- Patton, M. Q. *Qualitative Research & Evaluation Methods*, 3th edition, Sage Publications, 2002.
- Rapoport, A. *The Meaning of the Built Environment - A Nonverbal Communication Approach*. Tucson: The University of Arizona Press, 1990.
- Tanenbaum, Susie. *Underground Harmonies: Music and Politics in the Subways of New York.* New York: Cornell University Press, 1995.
- Vlăsceanu, Lazăr. *Erving Goffman şi dramaturgia socială* în *Viața cotidiană ca spectacol* de Erving Goffman. Bucureşti: comunicare.ro, 2003.
- Wirth, Louis. "*Urbanism as a way of life", The American Journal of Sociology*, vol. 44, no. 1 (1938): 1-24
- Yago, Glenn, "*The Sociology of Transportation". Annual Review of Sociology*, Vol. 9 (1983): 171-190

COMBINING MULTI-LEVEL AND NETWORK GOVERNANCE WITH A SPILLOVER EFFECT: THE CASE OF THE EUROPEAN "INNOVATION UNION" FLAGSHIP INITIATIVE

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Abstract

The purpose of this paper is to demonstrate the possibility of a theoretical up-grade to the framework offered by the theory of governance: from a middle-range theory to a full theory through adding a neofunctionalist component that would enhance its explanatory capabilities by projecting them at the systemic level. The authors have chosen, as a case study, the flagship initiative "Innovation Union" within the Europe 2020 Strategy; this initiative provides a set of actions that can be undertaken at different levels of political authority (supranational, national, etc.) and involving several types of actors (state, supranational, non-state, etc.), context which validates the theoretical components of governance, represented by multi-level governance and network governance. The authors consider that the integration of the research policy of the Member States will produce a spillover effect (in neofunctionalist terms) on other policy areas; the argument is based on the fact that the Europe 2020 Strategy, in general, and the flagship initiative "Innovation Union", in particular, require concerted actions within different policy directions (research, education, industrial policy, fiscal policy, employment, communications, environment, etc.), context that determines an "integration" trend of these policies on the basis of a spillover process. The authors believe that the integration of all policy areas involved in the flagship initiative "Innovation Union" would lead, through a spillover effect, to a better European economic integration. The normative foundation of the analysis is the Treaty of Lisbon, as the flagship initiative is part of the research and development policy of the European Union, in which the EU currently holds not only the competence to support, coordinate and complement the actions undertaken by the Member States, but also to define and implement programs.

Keywords: *Multi-Level Governance, Network Governance, Spillover, Europe 2020, Innovation*

Introduction

The global financial and economic crisis had a great impact on the European Union, cancelling part of the social and economic progress that has been achieved in the years preceding

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the crisis. Now, the most important objective of the EU is to recover soon and continue with the reforms. The world has changed, but Europe is still failing to adapt to the new reality around it. Besides the effort to overcome the crisis, the EU faces a number of other internal and external challenges (aging population, resource scarcity, climate change, globalization, the spread of new information and communication technologies, the emergence of new economic powers etc.[4]) which are continuously multiplying. In this context, it becomes imperative for the EU to reconsider its priorities and to review its sources of competitive advantage on global scale. Europe's only chance to return as a major player on the international stage depends on all Member States acting together as a Union. Therefore, the current developments within the EU are an important testing ground for EU scholars, who can closely analyze the means through which the integration/convergence of the Member States can be achieved, thus developing an improved theory of European integration.

This paper is meant to explore the possibility of a (theoretical) up-grade of the theory of governance: from a middle-range theory to a full theory by adding a neofunctionalist component that would enhance its explanatory capabilities by projecting them at the systemic level. This research initiative is based on the belief that the great theories in European integration (neofunctionalism and intergovernmentalism) aren't able to explain the current developments of the EU and that the recent theoretical perspectives on EU governance (multi-level governance and network governance) aren't enough to form a comprehensive theory of EU integration (they seem to lack the prescriptive component). Thus, it calls for a rethinking of the EU integrationist theories in order to be able to reflect the present reality of the European Union.

The authors of this article believe that the good explanatory capacity of the EU governance theory, in both of its forms – multi-level governance and network governance, can be improved by adding a neofunctionalist component of spillover. For proving this assumption, we have chosen to analyze – as a case study – the flagship initiative "Innovation Union" within the Europe 2020 Strategy. We believe this initiative is the most important of all seven flagship initiatives because it focuses on innovation, a thing which, in our opinion, must define every EU policy in order for the EU to develop and to become a significant player on the global stage; thus, the integration of the research and innovation policies of the Member States can produce a spillover effect on other policy areas.

The theoretical framework of this paper is represented by the neofunctionalist approach and the theory of governance; these perspectives on European integration are presented in the light of the existing specialized literature in the domain and by trying to identify a correlation between them, in order for a new, more comprehensive EU integration theory to emerge. The methodology used for this article consists in the study of documents, especially research papers of the main authors in the field of EU studies or official documents of the EU, such as the Treaty of Lisbon and other documents that establish the framework and the functioning of the Europe 2020 strategy and of the Innovation Union flagship initiative.

The analytical approach is structured in three chapters as follows: the first chapter presents the theoretical framework of the analysis; the second chapter corresponds to the case study and the third is meant to draw the conclusions of the paper.

[4] For more information about the internal and external challenges which the EU has to face at the moment, see European Commission *Communication from the Commission. Europe 2020 – A strategy for smart, sustainable and inclusive growth*, COM (2010) 2020 final, Brussels, 3.03.2010.

1. THEORETICAL FRAMEWORK

1.1. The Theory of Governance

Within recent decades, the area of European Studies has become extremely flexible; the very concept of integration has been strongly challenged, both in terms of its traditional neofunctionalist perspective (emphasizing the importance of different types of actors pressing for integration, which would eventually lead to a supranational state able to satisfy both the security and welfare needs of its components), or from an intergovernmentalist point of view (focusing on integration as a type of cooperation between countries seeking to meet their national interests, like the model of classic international organizations). New approaches have emerged in the '80s, which were more interested in issues such as streamlining the decision-making process or in other aspects of daily political life; we are talking about "the governance turn", when studies became less concerned about international relations theory, but more focused on comparative studies and public policy. Currently, there are either theories concerned about conceptual clarification or theories which seek to build explanatory political models, but, unlike the classical theories, they remain at a middle-range and seem to ignore the prescriptive aspect rather much.

Of all these middle-range theories, the governance perspective distinguishes itself both as a research interest in its own right and as an orientation that underlies the majority of the new approaches developed within the EU studies. In this case, the EU studies are perceived (see Chryssochoou 2009) as a combination of instruments coming from the two lines of research (the international relations theory and the comparative policy studies), in a context where traditional conceptions of both the international system and the nation-state are caused by a phenomena that determines a change of the old analytical categories (Chryssochoou 2009, p. 72)[5]. According to Rosamond, the questions addressed by this kind of analysis refer to "the nature of authority, statehood, the organization of the international system in the contemporary period", researchers being now less interested in explaining the EU *per se*, but more in the impact of the European construction on other factors/actors/ entities etc. (see Rosamond 2007, pp. 117, 119-121).

As we already stated within the introductory section, the purpose of this paper is to demonstrate the possibility of a theoretical up-grade to the framework offered by the theory of governance: from a middle-range theory to a full theory through adding a neofunctionalist component that would enhance its explanatory capabilities by projecting them at the systemic level.

Since the voices who insisted that the EU should not be considered strictly a classic international organization or a state in the making, have currently gained more power, the topical question remains: how can we tackle the EU phenomenon theoretically? By further applying the tradition of the great theories of integration or preferring to focus on particular aspects of the European experience? In our opinion, a solution may consist of the EU governance theory – one of the newest elements within the theories of integration – which distinguishes itself from the classical theories or form the once developed in the 80s especially through the way of conceiving/perceiving the levels of authority and the types of actors involved in the process of policymaking. However, a discussion about the theory of governance starts with the operationalization of the concept of *governance*. Analyzing the literature, we note that the presence of governance assumes an irregular distribution of power between administrative levels and between different types of actors (public and private, but also from the voluntary sector) and a

[5] Pollack also believes that the development of governance studies has been influenced equally by both research perspectives (Pollack 2005, p. 42)

constant process of negotiation between all these elements. One of its main merits is its capacity to bring together institutions and citizens (as individuals or, more often, as interest groups). When talking about governance, we tackle the issue of the "re-allocation of [formal] authority" in relation to state actors - individual decision-making levels, subnational (local or regional), supranational, international or transnational, are being developed - and the fact that "networks of diverse kinds have multiplied at every level"; therefore, we refer to the multiplication of actors, within an increasingly decentralized decision-making context (Hooghe and Marks 2001, p. 2; see also Gallagher, Laver and Mair 2006, p. 154).

As a working definition for governance, the following interpretation (proposed by Chhotray and Stoker) is worth mentioning: "governance is about the rules of collective decision-making in settings where there are a plurality of actors or organizations and where no formal control system can dictate the terms of the relationship between these actors and organizations" (Chhotray and Stoker 2009, p. 3). The debate on the idea of EU governance has occurred in the context of the extremely dynamic beginning of the millennium, when some European policy makers wanted to change the EU's institutional scaffolding for this to be consistent with new developments and the new political and social challenges. Thus, for the European Commission, the discussion on governance has been primarily centred on how the "the Union uses the powers given by its citizens" or on the existing solutions in order to increase transparency in policy making through involving as many elements of civil society as possible[6]. The proposals presented by the Commission in the *White Paper on European governance* for the achievement of the above mentioned objective, seek: (a) to increase citizen participation in the process of public policies making and bring greater openness to EU citizens, (b) to improve policies, regulations and results (quality improvement of the policy implementation process), (c) to promote global governance (increasing EU's role in the international system), (d) to redefine the role of EU institutions[7]. Summarizing the ideas of the European Commission, "«Governance» means rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness [of the European institutions towards other actors], participation [of actors], accountability [of actors], effectiveness and coherence [of policies][8]".

When exploring the theoretical aspects of governance, we must start by saying that the idea of governance is intensively used in analysis about the European Union, especially in its multi-level aspect - multiple decision centres, multiple territorial levels involved in decision-making, multiple actors (Chhotray and Stoker 2009, p. 16-22). In any case, in Gary Marks' articles, **multi-level governance** was mainly a simple description of processes related to the implementation of structural policies (George 2004, p. 107); this phrase (multi-level governance) was assumed later also by other analysts, like Liesbet Hooghe in 1996[9], at the beginning in similar contexts and afterwards in different other areas. The emergence and development of the concept of "multi-level governance" was determined also by the exponential growth of the number of analysis on the EU in terms of being a political system, in detriment of those interested in finding the causes and purpose of the integration process. Ben Rosamond argues that the EU has a vague character ("a hybrid form: neither political system nor international

[6] The Commission of the European Communities, *European Governance. A White Paper*, COM(2001) 428 final, Brussels, 25.7.2001, p. 3.
[7] The Commission of the European Communities, *European Governance. A White Paper*, COM(2001) 428 final, Brussels, 25.7.2001, pp. 4-6.
[8] The Commission of the European Communities, *European Governance. A White Paper*, COM(2001) 428 final, Brussels, 25.7.2001, p. 8.
[9] See Hooghe, Liesbet, ed. 1996. *Cohesion Policy and European Integration: Building Multi-Level Governance*. Oxford: Oxford University Press.

organization, but something in-between" – 2000, p. 110)[10], which is why studies on governance in general, and especially in its multi-level expression, are extremely useful for exploring the originality of this Union, which is seen as an expression of postmodernism; in this context, (multi-level) governance is not considered a theory, but more of "a metaphor used to depict the mature stage of the EU polity" (Rosamond 2000, p. 201), in which authority is no longer located within the nation-state, but divided among various types of actors involved in the decision making that simultaneously takes place within several levels. In the context of the governance turn that led to a shift towards "studying the EU as a political system in its own right", M. Cini sees multi-level governance as "an approach to the study of EU politics which emphasizes the interaction of many different actors who influence European policy outcomes" (Cini 2007, p. 460, 462)[11]. Papadopoulos (2005, p. 316) doesn't consider this phenomenon to be representative enough for an analysis; he is rather seeing it at the confluence between organizational theory and the policy networks analysis[12]. Thus, among the theoretical principles of multi-level governance features the fact that power is spread among several levels of asymmetric authority and several actors - there are differences both horizontally and vertically - the interaction between public actors and other types of actors (coming from the secondary or tertiary sector) leading to the removal of "the debate about authority away from the zero-sum notions associated with discourses of sovereignty" (Rosamond 2000, p. 110).

Another aspect of governance is the **network governance** perspective of carrying out public policies, which is perceived as an alternative for hierarchy and market. Not denying the fact that following this "third way", most processes are conducted through a network, the term "network governance" as a mode of governance seems a bit restrictive; however, networks are just one part – although significant – of governance. Thus, in our opinion, governance represents a type of governing, and its two main characteristics are its multi-level aspect and the presence of networks. An analysis of the elements of network governance (Kohler-Koch 1999, p. 24; see also Eising and Kohler-Koch 1999, p. 6) would lead to conclusions on:

- The activating role of the state – through mobilizing stakeholders and carrying out strategies to "reduce transaction costs and give stability to self-regulatory agreements";
- The dominant orientation of decisions - the negotiation to achieve the common interest without omitting to maximize private interests (however, the maximization is, usually, a sub-optimal one, compared to other cases)[13];
- Models of non-hierarchical interaction, overlapped interactions, involving both public and private actors, which differ from one context to another;
- The dominant actors - different government authorities (not the "state" as an abstract entity) and numerous interest groups;
- The level of political action - difficult to identify, with horizontal and vertical cooperation actions in order to achieve goals; Kohler-Koch insists much on the idea of the emergence

[10] For William Wallace, in the EU one should "remark on the persistence and adaptability of the provisional", that is why the organization is seen as "relatively stable *provisorum*" and "a partial polity", although it remains "a stable structure of collective governance" (Wallace 2005, p. 471, 473).

[11] A type of multi-level governance analysis preferred by "those studying federalism, decentralization, European integration, regional and global regimes" is the one which "prepares a list of policy areas and sees how authority is allocated among them" (Hooghe and Marks 2001a, p. 3).

[12] For other authors, multi-level governance is not an alternative in itself but a "gradual incremental development in which institutions still play a decisive role" as a "complement for intergovernmental relations in a certain regulatory framework" (Peters and Pierre 2004, p. 75-76).

[13] The consensus-oriented nature of negotiations and the "sub-optimal policy outcomes" within the EU would be determined by "the complexity" and "unpredictability of the EU policy agenda" (Eising 2007, p. 207).

of problems associated with the application of the principle of subsidiarity within the EU (the "rise to provincialism and the exploitation of the general interest").

The relationship between multi-level governance and network governance remains rather loosely defined, although theorists explicitly recognize the link between the two events occurring within governance, still the nature and purpose of the interaction between the two aren't explained as accurate as they should be. Papadopoulos, for example, mentions the recent efforts on trying to tie multi-level governance, "which developed in response to state-centric approaches to integration – and the literature on network governance, which focuses on the local level, but also on specific policy sectors at the national level" (Papadopoulos 2005, p. 316). However, his own version of their correlation is not satisfactory: multi-level governance should be intrinsically linked to "formulation and implementation of public policies by networks" (Papadopoulos 2005, p. 316), but there may be networks operating at a single decision-making level, as well as multi-level process carried out through other means than networks.

In our opinion, governance can be interpreted as a mixture of different theoretical approaches brought together under the same roof, multi-level governance and network governance being the most developed of its branches. Multi-level governance or network governance, taken separately, may represent ideal and symbolic models for the European Union; as Bunge (1974) explains: having the same referent (the EU), the two types of governance can serve as models for different – competing or not (the new institutionalism or constructivism, for example) – theories. Put together, however, the two gain the valences of a middle-range theory that explains the daily political processes of the European Union; in addition, with a neofunctionalist input, oriented towards processes at systemic level, it could lead to a full theory of European governance, having a major predictive capacity linked to the development of the system.

1.2. The Neofunctionalist Theory

Many of the researchers interested of the phenomenon of the European integration (independent of the way one looks at it – as a process or as a final target) consider that between the concept of neofunctionalism and the notion of *integration theory* there is a practical equivalence and some of the main reasons for supporting this view are that this stream is omnipresent in the theoretical approaches concerning the EU and also the similarity between the development of the EU and the predictions of early neofunctionalist analysts. In fact, we can say that the experiences of the neofunctionalist theory – the fundamental explicative theoretic framework in the first years of the EU; the main theoretical opponent of the major stream developed afterwards, the intergovernmentalism; the current significant influence on the new types of analysis of the European frame – follow rather exactly the sinuous course of the evolution of the EU, all the way from the excessive optimism of the 50's, to the difficult times of the 70's and to the recovery from these during the 90's.

The key elements of neofunctionalism, according to the systematization of Ben Rosamond, would be the spillover and the loyalty transfer. From an adjacent point of view influenced by Charles Pentland, C. Strøby Jensen (2007) also mentions the thesis of the socialization of elites and that of the supranational interest groups, besides the spillover component, indicating that these three elements are perceived as "different reasons" aimed at explaining the "dynamic integration process".

The spillover process has been introduced by Ernst Haas and was afterwards refined by other researchers. The spillover refers to the way that the creation and deepening of integration in a certain economic sector will produce pressures for a wider economic integration in and outside that sector and for a higher authority given to the European level (E. Haas, 1968 *apud* Rosamond

2000, p. 60). The example that neofunctionalists prefer is that of the creation of the European Coal and Steel Community. In a context dominated by national sensitivities of the member units interested only in a formal cooperation limited at the lowest possible level, the evolution of the idea of spillover, monitored by the researchers concerned with the evolution of the integration theories, indicates however Haas's subsequent conviction related to the need for a strong supranational institutional framework that would be able to supervise and provide the essential impetus for integration, both in terms of its scope and the increase of its own authority in the new emerged space.

If we limit the analysis to the classic type of spillover supported at first by E. Haas, we can distinguish two types of spillover, differentiated by the importance it gives either to cooperation by areas and the pressures that are being involuntarily generated by it in the direction of a wider integration – functional spillover, or to a political input, as limited as it may be, which would provide the basis for a similar cooperation.

The second main element of the neofunctionalist theory is the so called loyalty transfer from the national to the European level, and one of the explications for this kind of transfer has envisages the exemplary manner in which the new institutions at this level are supposed to action, in a way that their relationship with the citizens will be almost as direct as that of the nation-states (or even closer in some areas). In fact, in order to maintain the accuracy of the terminology, the word "citizens" appears quite rarely in the neofunctionalist analysis, as they are more interested in the role of the supranational interest groups and elites, as it is indicated also in Strøby Jensen's two thesis. Thereby, by emphasizing the role of training and socialization of these categories (let us not forget that pro-European approaches that come from that loyalty transfer have a positive extrinsic motivation), Haas, however, seems not to regard the success of the integration process as an automatic consequence of the spillover, feeling the need of constant pressures of sub-national entities, but especially those of supranational ones (those new emerged institutions that would have a political development that would eventually get out of the control of the initial design established by egocentric states; the phenomenon was actually proved by the evolution of the European Commission and the EU Court of Justice). In other words, it would also be necessary a political spillover[14].

The transition from the functional spillover to the political one, especially through the intervention of elites and interest groups, is insufficiently argued by neofunctionalists and often criticized by analysts. In fact, this extremely important role assigned to the elites was one of the main sources of critics towards neofunctionalism. We can recall for example Rosamond's vision that said that neofunctionalism is "an attempt to theorize the strategies of the founding elites of post-war European unity" (Rosamond 2000, p. 51) and also Strøby Jensen's questions regarding the importance of a „democratic and accountable governance" (Strøby Jensen 2007, p. 87).

Leon Lindberg seemed to be more interested in the way decisions were taken at the supranational level than in the change of attitudes and preferences, meanwhile Ben Rosamond points out the possibility that „the likes of Monnet were playing typical games of power politics, but employing the fashionable rhetoric of supranationalism and European unity" (Rosamond 2000, p. 53). Although the progress of the EU offered a possible answer to the critique regarding the

[14] The definition of political integration and that of supranationality in Haas's case: (1) the political integration represents "the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states. The end result of a process of political integration is a new political community, superimposed over the pre-existing ones" (Haas 1968, p. 16); (2) "Supranationality in structural terms means the existence of governmental authorities closer to the archetype of federation than any past international organization, but not yet identical with it" (Haas 1968, p. 59).

democratic deficit and the opacity towards its own citizens by increasing the European Parliament's powers and through various programs of information/communication/consultation for direct contact with the EU's nations, the neofunctionalist thesis that stipulated that "interests, loyalty, and power must lie at one level or another: to be *retained* by states, or *transferred* to a new entity" has proven to be inadequate, given the fact that they can actually be "shared and dispersed" (Wallace 2005, p. 463).

For a while, neofunctionalism was an integration strategy with pretty convincing results in an environment clearly defined by researchers of the international relations as anarchical (or intergovernmental as the Europeans would put it). Despite the criticism that neofunctionalism had to face during the 60s and 70s, it (relatively recent) returned to the attention of researchers. As a concession to the years when neofunctionalism couldn't explain the evolution of the EU, Philippe Schmitter doesn't think that the EU will follow the steps that the nation-state made in its consolidation process, but neither the ones of an interstate organism, no matter under what aspect. He considers that what will remain will be something new, with "major implications for the actors, the processes and the outcomes of policy-making at all levels in Europe: supranational, national and subnational" (Schmitter 1996, p. 14), outlining the need for a level of authority that could avoid the situation in which the multiplying of actors should lead to "free riders" of the public policy making process (it is also reminded the important role that the EU's Court of Justice has had over the years in this respect).

The current rediscovery of the main concepts and principles of neofunctionalism may also mean their dilution in various research approaches that are resistant to the idea of building a mega-theory of integration and focused on explaining the specific elements of the EU phenomenon (the so called middle-range theories). Although constantly present in the explanatory dichotomy of the mainstream EU visions, neofunctionalism is in C. Strøby Jensen's opinion currently just a middle-range theory, „a partial theory […] which would explain some but not all of the European integration process" (Strøby Jensen 2007, p. 96).

2. CASE STUDY

As mentioned before, the purpose of this paper is to demonstrate the possibility of a theoretical up-grade to the framework offered by the theory of governance: from a middle-range theory to a full theory through adding a neofunctionalist component that would enhance its explanatory capabilities by projecting them at the systemic level. After reviewing the main features of the theory of governance and of the neofunctionalist approach on EU integration, in order to sustain our assumption about making the two perspectives complement each other, we have chosen to analyze the flagship initiative "Innovation Union" within the Europe 2020 Strategy. From all the seven initiatives, we have chosen this one because we believe it is the most important of all due to the acute need of innovation in every policy field of the EU and the spillover potential of innovation.

2.1. Defining the Issue

First of all, we must define what we understand under the term *innovation*. Ann Mettler (2009, p. 14-15) cautions that innovation mustn't be seen only as a "social phenomenon that is mostly about research and technology", but as a means that provides change within the society (both in the economy and in the social structure); innovation shouldn't be considered an exclusive feature of private companies, which seek to gain profit through using it, because in the public or in the third sector innovation is also needed to "solve societal challenges or empower users and

citizens". In the documents of the EU institutions, innovation is mainly seen as an instrument for increasing EU's economic competitiveness[15], but also as EU's "best means of successfully tackling major societal challenges"[16]. Thus, innovation is especially associated with research and technology through which new products and services can be delivered to the citizens, but it also implies a renewal of business and social processes and models.

The importance of research and innovation to the European construct is first stated in Article 3 (2) of the Treaty on European Union[17] within the Treaty of Lisbon[18], where, besides the commitment to enforce an internal market and work for the sustainable development of Europe, the EU engages to "promote scientific and technological advance". By including this statement in the General Provisions of the TEU, scientific and technical innovation becomes one of EU's core values; thus, every EU policy and activity must be designed and implemented in an innovative manner, by both using the latest technical and scientific findings and contributing to the development of new research outcomes.

The increased pressure for the progressive integration of research activities within the EU is revealed by the fact that, in the research and technological development field, the EU shares with the Member States the competence to legislate and adopt legal binding acts[19]. Thus, according to the TFEU (Article 4.3), in the area of research and technological development, the European Union is entitled to "carry out activities, in particular to define and implement programmes", but by doing so, the Union should by no means prevent the Member States from exercising their competence in this field. Articles 179 to 188 of the TFEU outline the main features of the R&D domain within the EU. Thus, the EU seeks to create a European research area (n.b. some sort of "internal research market") where researchers, knowledge and technology circulate freely, and supports research within the European enterprises, including SMEs, research centres and universities, by facilitating the cooperation between such entities at EU level, but also with similar entities from third countries. As mentioned before, the Union encourages research activities to be delivered within every policy field of the EU and urges for the dissemination and use of research outcomes within all its activities, which is expected to lead to an increase of the external competitiveness of the Union. In order to carry out the outlined objectives, the Union and the Member States have to coordinate all their actions in the field of research and technical development. Therefore the European Commission, with the support of the Member States, has the task of developing guidelines and indicators in this field, but also of creating the necessary

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[15] See The Commission of the European Communities, *Putting knowledge into practice: A broad-based innovation strategy for the EU*, 2006, The Commission of the European Communities, *Towards world-class clusters in the European Union: Implementing the broad-based innovation strategy*, 2008, The Commission of the European Communities, *Assessing Community innovation policies in the period 2005-2009*, 2009.

[16] The European Commission, *Europe 2020 Flagship Initiative "Innovation Union"*, 2010, p. 2.

[17] When referring to the Treaty of Lisbon we mean both documents adopted in December 2007 and entered into force on 1 December 2009, i.e. the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU); in all other cases, the document being referred to will be indicated: TEU or TFEU.

[18] Through its entry in force on 1st December 2009, the Treaty of Lisbon marks the adapting of the EU legislation to the global economic and political context of the early 21st century: a Union of 27 states - or maybe more sometimes in the future - that one can not apply the same rules which were valid for six states. As stipulated in the Treaty, some of the main changes in the functioning of EU institutions and to the EU in general are: the redefinition of EU powers, the strengthening of the role of the European Parliament and of the national parliaments, the social partners' active involvement facilitating social dialogue at all levels and the horizontal "social clause" etc. (For a brief review of the changes brought by the Treaty of Lisbon to the functioning of the EU, see http://europa.eu/lisbon_treaty/glance/index_en.htm). The legislative and political reform within the EU has been necessary in order to create the favourable prerequisites for internal economic and social reforms, but also in order to strengthen the EU's external action.

[19] For more details about what a "shared competence" means, see TFEU Article 2 (2).

conditions for a fair exchange of good practices and a just monitoring and evaluation process. According to Article 182 of the TFUE, a multiannual framework programme, which includes all EU actions in the R&D field, is adopted by the European Parliament and the Council, following the ordinary legislative procedure and after consulting the European Economic and Social Committee. This framework programme is implemented through a number of specific programmes, which are adopted by the Council acting according to a special legislative procedure after consulting with the European Parliament and the European Economic and Social Committee. All decisions regarding the establishment of the European research area are also taken by the European Parliament together with the Council on the basis of the ordinary legislative procedure, after a consultation with the European Economic and Social Committee. Therefore, we can conclude that, according to the Treaty of Lisbon, the decision making process in the field of research involves a multitude of actors coming from different levels of authority – national and European – which interact with each other in order to influence the research policy outcomes.

2.2. Presenting the Data

In a time of big social and economic uncertainties, like the period we are currently going through, after the global financial crisis, the best way for the European economy to recover is to capitalize the innovation and development potential of its Member States. To give an impetus to the EU's future development, the European Commission defined in March 2010, the Communication "Europe 2020 - A European strategy for smart, sustainable and inclusive growth", laying out the main objectives and initiatives for the Europe 2020 Strategy, which was approved by the European Council in June 2010 and thus formally became the new EU's development strategy. This isn't EU's first such attempt, because the Union went through a similar process in 2000, when the Lisbon Agenda[20] was adopted, whose final results were far below expectations. Hence, the following (justified) question may arise: why would Europe 2020 have a different fate from the previous initiative? One possible answer might be that, learning from past mistakes, in the new EU strategy, the coordination of national economic policies and the monitoring progress will be stricter. This will be possible, especially due to new legislative framework provided by the entry into force of the Treaty of Lisbon.

The Europe 2020 strategy was designed as EU's response to the crisis and as EU's development plan for the next 10 years, which would make the EU smarter, sustainable and more inclusive. As stated in the European Commission's Communication[21], the EU will focus on 3 main priorities:

- ✓ Smart growth – the development of a genuine knowledge - and innovation - based economy,
- ✓ Sustainable growth – the establishing of a resource-effective, greener and more competitive economy,

[20] The Lisbon Agenda was EU's development plan to turn the European economy into "the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion" by 2010 (*Presidency Conclusions* of the Lisbon European Council Meeting on 23-24 March 2000). Based on its modest progress in reaching its goals, seen at the mid-term report, the Lisbon Agenda has been reviewed in 2005 through focusing on achieving a strong and sustainable economic growth and on the creation of more and better jobs. In 2010, the final year of the Lisbon Agenda, its unfulfillment has been intensively debated upon.

[21] The European Commission, *Communication from the Commission. Europe 2020 – A strategy for smart, sustainable and inclusive growth*, p. 10.

- ✓ Inclusive growth – the built of an economy with a high employment rate, which will be able to ensure economic, social and territorial cohesion throughout the EU.

These three priorities, as well as the five goals[22], through which they are developed and given a more concrete shape, and the seven flagship initiatives[23], which support the strategy, all are deeply inter-connected. Thus, the strategy provides guidelines for actions to be undertaken, by both the EU and the Member States (as an example of multi-level governance), in policy areas such as education, employment, research, ITC, environment, energy, industry, economic, social and territorial cohesion. It rests on the idea that by taking a collective action in one domain (e.g. the coordination of Member States' research and innovation activities) – thus acting as a Union – it will encourage the integration of other policy fields as well (e.g. industry and employment). The strategy also provides an institutional framework which has the task to ensure the surveillance of the process and give it an integrationist boost[24]: the European Council first approves the strategy, the EU and national targets and the integrated guidelines and afterwards keeps an eye on the implementation of the Europe 2020 programme, while focusing, in its meetings, on specific issues (e.g. research and innovation). In each domain, the relevant Council formations ensures the implement of the programme through facilitating the exchange of information and good practices between different Member States; on the basis of a set of indicators, the European Commission will annually monitor the overall progress in achieving the Europe 2020 goals, but it will also assess the country reports and convergence programmes of the Member States, and make policy recommendations, warnings or proposals; the European Parliament has the task to convince and mobilize the citizens and the national parliaments to contribute to the success of the strategy.

Through the inter-connections it creates between different policy areas and the well defined institutional framework responsible for the strategy's management, Europe 2020 is a good example for the use of the spillover effect within the EU. Integrationist pressure in the policy areas targeted by the strategy is expected to come from the local, regional and national authorities within the Member States, as well. By involving these authorities in the development and the implementation of national reform programmes[25], side by side with the national parliaments, the social partners and the civil society, the strategy aims to establish a permanent dialog between different levels of governance and bring the EU decisions and initiatives closer to the stakeholders, to EU citizens (thus, moving towards a neofunctionalist loyalty transfer from national to the European supra-national level or to the regional and local level). Another implicit goal of the strategy is to encourage the establishment of policy networks within the EU in order to involve more citizens, business entities, civil society organizations and other public or private entities in the making and implementation of the much needed socio-economic reforms. In order to ensure both the loyalty transfer and the implication of various stakeholders in the success of the Europe

[22] The strategy sets five measurable goals to be achieved by the EU by 2020: - a 75% employment rate for women and men aged 20-64; - 3% of EU's GDP to be invested in R&D (by both public and private entities); - the reduction of school drop-out rates below 10% and at least 40% of 30-34–year-olds completing third level education; - the reduction of greenhouse gas emissions by 20% compared to 1990 levels, the increase of the share of renewables in final energy consumption to 20% and a 20% increase in energy efficiency; - at least 20 million fewer people in or at risk of poverty and social exclusion.

[23] As mentioned before, the Europe 2020 strategy is accompanied by seven supportive flagship initiatives, which demand actions from both the EU and the Member States: "Digital Agenda for Europe", "Innovation Union", "Youth on the Move", "Resource Efficient Europe", "An Industrial Policy for the Globalization Era", "An Agenda for New Skills and Jobs", "European Platform against Poverty".

[24] The European Commission, *Communication from the Commission. Europe 2020 – A strategy for smart, sustainable and inclusive growth*, pp. 28-31, 34.

[25] The European Commission, *Communication from the Commission. Europe 2020 – A strategy for smart, sustainable and inclusive growth*, pp. 29-30.

2020 strategy, several information programmes and consultations have been initiated by the European Commission, so that the importance of taking action towards the Europe 2020 goals is well understood by everyone and concrete measures will be taken.

As part of the integrated framework of the Europe 2020 strategy, the **Innovation Union flagship initiative** focuses on improving access to finance for research and innovation, and ensuring that innovative ideas can be turned into products and services that create growth and jobs[26]. The initiative is part of EU's efforts to achieve smart growth through improving the level and conditions for innovation within the Member States. It aims at readjusting the research and innovation policy to the societal challenges of the 21st century (climate change, resource scarcity, aging population, globalization etc.) by intensively exploiting Europe's innovative potential and strengthening every link of the innovation chain – from 'blue sky' research to commercialization[27].

As we said before, innovation is the fundamental value for the EU, therefore the initiative urges for the embracing of a strategic approach where all EU policies and funds "are designed to contribute to innovation[28]". This desire to make innovation a cross-cutting policy, is a sample of the functioning of the spillover effect within the EU: it is believed that, through integrating the innovation policies of the Member States, the appropriate conditions for the integration of other policy areas, such as education, industry, employment etc. are created. The European Commission[29] admits that the Innovation Union initiative has been developed and will only have the expected outcome when it is accompanied by other EU initiatives, such as An Industrial Policy for the Globalization Era, Digital Agenda for Europe, Youth on the Move, An Agenda for New Skills and Jobs, which are meant to improve the conditions for innovation through their specific lines of action. Other already much more integrated EU policy areas (i.e. single market, competition policy, trade policy) are also designed to support and strengthen the goal of achieving a European innovation union. This comes as a proof for the fact that, in the case of innovation, the spillover effect works both ways: innovation acts as an integrator for other EU policies, but, at the same time, the integration of the research and innovation field is encouraged by actions coming from outside this policy area. Responsible for the political boost towards the integration of research activities within the EU are the European institutions (the European Council, the EU Council, the Commission and the European Parliament) which set out the main strategic guidelines and monitor the implement of the innovation agenda. According to the European Commission[30], the delivering and implementation of the tasks within the Innovation Union initiative fall in the burden of regional, national and European entities; thus a multilevel governance approach is imprinted to the process of creating EU's innovation union. The EU and national research policies have to be closely aligned and, in order to achieve that, all types of actors (local, regional and European) must act together creating a network for promoting innovation (this is a proof of the need for network governance in order to achieve the innovation union).

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[26] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, p. 6.

[27] The European Commission, *Communication from the Commission. Europe 2020 – A strategy for smart, sustainable and inclusive growth*, p. 12.

[28] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, p. 2.

[29] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, p. 6.

[30] The European Commission, *Communication from the Commission. Europe 2020 – A strategy for smart, sustainable and inclusive growth*, p. 12.

2.3. Data Analysis

In the next part of the paper, the main actions included in the Innovation Union initiative will be analyzed through the grid of the two European integration theories described in the theoretical part of the paper: governance and neofunctionalism.

One of the main goals of the European Union is to promote innovation throughout its member states and an important part of this process concerns the education of the European citizens. This involves improving the education system from every point of view. For example, one of the weaknesses of the basic education system that were identified by the European Commission refers to the gender dimension, more specifically the small percentage of girls that reach an advanced level in science in the case of some Member States[31]. The higher education system should also be strengthened in order to become more attractive to potential talents, offering smarter specializations across different fields[32]. Europeans must become more competitive in this R&D field because, as it is underlined in the European Commission's Communication regarding the Innovation Union Flagship Initiative, by comparing the number of researchers as share of the population, Europe is "well below" that of the US, Japan and other countries.

Therefore, the EU and the Member States will work together for promoting excellence in education and skills development[33] so that more young people are attracted and trained in the research field. The EU's support can be illustrated by the Marie Curie fellowships under the Research Framework Programme, and the one of the member states by the Finish example of using inter-disciplinary approaches in universities as to bring together skills from different areas. More specifically, the Member States must take provisions so that by the end of 2011, they have enough researchers as needed for reaching their national R&D target and so that they promote attractive employment conditions in public research institutions (it is outlined the importance of taking into account the gender and dual career considerations at the moment of developing these strategies). The role of the European Commission is to support an independent multi-dimensional international ranking system to benchmark university performance that will make it easier to identify the best European universities. Furthermore, the European Commission will propose an integrated framework regarding e-skills for innovation and competitiveness, in accordance with the stakeholders. Not only the national and supranational authorities should be part of this process, but also other actors, like the business sector, that should have a more consistent contribution to the curricula development and doctoral training. As to make this possible, the European Commission will create *Knowledge Alliances*, which will support business-academia collaborations, in order to develop new curricula addressing innovation skills gaps. All these emphasize the fact that we are dealing with more than just a multilevel governance (highlighted by the national and supranational examples examined before), but with a real network governance, that involves not only actors from different authority levels, but at the same time from different activity sectors (like universities, non-state actors like the business sector, supranational state actors or national state actors).

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[31] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, pp. 8-9.

[32] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, p. 9.

[33] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, pp. 8-10.

Another important aspect of the R&D development is the creation of a European Research Area[34], which is meant to reduce unnecessary costs that may appear in case of duplication in national research. In 2012, the European Commission will propose a European Research Area framework and also a set of supporting measures to remove obstacles to mobility and cross-border operation, so that they can be in force by 2014. The neofunctionalist perspective in this case is obvious, given the spillover effect that is expected with the creation of the European Research Area, because first of all, a part of the national attributes in the research area pass on to the supranational level, and at the same time, this unification of an important part of the research policies will determine a wider cooperation in more aspects of the education national policies or even other policies (for example a possible harmonization of the PhD areas or an enlargement of the variety of these areas so that they can be correlated to the demands on the European single market). Along with the neofunctionalist theory, the multilevel governance is the component that can help us fully understand the integration process. Thereby, the collaboration between the European Commission and the Member States on account of reaching by 2015 the 60% target of the construction of the priority European Research infrastructures is significant, given the fact that they are already identified by the European Strategy Forum for Research Infrastructures (the European Commission), leaving the Member States with the mission of reviewing the Operational Programmes so that they facilitate the use of cohesion policy money for this purpose.

Furthermore, the EU funding instruments shall focus on Innovation Union priorities[35], making them more efficient in accordance with the European goals in this area. The idea of all EU research and innovation programmes focusing on promoting excellence at European level highlights the neofunctionalist effect of the spillover, which will determine the integration of research and innovation at the supranational dimension. As always, the spillover will affect other dimensions of public policies that have to be taken into account, such as the societal challenges, the industrial and technological priorities). In this case the European Commission, the supranational actor, plays the main role in supporting this part of the European Strategy, because it will design future EU research and innovation programmes and took the commitment to strengthen the science base for policy making through its Joint Research Centre (creating also a European Forum on Forward Looking Activities in order to add coherence and efficiency to this step).

The promotion of the European Institute of Innovation and Technology as a model of innovation governance in Europe[36] emphasizes the fact that the network governance pattern is clearly applied in the European innovation strengthening process, as the EIT must set out by 2011 a Strategic Innovation Agenda to expand its activities, close links with the private sector and build a stronger role in entrepreneurship (thus outlining the importance of the cooperation between the state and non-state actors).

Due to insufficient funding opportunities for investing in innovation, European companies can hardly develop new products and technologies; therefore the EU aims to improve the innovative companies' access to financing. In order to do so, actions both at European and national level have to be undertaken; hence, a multilevel governance perspective is embraced. The main

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[34] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, pp. 10-11.

[35] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, pp. 11-12.

[36] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, pp. 12-13.

actor which ensures the implementation of all actions at EU level is the European Commission[37]: by 2014, it will have to make a proposal, to the Council and the European Parliament, for financial instruments meant to increase private financing in the field of R&D; by 2012, it will make sure that venture capital funds established in one of the Member States will function in the whole EU; it will strengthen cross-border investment in innovation and focus on innovative SMEs' financing problems; by 2011, it will make a mid-term review of the state aid R&D and innovation framework. In finding solutions for increasing private financing of innovation, the Commission will work closely with the European Investment Bank Group and other national financial intermediaries and private investors, thus creating a policy network for developing the best response to the critical gaps in investing in R&D. The European Commission had a spillover effect in mind when it engaged in liberalizing the venture capital market in order to ease investment in innovation. Since venture capital is a type of capital, it ought to "run freely" within the single market of the EU (free capital movement is one of the features of the European single market); by reading between the lines, we understand that the EU seeks to strengthen its single market and thus create an integrationist pressure on R&D and innovation. The European Commission plays also a mobilizing role through bringing together innovative firms with potential investors and building a network through which companies have better access to capital.

The establishing of the single innovation market[38] implies a series of actions to be undertaken at EU level – by the European institutions – and within every Member State (multilevel governance approach). One of the most important steps towards the integration of the EU innovation market is the adoption of the EU patent. The European Parliament together with the Council are encouraged to adopt the EU patent, its linguistic regime and the unified system of dispute settlement as soon as possible, so that the first EU patents be delivered in 2014. A significant pressure towards the integration of the European innovation markets is being delivered – through a spillover effect – from other EU policy areas such as competition policy (an effective competition policy is expected to stimulate the demand for innovation), environment policy (stricter environmental standards would stimulate eco-innovation) or telecommunication policy (the liberalization of the telecom market together with the GSM standard started the success story of mobile phones in Europe). Another important issue, having a spillover effect on the innovation domain, is the establishing of EU-wide standards. The European Commission plays the central role in integrating EU standards by presenting a communication accompanied by a legislative proposal on modernizing of standard-setting procedures in order to be able to enhance interoperability and stimulate innovation; the communication will include an analysis of how to adapt the standardizing system to a constantly changing environment, how this system could best contribute to EU's internal and external objectives and what kind of influence the European standardization system would have on innovation.

In 2011, under the guidance of the European Commission, both the EU and the Member States will engage in evaluating the regulatory framework of key areas such as eco-innovation and the European Innovation Partnerships in order to identify which rules need to be changed, updated or introduced so that innovation can be promoted. By early 2011, the European Commission will present an action plan for eco-innovation, focusing on finding ways to achieve environmental goals through innovation (this action plan counts on a spillover effect resulting from the

[37] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, pp. 14-15.

[38] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, pp. 15-17.

integration of the innovation field which will determine the integration of environment policies). Making use of the multilevel governance principle, starting 2011, the Member States and the regions will have to adopt budgets exclusively devoted to pre-commercial procurements and public procurements of innovative products and services. The European Commission has the task to provide the necessary guidance and create the financial support mechanism to help the regional and national authorities deliver the procurements in an open and non-discriminatory manner.

In the process of promoting openness and capitalizing Europe's creative potential[39], the European Commission plays a key role by collaborating with stakeholders for the development of a set of model consortium agreements, thus creating a policy network meant to ease the knowledge transfers and research collaboration initiatives. After working together with the Member States and the stakeholders, the Commission will have to present, by the end of 2011, a proposal for the establishing of a European knowledge market for patents and licensing. The initiative encourages the recognition of the so-called "fifth freedom" – the free movement of researchers and innovative ideas within the EU, which could be added to the four features of the European single market, thus consolidating it and making pressure towards the integration of the innovation markets. Through EU-wide networks (i.e. Enterprise Europe Network) large companies are brought together with SMEs, universities, research centres and communities of scientists and practitioners to exchange knowledge and ideas, but also contribute with suggestions to the improvement of the functioning of knowledge transfer offices within the public research organizations in order to make the results of publicly-funded research more available to everyone.

Another EU goal is to maximize the social and territorial cohesion, first of all by spreading the benefits of innovation across the Union[40]. The EU is a heterogeneous structure and any development initiatives must take this into account so that the effect of such action does not deepen the current gaps in the core of the Union. Consequently, the Innovation Union must involve all regions, avoiding the situation in which it produces disproportionate effects that result in less performing regions, endangering the convergence that has been reached so far. In order to succeed, the EU can use the Structural Funds, that are not fully taken advantage of and that should be used more effectively for innovation and achieving the Europe 2020 objectives, especially in a way that each region can become excellent in a certain area in which it has relative powers. Accordingly, the Member States should start improving their use of Structural Funds for research and innovation projects, by helping people to acquire the necessary skills in this respect and implementing smart specialization strategies and trans-national projects. The neofunctionalist element of the existence of trans-national interest groups can be found in this part of the strategy because it supports the cooperation between this type of actors and national state actors in the advantage of the supranational progress, which in turn produces benefits for all member states and European citizens. As a matter a fact, an important role is given to the Member States, which have to prepare post 2013 Structural Funds programmes with an increased focus on innovation and smart specialization. The spillover's influence is found here because of the crossing of different types of policies at the EU's level (that regard for example the structural policy and the innovation dimension).

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[39] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, pp. 18-20.

[40] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, pp. 20-21.

The EU wants to increase the social benefits that innovation can produce[41]. The European Commission's document uses the phrase *social innovation* to define the idea that brings together the actors in charge of meeting this goal and the benefits of their set of actions. Although thanks to its influence in the institutional system of the EU and the fact that it represents the supranational interest, the European Commission may have a leading role (given the fact that it has made a commitment for: a) promoting innovation through the European Social Fund, which will be complemented by the social experiments developed in the framework of the European Platform against Poverty, b) launching a European Social Innovation pilot partnership that will provide expertise for the social entrepreneurs and the public and third sectors and c) supporting a research programme on public sector and social innovation that emphasizes on measurements, evaluation, financing and barriers to scaling up and development), it doesn't work alone, but in cooperation with the Member States (that will also have to step up efforts regarding the promotion of social innovation through the European Social Fund) and different non-state actors (like the social partners that are to be consulted on how the knowledge economy can be spread to all occupational levels and sectors). Consequently, we have a very good example of the functioning of not only multilevel governance, but true network governance, which involves supranational, national and non-state actors. Furthermore, the development of an Innovation Union becomes more than just a goal, but also a mean to be used as to increase the social welfare of the European society and its citizens, in an obvious use of the spillover, the main element of the neofunctionalist theory and in the same time the way that the EU uses as to gain the progress it aspires to, by using all the instruments it has at hand, even if that involves the need of further cooperation in that specific area or in other related ones.

The establishment of European Innovation Partnerships[42] is another important issue aimed to be delivered through the Innovation Union flagship initiative. A wide range of actors coming from both the European supra-national level and the national level, as well as from the local and regional level, are all involved in the creation and implementation of these partnerships (a multilevel governance approach combined with a network governance perspective): the Council, the European Parliament, the Member States, the industry and other stakeholders are first invited to determine the extent to which they will get involved in making these partnerships work; afterwards, they are expected to contribute with competences and resources to the achievement of each partnership goals. As to be expected, the central role in defining and carrying out of the European innovation partnerships belongs to the European Commission, which, alongside with the Council and the European Parliament, will secure the political support of each partnership. Following a neofunctionalist perspective, the Commission is the supranational institution which launches – after taking account of the Council's and European Parliament's views and of the stakeholders' opinion – a wide series of innovation partnerships in key areas addressing societal challenges and, more or less directly, watches over their implementation. For defining the EU innovation partnerships, the Commission has to first develop a set of selection criteria and a transparent selection process; afterwards, it has to present the partnership proposals which have met the criteria and then set out the governance and financial arrangements for the selected partnerships; last, but not least, the Commission would evaluate the efficiency of the partnerships

[41] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, pp. 21-22.

[42] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, pp. 22-26.

and decide whether it is worth continuing with the partnership in the context of the next Research Framework Programme and under what circumstances.

The idea of creating innovation partnerships in areas such as energy and water supply efficiency, sustainable supply and management of raw materials, transport with lower greenhouse gases emissions, digital society, agricultural sustainability and active and healthy aging, comes from the belief that by contributing to the deepening of the integration of the innovation sector within the EU – through a spillover effect – an integrationist impulse would be given to other EU policy areas. An issue that requires special attention in the developing of the European innovation partnerships is the establishing of an appropriate governance framework for the implementation process of these partnerships. Thus, each partnership will be led by a Steering Board, composed of a certain number of high representatives of the Member States (Ministers), members of Parliament, industry leaders, researchers and key stakeholders; the board will be chaired by the lead Commissioner(s) and supported by a secretariat assigned by the Commission, but also by operational groups of experts, practitioners and users coming from both the private and the public sector. Once again, a multilevel governance approach is used alongside with a network governance perspective which has the purpose of bringing the policy making process closer to its stakeholders.

In the context of a globalization of the competition for knowledge and markets, Europe has to reverse "several decades of a relative *brain-drain*"[43], so that it can assure the possibility of remaining in Europe for the ones who leave their countries in search of a better career in the research field. The EU should work together with the Member States in order to take measures meant to ensure that leading academics, researchers and innovators reside and work in Europe, but also for attracting a sufficient number of highly skilled third country nationals to stay in Europe. For this end, both the EU and its Member States (as parts of a multilevel governance functioning) should treat scientific cooperation with third parts as an issue of common concern and develop common approaches. The European actor who plays an important role is once again the European Commission, that will propose common EU-Member States priorities in S&T as a basis for coordinated positions or joint initiatives vis-à-vis third countries.

After setting the targets and the measures which would lead to the establishing of the Innovation Union, the role and responsibilities of every actor engaged in this process, alongside with the evaluation methods must be very well defined[44]. In order for the research and innovation systems of the Member States to integrate, some reforms have to be made to their national and regional policies. For conducting this reform of the research and innovation policies, a multilevel governance approach needed to be embraced. Thus, the European Commission has identified the set of key policy features for a best-performing system. The Member States have to assess their research and innovation systems based on the features presented by the Commission and then define, within their National Reform Programmes, the reforms they need to undertake. In this multilevel policy framework, the Council – to be more precise, the Competitiveness Council component – could play an important role in monitoring the progress of the Member States on reforming their R&D policies via the integrated economic coordination framework, the so-called "European semester". The Commission will support the Member States in their assessments by facilitating the exchange of best practices regarding the reform of innovation policies between EU states. The degree to which the national innovation systems of the Member States converge and

[43] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, pp. 27-28.

[44] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, pp. 28-31.

thus the European Innovation Union is achieved, are measured through two indicators set by the European Council together with the European Commission, which can be analyzed, in neofunctionalist terms, as being the institutions which monitor and boost the integration process.

The first indicator for measuring the performance towards the Innovation Union is the Europe 2020 target of achieving a R&D investment value of 3% from EU's GDP; the second innovation-related indicator needs to be developed by the European Commission. For finding the best way to measure the share of fast-growing innovative companies in the economy, the Commission will call on the help of Member States and international partners, thus applying a network governance approach. Last, but not least, the Innovation Union flagship initiative describes the role and responsibilities of each actor involved in creating this Union, by basically using a multilevel governance approach. Thus:

- the European Council is responsible for the coordination and the political impetus of the initiative;
- the Council should adopt the necessary measures for improving EU's framework conditions and, through its semester meetings as an "Innovation Council", should evaluate the progress and identify the areas where more actions are needed;
- the European Parliament should have annual debates on the progress of the initiative with members of national parliaments and different stakeholders (this way, a loyalty transfer – in neofunctionalist terms – from the national to the European level comes out);
- the Commission is responsible for developing the main lines of actions within the initiative, for assisting the Member States in their reforms and facilitating the exchange of best practices within the EU, but also for systematically monitoring the progress, reporting once a year the achieved progress and giving country-specific recommendations in the field of innovation;
- the Member States should reform their innovation systems, review their operational programmes co-financed by EU Structural Funds in order to respond to the priorities set by the Europe 2020 strategy and allocate extra financial resources for R&D and innovation;
- in the attempt to involve more and more stakeholders in the policymaking process, the European Economic and Social Committee, the Committee of the Regions and other stakeholders are invited to support the initiative and help disseminate the good practices;
- also for filling in the gap between the policymakers and the stakeholders, the European Commission plans to call for an annual Innovation Convention which would complement the European Parliament's debate on the progress of the Innovation Union;
- in the debates of the convention a large range of actors should be involved: Ministers, Members of the European Parliament, business leaders, deans of universities and research centres, bankers and venture capitalists, top researchers and innovators, and last, but not least, citizens.

Due to the fact that the actors coming from different levels of authority need to permanently interact with each other and act together towards achieving the integration of the R&D and innovation sector, we can conclude that a network governance perspective has also been in mind of the European Commission when writing this initiative.

3. CONCLUSIONS

The recent global financial crisis reshaped the international environment profoundly. As one of the important global players, Europe has to recover soon from the losses it suffered due to the crisis (i.e. economic recession in most of its Member States, the Euro-Zone crisis) and start engaging in serious reforms in order to ensure a better life for its citizens. The EU started

reforming in 2009 with the entry into force of the Treaty of Lisbon and continued in 2010 with the Members States agreeing on the Europe 2020 strategy and its initiatives and with the setting of guidelines for future developments through the Project Europe 2030.

Regarding the process of European integration, reality has by far overcome theory. Classic theories have many times failed to describe the evolution of the EU and recent theoretical approaches seem to be incapable of fully explaining the complexity of the EU. In this paper, we followed the assumption that the theory of governance can be upgraded from a middle-range theory to a full theory by adding a neofunctionalist component to it, so that the explanatory capabilities of the governance theory can be increased and thus a more exhaustive theory of European integration can be developed.

In our attempt to prove our assumption, we first reviewed the main features of the theory of governance (putting a great emphasis on multi-level governance and network governance) and of neofunctionalism (especially the spillover element) as they are shown in the literature. Then, we applied these concepts on an EU initiative – the "Innovation Union" flagship initiative within the Europe 2020 strategy. Through our in-depth analysis of the initiative, we emphasized that the actions included in the initiative must be undertaken at different levels of political authority (supranational, national, regional and local), involving several types of actors (state, supranational or non-state actors) which permanently interact with each other – all these being characteristics of multi-level governance and network governance as components of the EU theory of governance. The analysis has also shown us that the initiative is based upon the belief that the integration of the research and innovation policies of the Member States would lead to a better economic integration within the EU, through the spillover effect it produces on other policy areas. The fact that the actions included in the initiative target not only the R&D policies of the Member States, but also other policies, such as education, industrial, fiscal, employment, ICT and environment, is very likely to create a spillover between all these policies. Through increasingly involving non-state actors (including supranational European entities) in the delivering of EU's innovation objectives, a significant loyalty transfer (in neofunctionalist terms) from the national to European level appears and thus the EU decisions are brought more closely to their true stakeholders, to the citizens.

The concrete examples provided by the "Innovation Union" flagship initiative come to acknowledge the fact that the current evolution and functioning of the EU cannot be explained solely through a governance perspective; multi-level governance and network governance aren't enough for delivering a full, exhaustive image on the present European integration process. Therefore, by adding a "touch" of neofunctionalism (some spillover effect) to the mixture, a clearer theoretical explanation of the real EU integrationist process can be provided. The initiative also shows that the gradual involvement of the stakeholders in the policymaking process (another aspect of neofunctionalism) can occur through using policy networks.

The implications of the conclusion we have reached after the analysis are quite important because this study aims to offer a different theoretical approach for the explication of the European integration process. The mixture of the two theories in order to create a new way of understanding the EU's internal functioning and its consequences for the future of the European construction seems to be the best theoretical framework for analysis in this area because it has a larger explanatory capability than other theories or than each part separately considered.

We believe that, when researching the European construction and its integration incentives, a particular, increasing attention should be given to the impact that the inter-connectivity and inter-dependence of various types of actors coming from different sectors of activities and different levels of decision-making have on EU law and EU's way of functioning. The main reason why it is imperative that this issue ought to be taken account of is the fact that there is a

wide range of actors already involved in EU's decision-making (having specific ways of collaborating and acting, depending on the policy area in question) and this number is expected to increase in the future. The spillover effect is also present in more and more policy areas, transmitting integrationist impulses from one domain to another. Thus, we believe future research in European integration should focus more on combining the elements of the existing theories of integration – as we have done in this article – in order to develop a comprehensive theory of European integration.

References

1. Ann Mettler, *Innovation Indicators. Choosing the Right Targets for EU 2020* in "The Lisbon Council E-Brief", issue 04/2009 , Brussels, 2009.
2. Bunge, Mario. 1974. „Teoria ştiinţifică" („Scientific theory"). In *Epistemologie – orientări contemporane* (*Epistemology - contemporary approaches*), pp. 214 – 267. Bucharest: Ed. Politica. The selection of texts, commentaries and bibliography by Ilie Pârvu.
3. Chhotray, Vasudha and Gerry Stoker. 2009. *Governance Theory and Practice. A Cross-Disciplinary Approach*. Palgrave Macmillan.
4. Chryssochoou, Dimitris N. 2009. *Theorizing European Integration*. Second edition, Sage Publications.
5. Cini, Michelle ed. 2007. *European Union Politics*. Second edition. Oxford University Press.
6. Eising, Rainer and Beate Kohler-Koch. 1999 (reprinted in 2005). Introduction: Network governance in the European Union. In *The Transformation of Governance in the European Union*, ed. Beate Kohler-Koch and Rainer Eising, pp. 3-12. Routledge.
7. Eising, Rainer. 2007. Interest Groups and the European Union. În *European Union Politics*, ed. Michelle Cini, ediţia a doua, pp. 202-221. Oxford University Press.
8. Gallagher, Michael, Michael Laver and Peter Mair. 2006. *Representative Government in Modern Europe*. Fourth edition. McGraw-Hill.
9. Haas, Ernst B. 1968. *The Uniting of Europe. Political, social and economic forces 1950 – 1957*. Second edition. Stanford: Stanford University Press.
10. Hooghe, Liesbet and Gary Marks. 2001. Types of Multi-Level Governance. *European Integration online Papers* (EIoP), vol. 5, no. 11, http://eiop.or.at/eiop/texte/2001-011a.htm.
11. Kohler-Koch, Beate. 1999 (reprinted in 2005). The evolution and transformation of European governance. In *The Transformation of Governance in the European Union*, ed. Beate Kohler-Koch and Rainer Eising, pp. 13 – 33. Routledge.
12. Papadopoulos, Yannis. 2005. Taking Stock of Multi-Level Governance Networks. *European Political Science*, 4, pp. 317-327.
13. Pollack, Mark A. 2005. Elaborarea politicilor UE – teoretizări (Theorizing EU Policy-Making). In *Elaborarea politicilor în Uniunea Europeană*, coord. Helen Wallace, William Wallace and Mark A. Pollack, pp. 13-45. Bucharest: IER. Published as *Policy Making in the European Union* (Oxford University Press 2005, fifth edition).
14. Rosamond, Ben. 2000. *Theories of European Integration*. Palgrave Macmillan.
15. Rosamond, Ben. 2007. New Theories of European Integration. In *European Union Politics*, ed. Michelle Cini, second edition, pp. 117 – 136. Oxford University Press.
16. Schmitter, Philippe C. 1996. Examining the present Euro-Polity with the help of Past Theories. In *Governance in the European Union*, ed. Gary Marks, Fritz W. Scharpf, Philippe C. Schmitter, Wolfgang Streeck, pp. 1 – 14. Sage Publications.

17. Strøby Jensen, Carsten. 2007. Neo-functionalism. In *European Union Politics*, ed. Michelle Cini, second edition, pp. 85 – 98. Oxford University Press.
18. The Commission of the European Communities, *Commission Staff Working Document. Assessing Community innovation policies in the period 2005-2009*, SEC (2009) 1194 final, Brussels, 9.9.2009.
19. The Commission of the European Communities, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Putting knowledge into practice: A broad-based innovation strategy for the EU*, COM (2006) 502 final, Brussels, 13.9.2006.
20. The Commission of the European Communities, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Towards world-class clusters in the European Union: Implementing the broad-based innovation strategy*, COM (2008) 652 final/2, Brussels, 5.11.2008.
21. The Commission of the European Communities, *European Governance. A White Paper*, COM(2001) 428 final, Brussels, 25.7.2001.
22. The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, COM (2010) 546 final, Brussels, 6.10.2010.
23. The European Commission, *Communication from the Commission. Europe 2020 – A strategy for smart, sustainable and inclusive growth*, COM (2010) 2020 final, Brussels, 3.03.2010.
24. Wallace, William. 2005. Guvernanța post-suverană (Post-sovereign governance). In *Elaborarea politicilor în Uniunea Europeană*, coord. Helen Wallace, William Wallace and Mark A. Pollack, pp. 455-473. Bucharest: IER. Published as *Policy Making in the European Union* (Oxford University Press 2005, fifth edition).